



F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

2014
JOURNAL



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WHY FASPE?

This past summer marked FASPE's sixth year of operation. In the years since the first pilot trip in 2009, FASPE has evolved into a leading ethics training program that receives close to 1,000 applicants each year and counts 259 alumni in its ranks. We share pride in the successes of our Fellows and hope that the FASPE experience continues to spur these future leaders of our society to think carefully about the ethical implications of their actions.

FASPE originated out of two main concerns, one drawn from the past and one looking to the present. The first was a realization that with each passing year the next generation finds it harder to connect to the Holocaust. My generation grew up with a strong connection to the Holocaust. We knew survivors and victims. In some cases our immediate family members had perished. We heard about them and felt their silence. However, as the years pass and the number of survivors dwindle, that ability to connect to the Holocaust cannot exist in the same way for future generations. It is our challenge to draw contemporary meaning from the increasingly distant past.

The second motivation was a series of highly publicized horrific breakdowns among professionals: lawyers defrauding clients; journalists misleading readers; religious leaders failing to address improper behavior; and doctors more interested in profits than the well-being of their patients. Such failures by professionals undermine the fabric of our society. Less often discussed, but equally important, are the ethical issues that are not so apparent or obvious. It is these issues that arise in the nuances of work that require even more vigilance.

FASPE was developed out of these concerns and seeks to address the current ethical failures of professionals while establishing a construct for the future study of the Holocaust. It is grounded in the fact that members of the professions — lawyers, doctors, journalists, and clergy, among others in Nazi Germany — played an instrumental role in the design and implementation of the “final solution.” They failed to stop the breakdown of societal mores that made the Holocaust possible. Equally important, members of the professions today continue to play a crucial role in shaping American society.

The 2014 FASPE Fellows are an impressive group. Their experiences last summer validate the core principles of FASPE: namely, that exploring the actions and choices of professionals during the Holocaust, through visits to historical sites and in-depth seminars, creates a transformative experience for each Fellow and establishes an ethical grounding for those who will become the future leaders in their professions.

On behalf of FASPE, I congratulate the 2014 FASPE Fellows and am pleased to present a small sample of their work along with several papers from our earlier FASPE alumni.

C. DAVID GOLDMAN, CHAIR
FASPE STEERING COMMITTEE

FASPE OVERVIEW

The Fellowships at Auschwitz for the Study of Professional Ethics (FASPE) are a set of innovative programs for students in professional schools designed to address contemporary ethical issues through a unique historical context. The Fellowships provide law, medical, seminary, journalism — and soon business — students with a 12-day trip to Germany and Poland where the actions of professionals during the Holocaust and in Nazi Germany serve as a backdrop and launching point for an intensive course of study on the current ethical challenges in their field. FASPE invokes the power of place — the first-hand experience of visiting Auschwitz and other historic sites — to engage Fellows in applying the lessons of history to the ethical issues they face today.

Piloted initially in 2009, FASPE invites between 10 and 15 Fellows from each profession to participate each year through a competitive process that draws applicants from around the world. In 2014, FASPE worked with 48 new Fellows. Following an introductory session at the Museum of Jewish Heritage—A Living Memorial to the Holocaust in New York, the Fellows traveled to Berlin, Krakow, and Oświęcim (Auschwitz).

FASPE programs combine visits to Holocaust-related sites with academic seminars that focus on contemporary issues and the formation of professional identity. Sample topics include:

- **Journalism:** The role of media in creating the historical narrative; balancing the costs and benefits of access; the challenges of fact-checking a victim's story
- **Law:** The challenge of ambition in professional development; how to manage duties of candor and confidentiality; which case decisions a lawyer may control; dilemmas in day-to-day practice
- **Medical:** Medical research; euthanasia/physician assisted suicide; the impact of resource limitations on healthcare decisions
- **Seminary:** The role of religious leaders as moral educators; when and how to address political issues with a congregation; the challenges of pastoral care during times of crisis

FASPE has far-reaching goals. On an individual basis, it seeks to instill participants with a sense of personal responsibility for the ethical and moral choices they make. By extension it also seeks to have an impact on these professions, improving the practices of all clergy, doctors, lawyers, and journalists.

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JOURNALISM
PAPERS

INTRODUCTION TO A SAMPLE OF THE 2014 FASPE JOURNALISM PAPERS

What we remember most about our travels in Germany and Poland with the 12 accomplished and dedicated 2014 FASPE Journalism Fellows was the talk — whether over meals, while traveling, in our newsroom, or in our seminars, we are grateful for some of the most provocative and intense conversations we can remember.

As FASPE intended, our explorations of how journalists performed during the Holocaust provided plenty of grist for pondering and evaluating the work we ourselves have done or hope to do, and for debating the perennial questions of our profession. How deeply should reporters put themselves at risk to investigate state secrets? Are there any photographs that simply should not be taken? Does reporting on terrorist threats serve the terrorists' agenda? Does the convention of journalistic objectivity serve a useful purpose, or are journalists who claim they can put aside their own prejudices deluding themselves — and their readers and viewers?

At the end of the journey our Fellows went home with one last assignment: to write a substantial feature about a contemporary question involving journalistic ethics. Like all of the stories submitted by our group, the three included here, which also include reflective explanations of what motivated the authors to choose their topics, carry strong echoes of our conversations on the trip.

Especially provocative was a seminar in which Benjamin Wilkomirski's fabricated memoir of surviving the Nazi death camps was the basis for a discussion on how journalists should fact-check people who have painful stories of victimization or abuse to tell. In the dilemma of the reporter torn between the human inclination to empathize and the professional obligation to verify, Martine Powers sees parallels with the recent epidemic of reports of rape on university campuses and the challenges posed to reporters struggling to be fair to both accusers and accused. Kate Newman approaches the question of fact-checking from a different angle, using the exposure of the fabricated memoir by the anti-sex trafficking activist Somaly Mam to explore the surprising failure of most commercial book publishers to do any fact-checking of their authors' work.

FASPE discussions pointed Stav Ziv to a second look at a story she'd been working on about a man exonerated and released from prison after serving more than 20 years for a triple murder he did not commit. While the legal system had failed this unjustly imprisoned man, Ziv explores whether the press failed him too, and what journalists should do differently when covering questions of criminal justice.

These three pieces are just a sample of the outstanding written work done by our thoughtful, committed, and passionate Fellows. Listen closely, and you may also hear echoes of the conversations that made this journey so memorable.

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Do You Fact-Check a Campus Rape Survivor?

By Martine Powers

In 2008, Kristen Lombardi, a journalist with the Center for Public Integrity, embarked on a series of interviews with one goal in mind: To reveal the wrongdoings of college campus administrators who failed to support rape victims and allowed their assailants to graduate with minor punishments.

The seasoned investigative reporter interviewed dozens of young women — in many cases, three or four or five times. Through hours of conversations, she slowly peeled back each student's story and the layers of trauma that each had endured.

At first, Lombardi just listened, allowing the women to share their experiences at their own pace and on their own terms, with few questions and no interruptions. In later interviews, she circled back to hone in on the hazier parts of their stories, pressing for details and painstaking explanations. Finally, she arrived at the tough questions, the ones she knew would be awkward and uncomfortable. She asked them about details they omitted from their stories, or inconsistencies between what they said and what they told police in reports. She asked them about drinking, and how much that could have clouded their judgment or their memories. She asked them to respond to the explanations provided by their alleged assailants.

“It's difficult to ask those questions, because implied in your question is doubt,” Lombardi recalled in a recent interview. “That line of questioning can seem very ‘blame the victim,’ and people immediately get defensive.”

“But,” she added, “you have to ask the question. Never did I not ask a question I wanted to ask.”

For journalists who cover the controversial issue of campus sexual assault, the process of interviewing rape survivors can bring about a clash of central journalistic tenets. In our reporting — and especially in investigative reporting — we seek to “comfort the afflicted” and “give a voice to the voiceless,” to bolster those without power and highlight injustices performed by the powerful.

But another central tenet of journalism requires us to exercise constant skepticism and to be scrupulous about verifying and proving every fact and detail.

It's a difficult line to toe, because the stigma of sexual assault remains endemic. Only five percent of rape incidents ever come to light, some studies say; underreporting is a much more rampant problem than false allegations. Victims often feel shame and guilt after such a crime, despite the fact that they have done no wrong — and that is coupled with the fact that they often face disbelief from friends, family, or law enforcement when they report a crime. Even as part of an act of journalism, expressing doubt or skepticism about allegations of assault can feel like another act of injustice dealt to a person already suffering from trauma.

And yet, the accusations made against alleged perpetrators are so grave, they warrant some kind of proof — or at least, that’s the rationalization of many news organizations that have grappled with these stories in recent years.

In 2012, the *New York Times* reported on accusations of sexual assault that had been made against Yale’s beloved star quarterback Patrick Witt — a student who had made national headlines when he passed up an opportunity to compete for a Rhodes Scholarship because the mandatory interview coincided with his final Harvard-Yale football game. It was assumed at the time that he had removed himself from the running because of duty to his team; the *Times* alleged that his decision was in response to the assault accusations. The *Yale Daily News* caught flak for failing to report on the issue; the newspaper argued that the victim had sought confidentiality by filing an informal complaint, and “because the nature of the complaint meant that all its details remain allegations, the *News* chose not to print a story,” editor-in-chief Max de la Bruyere wrote in a letter to readers.

The *New York Times*’ more confrontational tack — based largely on anonymous sources — was similarly maligned, because no charges had been filed, there was no criminal investigation, and Witt’s accuser never spoke to the *Times*.

“Good call, Newspaper of Record,” wrote one columnist for the New England Sports Network. “If Witt is a violent sexual predator, who needs all that messy ‘official records’ stuff? Witt might be guilty, but this is an irresponsible way to sully the reputation of a person who is entitled to a presumption of innocence.”

At Columbia earlier this year, the student-run *Bwog* was lambasted for waiting five days before reporting on campus flyers that listed the names of students accused of sexual assault. (The issue was further complicated because one of those names belonged to a *Bwog* staffer.) The staff defended their decision in a post: “The desire to be responsible and not start a witch hunt...[is among] the reasons that the uncensored list will never be published,” they wrote, adding that “perhaps writing this list (and publishing the work of a campus ‘vigilante’) is not the best way to create a safer campus environment for victims.”

It was a controversial decision. “There is such a hesitancy to call out perpetrators for wrongdoing,” said Dana Bolger, co-founder and co-director of Know Your IX, an organization working to end campus sexual assault and raise awareness about Title IX. “And there’s such a ferocity with which victims are blamed, doubted, and attacked.”

And yet, journalists are faced with a grim reality: Once in a while, on rare occasions, people lie — often for reasons that defy explanation. We hear the industry horror stories and shake our heads: Countless news organizations have been duped by people who feigned pasts as Holocaust survivors, or once-homeless drug addicts, or refugees from conflicts in far-flung countries.

“The challenge is to feel passion and outrage without losing your skepticism,” acclaimed *New York Times* columnist Nicholas Kristof told students in an online workshop in

2011. “Over the years, for example, I’ve learned that victims of human rights abuses lie and exaggerate as much as perpetrators do. It’s very easy if you’re passionate and outraged to listen to victims and not double-check and triple-check and listen to the other side.”

Even Kristof is not immune to the tendency to believe sympathetic stories. Over the years, his journalism has lauded Somaly Mam, a Cambodian woman whose career as a human rights advocate was based on the credibility she gained as a supposed survivor of childhood sex trafficking. Recently, reports surfaced that disproved Mam’s alleged past.

“This is why heroes are potentially dangerous turf for journalists. We, too, can be wooed by aura and charisma, turning from healthy skeptics to worshipers,” wrote journalist Karen Coates in the *Columbia Journalism Review* about the Somaly Mam case. “Our belief in heroes can endanger our allegiance to truth.”

But Coates also acknowledges, “Many personal stories of injustice are true, and to ignore them would defy our journalistic duties as well.”

If we rely only on instances of trauma that are proven beyond doubt through documentation, we risk missing out on important stories. Know Your IX’s Dana Bolger, a recent graduate of Amherst College and a survivor of campus sexual assault, said she knows how it feels to have her story questioned by a reporter — and, in some interview situations, the feeling of wishing she hadn’t chosen to share her story with the reporter at all, especially when they push for proof and documents.

“Whether it’s intentional or not, it feels almost automatically like you’re being disbelieved and doubted, and a lot of us are really accustomed to being disbelieved and doubted,” Bolger said. “It’s frightening. It takes a lot of trust to come forward and hand over your story for someone to tell in this very public way...To have them ask you for proof makes you doubt whether they are actually going to do it in way that feels safe.”

And, she warned, our stereotypes of rape victims can also affect who the media chooses to interview — and how likely they are to be believed without further question. Bolger, who is white, said she knows that stereotypes of black and Hispanic women mean that victims from those backgrounds have an ever harder time of garnering credibility in public spaces.

“As a white woman, I am sort of seen as innocent and naive in a way that women of color often aren’t,” she said. “People, reporters included, are more likely to see me as an innocent victim. I think I am more believable than other survivors.”

It’s a situation also faced by John Kelly, a 21-year-old senior at Tufts University and a coordinator for Know Your IX. Because he is a male survivor of sexual assault, he said, people — particularly journalists — have been skeptical of his story or wary about its veracity. He has a tough time understanding why reporters would think that a person would lie about such experiences — “Talking about this isn’t fun. We’re not getting a kick out of it,” he said — but that is the attitude he has faced in the past.

“Once I said that my assailant was punished [by campus administrators], I sort of got let off the hook in some ways,” Kelly explained. “But I very much got the sense that if it hadn’t happened that way, I probably wouldn’t have ended up in the interview. And most people who go through the process don’t have that kind of support for their story.”

Kelly felt that his story was worth sharing, because the idea of a male victim of sexual assault challenged cookie-cutter assumptions. So when journalists came knocking, he felt pressure to share documents on his case with journalists, and to offer proof, even if he didn’t feel wholly comfortable handing off files with such personal details.

“It didn’t feel great, but I was struggling to get my story published, and struggling to get people to feature me in stories,” Kelly recalled. “If a reporter was possibly going to feature my perspective, I would do everything I could do to keep myself in the story.”

But this need for documents is critical to reporting, and critical to making reporters such as Lombardi confident in their story. In a 2009 interview with the Dart Center for Journalism and Trauma, she talked about her aggressive pursuit of any kind of files to corroborate students’ testimonies.

“A lot of students thought they would just tell me their story and that’s all I would need,” Lombardi told the Dart Center. “But I needed documents. I needed to corroborate what they were saying, and, if I was going to feature their cases, I needed people who were comfortable with me filing records requests for their judicial file, talking to the school officials, signing waivers granting permission so the school officials would talk to me. I needed them knowing I was going to go to the accused student... At that point it became clear who was comfortable with that kind of reporting and who wasn’t. Our top cases were only those people who were comfortable.”

Lombardi told me that she tried to temper her adamant requests for students’ documents with sensitivity in other ways. In a decision she agonized over, she sometimes allowed sexual assault survivors to read their quotes before publication — and in one or two cases, to read the part of the finished story that centered on the student’s experiences. “It allowed her to be mentally prepared for the rest of the world knowing what happened to her,” Lombardi said. “I never do that, sharing a section of a story. But in these situations where you’re dealing with such vulnerable people, if somebody asks, I find it very hard to rationalize why people can’t see it.”

In one of these instances, the student read the section of Lombardi’s story. And the young woman was devastated.

“The student was upset that I quoted her alleged perpetrator’s statement,” Lombardi recalled. “I’d quoted what he said at the hearing, since he refused to talk to me, but she thought I was giving him a voice, somehow I was believing him over her.”

The student said she worried that the story would lead others to doubt her case — and she wondered whether Lombardi believed her assailant’s story over her own. The young

woman cried, and she said she regretted ever agreeing to be interviewed. But Lombardi explained her reasoning for including both sides, and after the story was published, the student said she was proud of her role in the final product.

“It was a difficult conversation. It really put me in a position where I really had to articulate why it was important to have this voice, to quote those documents,” Lombardi said. “I had to explain — producing a fair story that allows for all voices to be heard is not the same thing as believing one person over another.”

**Behind the Story: “Do You Fact-Check a Campus Rape Survivor?”
(We journalists will never know. So how do we tell?)**

By Martine Powers

It was a provocative title for a seminar discussion, especially one hashed out in the basement of a Berlin history museum: “Do you fact-check a Holocaust survivor?”

Our conversation centered on the case of writer Bruno Dössekker, whose memoir about a childhood spent in a concentration camp was later debunked as fiction. We agreed: his book should have been fact-checked. Yet the idea of calling into question the veracity of other accounts from Holocaust survivors – or testimonies from victims of other kinds of grave crimes – remained an unappealing prospect. Halfway through our trip with the Fellowships at Auschwitz for the Study of Professional Ethics, we had spent hours learning about the ways in which Holocaust atrocities were concealed or downplayed. We’d had the astonishing opportunity to interview a Holocaust survivor, an incredible woman who demonstrated strength and grace in sharing her terrible recollections.

How dare we journalists – those who were not there and will never know, to rephrase Elie Wiesel – challenge the veracity of those experiences?

It’s a question that remains a big part of how I think about my job. In my personal life, I skew toward the credulous, am quick to empathize, and tend to give others the benefit of the doubt. But as a journalist, I have learned the hard way that trusting people’s testimonies is fraught with risk. One example: I wrote a front-page story for the *Boston Globe* in which a sympathetic male interviewee, the focus of my article, turned out to be a registered sex offender – a fact that was pointed out by our competitor, the *Boston Herald*, in a withering column. In other instances, I’ve seen the damage that can be done when journalists report on accusations that turn out to be false.

These kinds of professional horror stories – my own, as well as those from other reporters – have served an important role, because they compel me never to let it happen again. Now, I’ve trained myself to approach interviews with one question always in the back of my mind: How do I know this person isn’t lying to me? Or at least, how do I know that this person is not exaggerating or mis-remembering his/her experiences, even unintentionally?

During FASPE, our journalism group read Holocaust scholar Michael Berenbaum’s essay on the challenge of crafting objective accounts. “Survivor testimony was considered inherently unreliable, a mixture of what was recalled from the camp and what was learned subsequently, fallible as human memory is fallible, most especially with the passage of time,” Berenbaum wrote in the *Jewish Daily Forward*. “Errors were pounced upon to discredit the entire testimony.”

But, he continues, the atrocities described in first-hand accounts – even those without supporting documentation – cannot be discounted. “Survivors ‘know’ something that we who were not there may never quite know: what it was like to be there...the assault on

even elemental humanity,” Berenbaum writes. “If we listen attentively, respectfully and cautiously, we can use the survivors as our guide to enter the portals of this evil.”

After our seminar, the other FASPE journalism fellows and I continued to discuss this topic during lunches and walks and bus rides. We tried to come up with best practices, neither complete nor infallible, on how to approach interviews with victims of crime or injustice. Our thoughts: seek outside sources and documentation to help verify a person’s testimony. Despite how awkward or uncomfortable it may be, discuss doubts or suspicions with victims themselves — give them a fair shot at rebutting skepticism. When there are no outside sources to confirm an interviewee’s claims, make that fact plain in your story. And understand that even though there may be no way to prove whether allegations of a crime are true, there can be ways to critique the response of institutions — governments, campus administrations, relief organizations — that are tasked with responding to allegations.

It’s a challenging prospect, to be sure. And it can feel repugnant to meet a survivor’s heart-wrenching account with professional skepticism. But we agreed: our reasons for questioning the veracity of a story are not because we don’t believe our interview subjects. It’s because their stories are so important — so worthy of being shared with the wider world — that they deserve to be unassailable.

Book Publishing, Not Fact-Checking

By Kate Newman

[Note: This was originally published by *The Atlantic* on September 3, 2014]

On the cover of her memoir, *The Road of Lost Innocence: The True Story of a Cambodian Heroine*, Somaly Mam sits in a field, surrounded by laughing children. “I came to know Somaly Mam, who was enslaved herself but managed to escape and then became the Harriet Tubman of Southeast Asia’s brothels, repeatedly rescuing those left behind,” *New York Times* columnist Nicholas Kristof wrote in the book’s introduction. “As a local person with firsthand experience in the red-light districts, Somaly has a credibility and understanding that no outsider does.”

That was in 2009. This past spring, Simon Marks’s *Newsweek* article on Mam charged the anti-sex trafficking activist with fabricating her past as a child prostitute. In the fallout, many readers faulted Kristof for lauding her as a heroine; others pointed fingers directly at Mam. Hardly any called out the publishing houses that distributed her book.

Mam’s story gained a mass following with the release of her best-selling memoir, first published in France in 2005. The book’s success helped the activist launch the Somaly Mam Foundation in 2007. Mam was also featured in Mariane Pearl’s *In Search of Hope* that same year.

In a *Politico* post, Kristof cited the fact that Mam’s story had been the subject of two published books as part of what made it so credible. Addressing the issue in the *Times*, he wrote, “We journalists often rely to a considerable extent on people to tell the truth, especially when they have written unchallenged autobiographies.”

There’s a basic problem with this line of logic, though: Most books are never fact-checked.

“When I was working on my book, I did an anecdotal survey asking people: Between books, magazines, and newspapers, which do you think has the most fact-checking?” explained Craig Silverman, author of *Regret the Error*, a book on media accuracy, and founder of a blog by the same name. Almost inevitably, the people Silverman spoke with guessed books.

“A lot of readers have the perception that when something arrives as a book, it’s gone through a more rigorous fact-checking process than a magazine or a newspaper or a website, and that’s simply not that case,” Silverman said. He attributes this in part to the physical nature of a book: Its ink and weight imbue it with a sense of significance unlike that of other mediums.

Fact-checking dates back to the founding of *Time* in 1923, and has a strong tradition at places like *Mother Jones* and *The New Yorker*. (*The Atlantic* checks every article in print.) But it’s becoming less and less common even in the magazine world. Silverman suggests this is in part due to the Internet and the drive for quick content production. “Fact-checkers don’t increase content production,” he said. “Arguably, they slow it.”

What many readers don't realize is that fact-checking has never been standard practice in the book-publishing world at all.

And reliance on books creates a weak link in the chain of media accuracy, says Scott Rosenberg, founder of the now defunct MediaBugs.org. "Magazine fact-checkers typically treat reference to a fact in a published book as confirmation of the fact," Rosenberg said, "yet too often, the books themselves have undergone no such rigorous process."

Somaly Mam's case is far from the first of its kind. In 1999, anthropologist David Stoll questioned the accuracy of *I, Rigoberta Menchú*, a memoir that describes the horrors experienced by Menchú during Guatemala's civil war. That same year, Benjamin Wilkomirski, author of the Holocaust memoir *Fragments*, was revealed not to be a Holocaust survivor at all. And we all watched Oprah poke a million little holes into James Frey's story of addiction and recovery.

These cases vary widely but share that they have many unfortunate effects. Critics of Menchú's political views were quick to completely discredit a rare survivor testimony. Conservative commentator David Horowitz labeled her a "Marxist terrorist" and "one of the greatest hoaxes of the 20th century" before launching an unsuccessful campaign to revoke her Nobel Peace Prize. Wilkomirski's downfall fanned the flames of Holocaust denial.

Kristof urged readers not to let Mam's falsehoods overshadow her cause.

"One risk is that girls fleeing Cambodian brothels will no longer get help," he wrote in a *Times* blog post. "... Let's remember that this is about more than one woman."

Why then, with the perils so apparent, are so many books still not fact-checked?

The reluctance may stem in part from a sense that it's unkind to question victims, especially when their pasts portray them unfavorably. Nan Talese, Frey's editor, sat beside him on the couch at *Oprah*. "As an editor," Talese wondered, "do you ask someone, 'Are you really as bad as you are?'"

"Yes," Winfrey flatly replied.

Or perhaps people are too in love with resilience narratives — the more harrowing Frey's original circumstances, the more buoyed we felt by his success.

Publishing houses cite lack of funds for fact-checking operations, but it's getting harder to accept that argument, particularly with major presses. Even when a line-by-line, magazine-style edit is unrealistic, publishers could work to clear certain key details. In Frey's case, for example, Doubleday might have verified court records, as *The Smoking Gun* was able to do, regarding the amount of time he spent in jail (a few hours, instead of months).

And publishers often find funds for an in-depth legal vetting process, during which lawyers carefully review a manuscript and flag any passages that may expose the author or publisher to issues of legal liability. These issues may fall into the categories of copyright and fair use, right of privacy, right of publicity, and defamation, explains Tonya M. Evans, a law professor at Widener University and author of a series of legal reference guides for publishing professionals. “The goal is to raise these issues so that the client can make an informed decision whether it is in their best interest to publish the work as is or make changes, secure permissions, or delete certain material altogether,” Evans says.

When I asked Sally Marvin, publicity director at Random House, whether Mam’s book had been fact-checked, she gave this statement: “Random House does not discuss the pre-publication review process for any particular title. Since Random House publishes in so many different subject areas — biographies, cooking, health and fitness, history, religion, etc. — and on so many topics within each subject area, it is not possible to have or describe any ‘standard’ pre-publication review procedure for non-fiction titles.”

Some authors are taking matters into their own hands. When Mac McClelland, formerly a fact-checker at *Mother Jones*, wrote her first book, *For Us Surrender Is Out of the Question: A Story from Burma’s Never-Ending War*, she enlisted the help of former *MJ* research editor Leigh Ferrara to pore through more than 700 sources. The process took about eight months.

McClelland recently finished fact-checking her second book, *Irritable Hearts*, a memoir about her experience of PTSD as a reporter covering conflicts and disasters. Because this work is more personal than her last, much of the checking this time around consisted of questions for McClelland’s family, exes, and friends.

“Everything you remember, somebody else remembers it differently,” McClelland said. “Everything I would ask each of my parents, the other one would say, ‘The complete opposite of that happened.’” She caught statistical and historical inaccuracies before publishing her first book; with her second, she changed some personal stories, too.

McClelland is quick to acknowledge the extreme challenges that fact-checking a book presents — it’s no doubt a test of time, patience, and money. In both cases, she financed the process herself. “For my first book, I actually wound up spending more money on fact-checking than I got for my advance — by a lot,” she said. McClelland would like to see a publishing culture in which fact-checking is written into book contracts, but she’s doubtful that will happen soon.

Scott Rosenberg of MediaBugs agrees. “I just think you’d have to rip up the publishing industry as it exists and start over if you really wanted publishers to fact-check books,” he said. Publishers aren’t motivated to take on this vast responsibility, he believes, without commercial pressure.

“They don’t pay a price when the book is exposed,” Rosenberg pointed out. “No one looks at the publishing house’s name on the book they bought four years ago

when *Newsweek* exposes it as inaccurate and says, ‘I’ll never buy a book published by them again!’ So why should the publisher care?”

Even in the case of *A Million Little Pieces*, for which Random House was made to offer refunds as part of a federal class-action lawsuit, the financial repercussions were minimal. Of the more than four million readers who purchased the book, fewer than 2,000 sought refunds. Random House set aside \$2.35 million for the lawsuit, but even with legal fees, wound up paying far less.

Perhaps in a perfect world, every publishing house would have an army of fact-checkers — but what can we do until then? At the very least, it’s important to read more critically, especially for journalists, who perpetuate untruths when they rely blindly on books for fact.

“Maybe there should be a warning, like on a pack of cigarettes,” said McClelland. “‘This book has not been fact-checked at all.’ Because when I realized that basically everything I had read until that point had not been verified, I felt a little bit lied to.”

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Behind the Story: “Book Publishing, Not Fact-Checking”

By Kate Newman

My final project grew directly from our seminars in Germany and Poland. I was struck by the case we discussed of Benjamin Wilkomirski, who claimed to be a Holocaust survivor. Survivors were hesitant to question him when he published his account because they feared it would hurt their own credibility, and yet when his story was revealed to be fraudulent, it hurt their credibility even more.

I couldn't help thinking of Rigoberta Menchú, the Guatemalan human rights activist whose account of the civil war was challenged by anthropologist David Stoll. In Menchú's case, the effects were devastating; critics used the book's factual errors to discredit her entire testimony. In a country where the perpetrators of genocide remain in power, this is especially significant.

One key difference between Wilkomirski's case and Menchú's, is that while some of the details in Menchú's story may be false, the story itself is fundamentally true. She is who she claimed to be.

When we discussed Wilkomirski, I was shocked to learn his story had not been fact-checked, and beyond that, to learn how few books ever are. I understand the difficulty of the task firsthand — this summer I worked as a fact-checking intern at the *New York Times* — but believe that publishing houses could do much more to verify the fundamental details of the stories they publish.

In Poland, one of the other Fellows mentioned the work of Nicholas Kristof. We discussed Kristof's writing on Somaly Mam, and it seemed to me, in many ways, another case like Wilkomirski's. Mam may or may not have believed her own story — as with Wilkomirski, we will never truly know — but much as Wilkomirski's downfall provided fuel to Holocaust deniers, Mam's exposure will likely hurt the anti-trafficking cause.

I decided to focus primarily on Mam in my final project, given that her case was the most recent. As surprised as I had been to learn that few books were fact-checked, I was even more shocked to read that Nicholas Kristof cited Mam's book as part of what made her story credible. It's hard to believe a journalist as seasoned as Kristof would defend himself this way.

Our discussions at FASPE left me keenly aware of journalism's ethical messiness. There are so many gray areas, and in some cases, no clear solution. When it comes to relying on books, though, I will be infinitely more careful. I hope that by sharing my final project, I can urge others to do the same.

Can the Right Coverage Prevent Wrongful Conviction?

By Stav Ziv

Antonio Yarbough had spent the night of June 17, 1992 out with his buddy Sharrif Wilson and some other friends. He says that he came home in the morning to find three bodies. His mother, Annie, along with his sister, Chavonn Barnes, and another 12-year-old girl, Latasha Knox, had been strangled and stabbed.

He ran out of the apartment to find his uncle, who returned to the apartment with him. Yarbough dialed 911. Yarbough and Wilson — 18 and 15 years old at the time, respectively — were interrogated for hours, charged, and later convicted of the murders.

The next day, a headline in the *New York Daily News* read, “Girl Slain with Pal, 12, Mom.” Another read, “Gay Son and Pal Killed 3: Cops.” *The New York Times*’ story was topped: “Woman and 2 Girls Are Found Slain, 2 Suspects Charged.” In *New York Newsday*: “Son and Pal Nabbed in Triple Stabbing.”

Amidst hundreds of homicides in Brooklyn that year, the articles were brief. Each one spelled the names of the victims and suspects differently, and the cursory first-day coverage had other inconsistencies. But there were no second- or third-day stories, according to a database search of those papers. Their names quickly vanished from the papers. Until more than two decades later, when Yarbough and Wilson were exonerated and released from prison.

Yarbough’s lawyer, Zachary Margulis-Ohnuma, filed a motion to vacate Yarbough’s conviction in 2010. He pointed to several flaws in the original trials, including an incompetent attorney and evidence withheld by the prosecutor. Testing in 2013 also matched DNA found under Annie Yarbough’s fingernails with that from a 1999 murder, when Yarbough had long been in prison.

Margulis-Ohnuma says there was overwhelming evidence to throw out Yarbough’s conviction even without the DNA results, but that new information finally pushed it over the edge. On February 6, 2014, Yarbough walked out of a Brooklyn courthouse, suddenly a free man after more than two decades behind bars for a crime he did not commit. Yarbough and Wilson are only two of at least half a dozen men who have been exonerated in New York since January 2014.

It’s clear now that the legal system failed Yarbough when it convicted him of murdering his family and sentenced him to 75 years to life. But did the press fail him as well?

“We tend to glorify [prosecutors] or accept what they do uncritically,” said Paul Moses, who became Brooklyn editor for *New York Newsday* in 1993, shortly after Yarbough was arrested for the triple murder. A start to better reporting, he said, would be to have a more skeptical attitude toward prosecutors.

But “that’s a very difficult thing as a journalist; your best sources are going to be the prosecutors,” said Maurice Possley, senior researcher for the National Registry of

Exonerations and a Pulitzer Prize-winning journalist who has investigated and written on criminal justice for more than three decades.

While a defense attorney is likely to be tight-lipped, he said, the prosecution is usually happy for the chance “to get the word out that they’re doing their job, that they’re protecting the public,” said Possley. “And so it’s very easy to fall into that sort of mindset that the prosecutors are always right and become less critical.” It’s crucial, he said, that reporters maintain a healthy distance and critical eye, as well as an open mind, avoiding assumptions that anyone going through the system must have done something wrong.

“Being vigilant and paying attention prior to conviction is very critical,” said Possley. “After someone’s convicted, the system is not designed to make it easy to undo it. It becomes exponentially harder.”

Yarbough, now 40, said the press crowded around him and the family and friends who had come to the courthouse on the day of his release as he figured out what to do first. Reporters followed him to Junior’s Cheesecake, and waited eagerly to capture his first bite of the pineapple slice he’d ordered.

“Now that I’m out,” Yarbough said in an interview in April, “I’m the hottest thing. Everybody wants to talk to me. I’ve turned down *Rolling Stone*. I’ve turned down the *New Yorker*. I’ve turned down *Vanity Fair*.”

But back then, it was all crickets. Yarbough’s case received a meager amount of coverage in June of 1992 and in the months and years that followed. And it has made it difficult, he said, to trust reporters.

“In my case, I had just turned 18 four months prior and had never been in trouble with the law before. Nobody knew that because no one took the time to check,” Yarbough said. “Even though I came from a messed up background ... I didn’t have no criminal record, nothing like that. I really wanted someone to come speak with me and ask me my side of the story. How do you take the police and DA’s word for it about something so heinous and not even speak to the person who is supposed to have done the crime?”

One partial explanation was the sheer volume of killings at that time. In the late 1980s and early 1990s, homicide rates in New York City had surpassed 2,000 per year, peaking in 1990. According to data from New York State’s Division of Criminal Justice Services, there were 2,245 murders in 1990, with Brooklyn leading the pack at 759 that year. The year Yarbough was charged, there were 1,995 murders citywide, with 652 in Brooklyn. In comparison, the data shows 335 total murders in the five boroughs in 2013; Brooklyn still had the highest number with 147.

“Because of the volume, the system failed more often,” said Margulis-Ohnuma, who has been Yarbough’s lawyer since 2009, but was a reporter for the *Daily News* back in the early 1990s. “There are more cases coming from that period.”

Moses, who now teaches journalism at Brooklyn College, said, “There was an enormous amount of crime. It took a lot for a murder to make it into the news.” Amidst so many homicides, time and resources were scarce. Though the murders of Annie Yarbough and the two young girls made it into the papers, coverage was brief.

Oren Yaniv — who currently covers Brooklyn courts for the *New York Daily News* and has written a handful of stories about Yarbough’s case and other recent exonerations — said that doesn’t surprise him. The victim, Yarbough’s mother, was a drug addict living in the projects in Coney Island. “You can see why this wasn’t headline news,” said Yaniv. Those are “not elements that make coverage likely.”

Even today, after a precipitous drop in homicide rates, reporters can’t and don’t report on every case that goes through the courts, Moses and Yaniv agreed.

“We still don’t cover the majority of them,” Yaniv said. Reporters and editors tend not to write about trials “if there’s nothing interesting or newsworthy in the case, tragic as it may be.”

Yaniv is not convinced the press made or could have made a difference for Yarbough, unlike in a high-profile case like the Central Park Five. In that case, five black and Latino teenagers were wrongfully convicted of the 1989 rape of a white woman in Central Park. They were exonerated in 2002. In that type of scenario, the press may have more of an effect, Yaniv said, even in terms of how the DA approaches the case.

But there’s a reason, he said, that juries are instructed not to read press coverage about a case. “The system is based on the fact that the jury doesn’t read coverage,” he said, “and the assumption is that most don’t.” However, “if there is injustice, the press has an important role in bringing it to [light].”

Moses also hesitated to say whether the press could have changed the course of Yarbough’s or others’ trials that we now know resulted in wrongful convictions. What we *can* do, said Moses, is avoid the pack journalism mentality, resist the urge to tie a bow on the catchiest narrative, and be a little more skeptical of law enforcement and prosecutors. Former Brooklyn DA Charles Hynes enjoyed a positive reputation during the late 1980s and early 1990s, and many reporters didn’t question the particulars enough, said Moses.

After all, police and DAs are charged with holding people accountable for crimes. But the press is charged with holding police and DAs accountable and exposing unique and particularly systemic mishandling of the process.

In 2013, the *New York Times* did just that. Sharon Otterman and Michael Powell wrote about David Ranta, who had been accused in 1990 of killing Rabbi Chaskel Werzberger in Williamsburg. Ranta, it turned out, appeared to have been framed by Detective Louis Scarcella in a case with shoddy evidence and glaring police misconduct.

Times reporter Frances Robles followed up when she “discovered that the lead detective in that case used the same ‘witness’ in half a dozen unrelated murders and put similar phraseology in the mouths of a number of suspects he swore had confessed,” according to the George Polk Awards announcement for 2013.

In this instance, said Yaniv, the press unequivocally played a role, putting pressure on Hynes to address the issue and demanding a review of dozens of cases tied to Scarcella. The host of potential wrongful convictions became a campaign issue. Hynes had been elected DA six times, serving consecutively since 1989. But in 2013, he lost his bid for a seventh term to Kenneth Thompson, who promised to investigate and overturn wrongful convictions.

Possley, however, also believes the press can have an impact on proceedings in real time, with no connection to swaying a jury. “I’m a great believer in sunshine. That if people know they are being watched, scrutinized, paid attention to, that that has a behavior modification effect,” he said.

“For the people who do it right, it’s not necessary. For the people that don’t, the idea that the press is there can have a positive effect on behavior,” said Possley, who is the author of the very first story to come out of the Marshall Project—“a not-for-profit, non-partisan news organization dedicated to covering America’s criminal justice system,” according to its website.

“I think that things have changed and will continue to change, for the better,” said Possley, who cited conviction integrity units, recorded interrogations, new procedures for the administration of lineups, and other adjustments that make the criminal justice system look different today than it did 20 or 25 years ago.

“All these flaws that are exposed by going back and reassessing what went wrong, how someone got wrongly convicted, it’s provided this great window into the workings of the criminal justice system so that we can see these flaws and attempt to correct them,” said Possley. And he has, no doubt. “Having a vigilant press makes the system work better,” said Possley.

**Behind the Story:
“Can the Right Coverage Prevent Wrongful Conviction?”**

By Stav Ziv

Not long before embarking on the FASPE trip, I had the opportunity to interview a man who had recently been released from prison. He was not on parole or finished with his sentence—a staggering 75 years to life—but exonerated, his conviction wiped off his record like spilled juice off a countertop. I knew from the moment I was given his phone number from a social worker who’d received his approval to pass it on to me, that I was lucky to be one step closer to the source.

A couple of weeks later, I sat with Antonio Yarbough and his friend from “the inside” in Yarbough’s basement apartment with a fellow journalism school classmate, who acted as photographer. As we talked, I learned I was being afforded a glimpse Yarbough had not granted to the big dogs, reporters from publications I could barely even dream of writing for, like *Vanity Fair*, *The New Yorker*, and *Rolling Stone*.

Yarbough’s decision to let me in, but keep them out was anything but flippant. It was hard for him to trust the press that he felt had utterly failed him in the early 1990s. No one had even spoken to him then, he said, to ask him his side of the story. But I was a student, he said, a journalist in training. He chose me over the veterans because he hoped the interview (or a handful of them) would have an impact on how I later covered stories like his.

On the FASPE trip, as we discussed various scenarios over the course of the program, I felt somewhat panicked at all the ways we can do things wrong as journalists; all the ways we could overlook what in hindsight and with context becomes clear—from playing into the dark side of humanitarian aid culture to succumbing to restrictions and censorship by a strong-armed authoritarian regime like that of the Nazis.

I found myself thinking back to Yarbough, and asking myself what role the press played in his story and what role my peers and I would play in the stories of others. Even before FASPE, I had become deeply invested in Yarbough and had begun working on a long-form profile of his experience, with particular attention to the transition from prison back into society after serving more than two decades for a crime he did not commit.

Delving into the thorny questions of journalism ethics while in Germany and Poland with the other Fellows, I realized I also needed to pick apart the ethical questions surrounding Yarbough’s case. And so I decided to bridge my schoolwork and FASPE by writing about the role of the press in relation to the criminal justice system and cases of wrongful conviction. I hoped in the process to glean lessons that would inform my future work.

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

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LAW PAPERS

INTRODUCTION TO A SAMPLE OF THE 2014 FASPE LAW PAPERS

Each year that I've traveled on the FASPE Law trip I have been both struck and puzzled by the power of our visit to the memorial at Track 17 of the Grünewald train station. This is the site from which more than 50,000 of Berlin's Jews were deported to the East between late 1941 and the spring of 1945. Unlike most of the other historical sites and museums we visit on FASPE, virtually nothing greets the visitor to Track 17. No historical photographs, no guided tours, not even an interpretive panel for context. It's just a drab and ordinary urban site, two parallel rails within an elevated concrete platform. Only on very close examination can a visitor make out, at the platform's edge, the hard-to-read dates and destinations of the deportations and the numbers of deportees.

The memorial visibly moves the lawyers on the trip, but the puzzle is why. It lacks the starkness of Birkenau, the shock value of Auschwitz I's museum displays, the vast scale of the Memorial to the Murdered Jews of Europe. It seems freighted with meaning but offers little guidance. The most it can do, for the attentive and imaginative visitor, is to hint at the remote suffering and violence that occurred at the other end of the tracks.

I have come to think that for us lawyers, Track 17's curious power might lie in the way it symbolizes our study together. We spend our time trying to understand how an educated and civilized German bar came to commit and collaborate in such evil. But for most of those lawyers, the horror — like the terminus of the tracks themselves — must have seemed impossibly distant from their urbane lives. We spend our time debating problems of legal ethics we encounter in our own lives, but like the memorial at Track 17, the written rules of legal ethics offer us little guidance. They mark out a site of meaning but leave us on our own, to discover meaning for ourselves.

Of course, while Track 17 leaves us on our own, it does not leave each of us alone: we have each other. In this sense, too, the visit to Track 17 symbolizes the FASPE experience. We walk the tracks in pairs and small groups; we talk to one another about our ideas and our confusions and help one another make meaning.

In 2014, Belinda Cooper and I had the good fortune to travel and study with 12 brilliant FASPE Law Fellows from nine U.S. law schools — to help them in the process of making meaning out of their experience. One manifestation of their hard work is the final paper each of them wrote, several outstanding examples of which appear in the following pages. They give a sense, we hope, of the richness of our discussions and some of the ways our Fellows connect the past with their own concerns about their work today and in the future.

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Ethical Duties: A Framework for Corporate Lawyers Advising on the Foreign Corrupt Practices Act

By Brittany Horth

The World Bank has recently declared that corruption is “public enemy number one” in the developing world.¹ Corruption — broadly defined as government officials using their authority for private gain such as bribes — increases income inequality and poverty in countries at different stages of development by perpetuating unequal access to education and distribution of asset ownership, as well as reducing economic growth and the level and effectiveness of social spending.² Countries with high corruption perception indices have child mortality rates that are one-third higher, infant mortality rates and low-birth weight rates that are twice as high, and primary school dropout rates that are five times as high as countries with low corruption perception indices.³ Indeed, child mortality can fall by as much as 75 percent in countries that reduce corruption.⁴ Corruption produces counterfeit and dangerous products and services and reduces the accessibility and sanitation of water, as well as causing a variety of other harms.⁵ Globally, more than one trillion dollars is paid in bribes each year.⁶

The Foreign Corrupt Practices Act (FCPA)

The Foreign Corrupt Practices Act (“FCPA”)⁷ was enacted in 1977 in response to work by the Office of the Watergate Special Prosecutor, the Securities and Exchange Commission (SEC), and Senator Frank Church’s Subcommittee on Multinational Corporations that revealed that more than 400 U.S. companies had paid bribes to foreign public officials to secure business overseas.⁸ The FCPA contains both anti-bribery and accounting

¹ “Corruption is ‘Public Enemy Number One’ in Developing Countries, Says World Bank Group President Kim,” The World Bank, last modified December 19, 2013, <http://www.worldbank.org/en/news/press-release/2013/12/19/corruption-developing-countries-world-bank-group-president-kim>.

² Sanjeev Gupta, Hamid Davoodi, and Rosa Alonso-Terme, “Does Corruption Affect Income Inequality and Poverty?” IMF Working Paper No. 98/76, 1998, Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=882360; Jong-Sung You and Sanjeev Khagram, “Inequality and Corruption,” Hauser Center for Nonprofit Organizations Working Paper No. 22, KSG Working Paper No. RWPO4-001, Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=489823.

³ Sanjeev Gupta, Hamid Davoodi, and Erwin Tiongson, “Corruption and the Provision of Health Care and Education Services,” IMF Working Paper No. 00/116, 2000, Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=879858.

⁴ “The Costs of Corruption,” The World Bank, last modified April 8, 2004, <http://go.worldbank.org/LJA29GHA80>.

⁵ On dangerous products and services, see Kathleen Brophy, “Working Together to Stop Fake Agricultural Products in Uganda,” Transparency International, last modified on August 28, 2014, <http://blog.transparency.org/2014/08/28/working-together-to-stop-fake-agricultural-products-in-uganda/>; on water issues, see “Water,” Transparency International, accessed September 15, 2014, <http://www.transparency.org/topic/detail/water>; on other harms, see “True Stories,” Transparency International, accessed September 15, 2014, <http://www.transparency.org/news/stories>.

⁶ “True Stories.”

⁷ Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, et seq. (1977).

⁸ Criminal Division of the US Department of Justice & The Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act* (Washington, D.C.: U.S. Department of Justice, 2012), 3; Mike Koehler, “The Story of the Foreign Corrupt Practices Act,” *Ohio State Law Journal* 73:5 (2012), 929-932.

provisions.⁹ The anti-bribery provisions prohibit U.S. persons and businesses (“domestic concerns”), U.S. and foreign public companies listed on stock exchanges in the U.S. or which are required to file periodic reports with the SEC (“issuers”), and certain foreign persons and businesses acting while in the territory of the U.S. (“territorial jurisdiction”) from offering, paying, promising to pay, or authorizing corrupt payments to foreign officials to obtain or retain business.¹⁰ The accounting provisions require issuers to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls, and they prohibit individuals and businesses from knowingly falsifying books and records or circumventing or failing to implement a system of internal controls.¹¹ After being largely nonexistent for over two decades, enforcement of the FCPA has steadily increased in frequency and intensity since 2009.¹²

The Divide between the FCPA and Human Rights

One may logically assume that the FCPA and its recent increase in enforcement have brought the reality of the human rights violations caused by bribery to the fore within the U.S. corporate world; however, this is not the case. Although bribery of foreign public officials itself does connect the corporate deals negotiated by multinational corporations in one part of the world with the human rights violations committed by governments in another part of the world, awareness of the real-world pain and suffering caused by bribery is notably absent from public activity and discourse regarding the FCPA. Instead, the most popular and prominent public discussions regarding the FCPA in the corporate-legal community center on the definitions of “corruptly,” “foreign official,” “knowingly,” “obtaining or retaining business,” and “willfully,” as well as defenses to and other limitations on the FCPA.¹³ While the importance of statutory interpretation to the integrity of the U.S. legal system should not be dismissed, it is troubling that the public discussions regarding the FCPA in the corporate-legal community are so limited given that the problem of corruption extends far beyond the U.S. legal system in both scope and severity.

During FASPE Law, one of our many discussions centered on Bernhard Loesener, a Nazi bureaucrat who became head of the department responsible for “Legislation in the Jewish Question,” which included the drafting of the Nuremberg Laws.¹⁴ In his memoirs, Loesener claims that he attempted to mitigate the severity of the laws regarding the “Jewish question” by drafting the legislation in such a way as to limit the

⁹ *A Resource Guide to the US Foreign Corrupt Practices Act*, 2.

¹⁰ *A Resource Guide to the US Foreign Corrupt Practices Act*, 2, 10.

¹¹ *A Resource Guide to the US Foreign Corrupt Practices Act*, 2.

¹² Mike Koehler, “The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence,” *Indiana Law Review* 43 (2010), 389-396.

¹³ See *A Resource Guide to the US Foreign Corrupt Practices Act*; Andrew Weissman and Alixandra Smith, “Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act,” (Washington, D.C.: U.S. Chamber of Commerce Institute for Legal Reform, 2010), accessed September 15, 2014, http://ilr.iwssites.com/uploads/sites/1/restoringbalance_fcpa.pdf; and *United States v. Kay*, 359 F3d 738 (5th Cir 2004).

¹⁴ Karl A. Schleunes, ed., *Legislating the Holocaust: The Bernhard Loesener Memoirs and Supporting Documents* (Boulder, Co.: Westview Press, 2001), 4.

number of individuals affected.¹⁵ Specifically, Loesener details the extensive negotiations over the definition of “Jewish” and his attempts to limit the definition to “full Jews only.”¹⁶ During our discussion, we commented on the uncomfortable absurdity of Loesener’s legalistic and narrow focus on the definition of “Jewish” within the broader context of the crimes that were about to be committed and the pain and suffering that was about to be inflicted on the Jewish people, and we considered the implications of this for Loesener’s role in the Holocaust. Similarly, it is troubling that, whereas businesspersons and lawyers debate the nuances of the definition of “foreign official” and other key words within the parameters of the FCPA, there is a broader context of human rights violations occurring — regardless of the definition. This analogy begins to touch upon one of the central themes of FASPE: our ability to be perpetrators in a modern-day context, and how we can identify manifestations of this.

The Purely Legalistic Approach

Prior to the start of FASPE Law, we were instructed to draft a memorandum, based on Nazi law, as it was in the Bailiwick of Jersey on September 2, 1943, addressing two issues: whether a certain female should be declared non-Jewish, and whether another certain female should be prohibited from owning and operating her knitting business. On the first day of FASPE Law, when we sat down as a group to discuss our responses to the task, it became clear that each and every one of us felt obligated to follow instructions and at least provide, if not focus upon, a purely legal, technical answer to each of the issues. Interestingly, we each felt and fulfilled this obligation despite the fact that we were aware that Nazi law was profoundly unethical and that we ourselves were not operating under any sort of totalitarian system, but within a nearly risk-free environment. The creator of the task — Professor Richard Weisberg of Cardozo Law School — reports that the majority of law students “cabin...the statutory material within a narrow space of technically manageable issues.”¹⁷ This task was created in part to demonstrate the dangers of legal positivism, a school of thought that stipulates the law has the power to assert itself and therefore is valid regardless of content or impact—“law is law.”¹⁸

The task we were assigned points to the danger that contemporary lawyers, in their tendency to approach matters in an overwhelmingly legalistic manner, run the risk of becoming complicit in human rights violations or other crimes. This seems to be the case with the FCPA, as well. The FCPA and similar laws have created an enormous demand for Corporate Compliance Officers (CCOs) responsible for a company’s compliance with laws and regulations;¹⁹ however, in their recruiting efforts, employers are actively excluding corporate lawyers from this new field of compliance.²⁰ Corporate

¹⁵ Schleunes, 4.

¹⁶ Schleunes, 10-22.

¹⁷ Richard Weisberg, “The Hermeneutic of Acceptance and the Discourse of the Grotesque, with a Classroom Exercise on Vichy Law,” *Cardozo Law Review* 17, no. 6 (1996), 1875-1888.

¹⁸ See Gustav Radbruch, “Legalized Lawlessness and Extralegal Law” (1946), translated by Alice Kennington, David Luban, and Markus Wagner, 6.

¹⁹ Aruna Viswanatha, “Wall Street’s Hot Trade: Compliance Officers,” *Reuters*, Oct. 9, 2013, <http://www.reuters.com/article/2013/10/09/usa-banks-compliance-idUSL1NoHR2CG20131009>.

²⁰ See Donna Boehme, “Big Ideas from 1200 Compliance Individuals,” *Compliance Strategists*, October 11, 2013, <http://compliancestrategists.com/pro/2013/10/11/big-ideas-from-1200-compliance->

lawyers are believed to make poor CCOs, it is considered an insult to the CCO if he or she has to report to the General Counsel (GC), and the in-house lawyer's definitive opinion on a compliance issue is no longer thought to be the end of a company's inquiry or responsibilities.²¹ Why? If lawyers are experts on the law, why is compliance with the law being carved out of their duties? The answer is that the compliance field considers corporate attorneys to be "overly technical" and "purely legalistic" in their analysis of problems replete with ethical dilemmas.²² In 1946, Gustav Radbruch, in reference to legal positivism, wrote "But upon power alone one can base at most a 'You must!' never a 'You *should!*'"²³ (Emphasis added.) Several decades later, Compliance Strategists, LLC, in reference to the exclusion of lawyers from the compliance field, wrote that lawyers' "purely legalistic approach ... tends to overlook the simple question of '*should* we?'"²⁴ (Emphasis added.) In the words of ethics guru Michael Josephson, this "purely legalistic approach" is at risk for "lawful but awful" rationalization that acts as an "anesthesia for the conscience"— a warning uncomfortably reminiscent of legal positivism.²⁵ This opinion of corporate lawyers implies that the compliance field is developing into a field about ethics, "a concept that clearly embraces but goes well beyond compliance."²⁶

The FCPA provides an ideal modern-day context to test the "purely legalistic" approach because it legislates corporate social responsibility across the globe rather than merely maintaining a minimal economic balance or social order within the United States. Specifically, although there is an old adage claiming that there is no way to legislate morality, the FCPA appears to be attempting to do so because it bucks the long-standing norm of bribery in global business, despite the fact that bribery occurs behind closed doors and thus is mostly hidden from both law enforcement and the public eye.²⁷ More problematic is that the FCPA seeks to operate within a realm that is endlessly complicated by cultural and linguistic diversity, where there is frequently an intellectual disconnect between corporate finance and human rights, and in global multinational corporations that operate on a massive scale. In accordance with these complexities and

professionals/; Donna Boehme, "There's No Crying in Compliance," *Compliance & Ethics Professional*, (September/October 2013), 23-24, accessed at <http://www.compliancestrategists.org/wp-content/uploads/2012/09/cep-2013-09-boehme.pdf>; Richard L. Cassin, "Mary Jo White Dishes on FCPA Self-Reporting and Cooperation," *The FCPA Blog*, June 25, 2014 (7:28 a.m.), <http://www.fcpablog.com/blog/2014/6/25/mary-jo-white-dishes-on-fcpa-self-reporting-and-cooperation.html>.

²¹ Cassin, "Mary Jo White Dishes."

²² Boehme, "Big Ideas from 1200 Compliance Individuals."

²³ Radbruch.

²⁴ Boehme, "Big Ideas from 1200 Compliance Individuals."

²⁵ Boehme, "Big Ideas from 1200 Compliance Individuals."

²⁶ Michael Josephson, "History of the Integrity, Ethics and Compliance Movement: A Cautionary Tale for CEOs and Corporate Directors," *Ethikos* 28 (January/February 2014), 13-15, accessed at <http://www.corporatecompliance.org/portals/1/PDF/Resources/ethikos/scce-2014-01-ethikos.pdf>.

²⁷ On this adage, see Cynthia A. Glassman, "Speech by SEC Commissioner: Sarbanes-Oxley and the Idea of 'Good' Governance," U.S. Securities and Exchange Commission, September 27, 2002, accessed September 2014, <http://www.sec.gov/news/speech/spch586.htm>. For a discussion of hidden bribery, see Raymond Fisman, "When Corruption is the Norm," *Forbes*, March 4, 2009, accessed September 2015, http://www.forbes.com/2009/03/04/china-bribe-peterson-opinions-contributors_morgan_stanley.html.

the standard limitations on human thought, language, and law enforcement, the FCPA will necessarily be both over-inclusive and under-inclusive, and it will fail to perfectly cover all of the issues that it aspires to settle, such that the statute will never be wholly adequate. Consequently, and as alluded to by Compliance Strategists, LLC, mere strict adherence to the statute may frequently be inadequate to address corporate social responsibility and other ethical duties. The continuous parsing of the FCPA's language and provisions within the corporate-legal community therefore misses the key points, which are the *values* underlying the FCPA.

An Alternative Approach

The compliance field's critique of corporate lawyers and the corporate-legal community's discomfort with the reach of the FCPA — perceived to be solely a result of the law's provisions, but more likely a consequence of the inherently complicated nature of corruption — suggests a moment ripe for the development of ethical consciousness within the corporate-legal community, as well as the need for an alternative approach to analyzing problems related to laws, such as the FCPA. Patricia Harned, President of the Ethics Resource Center, suggests a general framework in response to a query from a *Compliance Week* reader: A company bid on a government contract in a foreign nation and had to choose between paying a \$30,000 bribe, a violation of the FCPA, or losing the contract and laying off 2,000 employees.²⁸ The reader explained that he or she viewed this choice as the difference between “*being right*” by obeying the letter of the law or “*doing right*” by ensuring an income for 2,000 employees and their families.

Harned identifies this scenario as a “classic ethical dilemma,” which she defines as a “values-laden choice that carries significant effect on the lives of others.” Accordingly, there is no clearly right or wrong choice, but merely a best possible choice for this particular scenario and its circumstances. Harned explains that the best possible choice for any particular scenario can be determined by considering two critical elements: values and stakeholders. Values are the ideals that we as a society strive to attain, such as fairness, integrity, and responsibility. Stakeholders are all those who will be affected by the choice. Harned hypothesizes that the best approach to an ethical dilemma is to combine these two critical elements and consider, for example, not only the values of fairness, integrity, and responsibility, but *to whom* those values should be owed. In the context of the company's choice between paying a \$30,000 bribe or laying off 2,000 employees, such an approach would consider five factors: (1) a responsibility to protect the company's interests, (2) a responsibility to follow the law, (3) a responsibility to treat employees fairly and to take reasonable care of their needs, (4) a responsibility to care for employees as fellow human beings and be concerned for their wellbeing, and (5) a responsibility to society and the company's community. Ultimately, after a lengthy consideration of each one of these five factors, Harned concludes that a “greater risk is placed on a larger group of company stakeholders by paying the bribe, rather than by laying off employees to obey the law,” and thus the ethical obligation is to refuse the bribe.

²⁸ The following section draws from Patricia Harned, “Solving an FCPA Ethical Dilemma,” *Compliance Week*, July 15, 2008, accessed September 2015, <http://www.complianceweek.com/blogs/patricia-harned/solving-an-fcpa-ethical-dilemma>.

In sum, Harned suggests a multi-factor framework for analyzing problems related to the FCPA, of which the law is one factor, in order to prevent any one stakeholder or value — including the responsibility to follow the law — from driving the entire analysis. In this way, each one of the five factors provides an independent ethical perspective, *as well as* an ethical check on each one of the other factors, in the event that one or more of the other factors were to suggest an ethically problematic action. It is important to note that Harned regards the applicable law as an integral part of a thorough ethical analysis, something the reader fails to do. Omitting the law from such an analysis would ignore the fact that laws often protect against behavioral tendencies that make humans *more* susceptible to unethical choices, and it would discount the values that underlie the law. This is the risk when “ethics” and “law” are kept apart too stringently, instead of being intertwined. However, Harned also does not advocate strict adherence to the law merely because it is the law; rather, she makes clear that there is a responsibility to follow the law and that the law tends to be protective and based on values.

Of course, there may be other such balanced approaches to analyzing issues related to the FCPA. Corporate lawyers should consider and implement such approaches in order to fulfill all of their ethical duties as well as to avoid becoming complicit in human rights violations, or even merely becoming irrelevant, in a rapidly developing corporate world.

Critical Lawyering and Prison Reform

By Andrew B. Mamo

Bernhard Loesener's work in drafting racial laws in Nazi Germany forces us to confront the question of whether lawyers can achieve justice within a substantively unjust system. An architect of the Nuremberg race laws while at the Ministry of the Interior, Loesener was a Nazi but not a hardened anti-Semite. He believed that German Jews would benefit from having a system of rules to determine their racial status, rather than leaving this determination uncertain and *ad hoc*.¹ At the Ministry of the Interior, he worked to codify the German racial classification system while resisting the hard-liners.² Eventually he was taken aback by the plans for the Final Solution and, whether out of genuine revulsion for what his earlier work had wrought or out of a sense of self-interest, he began to distance himself publicly from these laws.³

Loesener was certainly no exemplar of courage in his work at the Ministry, but neither does he appear particularly monstrous. He seems, indeed, to be quite ordinary — even if the consequences of his actions were magnified by his being in the uniquely horrific position of drafting racial laws in Nazi Germany. His decision to work within the ministry is also understandable: assuming his concern for those with ambiguous Jewish ancestry was genuine, and that his faith in the German legal system was sincere, would his refusal to participate in lawmaking have saved anything other than his own soul? While particularly troubling in the context of Nazi Germany, the general problems faced by Loesener continue to be relevant: Can laws set effective limits on systems that seem fundamentally unjust? Is there a necessary trade-off between the purity of cause lawyering and the pragmatism of working within a public institution? How can a lawyer advance meaningful reform without it being co-opted by other interests?

America in the 2010s is not Germany in the 1930s, which makes these questions even more pressing in our own society than they were in the context of Nazi Germany. Loesener may have been able to excuse his shortcomings by having worked in a regime that eliminated basic civil rights, but we can hold ourselves to higher standards. Our protections for political speech and the expression of personal conscience would be hollow indeed if they did not allow us the possibility of pursuing a more ethical course of public interest lawyering. But this freedom requires that we figure out how.

The political theorist Judith Shklar, who fled Riga with her Jewish family in 1939, claimed that the infliction of cruelty should be considered the greatest evil for liberals.⁴ Shklar further noted that democratic governments are prone to abuse their power and to

¹ See Kristen Rundle, "The Impossibility of an Exterminatory Legality: Law and the Holocaust," *University of Toronto Law Journal* 59 (2009): 65, 97.

² Karl A. Schleunes, "The Enigma of Bernhard Loesener—Nazi Bureaucrat," in *Legislating the Holocaust: The Bernhard Loesener Memoirs and Supporting Documents*, ed. Karl A. Scheunes (Boulder, Co.: Westview Press, 2001), 3, 9–12.

³ Bernhard Loesener, "At the Desk for Racial Affairs in the Reich Ministry of the Interior," in *Legislating the Holocaust*, 33, 99–100.

⁴ Judith N. Shklar, *Ordinary Vices* (Cambridge: Harvard University Press, 1984), 8.

inflict cruelty.⁵ The United States of the 21st century is not free of its own state-sponsored cruelty, notably within the prison system. If our goal is to reduce the infliction of cruelty in contemporary America, we must confront our carceral state.

Any advocate who wishes to address prison issues faces an immediate dilemma: the choice between either leveraging existing civil rights law to reform prisons and bring them into alignment with the principles embodied in the Eighth and Fourteenth Amendments or critiquing the legacy of prison reform projects as having betrayed the more fundamental human rights goals of such reforms. This essay draws upon Shklar's insights into the "liberalism of fear" to outline a path forward for prison advocacy as an essentially *negative* project — engaged in reform, but in a fundamentally critical mode.⁶

The Legacy of 1960s and 1970s Civil Rights Litigation in Prisons

The problem of incarceration has long been close to the center of American political and legal reform.⁷ In the late 1960s and 70s, lawyers brought civil rights laws to prisons. The worst prisons tended to be located in the South, and many brazenly perpetuated the subordination of African Americans on the model of antebellum plantations.⁸ Building upon the political transformations of the civil rights movement and the constitutional developments of the Warren court years, reformers in state after state challenged practices such as abuse at the hands of correctional officers, environments that encouraged inmate-on-inmate violence, and inhumane living conditions.⁹ While these were significant victories, they only went so far. More radical reforms would have fundamentally changed the nature of incarceration and the relationship of inmates and officers within their institutions — but such reforms had little support within the mainstream of the legal profession.¹⁰

After the wave of early civil rights litigation, the worst conditions in prisons have, by and large, been ameliorated. Instances of abuse and poor treatment can now be addressed through the legal system, however imperfectly.¹¹ The legal victories of the late 1960s and

⁵ Shklar, 238: "The liberalism of fear ... begins with the assumption that the power to govern is the power to inflict fear and cruelty and that no amount of benevolence can ever suffice to protect an unarmed population against them."

⁶ See Judith N. Shklar, "The Liberalism of Fear," in *Liberalism and the Moral Life*, ed. Nancy L. Rosenblum (Cambridge: Harvard University Press, 1989), 21, 26 for comparisons of the anti-utopian orientation of the "liberalism of fear" with the positive agendas of the "liberalism of natural rights" and of the "liberalism of personal development."

⁷ For histories of American prisons, see David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (New York: Aldine Transaction, 2002) and Rebecca M. McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776–1941* (New York: Cambridge University Press, 2008).

⁸ See David M. Oshinsky, *"Worse Than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press Paperbacks, 1996).

⁹ See Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998).

¹⁰ Perhaps the most prominent voice since the 1970s has been Angela Davis; see Angela Y. Davis, *Are Prisons Obsolete?* (Toronto: Publishers Group Canada, 2003).

¹¹ For example, following the Supreme Court's decision in *Plata v. Brown*, 131 S. Ct. 1910 (2011), the state of California is now attempting to reduce the population of its prisons to reduce overcrowding—but this process of "realignment" involves shifting inmates from state prisons to county jails and does not always provide adequate support to the local governments who must deal with the consequences of prison

70s gave lawyers a set of tools with which to fight problems as they emerged.¹² However, this civil rights litigation, at the same time, reduced the *moral* cost of incarceration. The worst abuses were corrected, while the growing legal regulation of prisons legitimated their expansion from the 1970s to the present. The background assumptions on which prison litigation was based have become fixed in legal consciousness through continual repetition. And the progressive victories of prison litigation have made the dream of more fundamental reform, i.e. prison abolition, even more distant (intellectually and quantitatively) than it was in the heady days of the civil rights movement.¹³

Our existing legal toolkit fails to recognize the full range of cruelties in prison. Cruelty extends beyond the infliction of physical violence and the deprivation of basic material comfort. Perhaps the worst form of cruelty in a democracy is that of humiliation and degradation. As Shklar explained, “[i]t is not just a matter of hurting someone’s feelings. It is deliberate and persistent humiliation, so that the victim can eventually trust neither himself nor anyone else. Sooner or later it may involve physical hurt, but that is not inherent in it.”¹⁴ The widespread use of solitary confinement is but one obvious example. However, moral cruelty within American prisons remains beyond the reach of existing civil rights law; no generally accepted interpretation of the Eighth Amendment recognizes such claims, even in the context of solitary confinement.¹⁵

Recognizing moral cruelty requires more than just continuing to play by the established rules of the game. It requires acknowledging the contingent nature of our jurisprudence and making the case for expanding our legal concepts of “punishment.” This, in turn, means acknowledging that the application of our existing laws is in itself an inadequate remedy. Civil rights laws were the latest attempt to civilize prisons and make them fit for our democracy.¹⁶ Yet, this civilizing process has also served to facilitate the expansion of

downsizing. See Joan Petersilia, “California Prison Downsizing and Its Impact on Local Criminal Justice Systems,” *Harvard Law and Policy Review* 8 (2014): 327.

¹² As of this writing, one of the most high-profile examples is the investigation of conditions at juvenile facilities on Rikers Island in New York City by the U.S. Attorney for the Southern District of New York. See Preet Bharara, “Memorandum to Bill de Blasio re: CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island,” *New York Times*, August 4, 2014, <http://www.nytimes.com/interactive/2014/08/05/nyregion/05rikers-report.html>.

¹³ This point is expanded upon in Andrew B. Mamo, “‘The Dignity and Justice That Is Due to Us by Right of Our Birth’: Violence and Rights in the 1971 Attica Riot,” *Harvard Civil Rights – Civil Liberties Law Review* 49 (2014): 531.

¹⁴ Shklar, 37. Michael Walzer emphasizes the importance of this kind of cruelty for Shklar: “She is more focused on social or psychological degradation than on bodily injury, and the opposed state is equality, independence, dignity.” See Michael Walzer, “On Negative Politics,” in *Liberalism Without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar*, ed. Bernard Yack (Chicago: University of Chicago Press, 1996), 17, 20.

¹⁵ See Sharon Dolovich, “Cruelty, Prison Conditions, and the Eighth Amendment,” *New York University Law Review* 84 (2009): 881. See also Jules Lobel, “Prolonged Solitary Confinement and the Constitution,” *University of Pennsylvania Journal of Constitutional Law* 11 (2008): 115, 119–120. Note that the arguments about the constitutionality of solitary confinement typically draw on established categories of unconstitutional punishment and hinge on whether solitary confinement leads to mental illness. Shklar’s point, however, is that moral cruelty can exist even in the absence of traditional markers of injury.

¹⁶ See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (London: Penguin Books, 1977), 235: “The prison should not be seen as an inert institution, shaken at intervals by

the prison system by rendering it, in part, merely a means for removing poor minorities from society. To the extent that the building of prisons has become a way to warehouse poor people of color, the distance between Loesener and our prison reformers may be uncomfortably small.

Current Opportunities: Reform without Illusions

Today we incarcerate a larger proportion of our citizens than almost any other country in the world, with longer sentences than elsewhere, and with the possibility of the death penalty in several states.¹⁷ Incarceration rates are skewed heavily toward men of color from poor backgrounds. Parole remains underutilized, given the political stakes for elected officials of parolee recidivism. The consequences of incarceration can extend well beyond the imposition of a sentence: incarceration takes a significant toll on the families and communities of the incarcerated, reduces their opportunities for employment, and even strips them of fundamental rights, such as the right to vote.¹⁸ An unlikely convergence of interests between the political left (focused on racial inequality and the civil rights of inmates) and the right (focused on the costs of the carceral system and the reach of government power) has recently breathed new life into prison reform.¹⁹ The moral crime of contemporary mass incarceration is sufficiently terrible that we have a broad consensus against the status quo. And yet a gulf separates those who believe in radically rethinking incarceration from those who see actually existing prisons as the perversion of an essentially legitimate institution. The question confronting the cause lawyer is how to achieve the common goal of doing *something* to improve the lives of the men and women in our prisons without dismissing the significance of the differences that lie behind this consensus.

Retreating into ideological purity is not a good answer, even if it can be difficult for a lawyer skeptical of the possibility of justice within prisons to forge alliances with those working on the inside. It is easy (and satisfying) to hold all administrators of prisons responsible for the cruelty within the prison walls. They are the faces of institutions that place one set of men and women with weapons in positions of authority over other men and women with limited legal rights. In a system so structurally inadequate and unequal, it is easy to view the prison administration as complicit in or the prime cause of abuse, while insisting on the larger purity of the fight for the rights of the incarcerated.

But the hard truth is that there are individuals within prison administrations and within departments of corrections who recognize the shortcomings of the existing systems and

reform movements. The ‘theory of the prison’ was its constant set of operational instructions rather than its incidental criticism—one of its conditions of functioning. The prison has always formed part of an active field in which projects, improvements, experiments, theoretical statements, personal evidence, and investigations have proliferated.”

¹⁷ The question of cruelty in carrying out executions has been revived in a series of high-profile failures with lethal injections. See Alan Greenblatt, “Are Opponents of the Death Penalty Contributing to Its Problems?” *National Public Radio*, July 25, 2014, <http://www.npr.org/2014/07/25/335192804>.

¹⁸ See Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2006).

¹⁹ For the liberal view, see Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010). For the conservative view, see the web site of Right on Crime at <http://www.rightoncrime.com/>.

want to make things better; not everyone is a stooge. They are committed to creating meaningful opportunities to provide educational programs, spiritual counselling, vocational training, and medical and mental health care, including addiction treatment.²⁰ It is easy to dismiss these initiatives as empty gestures that deny the fundamental problems with our prisons. Reformers within prison administrations may be viewed as an obstacle because they seem to support superficial changes that legitimate the current system of incarceration. And yet there is something wrong with sacrificing efforts to address the tangible and immediate interests of inmates simply because they do not address the larger issues of the immorality of incarceration.²¹

The same dilemma is inherent to a lawyer's role. A lawyer is required to put the client's interest first, and it is the rare client who will insist upon opposition rather than accepting a settlement. The immediate interest of the individual client (in this case a prisoner) may be against the long-term interest of the group (all prison inmates) as a whole, creating a collective action problem. Cause lawyers may avoid confronting this dilemma either by selecting for specific clients or by not having individual clients at all. But this also weakens these lawyers. A lawyer's strength as a professional derives from being grounded in the life of the client. Advocates can be dismissed as mere agitators if they have no constituency and no experience with actual clients.

We cannot sustain the naïve belief that incremental change leads progressively to utopian ends, but neither can critique paralyze us. To the extent that civil rights advocacy substitutes for a larger scale critique, legalistic impulses can render systemic social change nearly impossible. But to the extent that civil rights advocacy involves an opportunity to reduce the infliction of cruelty, it is deeply valuable. As Shklar points out, sometimes we must subordinate our own moral purity to put cruelty first. The possibility of providing safer facilities, more humane treatment, and opportunities for genuine personal growth is not one to be taken lightly. The costs of insisting on purity must be fully acknowledged.

Civil rights advocacy is essential to reduce the infliction of cruelty, but this cannot come at the expense of maintaining a critical spirit. The prison reformers of the 1960s and 70s made important progress in revitalizing the Eighth Amendment in order to prohibit physical cruelty and the imposition of harmful conditions. Their failure was in not addressing the larger moral cruelty of a dehumanizing system. The truly important steps of reducing physical cruelty drained the energy from more radical critiques that recognized deeper forms of moral cruelty. Blinded by our real successes in reducing physical abuse, we believed that we had civilized and humanized prisons, and, as stated above, we opened the door for a steep rise in incarceration rates and legitimated and

²⁰ See, for example, Patricia Caruso's interview with David Onek: "The Criminal Justice Conversations Podcast with David Onek," conducted March 23, 2011, accessed September 15, 2014, http://www.law.berkeley.edu/files/CrimJusPod_Episode22_%28final%29.pdf.

²¹ Shklar is clear on the costs of maintaining this purity in the pursuit of utopian goals: "The purity of their aims, and the wickedness of actuality, combine to absolve their followers not only from their normal duties, but from looking at any facts that disturb their beliefs," (Shklar, 66).

facilitated their expansion.²² Ruthless critique must inoculate us against such complacency about our laws and institutions.

Advocates must continue fighting against overcrowding, inadequate oversight, prolonged solitary confinement, and sexual violence in prisons. But they must also continue to wrestle with the more difficult questions of what incarceration means in a democracy. Laws are not the solutions — they are the starting points for inquiry. By putting cruelty first, an advocate must seize upon the present opportunity to make genuine improvements while continuing to critique the civil rights discourse for its omissions. The work of advocacy may be more difficult when legal foundations are denied their fundamentality, but it is this commitment in the face of uncertainty and partiality that sustains ethical practice and distinguishes it from dogmatism and complacency.²³

By no means is this a call to vulgar pragmatism at the expense of abandoning principles. Such principles are essential for ethical practice. But they do not substitute for concrete achievements. They cannot derail the hard work of reducing the cruelty that we inflict upon others. Ethical legal practice in prison lawyering requires carefully navigating between the Scylla of legal reform and the Charybdis of critique. Working to change the game does not mean that one is permitted to stop playing the existing game skillfully; neither can mere skill in playing the game blind an advocate from reflecting upon its substance or the context in which it is being played.

Wanting to reduce cruelty is the easy part — even Loesener was motivated by a desire to resist hard-liners and restore stability amidst the chaos of the 1930s. The hard part is to maintain the critical spirit. If we cannot make a habit of robust critique in the face of everyday cruelty, we guarantee that we, like Loesener, will be rendered impotent in the face of monstrous cruelty.²⁴

²² Conversely, a search on Google Books shows that the use of the term “mass incarceration” increased sharply after the mid-1990s, when the Prison Litigation Reform Act made it more difficult to bring cases to court.

²³ See Richard Rorty, *Contingency, Irony, and Solidarity* (New York: Cambridge University Press, 1989), 46–47.

²⁴ As Shklar notes, “humility is not a democratic virtue,” (Shklar, 135).

Should Lawyers Be Judged For Representing Unpopular Clients?

By Andrew Haile

A small group of FASPE Fellows sat in a restaurant in Oświęcim, Poland. We had just wrapped up a lengthy discussion about the Nuremberg Trials and post-war measures taken by the Allies to prosecute Nazi war criminals. Among other issues, we briefly discussed the Israeli government's trial of Adolf Eichmann, a powerful Nazi official, in Jerusalem in 1961. One Fellow wondered out loud about Eichmann's defense attorney, Dr. Robert Servatius: "Who was that guy and how could he have brought himself to defend that monster?" We all agreed the right to counsel was central to a fair justice system, yet we all viewed Servatius with contempt, as if he were no better than the Nazis he represented. Later, upon reflection, I questioned that collective condemnation. How *should* we view lawyers who defend unpopular — even evil — defendants? Should attorneys be judged based on the clients they represent?

Of course, lawyers have represented unpopular clients for as long as there has been an adversarial system. One of the early American examples took place in November 1770, when a young lawyer named John Adams represented eight men accused of murder in Boston, Massachusetts. The accused were British soldiers; representatives of the Crown and symbols of colonial oppression. They were almost universally reviled in Boston, a hotbed of revolutionary activity. Seven months earlier, on March 5, 1770, witnesses claimed to have seen these eight soldiers fire into a crowd of unarmed protestors, killing five individuals. The event became known as the Boston Massacre. Following the shooting, the soldiers tried in vain to find a lawyer to represent them at trial. Finally, they found assistance from a peculiar source: diehard patriot John Adams, who supported American independence and worked with the Sons of Liberty to foment revolution against the Crown.

Knowing the unpopularity of his decision, Adams nonetheless took the case and zealously represented the eight soldiers at trial.¹ Each man faced the death penalty if convicted. After two lengthy trials, jurors returned an overwhelming verdict: six of the accused were found not guilty; two more guilty only of the lesser offense of manslaughter, not murder. All eight avoided the death penalty.

It was a huge victory for the young Adams, but it had come at a major cost to his reputation. Bostonians reacted angrily to the verdict and blamed Adams for his role in defending the soldiers. His law practice lost significant business. Even his wife and children received threats and mistreatment.² Indeed, Adams wrote in his journal in February 1771, shortly after the trial, that he had "never been in more misery my whole life."³

Yet Adams was far from repentant. Indeed, he later said that representing those hated soldiers was "one of the most gallant, generous, manly and disinterested Actions of my

¹ The trial was actually broken into two parts. Captain Thomas Preston, the officer in charge on the day of the shooting, was tried first. Eight weeks later, the remaining seven soldiers were tried together.

² Kent D. Kauffman, *Legal Ethics* (Clinton Park, NY: Delmar, 2014), 182.

³ Kauffman, 182.

whole Life, and one of the best Pieces of Service I ever rendered my Country.”⁴ And, as it turned out, his choice to represent the soldiers had no adverse effect on his political career. Three months later, he was elected to the Massachusetts House of Representatives. Twenty-seven years later, he was elected the second President of the United States. If he was judged for his decision to represent those eight soldiers, that judgment had no negative effect on his political career.

Fast forward nearly two and a half centuries. In February 2014, the U.S. Senate took a vote to confirm President Barack Obama’s nomination for the head of the Civil Rights Division at the U.S. Department of Justice. The nominee, a young attorney named Debo Adebile, was widely considered to have stellar credentials: a graduate of NYU Law School; a former director of litigation at the NAACP Legal Defense Fund; and a former associate at a well-regarded firm, Paul, Weiss, Rifkind, Wharton & Garrison. Adebile had argued a number of high-profile cases before the U.S. Supreme Court and had been on a short list of possible nominees to become a judge on the prestigious D.C. Circuit Court of Appeals. His qualifications, in other words, appeared unassailable.

Yet the confirmation failed. The Senate, in a 47-52 bipartisan vote, blocked his nomination to the civil rights post. Seven Democratic Senators joined every Republican Senator in voting down his confirmation. In justifying their vote, most Senators pointed to Adebile’s work in 2009 on a legal case appealing the 1982 conviction of Mumia Abu-Jamal. Abu-Jamal, a black journalist many considered “radical” for his left-wing political views, had been convicted of murdering a white police officer, Daniel Faulkner, in Philadelphia in 1981. He was tried, convicted and subsequently given the death penalty. Adebile and his organization, the NAACP Legal Defense Fund, assisted Abu-Jamal in overturning his punishment of the death penalty on the grounds that his trial and sentencing had been marred by racial discrimination. Abu-Jamal’s sentence was later commuted to life in prison without the possibility of parole. For his part, Adebile helped write and sign the NAACP’s legal brief, and later argued for Abu-Jamal in the U.S. Supreme Court when prosecutors tried to reinstate his death sentence. He had not represented him at the original 1981 trial and only began providing legal representation to the convicted murderer decades later.

Yet none of this mattered to the U.S. Senate. Both Democratic and Republican Senators voted against his confirmation, citing his past advocacy on behalf of Abu-Jamal as the main reason for their opposition. Pennsylvania Senator Pat Toomey excoriated Adebile for allegedly providing a platform for Abu-Jamal’s political views: “A political campaign had been launched, a campaign to discredit America, a campaign to discredit our justice system...That’s the effort that Debo Adebile became a part of.”⁵ Other Senators pointed to strong pressure from outside groups, including the Fraternal Order of Police, in swaying their decision to vote against Adebile. Indeed, the Fraternal Order of Police

⁴ “John Adams and the Boston Massacre,” ACLU, accessed September 1, 2014, <https://www.aclu.org/national-security/john-adams-and-boston-massacre>.

⁵ Jonathan Tamari, “A look at the campaign that scuttled civil rights nominee,” *Philadelphia Enquirer*, March 10, 2014, http://articles.philly.com/2014-03-10/news/48055066_1_toomey-debo-adebile-democrats; see also Pat Toomey, “Sen. Toomey Opposes DOJ Nominee Debo Adebile, Feb. 12, 2014,” <http://www.toomey.senate.gov/?p=video&id=1268>.

made no secret of its “vehement opposition” to Adegbile’s nomination, and explicitly criticized Adegbile and the NAACP Legal Defense Fund who “*volunteered* their services” to defend Abu-Jamal.⁶ These expressions of public opinion influenced the Senate vote, and Adegbile’s nomination was scuttled.

Not all Senators were happy about the outcome. Taking the floor after the vote, Senate veteran Tom Harkin decried the failed nomination, saying that the vote “marked about the lowest point that I think this Senate has descended to in my 30 years here.”⁷ In Harkin’s view, the Senate unjustly condemned Adegbile for doing nothing more than “fulfilling his legal obligations and his moral duty as a lawyer” and “protecting the defendant’s civil rights and the civil rights of all Americans.”⁸ He pointed out that U.S. Supreme Court Chief Justice John G. Roberts, Jr., in his work for a law firm prior to being appointed to the bench, also represented a convicted murderer on appeal. In that case, the defendant, John Errol Ferguson, had murdered eight people. Why, Harkin asked, did Roberts get a pass, when Adegbile did not?⁹ In closing, he quoted James Silkenat, the president of the American Bar Association, who had written in support of Adegbile:

A fundamental tenet of our justice system and our Constitution is that anyone who faces loss of liberty has a right to legal counsel. Lawyers have an ethical obligation to uphold that principle and provide zealous representation to people who would otherwise stand alone against the power and resources of the government — even to those accused or convicted of terrible crimes.¹⁰

To Harkin, Adegbile was plainly victimized because he chose to represent an unpopular defendant. President Obama, in a statement, agreed: “The Senate’s failure to confirm Debo Adegbile to head the Civil Rights Division at the Department of Justice is a travesty based on wildly unfair character attacks against a good and qualified public

⁶ Chuck Canterbury, National Fraternal Order of Police, Letter to President Barack H. Obama, January 6, 2014, http://www.fop.net/publications/archives/letters/2014_0106.pdf.

⁷ *Congressional Record*, March 5, 2014, 113th Congress, 2nd session, Vol. 160, S1305-1, <https://beta.congress.gov/congressional-record/2014/3/5/senate-section/article/S1305-1>.

⁸ *Congressional Record*, S1305.

⁹ Senator Harkin also claimed that Adegbile was given a hard time because he was black, whereas Roberts was white: “If you are a young White person working for a law firm and have a chance to defend someone who has done something wrong — even a heinous crime — my advice from what happened today is you should feel free to go ahead and do your job as a lawyer. Who knows? You might wind up as the Chief Justice of the U.S. Supreme Court one day. However, if you are a young black person working on civil rights issues at the NAACP legal defense fund and you—under your obligations as an attorney—are called upon to handle an appeal for someone who committed a heinous crime, the message sent today is you’re putting your career on the line,” (*Congressional Record*, S1305).

¹⁰ James R. Silkenat, American Bar Association, Letter to Senators Patrick Leahy and Charles Grassley, January 13, 2014, http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014jan13_adegbile_noms_1.authcheckdam.pdf.

servant.” Obama continued, “As a lawyer, Mr. Adegbile has played by the rules. And now, Washington politics have used the rules against him.”¹¹

But did Adegbile play by the rules? Was he merely doing his duty in representing a convicted cop-killer? After all, he, along with his organization, chose to take Abu-Jamal’s legal case — it was not assigned to him by the court. Should he be above reproach for such actions, or should he be judged — rightly or wrongly — merely for whom he chose to represent?

All lawyers have a duty to provide zealous representation to their clients within the bounds of the law.¹² This means a lawyer has an ethical obligation to use her legal skills to seek the most advantageous result for her client, so long as she does so in a manner consistent with the requirements of “honest dealings” with others.¹³ If both parties in a controversy receive zealous representation from their attorneys, legal tradition holds that justice will be served.

Virtually no one disputes the attorney’s duty to represent her client, regardless of how unpopular the client’s position is. What *is* apparently disputed is an attorney’s decision to represent a client in the first place. After all, John Adams *chose* to represent those soldiers. Debo Adegbile *chose* to represent Mumia Abu-Jamal. John Roberts *chose* to represent John Errol Ferguson. Should these lawyers be held accountable for their professional choices?

For better or worse, lawyers often are judged for their decisions to represent unpopular clients. I argue, however, that the public should judge them favorably for these decisions. Indeed, we should heed the example of John Adams, whose actions remind us that nowhere are our values more at stake than when we seek to punish those with little or no political power. Far from undermining the justice system or endangering American values, lawyers who represent the unpopular *strengthen* our justice system and *guard* our values.

The framers of the Constitution were concerned, among other things, with the “tyranny of the majority.”¹⁴ By this James Madison meant the potential for a democratic majority to impose their views against the will of a minority group whose views were not widely held or respected. In addition, the framers were deeply worried about the potential tyranny of the state: the ability of the government to trample on individuals’ rights and liberties.¹⁵ With these views in mind, the framers fashioned our Constitution and included a powerful Bill of Rights to protect the rights of the accused. Under this Bill of Rights, those charged with a crime have the right to due process of law, the right to

¹¹ “Senate rejects Obama appointment of Debo Adegbile to top civil rights post,” *Washington Post*, March 5, 2014, <http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/05/senate-rejects-obama-appointment-of-debo-adebile-to-top-civil-rights-post/>.

¹² American Bar Association, *Model Rules of Professional Conduct* (Chicago: ABA Publishing, 2013), 1.

¹³ American Bar Association, *Model Rules of Professional Conduct*, 1.

¹⁴ See James Madison, “Federalist No. 10” in *The Federalist Papers* (New York: Signet Classics, 2003), 71-78.

¹⁵ See James Madison, “Federalist No. 10,” 71-78.

counsel, the right to a jury trial, the right not to incriminate themselves, and the right to confront witnesses against them, among other protections.

Nowhere are these rights more in jeopardy than when an unpopular defendant faces trial for a heinous crime. Here, the framers' twin fears collide: the potential tyranny of the majority fuses with the potential tyranny of the state. Popular opinion demands blood for a terrible crime, and the full apparatus of the criminal justice system is brought to bear on a single individual or group. In situations like these, a defendant's Constitutional rights may easily be set aside in the rush to condemn his actions.

Skilled attorneys who agree to represent these unpopular defendants thus provide a crucial service to our country and our freedoms. By standing in the gap and ensuring a defendant's constitutional rights are respected, attorneys guard these rights for countless defendants to come. They also ensure that justice is served in a fair and orderly way; there are no lynch mobs here. Particularly where a defendant faces the death penalty, it is essential that the process be carried out in a way that is scrupulously fair. If not, we risk the possibility of executing someone unjustly — and the people in whose name we punish may have blood on their hands.¹⁶

In sum, lawyers can, and perhaps should, be judged for their decisions to represent unpopular defendants in criminal cases. Voters choosing a political candidate may rightly evaluate that candidate's credentials by examining their legal background and former clientele.¹⁷ Presidential nominees may also warrant scrutiny for their choices to represent certain clients. Yet those judging a lawyer's decisions should remember the role that attorneys play in defending not just an individual against criminal allegations, but also our Constitutional freedoms. Indeed, they should remember the example of John Adams, one of our most prominent Founding Fathers, and his choice to represent those despised British soldiers. In an illustrious legal and political career filled with acts of public service, we cannot ignore that Adams prized his representation of the soldiers as “one of the best Pieces of Service I ever rendered my Country.” We too should not easily forget that “Piece of Service” — and should recognize it when today's attorneys perform similar services, however unpopular.

¹⁶ See Maurice Possley, “The Prosecutor and the Snitch: Did Texas Execute an Innocent Man?” The Marshall Project, August 3, 2014, <http://www.themarshallproject.org/2014/08/03/did-texas-execute-an-innocent-man-willingham>. The Marshall Project, a non-profit journalism organization covering the U.S. criminal justice system, recently published a lengthy exposé on the execution of a Texas man named Cameron Todd Willingham, who was almost certainly innocent. It may be the first case to conclusively prove that an innocent defendant was executed.

¹⁷ See “Why being a public defender is increasingly bad for your political future,” *Washington Post*, June 17, 2014, <http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/17/why-being-a-public-defender-is-increasingly-bad-for-your-political-future/>. Hillary Clinton recently came under fire for representing a defendant in a rape case in 1977 in her prior capacity as a public defender. Despite the fact that she was appointed by the court to represent the alleged rapist, she was criticized for questioning the alleged victim's credibility. This incident has led to questions about whether simply *being* a former public defender is harmful—or fatal—to one's political career. The current composition of Congress appears to support this: of the 200 Congressman with a history of practicing law, 32 are former prosecutors, while only five Congressmen since 2000 acknowledge a history as public defenders (and one of those Congressmen was also a former prosecutor).

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

2014
JOURNAL

SEMINARY
PAPERS

INTRODUCTION TO A SAMPLE OF THE 2014 FASPE SEMINARY PAPERS

In 2014, the FASPE Seminary faculty — Nancy Wiener, Kevin Spicer, and I — worked together as a team for the second time. We brought backgrounds in three religious traditions — Judaism, Catholicism, and Protestantism — to a lively, intellectually-curious, and caring group of Fellows.

The twelve 2014 FASPE Seminary Fellows are an impressive group, chosen from an international pool of 265 applicants, who included representation from multiple faiths including Judaism, Islam, and several branches of Christianity. During the trip our appreciation for each other and for each other's faith traditions grew. We also came to understand our own traditions better through the interfaith dialogue that FASPE fosters.

The academic requirements of this study trip are formidable. Participants were asked to read three books and more than 200 pages of relevant primary and secondary sources. This year, for the first time, each participant was also asked to present the life and work of a representative figure from her or his own religious tradition and to interpret a sacred text from the Tanakh, the Christian New Testament, or the Quran.

Each of us holds special memories from our June 2014 trip. At a distance of five months the following moments stand out as I think back to our time together:

- Re-living the Wannsee Conference, first in New York, then at the villa in Berlin
- Standing at Track 17, the starting point of a fateful journey to the East for thousands of Berlin's Jews
- Walking among the gray pillars at the Memorial for the Murdered Jews of Europe, then experiencing the profound stillness of the Memorial's underground education center
- Attending a Shabbat service at the Galicia Museum in Kraków, then joining Jewish residents of Kraków for a festive meal at the Jewish Community Center
- Grieving, as we visited the grim brick buildings of Auschwitz I and the vast expanse of Auschwitz-Birkenau
- Admiring the courage of Ephraim Oshry, Elisabeth Schmitz, and Bernhard Lichtenberg

The papers on the following pages represent a small sample of the work produced by the 2014 Seminary Fellows after the conclusion of our trip. As faculty members, we are pleased to share their reflections with a larger audience. The members of the 2014 Seminary group are now scattered. Some are continuing their studies, while others have begun work in their chosen professions. Nancy, Kevin, and I are deeply grateful for our time with them and look forward to sustaining the dialogue started this past summer during the years ahead.

LEROY WALTERS
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Shiphrah and Puah: Birthing an Ethic of Resistance
A Sermon Written for Revised Common Lectionary Year A,
Proper 16 (Exodus 1:8-2:10)

By Sarah C. Stewart

Our passage from Exodus is awash with women: from vigorous mothers on their birth stools to big sisters of baby boys who bother Pharaoh so, to trustworthy midwives whose eyes witness all. These women and their bodies have become Pharaoh's problem. And it's a big problem.

It is ironic, how the Hebrews threaten those anxious Egyptians. Long forgotten is mighty Joseph, whose visionary powers of administration saved countless people from a crushing seven-year famine. Now these Israelites outnumber Pharaoh's own and he worries over when they might turn against Egypt. A conniving and shrewd ruler, Pharaoh invents creative ways for his Egyptian taskmasters to oppress these Hebrew slaves.

But the brazen Hebrew women keep making things difficult. Their bodies oppose him at every turn. Always present. Always procreating. These stubborn ladies *will* have babies. Such unstoppable, female bodies. Flummoxed, Pharaoh sidles up to Shiphrah and Puah, two Hebrew midwives, whose importance is underscored in the narrative's introduction by trade and proper name. We don't know if these women run a school for Hebrew doulas, whether they serve as consultants to support the most complicated pregnancies, or if they are bi-vocational women, laying down spade or hoe, amidst planting, to whisk themselves off into the world of midwifery — a labor of love serving their community's most vulnerable.

Whatever the case, God's call comes to them in the midst of their day-to-day lives. As they face Pharaoh's horrifying command, "If it is a boy, kill him. If it is a girl, let her live," God invites them to employ their natural gifts to subvert their Egyptian oppressors.¹ God challenges them to take a stand in the face of Pharaoh's harrowing decree.

To us, their dilemma may seem uncomplicated. The sanctity of life is crystal clear. Survival is a necessary act of resistance. Yet, I suspect a thousand concerns cross the minds of these midwives in this moment. A mother's subconscious dread, knowing she might still lose her child to the wicked whim of implacable Pharaoh, hell-bent on political domination and murder. The pain of enslaved Hebrews: whipped bodies and broken spirits, relentlessly tortured, aching for personal freedom, dying slowly, dehumanized, stripped of hope. Maybe Shiphrah or Puah wonder whether it is more merciful to dispatch the newborn before he is touched by such trauma. A complicated beneficence.

¹ Exodus 1:16.

Undoubtedly, these women also face their own fears. Pharaoh's death-wish for these babies beckons the midwives into positions of privilege and power. If Shiphrah and Puah obey Pharaoh's dictate, they secure their own safety. If not, they place themselves in harm's way. (Who dares defy such a ruler?) In the spaces and silences of the text, we are given room to wonder about the ethical dilemma these women confront. The pregnant pause before they choose a course of action keeps us hanging and buys them time to move on behalf of their people, blocking Pharaoh's reach. These two women use their arms to form a midwife barricade to prevent harm against some of the innocent. And that crucial window is the moment of opportunity God uses to raise up a deliverer, the baby Moses.

The midwives' defiance mirrors what Hebrew women, continuing to bear children, physically expressed from the start. These unstoppable female bodies fear God alone. They do not cave to human pressure; do not seek to save their skin; do not flinch when standing together against evil. And perhaps this is our invitation into the story. God calls each of us to use our gifts of training, vocation, and social location. God invites us to dive into that dangerous moment and dance with the divine. Maybe you are an attorney working in Washington, battling discrimination against undocumented workers in this country. Perhaps you are a high school principal advocating for the poorest students in our nation, within an educational system stressed by limited resources and polarizing politics. Maybe you are a brother, sister, cousin, friend, pulling resources together to help serve the down-trodden, coming out of prison, penalized by societal bias against people of color.

Like Shiphrah and Puah, you know firsthand how serving God faithfully challenges us to assume risk. To be vulnerable. To let our skin be in the game. On the hook, alongside the other. True, these midwives were blessed by God. The text tells us that God blessed them by giving them their own families and children. But this only means they feel the threat of Pharaoh's decree more deeply. When God summons you to use your gifts on behalf of the voiceless and the vulnerable, you can be certain it *will* be a blessing. And it will carry a personal price, too. The lives of midwives and the bodies of their sons are at stake in the wake of Pharaoh's demands and the midwives' brave defiance. But this radical faith unites them in the travail of childbirth. Groaning and laboring for the ultimate freedom of their people. Moses is aided and protected by these midwife warriors who give, even knowing that they may not see the fruition of their labors. Their faith paves a hopeful way for things unseen,² when terrifying obstacles obscure the path.

So by now you might be wondering ... what is today's good news? And that is an important question. The answer: You will never be alone. Just as God acts as a partner to Shiphrah and Puah, standing with their sisters against the slaughter of these children, God will supply the support you need. Much like Moses' mother, Jochebed the Levite, whose son is spared because these midwives dare defy the command of a despot, some will be empowered to fulfill their destiny because of your affirmative answer to God's call.

² Hebrews 11:1.

Shiphrah and Puah are foremothers to Jochebed, who launches Moses on his journey. Shiphrah and Puah make a way for Moses' sister Miriam to oversee her brother's Nile River odyssey. Unstoppable Shiphrah and Puah inspire even Pharaoh's own daughter to oppose her father's frenzied killing-spree. Pharaoh's daughter knows what she is doing; she names Moses a "Hebrew" at first sight. She makes it her business to protect this male child even though every Egyptian knows about her father's command. These women mobilize because of courageous Shiphrah and Puah, risking their lives to do the right thing in the face of genocide. This stunning supporting cast is supplied by God, the author of this subterfuge. And it's quite possible that none of them, with the exception of Miriam, ever lived to learn the outcome or to see Moses' triumphant trajectory. The text fails to tell us how it turned out for Shiphrah and Puah. For all we know, they died before the Hebrews tasted freedom. Maybe they lost their own children. It is likely Pharaoh sternly punished their defiance. Perhaps they even wondered if their actions really mattered in light of Egypt's ongoing program of oppression.

Much like these brave Hebrew midwives, we may risk standing against oppression in our world and never know the impact of our efforts. We may wonder whether we are one or few. We may question whether our labors, throwing back a single starfish at a time, when the shoreline is covered with dying creatures, will accomplish any good. Undoubtedly, the women of the Holocaust felt as perplexed as Shiphrah and Puah, straining to survive and support each other while suffering torture, abuse, and neglect. Many were ultimately murdered in the death camps of Nazi-occupied Europe.

One such Austrian-born Jew, Gertrude Groag, was a woman who showed remarkable courage in the face of the Holocaust's unspeakable atrocities. Gertrude, or Trude, as she was called, had a passion for teaching and volunteerism.³ She recounts her own story in an interview featured in the collection entitled *Mothers, Sisters, Resisters*. Trude explains that her work with the Red Cross and the Women's Zionist Organization inspired her to pursue nursing training after the Nuremberg Laws cut off Jews in her community from receiving medical care.⁴ Upon completing her four-week nursing program, Trude worked at a home for the elderly. Day and night, Trude commuted on foot, whenever neighboring communities needed her nursing skills, from midwifery, to night nursing, to post-operative care.⁵ Trude's prior experience as a kindergarten teacher heightened her sensitivity to the needs of the Jewish children in her village, especially when they were barred from attending school and prohibited from playing in public spaces.⁶ She arranged children's activities in a local garden and secured permission for more than 200 school children to play on the grounds.⁷

³ "Gertrude Groag," in *Mothers, Sisters, Resisters: Oral Histories of Women Who Survived the Holocaust*, ed. Brana Gurewitsch (Tuscaloosa: University of Alabama Press, 1998), 242-56.

⁴ "Gertrude Groag," 243.

⁵ "Gertrude Groag," 243.

⁶ "Gertrude Groag," 243, 351.

⁷ "Gertrude Groag," 243.

Trude first learned of the Nazi ghettos and death camps from friends who had fled to safety. By 1939, Trude decided to send two of her sons to Israel, but she was forced to remain in Nazi-occupied territory and was eventually deported to Theresienstadt in 1942.⁸ On the transport to Theresienstadt, Trude learned what it meant to practice her healing arts in a difficult setting. She explained, “I worked with the sick, who were lying on the floor of the transport train ... many patients were covered with dirt and terrible rashes. Most of them were not able to control their bodily functions.”⁹ Upon arriving at the camp, Trude stayed with the mentally ill, to ensure they received proper care. She remained with them until they were assigned their own nurses, because she feared for their safety.¹⁰

Trude’s ministrations within the camp’s makeshift hospital stretched her physically, mentally, and emotionally. She even suffered a bout of cholera, from which she was lucky to survive.¹¹ But the most stunning part of Trude’s story is how she describes, in her own words, what she calls “*mein kampf*, my own struggle;” the ongoing efforts “to counter the intentions of the Nazis ... with every ounce of my strength, [in order] to save the lives of Hitler’s potential victims.”¹² Trude proved a fierce angel of mercy. Her relentless determination empowered her to serve as advocate for the elderly, the sick, and the children of Theresienstadt.

Even as the Nazi camp leaders leaned on prisoners for additional forced labor and sanitation conditions deteriorated, Trude waged her own resistance movement. When she wasn’t knitting or peeling potatoes, Trude wrote poetry and encouraged other artists to employ their gifts.¹³ She taught drawing and handicrafts to children.¹⁴ Her work helped forge a community amid a “surrealistic world on the edge of life and death ... [that] stubbornly clung to [its] cultural values — books, art, music, intellectual debate, humor and irony.”¹⁵ Trude exercised her personal skill to subvert the heinous Nazi agenda, even under the most dehumanizing circumstances. Trude survived, as did her husband, and in 1949, they immigrated to Israel where her dedication persisted.¹⁶ There, Trude applied herself to improving the plight of immigrant women in Israel. She volunteered in temporary housing camps and worked to establish a sewing workshop to train immigrant women in a profession whereby they could sustain themselves in their new lives.¹⁷

⁸ “Gertrude Groag,” 244.

⁹ “Gertrude Groag,” 245.

¹⁰ “Gertrude Groag,” 245.

¹¹ “Gertrude Groag,” 247.

¹² “Gertrude Groag,” 247.

¹³ “Gertrude Groag,” 252-3.

¹⁴ “Gertrude Groag,” 253.

¹⁵ Elena Makarova, Sergei Makarova, and Victor Kuperman, eds., *University Over the Abyss: The Story Behind 520 Lecturers and 2,430 Lectures in KZ Theresienstadt, 1942-1944* (Jerusalem: Verba Publishers, Ltd., 2004), <http://www.makarovainit.com/first.htm>.

¹⁶ “Gertrude Groag,” 253.

¹⁷ “Gertrude Groag,” 255.

Like Shiphrah and Puah, Trude Groag challenges us to respond to God’s call in our daily lives, using our natural gifts, skills, and experiences to serve others. For all the women still oppressed around the world — the ones threatened with female circumcision, despite protests of the worldwide community; the ones denied access to proper medical care during pregnancy, in countries where a mother’s life is worth less than the one within her; or the one bullied into believing sexual assault is her own fault, when an institution downplays the violence sustained at the hand of a peer perpetrator — we MUST dare to be empathetic mothers, sisters, and resisters.¹⁸ We must risk standing in vulnerable places together. God will supply human and supernatural resources necessary to sustain us. This is not only gutsy work; it is our ethical mandate. Whom will you fear? Whom will you trust? However you wield your power to choose, I pray you discover the courage to embrace the “must” of God’s call with your heartiest “Yes!” For the fate of somebody in this world very well may depend on you.

¹⁸ For a discussion of female circumcision, see “Female Genital Mutilation,” World Health Organization, Fact Sheet No. 241, <http://www.who.int/mediacentre/factsheets/fs241/en>. For a discussion of reproductive rights, see “Whose Right to Life?” Center for Reproductive Rights, http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/RTL_3%2014%2012.pdf. For a discussion of sexual assault, see Laina Y. Bay-Cheng and Rebecca K. Eliseo-Arras, “The Making of Unwanted Sex: Gendered and Neoliberal Norms in College Women’s Unwanted Sexual Experiences,” *Journal of Sex Research* 45, (2008): 386 -97, <http://www.ncbi.nlm.nih.gov/pubmed/18937130>; as well as Rachael O’Byrne, Susan Hansen, and Mark Rapley, “‘If A Girl Doesn’t Say ‘No’ ...’: Young Men, Rape and Claims of ‘Insufficient Knowledge,’” *Journal of Community & Applied Social Psychology* 18 (2008): 168-93, <http://onlinelibrary.wiley.com/doi/10.1002/casp.922/abstract>.

The Inhumanity of Humanity

By Izak Santana

“It happened, therefore it can happen again: this is the core of what we have to say.” – Primo Levi

On a pleasant July morning in Cambridge, I sat waiting for a colleague at a table outside of a restaurant. Still a bit jetlagged from my trip to Europe, I reflected on how what was about to happen would be very difficult. Over the two weeks prior, I had participated in FASPE, one of the most beautiful and terrifying experiences of my life. I had been completely submerged in the study trip, and I felt I was just beginning to come up for air. I hadn't yet spoken to anyone outside of my immediate family about the trip. Contrary to my expectations, the reality of the Holocaust had only sunk in completely once I'd returned home. As I sat at the table, I wondered if it was a mistake to meet up with a friend so soon to “debrief” the fellowship, but I also felt it necessary. Sharing what we experienced was, after all, at the very heart of why FASPE is offered as a fellowship.

When my friend arrived, we started talking about the trip in the way that anybody would discuss a vacation to Europe. “How was the flight?” “Did you learn any German before you went?” “Did you get to try *pierogi*?” Eventually, though, we got to the heavy stuff, and she asked to look through my photos. Between the startling gravestone gray steles of the Memorial to the Murdered Jews of Europe and the barbed wire fences enclosing the camps, I could see that she was becoming upset. Finally, we came to the images of rooms filled with shoes, combs, toothbrushes, briefcases, and human hair. As I explained these pictures to her, she recoiled into her chair and tears flowed down her cheeks. After a minute of silence, she pushed away the album. “I just can't believe it. It's like something out of a horror film. It's inhuman. It's simply not human.”

Something inside of me broke and, to my own shock, I was suddenly enraged. In an attempt to hide my fury, I responded calmly after a few seconds. “Inhuman? Don't you mean inhumane?” I said, emphasizing the last syllable.

“No!” she snapped back at me. “I very much mean inhuman. *Not a human*. Those who did these things cannot be seen as humans like you and me. A true human wouldn't, *couldn't*, do that.” She paused for a sip of tea, and went on. “I truly believe in loving all people, and I know many would judge me for saying something like this, but we have to draw the line somewhere. It's not possible to empathize with *them* because whoever, whatever, did these things is *not human*.”

Having just spent a fortnight immersed in the world of Nazi occupied Europe, this rhetoric actually sounded all too familiar and sent a frosty chill down my spine. The idea that the Jews were “inhuman” was, of course, the cornerstone by which Nazi anti-Jewish ideologies and actions were held together. I was sure, despite her less-than-convincing apologetic tone, that in actuality she was silently or perhaps unconsciously proud of her pronouncement, of this “line drawn” between her and the devils of Auschwitz. During our time talking about FASPE and the atrocities of the Holocaust, she had encountered something blindingly dark and profoundly unsettling. In response, she, like many of us,

felt the need to “draw a line,” demarcating what is “human” and what is not. The crucial assumption of drawing this line is that “we” stand within the luminous territory of humanity, while those on the other side (like Hitler and his Nazi henchman) are some sort of inhuman monsters.

“I disagree,” I firmly said, trying to remain polite. “I actually think calling them ‘inhuman,’ instead of ‘inhumane,’ does far more harm than good.”

She erupted. “Are you kidding me? How the hell can you pretend these Nazi scumbags are *human*? They rounded up families and shipped them away in actual cattle cars. They murdered countless children. Innocent *children*! They are the very definition of inhuman!” She realized she had caught the attention of our fellow diners, so she lowered her voice and coolly continued. “What in the world do you mean by ‘does more harm than good’? Allowing these murderers to be called ‘human’ is the worst insult possible to those they dehumanized. The very least we can do is to reverse their work and insist that it was *they*, the perpetrators, who weren’t human. That’s really the only way we can honor their lives and avenge their tragedies.”

I sat in silence thinking about what she had said. Much of it resonated with me, and I knew that in a major way I, too, had yearned for the victims’ deaths to be avenged. After reading about the Nazis who settled all over the world once the regime fell, living out their days in Argentina or Canada, or evading justice in our own country to this day, I was left with a bitter taste in my mouth. In fact, this desire for vengeance was with me heavily when we first visited Auschwitz I, where I felt a long awaited sense of satisfaction when I finally saw the gallows by which Rudolf Höss, the commandant over Auschwitz, met his end.

Yet, this conversation with my friend also triggered a memory of the most powerful experience I had during FASPE – one that occurred immediately following my feelings of gratification over Höss’s death – when I was overwhelmed by my sense of confusion and remorse. As I stood in front of Höss’ death site, on my left stood a gas chamber, an instrument of death for so many innocents; on my right were the gallows, an instrument of death for a guilty man. On the left, I scorned death; on the right, I admired its work. I was struck with the paradox: Standing between these loci of death, I welcomed at the gallows what I loathed in the chambers. I immediately rebuked myself, wondering when death and I had become such good pals. I realized that the difference in how I viewed murder lay in my judgment concerning who, exactly, deserved death. For the first time, however, I felt a contradiction between how I felt viscerally, and with whom I identified. Hating and murdering the villain was justified simply because I was only identifying with the victims. But what difference was there between me and Höss? He too had stood at that spot and smiled as death ripped from the world those he deemed inhuman. Why, given my eagerness to celebrate his death, did I align myself only with the victim and not the perpetrator? Why was he inhuman and I human? The starkly painted borders between Höss’ humanity and mine became less perceptible. Until that moment, at the foot of the gallows, it had not occurred to me that exclusively empathizing with the victims at Auschwitz is a moral crime. In our tears of mourning, we often savor the sweet nectars of naiveté and heedlessly desecrate the memory of Holocaust victims by

blindly assuming that the evil that delivered them to death only threatens us as prey and not as predator. After reckoning with the potential for darkness that lurks within my own being, I saw myself as all too much like Rudolf Höss. In the end, I faced the fact that few, if any, of us are solely victim or perpetrator, and that it is as foolish as it is easy to believe that we are. This awareness is why I did and still do vehemently disagree with my friend on this issue of “inhumanness.” Though it may be kept in check today, tomorrow, or even forever, the human potential for violence and evil lies in every one of us. Despite the fact that this darker more malevolent side of us is unquestionably frightening and shameful, of one thing we should be perfectly assured: being inhumane is most certainly human.

As FASPE Seminary Fellows, my group was primarily concerned with themes of a religious nature. Fully aware that such a category can (and did) mean many different things to the religiously, culturally, and economically diverse group that we were, my personal recollection is that our conversations often revolved around issues of morality, ethics, justice, plurality, and meaning. Our group also explored and studied much of the history of the Holocaust, but no singular historical fact or event dominates my recollections. My memories of our experience with FASPE are both distinct and a blur, uncomplicated and overwhelming, enlightening and confusing. Yet, there is definitely a specific “something” I was left with, which I’ve tried to relay in the account above, and which I believe is a historical reality and, more importantly, a contemporary threat. As a religious leader in our world, I am kept up at night by the readiness of humans to dehumanize others to the point where murder is seen as acceptable. While undoubtedly a prominent characteristic of Nazi-occupied Europe, what both frightens and summons me is that this phenomenon is by no means *unique* to the Holocaust.

I was once told that, sometimes “heresy is heresy exactly because it holds a profound and disturbing truth that threatens the status quo.” As much as I fought it during and after my FASPE trip, I have come to believe that the Holocaust should not be seen as unique. Of course, nowhere in recorded history have so many people been systematically demonized and murdered in so short a period of time. And yes, the Holocaust is the defining reality of what many in the Western world see as a “world tragedy.” We use its existence to tell our children how both individuals and entire societies can go wrong, and it is the proverbial example around which questions of evil and suffering often revolve. I, along with many, still see the Holocaust as “the worst thing that ever happened.” So, in many ways the Holocaust is unique. Yet, separating the Holocaust from the rest of history precludes us from seeing the relevance of its lessons today.

Since the Holocaust has come into general cultural awareness, we have mythologized it and its perpetrators to such an extent that we have cast them and their actions as unnatural. As it turns out, humans throughout history have a rather condemning record of being motivated by ideas of “betterness” over others, and we frequently turn to theoretical or even mythic qualitative differences between “us” and “them” to justify this need to feel primacy. This need, and the propensity to throw others under the bus in order to feed it, is closer to us than we may like to admit. It is often not enough for us to make a judgment about other people’s lives or actions; we must also align or distance

ourselves from them. This incredibly common moral phenomenon, I fear, comes with paralyzing moral consequences.

Aside from feeding our ego, I think drawing lines between “us” and “them” disables our ability to reflect on the “self” that is intrinsically involved in morality and ethics. To call other people “inhuman” and reflexively punish them with a death sentence displays an utter ignorance of the fact that being capable of the worst is just as deeply human as being capable of the best. Further, our inability to see our own potential wickedness is the very reason why many become so unrestrainedly malevolent. Gratuitous evil is enabled and encouraged by a faith that one’s own actions are inherently good or “human,” exactly because this belief destroys a person’s power to recognize the self’s tendency toward evil and the “inhuman.” The worst of us will always be those who believe that we are incapable of the worst. We who choose to see others as inhuman will shed the most human blood. As a religious leader and as a person, I see it as absolutely imperative that we as a society face this human truth and begin cultivating a more discerning and ethically responsible perception and understanding of the self.

Good and evil, wonderful and horrific, and life and death are human — all too beautifully and damningly human — and any hope of a good and ethical life rests completely on this self-awareness. We are all deeply capable of the best *and* the worst, the humane and the inhumane, and we blind ourselves or deny this reality to our universal peril. Yet, in this lesson we can still rejoice. Another integral, if not *the* integral, part of being human is our magnificent ability to reflect upon and subsequently *change* ourselves. Understanding that evil is not something “out there” but “in here” could be the very definition of frightening. But seeing and accepting our most crippling fears often becomes the beginning of their long awaited end.

On Being Made Stupid: Developing a Religious Ethic of Anti-Propaganda

By Jordan Loewen

Stupidity is a more dangerous foe of the good than evil is...The fact that a stupid person is often stubborn should not deceive anyone into thinking he is independent...He is under a spell, he is blinded, he is misused, mis-handled in his own being. Thus, having become a will-less instrument the stupid person becomes capable of all evil, and at the same time incapable of recognizing it as evil.¹ (Dietrich Bonhoeffer, 1943)

Near the end of 1945, just a few weeks before his execution, Dietrich Bonhoeffer laid his thoughts to illegal scraps of paper in what eventually became part of a posthumous collection of writings titled *Letters and Papers from Prison*. The prologue to this collection, an essay written in 1943, offered Bonhoeffer's critical reflections on the previous ten years, encompassing the Nazis' rise to power. In it, Bonhoeffer reflects upon the German people, and Christians specifically, whose various approaches to combating evil failed to prevent the devastation wrought before and during the war. Throughout those ten years he had witnessed little or no Christian resistance (apart from the confessing church movement) and in some cases eager collaboration or silence.² In a particularly compelling section of his essay he wrote a short diatribe entitled "On Stupidity," about what he believed to be the culprit for such evil, which was primarily "not an intellectual defect but a human one."³ Bonhoeffer believed that many people had been "made stupid" by the smothering social atmosphere and pageantry of the Nazis. This stupidity was dangerous because it could affect people regardless of their knowledge, education, and wit. In fact, Bonhoeffer argued that it was in the very nature of this type of stupidity for humans to use their knowledge, education, and wit, traits we so often idealize, to inflict pain and chaos. Bonhoeffer believed that the stupid person was "under a spell, blinded, misused, and abused in his very being...capable of any evil and at the same time incapable of seeing that it is evil."⁴ And this ethical blindness, this stupidity, is still alive and well today. But I argue that religious leaders, though failing during the Holocaust, continue to have a unique role and responsibility in cultivating spaces of liberation from the cognitive oppression of stupefying propaganda.

I

In 1973, almost three decades after Bonhoeffer's execution at the hands of the Nazis, two cognitive scientists, Daniel Kahneman and Amos Tversky, published their Noble-prize-winning research on the heuristics and biases that affect cognitive judgments and our ability to make well-informed decisions. Kahneman and Tversky found that, contrary to

¹ Dietrich Bonhoeffer, *Letters and Papers from Prison* ed. Eberhard Bethge, Updated Edition (New York: Simon and Schuster, 2011), 43, Nook Book.

² Many of the Christian clergy, theologians, and educators of this era either fled Germany or encouraged their congregants to support the anti-communist stalwart that was the Nazi regime.

³ Bonhoeffer, 43.

⁴ Bonhoeffer, 43. For images of American World War II propaganda see <http://www.iheartchaos.com/post/2614589831/twenty-things-good-old-fashioned-wwii-propaganda>, accessed August 19, 2014.

what one might expect, our brains have evolved to be extremely quick in terms of processing large amounts of information rather than accurately assessing the veracity of information. What this means is that our minds are much quicker to believe something or make a judgment about the world, than to evaluate whether those beliefs and judgments match up with reality. This came about, Kahneman and Tversky argued, because our minds consist not of one unit that provides us with an accurate and immediate image of the world, but actually two unique but functionally intertwined systems that work together in order for us to make judgments and decisions, consciously and unconsciously, as quickly as possible. The researchers' findings indicated that the first of these systems rapidly assesses a situation and makes a decision, but is very "gullible and biased to believe" things, while the second system is slower and more careful, and "is in charge of doubting and unbelieving." The problem is that when the second system is distracted or "otherwise engaged, we will believe almost anything." In fact, this second system is so often "busy and lazy," that evidence suggests "people are more likely to be influenced by empty persuasive messages, such as commercials" and less likely to be skeptical of thoughts and ideas we would normally be skeptical of if we were in a better state of mind.⁵

Ultimately, what Kahneman and Tversky showed was that although our minds (our thoughts, beliefs, desires, etc.) are key to our survival and ability to function in the world, they are far from perfect and are more likely to trick us and mislead us into thinking and believing things that may seem to be to our immediate benefit, but that in actuality might be to our detriment or simply untrue. And it is exactly at these cognitive weak points that we are most vulnerable to propaganda that seeks to make us stupid. For example, Kahneman and Tversky found that individuals are more likely to feel confident that their judgments are absolutely true and accurate if they have only been offered one-sided arguments; that a person's inherent and often arbitrary likes and dislikes impact the types of arguments they find compelling while increasing the amount of concessions they are willing to make for beliefs and information that might actually be suspect.⁶ They also discovered that our minds value coherency over truth, which means that people are often more willing to believe something that makes sense to them, or that they can fit into a story, rather than something that is inherently accurate, reliable, and factual. Furthermore, our minds have an incentive to limit the amount of information we accept as true, because "knowing [less] makes it easier to fit everything [we do] know into a coherent pattern," as coherency is far more comfortable than truth.⁷ Being stupid means that we are passionately caught up in confirming our own biases rather than in seeking what is actually true. It means stubbornly shutting ourselves off to ideas and arguments different from our own, being unwilling to see beyond our first impressions and initial assumptions, and feeling self-satisfied and even malicious towards those who disagree with us.⁸

⁵ Daniel Kahneman, *Thinking, Fast and Slow*, Reprint Edition (New York: Farrar, Straus and Giroux, 2013), 81.

⁶ Kahneman, 87, 103.

⁷ Kahneman, 87.

⁸ See Robert Kennedy, *Of Knowledge and Power: The Complexities of National Intelligence* (Praeger Security International, 2008), 90, Kindle edition; also Bonhoeffer, *Letters and Papers*, 43; and Robert Ellis, "Cognitive Biases," Middle Way Society, accessed August 22, 2014,

Nevertheless, in knowing these things, we must be careful not to assume that we should toss all our thoughts and ideas out the window and dissolve into cognitive anarchy or intellectual relativism. Our thoughts and beliefs have been accurate enough to allow our species to survive as long as it has. Significantly, what Kahneman and Tversky's experiments seem to show is that training our minds to be better at connecting our beliefs and reality is not impossible, but takes more time, practice, and discipline than we might initially assume. Moreover, the more habitualized a bias, the harder it is to overcome. The deeper a person is in stupidity, the more blinded he or she is to the negativity that bias is causing. Perhaps this is why Bonhoeffer believed that "only an act of liberation, not instruction, can overcome stupidity."⁹ Stupidity is not all powerful. This, in my view, is why it is imperative for theologians and those serving in the clergy everywhere not only to encourage congregants to live a responsible life before God, where they practice self-sacrifice and devote themselves to radically serving and loving one's neighbor, but also to stand stalwart against the lures of propaganda and provide space for a liberation from stupidity.

II

Cognitive scientist and scholar of religion Justin Barrett has devoted his research to applying the insights of neuroscience to the work of clergy. As Director of the Thrive Center for Human Development, he writes that "cognitive science is rapidly gaining prominence in shaping how people think about themselves and the world, and the theologian who ignores it voluntarily surrenders a useful tool for [his/her] scholarly or pastoral vocation..."¹⁰ But what Barrett describes as a useful tool, I argue is part of our ethical imperative against stupidity and propaganda. If pastors, theologians, and religious leaders remain ignorant of the inherent power of their positions, the power to consciously and unconsciously use propaganda to make those who listen to them stupid, they have the potential to contribute further to the terrible injustices of the world. As religious leaders, we must train ourselves to recognize our cognitive limitations while minimizing their negative effects on our thinking and judgments in order to make good decisions.¹¹ This is important because, as Barrett points out:

Religious leaders often have to make decisions about the focus, organization, and officially orchestrated actions of their communities. Leaders have to decide what places of worship will look like, how rituals

<http://www.middlewaysociety.org/middle-way-philosophy/metaphysics-and-integration/cognitive-biases>.

⁹ Bonhoeffer, 44.

¹⁰ Justin L. Barrett, *Cognitive Science, Religion, and Theology: From Human Minds to Divine Minds* (West Conshohocken, PA: Templeton Press, 2011), 126.

¹¹ See also John Loftus, "Debunking Christianity—Atheism and More! The Role of Persuasion and Cognitive Bias in Your Church," accessed August 15, 2014, <http://debunkingchristianity.blogspot.com/2007/09/role-of-persuasion-and-cognitive-bias.html>; Alan Noble, "Citizenship Confusion: You Have No Idea How Biased You Are, But I Do. You're Welcome," *Christ and Pop Culture*, accessed August 22, 2014, <http://www.patheos.com/blogs/christandpopculture/2012/06/citizenship-confusion-you-have-no-idea-how-biased-you-are-but-i-do-youre-welcome>.

will be conducted, and what teachings need center stage. ... Often these decisions require some appreciation of the psychology of the people involved. If we hang that painting, how will it make people feel? If the worship service has this element, how will it change what people think about?¹²

Our sermons, studies, practices, and services all shape the way we and those who follow us think and believe. Making better-informed decisions does not necessarily mean we will make the best decision every time, but it limits the potentially devastating consequences of unchecked bias. It also indicates a devotion to striving for the good of our neighbor, as opposed to the simple and often selfish desire to feel certain of something, regardless of opposing evidence. Understanding how people are affected, not to manipulate them, but to consciously try to avoid manipulating them, as well as to do our best to provide for their stated and unstated needs, might actually be the type of noble enterprise to earn back the respectability and relevancy that Christianity, and religion in general, has lost in recent years. This is no easy task, and my worry echoes Upton Sinclair, who stated “It is difficult to get a man to understand something, when his salary depends on his not understanding it.”¹³ In undermining our own power and influence, we religious leaders may undermine our livelihood. But we will be following the ethical path. Many parishioners and students have spent years and lifetimes being made stupid by the conscious and unconscious propaganda from the leaders they have followed. Their faith may be more dependent on opting for coherence and ease, and by viewing the world through their likes and dislikes, rather than seeing the often messy reality. This may cause them to resist such an informed approach with devastating passion. Yet, as religious leaders, we need to spend more time training congregants and followers to cut through rhetorical jargon, including our own. We can begin by raising awareness of the ways their brains — their very thoughts — function, so that they can better resist being manipulated by those wielding the persuasive tools of propaganda, secular and religious alike. This could mean effectually weakening our positions as religious leaders because the tools and the rhetorical strategies we use most would be under scrutiny. It would mean encouraging our congregants and students to recognize when our arguments and speeches are (hopefully unconsciously) trying to make them stupid to the degree that they are, in Bonhoeffer’s words, “deprived of their inner independence.”¹⁴ The heart of this challenge is to train ourselves and others to be cognizant of when the information we are providing becomes insidiously propagandistic, because, as neuroscience has demonstrated, propaganda takes advantage of the very weaknesses in human cognition.¹⁵

¹² Barrett, 165-166.

¹³ Upton I. Sinclair, *I, Candidate for Governor: And How I Got Licked* (Berkeley: University of California Press, 1994), 109.

¹⁴ Bonhoeffer, 43.

¹⁵ Cognition is “The rational and intellectual processes of thinking, reasoning, and remembering, but also...the processes by which we filter the vast amount of information our senses confront in the world around us and how we interpret the filtered information.” Kennedy, *Of Knowledge and Power*, 90; see also Catherine Z. Elgin, “The Epistemic Efficacy of Stupidity,” *Synthese* 74, no. 3 (1988): 297–311.

III

As World War II taught us, succumbing to propaganda, at best, leaves us functionally paralyzed with uncertainty, and, at worst, encourages us to believe lies as truth and fight against neighbors we are called to love and serve who, because of our stupidity, are transformed into the enemy. Becoming aware of how our minds work is only a small step towards preventing and righting these wrongs. Recognizing biases, such as those listed by Barrett, may make it more likely that we can nullify their potential negative impact on our thinking and decision-making. Biases such as:

- The Conformity Bias: When in doubt, we tend to embrace the consensus opinion as our default belief and accept it as true.
- The Prestige Bias: When a strong consensus is lacking, we trust those who have social power or high status to be truthful.
- The Similarity Bias: When in doubt, we trust those who are similar to us.¹⁶

Former US Intelligence specialist Robert Kennedy pointed out that “Well-trained, highly disciplined minds frequently will recognize when bias is playing a role in analysis and can reduce its impact.”¹⁷ But becoming well trained is not something that should just happen on an individual basis. Although practicing reflective decision-making is a life-changing habit that is relatively simple to initiate, the impact may be even more profound when practiced communally. If religious leaders cultivate space for members to recognize bias, the community can help us in doing what Jesus called upon us to do: to expose the planks in our own eyes. We must train ourselves to see the planks we carry, the planks of cognitive bias that make us stupid, while not forgetting to rely on our beloved community that surrounds and supports us. We are only capable of seeing the planks and biases of others because we have experienced similar biases ourselves. Thankfully, this familiarity is reciprocal. As we work together to recognize the biases in our individual and communal thinking, we can help each other develop the sort of judgment that Scripture calls us to with verses like: “Prove all things; hold on to what is good”¹⁸; “Do not judge by appearances, but judge with right judgment”¹⁹; and “Solid food is for the mature, for those whose faculties have been trained by practice to distinguish good from evil.”²⁰ This right judgment is important because we are fighting an age-old battle not solely against lies, principalities, and powers that exist in the world, but also those that exist within our own minds. We religious leaders must learn the lessons of World War II and the Holocaust and develop skills and communities that resist propaganda that can turn us against each other. We must generate space for liberation and advocate for propaganda-defying programs like FASPE, which allow us to encounter ideas and beliefs that challenge our common habits of thinking. As a simple beginning we should offer sermons and lessons on intellectual and hermeneutical humility. We should pay careful attention to when the language of our community is

¹⁶ Barrett, 43. See also Eric Fernandez, “Cognitive Biases - A Visual Study Guide,” *Scribd*, accessed August 15, 2014, <http://www.scribd.com/doc/30548590/Cognitive-Biases-A-Visual-Study-Guide>.

¹⁷ Kennedy, 91.

¹⁸ 1 Thessalonians 5:21

¹⁹ John 7:24.

²⁰ Hebrews 5:14.

shaded by bias, and make our congregants aware. We should develop better relationships with other religious leaders in our communities, as their perspective and insight is key in this bias-spotting endeavor. Above all, we should engage in challenging, safe, and reflective ethical conversations, where we both listen and are willing to offer our thoughts and beliefs up to one another for correction. We need to help remove the planks and splinters in our neighbors' eyes as they help remove them from ours.

In 1939, just months before the Nazis declared war on Poland, Melvin Gingerich, a professor of history and writer for the *Mennonite Quarterly Review*, penned an essay in which he called attention to propaganda. He wanted to warn his readers, specifically the Mennonite community at home and abroad, of the dangers it posed. Gingerich wrote that people should be wary of the propagandist who: "... tries to get you to accept his point of view without giving you the opportunity to examine critically his philosophy or to listen to a presentation of a conflicting point of view. In fact, he will try to convince you that there is only one point of view and will attempt to keep you from hearing an opposing philosophy."²¹

As Melvin Gingerich prophetically reminds us, religious leaders "have an obligation not to think evil of people, we have an obligation to seek the truth, and we should be an example to the world of a people who form sane judgments based upon genuine evidence. We should learn to demand facts and proof," holding ourselves to the highest standards of ethics while using the best possible tools in communal support, and ultimately allowing ourselves to be liberated from stupidity by the saving power of the God who is greater than us all.²²

²¹ Melvin Gingerich, "The Menace of Propaganda and How to Meet It," *Mennonite Quarterly Review* 13 (April 1939): 123-124.

²² Gingerich, 124.

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

2014
JOURNAL

MEDICAL
PAPERS

INTRODUCTION TO A SAMPLE OF THE 2014 FASPE MEDICAL PAPERS

This past June, 12 medical students took part in the fifth FASPE Medical Fellowship. They were selected from a highly competitive applicant pool, our largest to date. An important change for this year was the addition of Dr. Sara Goldkind to our faculty. Sara proved to be an excellent resource for the Fellows, a gifted teacher, and a great travelling companion for us all. We are delighted to have her as a new addition to our group. We also shared the journey with the Seminarists and their wonderful faculty, which added immensely to the richness of the experience.

As always, we started at our home base in New York City, and the Museum of Jewish Heritage. We got acquainted, started learning some history, and had preliminary seminars on the basics of medical ethics. And, memorably, the fellows spent some time listening to and talking with a Holocaust survivor. From there we travelled to Berlin, Auschwitz, Birkenau, and Krakow. The fellows were exposed to a great deal of history, taught skillfully by Thorsten Wagner and Thorin Tritter. The power of learning about these things in the places where they occurred was, to be honest, lost on me before I made my first FASPE trip, now several years ago. What was the point in taking them all the way to Berlin to sit in the room where mass murder was planned? Or to the railroad station where so many families were sent off to the camps? Or to the camps themselves? We have excellent films and stories to convey the message without actually going. At least, that was what I thought, until I got there.

I became a “convert” to the value of the FASPE experience after making my first such journey, on the inaugural fellowship in 2010. The impact of place is immense. After seeing and hearing, and after the excellent priming provided by our historians, we found ourselves uniquely open to and eager for the conversations on contemporary medical ethics that ensued. This year the students were as outstanding in their insights and enthusiasm as in previous years. Sara and I both feel very fortunate to have shared this experience with such gifted young people. For a teacher, it doesn’t get any better than this.

It is difficult to convey the high quality of the students who made up the 2014 FASPE Medical trip. As an attempt, however, we offer the three essays that follow. Every Fellow wrote an essay that was informed by his or her FASPE experience and it was with great difficulty that Thorin, Sara, and I selected these three to be included in this journal. We are very proud of them all, and expect great things from them all in the years to come. And, we welcome them all to the growing FASPE family!

MARK R. MERCURIO, MD, MA

FASPE FACULTY

PROFESSOR OF PEDIATRICS; DIRECTOR, PROGRAM FOR BIOMEDICAL ETHICS

YALE SCHOOL OF MEDICINE

Degrees of Moral Status: Rethinking the Legacy of Holocaust Rhetoric

By Corina Iacopetti

We would like to say that all humans are equal. Especially in the aftermath of the Holocaust, it seems vital to say this. For me, nothing strengthened this impulse more than moments on FASPE. We watched an Auschwitz survivor reveal the tattoo that branded her as a number. We turned pages in the Book of Names, running our fingers over the record of whole families murdered. We traced a path from Track 17 to the Birkenau platform where Josef Mengele selected whom to exploit for labor and whom to kill immediately. Unthinkable suffering and dehumanization was justified by denouncing fellow humans as *Lebensunwertes Leben*, “life unworthy of life.”¹

On FASPE, as we confronted histories of eugenics and genocide, we repeatedly encountered scientific terminology used as justification for murder. Through the T-4 program, for instance, Nazis killed thousands of people institutionalized for disability and mental illness. As they experimented with killing methods ranging from starvation to lethal injection to gas chambers, they justified their actions in Social Darwinist terms as removal of the weak and in medical terms as “euthanasia” for the suffering.² In modern medical ethics, we react to this history by recoiling from language that implies any human inequality. We grow uneasy at suggestions of euthanasia; “life not worth living” sounds too similar to “life unworthy of life.” We fear the slippery slope.

In this fear, Holocaust comparisons of “Nazi” or “Hitler” are often bandied about to caution against such slopes. However, this reflexive rhetoric can, at times, obstruct thoughtful discussion — as is the case with the claim that all humans are equal. The difficulty, of course, is that humans are different. We are different in appearance, in ability, in behavior. It is this difference that leaders of genocide around the world have exploited in their dehumanization of certain groups, labeling them “the other.” Thus, ethical questions arise: What gives someone moral status? How can we prevent our perceptions of difference from causing us to trespass on other human beings?

To answer this question, we often appeal to the idea of “personhood.” We create a binary system of “persons,” who have a full set of rights, and “non-persons,” who lack them. We then try to fit all of humanity into the former category. However, I would like to argue for a framework of equality that affirms human difference and supports degrees of moral status without slipping into Nazi values. Using this framework, I will then examine the possibility of euthanasia for severely impaired infants, as outlined by the controversial Groningen Protocol, a set of guidelines for actively ending the life of an infant drafted in the Netherlands in 2004.³

¹ Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, 2000), 46.

² Doris Bergen, *War and Genocide: A Concise History of the Holocaust* (Lanham, MD: Rowman & Littlefield Publishers, 2009), 7, 12.

³ Hilde Lindemann and Marian Verkerk, “Ending the Life of a Newborn: The Groningen Protocol,” *Hastings Center Report* 38 (2008): 42-51.

The Problem of Equality

What do we mean by equality for all individuals? Exploring this question requires definitions of the terms moral status, human, and person. Ethicist David DeGrazia defines moral status as follows: “To say that X has moral status is to say that (1) moral agents have obligations regarding X, (2) X has interests, and (3) the obligations are based (at least partly) on X’s interests.” Or, stated in rights-based language, moral status is what gives an agent a right and other agents a duty regarding that right. As DeGrazia notes, this may simply be a redundant yet convenient way to discuss our obligations to others and from where they derive.⁴

The definitions of “human” and “person” do not overlap fully. “Human” can be defined as a genetic member of *Homo sapiens*; an adult is equally as human as an anencephalic infant or an embryo. On the other hand, “person” refers to a self-conscious, rational being – in John Locke’s terms, one that “can consider itself as itself, the same thinking thing, in different times and places.”⁵ However, we then draw the troubling conclusion that some humans are not persons. This gives rise to the question: Do humans and persons have a different moral status? If so, can we recognize this without devolving into the same reasoning that led the Nazis to designate certain groups as *untersmenschen*, or sub-persons, and deprive them of rights?

In some religious traditions, the answer is simple: all human lives have equal moral status because all were imbued with meaning by a deity, and human life stands separate from non-human life. Thus, it does not matter who is a person but merely who is human. In medicine, however, we dialogue with individuals of all backgrounds and therefore must seek religiously neutral ground. From this secular perspective, the answer is not so clear.

We would still like to say that all humans have the same moral status and therefore the same rights. Unfortunately, it is difficult to find a characteristic shared by all humans that could justify special moral treatment. For any characteristic we use – rationality, self-concept, capacity for relationships – we exclude some humans and include some non-human animals.

There are three ways to resolve this issue. First, we could truly rely on genetics and claim that the 1% difference between human DNA and chimpanzee or bonobo DNA justifies the distinction. Genetic humanhood seems safe because it is easy to define, easy to recognize, and resistant to prejudice. However, not only does this not seem to constitute a moral distinction, but it would also absurdly give human skin cells greater moral status than adult chimpanzees. Second, we could – and often do – turn to religious phrasing such as “the special dignity of human life.” However, this would give an anencephalic human more dignity and moral status than a bonobo who has the full ability to play, express intelligence, experience emotion, and share social interaction.

⁴ David DeGrazia, “Moral Status as a Matter of Degree?” *The Southern Journal of Philosophy* 46 (2008):181-197.

⁵ Peter Singer, *Practical Ethics* (New York: Cambridge University Press, 2011), Kindle edition, 74.

A third alternative, and the one for which I will argue, is that we carefully leave behind binary systems of human-nonhuman and person-nonperson. Let us consider an ethical framework that allows for degrees of moral status based only on morally relevant differences between beings.

Moral Status in Degrees: Difference without Discrimination

Moral philosopher Peter Singer offers one such view of equality in his principle of “equal consideration of interests.” He writes, “The essence of the principle...is that we give equal weight in our moral deliberations to the like interests of all those affected by our actions...An interest is an interest, whoever’s interest it may be.”⁶ While Singer employs this principle from a utilitarian perspective, it is helpful regardless of the ethical theory we employ. We agree that equals should be treated equally; however, we must first *perceive* equals as equal. This is where Singer’s principle can aid our understanding of moral status.

It will also be helpful to center our discussion on a being’s most fundamental interest: the interest in avoiding harm. Negative rights and duties are less controversial than positive ones, and obligations not to harm will provide sufficient basis for discussion. Using this framework, let us consider the following four humans: an anencephalic infant, a severely impaired newborn, a child with moderate intellectual disability, and an adult with full cognitive ability. I will discuss their respective capacities as morally relevant differences that can justify degrees of moral status.

The anencephalic infant is not sentient — she cannot suffer or enjoy, perceive or experience. As Singer notes, this “is not just another characteristic like the capacity for language or for higher mathematics...the capacity for suffering and enjoying things is a prerequisite for having interests at all.”⁷ The anencephalic infant, therefore, has no interests. By contrast, the severely impaired newborn is sentient but has no self-concept. She has an interest in avoiding suffering; however, she cannot conceptualize of herself as a distinct entity, so she cannot desire to exist as that entity in the future. She thus has no interest, or stake, in having a future.⁸

The child with moderate intellectual disability does have a self-concept and can perceive a future. Thus, in addition to the interest in avoiding suffering, she also has an interest in avoiding curtailment of her future. However, she lacks the capacity for medical decision-making — she may be able to assent but not consent. In contrast, the adult with full cognitive abilities has the capacity to process information presented to her and to make a rational choice based on it. She thus has an interest in preserving autonomy and can consent to or refuse medical intervention.⁹

The different capacities of these four humans result in corresponding levels of interests, which, in turn, generate moral status. For instance, the capacity for pain results in an

⁶ Singer, 20.

⁷ Singer, 49.

⁸ Singer, 152.

⁹ Since she also has the ability to act as a moral agent (to consider ethics and make moral choices), she is also the only one of these four humans who can be held to this standard — both ethically and legally.

interest in avoiding pain, which in turn obligates us to avoid causing it. Using the principle of equal consideration of interests, we should view all beings with equal interests as equal *in regard to those interests*. We should equally avoid causing suffering to all those with an interest in avoiding suffering. We should equally respect the autonomy of all those with an interest in preserving autonomy.

Importantly, moral status does not imply moral value. I am *not* arguing that individuals with higher order interests are “morally good” while merely sentient beings are “morally bad.” Moral status simply means we have obligations to individuals based on their interests, and we are only obligated by interests they actually possess – ought implies can. A newborn and an adult have equal moral status in regard to the interest in avoiding suffering, but the adult clearly has greater moral status in regard to the interest in preserving autonomy. It is in this manner that moral status can exist in degrees: if an individual has more levels of interests, we have more obligations to her. In other words, the more ways we can harm her, the more ways we are obligated not to do so.

I acknowledge that this framework suggests we should be less concerned about killing merely sentient beings than killing self-aware beings. However, before approaching the inevitable application to euthanasia, let us pause and address these questions: Why are these capacities different from skin color, gender, or sexual orientation? How is this not discrimination against intellectually disabled individuals? In effect, how will this not lead to another T-4 program?

In determining moral status, capacities such as sentience and self-concept are appropriate to consider because they *relate to the question at hand*. Relevance allows us to distinguish practicality from discrimination. In hiring sperm donors, gender is relevant: since neither women nor transgendered men produce sperm, excluding them is not gender discrimination. In contrast, excluding women from work that both genders can perform equally does constitute discrimination. Likewise, the capacity to suffer is relevant to determining if we ought not cause a being pain, but the capacity for autonomy is not. Discrimination is not the acknowledgement of difference; it is applying perceptions of difference to situations where the difference is irrelevant.

The individuals killed through the T-4 program had the capacity to suffer. They had identities, emotional lives, and interests in their futures. Perhaps not all of them had the capacity for rational, autonomous choice. But that capacity was irrelevant to the question of whether they would be harmed by experimentation or murder. Therein lies the difference.

Euthanasia for Infants

Despite the fact that T-4 “euthanasia” was murder rather than mercy killing, its history overshadows discussions of euthanasia for patients who have not explicitly requested death — especially infants and children. The reaction against Singer’s work epitomizes this tendency: detractors liken him to the notorious Nazi physician Josef Mengele and

label him a “baby-killer.” Likewise, some U.S. ethicists criticize the Groningen Protocol in inflammatory terms, including “*Stop killing babies.*”¹⁰

The terms “baby-killer” and “killing babies” are intended to generate an emotional response. They conjure images of haphazard murder of healthy infants. They suggest slippery slopes in which, if we justify killing one infant, we will ultimately commit indiscriminate infanticide. Such a picture is rightly horrifying; however, it does not remotely reflect what is being suggested.

It is a grave offense to kill a *person* who does not ask to die. However, as Singer notes, the ethical reasons why this is the case do not apply to infants. First, killing violates a person’s interests by curtailing her perceived, desired future. However, an infant has no capacity for self-concept, at least up to a certain point in time, and thus has no interest in a future.¹¹ In addition, killing severely violates autonomy because a person’s choice to live is “the choice on which all other choices depend.”¹² An infant, though, is not capable of autonomy, so killing her constitutes no such violation. Finally, killing violates a right to life, but only persons hold this right, as philosopher Michael Tooley demonstrates. His argument can be reconstructed as follows:

P1: Rights can be violated, and to violate a right is to frustrate the corresponding desire.

P2: The right to life is the right to continue existing as a distinct entity.

P3: The desire relevant to a right to life is the desire to continue existing as a distinct entity.

P4: The only being capable of conceiving of herself as a distinct entity over time is a person.

Conclusion: Only persons have a right to life.¹³

As Tooley claims, the capacity to conceive of oneself over time is a necessary condition for the right to life. Without this capacity, infants have no inherent right to life.¹⁴ Overall, then, killing a person inflicts an especially grave harm for reasons not applicable to infants.

Yet this conclusion still does not mean that we should kill healthy infants, as Singer’s detractors claim he implies. Singer offers two explanations for why not. First, killing an

¹⁰ See Eric Kodish, “Pediatric Ethics: a Repudiation of the Groningen Protocol,” *The Lancet* 371 (2008): 892-3.

¹¹ Singer, 152.

¹² Singer, 84.

¹³ Singer, 81-83.

¹⁴ It is often argued that an infant (or, frequently, a fetus) is a potential person and should therefore have the same right to life. This potentiality argument is difficult to support. It is an involved topic with metaphysical issues regarding possible persons versus potential persons, and it merits more coverage than can be afforded here. However, a brief example from Singer can illuminate this issue: Prince Charles is a potential king, but this does not give him the rights of an actual king. One does not hold rights for a position one does not yet occupy. Instead, the main defense of potentiality can be found in an Aristotelian view of the natural world in which a fetus or infant already holds the essence of a person, analogous to how Aristotle believed an acorn already holds the essence of an oak tree. In our modern society, however, we do not share this view of the world, and we view and treat acorns and oak trees differently. For more on this topic, see John P. Lizza, “Potentiality and Persons,” *Diametros* 26 (2010): 44-57.

infant would inflict great loss on those who love her. Killing could thus only be supported when others do not want the infant to live, which will be rare since she can be adopted. Second, it is difficult to determine when children gain the capacity for self-concept, and legal purposes require a clear defining line. Therefore, we err on the side of caution and draw this line at birth, disallowing killing after.¹⁵

While these explanations for why we do not generally “kill babies” may be true, I offer a third, which I believe is more compelling. Referring to my earlier argument regarding negative rights and duties, I agree that killing a healthy infant would not violate her interests. To use bioethics terminology, we do not breach our basic duty of non-maleficence. Additionally, though, we reason from beneficence: while it does not benefit the infant to die, it *may* benefit her future self to live if positive future experiences are possible. We do not know for certain if she will benefit: she may die suddenly or suffer severely. Nonetheless, based on the information we have, if there is no benefit *to the infant* to die and there *may likely* be a benefit *to her future self* to live, we act to preserve chance for benefit. This calculation can be termed “best interests,” and it is the same calculation parents or guardians use in making medical decisions for their children.

Perhaps some of the shock that may come from hearing “Killing an infant does not violate her interests” is due to a semantic confusion between an infant’s “interests” and her “best interests.” The two, in fact, can be seen as separate concepts. An infant’s “interests” can be understood only *from her perspective* at present; these consist of receiving pleasure or comfort and avoiding pain or discomfort. In contrast, “best interests” refers to a judgment *by others* about *what they believe* will be best for her in the future, should that future occur. It is therefore not inconsistent to state both that killing an infant would not violate her interests *and* that we do not kill healthy infants because we judge it to be in their best interests to preserve the chance for future benefit.

A wholly different argument applies to cases for which the Groningen Protocol outlines strict conditions for allowing euthanasia. In these cases, a severely impaired newborn suffers greatly with no prospect for improvement, and her physicians and parents concur that “death would be more humane than continued life.”¹⁶ Implicit in this conclusion is the assessment that the infant *would* benefit if she dies, via relief from suffering, but *would most likely not* benefit if she continues to live. Thus, beneficence shifts concern in favor of euthanasia. This careful assessment is what the Groningen Protocol, in effect, argues – as such, it stands in sharp distinction to reflexive accusations of eugenics and indiscriminate “baby killing.”

As a final note about euthanasia, I maintain that we must see both our actions and our inactions as ethical choices. In the U.S., we have come to accept withholding and withdrawing treatment as ethically equivalent, despite acknowledging that withdrawing treatment feels more difficult for the family and, sometimes, for the physician. In contrast, we still view “letting die” and “killing” differently: in cases where we may

¹⁵ Singer, 154.

¹⁶ Eduard Verhagen and Pieter Sauer, “The Groningen Protocol: Euthanasia in Severely Ill Newborns,” *New England Journal of Medicine* 352 (2005): 959-962.

withhold or withdraw life-sustaining intervention, including nutrition and hydration, we do not accept active euthanasia through lethal injection.

But recall that Nazi physicians employed starvation as a killing method in addition to lethal injection. If death is a certain outcome of our actions in either case, we should see the actions as equivalent. We should not hide behind terminology of “letting die” when there simply exists more time, space, or other forms of separation between our choice and its inevitable consequence. It feels different, yes — just as withdrawing treatment feels different from withholding it. But time or space itself is not a morally significant difference. We must see and treat equals equally. We cannot rely on feeling alone to determine our ethics because feeling is subject to bias.

Conclusions

The claim that all humans are equal is rhetorically appealing but lacks ethical authority. To better protect against inequities and ethical slippery slopes, we should instead ask if equals are being treated as equals. By relying only on *morally relevant* differences among individuals to elucidate degrees of moral status, we can avoid binary “person-nonperson” and “human-nonhuman” judgments. We can, overall, support an ethical framework that acknowledges human difference without devolving into Nazi values.

Of course, additional implications for treating equals as equals must be explored thoughtfully. For instance, what are our obligations to non-human animals, particularly those with a self-concept? Is there a morally relevant difference between a starving child in my country and a starving child in another country that would justify different treatment by me? These are significant questions. For now, we can simply highlight the importance of an ethical commitment to the individual. Nazi ideology rationalized harm to individuals based on advancing the “health” of society; we must instead emphasize the individual’s perspective above all else. As the bioethicist Edmund Pellegrino wrote, “If medicine becomes, as Nazi medicine did, the handmaiden of economics, politics, or any force other than one that promotes the good of the patient, it loses its soul and becomes an instrument that justifies oppression and the violation of human rights.”¹⁷

By valuing individuals’ perspectives, we will be best equipped to avoid trespasses against them. With this goal, we should try to *perceive* an individual’s perspectives and interests rather than simply *treating* her “how we would like to be treated.” True empathy avoids self-reference.

At times, such reasoning may challenge our existing intuitions, as in the case of euthanasia for impaired infants. We must critically examine our own intuitions and look for any bias we may be harboring. Only by confronting bias can we transcend it. Only through honest acknowledgement of human difference can we guard against discrimination.

¹⁷ Edmund Pellegrino, “The Nazi Doctors and Nuremberg: Some Moral Lessons Revisited,” *Annals of Internal Medicine* 127 (1997): 307-308.

Futility, Feelings, and Bias: Developing a Relational Method

By Yael Shinar

In 1920, German jurist Karl Binding and German psychiatrist Alfred E. Hoche published a philosophical treatise, entitled “The Permission to Destroy Life Unworthy of Life.” In this work, the two identified “burdensome lives” whose medical treatment generated what they believed were unjust economic costs to society.¹ To relieve society of this “burden,” they elaborated an ethic of killing, or “death assistance,” that would ultimately be invoked to justify Nazi Germany’s murderous crimes.² Their apologetics drew on prevailing economic, political, and biological concepts, and the treatise went so far as to conceive of killing “life unworthy of life” as therapeutic, “a healing treatment,” and “healing work.”³

Hoche, the physician of the pair, argued that achievable benefits of medical care for certain individuals or groups were actually no benefit at all, amounting at best to futile interventions. Binding, for his part, articulated legal parameters for medical killing, providing procedural recommendations for “killing of the consenting participant” and legal protections for physicians who participated in the “killing of ‘incurable idiots,’ unable to consent.”⁴

Binding and Hoche were not alone in their thinking. Together with other intellectuals, scientists, and bureaucrats, they developed the rhetorical and technological infrastructure that ultimately became the “final solution” and the gas chambers.⁵

While Nazi appropriation for genocidal purposes of such concepts as euthanasia and mercy killing were euphemistic and deceitful, it seems that the intellectual work of individuals such as Binding and Hoche was offered in earnest.⁶

Hoche’s discussion of medical futility and distributive justice and Binding’s recourse to autonomy and informed consent are eerily echoed in current discussions in medical ethics. While the echoes may be partial, they mark materially important principles in interactions between physicians and the people suffering who seek their help. By listening to these echoes, we may learn about current bioethical models, where they may be wanting, and what might be needed to augment them.

What biases might we harbor that could pervert the application of our ethical principles? Further, what mechanisms do we have in place to protect against such distortions? To reflect on these questions, this paper will examine the concept of

¹ Karl Binding and Alfred Hoche, *Die Freigabe der Vernichtung lebensunwerten Lebens: Ihr Mass und ihre Form*. (Leipzig: F. Meiner, 1920), translated into English as, *The Release of the Destruction of Life Devoid of Value*, by Robert L. Sassone. (Santa Ana, CA: Privately published, 1975).

² Robert J. Lifton. *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, 1986), 46.

³ Lifton, 46.

⁴ Lifton, 46.

⁵ Lifton, 21.

⁶ Lifton, 45-51.

medical futility in current discourses in medical ethics. It will then go on to describe some philosophical traditions that may support ethical relationships where prevailing ethical principles provide little guidance.

Medical Futility and Non-Abandonment

The concept of medical futility describes the assessment that a medical intervention will not serve the goals of care, regardless of how those goals are determined. As the ethicist John Lantos has written, the judgment of medical futility pertains to the ethical commitments of both the sick and the healer: “In ancient and modern medical ethics, a physician’s judgment that a treatment is futile absolves doctors from the moral obligation to provide care and [absolves patients] from the obligation to seek care.”⁷

Guidelines for assessing medical futility appear as early as a text attributed to Hippocrates, in which it is written that one of the goals of medicine is “to refuse to treat those who are overmastered by their diseases, realizing that in such cases medicine is powerless.”⁸ Providing futile treatment was considered unethical throughout the ancient West, because it was thought that this “challenged nature and constituted hubris against the gods,”⁹ and thus, by the Byzantine Era, there existed a ceremonial “abandonment by physicians of a patient at the stage just prior to death ... when no medical means were believed available to save the patient.”¹⁰

The ethical challenge arises in the gap between the recognition of futility and the act of abandonment. What should physicians do, prohibited by both law and sentiment from abandoning the sick in their midst, when they have no means to modify disease? Futility describes a limit on a physician’s obligations in interaction with a disease. Non-abandonment demands her ongoing interaction with the person suffering the disease.

Palliative physician Dr. Diane Meier describes some of the confusion that may arise in the space between medical futility and non-abandonment. In 2012, Meier consulted in the care of a woman who had been diagnosed with non-small-cell lung cancer six years prior.¹¹ The disease had progressed to a point where chemotherapy had become futile, and Meier discussed options with the oncologist:

“Jenny was in today, and she mentioned that you had suggested intrathecal chemo for her brain metastases,” I said. “I told her I’d call to find out what you anticipated from this approach, since this is outside my expertise.”

⁷ John D. Lantos, et al., “The Illusion of Futility in Clinical Practice,” *The American Journal of Medicine* 87, no. 1 (1989): 81.

⁸ Cited in Nancy S. Jecker, “Knowing When to Stop: The Limits of Medicine,” *The Hastings Center Report* 21, no. 3 (May – June 1991): 5-8.

⁹ John Lascaratos, Effie Poulakou-Rebelakou, and Spyros Marketos, “Abandonment of Terminally Ill Patients in the Byzantine Era. An Ancient Tradition?” *Journal of Medical Ethics* 25 (1999): 254.

¹⁰ Lascaratos, Poulakou-Rebelakou, and Marketos, 256.

¹¹ Diane E. Meier, “‘I Don’t Want Jenny to Think I’m Abandoning Her’: Views on Overtreatment,” *Health Affairs* 33, no. 5 (2014): 895-898.

“What are you hoping we can accomplish with this treatment?”

After a brief pause, he spoke. “It won’t help her.”

I struggled for a response. “Would you want me to encourage her to go ahead with it anyway?” I asked, finally.

After another pause, this one longer and more awkward than the last, he said, “I don’t want Jenny to think I’m abandoning her.”¹²

Meier writes, “It seemed that the only way Jenny’s oncologist knew to express his care for and commitment to her was to order tests and interventions. He felt that to stop doing this was akin to abandoning her.” It was uncomfortable for this oncologist to cease medical intervention, because this was the only thing he saw intervening between him and abandonment of a patient.

Meier sees the oncologist’s confusion as a bias cultivated by his training: “Medical school and residency have traditionally provided little or no training on how to continue to care for patients when disease-modifying treatments no longer work.”¹³ The concept of medical futility may have helped this oncologist see the ethical risks of his recommendation, but it did not help him see what to do instead. Ironically, Meier writes, “The only way in which Jenny felt her oncologist had actually abandoned her, as she told me, was by his unwillingness to talk with her about what would happen when treatment stopped working.”¹⁴

Meier’s story illustrates the power of bias to guide our actions in the absence of procedural guidelines. Jenny’s oncologist had the benefit of working with a colleague who could discover his biases and help balance them. Collaborative care teams often serve this purpose, as do institutional ethics committees. Is there a personal practice, a systematic method, by which Jenny’s oncologist could have understood on his own that the remaining mode of care appropriate to his interaction with Jenny was not that of medical intervention, but that of communication?

A Tradition of Negative Liberties

Our prevailing ethical codes reflect a tradition devoted to ensuring negative liberties. As described by philosopher Isaiah Berlin, negative liberties are liberties *from*, in the sense that “I am normally said to be free to the degree to which no man or body of men interferes with my activity.”¹⁵ In the United States, our justice system focuses heavily on protections of negative liberties, reflecting the idea that “Since justice demands that all individuals be entitled to a minimum of freedom, all other individuals [are] of necessity to be restrained, if need be by force, from depriving anyone of it.”¹⁶

¹² Meier, 896.

¹³ Meier, 897.

¹⁴ Meier, 897.

¹⁵ Isaiah Berlin, *Four Essays on Liberty* (New York: Oxford University Press, 1969), 122.

¹⁶ Berlin, 127.

This focus on negative liberties characterizes our thinking on relationships among physicians and patients. Physician and bioethicist Hannah Lipman provides an example in her discussion of consent and futility: “Informed consent and refusal give patients the right to limit what health care professionals can do to them. The concept of medical futility is used to limit what patients can demand of physicians.”¹⁷ Lipman’s summary implies that consent and futility consist in the reciprocal negative liberties that they protect, a view that she has derived from the medical context in which she is operating. These concepts ought not to be reduced in this manner, because they also describe complex relational processes.¹⁸ As such, relational ethics may provide an apt framework for understanding them. Further, relational ethics may help us envision the space between them as something other than abandonment.

Relational Ethics and a Methodology of Trust

As Meier’s narrative illustrates, in the space between medical futility and abandonment is dialogue and an ongoing relationship of care. In order to articulate some ethics for caring relationships, this paper turns to the long tradition of Buddhist inquiry and to contemporary work in psychology.

To supplement philosophical traditions focusing on protecting individual liberties, psychologist Carol Gilligan presents the assessment that among the primary assets needing cultivation in human life is that of relationship. Gilligan cites evidence for a fundamentally “interpersonal world” from anthropologists, neurobiologists, and other researchers, who observe in both biology and behavior that, from infancy to adulthood, people actively seek “to participate in responsive relationships.”¹⁹ It is in responsiveness, she argues, that we learn ethical behaviors. We cannot understand ethical action through abstract contemplation alone, but must also integrate information gathered through engagement with others in the world.

In ethics, a responsive relationship should not be construed to mean mutual affirmation, which easily perpetuates biases and injustices. Rather, responsiveness involves shared vulnerability and trust. These experiences, frequently accompanied by strong emotion and sentiment, are often maligned by systematic thinkers. Although emotions may misdirect us, the protection against this cannot be a Rawlsian bracketing of personal experience.²⁰ Carol Gilligan argues, “When we separate our thoughts from our

¹⁷Hannah I. Lipman, “Medical Futility,” *The American Journal of Geriatric Cardiology* 16, no. 6 (2007): 381.

¹⁸ For more on informed consent, see “Nuremberg Code,” Sections 1, 9, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 2 (Washington, D.C.: U.S. Government Printing Office, 1949), 181-182; and World Medical Association, *Declaration of Helsinki*, 1964, Basic Principles 3, 9, 10, 11.

¹⁹ Carol Gilligan, “Moral Injury and the Ethic of Care: Reframing the Conversation about Differences,” *Journal of Social Philosophy* 45, no. 1 (2014): 90.

²⁰ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 2009), 118. Rawls proposed that in order to “nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage,” when considering questions of justice, all “parties [must be] situated behind a veil of ignorance” so that they could “not know how ... various alternatives will affect their own particular case.” While Rawls’ “veil of ignorance” restrains our impulses to exploit personal advantage, it also exposes anyone who would wish to expound an ethical scheme to at

emotions, we retain the capacity to solve logical problems, but lose the ability to register experience and navigate the human social world.”²¹ Such a separation is particularly hazardous in medical ethics, because through it “our mode of listening deteriorates into intellectual sorting ... [and] listening in this way destroys trust.”²²

In order to create trust in relationships, Gilligan suggests we must listen in a way that invites the unfamiliar and allows us to hear “a ‘different’ voice ... a voice that [may not] make sense according to the prevailing categories of interpretation.”²³ Thus it is the *feeling* of vulnerability itself—to the person with whom we’re speaking or to the world we’re investigating—that may signal to us that we are behaving ethically in a relationship. It was vulnerability that gave Jenny’s oncologist pause in his conversation with Meier and that allowed him to re-think and to modify his ideas.

Critical investigation and reflection are primary ethical acts in several traditions. The Buddha encouraged his disciples to be critical, as described in the Kalama Sutta:

Don’t go by reports, by legends, by traditions, by scripture, by logical conjecture, by inference, by analogies, by agreement through pondering views, by probability, or by the thought, ‘This contemplative is our teacher.’ When you know for yourselves that, ‘These qualities are unskillful; these qualities are blameworthy; these qualities are criticized by the wise; these qualities, when adopted & carried out, lead to harm & to suffering’ — then you should abandon them.²⁴

The translator adds, “Any view or belief must be tested by the results it yields when put into practice.”²⁵ This is a broader articulation of the same principles underlying the scientific method, and it may also be applied to relationships.

In examining our relationships, we may learn what constitutes ethical relationships. Ethics in a relationship does not mean pursuing pleasure or affirmative feelings. Interpreting good feelings as signs that we are acting ethically could easily lead us to tautologically affirm our own biases. What Gilligan’s “ethic of care” and the Buddha’s admonishment against abstracted belief both teach us is that the categorical imperatives befalling someone sequestered behind a veil of ignorance are to open her eyes and to see, to encounter the world, and to listen.

least two perils. First, it fails to account for diversity. Second, it allows biases to remain intact, for they are challenged by no material intervention from the extant world.

²¹ Gilligan, 89.

²² Gilligan, 91, citing Jonathan Shay, *Achilles in Vietnam: Combat Trauma and the Undoing of Character* (New York: Scribner, 1994), 4.

²³ Gilligan, 91.

²⁴ “Kalama Sutta: to the Kalamas AN 3.65,” trans. Thanissaro Bhikkhu (1994), *Access to Insight* (Legacy Edition), last modified November 30, 2013, <http://www.accesstoinsight.org/tipitaka/an/ano3/ano3.065.than.html>.

²⁵ Thanissaro Bhikkhu, “Translator’s Note” to “Kalama Sutta: to the Kalamas, AN 3.65,” (1994), *Access to Insight* (Legacy Edition), last modified November 30, 2013, <http://www.accesstoinsight.org/tipitaka/an/ano3/ano3.065.than.html>.

Case Study

In August 2014, the University of Michigan Health System (UMHS) Adult Ethics Committee was consulted by the pulmonary critical care team on a case in which differences between a family's wishes and the medical team's values seemed intractable.²⁶ The case was that of a 74-year-old woman with a history of kidney disease, Parkinson's, ARDS, and atrial fibrillation, who was admitted to the hospital with pneumonia several weeks prior. At the time of the ethics consult, the patient was ventilator dependent, with a tracheostomy, and delirious. Her husband and son were her surrogate decision makers, and they consistently requested discharge home, with home ventilation and dialysis. The medical team had resisted discharging the patient to her home with these parameters. It was their judgment that available systems for home ventilation and dialysis would be insufficient in treating her organ failures, and that these interventions would prove futile. The medical team offered the family two alternative options: discharge home with hospice, on a terminal wean and without dialysis, or indefinite hospitalization, likely until death, while receiving the medical interventions necessary to manage her conditions. The family was not ready to accept hospice care, believing that this would constitute abandonment. They also expressed a commitment to getting their wife and mother home, stating that she would not want to spend the rest of her life in a hospital or extended care facility. The family had communicated their understanding of the professional opinion of the medical team—if the patient went home, with home ventilation and dialysis, her respiratory status and kidney failure would likely worsen and her life would likely be shorter than it would be if she remained hospitalized for treatment. The family insisted that home ventilation and dialysis, however insufficient, would nonetheless be her wish.

With the family's substituted judgment presented so cogently, the ethical question was not one of autonomy or even of conflicting values. Rather, it was a question about the ethical limits on the degree of physician participation in futile medical intervention. The disagreement between her surrogate decision makers and her medical team arose from the feelings of unease among the physicians that they might assist in a plan that departs from standards of care. The medical team's ethical challenge was to understand the significance of their uneasy feelings when dealing with unorthodox potentialities.

In this case, the Committee's recommendation was that discharge home with home ventilation and dialysis was ethically permissible, given that the surrogate decision makers articulated this as the best material approximation of the patient's own values, while articulating an understanding that it was thought sub-optimal by the medical team. While the medical team considered provision of such interventions to be futile, the ethics committee considered them effective in facilitating achievement of the patient's and family's goals of care. It was in conversation among the medical team, the family, and members of the ethics committee that problems of medical futility were elided by the reframing of goals.

²⁶ Charles J. Boyer, Jr., UMHS Adult Ethics Committee consult, September 2014.

Conclusion

While some medical interventions may be futile in the treatment of some diseases, the relationship of care need not be abandoned. This relationship has the potential to protect its parties from the hazards of their own biases.

It would be disingenuous and unsavory to speculate as to whether a methodology of relationship might have spared millions of disenfranchised people from Nazi genocide. The forces of hatred and numbness can disrupt the most charitable of disciplines. Yet, if we are to cultivate ethical relationships among people whose funds of power, knowledge, and money are drastically divergent, as is often the case among physicians and the sick who seek their care, then we may benefit from relational methodologies that serve this goal. Principles like autonomy and justice, beneficence and non-maleficence, may be supported by an ethic of shared vulnerability, through disciplines of care and courageous discernment.

Who Is “Not Worth” Treating? Exploring Outcomes, Costs, and Ethics of Newborn Resuscitation for Premature Infants Worldwide

By Samuel Enumah

The alarm startled me. A nurse brushed past to attend to a newborn girl gasping in her crib. After what seemed to be minutes but was, in fact, only seconds, the nurse reconnected her breathing tube, and the infant’s breathing slowly steadied. The girl had been born prematurely without a functional nerve to direct her diaphragm in breathing, and she was placed in the neonatal intensive care unit (NICU) on a ventilator with a tracheostomy tube. Her parents were mentally disabled and unable to function independently, but had some decision-making capacity. As the team discussed a care plan—including a role for social work and the possibility of 24-hour at-home care—I wondered about this newborn’s quality of life, and the physical, mental, and emotional strain that she and her family would likely face. Could her parents take care of her? How much would her cost of care burden her family? Burden the hospital? Society? Should the cost of her care determine treatment? Who had the authority to make decisions about her treatment? About her life?

That was three years ago. At the time, I was a first-year medical student, and it was my first time at a NICU. Now I have completed the majority of my clinical rotations, and I recently returned from a two-week FASPE trip to the sobering sites of the Holocaust. Yet I remain troubled by the inner debate I had on whether to provide life-sustaining treatment for that infant in the NICU. I am perplexed by a prevailing medical culture that directs herculean efforts at increasing survival, sometimes at the expense of quality of life or with no consideration of cost. Yet, the Holocaust and the murder of mentally and physically handicapped persons by Nazis, demonstrate the sobering consequences of physicians who were guided by a belief that there is “life unworthy of life.”¹ I find these questions of particular importance as we expand more aggressive treatment options (neonatal intensive care and advanced pediatric surgery) to places around the world where resources are often more scarce than in U.S. hospitals.

In the following pages, I look specifically at extremely premature infants, defined by having a gestational age (GA) of 22–30 weeks, and explore *how* providers and patients’ families across different social, economic, and political climates may arrive at a decision about who should receive life-sustaining treatment. This should not be confused with a prescription for who *should* receive treatment, something that I do not attempt to cover.

In general, providers in the NICU are faced with a particularly challenging set of questions when deciding to withhold or withdraw treatment from newborns with profoundly disabling conditions or under extremely adverse circumstances (e.g. extreme prematurity, congenital anomaly, anencephaly). A review of the published literature on neonatal outcomes and a discussion of study limitations reveals why this is the case.

¹ Jeremiah Barondess, “Care of the Medical Ethos: Reflections on Social Darwinism, Racial Hygiene, and the Holocaust,” *Annals of Internal Medicine* 129, no. 11 (December 1, 1998): 891–898.

The American Academy of Pediatrics (AAP), for example, provides guidelines for making decisions on a child's life in the newborn period, stating, "Where gestation, birth weight, and/or congenital anomalies are associated with almost certain early death, and unacceptably high morbidity is likely among rare survivors, resuscitation is not indicated, although exceptions may be appropriate in specific cases to comply with parental request."² But what constitutes "early death" or "unacceptably high" morbidity?

To better define these terms, we can examine the available data on survival and disability for extremely premature infants. The National Institutes of Child Health and Human Development (NICHD) published outcome data for 4,446 newborns born in the U.S. at a gestational age of between 22 and 25 weeks from 1998 to 2003.³ Survival to discharge for those born at 25 weeks was 76%, at 24 weeks was 56%, at 23 weeks was 26%, and at 22 weeks was 5%. Gestational age, however, is only one of many factors that affect newborn outcomes. Other factors include birth weight, sex, whether the mother was given antenatal steroids (medicines administered to women expected to deliver prematurely), and whether the infant was part of a multiple birth.⁴ A heavier single female infant born at 24 weeks GA may have a better prognosis for survival than low-weight twin boys born at 26 weeks GA.⁵ The NICHD has created an outcomes estimator to help in making decisions about newborn patients, but in practice it is difficult for providers to come to a consensus about the prognosis for neonates. The fact is that the data used to inform decisions on whether or not to administer treatment to premature infants is subject to significant limitations.⁶

First, there is great variability in survival rate data across the globe. Survival rates worldwide range anywhere from 11 to 60 percent for infants who weigh less than 500 grams at birth. In the United States, the figure is between 11-20%; in Australia and New Zealand, 38%; and in Germany the survival rate is as high as 60%.⁷ These wide

² John Kattwinkel, ed., *Neonatal Resuscitation Textbook*, 6th ed., (Elk Grove Village, IL: American Academy of Pediatrics and American Heart Association, 2001), 287-8.

³ Jon E. Tyson et al., "Intensive Care for Extreme Prematurity — Moving beyond Gestational Age," *New England Journal of Medicine* 358, no. 16 (April 17, 2008): 1672-1681.

⁴ Mark Mercurio, "Ethics for the Pediatrician: Imperiled Newborns: Limiting Treatment," *Pediatrics in Review* 31, no. 2 (February 2010): 72.

⁵ Also see Amy Keir, Andrew McPhee, and Dominic Wilkinson, "Beyond the Borderline: Outcomes for Inborn Infants Born at \leq 500 Grams," *Journal of Paediatrics and Child Health* 50, no. 2 (February 2014): 146-152.

⁶ "Extremely Preterm Birth Outcome Data," NICHD Neonatal Research Network, accessed August 2009, http://www.nichd.nih.gov/about/org/cdbpm/pp/prog_epbo/epbo_case.cfm.

⁷ For data on survival rates in the United States, see Avroy A. Fanaroff et al., "Micronates: 401–500 Grams: The NICHD Neonatal Research Network Experience 1996–2001," *Pediatric Research* 53 (2003): A398; Regina Gargus et al., "Unimpaired Outcomes for Extremely Low-birth-weight Infants at 18 to 22 Months," *Pediatrics* 124, no. 1 (July 1, 2009): 112-121. For data on Australia and New Zealand, see Sharon Chow, *Report of the Australian and New Zealand Neonatal Network 2010*, (Sydney: ANZNN, 2013), <https://npesu.unsw.edu.au/data-collection/australian-new-zealand-neonatal-network-anznn>. For Japan, see Kazushige Ikeda et al., "International Perspectives: Recent Short-term Outcomes of Ultra-premature and Extremely Low-birthweight Infants in Japan," *NeoReviews* 7, no. 10 (October 2006): e511-16; Kazuo Itabashi et al. "Mortality Rates for Extremely Low-birth-weight Infants Born in Japan in 2005," *Pediatrics* 123, no. 2 (February 1, 2009): 445–50. For Germany, see Esther Rieger-Fackeldey et al., "Short-term Outcome in Infants with a Birthweight Less than 501 Grams," *Acta Paediatrica* 94 (2005): 211-16.

differences show the lack of consensus about what constitutes viability at our current cut-off values, and suggest that local and context-specific decisions about management and intervention at these gestational ages may affect overall outcomes.

A second limitation in using existing data is the lag in time between any study and the publication of its findings. Much of the data available today is from studies conducted ten or 20 years ago and does not reflect recent advances in technology and care. Over the last ten years, the medical establishment has revised its use of surfactant and non-invasive ventilation, made advances in managing perinatal complications, and even started performing intrauterine surgery.⁸ It is essential that physicians communicate the lag time in available data to patients' families to provide a more honest picture of the data pertaining to survival and disability.

Third, some hospitals engage in what turns into a self-fulfilling prophecy when they establish a policy not to resuscitate neonates below a certain gestational age because they have never had a survivor below that age.⁹ If a hospital does not resuscitate below 23 weeks GA, then by definition the survival rate for infants at 22 weeks at that hospital will always be 0% and the facility will continue to justify a decision to not resuscitate by stating that survival is impossible. This circular reasoning becomes the basis for a policy.

A fourth weakness in the data is pinpointing gestational age. A woman's last menstrual period and second trimester ultrasounds are commonly used to determine the age of a fetus, and physicians discuss GA in terms of weeks and days since conception. However, studies have shown that using the last menstrual period (LMP) is only accurate to within about two weeks, and second trimester ultrasounds are only accurate to within 10 to 14 days.¹⁰ We should therefore proceed with caution, for example, when counseling a mother of a 22-week-and-6-day old fetus, as dated by LMP, regarding survival chances when, in fact, the infant's true survival rate may be as low as 0%, or as high 76%, i.e. equivalent to that of an infant of 25 weeks GA.

Two additional considerations arise when advising families about future developmental disability and quality of life for surviving children. First, previous work demonstrates that when providers evaluate low-birth-weight infants, they commonly overestimate the chance of disability at a later age.¹¹ We should bear this in mind when we make decisions about providing or withholding treatment. Furthermore, since quality of life (QOL) is

⁸ Narayan Iyer and Maroun Mhanna, "The Role of Surfactant and Non-invasive Mechanical Ventilation in Early Management of Respiratory Distress Syndrome in Premature Infants," *World Journal of Pediatrics* 10, no. 3 (August 2014): 204-10. See also, Paolo Sala et al., "Fetal Surgery: An overview," *Obstetrical and Gynecological Survey* 69, no. 4 (April 2014): 218-28.

⁹ Mark Mercurio, "Physicians' Refusal to Resuscitate at Borderline Gestational Age," *Journal of Perinatology* 25 (2005): 685-689.

¹⁰ Urania Magriples and Joshua Copel, "Obstetric Management of the High Risk Patient," in Gerard Burrow, Thomas Duffy, and Joshua Copel, eds., *Medical Complications During Pregnancy*, 6th ed. (Philadelphia: Elsevier Saunders, 2004), 1-14.

¹¹ Maureen Hack et al., "Poor Predictive Validity of the Bayley Scales of Infant Development for Cognitive Function of Extremely Low Birth Weight Children at School Age," *Pediatrics* 116, no. 2 (August 1, 2005): 333-341.

inherently a subjective matter, we should be cautious about assessing QOL. In the case of adults, evaluating future QOL can be challenging, but in most cases, the patient and physician can engage in shared decision-making. Newborns are, of course, not able to participate in discussions over their own care. Physicians only have their own subjective assessments to rely on, as well as those of the parents. Yet, there is evidence that doctors consistently describe the QOL of patients living with disability — particularly severe disability — as worse than the patients themselves report.¹² We should therefore also approach evaluating QOL with extreme caution and not seek to impose our own values and preferences on those living with disabilities.¹³

If intensive treatment is delivered, more premature neonates may survive, but there is a risk of prolonging death and suffering for the patient and her family. If intensive treatment is withheld, the inevitable result is greater morbidity and mortality. Both approaches have unwanted and unpredictable results. The four principles of medical ethics (beneficence, autonomy, non-maleficence, and justice) offer some additional guidance, but they too leave much room for debate.

Beneficence is often viewed as doing what is in the best interest of the patient, but what does “best interest” mean and who should make this determination? I define “in the patient’s best interest” as acting in a way that provides the most benefit to the patient while minimizing risks and harms. As for who determines risks and benefits, since in the case of a preterm newborn the patient cannot contribute to the discussion, it becomes the responsibility of family members (usually the parents) and the physician to do so.

In the case of an adult patient, the medical principle of autonomy guides the shared decision-making models of the doctor-patient relationship to arrive at a consensus on what constitutes “the best interest.” Physicians are instructed to respect a patient’s decision, even in cases in which a competent patient refuses treatment. However, since as noted above, a neonate cannot play a role in deciding on its own treatment, the principle of autonomy gives way to parental authority—as it is the parents who are primarily vested with the power to make decisions for their children.¹⁴

Parental authority has defined legal limits in all spheres, including health. Parents, for example, may decide what their children will eat, but they are not permitted to starve their children. Similarly, parents can decide where to send their children to school, but they are required by law to provide their children with schooling up to a certain age. In medicine, parents mostly retain the power to choose care for their children. Many hospital guidelines and policies suggest that in cases where decisions fall outside strictly medical judgments, the values and beliefs of the parents should prevail.¹⁵

¹² Saroj Saigal et al., “Self-perceived Health Status and Health-related Quality of Life of Extremely Low-birth-weight Infants at Adolescence,” *Journal of the American Medical Association* 276, no. 6 (August 14, 1996): 453-459.

¹³ Saroj Saigal, “Perception of Health Status and Quality of Life of Extremely Low-birth Weight Survivors: The Consumer, the Provider, and the Child,” *Clinical Perinatology* 27, no. 2 (June 2000): 403-419.

¹⁴ Rosalind Ekman Ladd and Mark Mercurio, “Deciding for Neonates: Whose Authority? Whose Interests?” *Seminars in Perinatology* 27, no. 6 (December 2003): 488-494.

¹⁵ Ladd and Mercurio, 488-494.

Although they may not act in ways that explicitly go against a newborn's interest, parents — as opposed to physicians — are also not obligated to act in accordance with the best interest of the child. The Baby Doe Case serves as a classic example.¹⁶ The parents of Baby Doe decided against an operation to repair a tracheo-esophageal fistula that would have allowed their newborn living with Down Syndrome to survive, and as expected, the baby succumbed to its disabilities and died.¹⁷ The court later upheld the parents' right to refuse treatment for their child, even though it resulted in the baby's death. As this case highlights, not all parental decisions are unequivocally in the child's best interest. Similarly, while providers and families may come to the same conclusion as to whether or not to provide life-sustaining treatment, this does not mean that the resultant action (or inaction) is, in fact, in the best interest of the child.¹⁸ There are many instances in which it is difficult for providers and/or families to determine what is in the best interest of the child, constituting what some have termed an "ethical gray zone."¹⁹

Nevertheless, this does not absolve the physician of her responsibilities to the patient, chief of which is a responsibility to inform the family about treatment options. Evidence shows that parents' views can be influenced by the way in which the information is presented.²⁰ We should be honest with ourselves and with our patients' families about the available evidence and the weaknesses and limitations of the data.

The principle of non-maleficence also plays a role when decisions are made on treatment for premature newborns. In the early 1980s, the U.S. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research ruled that physicians are not obligated to treat a patient if *they* believe the action would result in harm.²¹ The decision to withhold or withdraw treatment may appear contrary to the principle of beneficence, but this choice is often justified by the principle of non-maleficence.²² A physician should avoid subjecting a newborn to months of invasive and painful procedures (surgeries, needle sticks, tube feeds) without clear benefit. Thus, acting in the "best interest" of the child may include not providing life-sustaining treatment (resuscitation, intubation, surgery). Although this raises the question of what benefit is worth a protracted NICU hospitalization, it seems reasonable to assume that there is some threshold for which a person would opt out of receiving painful interventions if there is no clear benefit.

¹⁶ *Infant Doe v. Monroe Circuit Court* in the matter of the treatment and care of infant Doe, Circuit Court of the county of Monroe, State of Indiana, (1982), Case No. GU 8204-004A.

¹⁷ Gregory Pence, *Classic Cases in Medical Ethics*, 4th ed. (New York: McGraw-Hill, 2004), 219-220.

¹⁸ See Jehanna Peerzada, Douglas Richardson, and Jeffrey Burns, "Delivery Room Decision-making at the Threshold of Viability," *Journal of Pediatrics* 145, no. 4 (October 2004): 492-498; and Ingrid Miljeteig et al., "Impact of Ethics and Economics on End-of-Life Decisions in an Indian Neonatal Unit," *Pediatrics* 124, no. 2 (August 1, 2009): e322.

¹⁹ Mark Mercurio, "The Ethics of Newborn Resuscitation," *Seminars in Perinatology* 33, no. 6 (December 2009): 361.

²⁰ Jehanna Peerzada, Douglas K. Richardson, and Jeffrey Paul Burns, 492–498.

²¹ President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment*, (Washington DC: US Government Printing Office, March 1983), 199-229.

²² Mercurio, 358.

Justice, the fourth basic principle of medical ethics, takes the discussion in a somewhat different direction. The threshold for initiating treatment for premature newborns differs substantially from country to country. In the United States, the threshold is 22 or 23 weeks, whereas in parts of India, it is 28 weeks. The principle of justice compels us to treat all neonates equally across all settings, but providers and families confront different dilemmas in resource-rich and resource-poor areas. Is justice served when money is devoted to save a newborn who may not survive, instead of being spent on food, medicine, shelter, and school fees for other siblings?

The revised AAP guidelines about withholding or withdrawing intensive care for the critically ill newborn clearly state that these decisions must not “be based on the financial status of the parents or financial interests of the physician, hospital, or any third-party.”²³ Yet, this is not a worldwide policy. A recent study documented how resource-scarcity led physicians in a particular NICU in India to take socioeconomic factors into consideration when deciding on life-sustaining treatments for preterm newborns.²⁴ In particular, the physicians openly discussed financial costs for current and future treatments with patients’ families. The physicians also justified treatment decisions based on factors such as a desire to protect families from financial ruin, a concern for using limited resources in a cost-effective manner, the absence of a good system to support persons with disabilities, and the lack of formalized national legal guidelines.²⁵ This study demonstrates important distinctions between care in resource-rich and resource-limited settings.

Should we deny life-sustaining treatment to a neonate with a low probability of surviving her NICU hospitalization and an even lower probability of living without a disability merely because the child was born in a different country? If the prognosis is the same, is there any morally relevant difference between a 26-week old infant in the U.S. and one in India? Are we ready to tell the families of these newborns that our decision to not treat their child rests on a concern about the “greater good” or that it would be more effective to use our resources on some other child?

This is all too similar to the rhetoric adopted by Nazi doctors in their effort to “cleanse” Europe of Jews, and people with disabilities. Nazi physicians felt morally justified as they starved and murdered people they deemed unworthy of life.²⁶ And as scholars have shown, the abuses of power and egregious acts of violence and murder were not only committed by “incorrigible fiends” like Josef Mengele, but by ordinary, competent, and responsible physicians whose uncoerced actions and beliefs grew out of their assumed

²³ American Academy of Pediatrics Committee on Fetus and Newborn, “Noninitiation or Withdrawal of Intensive Care for High-Risk Newborns,” *Pediatrics* 119, no. 2 (2007): 401.

²⁴ Ingrid Miljeteig et al., “Impact of Ethics and Economics on End-of-Life Decisions in an Indian Neonatal Unit,” *Pediatrics* 124, no. 2 (August 1, 2009): e322.

²⁵ Miljeteig et al., “Impact of Ethics,” e322.

²⁶ Arthur Caplan, “How Did Medicine Go So Wrong? Is Moral Inquiry into Nazi Medical Crimes Immoral?” in *When Medicine Went Mad: Bioethics and the Holocaust*, ed. Arthur Caplan (Totowa, NJ: Humana Press, 1992): 53-57.

superiority.²⁷ Physicians today should be wary of assuming that their greater knowledge or status guarantees they are making the best decision for patients who are unable to decide for themselves about treatment options.

While the previous discussion may not provide definitive answers to the difficult ethical questions we face in the NICU, we can take action in three ways to ensure we do not follow in the footsteps of doctors under the Third Reich. First, we can be honest with our patients' families and colleagues about the quality of the evidence supporting our medical judgments. We should be more comfortable telling families that we do not have accurate data about the prognosis of survival or disability, and we should engage them in a thorough discussion about the limitations of our evidence. Second, we can equip health care providers with skills in ethical reasoning and shared decision-making. These skills are not always explicitly taught during medical training, and providing physicians with this competency will permit them to approach ethical quandaries responsibly. Lastly, we should continue to advocate for our patients. We should demand greater financial investments in resource-limited settings and ensure that the distribution of new medical technologies is accompanied by laws and guidelines to direct the equitable provision of services. Through honesty, education, and advocacy, we can focus on what matters most: our patients.

²⁷ Caplan, 53-57.

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
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2014
JOURNAL

ALUMNI
PAPERS

INTRODUCTION TO A SAMPLE OF FASPE ALUMNI PAPERS

This year marks the fifth publication of the FASPE Journal, and we are pleased to add a section dedicated to a sample of writing by our alumni.

When the FASPE Journal debuted in 2010, it included examples of the final projects written by the 42 new Fellows who had participated in the first formal FASPE program. Eight students had traveled the previous year in a pilot program, but the Journal focused on the work of the new Fellows who made up the great majority of all FASPE Fellows.

After five years of implementation, FASPE now counts 259 alumni among its ranks and seeks to recognize their sustained engagement in discussions about professional ethics by including some of their writings in this Journal.

The three works that follow represent some of the different ways in which our alumni continue to grapple with the topics discussed on the FASPE trip. The first is a sermon written by Jillian Cameron, a rabbinical student who participated in the initial Seminary trip in 2010. Ordained two years later at Hebrew Union College — Jewish Institute of Religion, she went on to serve as a rabbi at a synagogue in Virginia before becoming the Director of Interfaith/Boston. The sermon recounts her FASPE visit to Auschwitz and highlights the strength of the interfaith connections made by her cohort of Fellows — a sentiment that has stayed with her five years later.

The second piece is a reflection by Rachel Hadler, a medical student who was part of the first Medical cohort in 2010. At the time of her FASPE trip, Rachel had just completed her third year at the University of Pennsylvania's medical school. She notes in this paper how the topics discussed on that trip continue to resonate with her five years later.

The final alumni piece is written by Reverend Adam Kelchner, who was a divinity student at Vanderbilt University when he participated in FASPE in 2012. Now a Methodist minister, he writes about the silence of his fellow clergy on one hot-button issue in Tennessee and how this reminds him of the silence of many clergy members during the Holocaust.

We look forward to including more work from FASPE alumni in future years.

THORIN TRITTER, PH.D.
MANAGING DIRECTOR, FASPE

**A Sermon Given on Yom Kippur Morning at
Temple Beth Ha-Sholom, Williamsport, PA**
By Rabbi Jillian Cameron, 2010 FASPE Seminary Fellow

I walked through the gates with immense trepidation, carefully watching each step before me. I glanced behind me and followed the long line of train tracks with a single destination; a sole function; a delivery method par excellence. With each step, I felt my heart beating stronger and stronger, my breath quicken. My eyes darted around. My stomach dropped. Each part of my body reacted independently, yet united in fear and terror. I walked through the gates of Auschwitz-Birkenau and my feet, my heart, my lungs, my eyes and my stomach cried together – turn around! I obeyed before my brain had the time to catch up and as I turned, a loud, strong, comforting voice pierced through: “*Allahu Akbar*, God is the greatest.” I looked over at my Muslim friend, Bilal, as he continued the Muslim call to prayer and watched as our group of 12 seminary students, four Jewish, six Christian and two Muslim, also turned towards him. We had each prepared as much as we could for this day, some read comforting psalms, some talked through their fears, some slipped into silence. Each of us walked through those gates with different expectations and we each entered that place alone. Some had made it several yards in, while others held back, close to the open gate, not yet able to continue forward. We were scattered until we heard that loud piercing note, the reminder of God in a place easily and often described as god-less.

We each made our way toward one another and amid the beautiful praise of Allah, I heard, “The Lord is my shepherd, I shall not want,” and then, “*El maleh rachamim shochein bamromim*,” then another voice, “thy kingdom come, thy will be done on earth as it is in heaven,” and finally I heard my own small voice barely audible, “*Elohai n’tzor l’shonim meirah u’sfatai m’daber mirmah*, My God, guard my speech from evil and my lips from deception, save with your power and answer my prayers.” The prayer buzz filled the air around us. I could almost see the words lifting from our mouths and rising to encompass the vast space. As individuals, we were lost, but as a group, even with differences that spanned continents, religions, gender, and a multitude of hot button issues, we stood together, stood strong, ready to witness the very worst of human nature.

Today we read from Deuteronomy, “*Atem Nitzavim hayom coolchem, lifnei Adonai Elohechem*.” You stand today, all of you, before Adonai our God. Moses assembles the children of Israel before him. He does not merely gather the community elders or the priests or even just the men. Moses calls forth the entirety of Israel, not discriminating between those who may be considered important in an ancient context and the groups which are most notably forgotten, the women, children or the stranger residing within the Israelite community. He does not distinguish between the richest members or the lowliest woodchopper or water-drawer. All are gathered. All stand together. All witnessing the final words of their great leader and their charge for the future.

Today, on our most holy of days, we exist in our annual tenuous balance, hovering ever so slightly between life and death, between last year and this coming year, between what was and what will be. The Israelites stood together to hear the words of God through

Moses, the reiteration of the most sacred bond, the covenant, between the Jewish people and God. Every member of the community stood listening to the responsibility we each have to maintain and uphold this contract, how we treat each other, how we treat ourselves, how we are to live in the world. They were not just physically standing before Moses but they also stood together as a community, agreeing to conduct themselves in a certain way, living for justice, freedom, and peace.

We stand together here as a community and with all Jews around the world, but what do we stand for? Who do we stand with?

Amid the personal reflection so deeply entrenched in this holy day, we cannot help but look outward as well. None of us exist merely in our own lives, we all affect each other. Today we have an opportunity to decide what we stand for and whom we stand with.

We stand for justice and equality, the chance for all people to make the same decisions we each make so easily each day. We remember the commandment to love the stranger and we try to love those we do not know, love those we disagree with, love those who do not treat us the same way. We remember that we were slaves once in Egypt and we cannot allow such hardship and inhumanity to exist in the world around us. We remember that peace is our highest goal; in our prayers each time we gather together and we struggle to achieve it in these complex and uncertain times.

Perhaps this all seems unattainable, out of our reach. In our parsha, Moses reminds the Israelites, “Surely, this Instruction which I enjoin upon you this day is not too baffling for you, nor is it beyond your reach. It is not in the heavens, that you should say, ‘Who among us can go up to the heavens and get it for us and impart it to us, that we may observe it?’ Neither is it beyond the sea, that you should say, ‘Who among us can cross to the other side of the sea and get it for us and impart it to us, that we may observe it?’ No, the thing is very close to you, in your mouth and in your heart, to observe it.”¹

It is part of us all. We hear that small voice within us, softly commending our actions when we listen to one another, when we provide for another human being, when we take care of the needs of someone else before our own, when we stand together as part of a community. We hear that voice, perhaps in the pit of our stomachs, when we take our frustration out on another undeservingly, when we fall deaf toward the screams of injustice, when we fail to look outside ourselves, when we decide to stand alone. This voice within each of us comes from our own struggles and the struggles of our people, from the myriad of life experiences, from collective and personal history, from our relationship with God. We are reminded that our strength comes from one another and we stand, joining our lives, creating relationships to better the world.

We stand with our families, sharing the joys and hardships of daily life, we stand with our community, striving to work together for a holy purpose, we stand with the Jewish people around the world, hoping to put aside differences and fulfill our sacred covenant

¹ Deuteronomy 30: 11-13.

and we stand together as members of the global community, praying for peace and understanding, opening our hearts to all the variety and diversity that exists. Where there are those who stand alone, we join them. When we feel as if we are standing alone, we are joined. The thing, that voice, is very close to all of us, in our mouths, in our hearts, we can choose each day whether or not to observe it.

When our day at Auschwitz-Birkenau came to an end, and we made our way back toward that looming gate, my 11 fellow seminary students, my friends. Silently, we all put our arms around each other. We walked slowly in a long line. I could feel the energy of the people beside me as we each attempted to begin to process the experience. The utter emotional exhaustion, the almost blank numb feeling that we could never fully understand this place. We walked together, silently supporting each other. I looked at the pained faces of my Muslim, Christian, and Jewish friends and softly began, "*Oseh Shalom bimromav, hu ya'ahseh shalom aleinu, v'al kol Yisrael v'imeru amen.*" I lifted my head as we passed through the gate singing of peace, the gate that so many could not pass through. Each step we took, we stood for community, we stood for understanding, we stood for a new future, a better future, we stood for peace. It was in our mouths and in our hearts.

This year we will heed that small voice within us, reminding us of our responsibility towards our covenant with God. This year we will stand courageously against the evil in the world, in our lives, and in our hearts. This year we will stand proudly celebrating the joy, reveling in each triumph of peace, appreciating those we share our lives with. We stand with each other. We stand as a community. We stand before God.

Defining and Managing Futility in the Operating Room

By Dr. Rachel Hadler, 2010 FASPE Medical Fellow

Five years ago I participated in the first FASPE Medical trip. The ethical quandaries that we explored on this trip feature frequently in my approach to providing the best possible care that I can in the operating room and intensive care unit. I recently participated in the care of two patients whose cases highlight the immediate importance of ethical exploration in day-to-day practice, and the struggles that physicians face when we try to ‘do the right thing.’

In the first, a 90-year-old man with severe hypotension and altered mental status in the setting of a ruptured abdominal aortic aneurysm was rushed to the operating room for exploratory laparotomy and aneurysm repair. He underwent multiple rounds of cardiopulmonary resuscitation and received over 100 units of blood products before expiring in the operating room. The second case featured a teenage boy receiving a second liver transplant for a congenital condition. Over the course of his 24-hour procedure, he received over 400 units of blood products in addition to over 90 minutes of open cardiac massage before ultimately “crashing” into a cardiopulmonary bypass. He required intraoperative initiation of continuous renal replacement therapy (CRRT) and left the operating room on extracorporeal membranous oxygenation. Over the course of the next several months, he developed bilateral subdural hemorrhages, fungal sepsis, and ventilator-dependent respiratory failure. He ultimately required re-transplantation of a third liver after his transplant failed. He survived, and went on to become high school prom king, but still has an inoperable infected hepatic artery aneurysm, essentially a time bomb just waiting to rupture.

These two cases illustrate the paradox facing healthcare providers for critically ill patients. For every argument decrying the unnecessary trauma to patients and families, the redirection of resources from patients more likely to survive their hospitalization, there is an account of a patient who miraculously survived against incredible odds. In a climate of dwindling financial resources, increasing scrutiny of healthcare costs, and near-continuous advances in potentially life-saving technology, these types of cases have become increasingly common and progressively more uncomfortable. Saving a patient without delivering them into a functional future may be described as the definition of futility, but in some cases it may be the path of least resistance. The costs of action versus inaction, of initiating what one of our surgical colleagues refers to as the “surgical cascade,” are almost overwhelming, but somehow it feels easier to move ahead than to stop.

We are profoundly uncomfortable when we encounter potentially so-called futile cases in the operating room. Surgeons and surgical residents have questioned, sometimes unsolicited, the value of performing a procedure on someone “who is going to die anyway.” Colleagues cite what they perceive as the waste of staff, or time and resources; and the emotional stress both for providers and for the family and patient. Physicians are also troubled by the resource utilization component of these cases. The notion of rationing is separated from that of futility, but less so from that of unacceptability, and it

is hard not to wonder how or whether it is possible to draw a line quantifying the amount of resources to be used on a dying patient. In 2013, researchers Angela Saettele and Joseph Kras discussed the politics and logistics of taking seemingly futile cases to the operating room with resident and attending anesthesiologists at their institution. Although individual definitions of futility varied widely, most of the physicians interviewed reported that they, “Knew [futility] when they saw it,” but rarely felt empowered to derail the plan for surgery.¹ When questioned further, most physicians suggested that a shorter relationship with the patient discouraged deeper discussion of surgical goals and anticipated outcomes. Participating anesthesiologists also suggested that workplace politics and interpersonal relationships further limited their ability and willingness to question the utility of a given procedure. A quick glance through the literature of the 1990s that discusses futility in the medical intensive care unit suggests that internists have been trying to define limits for the provision of intensive care for decades. Concepts of futility have even been defined within general surgery, yet no criteria exist to guide providers through the complicated decision of whether to take a patient to the operating room or not.²

Perhaps the question we need to ask is not: “How do we stop these cases from going to the operating room,” but, rather, “Can we better educate patients for the downstream consequences related to their disease processes?” The patient with the ruptured AAA discussed above had seen a vascular surgeon in the clinic and had, in fact, been told that the morbidity and mortality risks associated with repair were too high to warrant an elective trip to the operating room. Faced with the inevitable mortality of an unrepaired rupture, though, a decision was made to go to surgery in spite of the risks.

How we manage this side of the interaction, is, perhaps, the area most ripe for reform. Perhaps this gentleman would have made a different decision had he been informed that, in the event that his aneurysm ruptured, his likelihood of survival was less than one in ten; and that, even if he did survive, he would likely spend months in an intensive care unit, perhaps being mechanically ventilated — unable to speak or communicate — perhaps dependent upon dialysis due to acute and then chronic renal failure, and perhaps with diminished consciousness due to stroke. Perhaps, as one of my surgical colleagues suggested, it is not that we need to change the way we play gatekeeper after a patient has been admitted, but rather use a patient’s presentation in the clinic as an opportunity to discuss with the patient and his or her family the goals of care and preferences in the event of an acute rupture.

A rejected, and since reinvigorated, provision (Section 1233) within the Affordable Care Act would have incentivized this sort of conversation between patients and providers, and could have provided the “carrot” needed to encourage practitioners to discuss the what ifs of surgery in the critically ill, long before they arrive in the operating room. While a national dialogue has been slow to evolve, the American Medical Association and American Thoracic Society have taken the step of outlining futility policies, and

¹ Angela Saettele and Joseph Kras, “Current Attitudes of Anesthesiologists Towards Medically Futile Care,” *Open Journal of Anesthesiology* 3 (June 2013): 207-213.

² Eric Grossman and Peter Angelos, “Futility: What Cool Hand Luke Can Teach the Surgical Community,” *World Journal of Surgery* 33, no. 7 (July 2009): 1338-1340.

regional governments in locations as diverse as Denver, Colorado, and Texas, have seen fit to develop their own protocols, with promising results. Surgeons and anesthesiologists are the groups with the clearest understanding of the sequelae of the last-ditch trip to the operating room. If we can agree that there is a problem, then it behooves us to find a space in which to address it.

**Consistent Confrontations with Power:
Gun Violence, Capital Punishment, & Abortion**
By Rev. Adam Kelchner, 2012 FASPE Seminary Fellow

On November 4, 2014, a narrow majority of Tennesseans voted in favor of amending Article I of the Tennessee Constitution to clarify the state's power to block any legal protection of abortion rights.¹ This was the culmination of 14 years of work by pro-life or anti-abortion advocates following a 2000 ruling by the Tennessee Supreme Court which upheld that access to abortion services was a "privacy right" afforded to women under the state constitution.

The amendment that Tennesseans voted for added the following language as a new, appropriately designated section of the state constitution:

Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother.

Prior to November 2013, I did not consider abortion or reproductive healthcare an issue which warranted much of my time. As a male member of the clergy, I initially deferred to female colleagues to address this matter in a public setting.

My initial hesitancy to frame reproductive health as a justice issue for my congregation pointed to an internal inconsistency in my practice of professional and ethical ministry. Since returning from my FASPE trip to Auschwitz in June 2012, I had taken public and congregational stances on a multitude of issues in Tennessee, including asking Governor Bill Haslam to issue an immediate stay on all executions in the state; lobbying to remove state legislation linking welfare benefits to the performance of elementary age children; criticizing state senators for their intimate relationship with the National Rifle Association and their failure to expand background checks; and committing to inclusive ministry for LGBTQI individuals despite denominational restrictions.

Given my commitment to confront absurd and twisted manifestations of power, the state amendment regarding women's health spurred me to act. However, in the ensuing 12 months leading up to the November election, I found clerical silence rampant among my colleagues. Rabbi Philip Rice was one of the only other clergypersons in Nashville who publicly addressed the issue at the start of 2014.

I began to take a more vocal public position, writing an op-ed in Nashville's *The Tennessean* on January 22, 2014. It was the 41st anniversary of *Roe v. Wade*. I drew

¹ The official count by the Secretary of State's office is currently being challenged in the courts.

particular attention to the named circumstances of rape and incest that would no longer be protected as legitimate ground for abortion if Amendment One were to pass:

There are young women whose lives are traumatized everyday by rape, incest, and abuse; in these situations I am particularly called to compassion - obstructing access to reproductive health care services only exacerbates shame and traumatizes women again. In these times, the community's commitment to reproductive health and justice is a needed demonstration of compassion and mercy.

In the wake of my published pieces, it was common for me to be accused of propaganda supporting genocidal conspiracy, serial murder, and a 21st century holocaust. However, what reminded me most of my FASPE experience and visit to Auschwitz was neither the invocation of Holocaust-related terminology, nor the oft-raised concern about when one life takes priority over another. The overwhelming silence of clergy to confront the attempted power grab by state senators deeply reminded me of our learning and research together regarding legislative disenfranchisement during Nazism's rise. Drawing tangential lines between the complicity of clergy and government officials in the 1930's and 1940's, I committed myself as an advocate to protect the rights of women regarding reproductive health in my community.

So I extended an invitation to Tennessee clergy, particularly those in the United Methodist tradition: "To be silent for the sake of ease is to renounce the vows to care for God's people in whatever they face and to limit the scope of public justice." But when clergy began to confront the amendment in September and October, weeks before the election, it was too late. Those, including clergy of varying traditions, who applauded the campaign to pass Amendment One won.

For me, however, the real issue here was not abortion. What struck me most, in this instance, was the way the clergy of this city have become bedfellows to the political power brokers. Collectively they abdicated or forfeited their voice to address the sense of justice that lingers in their gut. Sound familiar?

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