



F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

FINAL PROJECT
JOURNAL
2011



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THE BASIS FOR FASPE

FASPE grew out of two intersecting concerns.

The first is a recognition that the Holocaust is becoming more distant and harder to connect with. My generation—and the generations that bracket mine—grew up feeling the Holocaust. We knew survivors. They were family or friends. We heard their descriptions. Family members were victims or we knew those whose family perished. Our generations saw those who experienced, those who did not want to tell, and then those who opened the dialogue across cultures and mediums that sought meanings and explanations. This proximity in time and familiarity with survivors, that ability to feel the Holocaust, cannot exist in the same manner in future generations.

The second is the high visibility of embarrassing and horrific breakdowns among professionals. Business frauds. Medical frauds. Lawyers defrauding clients. Journalists who fail to report or report with bias. Clergy who do not speak out. The harm is not just financial; it is human and societal. It speaks to who we are. To increase the difficulty, the ethical issues facing the professions are increasingly complicated by globalization and technological change.

FASPE was born out of these two concerns and seeks to address the current ethical failures of our professionals while establishing a construct for the future study of the Holocaust. It is also grounded in the belief 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 Holocaust and in failing to halt the breakdown of societal mores. Members of the professions also continue to play an instrumental role—positive and negative—in all so-called civilized societies, including today's America. FASPE Fellows start by examining the role of their profession in the Holocaust as a way to see the power (positive and negative) of their future careers, and then expand their focus to explore contemporary ethical issues in their field.

The 2011 FASPE Fellows and their journeys last summer verify the core principle that stand as the basis for FASPE; exploring the history of professionals during the Holocaust through visits to historical sites and in-depth seminars creates a transformative experience for each individual Fellow and establishes an ethical grounding for the future leaders of our professions.

We are deeply proud of the 2011 Fellows and are pleased to present a selection of their work.

C. DAVID GOLDMAN
CHAIR
FASPE STEERING COMMITTEE

FASPE OVERVIEW

Fellowships at Auschwitz for the Study of Professional Ethics (FASPE) is an innovative effort that uses a unique historical context to engage graduate students in professional schools in an intensive program about contemporary ethics. The Fellowships provide law, medical, seminary, and journalism students a structured course of study that focuses on the role of their chosen professions in Nazi Germany and the Holocaust, and uses that historic framework to explore present-day ethical issues.

Piloted initially in 2009, between twelve and fifteen Fellows from each profession are chosen to participate in FASPE each year through a competitive process that draws applicants from across the world. In 2011 48 students participated in the program. 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). Over the course of 11 days, these students attended seminars with leading scholars and visited sites such as the House of the Wannsee Conference, where plans for the “Final Solution” were established; the Deportation Memorial “Track 17,” one of the train platforms where Berlin’s Jews were forced to board trains heading to concentration camps; and Auschwitz-Birkenau where more than one million people were murdered. During the final days of the trip, the Fellows focused exclusively on some of the contemporary ethical issues facing their professions.

The program has long-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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INTRODUCTION TO THE JOURNALISM PROJECTS

The philosopher Theodor Adorno famously said, “After Auschwitz, there can be no poetry.” While visiting the site of the notorious death camp at Auschwitz with a group of FASPE journalism students last summer, we could see the truth of Adorno’s words. There was no beauty in the barracks, the barbed wire and the crematoria. We saw no poetry in the mounds of hair and eyeglasses and shoes on display in the Auschwitz Museum.

But we did reach one other conclusion on our visit: “After Auschwitz, there must be journalism.” We took that lesson to heart by reporting and writing about everything we saw -- from the memorials in Berlin to the House of the Wannsee Conference to Track 17, where the trains packed with human cargo left Berlin, and finally to Auschwitz, where the trains disgorged passengers into the death camps.

I am proud of the work produced by these students, some of which you can read in these pages and more of which is on our website, <http://www.faspe.info/journalism2011>. But I am even more proud of the lessons they learned and the insights that they took away with them. Late into the night -- in hotel lobbies and in airport lounges, over dinners and on long bus rides -- they struggled with the horror of what they saw in Central Europe. They talked about how it could have happened and about how they, as journalists and human beings, must react when they see corruption, malfeasance and the abuse of power today. Most of all they learned from one another.

Among those in our journalism group were two students from India and two from Africa, all of whom had witnessed ethnic wars in their countries. One of the Africans, Eugene Kwibuka, was from Rwanda, which experienced a genocide of its own in the 1990s, when warring tribes killed 800,000 people. Another, Rodney Muhumuza, was from Uganda, where a madman named Idi Amin ruled in the 1970s and murdered a half million people. Before FASPE, Eugene and Rodney knew next to nothing about the Holocaust; and most of the Western students knew next to nothing about the African genocides. But FASPE opened channels of communication and understanding that will remain with us all forever. We discussed everything from the importance of a free press and the dangers of censorship, to the implications of social media and rising democratic movements around the globe.

And so the fine examples of journalism you will see in these pages are only the beginning. The fruits of what the FASPE Journalism Fellows saw and experienced on their 2011 journey will bloom for many years and in many places in ways we can only imagine. Of one thing I am confident: the lessons of Auschwitz will never leave them.

PROFESSOR ARI L. GOLDMAN
FASPE FACULTY
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Why Do We Study History, If Not to Make a Better Future?

Rebecca Lim

Georgetown University, Class of 2011

NEW YORK – Why do we study history, if not to make a better future? That was the thought that filled my mind as the documentary “A Film Unfinished” came to an end and the shades over the windows in the auditorium rolled up to reveal a magnificent sunset. The documentary, about the Nazi effort to make a propaganda film about the Warsaw Ghetto, was probably one of the most intense I’d ever seen, along with The Conscience of Nhem En (about a photographer who documented the Khmer Rouge genocide in Cambodia).

It was the end of the first day on the FASPE journalism program and we had spent the day in discussions and seminars on the role of the press during the Holocaust and covering conflict. We had also been taken on a tour of the Jewish Heritage Museum in New York by a Holocaust survivor from Poland. We were warned that the film was hard to watch, but even then, there was a cloud of silence hanging over the room for a few minutes when it ended.

I’m hardly ever at a loss for words, but in that moment, I was only able to come to terms with the horrific images I had just seen, by capturing images myself. I grabbed my camera and shot the sunset through the window. Being behind the lens made me feel safe again, even as the questions and thoughts were racing through my head about the people who shot that film in the ghetto, of the dead and dying, and the one man who recounted the process in an interview years later.

Strangely, I felt like I could understand how he could have done it...just stayed behind the camera and shot the scenes, and fall back to the concerns of the craft (i.e. was there good lighting, etc.) instead of addressing the moral and ethical issues of being an apparatus to documenting atrocities. Of course it’s morally wrong. I’m not saying it’s right. I’m just saying that for a split second, I felt like I could get into the mind of the person behind the camera. In a poetically ironic way, it was through an appreciation of beauty, that I could almost fathom the depths of horror the human soul is sometimes capable of.

I’ve always loved sunsets...because they signal to me that there will be another glorious sunrise the next day. Why study history, if it isn’t to make a better future?

What Uganda Can Learn From Germany

Rodney Muhumuza

Columbia University Graduate School of Journalism, Class of 2011

KAMPALA – I recently returned to Uganda after a visit to Poland and Germany, two countries that have in so many ways marked the atrocities committed under Hitler during World War II. Several of the death camps have been turned into museums and the deportation centers into memorials. Everywhere one travels there are reminders of the past.

But not so in Uganda. We had a Hitler-like character in Idi Amin, but there is no memorial to those who perished under his reign of terror. Historians estimate that 300,000 to 500,000 people were murdered in the years between 1971 and 1979, when Amin ruled. Finally dislodged in 1979, he fled to Libya, where he was briefly entertained by Muammar Qaddafi, and then to Saudi Arabia, where he spent the rest of his life in relative comfort. He died in 2003.

As close as Uganda has to a memorial to those awful years is a movie, a fictionalized account of Amin's rule that was made in Hollywood. The movie, released in 2005, is called "The Last King of Scotland," in which the American actor Forest Whitaker brought Amin to life in an Academy Award-winning role. The movie revived international interest in Amin, but the picture probed the dictator's personality more than his crimes. A lot of Ugandans praised the picture and were moved by the story, but what the film did not do is instill in them the need to memorialize the victims of Amin's crimes.

Kampala has never been known for monuments, and it only has a few, most of them from the colonial era. None of them remember the days of Idi Amin, a singular figure whose actions have given shape to the stereotypical view of Uganda for decades. In the annals of memory, such as they are, Idi Amin committed enough crimes that they should never be forgotten. If we accept the common accusation that Ugandans are poor readers of books, that they prefer to spend their weekends drinking beer and eating grilled pork, where can they go to revive their memory of such things, to touch base with a past they do not wish on their children? I put these questions to Michael Wakabi, the Uganda bureau chief of the *EastAfrican* newspaper, an influential weekly, and he smiled and pondered them for a while. He said it was obvious why successive governments in Uganda have been reluctant to put up a monument to the crimes of Amin—they themselves have been brutal, even if less so, and so they don't want to set a precedent. "Our history is a reminder of our failures," Wakabi said, "and so we would rather forget. We don't want to remember, because we feel too guilty."

The idea that Ugandans are forgetful has been thrown around often, and it has two dimensions. One is that they are traumatized by their violent history, so they will have none of it; the other, steeped in politics, is that the politicians have no incentive to remember the crimes of those who ruled before them—Wakabi's point. The same question once puzzled a young American journalist, the writer Andrew Rice, who lived in Uganda in the post-Amin era. Rice, who wrote pieces for the *New Republic* and the *New York Times Magazine*, became interested in the subject of murder and memory in Uganda through the eyes of one family whose father had been killed by Amin's agents. The dead man's son, now a grown man, had, through an intriguing court case, come to seek justice against his father's killers. And then, suddenly, the family had been lucky enough to trace the victim's remains and give him a proper burial. Rice's account, a riveting book called "The Teeth May Smile But the Heart Does Not Forget," investigates the family's painful efforts to come to terms with the violence that took their father. This is how it ends, with Rice detailing the words on the victim's tombstone:

ELIPHAZ MBWAIJANA LAKI
1920-1972
DISAPPEARED 1972
REMAINS DISCOVERED 2001
BURIED 2002
NO LONGER "MISSING"
BETRAYED BUT NOT FORGOTTEN

This was one man's grave, but it really was a powerful, private monument to the crimes of Amin. Rice allowed that public memorization was often a political affair, and he seemed to reject the suggestions of those who told him Ugandans just wanted to forget. "I often heard it posited—by Ugandans, among others—that Africans are inured to tragedy because so many terrible things have befallen them, that justice and memorialization are First World luxuries," he wrote, quoting an old man who told him that Africans have important things to worry about. Rice noted, "But in reality, there was nothing economically or culturally intrinsic about Uganda's approach. In Rwanda, Uganda's neighbor to the west, the countryside is dotted with memorials to those killed in the 1994 genocide."

For a long time a man named Henry Kyemba has been one of the most important authorities on the legacy of Idi Amin. He had worked as Amin's health minister before he ran into exile, where he wrote a bestseller called "A State of Blood," about the untold crimes of Amin. Kyemba is credible because he lost a sibling during Amin's murderous campaign, and journalists interested in Amin make it a point to pay him a visit, to complete the picture. In 2005, as part of a series called "Serving Amin," in which I interviewed Amin's ministers still alive for Uganda's *Sunday Monitor* newspaper, I met Kyemba at his house in Jinja, an idyllic town in the eastern part of Uganda. After I was done, he put me in his car and drove to a restaurant atop a hill overlooking the Nile. It was a beautiful view, but then Kyemba had a morbid story to recall. He put down his cup of tea and pointed out the window, to the rocky, green areas where birds now were enjoying the evening cool. "You would find bodies floating there, being eaten by the crocodiles," Kyemba said. "Every day you saw it." There is a part in Kyemba's book where he describes his decision to flee Uganda after Amin ordered the murder of Janan Luwum, the Anglican archbishop. "My friends were killed—even my brother," Kyemba wrote. "I saw corpses by the hundred. I heard of horrendous massacres. I experienced the death throes of a whole nation as it spiraled down toward mere subsistence, its population cowed by thugs who were bribed with luxury goods and easy money to kill on Amin's orders."

The generation of Ugandans who knew Amin on a personal level, who witnessed his terror, whose testimony informed our understanding of his crimes, is old and slowly being lost. Kyemba is 71 years old. What will happen when they are all gone? Will books like Kyemba's be sufficient to preserve the memory of Amin's horrible legacy? Can we simply depend on a fictionalized account like the *Last King of Scotland* to constantly remind Ugandans of that place where they don't want to be? Whether or not Amin killed hundreds or hundreds of thousands seems like a distraction at this point. His crimes were horrible enough as to deserve a lasting place in the collective memory of Ugandans—a permanent monument to the dead.

So why, then, don't we have one? Angelo Izama, who runs Fanaka kwa Wote, a think tank on regional politics and security, told me it had something to do with the immaturity of the Ugandan state. "It's a testament to the Ugandan condition," Izama said. "A common national identity has not been fully formed."

There is, however, a danger in this national tendency to forgetfulness and it was underscored by a column written in Uganda's *Daily Monitor* newspaper by one social critic, Timothy Kalyegira, not long after Amin's death in 2003. Kalyegira asked some provocative questions. The reign of Idi Amin

was terrible, he acknowledged, but did the dictator really kill 300,000 people as the historians claimed? Who did the counting? Was it possible, he wondered, that Idi Amin was the victim of propaganda by political opponents eager to see him lose favor with the British? If Idi Amin targeted only his political opponents, men often drawn from one or two tribes, how then could the number be so high in a country of nine million people?

Kalyegira is a clever conspiracy theorist, and in this case he put together a series of persuasive anecdotes highlighting instances of Amin's kindness, even to putative enemies, and of his good standing with some Ugandans whose relatives were allegedly killed by Amin's thugs. The result was an offensive piece in which he concluded that it is possible that Amin was not the monster he had been made out to be. "It would surprise many people to know that, as bloody as Idi Amin no doubt was, much of what is said about him started largely as a smear campaign in part by Ugandan exiles to hasten his downfall," Kalyegira wrote. "Because we rarely read, much less think and scrutinize issues and events, rarely record our history, we are always subject to being deceived, to having people claim heroism for themselves or infamy for their political rivals, and we believe it all."

As it turns out, an article like Kalyegira's could never be written in Germany, where Holocaust denial is a crime. But even without such laws in Europe, revisionism would never gain traction there. After all, Germany and Poland, where so many of Hitler's crimes were carried out, are littered with monuments and memorials to what happened during World War II. Isn't it time that we in Uganda had some monuments and memorials of our own? They would serve as a witness to history that no one could dismiss.

Silence is Complicity

Laura Rena Murray

Columbia University Graduate School of Journalism, Class of 2011

NEW YORK — The steps of Auschwitz are disappearing. Millions of footsteps degrade the stone every year. The camp seems to be disintegrating, falling into the void of history. And by struggling so hard to retain the memories of the Holocaust, by making the journey to walk the same halls and wince at the barbed wire, the physical reality of Nazi horror slowly disappears.

At Birkenau, there's a glass case with a peaked roof located between the third gas chamber and the building where Jews and other prisoners were herded for registration upon arrival. The case sits under the sun, protecting spoons, forks and other remnants that continue to be found on the grounds, tools that were used by victims of the Holocaust before they were slaughtered. Tools that were prized and irreplaceable. Perhaps possessing a spoon reminded someone of their humanity as they hurried to the mass toilets for the allotted five seconds. Flowers sprout under the glass. Visitors marvel at them, ignoring most other flowers that scatter the grounds. These buds are extraordinary because of their location, because they shade the utensils we cannot touch. When someone in the group remarks on them, our guide responds, "Nature always wins."

This was an enormously intense trip. The word "pain" feels too weighted now. I don't know that I can use it again. Now that I'm back in New York, I am left grasping for words. I can't explain the haunted spirit that returns to view the photographs my friends and colleagues took while we visited Auschwitz. I read and reread our articles when I cannot sleep. It feels like a precarious tether to a shared experience that I cannot relinquish just yet.

At the end of our trip, I found out my middle name means "joy" in Hebrew. Although the construction of Auschwitz and the process of envisioning what truly occurred there seemed too stark to imagine moments of joy, I noticed we all paused with upturned faces to enjoy the sunlight and marveled at the flowers when we stumbled out of the barracks. I hope there might have been similar small private moments for the people who lived and died at Auschwitz.

No matter the context or the circumstances of my future assignments, I will always carry the memory of Auschwitz with me. Silence on the part of journalists in the face of such atrocity is complicity. I will not remain silent.

Uncertain Future: The Struggle to Maintain Artifacts that Never Should have Existed

Suzanne Rozdeba

NYU Arthur Carter Journalism Institute, Class of 2012

OŚWIECIM, POLAND — Ewelina Bisaga is bent over a worn blue suitcase, Q-tip in hand. A conservator at the Auschwitz Museum, she gently slides the cotton swab along the suitcase's edges, slowly removing some residue. Almost 70 years ago, that luggage, filled with clothing and personal possessions for what would be its owner's final journey, was carried into the concentration camp by a prisoner deported there by the Nazis. Today, it lies open, anonymous, never to be claimed, on a table in a whitewashed room at the conservation department in the museum. Its fragile fate is in the hands of Bisaga.

"We try to do the least amount of conservation on an object," Bisaga, 31, says in Polish, describing how she approaches her daily work. "They are damaged, and their state is telling of their history."

Bisaga, who lives in Oswiecim, Poland, is one of 11 conservators who work meticulously to preserve the past at the former concentration camp established by the Nazis in occupied Poland during World War II. Bisaga has been working at Auschwitz since 2003.

At the museum, and particularly in this conservation department, which handles fragile items like prisoners' artwork and thousands of documents, shoes, and suitcases, preservation is seen as an ethical as well as a practical issue. But these conservators must also wrestle with questions about the proper role of restoration. "People who come here don't want to see a replica of how something might have once looked," says Ewa Cyrulik, another conservator. "They are looking for the original condition, as if the objects exist as guardians of history."

Conservation work at Auschwitz is unique; while some basic rules of conservation do apply, others defiantly do not. And threading that needle is an ethical conundrum the conservators face daily. "It's an experiment in doing something unbelievable, but we have to guide ourselves this way, and work in an orthodox way," Cyrulik says. "Then we have a chance that these objects will affect the people who come here, that they'll see these original, historical objects."

A new conservation department, with new workshops, opened at Auschwitz in 2005. Its budget last year was 11.3 million euros, around \$15 million. The Auschwitz-Birkenau Foundation is seeking to raise an additional 120 million euros in a two-year campaign ending this year for an endowment to fund future preservation work. So far about 85 million euros, or \$122.5 million, has been committed, according to Pawel Sawicki, a spokesman for the museum and a Polish radio journalist, including a subsidy from the Polish Ministry of Culture and National Heritage and a grant from the European Infrastructure and Environment Operating Program.

When Auschwitz was liberated by the Soviet army in January 1945, it covered 40 square kilometers, with three camps, sub camps, and an additional area that was supervised by SS administration. "There were some voices [saying] that it should be completely dismantled because this memory is so difficult," says Sawicki. But a group of former prisoners began talks with the local government to keep the former concentration camp intact as a memorial. The Polish government began initiatives to

preserve the site, giving the Ministry of Culture and Art the authority to preserve parts of it. The ministry named former prisoner Tadeusz Wasowicz as the head of the Protection Board, and in 1946 work began on creating a museum.

Since then, the fragile future of artifacts in the museum's possession has been constantly discussed. Among the artifacts are 110,000 prisoners' shoes, 3,800 suitcases, 6,000 works of art, and, often most harrowing for visitors, the pile of hair collected from the heads of 30,000 murdered women.

Beyond the artifacts, one of the impending projects is the preservation of 45 brick barracks at Auschwitz-Birkenau's former women's camp. Environmental conditions are viewed as the biggest barrier to preservation. "This is very difficult because protecting a standing building is relatively easier than protecting a ruin from all-natural conditions, atmosphere, rain, and cold, which is the biggest threat here," Sawicki says.

The foundations themselves are also fragile. "The structures in Birkenau were built by prisoners and were not built to last 70 years," he says. "They were built from weak materials; these are weak constructions. And the fact that they are still standing today is a miracle, and this is more and more difficult to upkeep them and preserve them."

For all the rigorous ethical standards that guide their everyday work, conservators believe they have a bigger mission than daily preservation. "We need to conserve objects that speak of the many histories of this place," says Cyrulik. "We maintain that history for the future. Maybe in some way, with our work, this will protect someone, and in the future, these things won't happen again."

Last Words: The Letters of Holocaust Victims Leave a Lasting Legacy

Emily Shenk
Georgetown University, Class of 2011

The letters just kept coming. Several times a day, on the railroad tracks behind the Polish work camp where the young Sol Rosenkranz was imprisoned by Nazis during World War II, trains some 40 cars long would roll by. And every time, without fail, the letters would come flying out.

“It was only two little windows in each car—one at either end. People threw out notes from those cars and those notes fell down on the ground,” Rosenkranz remembers now. “Of course we could not go get them, but the Polish people living on the outside, the kids were running back and forth and they picked up those notes and pushed them into our camp.”

One day in the fall of 1942, Rosenkranz was shocked to find a letter meant for him. It was written by his sister-in-law, Luva. She was on the train with Rosenkranz’s mother, sister, and nephew. He knew the train tracks led to Treblinka, the now-famous extermination camp.

“They all knew they were going to their deaths. They were very much aware,” Rosenkranz says. “I was devastated that I lost my family. But at the same time, if one should look a little deeper into what happened, you could imagine people throwing out notes from a train, not knowing which direction they’re going and at what point they throw out those notes. So it ended up that they threw out those notes right in front of our camp. You could imagine the odds for the note from my family coming into my hand—I would say one in a million.”

The letter from Rosenkranz’s family asked that he try to survive and tell the world what happened. Though he was forced to give up the letter when he entered Buchenwald a few years later, he never forgot his family’s last words. Today, the 93-year-old is honoring their request to speak out by telling his story several times a week as a volunteer at the Museum of Jewish Heritage in New York City.

While Rosenkranz’s story is remarkable, it is not uncommon. Many Holocaust victims tried to leave messages for loved ones in the last days of their lives, sending letters by mail when it was available or through good Samaritans, or by more unconventional methods like hiding notes in fences or synagogues. Following the war, some of these letters were turned over to liberators or eventually passed on to their intended recipients. Many letters that reached their original destinations during the war were kept by the recipients for years—sometimes hidden away in attics or closets, preserving meaningful but painful memories of loved ones. Over time, relatives have donated thousands of personal documents to Holocaust museums and archives around the world.¹

These collections are inspiring new ways of thinking about the Holocaust. While scholarship about the Nazis’ persecution of Jews and others has traditionally focused on the methods and policies of systematic killing, historians have been coming to recognize the special insights these letters and

¹ Most of the letters quoted in this article, unless otherwise specified, were published in a 2004 collection from Yad Vashem called Last Letters from the Shoah. The letters come from 13 archive collections around the world, as well as private sources, community memorials, and other anthologies.

other documents offer into the everyday lives, personal relationships, and emotional responses of the victims. “There’s been no change in the availability of sources,” says Emil Kerenji, a scholar at the United States Holocaust Memorial Museum’s Center for Advanced Holocaust Studies. “But intellectually there’s been a change in recognizing that grandma’s diary is a historical document, which wouldn’t have been recognized in 1952.”

Many of these documents represent the last communications that victims made to their loved ones. In some cases, the desire to write was driven by something simple: that the authors might be remembered. On March 2, 1941, David Berger wrote from Vienna to Elsa Gross: “Be well, Elsa, and keep on going. I remember you. If something happens, I would want there to be somebody who would remember that someone named D. Berger had once lived. This will make things easier for me in the difficult moments.”

While each letter is personal, the letters as a whole often show the desire to live and the persistence of human hope. Time and time again, even in goodbye letters before death, the writers included messages of hope, expressing the possibility that somehow their fates would change and they would be reunited with their families. Awaiting her execution in prison, Gusta Berger-Ehrlich wrote to her daughters: “I force myself to eat so I won’t starve to death, because maybe some miracle will happen and I will get out of here alive. I have always believed in dreams and therefore maybe this time some miracle will happen to me also.”

Kerenji and Leah Wolfson, his colleague at the U.S. Holocaust Memorial Museum, are working on a five-part series of educational books called *Jewish Responses to Persecution*. The series examines contemporary sources written or created during the Holocaust, including letters, photographs, diaries, and other forms of communication. It is organized chronologically, allowing readers to study the documents in the context of the larger history of World War II. “[The letters] give you a really interesting perspective on what daily life is like and what daily concerns are like in a way that perhaps looking at history from the top down as opposed to the bottom up doesn’t necessarily give you. It’s one thing to know about the fact of a deportation, but what does it mean to be living in the middle of it?” Wolfson says. “The idea is to cast as wide a net as possible and to really look at the many different ways and many different contexts in which Jews responded to what was going on and how that’s different based on region and based on time period.”

Kerenji is careful to point out that the writers’ responses should not be judged based on our own perceptions today. He says that while some of the letters acknowledge the significance of what is happening to the Jewish people as a whole, many do not. “If people are realizing that they’re going to die, you can’t expect them to think of the grand picture,” he says. “It’s very difficult, in fact, to generalize. I don’t think we can ever have a representative sample of letters from which to try to resolve this issue. I wouldn’t say that reading letters and not finding this statement about Jewish fate or Nazi genocide means that people were naïve or oblivious; it was a very different moment for them than it is for us, and we can never really be in that situation.”

Having access to a variety of correspondence can give historians insights into a broad spectrum of experience. Some museums are stressing the importance of these letters by encouraging relatives to donate them for safekeeping. Yad Vashem, Israel’s official memorial to Holocaust victims, recently launched a new campaign for document collection called *Gathering the Fragments*. “Family members still hold letters and other artifacts, not being aware of their importance,” says Bella Gutterman, Director of the International Institute for Holocaust Studies.

Gutterman says that Yad Vashem’s archives already hold more than 10,000 letters written during the Holocaust. Many of them manifest hope and faith, some explain wills and last requests, others

express concern for the writer's children and parents, and still others convey a sense of doom, revenge, or resistance. Gutterman explains that these messages were transferred in various ways. "Some were given to Polish neighbors, some were hidden in the houses, some were thrown out from trains, some were sent when it was still possible," she says. "We even have last messages written on walls, signed and calling for revenge."

On a recent visit to Birkenau, the death camp associated with the infamous Auschwitz complex, I stood among the ruins of three gas chambers and struggled to come to terms with the evil that had existed all around me. A light breeze was blowing, and a chorus of birds sung overhead. The area had a quiet—strangely calming—feel. But according to folklore, in 1943, when Alice Bala was imprisoned in Birkenau, no birds were singing. A tour guide told us that birds stayed away from the air above the camp because the smell of death was too strong.

In July of that year, Bala wrote from Birkenau. She used the name Halal, which is associated with the term slain in Hebrew, to encode the real meaning of her message: "Mrs. Halal [Slain] is very diligent here. Back home I didn't like it when she would be in my house, but here I'm with her all the time, and I've already befriended her."

Bala's stratagem is just one example of how many prisoners got their letters through Nazi censorship. Kerenji explains that while people sent to death camps like Birkenau or Treblinka were rarely alive long enough to have a chance to write to loved ones, some limited communication was possible from the camps. Letters typically had to be written in German so that Nazis could read them. "In labor camps, for example, there would be forms printed by the Nazi state, and you would be able to write to your family," he says.

People who wrote from the camps had to pay dearly in order to obtain writing supplies. "In the camps Jews had to pay with portions of bread if they wanted to get a small piece of paper or a pencil," Gutterman says.

At first glance, the letters written from Nazi camps seem formulaic, stating simple facts: that the writer is alive and perhaps in need of bread or other items. But when they are read by trained eyes, coded meanings emerge. "You'll see sometimes there's a particular phrase that jumps out on a number of occasions that becomes a pseudonym for something else," Wolfson says. "Sometimes in German letters there will be some Hebrew spelled out, thrown in there." Often Jewish writers would use Hebrew or Yiddish words to get their messages through to others.

"The interesting thing about the codes is that [the letters] have them across the board—it's not just in Polish or German," says Kerenji. For example, Riva Sara Nisdovska wrote this coded message to Natan Schwalb in Switzerland: "Mr. Gieruss [Deportation] is staying with us and bringing with him also Mr. Mawed [Death]. And then we hope very much for Hazalah [Rescue]."

In other situations, Jews practiced different forms of written resistance. For three years, Jews confined in the Warsaw ghetto carried out an underground project to document the Nazis' unprecedented effort to control and eventually deport hundreds of thousands of "undesirable" Poles. Their work, most of which survives to this day at the Jewish Historical Institute in Warsaw, is now known as the Ringelblum Archives, named after Emanuel Ringelblum, the Jewish historian who led the project. Ringelblum and others interviewed Jewish refugees about events in their hometowns, talked to people who had escaped from death camps, and also documented what life was like in the ghetto. When it was clear that the ghetto was going to be destroyed, the contents of the collection

were buried in metal boxes and milk cans and not discovered until after the war. Parts of the archives are still missing.

Inside the museum at Berlin's Memorial to the Murdered Jews of Europe, in a dark space called the Room of Dimensions, several beams of light drop from the ceiling. Images of handwritten letters are projected onto the floor below, as tourists from around the world walk around the edges. One letter, written on July 31, 1942, is from a 12-year-old girl named Judith. She wrote: "Dear father! I am saying goodbye to you before I die. We would so love to live, but they won't let us and we will die. I am so scared of this death, because the small children are thrown alive into the pit. Goodbye forever. I kiss you tenderly."

It is perhaps the farewell letters from children—those we feel are too young to be asked to comprehend their own death—that are the most difficult to read. Chaim, a 14-year-old son of Jewish farmers, was imprisoned in a camp in Pustkow, Galicia (now Poland), where he eventually died. He inserted his final letter, which describes a heartbreaking daily routine, in the camp's barbed wire:

My Dear Parents!

If only the sky were paper and the world ink, I wouldn't be capable of describing to you my suffering and all that I see around me.

The camp is situated in a forest clearing. Already early in the morning they take us out to work in the forest. The soles of my feet are bleeding, because they took my shoes from me. We work all day, with hardly any food, and at night we sleep on the ground (they also took our coats from us). Every night drunken soldiers come and beat us with wooden sticks, and my body is already black from bloodstains under the skin and it looks like a piece of charred wood. Sometimes they toss us some uncooked carrots, or beets, and this is shameful and disgraceful: here fists fly in order to grab a little piece or a small leaf. The day before yesterday two boys escaped, so they lined us up in a row, and every fifth one in the line was shot to death. I was not the fifth but I know that I will not leave here alive. I part from you, dear Mother, dear Father, dear brothers, and I cry...

Messages between parents and children range from the tearful, like Chaim's letter, to the practical. Gusta Berger-Ehrlich, the condemned prisoner who in the summer of 1942 was forcing herself to eat while hoping for the "miracle" that never came, wrote a series of letters to her daughters from jail. In return for a fee of 5 zlotys for each day of her imprisonment, her jailer agreed to deliver the letters to the girls. Berger-Ehrlich's first letter carried advice to her oldest daughter that suggested she was realistic about her chances of survival: "Considering that after my death your lives must continue and move forward, because this is the calling of life, I would like to give you, Vladz'ia, some instructions and worldly explanations. I'm convinced that someone will help you find solutions for Agussia's education. I know that if Poldi returns, you will take care of her. And if, Heaven forbid, something happens to Poldi, in my opinion, you should complete your studies and education in order to achieve an independent position. Learn in the Polytechnion! Your experience as a draftswoman will help you and give you an independent position even with the most devoted husband."

Sarah Gerlitz, from Będzin, Poland, wanted to leave her daughter with a different message—one of pride. "Your mother walked with an upright posture, despite all of the humiliations that we suffered from our enemies, and if she is sentenced to die, she will die without condemning, without crying, but she will put a scornful smile on her face while facing her executioners," she wrote. Unlike many of the

writers cited here, Gerlitz survived. She and her husband were eventually reunited with their daughter and emigrated to Israel.

Sometimes, letters weren't sent through camp mail or passed on by others. Instead, they were inscribed on the walls of tragic places. In the fall of 1942 in Kovel, Volhynia (now Ukraine), all of the town's remaining Jews were gathered in a synagogue and shot in groups. It is in that synagogue that two women left their last messages in their own blood. The notes from Ester Shroll and Gina Atlas both seek vengeance. Shroll asks those who remain alive to remember "our little and innocent street of the Jews" and calls for "revenge against our murderers." Atlas leaves a message for her husband, Reuven, telling him that their son was murdered. "Go to war and take revenge for the soul of your wife and your one and only son," she writes. "They are taking us to die, and we are innocent."

We can never presume to know how the authors of letters written during the Holocaust wanted their words to be read. But it is apparent that the letters have left a legacy that stretches far beyond their intended recipients. The study of Holocaust correspondence is part of an overall movement in how history is being studied today. Wolfson explains that she is seeing a shift in Holocaust scholarship that is less about how Jews died and more about how Jews lived. "What constantly amazes me are the different types of ways in which people respond—everything from the very everyday to the not-so-everyday," she says. "To me, that's a great testament to how people lived."

The importance of these letters continues to prove itself. During the recent trial of John Demjanjuk, an SS officer at the Sobibor extermination camp, Rudolf Salomon Cortissos read a letter from his mother, Emmy. "I promise you I will be tough and I will definitely survive," she wrote. She threw the letter from a train on the way to Sobibor, where she perished just days later. Demjanjuk was convicted of 28,060 counts of accessory to murder in May.

Nearly 70 years after the Holocaust, its victims' voices are still being heard.

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

FINAL PROJECT
JOURNAL
2011

LAW PROJECTS

INTRODUCTION TO THE LAW PROJECTS

Amos Friedland, Eric Muller and I were privileged to serve as the faculty for the 2011 FASPE Law Seminar. We accompanied eleven students from six law schools for some ten days as we traveled together from New York to Berlin to Auschwitz-Birkenau and Krakow. As we talked together in formal seminar sessions and informal settings, we tried to understand the professional failures of lawyers and judges in confronting evil virtually beyond comprehension. The Holocaust was the principal focus of our deliberations, if only because the places that we visited in Europe were still dense with its memories. But we also spoke of other terrible misdeeds where lawyers and judges failed to address the wrongs inflicted under the aegis of state authority – in particular, the Japanese internment from the West Coast during World War II and the infliction of torture on suspected terrorists at Guantanamo and other sites under U.S. Government control.

I wish we could say that at the end of our time together, we came to an understanding of how these events could have occurred. I wish we could say that we emerged from the FASPE experience not simply with a clear conception about what lawyers and judges should have done at the time – but more fundamentally about what might be done to assure that legal professionals would never again blind themselves to the evil which they failed to oppose and in which they collaborated. But I cannot say this. I can only say that our immersion in the places where state-sponsored evil occurred and our intense discussions led us to turn away from simple moralizing and to see the enormity of the task in assuring that “never again” is more than an empty wish.

The two papers published here are fine examples of the project that we all shared in our formal and informal discussions – that is, while acknowledging the difficulty of the enterprise, to use our skills as legal professionals to guarantee that “never again” becomes a living reality.

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Illegal Laws and Legal Crimes: An Introduction to a Lawyer's Opposition to Hitler¹

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Today, we do not dispute that the Nazis' acts—the extermination of approximately eleven million individuals, use of forced labour, torture, medical experimentation, and deprivation of property—deserve punishment.² But, today, there is language and law to support this statement. These acts constitute “crimes against humanity,” and the legal community accepts that “crimes against humanity” are just that—defined crimes. With an established principle specifying these acts as illegal, judges and lawyers can categorize the Nazi behaviour as wrongful and sanction punishment. Without an established principle, however, legal professionals lack clear authority to prosecute. This paper examines how a legal professional reasoned that the acts of the Nazi regime were illegal when no such legal principle existed and when the law actually sanctioned the acts. In particular, it examines the legal reasoning of Count Helmuth James Graf von Moltke, a lawyer who practiced under the Third Reich, challenged Nazi law, and sought to overthrow Hitler.³

Moltke studied law during the decline of the Weimar Republic and in 1932 began practicing international law as a solicitor in Berlin. Having read *Mein Kampf* prior to Hitler's appointment, Moltke took Hitler's gradual persecution of the Jews seriously.⁴ He resisted the anti-Semitic laws early on by consistently representing Jewish clients and urging them to emigrate.⁵ At the end of 1938, however, no lawyer could represent Jews, and Moltke was drafted into the Army as a specialist in international and martial law.⁶ Expressed in his letters to his wife, Moltke's concern for the Jews motivated him to internally challenge the Final Solution (the systematic extermination of the Jews) and to join resistance circles to overthrow the regime.⁷

Beginning in 1940, Moltke lived a double life. Though ostensibly working for the Reich, he used his position in the army to aid resistance groups. In particular, he contacted the British government to gain their support for the military resistance circle in Germany and a new German government.⁸ Within Germany, Moltke formed his own resistance circle: Kreisau Kreis. This group focused on the

¹ This is an abbreviated version of a larger paper, “Illegal Laws and Legal Crimes: A Lawyer's Opposition to Hitler.”

² The definition of the “Holocaust” varies from including the extermination of only European Jews to including the extermination of POWs, Romas, homosexuals, the mentally ill, and ethnic minorities. This paper uses the latter in deriving the sum of eleven million. See Timothy Snyder, *Bloodlands: Europe Between Hitler and Stalin* (Basic Books, 2010), 384.

³ Although Moltke opposed many Nazi laws and acts, this paper only focuses on his opposition to the Third Reich's domestic criminal laws, specifically the laws sanctioning Jewish persecution and targeting political dissenters.

⁴ Freya Von Moltke, *Memories of Kreisau and the German Resistance* (hereinafter *Memories*), translated by Julie M. Winters, (1998), 12.

⁵ Ger Van Roon, *German Resistance to Hitler: Count Von Moltke and the Kreisau Circle*, Translated by Peter Ludlow (1971), 27.

⁶ *Memories*, 18 & 22.

⁷ *Memories*, x. See also Moltke's letters dated 8 November 1941–14 November 1941 in Helmuth Von Moltke, *Letters to Freya: 1939–1949* (hereinafter *Letters*), translated and edited by Beate Ruhm von Oppen (1995), 179–183.

⁸ Roon, 180.

pragmatics of reconstructing Germany after a military coup, including a framework for prosecuting Nazi officials for committing war crimes and persecuting Jews.⁹ Ultimately, Kreisau Kreis' plans never came to fruition. After the 20 July 1944 assassination and coup attempt failed, Moltke was captured and sent to a concentration camp. On January 23, 1945, he was executed at Plötzensee prison in Berlin.¹⁰

To contest the validity of Nazi law, Moltke invoked three legal theories: natural law, *nulla poena sine lege*, and international law. According to Thomas Aquinas, natural law determines what a law *should* be: only written laws that are “just” are binding, and a law is just if it reflects the common good, was validly formed, and is imposed on citizens fairly.¹¹ If a law fails one of these criteria, it is not law because *lex iniusta non est lex*: an unjust law is not law.¹² Thus, a person is not breaking the law by refusing to follow an unjust law, and natural law can justify punishing individuals who follow morally repugnant laws.¹³ The challenge of using this theory, however, is twofold. First, the Nazis had already co-opted natural law reasoning. In the 1935 Act, judges were empowered to use “morality” in applying the law. For example, the German Act of 28 June 1935 amended the Criminal Code to encourage judicial discretion:

Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of the penal law and *sound popular feeling*, shall be punished. If there is no penal law directly covering an act it shall be punished under that law which most closely fits, in regards to fundamental conception.¹⁴

This reasoning allowed judges to prosecute individuals whose act was not specifically proscribed by law. Although arguably Nazi morality never reflected common moral principles, the judges had already perverted this line of reasoning as a means to impose arbitrary decisions. To be a valid and respected profession post-Hitler, German judges would have to break with the legal reasoning employed and not justify decisions on moral intuition. Linked to this issue is the second problem. Grounding a legal system in natural law can lead to unpredictable results, as a judge's discretion can define illegal activity. Given that Nazi Germany had blurred the distinction between illegal and legal activity to criminalize threatening behaviour, a new legal system's authority would depend on clearly defining crimes *ex ante*.

The second legal theory, *nulla poena sine lege* (*nulla poena*), illustrates the tension between the desire to challenge the substance of a law and the advantages of only punishing clearly proscribed behaviour. *Nulla poena sine lege* translates to “no punishment without law,” and has three main principles: (1) no conduct can be criminal unless it is proscribed in a law; (2) statutes must be strictly

⁹ *Memories*, 33.

¹⁰ *Memories*, xi.

¹¹ Brian Bix, “Natural Law Theory,” in *The Philosophy of Law*, Joel Feinberg & Jules Coleman, editors (7th ed. 2007), 10.

¹² Bix, 10.

¹³ Andrew Emanuel Tauber, *Tyranny on Trial: The Politics of Natural Law and Legal Positivism in the Federal Republic of Germany* (PhD. dissertation, Massachusetts Institute of Technology, 1997) 26.

¹⁴ Law to Change the Penal Code, 28 June 1935, art. 1 sect. 2 (REICHSGESETZBLATT 1935), Document No. 162-PS, Office of the United States Chief Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Volume IV (United States Government Printing Office, 1946), <http://avalon.law.yale.edu/imt/1962-ps.asp>, accessed December 1, 2011.

construed; and (3) no law shall be applied retroactively.¹⁵ Under Hitler, all three principles were violated: The police, rather than a statute or the judiciary, had sole control over deciding who qualified for preventative detention (concentration camps). The decrees passed under the Reichstag Fire Decree were applied retroactively. And the 1935 Act premised crimes on undefined traits rather than proscribed behaviour.¹⁶

Since disposing of *nulla poena* allowed the Nazis to abuse criminal law, it is intuitive that legal resistance groups would aim to reinstall *nulla poena* post-Hitler. They believed it would revitalize the citizens' trust of the judiciary and respect for the law. However, the main problem with reembracing *nulla poena* was that it limited a court's ability to prosecute those who obeyed Nazi law, as one of its primary precepts is that an individual cannot be prosecuted for breaking a law that did not exist when the act was committed. Disregarding *nulla poena* would allow prosecutors to more easily convict those who committed atrocities sanctioned by law, but such disregard further undermined faith in the legal system; embracing the principle would foster a more predictable and fairer legal system.¹⁷

Demonstrating that Nazi laws were substantively void, however, provided a solution to Moltke and others. *Nulla poena* requires a legal source to predate a wrongful act in order to define the act as a crime. Yet it does not specify where the legal source must originate. It only mandates the legal source to *clearly* proscribe behavior. Another set of legal principles outside of domestic law, like international law, could act as the source. Although there are obvious limits to using international law to punish domestically legal acts—namely, the international law must exist and be reasonably explicit—some situations are well-suited to this mode of legal reasoning. Notably, when the domestic acts are so egregious that “right-minded people” do not dispute that there has been a “clear case of violation of the laws and customs,” international law is an applicable source.¹⁸

Two pieces of Moltke's writing composed in response to the rise of the Nazi regime offer insights into how he justified opposing German law. The first, entitled “On the Foundations of Political Science,” was written in October 1940 as a reaction to the changing situation in Nazi Germany.¹⁹ The second piece was written three years later and was entitled “Instruction for Negotiations about the Punishment of Defilers of the Law by the Community of Nations (2nd Draft).” The Kreisau Kreis' collectively produced the piece, which was completed on 23 July 1943. It was written when a coup seemed likely and reflects the Kreisau Kreis' views on how post-war Germany should be reconstructed.²⁰ In particular, it discusses who in Germany violated the law and the process by which they should be prosecuted.

In the earlier article Moltke examines the legitimacy of laws. Moltke defined “law” as a limit on personal freedom, but argued that for such a limitation to be valid there needed to be a basis for that limit and a power to enforce it. “Law,” he wrote, “. . . cannot come from the arbitrariness of

¹⁵ Jerome Hall, “Nulla Poena Sine Lege,” Yale Law Journal, 47 (1937): 165.

¹⁶ Ingo Muller, *Hitler's Justice: The Courts of the Third Reich*, translated by Deborah Lucas Schneider, (Harvard University Press, 1991), 73-74.

¹⁷ Muller, 73-74.

¹⁸ Charles Cheney Hyde and Edwin D. Dickinson, “Punishment of War Criminals” in *Proceedings of the American Society of International Law at its Annual Meeting*, 37(1943):48.

¹⁹ Peter Hoffmann, editor, *Behind Valkyrie: German Resistance to Hitler*, (McGill-Queen's University Press, 2011), 44.

²⁰ Muller, 76.

individuals but must result from the nature of things or, as I called it...the natural order.”²¹ By contrast, laws are illegitimate when they arbitrarily limit personal freedom: “those measures that limit me that...arise from the arbitrariness of other people who, overstepping the bounds of their own freedom, strive to limit mine.”²² His conclusion followed: “the use of power for the purpose of enforcing the natural order is legitimate and is not a restriction of freedom, but merely of arbitrariness.”²³ Moltke also addressed personal culpability, arguing that only people, not states, can break laws. Individuals, he said, may act as agents for the state, but the individuals remain responsible for their actions: “...they cannot exculpate themselves with the argument that what they did had been required for reasons of state ethics: the state cannot give an individual cover for his actions.”²⁴

Three years later, Moltke and the Kreisau Kreis looked toward a potential overthrow of Hitler and the need to establish principles for how to prosecute those who had followed the letter of the law. Moltke began by stating that German interest only extended to punishing those who “desecrate” the law, or the “defilers” of law. He defined a “defiler” as someone “who breaks essential principles of divine or natural law, international law, or positive law that is overwhelmingly identical in the community of nations, in a manner that makes it clear that he culpably disregards the binding force of these legal axioms.”²⁵ However, in punishing defilers of the law, Moltke insisted on following *nulla poena sine lege*, claiming a person could only be convicted of a crime if the act was proscribed by the law of the country to which the person belonged at the time of commission.²⁶ New laws could not be applied retroactively because that would undermine efforts to regain confidence in the law.²⁷

By remaining committed to punishing “defilers of the law” without deviating from *nulla poena*, his ultimate goal seemed paradoxical if not impossible: he sought to invalidate the substance of a procedurally valid law without violating legal principles and judicial process. His discussion of a “defiler of the law” reveals his solution: a defiler of the law is “he who breaks essential principles of divine or natural law, *international law*, or positive law that is *overwhelmingly identical in the community of nations*, in a manner that makes it clear that he culpably disregards the binding force of these legal axioms.”²⁸ By rooting this definition in international law, Moltke identified international legal principles as the standard by which to judge the validity of Nazi law.

International law could achieve Moltke’s goal because international law had sufficiently developed to encompass and proscribe Nazi acts: common principles of criminal law and “crimes against humanity.” In discussing how to prosecute Nazis, Edwin Dickinson (an international legal scholar and Special Assistant to the United States Attorney General in Washington) stated that criminal law principles common among different nations are a valid source of international law.²⁹ Murder was commonly accepted as a crime. The second principle, crimes against humanity, was not officially

²¹ Hoffman, 44.

²² Hoffman, 44.

²³ Hoffman, 44.

²⁴ Hoffman, 51.

²⁵ “Instruction for Negotiations about the Punishment of Defilers of the Law by the Community of Nations— (2nd Draft)” (July 23, 1943) in Hoffman, *Behind Valkyrie*, 92.

²⁶ “Instruction for Negotiations about the Punishment of Defilers of the Law by the Community of Nations— (2nd Draft)” (July 23, 1943) in Hoffman, *Behind Valkyrie*, 91.

²⁷ “Instruction for Negotiations about the Punishment of Defilers of the Law by the Community of Nations— (2nd Draft)” (July 23, 1943) in Hoffman, *Behind Valkyrie*, 93.

²⁸ “Instruction for Negotiations about the Punishment of Defilers of the Law by the Community of Nations— (2nd Draft)” (July 23, 1943) in Hoffman, *Behind Valkyrie*, 92 (emphasis added).

²⁹ Hyde and Dickinson, 39 and 48.

recognized until the Nuremberg trials, but it arguably had enough traction in the 1930s and 1940s to constitute a legal principle.

As early as 1909 the preamble of the Hague Convention IV, to which Germany was a signatory, recognized that inhabitants and belligerents in war are protected under “the law of nations,” “laws of humanity,” and “dictates of public conscience.”³⁰ While the Hague Conventions were not intended to regulate a State’s treatment of its own citizens, the preamble could be applied to Nazi’s treatment and extermination of non-citizens: Eastern European Jews, homosexuals, Romas, and minorities.

More specific precedents for crimes against humanity came in 1915, when Britain, Russia, and France denounced the Armenian Genocide as a “crime,” and announced that they would hold the Turkish government responsible for its acts against this group.³¹ In fact, the French and Russian versions of the declaration labeled Turkey’s acts as “crimes . . . against *humanity* and civilization.”³² After World War I, this denunciation was codified in the Treaty of Sevres (10 August 1920), the first peace treaty signed between the Allies and the Turkish government which included a section requiring the Turkish Government to hand over to the Allied Powers those people “responsible for the massacres committed during the continuance of the state of war on ...August 1, 1914.”³³ Ultimately, this treaty was replaced by the Treaty of Lausanne, which did not include a similar provision. Nevertheless, the response to the Armenian Genocide was the precedent for the Nuremberg Trial’s prosecution of “crimes against humanity.”³⁴

Contemporary scholars in the 1930s also advocated for international recognition of “crimes against humanity.” Notably, Russian born Raphaël Lemkin requested such recognition in a report to the International Conference for the Unification of Criminal Law in 1933.³⁵ Although the Conference never adopted his suggestion, Lemkin argued that crimes against humanity, which included massacres against ethnicities, inhuman acts, and pogroms, were consistent with the international denunciation of slavery.³⁶

Granted, there is no proof that Moltke identified murder or crimes against humanity as the legal principles by which to prosecute Nazis. However, there is ample evidence that Moltke viewed Nazi acts as illegal. For example, in a letter to British official Lionel Curtis on 25 March 1943, Moltke described the concentration camps, stating “there is no denying the mass murders” and labeling those performing the killings as “murderers.”³⁷ Even if Moltke could not identify an international legal principle proscribing some Nazi acts, Moltke was not deterred. *Nulla poena*, he wrote “does not impede the purely declaratory determination by the court of the desecration of the law, even for retroactive cases.” The very act of repealing invalid laws would make clear that those who followed

³⁰ Hague Convention IV: Respecting the Laws and Customs of War on Land (October 18, 1907).

³¹ Declaration of 23 May 1915 by British Government, in Ara Sarafian and Eric Ayebury, editors, British Parliamentary Debates on the Armenian Genocide: 1915-1918 (2003), 59. In the French and Russian version, the term used was “crimes committed by Turkey against *humanity* and civilization.”

³² Declaration of 23 May 1915 by British Government, in Ara Sarafian and Eric Ayebury, editors, British Parliamentary Debates. (emphasis added).

³³ The Peace Treaty of Sevres, article 230, August 10, 1920, superseded by The Peace Treaty of Lausanne.

³⁴ “United Nations War Crimes Commission Report, May 28, 1948, Armenian National Institute, http://www.armenian-genocide.org/Affirmation.168/current_category.6/affirmation_detail.html/, accessed December 1, 2011.

³⁵ See Raphaël Lemkin, “Genocide as a Crime Under International Law,” *American Journal of International Law*, 41(1947): 145-146.

³⁶ Raphaël Lemkin, Les actes constituant un danger general (interetatique) consideres comme delits des droit des gens, (A. Pedone, 1933).

³⁷ Letters, 287-288.

such acts had been committing crimes, but crimes for which they could not be punished. Moreover, according to Moltke, the application of a new criminal code even “as *lex imperfecta* [unenforceable] is a valuable support for the reawakening of awareness of the law and will be felt to be a kind of expiation.”³⁸

Overall, international law resolved Moltke’s challenge of punishing Nazi officials and upholding *nulla poena*: it provided a standard by which Moltke could find the substance of domestic laws invalid and the acts illegal. Existing international law also met *nulla poena*’s requirements of clarity and ban on retroactivity, allowing Moltke to achieve his twin, though paradoxical, goals.

Although appealing to international law was useful for Moltke, it may not have a broad application today. The Nazis and the Holocaust present an extreme example of immoral acts, to the extent that Holocaust is perceived as *sui generis*. Even Moltke enunciated that to contest the substance of domestic law, the effects of the law must be clearly in violation of nearly universal legal principles. The International Military Tribunal for Nuremberg (IMT) faced this limitation when prosecuting those who designed and participated in the Holocaust. Indeed, the IMT struggled with how to justify prosecuting Nazi officials without violating *nulla poena*’s ban on retroactivity. Ultimately, these officials were prosecuted for “crimes against humanity,” even though this crime was not clearly established when the acts were committed. By appealing to the depravity of Nazi acts, however, the IMT reasoned that there was no retroactivity, or, any retroactivity was justifiable.³⁹

The chief American prosecutor, Justice Robert Jackson, emphasized in his opening speech to the IMT that the depravity of the acts warranted prosecuting the defendants for crimes against humanity. He characterized the Nazis treatment of its citizens as “pass[ing] in magnitude and savagery any limits of what is tolerable by modern civilization.”⁴⁰ Given this egregious behavior, he believed Nazi officials knew their acts were illegal and were thus put on notice: “does it take these men by surprise that murder is treated as a crime?”⁴¹ Moreover, he explained that international law, like common law, can only develop “through decisions reached from time to time in adapting settled principles to new situations.” It must develop, “at the expense of those who wrongly guessed the law and learned too late their error.”⁴² He permitted some degree of retroactivity only due to the severity of the acts.

Yet, like Moltke, the IMT was cognizant of the limits of applying emerging international law. Although the IMT officially recognized crimes against humanity as punishable and this crime encompassed all of the Nazi acts,⁴³ the IMT limited the scope of its application. Given *nulla poena* concerns, the IMT chose to only prosecute individuals for acts constituting crimes against humanity after 1939 (the official beginning of the war). After that date, crimes against humanity were connected with recognized war crimes under the Hague Convention, reducing the appearance of

³⁸ “Instruction for Negotiations about the Punishment of Defilers of the Law by the Community of Nations— (2nd Draft)” (July 23, 1943) in *Behind Valkyrie*, 94 (discussion of *lex imperfecta*)

³⁹ Interestingly, the IMT did not consider prosecuting Nazi officials for murder.

⁴⁰ “Nuremberg Trial Proceedings (Day 2),” Nov. 21, 1945, The Avalon Project, <http://avalon.law.yale.edu/imt/11-21-45.asp>, accessed November 29, 2011.

⁴¹ “Nuremberg Trial Proceedings (Day 2)”

⁴² “Nuremberg Trial Proceedings (Day 2)”

⁴³ Under Article 6(c) of the Charter of the International Military Tribunal, crimes against include “namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

Given the IMT's focus on the extreme nature of the Nazi regime and its reticence to apply emerging international law retroactively, it is questionable how useful Moltke's reasoning is. Today treaties define crimes and remove the concern of retroactivity. Therefore, for acts that are clearly egregious—such as the Holocaust—there is a direct process to use international law: treaties specify the act as illegal and allow for prosecution. The current challenge is interpreting the definition and scope of these crimes, not on developing a body of law that recognizes certain acts as wrongful. However, It is likely more difficult to argue that acts outside or only analogous to the enumerated crimes violate international law. Indeed, current debates on what constitutes torture and whether international law forbids terrorism are illustrative. Therefore, there is no need to engage in the same legal gymnastics that Moltke used. Rather, legal positivism is likely a more useful mode of legal reasoning as it can investigate how written laws could be interpreted to include these acts. Certainly, legal professionals can still marshal international law to challenge the substance of domestic laws. However, given American courts' reticence to look beyond sources of domestic law, it is questionable whether this technique will succeed. Instead, using *lex imperfecta* may be a more reasonable goal.

Looking back, Moltke's resistance to Hitler reveals the fundamental tension in opposing the substance of a procedurally valid law: the desire to declare the law and any act it sanctions as illegal conflicts with the concern that the courts remain principled and fair. Grounding his legal reasoning in principles of international law resolved this tension for Moltke. Although it is unclear whether domestic courts would be receptive to similar reasoning today, Moltke's experience remains relevant. Not only does it remind legal professionals that the two values—the substance of the law and the legitimacy of the courts—must be considered when evaluating laws and the merits of opposing them, but it also reminds lawyers that opposition is an option. At its broadest level, Moltke's experience indicates that there is a space and a role for lawyers to challenge the substance of a law. A lawyer's professional commitment to uphold the law does not require unfaltering obedience to its content.

⁴⁴ "The Law Relating to War Crimes and Crimes Against Humanity," in Judgment of the International Military Tribunal for Germany (1945), The Avalon Project, <http://avalon.law.yale.edu/imt/judlawre.asp>, accessed November 29, 2011.

The Role of International Agreements and US Courts in Holocaust Restitution: Limitations and Lessons for Crimes against Humanity

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This paper reflects on the history and ethics of legal solutions to provide restitution to Holocaust survivors and families of victims. In an important sense, Holocaust restitution is ultimately futile: no apology, money, or returned possessions can bring back the murdered mothers, fathers, sons and daughters whose individual lives are now masked under the number six million. No restitution can compensate the permanent effects of Nazi persecution. Yet whether out of a hope that the work will expose the guilt of the perpetrators for the world to see or whether out of a need to respond in some way, no matter how inadequate, to an overwhelming crisis, Jewish representatives have worked tirelessly to bring a measure of justice to survivors and families of those who perished by using the law to deliver restitution. This paper seeks to provide an introduction to this topic in an effort to ground ethical reflections on arguments for and against international agreements on restitution, which tended to be the initial response in the wake of the Holocaust, and restitution through litigation, which has evolved into a larger force in the past two decades.

The International Agreement Model

The earliest forms of compensation for Holocaust victims were restitution payments governed by international agreement. Indeed, as early as 1941, Jewish leaders in the United States and British-mandate Palestine were calling for restitution from Nazi action for European Jewry.¹ These leaders employed the language of reparations as it had been formulated after World War I; indeed, in 1945, there was no model or precedent for reparations to victims of genocide.² Traditional models of war reparations required international agreements between states, but at the conclusion of the European war, “the victimized Jews were not recognized as a separate and distinct entity under international law, no Jewish political body had the requisite legal standing to represent either the survivors or the heirs of the murdered, and there did not exist a forum where individual survivors could bring their claims for compensation or restitution.”³ Every past model of reparations had been based on the victor forcing the defeated to pay the cost of the war.⁴ Thus Holocaust restitution had to overcome two novel situations: finding a way for one people to compensate another without governmental representatives, and finding a way for reparations to accompany an acknowledgement of wrongdoing and guilt.

To resolve the first of these conflicts, the American and emerging West German governments gradually began recognizing councils of Jewish leaders as having standing to receive restitution. Early efforts at restitution recognized a Jewish Restitution Successor Organization, which presented claims

¹ Menachem Z. Rosensaft and Joana D. Rosensaft, “The Early History of German-Jewish Reparations,” *Fordham International Law Journal* (hereafter *FILJ*), 26 (2001):1.

² Rosensaft and Rosensaft. 2.

³ Rosensaft and Rosensaft. 2.

⁴ Eva Fogelman et. al., “The Evolution and Objectives of the Holocaust Restitution Initiatives,” *FILJ* 25 (2001):145 and 152.

to Jewish property in the American Zone of Occupation.⁵ However, these efforts were severely limited. The claims were predominantly entertained for restoration of property that had been personally owned during the war, thus limiting restitution mostly to the return of stolen property. There was no required recounting of the suffering, deprivation, and slave labor extracted from recipients. Nevertheless, this effort was able to restore approximately \$250 million of stolen property to Jewish survivors and the families of those killed.⁶ During 1947 and 1948, there were limited attempts to provide for the Jewish community as a whole in addition to restoration of individual property claims. Property of Jews killed by the Nazis who left no heirs was given to the Jewish Restitution Successor Organization to benefit the community, and was used to aid the needy in Germany and Israel.⁷ Moreover, laws were established to collect a fund from former Nazi officials for compensation of liberated Jews, but the disbursements were limited to those present in Germany after 1947 in the American Zone, which excluded a great many survivors who emigrated from Germany between 1945 and 1947. The compensation was even more limited in the British Zone, where disbursements were limited not only to those present in Germany in 1948, but also to German citizens, effectively excluding any Eastern European Jews from receiving reparations.⁸

At the conclusion of the war, some Jewish organizations were already protesting the legal status of the Jewish Agency for Palestine, and later the State of Israel, to negotiate on behalf of Jews outside of *Eretz Yisrael*.⁹ Nevertheless, international law required a body to negotiate with the Federal Republic of Germany that could represent all Jewish people. Thus, in 1951, a conference between the Israeli government, the Jewish Agency for Palestine, the World Jewish Congress, and twenty-three representative groups of Jews from across the world founded the Conference on Jewish Material Claims against Germany (“Claims Conference”) to be an independent representative of all Jewish claims for reparations against the West German government.¹⁰ Ultimately, the Claims Conference and the Israeli government signed an agreement with the West German government on September 10, 1952, called the Luxembourg Agreements, that provided for the direct compensation of Jewish victims of Nazi persecution and for German payments to the Claims Conference and the State of Israel to defer the cost of the relief, rehabilitation, and resettlement of Jewish refugees.¹¹

Under the terms of the Luxembourg Agreements and subsequent agreements, the West German government, and later the German government after reunification, paid more than \$60 billion in satisfaction of claims to Holocaust survivors and the relatives of those who perished in the Holocaust.¹² In addition to direct payments to individuals, the payments included funds given to Israel for the “relief, resettlement, and rehabilitation of Jewish victims of Nazi persecution.”¹³ The Claims Conference thereafter bore responsibility for distributing the funds to Jewish survivors throughout the world, including those in former Soviet bloc countries who were prevented from making claims until the fall of the Soviet Union.¹⁴ Notably, the compensation has gone both to

⁵ Rosensaft and Rosensaft, 12.

⁶ Rosensaft and Rosensaft, 13.

⁷ Rosensaft and Rosensaft, 13.

⁸ Rosensaft and Rosensaft, 14.

⁹ Rosensaft and Rosensaft, 18-19.

¹⁰ Rosensaft and Rosensaft, 27.

¹¹ “History of the Claims Conference,” The Conference on Jewish Material Claims against Germany, <http://www.claimscon.org/?url=history>, accessed November 29, 2011.

¹² “History of the Claims Conference.”

¹³ “History of the Claims Conference.”

¹⁴ “Former Soviet Union,” The Conference on Jewish Material Claims Against Germany, <http://www.claimscon.org/index.asp?url=allocations/fsu>, accessed November 29, 2011. For a description of individual survivors aided by the Claims Conference, see: <http://www.claimscon.org/index.asp?url=allocations/fsuo411>.

individual survivors and to organizations and institutions that represent the larger Jewish community.¹⁵

The prospect of accepting restitution from Germany proved extraordinarily controversial in Israel and among Jews worldwide.¹⁶ Many were opposed to taking money from Germans, considering the payment to be “tantamount to ‘blood money’” or the acceptance of any sum to be an implicit forgiveness of unforgivable crimes that could never be undone by any financial compensation.¹⁷ Others were opposed to even opening negotiations with the Federal Republic of Germany, as it meant conferring legitimacy on a government composed of Germans that many Israelis viewed as responsible for the Holocaust.¹⁸ The debate in the Knesset over whether to negotiate with West Germany for reparations was met with large organized demonstrations from both the political left and right in Israel, and the ultimate vote in favor of negotiations was narrowly won.¹⁹

Indeed, some claim the terms “restitution” and “reparations” are inappropriate, as they appear to connote making the victim whole, when all sides recognize that money does not begin to return any of what was lost to the recipient, nor does it imply forgiveness for those who perpetrated the Holocaust. It was in acknowledgement of the insufficiency of reparations that the Claims Conference – the Conference on Jewish *Material* Claims Against Germany – chose to emphasize the material element of its work, emphasizing that it only sought settlement of material claims and not moral claims against the perpetrators of the Holocaust.²⁰ Likewise, the Israeli delegation negotiating the German restitution payments clarified the limitations of restitution with this remark:

[i]t must furthermore be clearly understood that the satisfaction of Israel's claim cannot be regarded as constituting in any way an expiation of the fearful holocaust of 6 million Jews murdered in Europe, and of the destruction of ancient Jewish Communities and their precious spiritual possessions. These losses cannot be made good by any material recompense. The claim advanced by the State of Israel is thus both minimal in its size and symbolic in its character. For settling the historic account, the hour has not yet come.²¹

What justification could permit restitution, then, when it has a tendency to legitimize the status quo and abate moral pressure on the perpetrators of genocide? Many commentators have pointed to the role of restitution as a symbol for larger guilt and healing. Elie Wiesel stated “If all the money in all the Swiss banks were turned over, it would not bring back the life of one Jewish child. But the money is a symbol. It is part of the story. If you suppress any part of the story, it comes back later, with force and violence.”²² Human Rights Professor Thane Rosenbaum of Fordham Law School agrees that restitution is ultimately about memory and preventing the suppression of any part of the story. He wrote in 2001 that restitution forces “perpetrators to confront the enormity of their crimes and the

¹⁵ “About Us,” The Conference on Jewish Material Claims Against Germany, http://www.claimscon.org/index.asp?url=about_us, accessed November 29, 2011.

¹⁶ Rosensaft and Rosensaft, 30.

¹⁷ Rosensaft and Rosensaft, 2.

¹⁸ Rosensaft and Rosensaft, 30.

¹⁹ Rosensaft and Rosensaft, 30.

²⁰ Ronald W. Zweig, “Holocaust Restitution, Reparation, and Indemnification,” The Yivo Encyclopedia of Jews in Eastern Europe, http://www.yivoencyclopedia.org/article.aspx/Holocaust/Restitution_Reparation_and_Indemnification, accessed December 1, 2011.

²¹ Rosensaft and Rosensaft, 31-32.

²² Lance Morrow, “The Justice of the Calculator,” *Time*, February 24, 1997, 45, quoted in Vivian Grosswald Curran, “Competing Frameworks for Assessing Contemporary Holocaust-Era Claims,” *FILJ* 25 (2001):107.

repugnance of their deeds, and it also places moral pressure on those who are not directly guilty but yet are still responsible for what was done on their soil.” He added that “the rest of humanity benefits from restitution because it reminds bystanders of the moral duty to act otherwise and compels each of us to reject the poison of complacency, indifference, and neglect.”²³

One of the central roles of the law is to assign costs and losses, yet one of the greatest ethical difficulties of international agreements for restitution is the difficulty in drawing precise lines between guilty parties who should pay, victims who should receive benefits, and bystanders who should be left out of the arrangement. The very arrangement of an agreement between two countries, which draws these lines using national boundaries, surely is an imprecise measure. Columbia Professor Elazar Barkan acknowledged this when he identified three often forgotten groups from the end of the war: guilty bystanders that enabled the Holocaust to occur but whose agency did not rise to a level that prompted the international community to demand restitution of them, innocent perpetrators who committed war crimes that paled in comparison to the crimes around them and so were excused for their crimes, and guilty victims that were called on to pay restitution despite suffering enormously.²⁴ The mission of the Claims Conference is to attempt to identify all Jewish victims of Nazi persecution and to ensure they receive benefits, but despite their best efforts some survivors have inevitably been missed. Political barriers, for instance, kept Holocaust survivors from receiving individual benefits behind the Iron Curtain until the fall of the Soviet Union.²⁵ Overall, the problems of identifying victims have largely been treated pragmatically, but there are questions as to how much persecution should count. Descendants of Holocaust survivors who were born in refugee camps have sometimes been included as survivors. Indeed, Rabbi Israel Sanger has famously asserted that the entire Jewish people are the “heirs of survivors,” though his words have been met with much disagreement from those who experienced Nazi atrocities first-hand.²⁶ The focus of the Claims Conference on material restitution has allowed it to define those deserving of restitution as those who suffered material deprivation, but even that narrowing does not dispel difficult debates over priorities and institutional focus. As with all matters, it is helpful to listen to the stories of the affected and to use the material as a means to help those who have suffered to tell their stories.

The problem of sorting the perpetrators from the bystanders has proven far more vexing. Germany was the only country to sign an international agreement with the Claims Conference. On one level, this is appropriate; it is elementary that the German regime was primarily responsible for atrocities against the Jews. Nevertheless, even those casually familiar with the history of the atrocities are aware of complicity from other nations. It appears strikingly unfair for the German people alone, including taxpayers born fifty years after the end of the war, to pay for the actions of the Nazis while the inhabitants of Eastern Europe contribute nothing. Until the fall of the Berlin Wall, only those in West Germany bore the cost of their successors. Certainly many West Germans who were alive during the war are appropriate heirs to the guilt of their war-time government, and should be called to pay for its excesses. However, it is not entirely clear that citizens of West Germany were more complicit by their acquiescence than citizens of East Germany or even some citizens of countries occupied by the Third Reich. Indeed, even the Western Allies bear some responsibility, as revealed in well-known decisions to refuse to accept Jewish refugees and to decline urgent calls to destroy Auschwitz and its rail connections in war-time bombing raids. The complicity of so many bystanders reveals the large

²³ Dean John Feerick & Thane Rosenbaum, “Welcoming Remarks,” *FLIJ* 25 (2001):139 & 142.

²⁴ Elazar Barkan, “Between Restitution and International Morality, *FLIJ* 25 (2001): 46.

²⁵ David A. Lash and Mitchell A. Kamin, “Poor Justice: Holocaust Restitution and Forgotten, Indigent Survivors,” in Michael Bazyler and Roger Alford, editors, *Holocaust Restitution: Perspectives on the Litigation and Its Legacy* (NYU Press, 2006).

²⁶ Michael J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (NYU Press, 2003), 272.

ethical problems in delineating bystanders and perpetrators so distinctly by nationality. Nevertheless, this is the line that international agreements have sought to draw.

Litigation Model

Given the limitations imposed on restitution by the International Agreement model, particularly its singular placement of blame on West Germany, Holocaust victims have turned in recent years to the courts. Many entities, in addition to the German state, owned property stolen from murdered Jews or profited from the Holocaust. The list includes Swiss banks, multinational corporations, and private property owners across the world. Litigation has presented a way for individuals to reclaim stolen property or for a class to reclaim profits earned through slave labor which could not be recaptured through the more limited restitution agreements. Thus, the courts have provided a secondary means for Holocaust victims and their relatives to reclaim a small piece of what was stolen from them.

The first lawsuit granting relief for losses incurred in the Holocaust was *Buxbaum v. Assicurazioni Generali*, heard in 1942 in a United States court.²⁷ However, the vast majority of Holocaust restitution litigation emerged after 1996.²⁸ These lawsuits did not originate in the 1990s, as survivors had unsuccessfully attempted to raise these claims for years, so it is worth asking why they found success after 1995 and why the United States courts have become the site of many of these cases. Overall, between 1945 and 1995 only ten suits were filed in American courts over Holocaust restitution.²⁹ Litigation in Europe during the same time also generally proved unsuccessful.³⁰ In comparison, more than fifty Holocaust restitution claims were filed in the United States between 1996 and 2000.³¹ Three factors came together to encourage Holocaust restitution litigation in the United States after 1995. First, in October 1996, Holocaust survivors and the children of Jews who perished in the Holocaust filed class-action lawsuits against three Swiss Banks in the United States consolidated under the title *In re Holocaust Victim Assets Litigation*.³² The plaintiffs alleged that the banks unlawfully withheld Jewish assets in dormant accounts, that the banks knowingly concealed property stolen by the Nazis, and that the banks accepted payment in goods produced by slave labor during the Holocaust.³³ The resulting large settlements from the banks encouraged further litigation.

Second, and somewhat related to the initial factor, in 1996 Congress imposed significant political pressure on foreign banks to atone for their role in the Holocaust. Senator Alfonse D'Amato, working with Edgar Bronfman of the World Jewish Congress, held hearings of the Senate Banking Committee in April and October of 1996 and threatened sanctions if Swiss banks did not address the issue.³⁴ As Rabbi Marvin Hier, head of the Simon Wiesenthal Center explained, "Without the pressure, with Sen. D'Amato's banking committee, without the threat of sanctions, the Holocaust survivors would have gotten nothing."³⁵

A third factor in this swell of restitution suits was a shift among plaintiffs to focus on United States courts as the appropriate forum to seek restitution for stolen property and slave labor. Professor

²⁷ Michael Bazyler and Roger Alford, xii .

²⁸ Michael Bazyler and Roger Alford, xii .

²⁹ Michael J. Bazyler, "Nuremberg in America: Litigating the Holocaust in United States Courts," *University of Richmond Law Review*, 34 (2000), 1 & 7.

³⁰ Michael Bazyler and Roger Alford, xi.

³¹ Bazyler, "Nuremberg in America," 6.

³² Bazyler, "Nuremberg in America," 31.

³³ Bazyler, "Nuremberg in America," 33-39.

³⁴ Bazyler, *Holocaust Justice*, 11-14; Bazyler, "Nuremberg in America," 65.

³⁵ Bazyler, "Nuremberg in America," 65 (citing Lisa Anderson, "Jewish Leaders Hail Decision by Swiss on Stolen War Assets," *Chicago Tribune*, August 13, 1998).

Michael Bazylar has identified these eight principles of American courts that make them, as he says, “the *only* forum in the world where Holocaust claims could be heard today:”³⁶

1. The ability of foreign citizens to file suit in the United States for human right abuses committed in foreign lands.
2. The recognition of jurisdiction over foreign defendants that do business in the United States, even over claims that occurred abroad.
3. The recognition of class action lawsuits.
4. The ability of lawyers to take cases on a contingency basis, thereby giving Holocaust claimants top-notch legal representation when filing civil suits against European and American corporate giants.
5. A legal culture in which lawyers are willing to take high-risk cases with a low probability of success, in order to test the limits of the law.
6. Fixed and affordable court filing fees when filing a civil lawsuit.
7. The ability to have a jury trial in civil litigation.
8. The existence of an independent judiciary that does not “take marching orders” from the political branches of government.³⁷

While the liberal subject matter jurisdiction over claims now aid Holocaust plaintiffs in seeking restitution against foreign governments and corporations, this is a relatively new phenomenon and far from guaranteed. Indeed, in the 1980s American courts dismissed two claims for want of subject matter jurisdiction: one by a former Dachau prisoner who was denied restitution from the German government on sovereign immunity grounds³⁸ and the other a class action suit against a former pro-Nazi Yugoslavian official for a lack of subject matter jurisdiction over alleged violations of the Geneva Convention and Hague Convention.³⁹ Two statutes, however, helped establish the idea that human rights victims injured abroad can sue in the United States.⁴⁰ The first is the Alien Tort Claims Act, which was reinterpreted after litigation in 1980 to permit foreign nationals to sue in tort in American courts. The second is the Torture Victim Protection Act, passed in 1992, which permits victims of torture in foreign countries to sue in American courts whether the victims are aliens or United States citizens.⁴¹

Nevertheless, significant hurdles still prevent many Holocaust survivors or families of victims from using litigation as a means to get even partial compensation for the unspeakable crimes committed by Nazis and their enablers. The main bar to recovery in Holocaust restitution litigation has been political concerns, referred to as the political question doctrine.⁴² Many courts have treated restitution claims arising from the Holocaust as claims for war reparations, which are seen, given that they may impinge on foreign policy, as the domain of the executive and legislative branches.⁴³

The political bar to recovery was made higher by two actions of the United States government. First,

³⁶ Bazylar, *Holocaust Justice*, xii (emphasis in original).

³⁷ Bazylar, *Holocaust Justice*, xii-xiii.

³⁸ *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1168 (D.C. Cir. 1994).

³⁹ *Handel v. Artukovic*, 601 F. Sup 1421, 1428 (C.D. Cal. 1985).

⁴⁰ Bazylar, *Holocaust Justice*, 55.

⁴¹ Bazylar, *Holocaust Justice*, 55-57. See also Elizabeth D. Lauzon, “Recoverability of Reparations from Corporations for Nazi-Related Conduct,” *A.L.R. Fed.* 2d, 6: 279; Sarah Willig, “Politics As Usual? The Political Question Doctrine in Holocaust Restitution Litigation,” *Cardozo Law Review*, 32 (2010): 723-724.

⁴² Sarah Willig, 723-724. See also Elizabeth Lauzon, 279.

⁴³ Sarah Willig, 723 & 739 (citing *Iwanowa v. Ford Motor Co.*, 67 F. Sup 2d 424, 483 (D.N.J. 1999), *Burger-Fischer v. Degussa AG*, 65 F. Sup 2d 248, 281-82 (D.N.J. 1999).

an International Commission on Holocaust Era Insurance Claims (ICHEIC) was established in 1998 by a Memorandum of Understanding between U.S. insurance regulators, six insurance companies, the Claims Conference, the World Jewish Restitution Organization, and the state of Israel.⁴⁴ ICHEIC was created as an alternative means of resolving disputes over insurance policies held by those who perished in the Holocaust. The ICHEIC was designed to provide a free path to recovery for claimants, and to help insurance companies by stemming the tide of further litigation.⁴⁵ The establishment of this commission lent credence to requests by defendants to dismiss the action and settle disputes in a more convenient forum, namely, the ICHEIC. It also convinced the courts that setting an insurance claim in American courts might supersede an agreement of the executive branch, implicating the political question doctrine. The second action of the United States government to strengthen the political question doctrine defense was the signing of executive agreements with Germany, Austria, and France in 2000 and 2001 that granted corporations in those countries immunity from future lawsuits in the United States arising out of Holocaust Claims if those countries would establish foundations for the adjudication and payment of such claims.⁴⁶ The decision to establish these foundations reduced the costs and sped up the process of recovering stolen assets for many families, but it also kept many claimants from having their day in court.

As with the international agreements, the rising of Holocaust-related litigation in the mid 1990s prompted a public debate over whether such litigation was acceptable at all. For example, in 1998 Abraham Foxman, head of the Anti-Defamation League and a survivor, criticized the litigation as a “desecration of the victims.”⁴⁷ He later explained that, in his view, the litigation “trivialized the Holocaust” by making it seem that the Jews died because of their assets rather than because of their identity as Jews.⁴⁸ Columnist Charles Krauthammer also considered the lawsuits to be beneath the dignity of survivors, and blamed the lawyers representing survivors for committing a “shakedown” of banks and businesses that could possibly revive anti-Semitism.⁴⁹ Many other Jewish individuals and groups offered criticisms that raised questions like those that emerged from Israeli protests in 1951 about whether such litigation “extinguished moral guilt” or “demean[s] the memory of the deceased victims.”⁵⁰

A long litany of justifications for the suits has been raised by supporters and academics alike. Professor Katrina Miriam Wyman of the New York University School of Law argues that a duty to correct past injustices offers a promising moral argument for such lawsuits.⁵¹ Prominent survivor advocate Stuart Eizenstat appealed to the particular propensity of the law to compensate victims of injustice with money as a symbol to acknowledge that they have suffered a wrong, arguing that the

⁴⁴ Lawrence S. Eagleburger et al., “Finding Claimants and Paying Them: The Creation and Workings of the International Commission on Holocaust Era Insurance Claims,” International Commission on Holocaust Era Insurance Claims, <http://www.icheic.org/pdf/ICHEIC%20Legacy%20Document.pdf>, accessed November 29, 2011.

⁴⁵ Kai Hennig, “The Road to Compensation of Life Insurance Policies: The Foundation Law and ICHEIC” in Michael J. Bazyler and Roger Alford, editors, *Holocaust Restitution: Perspectives on the Litigation and Its Legacy* (NYU Press, 2006), 254.

⁴⁶ Sarah Willig, “Politics As Usual? The Political Question Doctrine in Holocaust Restitution Litigation,” *Cardozo Law Review*, 32 (2010), 723 & 736-737.

⁴⁷ Abraham H. Foxman, “The Dangers of Holocaust Restitution,” *Wall Street Journal*, December 4, 1998, A18, quoted in Bazyler, *Holocaust Justice*, 287.

⁴⁸ Naftali Bendavid, “Is the Meaning Lost in Court,” *Chicago Tribune*, August 12, 2001, 1, quoted in Bazyler, *Holocaust Justice*, 287.

⁴⁹ Charles Krauthammer, “Reducing the Holocaust to Mere Dollars and Cents,” *Los Angeles Times*, December 11, 1998, 26, quoted in Bazyler, *Holocaust Justice*, 287.

⁵⁰ Bazyler, *Holocaust Justice*, 287-90.

⁵¹ Katrina Miriam Wyman, “Is There A Moral Justification for Redressing Historical Injustices?” *Vanderbilt Law Review*, 61(2008):127 & 130.

victims of the Holocaust should “have the same right to sue for justice as victims of other and lesser catastrophes.”⁵² Others justified the suits as a means of preventing current wrongdoing, arguing that companies could not be allowed to continue to profit from looted heirlooms and slave labor which had set them in an advantageous financial position after the 1940s.⁵³

The conflict over such lawsuits remain, but as a result of this litigation 1.6 million people had received payments by 2006.⁵⁴ As many of those receiving payments remain indigent and dependent on such restitution, such efforts seem an appropriate way for those who benefitted from the crimes to do their part to atone for their role and to sustain the memory of such a moral catastrophe.⁵⁵

An additional advantage to litigation over international agreements is that it connects specific survivors with the actions of specific companies, thereby validating the experiences and memories of the individual. While some disagree, these suits protect the memory and identity of individual victims of Nazi persecution.⁵⁶ The high demands of evidence require lawyers in these suits to compile a historical record from the testimonies of survivors. Even in a class action, many will have their testimony and experience preserved in a judicial record with the legitimacy and respect conferred by the court. Litigation also provides the only means for an individual survivor to confront an individual actor over the role that actor played in the survivor’s suffering. Whether in a class action or as a single plaintiff, litigation has as its goal discovering the exact wrongdoing dealt by a specific defendant to a specific plaintiff. This process captures the identities and experiences of survivors far more effectively than the amorphous arrangement of collective guilt and pooled restitution offered under international agreements. The law may be a difficult instrument for restitution, but its power to validate experience by coupling specific perpetrators with specific victims leads to a government-verified record of guilt that remains in perpetuity.

One complaint about the Holocaust-era litigation in particular, however, should give lawyers pause. This is the concern that advocates are not always responsive to the survivors they represent. In an essay entitled “Why Won’t Those SOBs Give Me My Money?” survivor Si Frumkin complained not only about dismissive treatment from the corporation for whom he served as slave labor during the Holocaust, but also about the inadequacies of his own advocates.⁵⁷ Dismayed by the eventual settlement, Frumkin wrote “We want direct confrontation and compensation to be decided in court...by a jury of our peers.”⁵⁸ Others have raised similar complaints about the Claims Conference and its distribution priorities.⁵⁹ Of course, there are limitations which sometimes prevent a lawyer from carrying out a client’s exact wishes; and as Frumkin acknowledges large class actions cannot satisfy every defendant. Nevertheless, when litigation offers a means to validate the suffering of victims through monetary compensation and the creation of a legal record of atrocities, lawyers should be particularly sensitive to their duty to follow the wishes of their client even when such wishes do not align with the choices the lawyer would make.

⁵² Bazylar, *Holocaust Justice*, 287 (quoting Jeff Jacoby, “Jews Can Set a Moral Example with Holocaust Funds,” *Boston Globe*, December 7, 1998, A15.)

⁵³ Bazylar, *Holocaust Justice*, 294-95.

⁵⁴ Stuart E. Eizenstat, “The Unfinished Business of the Unfinished Business of World War II”, in Bazylar and Alford, editor, *Holocaust Restitution*, 299.

⁵⁵ See generally David A. Lash and Mitchell A. Kamin, “Poor Justice: Holocaust Restitution and Forgotten, Indigent Survivors,” in Bazylar and Alford, editor, *Holocaust Restitution*, 317.

⁵⁶ Vivian Grosswald Curran, “Competing Frameworks for Assessing Contemporary Holocaust-Era Claims,” *Fordham International Law Journal*, 25 (2001):107.

⁵⁷ Si Frumkin, “Why Won’t Those SOBs Give Me My Money?” in Bazylar and Alford, editor, *Holocaust Restitution*, 92.

⁵⁸ ⁵⁸ Si Frumkin, “Why Won’t Those SOBs Give Me My Money?” in Bazylar and Alford, editor, *Holocaust Restitution*, 95.

⁵⁹ Bazylar, *Holocaust Justice*, 270-71.

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

FINAL PROJECT
JOURNAL
2011

MEDICAL
PROJECTS

INTRODUCTION TO THE MEDICAL PROJECTS

Though it has been several months since the FASPE trip last summer, the memories are still vivid. Those memories were brought back in force by the opportunity to read the projects submitted by the 2011 FASPE Medical Fellows. These projects stood as a strong reminder of the difficult journeys each of us took, both in our own hearts and minds, and together as a group. Our travel from New York to Germany to Poland took us back in time to study the transgressions of our medical forebears, and then forward again to consider our own ethical struggles, transgressions and opportunities in the present and future. The projects also stood as a reminder of something else, something at the core of FASPE: the exceptional quality of the student fellows.

In addition to the journey itself, the duration and depth of the interaction between students and faculty give FASPE the potential to be an extraordinary educational opportunity for us all. This potential was made real, however, by the quality of the student fellows. I know I speak for Jack Hughes too, when I say it was an honor and a pleasure for us to work with the 2011 Fellows, and we are grateful for the opportunity granted by the FASPE organization. Were the 2011 fellows as good as previous fellows? Better? I will never tell. But, as the second full group they are now, along with those from the pilot trip and the inaugural Fellows, an integral and permanent part of FASPE.

“Hit the Road Jack” Hughes and I were given the difficult task of choosing several representative papers for this journal from among the 2011 projects. All of the projects submitted represent remarkable work, and we congratulate every student. Choosing among them was challenging and, to be honest, somewhat subjective. No doubt many of the projects not found in these pages are equally deserving, but given the limited space we believe these capture some of the power of our joint experience. Dr. Hughes and I would like to thank all the students for the excellent projects, whether printed here or not, and the thought and time they put into them.

To all the readers of this journal, please enjoy the enclosed projects. I hope you will be as impressed with the students’ work as Dr. Hughes and I were. These projects highlight the passion, insights, and desire to learn from the FASPE experience that students brought to the table this summer.

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Moral Luck and Medical Murder: Are Physicians in Jeopardy?

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On a rainy summer day in Oświęcim, Poland, I stood next to the rusty railroad tracks leading into Auschwitz and realized that I was standing in the same place where Nazi doctors had performed “selections,” sentencing millions of innocent Jews to death or imprisonment by pointing either left or right. Though I had spent weeks reading and discussing the role of physicians in the Holocaust, I was in a state of disbelief. The value of physicians to the Nazi regime is clear: physicians legitimized the “scientific” principles of eugenics on which the Nazis built their so-called *Rassenpolitik* (Racial Policy), and rationalized murder under the logic of “medical necessity.” But what could possibly have motivated these doctors to so wholly ignore their own professional code?

By enlisting physicians, first in the sterilization and T4 “euthanasia” programs, and later, in the “Final Solution,” the Nazis seemed to have science and medicine on their side. Without active physician participation, the Nazi regime could not have achieved its murderous aims: physicians helped disguise the horrors by using deliberately misleading medical jargon, by systematizing murder, and by subverting their own professional values. The more I reflect, and the more historical analysis I read, the more elusive the answer to this fundamental question seems to become. How could so many doctors, all of whom presumably took the Hippocratic Oath, have become such an integral part of torture and genocide? Why was it so easy for the Nazis to convince German physicians to join their ranks? While this essay focuses on Nazi Germany, what is even more disturbing to me is the fact that the Nazis were neither the first nor the last regime to facilitate the transformation of physicians into murderers. Physician involvement in murder and torture has been a seldom-discussed stain on the profession from well before World War II to contemporary Guantánamo Bay.¹

In discussing these questions with medical peers, I’ve encountered two arguments that I would like to address outright. The first says that any physicians who actively participated in the murder of innocents were by definition evil, psychopathic monsters, who would have been monsters even if the Nazis never came into power. This is incorrect, and dangerously so. While extreme pathological examples exist (Drs. Josef Mengele and Sigmund Rascher, for example), the majority of German doctors who participated in the Holocaust were not demons but regular people who believed that they were doing an unpleasant but morally correct and necessary job.² This is evidenced by the overwhelming enthusiasm for eugenics displayed by German physicians and scientists, the notable lack of cohesive professional resistance to the Nazi regime, and the sheer numbers of physicians who participated.

The second argument states that even if the Nazi physicians weren’t monsters, they were forced to participate or risk their own deaths; they did not have free will and therefore we should not hold them accountable for the so-called choices they made. Two facts speak against this: first, that a few doctors

¹ T.F. Murphy and P.J. Johnson, “Torture and Human Rights,” *Virtual Mentor: American Medical Association Journal of Ethics*. (2004); 6(9); S. Allen, et. al., “Aiding Torture: Health Professionals’ Ethics and Human Rights Violations Revealed in the May 2004 CIA Inspector General’s Report,” Physicians for Human Rights. (2009), accessed 4 October 2011, www.physiciansforhumanrights.org.

² Arthur L. Caplan, “How Did Medicine Go So Wrong?” in *When Medicine Went Mad: Bioethics and the Holocaust* (Humana Press, 1992), 56; Caplan, 54.

did refuse to participate – and far from being killed for their actions, they were tolerated and even, in some cases, respected for their decisions.³ Second, that nearly half of all German physicians joined the Nazi party, 6% before Adolf Hitler gained power in 1933; and 7% of all physicians were members of the *Schutzstaffel* (SS), compared with 0.5% of the general population.⁴ Physicians joined not at gunpoint, not by force, but of their own volition.

I address these two counterarguments now because it is crucial to understand that not all physicians that participate in murder and torture do so because of some latent psychological illness or because they are under duress. It is natural for physicians (and future physicians) to try to find some fundamental difference between themselves and the Nazi doctors – to distance themselves as far as they can from the perpetrators of such heinous crimes – but to do so misses the point. Philosopher Thomas Nagel's concept of "moral luck" provides one reason why.⁵ Nagel compares the relative moral status of two men, each of whom becomes equally intoxicated and drives home impaired. One man strikes and kills a small child who happens to run out in front of his car. The other man makes it home safely: no child runs out in front of his car. Both men were equally negligent, but by virtue of circumstance – luck – only one man ended up with blood on his hands. In another oft-cited example, a man who may have led an uneventful life as a German citizen became a concentration camp guard and committed unimaginable crimes when the Nazis came into power. Political circumstances did not entirely cause, but certainly facilitated, the change in that man's moral record. The reality of moral luck forces us to consider the unpalatable possibility that these doctors were ordinary people under extraordinary conditions – and that we, as physicians, have the same capacity for wrongdoing.

Through reading, reflection, and discussion, I have come to believe that specific vulnerabilities exist within the medical profession, which the Nazis and other regimes have actively exploited to facilitate the almost unfathomable transition from physician to murderer. All of these vulnerabilities are in some ways necessary parts of becoming a physician, but they occupy a vanishingly small space between being adaptive and dangerous. These include the hierarchical nature of medical culture; the career ambition innate to and celebrated in physicians and would-be physicians; the idea of a "license to sin;" medical terminology and euphemism; comfort with inflicting pain for future benefit; and finally, the concept of clinical detachment, often deemed essential to clinical practice. In this essay I will define these vulnerabilities, assess how they facilitated physician participation in the Holocaust, and reflect on what I can do to avoid my own moral erosion in my own transition from medical student to physician.

Hierarchy and Socialization

Medical culture is, in many ways, a rigid hierarchy. Medical students answer to residents, residents answer to attendings, attendings answer to department chiefs and so on. Those at the lower end of the hierarchy are used to doing what their superiors ask of them, often without understanding exactly why, and they are not always encouraged or comfortable enough to speak up if they have concerns. Questioning superiors is often uncomfortable, both for fear of negative consequences (retaliation, losing the superior's respect, seeming ignorant) and for fear of being wrong. Young physicians are rapidly socialized to this culture, learning how to behave by watching their superiors and more experienced peers. Some of this is adaptive: there is much to learn to become a doctor, and learning the right way to perform procedures, behave with colleagues, and present information is crucial to becoming a good doctor and keeping patients safe. On the other hand, it is easy to see how this powerful cultural pressure could be viewed as indoctrination. Sleep-deprivation, heightened stress

³ Robert J. Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (Basic Books, 2000), 303-335.

⁴ Caplan, 90.

⁵ Thomas Nagel, "Moral Luck," accessed 4 October 2011, <http://philosophyfaculty.ucsd.edu/faculty/rarneson/Courses/NAGELMoralLuck.pdf>.

levels, and fear of failure are infamous in medical training and on the wards – and they are also powerful tools of socialization.

The Nazis utilized that hierarchy and tendency toward socialization to enlist physicians in their cause. By calling on doctors to do their national duty as “soldiers,” they added a level to the existing hierarchy and made doctors accountable to the Nazi state; as one physician put it, “according to a ‘Führer order,’ service in a concentration camp was considered front-line duty.”⁶ These doctors were already used to reporting to superiors, so the change fit well within their existing professional paradigm. The Nazis also relied on physicians, particularly those physicians working within Auschwitz, to adjust to their new reality by means of extreme socialization. As one physician worded it, “Auschwitz was an existing fact. One couldn’t... really be against it, you see, one had to go along with it whether it was good or bad.”⁷ By watching their more experienced peers perform ramp “selections,” and by commiserating with them afterwards, doctors new to Auschwitz rapidly came to view selections – and their lives within Auschwitz’s boundaries – as an unchangeable fact to be adapted to.

Commandeering Ambition

Becoming a doctor requires no small amount of ambition. Pre-medical classes are often large and graded on a curve, so-called “weed-out” courses designed to discourage all but the most hardworking and dedicated from continuing on. The stereotypical pre-medical student – ruthlessly competitive, willing to do anything to get ahead, even cheating or sabotaging others – is so well known that it has a name: a “gunner.” Again, some of this ambition is adaptive: the path to becoming a doctor is long and arduous, and medical schools want to make sure that the people they admit will be able to handle the workload and stress without giving up. However, there is a slippery slope between being motivated to succeed and being willing to compromise one’s moral values to attain success. While some aspects of medical school education are now being redesigned to combat the negative aspects of this culture (for example, through pass-fail classes), an air of competition and ambition is still pervasive.

This career ambition was commandeered by the Nazi regime. Even within pre-Nazi Germany, it was understood that one sure way to earn powerful standing was to become a part of the Nazi party. Eugenics was coming into prominence in the US and the UK through the work of Charles Davenport and Francis Galton, and as the Nazi party began to adopt those principles as its own, savvy physicians and scientists jumped aboard in droves. Other physicians conducted human subjects research within concentration camps to advance their own careers.⁸ It is at least partially for this reason that nearly half of all German physicians had joined the Nazi party by 1945, 6% before Adolf Hitler gained power in 1933.⁹

The “License to Sin”

Physicians – and even medical students – are allowed to perform actions that, in other contexts, are taboo. This begins early in medical school: in the pursuit of scientific knowledge, I dissected the cadaver of a ninety-eight year old woman with two classmates, cutting her muscles apart with scalpels and cleaving her bones with a saw. Forcing an intubation tube down an unconscious person’s throat, removing a dead person’s heart and placing it in a live person’s chest in a transplant operation, drilling holes in someone’s skull – these actions are allowed when they’re performed by physicians, but the stuff of horror films and criminal cases when non-licensed personnel attempt them. The “license to sin” is not confined to the hospital: as of 2007, thirty-eight states allowed the death penalty

⁶ Dr. Ernst B., quoted in Lifton, 198

⁷ Dr. Ernst B., quoted in Lifton, 196

⁸ W.E. Seidelman, “Medspeak for Murder,” In When Medicine Went Mad: Bioethics and the Holocaust (Humana Press, 1992), 278.

⁹ Caplan, 90.

and of those, seventeen required and eighteen permitted the presence of a physician during the execution.¹⁰ These are rights and responsibilities that are earned and carefully meted out through rigorous training and licensing procedures, but they also may lead physicians to arrogance or a belief that they are above the law.

This “license to sin” aspect of medicine was crucial to the Nazi regime. By having a *doctor* make every decision that sent an innocent person to death, murder became a medical procedure. In the T4 “euthanasia” program requiring three junior physicians to mark brief questionnaires about mentally handicapped individuals with a red “+” (for death) or a blue “-” (for death), murder was systematized, medicalized, and agreed upon.¹¹ To the physicians who volunteered for these tasks, whether they should be allowed to condemn someone to death was not a question: they were already allowed to do other things that ordinary citizens could not do, and the selections were one more special responsibility.

Medical Terminology and Euphemism

Medicine, and the scientific research on which much of medicine is based, explicitly removes linguistic evidence of human action from its proceedings. Scientists use euphemisms and the passive voice in journal articles – writing “the animals were sacrificed” at the end of the experiment is less grotesque and jarring than admitting that “I killed twenty mice by holding their necks and pulling their tails until their necks snapped.” In medicine, we routinely use the words “idiopathic” to mean, “we don’t know,” and “iatrogenic” to mean, “we caused it.” Patients who disagree with our assessments can be deemed “difficult,” “noncompliant,” or can leave “AMA” (against medical advice). On the one hand, it is necessary for medical language to be specific – calling something a diffuse maculopapular erythematous rash will mean the same thing at every hospital, and that is a good thing for the practice of medicine. On the other, overmedicalizing can be dangerous when it leads to dehumanization, euphemism, or impenetrable jargon.

Physicians in Nazi Germany used euphemism to great effect. They weren’t murdering mentally handicapped individuals with poisonous gas; they were “euthanizing” hopeless cases, or “cleansing” German genetic stock. They weren’t sending children and families to die by suffocation; they were “selecting” them for “special treatment” (*Sonderbehandlung*) or *Terapia Magna Auschwitzciense*¹² in “showers.” They weren’t murdering individual human beings, they were ridding their country of, as previously discussed, a “gangrenous appendix.” By using this language, Nazi physicians were able to rationalize and intellectualize what they were doing, living with their crimes while detaching from them further.

Inflicting Pain

Though the idea of causing another human being to suffer pain sickens me (and I have been told more than once that I’m “not hitting hard enough” to elicit reflexes using my hammer), I know that I will eventually have to get used to the idea. Doctors have to become comfortable inflicting transient pain and discomfort on their patients for their own health benefit – for example, stitches for lacerations, annual colonoscopies, and biopsies. It is unpleasant to hurt another human being, but sometimes it is a physician’s duty to cause pain in order to heal. One article, condemning physician participation in torture, stated that, “being a party to the infliction of pain, harm, and death is simply incompatible

¹⁰ L. Black and RM Sade, “Lethal Injection and Physicians: State Law vs Medical Ethics.” *JAMA*. (2007); 298(23): 2779-2781.

¹¹ H. Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (The University of North Carolina Press, 1995), 83.

¹² Lifton, 208.

with the ethics of medicine.”¹³ The fact is, physicians inflict pain, harm, and even death every day – but whatever pain doctors inflict is ideally both agreed-to by the patient and in the patient’s best interests. That said, there are doctors that do not worry enough about whether their patient is being hurt: overutilization of CT scans, for example, can lead to unnecessarily increased risk of cancer¹⁴ and overzealous treatment has recently been given the moniker “pathological altruism” because of its ability to harm in the name of helping.¹⁵

In Nazi Germany, comfort with the idea of doing something painful or unpleasant for a future benefit was crucial to the transition from physician to murderer. Continuing the soldier’s analogy, as one former Nazi physician put it, “It was a matter of loyalty and sacrifice, for, as he came to feel, ‘the soldiers at the front also had to do things they did not like.’ The claim of his responsibility lay not with the patients but with his superior, his country, his race.”¹⁶ After this perceived shift in physician responsibility, from the patient to the German population, Nazi physicians could justify the infliction of pain and death on millions of people using the same logic. As Dr. Fritz Klein, a Nazi doctor, famously put it, “Of course I am a doctor and I want to preserve life. And out of respect for human life, I would remove a gangrenous appendix from a diseased body. The Jew is the gangrenous appendix in the body of mankind.”¹⁷

Detachment

Physicians are more at ease in the presence of pain, sickness, morbidity, and death than are their citizen counterparts; the medical profession requires unflappability in the face of things that others would consider disgusting, horrific, or otherwise overwhelming. On an intellectual level, I know I will not be able to optimally treat a patient with a serious injury if I am too sickened by the sight of the wound to stitch it up; my peers and I have been warned against getting so emotionally invested in our patients that we lose the ability to “leave work at work.” This is often referred to as clinical detachment, or “detached concern” – showing empathy and caring, but not so much that you burn out emotionally. I have trouble with this concept, and with the way that it is treated as an unspoken requirement of being a doctor. Some detachment may be necessary to practice medicine: you can’t operate logically if you’re too emotionally involved. But it is a very fine line, and there is no objective way to tell how much is too much. This is something that I struggle with even now, this idea of professionalism that some of my peers have taken to mean that they aren’t allowed to have controversial opinions, a personality, or anything but a fresh face and a white coat. In my more cynical days, it has occurred to me that I’m being asked to create a “doctor self” that is entirely separate from my true personality.

Physicians in Auschwitz had to use their considerable powers of detachment to simply exist in a place so horrific that one of them called it *anus mundi*, the anus of the world.¹⁸ Just as some doctors today have their “physician personality” and their “normal personality,” Nazi doctors had their “outside selves” and their “Auschwitz selves.”¹⁹ Because those physicians were accustomed to being stoic, because *not reacting* was something they knew was expected of them, they quickly adapted to the grim realities of their lives at Auschwitz. Thus, standing at the edge of the ramp, pointing hundreds of people at a time to their painful deaths became just another disagreeable but necessary task: “For

¹³ T.F. Murphy and P.J. Johnson, “Torture and Human Rights,” *Virtual Mentor: American Medical Association Journal of Ethics*. (2004); 6(9).

¹⁴ D.J. Brenner and E.J. Hall, “Computed Tomography: An Increasing Source of Radiation,” *The New England Journal of Medicine*. (2007); 257: 2277-2284.

¹⁵ Natalie Angier, “The Pathological Altruist Gives until Someone Hurts,” *New York Times*, October 3, 2011.

¹⁶ Lifton, 106.

¹⁷ Dr. Fritz Klein, quoted in Lifton, 16.

¹⁸ Lifton, 147.

¹⁹ Lifton, 419.

most SS doctors, selections were a job – somewhat unpleasant and often exhausting.”²⁰ Their powers of detachment were so strong that, as one physician who had worked in Auschwitz noted, “In the beginning it was almost impossible. Afterward it became almost routine. That’s the only way to put it.”²¹

Conclusions

As thrilled as I am to be on the path to becoming a doctor, it terrifies me to know that I will be a member of a profession that includes in its ranks effectors of torture and genocide. Though the vast majority of doctors do not end up betraying their professional oaths in such dramatic ways, I worry about the combined effect of long hours, little sleep, stressful conditions, and the aforementioned vulnerabilities on my own moral character. By taking time for self-reflection, by recognizing my own weaknesses, and being aware of the aforementioned vulnerabilities and others, I hope to build an ethical foundation strong enough to withstand whatever twists in circumstance come my way, and whatever bouts of bad moral luck I may be exposed to in the future. The Nazi physicians cast a shadow and a chilling legacy on our profession. It’s up to us to change that legacy by actively preventing our own moral erosion.

²⁰ Lifton, 193.

²¹ Lifton, 195.

The Groningen Protocol: A Dangerous Step in the Right Direction

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Perelman School of Medicine at the University of Pennsylvania, Class of 2012

El Malei Rachamim¹

*God full of mercy who dwells on high
Grant perfect rest on the wings of
Your Divine Presence
In the lofty heights of the holy and pure
who shine as the brightness of the heavens
to the souls of my relatives
both on my father's side and my mother's side
the holy and the pure
who were put to death, slain, slaughtered
burned to death or suffocated in the sanctification
of God's name
as, without making a formal vow,
I pledge to give charity
to commemorate their souls.
Their resting place shall be in the
Garden of Eden.
Therefore, the Master of mercy will care for them
under the protection of His wings for all time
And bind their souls in the bond of
everlasting life.
God is her inheritance and they will rest in peace
and let us say Amen.*

אל מלא רחמים שוכן במרומים
המצא מנוחה נכונה על פנפי השכינה
במעלות קדושים וטהורים
כזוהר הרקיע מזהירים
לנשמות כל קרובי וקרובותי
הן מצד אבי והן מצד אמי
הקדושים והטהורים
שהומתו ושנהרגו ושנשחטו
ושנשרפו ושנחנקו על קדוש השם
בעבור שבלי נדר אתן צדקה
בעד הזכרת נשמותיהם
בגן עדן תהא מנוחתם.
לכן בעל הרחמים יסתירם
בסתר כנפיו לעולמים
ויצטר בצרור החיים את נשמותיהם
יי הוא נחלתם וינחם בשלום על משכבותיהם
ונאמר אמן

I could not say Amen. I could not speak. I could not even move. Standing there in the crematorium there was nothing I could do. My wet shoes seemed bolted to the cement below them as I looked down at the floor where so many innocent people had lost their lives. No, had their lives brutally stolen from them. A woman in the seminary group had just finished singing the El Malei Rachamim prayer, the words drifting through the eerie space and lingering in the air. No one dared to move or say a thing as tears welled in our eyes. Eventually, sensation returned to my legs and I moved to walk out of the room, past the ovens, and into the dreary weather outside. As I stepped through the door, I couldn't help but think that not a single person got the chance to walk out alive through that door during the Holocaust. In desperation, I grabbed a fellow student's hand and broke down as we walked through Auschwitz back to our bus, hands clenched tightly together as the harsh raindrops beat against my face.

¹ Yizkor Memorial Prayers. "El male rachamim, For males, females and martyrs," World ORT.
http://yizkor.ort.org:8081/html/yizmemprayer_th.shtml.

When applying for the FASPE Medical, I knew it was going to be an intense experience. I awaited with nervous anticipation what we were planning to see and the topics we were going to discuss, with strangers no less. It was an exciting nervousness, one that compelled me to want more and delve deeper rather than shy away and hide. Ultimately, FASPE provided the exact experience I desired as a growing physician. It not only fostered strong supportive bonds during highly emotional visits to concentration/extermination camps, but also provided a group of intellectual and motivated individuals who wanted to learn from their professional ancestors as well as each other about how decisions are made in clinical practice. The program's ethical focus helped me explore my own justifications, biases, morals, and beliefs in deciding what is right versus wrong in various contemporary clinical dilemmas. It enabled me to expand my ability to think through difficult situations in order to hopefully become better prepared for my future as a physician when increased responsibility and decreased time provide a dangerous combination for incentivizing less than ideal ethical decision-making.

The group of students and faculty created a truly remarkable framework of trust and respect in only a matter of days. I felt comfortable completely immersing myself emotionally, intellectually, and ethically in the FASPE experience during the eleven days we spent in New York, Germany, and Poland. Thoughtful discussions – some pre-planned and expertly facilitated by the faculty, others spontaneous, contentious, and held over warm pierogi and mushroom soup – encouraged my ability to be honest and open with my peers and teachers. Our discussions towards the end of our journey concerning the Groningen Protocol and infants' rights to end-of-life care transcended both environments. How do we make quality of life decisions for neonates? Is there such a life as a life not worth living, and who has the right to determine that? Are there too many risks in having a protocol associated with ending the lives of innocent babies? Understandably, we came to no absolute conclusions. These questions that we began to address mirror the current debate in the literature. Significant discordance exists within the medical community about whether the protocol provides an ethical mechanism to relieve the suffering of neonates with grim futures or instead corrodes the doctor-patient relationship and provides a potential dangerously small step towards the ideology behind childhood euthanasia performed in Nazi Germany during the 1930s and 1940s. Though the concerns are valid, I believe the need for such a protocol outweighs the potential risks if medicine is to adequately serve each and every member of society, including the most ill infants and their families.

The Groningen Protocol, adopted by the Netherlands in July of 2005, sets forth a guide to promote responsible decision-making of physicians with their patient's families about the deliberate ending of life in newborns. It also provides a procedure for the evaluation of each individual decision by ethical and prosecutorial authorities. The first section of the protocol presents the requirements that must be met in order to perform euthanasia. The ensuing section explains and clarifies in further detail what minimum information must be discussed and recorded throughout the decision-making process. In total, the protocol demonstrates how the current and anticipated medical condition of the patient can and should direct the type of end-of-life decisions that are made. The primary authors of the protocol, Dr. Verhagen and Dr. Sauer, sub-categorize infants for whom end-of-life decisions are applicable into three groups based on life expectancy and dependency on intensive care interventions. Group 1 includes newborns with no chance of survival even if provided the most intense treatment. The authors of the protocol recommend withholding or withdrawing life-prolonging treatment for such newborns, a practice already accepted throughout Europe and the United States. Group 2 consists of babies who have the potential to survive beyond a period of intensive treatment, but only with a severely bleak prognosis and poor predicted quality of life. The authors recommend if physicians and parents agree, they can withdraw life-sustaining treatment with the anticipated outcome that the child will die. Group 3 is comprised of infants who no longer require intensive care treatment or can

survive independent of such treatment, but have lives of “unbearable, chronic, untreatable suffering with no prospect of improvement.”² For these rare situations, the authors suggest that deliberately ending life can be medically responsible and ethically appropriate. The authors stress that this protocol was designed particularly to guide practice for the deliberate ending of life, or euthanasia, of infants characterized in this third group.³

Beginning in the 1970s, major technological advancements in neonatal medicine led to a drastic decrease in Dutch mortality rates. With the increased survival of neonates and the improved ability of doctors to accurately prognosticate infants’ futures came new responsibilities, demanding neonatologists to ask the question of how to best serve their most ill patients and their families. It soon became apparent that withholding or withdrawing some forms of treatment was appropriate in certain situations where the infant’s pain and suffering was felt to be too great and the predicted outcome too grim to justify continued intensive care management.

By 1986, the Perinatology Section of the Dutch Association of Pediatrics had formed a committee, Ethics in Neonatology, to produce a guideline for regulating end-of-life decisions in neonates. Researching current practices at the time in Dutch neonatology led to various significant conclusions. First, the committee determined that it is indeed within the realm of the neonatologist’s responsibilities to limit and even stop life-prolonging interventions when treatment would lead to unacceptable outcomes. This presents the concept of medical futility. However, in order to support or oppose treatment it became evident that a more objective definition was needed to describe what kind of future would justify a conclusion of acting in medical futility. Therefore, they outlined some criteria to help judge the current and anticipated quality of life of the neonate before emphasizing a range of other issues including: the importance of parental involvement in decision-making, strategies to allay differences between parents and medical professionals, the value of an independent consulting physician, and how to appropriately document family meetings and the dying process. On November 5, 1992, the Dutch Association of Pediatrics ratified the final report with an almost completely unanimous vote.⁴

One aspect of the report that was intensely debated, but never reached consensus, was the “ethical acceptability of deliberate ending of life.”⁵ This controversy received some clarity after the *Prins* and *Kadijk* court rulings in 1995, in which two physicians who, with the consent of the parents, decided that unbearable and hopeless suffering and unacceptable modes of death were likely for two of their neonatal patients, “a newborn with an extreme form of spina bifida, and the other an infant with severe trisomy.”⁶ To alleviate this suffering, the physicians determined that administering a lethal injection was an ethically appropriate decision in each case – of note, these conclusions were reached

² B. Gesundheit, A. Steinberg, S. Blazer, A. Jotkowitz, “The Groningen Protocol – The Jewish Perspective,” *Neonatology*, (2009); 96(1): 6-10.

³ E. Verhagen and P.J. Sauer, “The Groningen protocol—euthanasia in severely ill newborns,” *New England Journal of Medicine* (March 10, 2005); 352(10): 959-62; A.A.E. Verhagen and P.J. Sauer, “End-of-Life Decisions in Newborns: An Approach From the Netherlands,” *Pediatrics*, (September 2005); 116(3): 736-9; P.J. Sauer, Ethics Working Group, Confederation of European Specialists in Paediatrics, Confederation of European Specialists in Paediatrics (CESP), “Ethical dilemmas in neonatology: recommendations of the Ethics Working Group of the CESP,” *European Journal of Pediatrics* (June 2001); 160(6): 364-8; H. Lindemann and M. Verkerk, “Ending the Life of a Newborn: The Groningen Protocol,” *Hastings Center Report* (January-February 2008); 38(1): 42-51; S. Moratti, “End-of-Life Decisions in Dutch Neonatology,” *Med Law Rev.* (Winter 2010); 18(4): 471-96.

⁴ S. Moratti, “End-of-Life Decisions in Dutch Neonatology.”

⁵ S. Moratti, “End-of-Life Decisions in Dutch Neonatology.”

⁶ H. Lindemann and M. Verkerk, “Ending the Life of a Newborn: The Groningen Protocol.”

only after all other forms of treatment had already been withdrawn. The courts ultimately acquitted both physicians.⁷

These cases caused a shift in the understanding of end-of-life care for newborns. Now, case law legitimized that the active taking of a baby's life was justified when withholding or withdrawing intensive care would not lead to a relatively quick death. Furthermore, this action did not require direct voluntary patient consent, but rather showed that obtaining parental informed permission could substitute for making such decisions. Non-voluntary active ending of life had suddenly become an ethically and legally viable option for severely ill neonates in the Netherlands. However, no further guidelines were initially created to help other physicians tread the controversial moral ground of deliberately ending the lives of newborns, especially patients who do not rely on intensive medical treatment to survive.⁸

In 2001, a newborn girl with a severe form of epidermolysis bullosa was treated at the University Medical Center in Groningen. Adequate pain management was reportedly impossible to achieve – even a chemically induced coma was insufficient. Though the parents asked the physicians to end their baby's life, the hospital ultimately denied their request. The girl was transferred to a smaller hospital where she eventually died after a few months of excruciating pain and suffering. This case initiated a chain of events at Groningen that led to the production of a formal guide for physicians to follow during the deliberate ending of life of severely ill infants, especially those not dependent on intensive care treatments. This guide outlined the major necessary conditions for appropriate clinical practice, many of which came straight from the 1992 report and the *Prins* and *Kadijk* cases, and made it a requirement to inform the local authorities for each and every case of deliberately ending life. The committee also reviewed the twenty-two reported cases of euthanasia in newborns in the Netherlands between 1997 and 2004, all of which involved infants with very severe forms of spina bifida, in order to help determine which requirements and safeguards to include in the protocol. This guide was eventually adopted by the entirety of the Netherlands in 2005, and the Groningen Protocol was born.⁹

A multitude of criticisms of the Groningen Protocol have arisen since its adoption six years ago. Some of these are ethical arguments. Others oppose it on psychosocial grounds. Yet one of the most consistent criticisms concerns the idea of physicians, and parents for that matter, making quality of life judgments for infants. Jotkowitz and Glick claim, "Who gave physicians the right to determine quality of life and practice euthanasia on that basis?"¹⁰ They go on to reprehend physicians who serve competent adults in physician-assisted suicide, accusing them of abandoning "the longstanding honourable medical tradition of not deliberately terminating human life," and instead suggest that "medicine should be... fulfilling its traditional role of preserving not ending life."¹¹ Jotkowitz and colleagues support these statements by arguing that, "Physicians tend to overestimate the importance

⁷ S. Moratti, "End-of-Life Decisions in Dutch Neonatology;" H. Lindemann and M. Verkerk, "Ending the Life of a Newborn: The Groningen Protocol."

⁸ S. Moratti, "End-of-Life Decisions in Dutch Neonatology;" H. Lindemann and M. Verkerk, "Ending the Life of a Newborn: The Groningen Protocol."

⁹ S. Moratti, "End-of-Life Decisions in Dutch Neonatology;" H. Lindemann and M. Verkerk, "Ending the Life of a Newborn: The Groningen Protocol;" G.A. Crouch, "A Crusade Born of a Suffering Infant's Cry."

¹⁰ A.B. Jotkowitz and S. Glick, "The Groningen protocol: another perspective," *Journal of Medical Ethics*. (March 2006); 32(3): 157-8.

¹¹ A.B. Jotkowitz and S. Glick, "The Groningen protocol: another perspective;" A. Jotkowitz, S. Glick, B. Gesundheit, "A Case Against Justified Non-Voluntary Active Euthanasia (The Groningen Protocol)," *American Journal of Bioethics*, (November 2008); 8(11): 23-6.

of quality of life on a patient's desire to live."¹² These and other critics ask how we as a society could encourage physicians and parents to make quality of life judgments for vulnerable infants that directly lead to the infants' deaths?¹³

While many people hold these views, another group equally as confident in their beliefs has surfaced on the other side of this debate. Lindemann and Verkerk explain that people even in the United States frequently make end-of-life decisions, such as withdrawing or withholding intensive care treatment, on behalf of their severely ill and suffering loved ones in adult hospitals. They suggest that the Dutch expand upon this belief by suggesting that "newborns have a fundamental interest in not prolonging a life that is or will become an intolerable burden to them."¹⁴ They go on to warn the reader and the critics of the protocol that, "It is one of the harsh realities of twenty-first century medicine that quality-of-life judgments must be made. What we must not do is pretend that we do not already make them, and that there is somehow something morally different about doing it for a newborn baby."¹⁵

While these two groups agree that the goals of care for newborn babies must center around patients' best interests, they differ in their interpretation of this principle. When comparing the two sides, I find myself more often in agreement with the latter and believe it a duty of physicians to make quality of life judgments with their patients and their patients' families. In neonatology, we as a society ask doctors to take on an even greater burden of responsibility. We expect them to make medical decisions based on predicted quality of life judgments without the explicit permission from the patient; a practice occasionally confronted in adult medicine, but regularly dealt with in pediatrics. Consider the case of Baby Doe.

The setting is Bloomington, Indiana, in 1982. A boy is born with a tracheoesophageal fistula, an easily surgically correctable congenital malformation that disrupts the passageway allowing food entering the mouth to get to the stomach. Yet Baby Doe's parents decline the operation, not because the surgery is too risky, but because the boy also has Down syndrome. The case is taken to the Indiana Supreme Court, which ultimately upholds the parents' decision. Baby Doe dies shortly thereafter from pneumonia, dehydration, and starvation.¹⁶

It proves difficult to hear the story of Baby Doe and not feel disgusted that such a situation was allowed to occur. How could medical staff not have intervened and taken charge as they do nowadays when they determine that families are not making medical decisions in the patient's best interest? To even ask this question implies that we would have hoped that the physicians would have made reasonable quality of life judgments for Baby Doe and realized that his future certainly had the potential to be long, fruitful, and worthwhile. If we consider the quality of life criteria presented in the 1992 Dutch report, it seems obvious that any decisions made based on his predicted quality of life should not have been in favor of his death. Unthinkable cases such as this have occurred throughout history and across the world because of inadequate guidance provided to medical staff making complicated decisions about ending patient's lives and due to insufficient legal and ethical investigation of their actions. These shortcomings are exactly what the Groningen Protocol aims to address. Imagine if a protocol guiding end-of-life decision had been in place in Bloomington, Indiana, in 1982. The doctors would have been compelled to explore the parents understanding of

¹² A. Jotkowitz, S. Glick, B. Gesundheit, "A Case Against Justified Non-Voluntary Active Euthanasia (The Groningen Protocol)."

¹³ Also see A.A. Kon, "We Cannot Accurately Predict the Extent of an Infant's Future Suffering: The Groningen Protocol is too Dangerous to Support," *American Journal of Bioethics*, (November 2008); 8(11): 27-9.

¹⁴ H. Lindemann and M. Verkerk, "Ending the Life of a Newborn: The Groningen Protocol."

¹⁵ H. Lindemann and M. Verkerk, "Ending the Life of a Newborn: The Groningen Protocol."

¹⁶ B.A. Manninen, "A case for justified non-voluntary active euthanasia: exploring the ethics of the Groningen Protocol," *Journal of Medical Ethics*, (November 2006); 32(11): 643-51.

their child's prognosis and their intentions in denying treatment. Even if you argue that they were informed in 1982, it is hard to imagine Baby Doe's medical state would have fulfilled the criteria of "hopeless and unbearable suffering" at least by any common sense meanings of the words.

This brings up another frequent criticism of the protocol – the vagueness of the terminology, such as "hopeless" and "unbearable suffering." While some critics suggest that babies can feel pain but not suffer, others explore the ambiguity of these terms in order to question the extent physicians and parents can accurately determine the severity of an infant's suffering.¹⁷ Kon argues: "Suffering is inherently subjective... Since the key question is not whether the patient is suffering, but rather whether the patient is suffering *unbearably*, we can never be certain of our answer."¹⁸ On the other side of this debate, Lindemann and Verkerk defend these terms, explaining that they "have a perfectly ordinary, everyday meaning, and to assume that this can't be known or conveyed adequately in the absence of precise criteria is a mistake."¹⁹ Yet, Lindemann and Verkerk overstate their case and there remains a need for broad criteria to help elucidate the subjective terms such as "quality of life." And this provides one area where the protocol could improve. No mention of the quality of life criteria adopted by the Dutch Association of Pediatrics in 1992 appears anywhere in the protocol, even though they are critically important in understanding what is meant by "hopeless and unbearable suffering."

Many opponents of the protocol also point to the fundamental difference between active and passive euthanasia. Active euthanasia is defined here as the deliberate shortening of a patient's life via a lethal injection, while passive euthanasia refers to the withholding or withdrawal of treatment that subsequently leads to the patient's death. Gesundheit and colleagues firmly believe in this distinction; "Passive euthanasia, is tacitly accepted – although not officially authorized – the world over, however, this issue of active euthanasia is fraught with bioethical problems."²⁰ On the contrary, however, I believe at times passive euthanasia may be even less humane than active euthanasia. Manninen agrees: "By allowing terminally ill infants who are in pain to die passively...we do add to their suffering by allowing the dying process to be prolonged naturally."²¹ James Rachels has repeatedly presented similar ideas over many years. He writes, "The doctrine that says that a baby may be allowed to dehydrate and wither, but may not be given an injection that would end its life without suffering, seems so patently cruel as to require no further refutation."²² Though these ideas surfaced at least as far back as Rachels' landmark paper in 1975, it took thirty years for the first country to create a protocol addressing active euthanasia that incorporates these principles directly into clinical practice. Change is happening, but at a snail's pace.

When we consider the euthanasia of babies, it proves impossible not to at least think about the Holocaust and the events leading up to it. While this superficial association is initially frightening, it

¹⁷ F.A. Chervenak, L.B. McCullough, B. Arabin, "Why the Groningen Protocol Should Be Rejected," *Hastings Center Report*, (September-October 2006); 36(5): 30-3.

¹⁸ A.A. Kon, "We Cannot Accurately Predict the Extent of an Infant's Future Suffering: The Groningen Protocol is too Dangerous to Support," *American Journal of Bioethics*, (November 2008); 8(11): 27-9; Also see E. Kodish, "Paediatric ethics: a repudiation of the Groningen protocol," *Lancet*, (March 15 2008); 371(9616): 892-3.

¹⁹ H. Lindemann and M. Verkerk, "Are Their Babies Different from Ours?" Dutch Culture and the Groningen Protocol," *Hastings Center Report*, (July-August 2008); 38(4): 7-8.

²⁰ B. Gesundheit, A. Steinberg, S. Blazer, A. Jotkowitz, "The Groningen Protocol – The Jewish Perspective," *Neonatology*, (2009); 96(1): 6-10.

²¹ B.A. Manninen, "A case for justified non-voluntary active euthanasia: exploring the ethics of the Groningen Protocol," *Journal of Medical Ethics*, (November 2006); 32(11): 643-51.

²² J. Rachels, "Active and Passive Euthanasia," *New England Journal of Medicine*, (January 9, 1975); 292(2): 78-80.

should not lead us to automatically reject the protocol. Rather, it should encourage us to further explore this relationship to adequately assess the similarities and differences between the Groningen Protocol and Nazi ideology. The elimination of handicapped children served as one of the first goals of the euthanasia program. The secretive program started even before the war began and served to support the Nazi's distorted eugenicist ideology. Though exact numbers are difficult to obtain, it is estimated that at least 5,000 children were murdered under the direction of this program.²³ Both stark critics and emphatic proponents of the protocol insist that a direct comparison to such a horrific program is unjustified. While many differences exist between the Groningen Protocol and the Nazi euthanasia program, the most fundamental differences is in the opposing motivations behind each. The protocol intends to support patients' best interests who are suffering, while the Nazi euthanasia program served to murder innocent victims deemed subhuman in comparison to the German and Aryan ideal. And while some critics comment that the Groningen Protocol reminds them of the early Nazi concept of life unworthy of life, a more accurate and nuanced understanding of the Groningen Protocol's concept of life is the premise that some forms of life may not be worth living; a totally different proposition altogether.²⁴

Some safeguards are also built into the protocol in order to ensure that it serves the specific purpose for which it was intended. For instance, two of the required criteria are that "the diagnosis, prognosis, and unbearable suffering must be confirmed by at least one independent doctor" and "both parents must give informed consent."²⁵ These checks and balances encourage a team approach among all parties involved, and the requirement of a unanimous decision discourages the primary physician from taking the decision into her own hands.

Since the adoption of the protocol in 2005, an additional safeguard has been put in place. In 2006, a Central Expert Committee was formed – a multidisciplinary team composed of one professor of medical law, one professor of ethics, and three physicians. The creation of this committee was intended to encourage physicians to report all cases of deliberate ending of life by reducing the concern for legal repercussions. Whenever a deliberate ending of life is undertaken for a newborn, the case is first sent to this committee prior to being forwarded to the legal authorities. The committee served to assess whether the physician appropriately followed the requirements explained in the protocol. After the evaluation is complete, their findings are sent to the prosecutorial authorities, who then make their own decision on whether or not to try the physician in court.²⁶

Unfortunately, this does not mean that mistakes would not occur. Lindemann and Verkerk, strong supporters of the protocol, even admit this unfortunate reality. "It is of course true that some of these babies... might, if kept alive, judge as adults that their lives had been worth something to them. Much would depend, one supposes, on how much pain and other kinds of suffering they had to endure to get to adulthood."²⁷ This presents a particularly significant judgment call. What is worse: the risk of prematurely ending the life of a baby who may later grow up to have some acceptable quality of life, or subject a cohort of severely ill infants to lives of unbearable suffering for an indeterminate amount of time? No correct answer to this predicament exists.

²³ H. Friedlander, The Origins of Nazi Genocide: From Euthanasia to the Final Solution (Chapel Hill, NC, University of North Carolina Press, 1995).

²⁴ A. Jotkowitz, S. Glick, B. Gesundheit, "A Case Against Justified Non-Voluntary Active Euthanasia (The Groningen Protocol)," *American Journal of Bioethics*, (November 2008); 8(11): 23-6.

²⁵ E. Verhagen and P.J. Sauer, "The Groningen protocol—euthanasia in severely ill newborns;" A.A.E. Verhagen and P.J. Sauer, "End-of-Life Decisions in Newborns: An Approach from the Netherlands."

²⁶ S. Moratti, "End-of-Life Decisions in Dutch Neonatology."

²⁷ H. Lindemann and M. Verkerk, "Ending the Life of a Newborn: The Groningen Protocol."

The Groningen Protocol attempts to provide guidance to a previously ignored area of neonatal medicine. It gives direction to help caring physicians work with loving parents to act in favor of severely ill babies' best interests by intentionally causing their deaths when their lives are, and forever will be, full of pain and suffering. There are three primary reasons why I judge the protocol an improvement on the past when no such guidance existed:

- 1.) Secrecy is dangerous. Hitler's euthanasia program developed into an ideology that ultimately led to the murder of millions of innocent people. Yet the world was initially not fully aware of his developing horrific intentions to cleanse Europe and the rest of the world because he and his Nazi government were experts at keeping their true motives hidden. Today, we already know that the deliberate ending of life occurs. Verhagen and Sauer reported in their initial publication of the protocol that the national survey indicated that 15-20 newborns were actively euthanized every year, yet only three cases per year were reported to the authorities. Therefore, if we know active euthanasia was occurring even before the protocol was instituted, then it seems preferable to provide some sort of guidance and encourage the transparency of physicians' actions so that they can be judged accordingly. As Lindemann and Verkerk eloquently propose, "Euthanasia happens everywhere, but when it remains hidden, its abuse does, too."²⁸
- 2.) Prolonging life and improving quality of life provide two of the physician's primary duties to her patients. One duty is not more important than the other in all situations, but rather it depends on each individual patient and the associated clinical context. I firmly believe that there are very few extremely ill infants who are inadequately treated by standard means of palliative care and do not have a convenient mode of exit, such as the withdrawal of intensive care treatment. These suffering patients deserve the right and respect from the medical community and society at large to undergo active euthanasia.
- 3.) The fact that a protocol exists to provide guidance for such rare cases of severely impaired newborns is just as important symbolically as it is functionally necessary. It shows that medicine respects each and every individual for her unique medical presentation and family relationships. Therefore, even if it only serves a select few each year, it represents something truly invaluable to the parents of those individual patients and shows other families that we, the medical community, truly aspire to work with everyone in society to reach the best possible outcomes for all children.

The FASPE experience will continue to live with me until the end of my life, and the numerous lessons taught implicitly and explicitly throughout our discussions will serve to guide my clinical practice as a physician. FASPE challenged me to ask many difficult questions: Why is it important to study history, specifically physician participation during the Holocaust, when addressing contemporary issues in medical ethics? How am I like the Nazi doctors? How can I be sure that I, as a future physician, do what is right by my patients? What does it truly mean to "do no harm"? Though these provide only a few of the questions addressed during our journey, they are some of the most important to contemplate, especially when considering the Groningen Protocol.

²⁸ H. Lindemann and M. Verkerk, "'Are Their Babies Different from Ours?'" Dutch Culture and the Groningen Protocol," *Hastings Center Report*, (July-August 2008); 38(4): 7-8.

Why is it important to study the history of our professional predecessors during the Holocaust? As a result of having participated in FASPE, the answer to this question has become clear. Physicians are often viewed as leaders of their societies. With this role comes a responsibility to understand from where this respect comes and to recognize where our predecessors have been both worthy and unworthy of this praise. It therefore behooves us as medical professionals to critically assess the successes and failures of those who have come before us in an effort to remedy their mistakes and avoid similar failures in our own futures. To do so, I must not distance myself from the Nazi doctors, but rather accept that we have similarities as well as differences. It proves instinctual to want to defend that I could never do anything like those physicians. Maybe this is true – I would like to think that I would never contribute to the mass murder of millions of innocent people. But no one doctor led to the murder of millions. It therefore was many individual decisions by hundreds, if not thousands, of medical professionals that contributed to the development of mass murder. Learning how those doctors were educated, becoming aware of the cultural norms that affected their decisions, and understanding how they justified their actions can only prove to benefit me in my own future practice with patients.

How will I know what I do as a doctor is right by my patients? And how can I ensure that I will uphold the ethical principle of nonmaleficence when interacting with my future patients? Participating in FASPE has certainly shed light on my responses to these challenging questions. The experience will continue to remind me that patients' best interests are of primary importance, while recognizing the wishes of families and societies are only secondary and tertiary contributors to ethical decision-making. My peers on the program taught me that we must support each other and believe that we truly have the power to make positive change in our patients' lives. While these explanations begin to address these complex questions, they cannot completely do them justice – I simply do not have absolute answers to these important questions. While this uncertainty feels tremendously uncomfortable, I think that it is probably what is best. For it is this uncertainty that will remind me to constantly reevaluate my clinical decisions and actions. It is what will encourage me to talk with my peers to explore as a team what will be best for each and every patient. Therefore, the ultimate goal of asking these questions is not to come up with concrete answers. Rather, the goal is to continue to discuss these questions to further my growth and awareness as a physician. I must always remember that my profession is founded upon specific ethical principles. Obtaining absolute correct interpretations of these ethical principles in all possible clinical situations would certainly simplify the task of practicing medicine. But we must maintain flexibility and judgment in medical practice if we are to avoid the mistakes of our predecessors. Only then, as caring, thoughtful, and loving physicians will we truly serve our patients to the best of our ability.

Now that I have had the unique opportunity to walk out of that crematorium where so many innocent people had been barred from the door, I hope to use my expanded knowledge and improved emotional awareness to guide my future doctor-patient relationships. Let me never forget the immense responsibility of the medical position I hope to assume, and how the grave decisions I will make with and for my patients will shape both the quality of their lives and, importantly, the quality of their deaths.

On Moral Courage and Civil Disobedience

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When you think of the long and gloomy history of man, you will find that far more, and far more hideous, crimes have been committed in the name of obedience than have ever been committed in the name of rebellion. – C. P. Snow (1961)

In the documentary *The Restless Conscience: Resistance to Hitler Inside Nazi Germany 1933-1945*, Captain Axel von dem Bussche, who was an 18-year-old officer in the elite 9th Infantry Regiment in Nazi Germany, describes how he came to volunteer for a suicide mission to assassinate Hitler in 1943. As part of the military that invaded Poland and France, he witnessed numerous acts of indiscriminate violence and human rights violations, but it wasn't until he saw the massacre of Jews in Russia that he was propelled into action. As he watched long lines of naked men, women, and children being led into a pit to be murdered by the SS, he instinctively knew that he could no longer stand idle – this was a turning point, when he knew he had to react. “It’s a moment when the bottom of everything falls out, and keeps away,” he recalled.¹ As part of *Operation Spark*, a plan was soon hatched for Bussche, who stood over two meters tall, blond, and blue-eyed, to wear a bomb when modeling new winter uniforms for Hitler, and to detonate it while embracing Hitler. However, the night before the scheduled event, the uniforms were destroyed by an Allied air raid and the event was canceled. Bussche’s suicide mission was only one of many unsuccessful attempts at a coup d’état to remove Hitler from power and end the reign of terror. Bussche holds that it still pains him that he couldn’t stop the mass killings, and laments, “it is my responsibility and guilt that I am still alive.” Ewald-Heinrich von Kleist, another German army officer who was recruited to repeat Bussche’s failed suicide mission, recalls seeking advice from his father when presented with the opportunity to sacrifice his life. “Yes, you have to do it,” his father said, giving von Kleist his whole-hearted support, stating, “a man who doesn’t take such a chance will never be happy again.”²

* * * * *

The prevailing narrative of the Holocaust is dominated by stories of Jewish passivity and victimhood juxtaposed with Nazi dominance and brutality bolstered by German indifference and complacency. Countless volumes have been written on how apathy and obedience allowed the Nazis to perpetrate one of the most horrific atrocities in history. However, despite the indifference of many and active corroboration of others, thousands of individuals, both Jewish and non-Jewish, did, in fact, take action against Nazi tyranny and oppression, often at the risk of life and liberty. Much of the Jewish resistance arose out of necessity, but thousands of others who otherwise would not have been a target of the Nazi persecution defied the regime, knowing full well that they, and often their families, had little chance of escaping the consequent torture and death. It is one thing to stand up for one’s own rights, but quite another to deliberately risk one’s own welfare to protect another’s. Why did they act? Why did some individuals intervene while others did nothing? How did they override their fundamental consideration for survival to rise against? The resistance took many forms: while some objected publically, others fought in secret; while some opposed peacefully, others resorted to violence as a necessary weapon for change. Nevertheless, no matter how they chose to respond, these

¹ Hava Kohav Beller, Director, *The Restless Conscience: Resistance to Hitler Within Germany, 1933-1945*. (NewVideo Group: 1992).

² Beller.

individuals recognized that subjective beliefs and values were largely irrelevant to the moral issue at hand if they were not transformed into action, and understood that violence and cruelty would continue unless they took a stand. I would like to think that had I been around at the time, I would have been one to take action; yet standing up for justice in the face of immense opposition and danger requires extraordinary moral courage. It would have been infinitely easier to stand aside. The remarkable courage of these individuals remind us that our responsibilities as humans go beyond the obligation to follow rules and laws, and their stories provide an edifying lens for exploring how they grappled with their personal sense of justice, responsibility, and guilt as they were propelled into action.

Civil Disobedience as a Moral Imperative

A common and natural result of an undue respect for the law is, that you may see a file of soldiers, colonel, captain, corporal, privates, powder-monkeys, and all, marching in admirable order over hill and dale to the wars, against their wills, ay, against their common sense and conscience, which makes it very steep marching indeed, and produces a palpitation of the heart. – Henry David Thoreau (1849)

In 1933, when the mainstream German church hierarchy supported Nazi efforts to combine National Socialism and all Protestant churches into a unified Reich church based on Aryan blood called the Deutsche Christen (“German Christians”), Martin Niemöller, Dietrich Bonhoeffer, and other German theologians established the Confessing Church in protest. They insisted that Christ, not the Führer, was the head of church, and objected to the regime’s interference with the organizational independence and theological autonomy of the church. In the Barmen Declaration, the Confessing Church declared, “We reject the false doctrine, as though the State, over and beyond its special commission, should and could become the single and totalitarian order of human life, thus fulfilling the Church’s vocation as well. We reject the false doctrine, as though the Church, over and beyond its special commission, should and could appropriate the characteristics, the tasks, and the dignity of the State, thus itself becoming an organ of the State.”³ For his role in opposing the unification of church and state, Niemöller was imprisoned in Sachsenhausen and Dachau concentration camps from 1937 to 1945.⁴

Bonhoeffer, an even more fervent critic of the Nazi regime, repeatedly and publically called for the church to resist Hitler’s persecution of Jews, stating its obligation to fight injustice. The church, he wrote, “must fight evil in three stages: The first, to question state injustice and call the state to responsibility; the second, to help the victims of injustice, whether they were church members or not; and ultimately, to ‘not only to help the victims who have fallen under the wheel, but to fall into the spokes of the wheel itself’ in order to halt the machinery of injustice.”⁵ He further insisted that “The more spiritual you are, the more political you must be. Only if you cry for the Jews are you permitted to sing Gregorian chants.”⁶ He was visiting New York in 1939 when the war broke out, but he promptly returned to Germany insisting, “Christians in Germany will have to face the terrible alternative of either willing the defeat of their nation in order that Christian civilization may survive or willing the victory of their nation and thereby destroying civilization. I know which of these

³ Cochrane K. Barth K, “Theological Declaration of Barmen” in The Church’s Confession Under Hitler (Westminster Press, 1962), 237-242.

⁴ “Martin Niemöller,” United States Holocaust Memorial Museum, accessed September 20, 2011, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007391>.

⁵ “Dietrich Bonhoeffer,” United States Holocaust Memorial Museum, accessed September 20, 2011, <http://www.ushmm.org/museum/exhibit/online/bonhoeffer/?content=3>

⁶ “Dietrich Bonhoeffer,” United States Holocaust Memorial Museum.

alternatives I must choose but I cannot make that choice from security.”⁷ For his opposition to the regime and connection to Operation Valkyrie, the German Military Intelligence Office’s failed July 20, 1944 attempt to assassinate Hitler, he was executed by hanging at Flossenbürg concentration camp in 1945.

* * * * *

In 1941, at the height of Third Reich’s power, Bishop Clemens August von Galen, Bishop of Munster and an outspoken critic of the Nazi regime issued a series of powerful, public denunciations of the forced sterilization and euthanasia programs and the terror tactics used by the Gestapo, and condemned the persecution of the Catholic Church. He wrote:

“None of us is safe — and may he know that he is the most loyal and conscientious...he cannot be sure that he will not some day be deported from his home, deprived of his freedom and locked up in the cellars and concentration camps of the Gestapo. I am aware of the fact [that] this can happen also to me, today or some other day. And because then I shall not be able to speak in public any longer, I will speak publicly today, publicly I will warn against the continuance in a course which I am firmly convinced will bring down God's judgment on men and must lead to disaster and ruin for our people and our country.”⁸

His sermons aroused such strong opposition across the German society that several Nazi party officials demanded his arrest and execution; however, his life was spared in an effort to avoid undermining the German morale in a heavily Catholic area at time of war.

* * * * *

Mere days after the new anti-Semitic laws were passed in Germany in 1933, Armin T. Wegner, a German writer and soldier, who fought in World War I, boldly wrote an open letter to Hitler publically condoning the persecution of Jews. He wrote:

Mr. Reich Chancellor! It is not only a question of the destiny of our Jewish brothers. The very destiny of Germany is at stake! ...As a German who has not been given the gift of speech to be a silent accomplice and whose heart is quivering with indignation, I address myself to you: Put a stop to all this! ...The same stubborn will that allowed the Jews to survive and become an ancient people will help them overcome this danger. But as a result of this, shame and misfortune will befall Germany and for a long time will not be forgotten! In fact who is going to pay for the evil we are now inflicting on the Jews if not ourselves?... Mr. Reich Chancellor, I am sending you words that spring from a torn and tormented heart. They are not only mine; it is rather the voice of destiny warning you through my mouth. Protect Germany by protecting the Jews... Even if Germany might be able to do without the Jews, she cannot do without her virtue....Defend the dignity of the German people!⁹

⁷ “Dietrich Bonhoeffer,” United States Holocaust Memorial Museum; Eberhard Bethge, Dietrich Bonhoeffer: Eine Biographie (Munich: Christian Kaiser Verlag, 2001).

⁸ “Four Sermons in Defiance of the Nazis Preached During 1941 by Bishop von Galen of Munster,” accessed September 20, 2011, http://kirchensite.de/downloads/Aktuelles/Predigt_Galen_Englisch.pdf.

⁹ Armin T. Wegner, “Letter to Hitler,” *Journal of Genocide Research* (March 2000), 2(1):139-144.

The head of the chancellery acknowledged the receipt of his letter, stating that it “would be laid before the Führer shortly.”¹⁰ Instead of a response, Wegner was arrested days later and imprisoned and tortured in seven concentration camps and prisons before making his escape to Italy. He could never bear to live in Germany again and died in exile. The inscription on Wegener’s gravestone reads, “Amavi iustitiam odi iniquitatem, propterea morior in exilio (I loved justice and hated injustice, therefore I die in exile).”

* * * * *

In 1942, a group of German students at the University of Munich, led by siblings Sophia and Hans Scholl, formed a resistance group, Die Weiße Rose (The White Rose), and launched an anti-Nazi leaflet campaign throughout Germany in an effort to awaken the German conscience to the evils of Nazism. The group created and distributed six leaflets that were critical of the Nazi policies, calling attention to the atrocities perpetrated by the regime and calling for passive resistance. “It is certain that today every honest German is ashamed of his government,” they wrote.¹¹ “Who among us has any conception of the dimensions of shame that will befall us and our children when one day the veil has fallen from our eyes and the most horrible of crimes – crimes that infinitely outdistance every human measure – reach the light of day?”¹² They asked, “Why do German people behave so apathetically in the face of all these abominable crimes, crimes so unworthy of the human race?”¹³ They were arrested and executed by guillotine in 1943. At her trial, Sophia Scholl, aged 21, maintained, “I am, now as before, of the opinion that I did the best that I could do for my nation. I therefore do not regret my conduct and will bear the consequences that result from my conduct.”¹⁴

* * * * *

When Count Helmuth James von Moltke, a German aristocrat, lawyer, and member of the German Military Foreign Intelligence Office observed numerous Nazi human rights abuses in his official travels throughout Nazi-occupied Europe, he attempted to intervene by advocating for the humane treatment of prisoners of war, urging that Germany observe the Geneva and Hague Conventions. He wrote, “Doubtless more than a thousand people are being murdered daily, and thousands of German man men are becoming accustomed to murder. And all of this is more than a child’s play compared to what is happening in Poland and Russia...How can anyone know these things and walk around free?”¹⁵ Frustrated by the Nazi disregard for the law and humanity, Moltke began a regular gathering of anti-Nazi dissidents at his estate in Kreisau in 1942 to discuss topics ranging from the failure of German education and religious institutions to fend off the rise of Nazism, to plans for post-war reconstruction and handling of the Nazi war crimes after an assumed defeat of Germany. This group, dubbed the Kreisau Kreis (Kreisau Circle) by the Gestapo, also covertly spread intelligence to the Allies and to other resistance groups throughout Europe and orchestrated the deportation of Jews to countries that provided safe haven. Moltke himself made clandestine trips abroad in 1943 to muster foreign support for the resistance movement and smuggled White Rose leaflets to be distributed abroad. While no evidence of Moltke’s involvement in any conspiracy against the regime was found, he was charged with treason in 1944 for having discussed moral and democratic principles for post-Nazi Germany. He was executed in 1945 at Plötzensee Prison in Berlin. In a farewell letter written to

¹⁰ “Armin T. Wegner,” Yad Vashem’s *The Righteous Among The Nations*, accessed September 20, 2011, <http://www1.yadvashem.org/yv/en/righteous/stories/wegner.asp>.

¹¹ Inge Scholl and Dorothea Sölle, *The White Rose: Munich, 1942-1943* (Wesleyan University Press, 1983).

¹² Inge Scholl and Dorothea Sölle.

¹³ Inge Scholl and Dorothea Sölle.

¹⁴ “Schulz K. Auszüge aus den Verhörprotokollen von Sophie Scholl” (Excerpts from the interrogations of Sophie Scholl), Bundesarchiv Berlin, accessed 20 September 2011, http://www.bpb.de/themen/5H3ZT3,3,0,Ausz%FCge_aus_den_Verh%F6rprotokollen_von_Sophie_Scholl.html#art3.

¹⁵ Helmuth James von Moltke, *Letters to Freya: 1939-1945* (Vintage, 1995).

his two sons while in custody, he explained, “Since National Socialism came to power, I have committed myself to softening its consequences for its victims and to preparing the way for the change which must follow. My conscience drove me to these steps—and in the end that is a man’s duty.”¹⁶

* * * * *

As army contracts poured in with the escalating war, as a successful, well-connected factory owner, Oskar Schindler had much more to lose than gain by keeping his Jewish workers at his factory. Yet at some point, he decided that it was imperative that he fend for his workers and continually risked his life and fortune to keep them out of harm’s way. Schindler intervened repeatedly on his workers’ behalf through bribes and personal diplomacy and spared them from deportation to concentration camps. He explained, “The persecution of Jews in the General Government in Polish territory gradually worsened in its cruelty. In 1939 and 1940 they were forced to wear the Star of David and were herded together and confined in ghettos. In 1941 and 1942 this unadulterated sadism was fully revealed. And then a thinking man, who had overcome his inner cowardice, simply had to help. There was no other choice.”¹⁷

* * * * *

As a Roman Catholic social worker in Nazi-occupied Poland, Irena Sendler could have stuck to her job of monitoring the spread of infectious diseases in the Warsaw Ghetto, but instead, she joined Żegota, a Polish underground resistance group Council for Aid to Jews, and used her position to smuggle over 2,500 Jewish children out of the ghetto, sometimes by hiding them in coffins and potato sacks.¹⁸ She hid the children in churches, schools, and private homes, and carefully provided each child with a new identity while cataloging their original names and addresses so that they could be reunited with their families after the war. In 1943, she was arrested and tortured by the Gestapo and sentenced to death but was rescued just before her execution by a Żegota member who bribed a guard to set her free. Despite her heroic efforts, she reflected, “We who were rescuing children are not some kind of heroes. That term irritates me greatly. The opposite is true – I continue to have qualms of conscience that I did so little. I could have done more. This regret will follow me to my death.”¹⁹

A Pattern of Moral Courage

First they came for the Socialists, and I did not speak out because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out because I was not a Jew. Then they came for me and there was no one left to speak for me. – Martin Niemöller (1946)

These are the stories of individuals who, despite grave danger to themselves and their families and in the absence of clear personal gains, dared to stand up against Hitler and the Third Reich. They stood against the overwhelming national consensus and steadfastly refused to become silent bystanders,

¹⁶ Helmuth James von Moltke, *Letters to Freya: 1939-1945* (Vintage, 1995); Moltke–The Duty of Conscience,” Harper’s Magazine, accessed 20 September 2011, <http://harpers.org/archive/2009/01/hbc-90004159>.

¹⁷ “Oskar Schindler: An Unlikely Hero,” United States Holocaust Memorial Museum, accessed 20 September 2011, <http://www.ushmm.org/museum/exhibit/focus/schindler/>.

¹⁸ D. Hevesi, “Irena Sendler, Lifeline to Young Jews, Is Dead at 98,” New York Times, May 13, 2008, accessed 20 September 2011, <http://www.nytimes.com/2008/05/13/world/europe/13sendler.html>.

¹⁹ “Irena Sendler-Obituary,” [London] Telegraph, May 12, 2008, accessed 20 September 2011, <http://www.telegraph.co.uk/news/obituaries/1950450/Irena-Sendler.html>

enablers, or willing participants; their conscience and their pride in their country allowed them no other choice. Given that the Nazis ruthlessly crushed subversive activities, this task was made all the more difficult. Resisters could not band together into an organized movement and were compelled to make independent decisions to protest as individuals and operate in isolation. While they chose to express their dissent through a variety of means, they all nonetheless arrived at the same conclusion that something had to be done.

The precise number of just how many individuals acted in defiance of the Nazis will never be known, as many perished in their efforts. To this date, Yad Vashem, the body responsible for recognizing the Righteous among the Nations, has identified over 23,000 non-Jewish individuals who risked their lives to save the Jews, and it is estimated that the true figure falls between 50,000 and one million. Yet even the highest estimate of one million, not including those who stood up for non-Jewish individuals, represents less than half a percent of the population under Nazi occupation, illuminating the fact that countless fundamentally good and otherwise decent individuals allowed the atrocities to continue right before their eyes. It is obvious now that not enough people took action, but some did. While the majority stood idle, this minority made a choice to act against the odds.

Although the courageous actions of these individuals may have transpired at the confluence of a particularly unique set of events, influences, social forces, and institutions, their stories share many common threads. By successfully freeing themselves from the fallacies of “group think” and recognizing that the majority is not always just, they were able to preserve and foster their capacity for independent analysis, reflection, and decision making. Their keen awareness for injustice and the ability to foresee the consequences of inaction gave them a sense of urgency to intervene. Their empathy towards others motivated them to reach out from under their cloaks of safety, whereas those who stood idle considered anything beyond their personal boundary as peripheral. In fact, when Samuel and Pearl Oliner conducted their landmark study of those who rescued the Jews in Nazi Europe, they found that these individuals had a “heightened capacity for extensive relationships,” and a “stronger sense of attachment to others and feelings of responsibility for the welfare of others.”²⁰ While these individuals derived the impetus for mobilization from balancing their personal sense of obligation, duty, and responsibility against guilt, shame, and regret, bystanders simply saw the suffering of others as alien or irrelevant. Finally, their firm conviction that their efforts could make a difference pushed them to act despite the risks.

These commonalities suggest that the actions of these individuals were not radical departures from their typical behaviors but courageous extensions of how they ordinarily related and responded to the world around them. Their personal moral sensibilities and usual patterns of behavior had predisposed them to act as they did, and this feature is reflected, time and again, in the fact that many resisters can identify a specific moment in time when they knew they had no choice but to take a stand. While we marvel at their remarkable courage, many of these individuals maintain that their actions deserve no special recognition, since it was simply an “ordinary” thing to do, and, to them, it may well have been.²¹

It must follow, then, that preparations for their courageous acts of resistance began long before they encountered the moral dilemma in question. Indeed, in *Nicomachean Ethics*, Aristotle contends that “moral excellence comes about as a result of habit.”²² Just as “men become builders by building and lyre-players by playing the lyre; so too we become just by doing just acts, temperate by doing

²⁰ Samuel Oliner and Pearl Oliner, *The Altruistic Personality: Rescuers of Jews in Nazi Europe* (Free Press, 1988).

²¹ Oliner and Oliner.

²² Aristotle, *The Nicomachean Ethics*, translated by W.D. Ross, revised by J.O. Urmson, in Jonathan Barnes, ed, *The Complete Works of Aristotle. The Revised Oxford Translation*, Volume 2, Book 2, chapter 6 (Princeton University Press, 1984), 1747.

temperate acts, brave by doing brave act.”²³ He continues that just as both good and bad lyre players are produced from playing the lyre, it is “by doing the acts that we do in our transactions with other men we become just or unjust.”²⁴ Thus, habituation is the process by which we learn to focus our moral attention to the important particulars of a dilemma such that the right thing to do becomes obvious in the moment of truth. Iris Murdoch similarly observes that morality is “not something that is switched on at a particular crisis but is rather something that goes on continually in the small piecemeal habits of living” and as such “at crucial moments of choice most of the business of choosing is already over.”²⁵

I cannot be confident that I would have been able to identify the moral dilemmas amidst the messy complexities of human life, nor can I be certain that I would have come to the right ethical decision or had the courage to do what the resisters did when confronted with the same circumstances. I can, however, strive to ensure that I maintain a heightened sense of critical awareness in my day-to-day routines and continue to practice turning my beliefs into action, even when faced with the smallest of concerns, so as to learn by doing and foster habituation. Every day, we encounter matters that we would like to see changed, but only a few act in response. While some of the problems might be trivial, others might concern the life and death of millions of individuals. From the stories of those who stood idle, we learn that morality cannot simply be switched on at will in the face of abuse and injustice, and that we cannot reliably count on our conscience to tell us when we need to take action. From the stories of those who did take a stand, we learn that moral courage must be refined and honed over time, and that we must regularly exercise our conscience to overcome apathy and indifference. Taking a stand against injustice is often difficult, but inaction and disengagement in our everyday lives can only make tackling subsequent dilemmas all the more challenging. Being ethical takes practice, and, with practice, we can overcome our inertia and learn to more readily mobilize our principles, values, and beliefs in the pursuit of what is right.

²³ Aristotle, 1747.

²⁴ Aristotle, 1747.

²⁵ Oliner and Oliner.

In Auschwitz: Facing the History of the Holocaust

Haleh Kadivar

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FOREWORD

The following poems give voice to my personal experience in FASPE. Delving deeply into the story of the Holocaust itself had a profound impact on my sense of self as a future physician. I became more cognizant of the responsibility resting on my shoulders as well as more motivated to utilize such power in a fashion that truly improves the life of every individual patient I encounter. The broader implications and questions engendered by this experience in relationship to my existence simply as a human being, however, were more troubling.

I am one of four daughters and was raised as a Muslim in the Bible-belt of Tennessee; I could not have been further away from Jewish culture and history during my upbringing. However, as an adult, I find myself to be a free-spirit frequently mistaken for a Jew given my appearance and Hebrew-sounding name. I am also now engaged to a Jew and have been jokingly called an honorary member of his religious community due to my frequent participation in their holiday activities. Such proximity to Jewish society has of course made the events of the Holocaust seem more closely linked to my own life. Yet I believe (or at least I would like to believe) that this history would still have been just as painful to confront without such a connection, for I – like everyone who perished in the flames of Nazi ideology – am human.

The following pieces are among several that seek to explore what the Holocaust means to me, both as an individual with my own unique story and as member of the human species at large. My poems take inspiration from e. e. cummings by using punctuation, spelling, syntax, and structure to both enrich expression of concepts and emotions and pose questions.

auschwitz is not mine

i know what it feels like
to be different
to be hated

but I do not know public humiliation
 Or the sharp pang of rocks against my body
 Or the anguish of being stripped away
 from home
 from family

simply because of a name
 whether religion
 appearance
 or heredity

feet cold and damp
 (despite my nice shoes and socks)
i walk through auschwitz
miserable
in the wind bitter
and rain cold
but i will never know this place as the prisoners of its walls once did.

at birkenau, all is Horrible
yet Holy

P

e

bbles

Latrines

Ramp and Ruins

bear witness to monstrous suffering

so it feels sacrilegious
to *lean* against a wooden support beam
to pick up a piece of broken concrete
 r k n
surely once stained
 with the urine and excrement of its previous tenants –

Exhausted Beings!

too ill to arise
from the harsh wooden beams
on which they slept.

Persons

whom I can only know

as photographs, belongings, and stories scattered

had Life (in the most fundamental sense of the word)

crudely stolen from them

by one of the greatest failings

of human judgment

morality

empathy (whatever you want to call it).

and so

in the lonely crowded expanse of birkenau

Human Potential died

its ashes rendering sacred all that remains of that place.

being

i am not a jew
but mounds of now decaying hair still weigh heavy in my heart

wavy brown hair
dark thick eyebrows
fair freckled skin
with a name that echoes hebrew

could i have been at auschwitz
(within its walls what would i have been
or
outside
would i have challenged madness)

reaching out to gently touch the glass
(keeping safe belongings of the perished)
i mouth the words –
i am so sorry.

i was not there (and as far as i know
neither were any of my relatives)
but as a human
responsibility shakes within every atom of my being

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

FINAL PROJECT
JOURNAL
2011

SEMINARY
PROJECTS

INTRODUCTION TO THE SEMINARY PROJECTS

Following a rigorous and highly competitive application process, 12 talented students participated in the 2011 FASPE study trip for seminarians. As I write this, I am looking at a photo of the group taken outside the Archdiocesan Seminary in Krakow. What a wonderful group they were and are! I know that the memories of our time together will stay with all of us for the remainder of our lives.

There were so many meaningful moments during our trip. A few that especially stand out in my mind are the following:

- Bronia Brandman's eloquent testimony and the courage she showed in telling us the story of her survival
- Doris Bergen's chilling account of complicity in murder by Christian military chaplains
- The large conference room at the Wannsee House where the plans for the Jewish Holocaust were finalized at an inter-agency meeting
- The outdoor rows of columns and the reverent underground exhibition at the Memorial to the Murdered Jews of Europe in Berlin
- The individual and family photographs in "Canada," the building where the clothing of Auschwitz inmates was stored
- Our prayers and scripture readings at the final crematorium that we visited in Auschwitz-Birkenau
- The evening discussion, with the medical students, of the searing question, "Where was God in Auschwitz?"
- The joy of Shabbat, as we worshiped and joined in the dance at Cracow's ancient Jewish synagogue

The students were impressively committed to our program and devoted themselves to completing their final projects after our trip. Their written essays, three of which are included here, and their visual art authentically represent the profound experience that we were all privileged to share.

On behalf of John and Michael, I want to thank the seminarians for their thoughtful and dedicated participation in our study trip.

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The Insufficiency of Outrage

Steven Cottam

Catholic Theological Union, Class of 2012

To be “anti-anti” runs the risk of finishing up in denunciations of little effect. More is needed. It is not enough to be against someone who is against; rather one must be *for* someone and this in a consistent way. It is necessary therefore to be *for* the Jewish people, for their culture, for their values, for their human and spiritual riches, for their history, for their extraordinary religious witness. It is necessary to be for those values that enrich all humanity. – Cardinal Carlo Martini¹

In the wake of my experience with FASPE -- as a result of my travel to and engagement with the sites where some of history’s greatest crimes were perpetrated -- I have formed two distinct and deep convictions about the Holocaust. First, the Holocaust is utterly incomprehensible. Second, mere opposition to anti-Semitism is insufficient. Reflecting on these convictions, this paper seeks to explore an answer to the question: how ought I respond to the Holocaust?

The Holocaust as an Incomprehensible Event

I spent two weeks during FASPE ruminating on the events leading up to and constituting the Jewish genocide, as well as countless hours upon my return. The more I think about the trip, the more I realize: I do not understand what happened. I do not understand how it happened. I do not understand why it happened. What’s more, I am no closer to understanding now than when the program began.

This is not to say that I did not learn things from the program. On the contrary, I learned a great many things. I learned a tremendous amount about the details of the Holocaust: facts, dates, important figures, the cause and effect relation of a number of different circumstances that allowed the Nazis to perpetrate their crime spree. Even more existentially, I learned about the way in which the professions, especially my own profession as a religious minister, failed to respond to, or in many cases aided and abetted, the tragic events of those years. However, the deeper I probed, the more I realized that something was alluding me. There exists this facet of the entire affair that I just cannot grasp; no amount of mental strain or intellectual anguish has allowed me to comprehend it. Through the program I came to understand how populations can stand by and watch murder happen, and I came to understand how people rationalized their involvement. But what of the ringleaders, the Nazi architects? What of those who to the end were unapologetically and frenziedly anti-Semitic? From whence comes that level of hatred, that level of malice directed, not at just one person, but at an entire people who committed no other crime than to exist?

At first I thought this was some sort of failing on my part. I have since decided it is a blessing. I was exonerated by the writings of Primo Levi, who in discussing his own ruminations on the Holocaust wrote:

Perhaps one cannot, what is more one must not, understand what happened, because to understand is almost to justify. Let me explain: ‘understanding’ a proposal or human

¹ Cardinal Carlo Martini, quoted in Cardinal Edward Idris Cassidy, “The Vatican Document on the Holocaust: Reflections toward a New Millennium,” in Judith A. Bank and John T. Pawlikowski, editors, Ethics in the Shadow of the Holocaust: Christian and Jewish Perspectives (Sheed & Ward, 2001), 17-18.

behavior means to ‘contain’ it, contain its author, put oneself in his place, identify with him. Now, no normal human being will ever be able to identify with Hitler, Himmler, Goebbels, Eichmann, and endless others. This dismays us, and at the same time gives us a sense of relief, because perhaps it is desirable that their words (and also, unfortunately, their deeds) cannot be comprehensible to us. They are non-human words and deeds, really counter-human...²

At the end of the day, I cannot understand what took place in the souls of the Holocaust architects. From my discussions with my FASPE peers, I find that none of us do. I hope it always stays this way. The fact that we cannot understand, that most people cannot, is a testimony to the fundamental goodness of most of humanity. I hope, as the Holocaust becomes more and more removed from the present, that the incomprehension grows. I hope that future generations are utterly baffled by what transpired.

However, if true understanding is impossible, remembrance is a duty. The Holocaust is incomprehensible because it is a tragedy of unconceivable proportions. However, if we do not remember its victims, and if we do not analyze how it came about in order to learn from it, then we have committed a grievous sin; if we learn nothing from it, then the Holocaust remains only a tragedy, and nothing more. We must remember, and we must orient ourselves toward the future in such a way that indicates we have gained something from this history and incorporated it into the way we are in the world; if not, then the victims of the Holocaust have died not only senselessly, but then they have also died utterly in vain.

The Insufficient Response of Opposing Anti-Semitism

This, however, brings us to the question: what have we gained from our experience that is valuable to us as ethically minded professionals? I learned much about the Holocaust, but what is less clear is what I have learned from it, and how ought I respond to it? If I cannot diminish the tragic nature of what occurred, then what could I bring out of this experience that is of any value to anyone other than myself? This brings me to my second deep conviction stemming from my FASPE experience: as a response to the Holocaust, mere opposition to anti-Semitism is not enough.

No one in their right mind will look upon the events of the Holocaust and say they were justified or fell within some bounds of moral permissibility. A common response to the horror of these events has been to spend time crafting eloquent denunciations, and fostering moral outrage in the hearts of all those who study it. This is a very human response, and in a very real sense it is extremely cathartic: looking upon the Holocaust, it is natural, indeed even helpful, to get angry, and to give words to these feelings.

However, I believe there are two serious problems with denouncing the Holocaust, however public or eloquent those denunciations may be, as our primary way of relating to it. First, the emotions that correspond to such denunciations are short lived. Intense emotions cannot be maintained, and it does the Jewish community little good if people get enraged about the Holocaust for a few hours and then return to the same mental space they occupied prior. In discussing religious fervor, John Henry Newman warns that indulging in emotions is not the same as acting well, reminding us that there is an “immeasurable distance between feeling right and doing right.”³ Speaking about faith and works, Newman states that doing a single good deed “evinces more true faith than could be shown by the most fluent religious conversation, the most intimate knowledge of Scripture doctrine, or the most remarkable agitation and change of religious sentiments.”⁴ I worry that what Newman says about

² Primo Levi, *The Reawakening* (1965), 227.

³ John Henry Newman, *John Henry Newman: Selected Sermons*, edited by Ian Ker (1994), 18.

⁴ Newman, 18.

religious fervor applies to this form of fury as well. I worry that when we focus primarily on crafting denunciations of already recognizably evil historical actions we allow ourselves to go on acting as we acted before, but we believe we are now somehow morally superior and more enlightened, or that the Jewish community is somehow better off, because we use poetic and heartfelt language to disapprove of the sins of others.

The second problem, alluded to in the quote that begins this paper, is that anti-Semitism is a negative force; being merely anti-anti-Semitism is not productive, as a negative force cannot be ultimately repelled and overcome with another negative force. Doris Bergen sees this as essential to the very terminology we use when describing anti-Jewish violence. As Bergen states, “often you will see the word written with a hyphen—‘anti-Semitism’—a spelling I avoid...Use of the hyphen implies that there was such a thing as ‘Semitism,’ which antisemites opposed. In fact, no one who used the term in the nineteenth century (or since) ever meant it to mean anything but hatred of Jews.”⁵ There is nothing substantial in a primarily negative response to the Holocaust; saying that others have behaved badly will do little to make us good.

The Proper Response: Being for our neighbor

So what should our response be? As Cardinal Martini offers, it is not enough to be against anti-Semites; we (or, at least the non-Jews among us) be actively and positively for Jews and their continued vibrant existence. We must become friends with Jewish people. We must become protectors of Jewish values and participants in Jewish culture. We must not simply tolerate Jews, and shout down those who shout at them; we must shout for them. We must stand in solidarity with them, and invite them to be in solidarity with us.

I am not saying that this means breaking down all distinctions that exist between us. The Jewish community will remain the people of Israel, and the Christian community will remain the Church, and the Muslim community will remain the Ummah; I am not proposing we collapse or eradicate our cherished practices or any of those things that are the most intimate markers of our religious and cultural identities. However, it does mean recognizing that all of these communities belong to a single, larger community of which we are a part. It means recognizing that I am my Jewish brother’s keeper as much as I am the keeper of a fellow Christian.

If I learned anything from FASPE, it is that it matters where we draw the lines of community. Those lines determine to whom we give equal moral consideration. The road to the Holocaust began with communal divisions, and those who stood by and watched did so because Jews were considered separate, outside the community to whom protection was owed. Cardinal Hlond stated during the Jewish persecution in Poland that “one may love one’s own nation more, but one may not hate anyone. Not even Jews. It is good to prefer your own kind when shopping, to avoid Jewish stores and Jewish stalls in the marketplace, but it is forbidden to demolish a Jewish store...”⁶ Hlond was making it clear the Jews were not members of the community to which he and his belonged. While I understand that Cardinal Hlond sought to restrain as rather than incite anti-Jewish violence, the path toward genocide began with his type of separation of those more and less worthy of moral consideration. It began by saying that alienating the other is valid, that they are different from us and we must protect our own first. It ended at Auschwitz.

By contrast, as I studied the stories of the rescuers, the ones who fought to save Jewish lives at the risk of their own, I found myself asking who belonged to this group? I found that the rescuers were not necessarily those that condemned the Nazi’s most vocally or publicly, that opposed the Nazis in some

⁵ Doris L. Bergen, War and Genocide: A Concise History of the Holocaust (2009), 4.

⁶ August Hlond, excerpt from his pastoral letter, “On Christian Moral Principles” (1936), reprinted in Ronld Modras, The Catholic Church and Antisemitism: Poland, 1933-1939 (1994), 346.

philosophically negative sense; rather the rescuers were most often those that had Jewish friends, and saw in those friends one of their own.

However, our response to the Holocaust cannot be limited to taking this proactive stance only toward the Jewish community. It is our obligation to take this stance toward all groups with whom we come in contact. Speaking for a moment very specifically as a Catholic and what this means for my own community, I believe it means that the Church must be for Jews; but it must also be for Muslims, and for immigrants, and for woman, and for every single person who appears as “other.” Christ said, “What you did for the least of these, you did it for me.” You will note he did not make a distinction based on the creed or nation of the least. If the Church is serious about following Christ, then the Church’s first allegiance is not to the baptized, but to the oppressed, whoever and wherever they are.

Ultimately, the part of FASPE that I think is the most important is the bringing together of people from different backgrounds and communal allegiances to reflect and share on these issues. My feeling sad or angry about the deaths of innocent people will not bring them back, and my decrying the Nazis will not change history; however, my engaging in friendship, solidarity, remembrance, mourning, prayer, and professional ethical discourse with people from other communities—with Avi, with Bethany, with Craig, with Ben, with Leslie—might well prevent future discrimination from occurring. Or, when it occurs, it might equip us all with the resources necessary to positively and proactively oppose it.

The CIA has a colloquial saying that goes “our failures are public, but our successes are private.” FASPE could be judged by a relatively similar standard, for its success will be judged by things that do not occur: Holocausts that don’t happen, discrimination that never emerges, and hatred that is never borne. I again reiterate that my deep and abiding hope is that future generations will look back on the events of the Holocaust with unrelenting confusion and bafflement, wondering how such events could ever have transpired. A corresponding hope is that future generations will one day be confused about why organizations like FASPE exist. For in our day we are all too aware of why we need such programs, and what work we have to accomplish; but on the day when someone can look at FASPE and wonder why it is around, and why such bonds of community and commonality and engaged ethical discussion need to be so laboriously sought after, then the program will have truly accomplished its mission.

I pray for that day. Amen.

To See Ourselves for Who We Are: Victim, Perpetrator, and Hero

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Theological language pervades our vocabulary for the Holocaust. Even the name of the event, “The Holocaust,” comes from the Greek *holocaustos* (λόκαυστος) meaning “whole” and “burnt;” and is used in the King James Bible to translate the Hebrew word *olah* (עלה), a burnt offering in Ancient Israel.¹ Similarly, “victim” comes from the Latin, *victima*, a person or animal without blemish offered as a sacrifice, i.e. completely innocent of any wrong doing.² These, and other words, draw on biblical motifs to describe people who are on the receiving end of violence. Yet this religiously rooted language suggests a false lack of ambiguity. As the criminologist Nils Christie, among others, points out, labeling someone a “victim,” creates an idealized and unrealistic vision of both victim and perpetrator.³ Victim discourse assumes that the person affected by the crime is without fault and undeserving of the attack. The parallel is then that the perpetrator is wholly evil. And the forces of liberation and “the righteous among the nations,” are portrayed as saints or saviors -- courageous vanquishers of evil.

These idealized generalizations, with their strong theological and mythical overlay, create a profound ethical challenge in the context of the Holocaust. The type-casting of victim, perpetrator, and hero is so unrealistic that it can obscure a vision of our own capacity to act in any of these roles. We each recognize the complexity of our own motivations and internal conflicts. Our sense of self includes our failings and our greatness. Yet the idealized “victim,” “perpetrator,” and “hero” don’t share those complexities. We shake our heads and say, “we will never be like them” or “we could never do what they did,” but we fool ourselves. The central claim of this paper is that these ideal types have shaped communal memories of the Holocaust which, depending on how we use them, can obscure our moral vision or help us become ethical actors.

Memorials and museums are loci of communal memory creation. The Holocaust has a vast number of museums and memorials that are meant to help us draw moral lessons from this atrocity and “never forget.” There are museums in buildings where key decisions were made, like the museum at 56 *Am Großen Wannsee* where mid-level managers worked out the details for the “final solution” of “the Jewish problem.” There are museums in the homes of victims or synagogues, tributes to the Jewish communities destroyed in the war. There are museums and memorials near national capitals, notably *Yad VaShem* in Jerusalem, the United States Holocaust Museum and Memorial on the Mall in Washington DC, and the Memorial to the Murdered Jews of Europe in the heart of Berlin. These three museum/monuments mark the centrality of the Holocaust to the self-understanding of these nations. There are also smaller memory markers/memory makers: the *Stolperstein* or “stumbling block” memorials now in ten European countries, the countless six light menorahs burning in almost every American synagogue, etc. All of these memorials reflect a particular view or suggest key communal lessons that should be learned from this incomparable cataclysm.

¹ See, for example, Leviticus 1-6, King James Bible.

² Jan Van Dijk, “In the Shadow of Christ?: On the Use of the word “Victim” for those Affected by Crime,” in *Criminal Justice Ethics*, (Winter/Spring 2008), 14.

³ Nils Christie, “The Ideal Victim,” in *From Crime Policy to Victim Policy*, editor. Ezzat Fattah (Palgrave Macmillan, 1986).

The memorials chiseled into the German landscape reflect the *tshuva* or repentance that has washed over that nation.⁴ *Tshuva* is overwhelmingly apparent in the understated, power-effacing, and deeply introspective style of the memorial architecture around Berlin. The German people have internalized their role as perpetrator and re-founded their national identity around “never again” -- we shall never do this again.⁵ However, the preponderance of the perpetrator narrative can become so oppressive that it obscures other genuine communal needs. For example, where do parents of a German soldier go to honor their son’s memory and sacrifice? At this moment there is no place in Berlin where those parents can grieve and express their sense of pride for their son and his sacrifice for his country. The closest analogue to the “tomb of the unknown soldier” for Germans is a “Memorial to the Victims of War and Tyranny” at the *Neue Wache* (New Guard House) in Berlin. This is a complicated memorial, a place where the remains of an unknown soldier and a victim of a concentration camp are together memorialized in a hall whose most prominent object is a sculpture called “Mother with Her Dead Son” modeled on the Pieta. There is potential for a lot of criticism of this memorial. It memorializes a concentration camp victim (a person stripped of power) together with a soldier (a person equipped with the power of life and death over others) in the same location. It uses a central Christian symbol to mark the spot, a particularly insensitive choice if the concentration camp victim was Jewish. And the memorial fails to provide a space for the grieving parents to express the pride of son and country that they need. The German collective sense of self must find an avenue of expression that can honestly embrace all its manifestations, both good and evil. If the sense of national shame becomes overly burdensome the backlash could be problematic.

For the American Jewish community the symbols of the Holocaust are almost entirely centered on loss, death, destruction, and powerlessness. Almost all Synagogues have menorahs with six lamps burning, one for each of the 6 million Jewish victims. These memorials are clues to one of the primary socializing and identity forming truths for American Jewish life in our time, the centrality of Jewish victimhood and the resounding response, never again to us! The failure of Jewish power during the Holocaust has formed a victim identity for Jews that has dominated the 20th century, despite the Zionist attempt to create the “new Jew.” This lack of vision of self as powerful can lead to a mis-management and abuse of power if the community is not careful.

Israeli memory culture regarding the Holocaust is complex, but a dominant image is the role of redeemer for the victims/survivors. Consider the iconic *Yad VaShem*. The name, which comes from the Prophet Isaiah, metaphorically connects the Zionist project with divine redemption.⁶ The museum teaches that only in a return to power will the Jewish people find redemption from victimhood, i.e. Jewish power is heroic. The Israeli sociologist Jackie Feldman has pointed out that a heroic national identity is also being shored up by the ritual visiting of Poland’s death camps by Israeli youth.⁷ On trips to Poland such as the March of the Living, young Israelis are reminded of their status as victims by virtue of their Jewishness, but they also encounter the heroic character of their own existence as Israelis – in the shadow of the Holocaust Jews created the state of Israel where they not only survive but thrive. A native born Israeli remarked while visiting the death camps, “I traveled two

⁴ Tony Judt, “The Problem of Evil in Post War Europe,” *The New York Review of Books*, February 14, 2008. “West Germany above all, the nation primarily responsible for the horrors of Hitler’s war, was transformed in the course of a generation into a people uniquely conscious of the enormity of its crimes and the scale of its accountability.”

⁵ This sense of identity even impacts the way that Germans feel about having to bail out Greece for its profligate spending. See Planet Money, NPR Radio, episode #308, “The Dream of Europe and the Bailout of Greece.” However, it is also worth noting that some German human rights groups are deeply uncomfortable with the marginalization by some Germans of German-Turkish citizens.

⁶ “I will give you a memory and a name (YadVaShem) better than sons and daughters.” This verse from the prophet Isaiah is part of a divine promise to restore Jerusalem. For the Zionist that restoration is accomplished through the presence of restored Jewish power. Hence, the Israeli public can now grant “a memory and a name” for the victims of the Holocaust.

⁷ Jackie Feldman, “Marking the Boundaries of the Enclave: Defining the Israeli Collective through the Poland Experience,” *Israel Studies*, (Summer 200); 7 (2):84-114.

thousand kilometers to find *Eretz ha'yafa* (the beautiful land of Israel).”⁸ This *sabra* recognized the heroic Israel of myth, by traveling to the death camps of Poland. In the face of the evil of Auschwitz, Israel’s rise and power is heroic. But embracing heroic power can lead to an inability to recognize the abuse of power as a hero is incapable of wrong-doing.

The broader American encounter with the Holocaust also has an heroic element, which is both reinforced and created by the United States Holocaust Museum and Memorial in Washington, DC. Its location alone, in the capital and on the Mall, demonstrates that the nation’s role in “stopping” the Holocaust is central to American identity. When a visitor enters the Holocaust Museum, the first image she encounters is a floor to ceiling photograph of American soldiers liberating a death camp. In that mural America is celebrated as the liberator that saved a Europe which had descended into evil barbarism. For Americans there is a profound sense of honor that this country maintained its rationality and civility while Europe went insane. The American “never again” is a call to never again allow the world to collapse and to always serve as a beacon of moral courage. The danger of this narrative for the American consciousness is that it can contribute to a national sense of moral superiority. This can lead to moral arrogance and a willingness to enforce a moral vision on the rest of the world.

As these summaries suggest, there can be ethical consequences when a collective identity is based on a singular idealized role. Thus the sad irony of the memorial project is that instead of reminding us all of our capacity for evil, it can promote narrow group narratives that feed an insular moral imagination. These narrow narratives are the product of allowing one of the roles to become all encompassing.

Accepting one encompassing narrative role helped build the moral legitimacy for destroying European Jewry during the Nazi period. Alon Confino, Professor of History at the University of Virginia, has highlighted the way victimization can be used for building collective identity. Victimhood serves as “a fundamental aspect of the making of imagined national communities” because it draws together individuals based on the assumed need for collective rights.⁹ The cohesive power of victimization was used, for example, for promoting German identity before and during WWII. Hitler particularly cultivated a victim narrative for the German people and it served as a major rationale for the actions German soldiers took against Jews. In an article published in *Das Reich*, 16 Nov 1941, Joseph Goebbels made the following claim:

The historic guilt of world Jewry for the outbreak and spread of this war is so far proven that I need say nothing more about it. The Jews wanted their war and now they have it. Yet they also demonstrate the proof of the *Fuhrer's* prophecy made on 30 January 1939 in the German *Reichstag*, when he stated that if the International Jewish financiers again succeed in plunging the nations into war, the result would not be the Bolshevization of the world and thereby a Jewish victory but the annihilation of the Jewish race in Europe.

The notion that the Jews of Europe were somehow perpetrating war for their own benefit morally justified for German citizens what was being done to former neighbors and friends. As Confino explains, “Hitler saw himself and Germany as victims of the Jews, who supposedly undermined German identity, purity, and racial- historical mission; this wholly imaginary worldview was the basis of Hitler's exterminatory rage.”¹⁰ According to Hitler’s narrative, the collective rights of the German

⁸ Jackie Feldman, *Above the Death Pits, Beneath the Flag* (Berghahn Books, 2008), 256.

⁹ Alon Confino, “Remembering the Second World War, 1945-1965: Narratives of Victimhood and Genocide,” *Cultural Analysis* (2005); 51.

¹⁰ Confino, 51.

people (excluding of course German Jews) were being violated by European Jewry to such an extent that all Jews needed to be removed for the safety of other Europeans. Our incredulity at this specious argument does not change the fact that during the war, Germans were persuaded that it explained who was at fault for the pain and suffering being endured on the German home-front.

Today this view of Germans as victims has been eclipsed and there is strong Western agreement over how the roles of victim, perpetrator, and hero should be apportioned when we talk about the Holocaust. Yet 80 years ago there were many different groups claiming the role of the victim. Wealthy German's living in comfort did not see the victimization going on outside the windows of their beautiful upper class homes near the Grunewald Train Station, where Jews boarded trains for death camps, because they saw themselves as victims and the people herded into trains as perpetrators.

What do we learn from their lack of moral vision? We learn that our own moral vision can be profoundly hindered by the ways that we cast ourselves and others in the roles of victim, perpetrator, and hero. In order to find some moral perspective we must develop a new way of telling our stories.

Consider the following thought experiment. Think about a conflict that you are currently in or one that you have had in the past. How do you tell the story of that conflict to yourself? Are you the victim? Are you the hero? Confino explains, "Remembering is not about getting the past right; it is often about getting it wrong, thus making the present bearable."¹¹ We have to live with ourselves. We tell ourselves who we are in such a way that we can bear our own company. This means we rarely consider ourselves the perpetrators in any given conflict. Our personal narratives, however, limit our perspective and become obstacles to our ethical action.

What if instead of telling our personal stories of conflict from one perspective, we forced ourselves to tell the same story three times. In any given conflict tell a story of how you were the victim. Then tell the same story but focus this time on how you acted heroically. Then do it again, considering how your actions made you a perpetrator. This exercise prepares you to ask, "What is the most morally upright action I can take given the circumstances?" and helps you avoid the banal choices that may lead to great evil.

Today, we face a world filled with personal and national conflicts. Can we face the challenge of being the kind of people who re-tell our stories? If we can, we will begin to do the kind of *tikkun*/repairing of the world that is needed. Then we will have cause to celebrate our progress towards redemption. We must build societies that can handle this kind of internal reflection so that we do not have to wait years before we come face to face with our own evil.

A similar multi-narrative perspective has been suggested by the historian Robert Moeller in his article "Germans as Victims?" to help "communities of memory" form ethically responsible historical narratives. He believes that telling many histories is a way for Germans to mourn their dead without creating a moral balance sheet that pits the pain and suffering they experienced against the pain and suffering they caused -- as if more pain could somehow atone for the pain caused. A multi-narrative history could perhaps justify both communal "rites of accountability and rites of mourning -- for German losses."¹²

Can we imagine a history of the bombing war in which Anne Frank's heart soars as Allied bombers fly over Amsterdam, never knowing that they will deliver the payload

¹¹ Confino, 49.

¹² Robert G. Moeller, "Germans as Victims?: Thoughts on a Post-Cold War History of World War II's Legacies," *History and Memory*, (2005); 17:178.

that will leave her former school friends in Frankfurt dead in the rubble? A history in which Red Army soldiers who liberate Auschwitz move on to Breslau where they “liberate” Germans from their lives and property?¹³

What good would this kind of history do? It would help us to understand that no event means only one thing. Doing this kind of history we would achieve two goals. First, we would avoid the kind of ideal typing of the past that I described at the beginning of this essay. This kind of history would also reinforce our own moral responsibility to see our contemporary personal and communal conflicts from multiple perspectives. We would become better through practice at making ethical choices in the midst of conflict.

One could argue that self understanding is about finding different vantage points from which to see the self. Every new relationship is another chance to see yourself through someone else’s eyes, every new city you travel to or culture you encounter exposes your self to you through the contrast of your own assumptions with those of the people around you. The old adage of Socrates, “the unexamined life is not worth living” shows that life is a process of self-perception, self-creation, and self-discovery. Imagine if you could see yourself from every angle at once, as if you were one of Picasso’s subjects during his cubist period. What would you see? How would you tell your story? This paper suggests that this should be our goal. By understanding our role in any conflict from all three ideal types – victim, perpetrator, and hero -- we will strengthen our ability to make ethical decisions in the here and now.

¹³ Moeller, “Germans as Victims?: Thoughts on a Post-Cold War History of World War II’s Legacies,”178.

Dangerous Narratives: Lessons from the German Christian Movement for the American Church

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In her article on Christian Anti-Semitism in Nazi Germany, Doris Bergen points out, “With regard to Nazi persecution of the Jews, the Catholic and Protestant churches remained overwhelmingly silent ...the churches of both confessions did little to mitigate the vicious antisemitism of the Nazis.”¹ From a 21st century vantage point, hindsight might rightly cause us to question how the Body of Christ could have remained so taciturn in the face of genocide. Even more troubling is that one segment of the German church in particular – the German Christians, as the movement came to be labeled – were not merely silent, but played an active role in the justification of National Socialist ideology in the mind of German Protestants.² Six hundred thousand members strong in the mid-1930s, the active collusion of a significant portion of the German church with Nazi policies is troubling.³ How could Nazi ideology, which was so blatantly contrary to the love ethic found in the Gospel narrative, have permeated Christian theology and praxis so pervasively during the Third Reich? One answer has to do with the German Christian Movement’s ability to foster an alternative national collective memory that drew on Christian language and symbols to create an acceptable framework for Christians to embrace discriminatory and genocidal policies. This phenomenon, however, was not limited to German Christians in the 1930s and 1940s. Though today we find German Christian complicity appalling, in this essay I shall posit that contemporary American Civil Religion also poses an alternate narrative that at times employs Christian language and symbols to create an “other” against which discriminatory policies are justified.

The Narrative of the German Christian Movement

The German Christian Movement used Christian language, history, tradition and symbolism to legitimate a new religious narrative that aligned more with the ideology of the state than with orthodox Christianity. Their accommodationism was beyond H.R. Niebuhr’s “Christ of Culture;” the German Christians, in Marcionite fashion, discarded elements of the Christian tradition that were not useful for their project. The resultant German Christian narrative answered the psychological needs of the people in accepting both past hardships and present politics.

As Bergen has argued, German Christian theology was not completely novel.⁴ Indeed, an already pervasive national collective memory facilitated the acceptance of the German Christian narrative. Maurice Halbwachs defines collective memory as “a reconstruction of the

¹ Doris L. Bergen, “Catholics, Protestants, and Christian Anti-Semitism in Nazi Germany,” *Central European History*, 27(3) (1994): 329-348.

² Of course, the German Christian Movement was rivaled in German Protestantism by the Confessing Church, which formed in protest to the German Christian acceptance of the Aryan Clause of 1933. The division was primarily doctrinal (the major concern was the negation of the sacrament of Baptism for Christians of Jewish descent) and thus most in the Confessing Church, with a few notable exceptions, remained among the silent bystanders of the Holocaust. This silent segment of the Protestant church in Germany is beyond the scope of this treatment, though their inaction no less signifies complicity with the Nazi Regime. See Doris L. Bergen, *Twisted Cross: The German Christian Movement in the Third Reich* (University of North Carolina Press, 1996).

³ Bergen, *Twisted Cross*, 7.

⁴ Bergen, *Twisted Cross*, 7.

past in the light of the present.”⁵ Collective memory is therefore fluid; individuals and societies tend to inform their memories of the past based upon present circumstances. In this vein, the anti-Jewish, anti-feminine, and anti-doctrinal nature of the German Christian church emerged from a collective memory that was informed by Germany’s defeat in WWI, resentment over the perceived unfairness of the Versailles Treaty, the longstanding anti-Semitism in the German Church, and the political agenda of the rising National Socialist Party.⁶ In short, during the Weimar era the past was interpreted in light of existing national emasculation.

To regain their pride, Germans – 95% of whom identified as either Catholic or Protestant – needed a scapegoat.⁷ The collective memory and consequent narrative of the German Christians provided for both of these psychological needs. Responding to the question “Was it not the Jews who caused Germany to lose WWI?”, the old anti-Semitism of the German church and the new Nazi-propagated anti-Semitism rendered the Jews an easy culprit.⁸ Scripture that seemed to blame Jesus’s crucifixion on the Jews, such as Matthew 27:25, as well as prominent voices from Christian tradition such as Martin Luther’s “Against the Jews and Their Lies,” were presented as evidence that the Jews were an accursed people.⁹ This collective memory, defined by the need for a scapegoat and longstanding Anti-Semitic theology in the German church, led to indifference toward and even support of the persecution of Jews. Bergen cites one German Christian who wrote to military authorities in protest of the Nazi euthanasia program:

Some say the institutions have to be cleared because of the many air force officers with nervous illnesses, others talk about economic measures with a view to feeding our population... One counters these arguments simply by pointing to the many millions of Jews who are still in the country. Why do these dregs of society still live while our sick are simply being murdered?¹⁰

This Anti-Semitic narrative became institutionalized in the German Church through entities such as the Institute for the Study and Eradication of Jewish Influence on German Church Life, which according to Susannah Heschel “developed new biblical interpretations and liturgical materials...to create a dejudaized church for a Germany that was in the process of ridding Europe of all Jews.”¹¹ Through such theological think tanks German Christians created a narrative that closely resembled orthodox Christianity but which ascribed new meaning to language, ritual, and symbols. They rejected traditionally orthodox church teaching and universal Christian claims.¹² Bergen asserts that as part of this anti-doctrinal nature, the German Christian Movement embraced not only exclusivity by excluding non-Aryans from the church in order to maintain the racial purity of the German *Volk*, but an inclusivity that redefined “Baptism” as connected to German identity. German Christians saw the church and the nation as one entity. The church existed as the German *Volk* and all members of the *Volk*, through baptism, were included in the church.¹³

⁵ Maurice Halbwachs, On Collective Memory (University of Chicago Press, 1992).

⁶ Bergen, Twisted Cross.

⁷ Bergen, “Catholics, Protestants, and Christian Anti-Semitism in Nazi Germany,” 330.

⁸ Doris L. Bergen, War & Genocide: A Concise History of the Holocaust (Rowman and Littlefield, 2009), 28.

⁹ Bergen, “Catholics, Protestants, and Christian Anti-Semitism in Nazi Germany,” 331-333.

¹⁰ Franz Bergmann to Deputy Chief Command of the Sixth Military District, Chief of Staff Division, Münster, 8 September 1941, Neheim-Ruhr, Ba-MA Freiburg, RH 14/146, 47, quoted in Bergen, “Catholics, Protestants, and Christian Anti-Semitism in Nazi Germany,” 347.

¹¹ Susannah Heschel, The Aryan Jesus: Christian Theologians and the Bible in Nazi Germany (Princeton University Press, 2008), 1.

¹² Bergen, Twisted Cross, 45.

¹³ Bergen, Twisted Cross, 11.

This narrative redefinition of “baptism” – as a rite signifying racial purity and “unity of blood” rather than rebirth into the Body of Christ – is a prime example of the German Christian use of Christian ritual to craft an alternate narrative.¹⁴ Christian baptism, though ostensibly the same ritual that had been performed since the dawn of the church, was assigned new meaning. Eucharist, the Holy Spirit, the Christmas Event and the liturgy all came to symbolize in some way a pro-Aryan, Anti-Semitic, German *Volk* ideology. Even the figure of Christ was redefined, according to Bergen, as a “‘fighting Christ,’ not a ‘cowardly sufferer’ who assumed the guilt of others and turned the other cheek to his enemies.”¹⁵ German Christians claimed that “unmanly men,” women, and Jews – depicted as weak and feminine – had caused Germany’s defeat. The image of a “manly church” aligned the church with a strong Germany, rather than the emasculated Germany that had lost WWI.¹⁶ The German Christians even went so far as to call their narrative a new revelation: God had revealed in nature a pure sanctified race that showed a divine plan for mankind. With this view, creating an Aryan church was a God-given task.”¹⁷

Though Hitler, Himmler, Goebbels and other National Socialist elites did not condone Christianity – in fact, they set out to promote a German brand of neo-paganism – they came to realize that the German Christian Movement was providing a pro-Nazi narrative that appealed to the German public.¹⁸ Stanley Hauerwas argues that the Reich church had, in fact, ceased to be the church. He writes:

...certainly one of the basic tests of the truthfulness of any significant set of convictions lies in the kinds of lives in which they are embodied. If it can be shown that the Holocaust lies at the heart of Christian claims about the kind of life required to be a disciple of Jesus, it would surely provide strong evidence that Christianity is a false and perverse faith.¹⁹

In other words, the actions of the German Christians betray the fact that they had ceased to live their Christianity and instead had created an alternate paradigm. Though this paradigm was replete with Christian language and ritual, these were merely hand-plucked from the Christian narrative and used in radically unchristian ways. Hauerwas warns against this use of religious symbol outside of its indigenous narrative framework, as without context the symbols inevitably lose meaning.²⁰

The German Christians had created a perverse civil religion that hollowed and reassigned elements of Christianity. The question remains whether it is possible to “borrow” from one narrative to form another without adulterating the first. In the case of German Christians, the church was unable to fit with both the orthodox Christian narrative and the German Christian narrative: because of their incommensurability, one overtook the other. But is the case of American Civil Religion and the contemporary American Church different?

Civil Religion and the Church in America

Robert Bellah defines American Civil Religion (ACR) as,

¹⁴ Bergen, *Twisted Cross*, 49.

¹⁵ Bergen, *Twisted Cross*, 74.

¹⁶ Bergen, *Twisted Cross*, 66.

¹⁷ Bergen, *Twisted Cross*, 11.

¹⁸ Heschel, 8.

¹⁹ Stanley Hauerwas, “Remembering as a Moral Task: The Challenge of the Holocaust”, *The Hauerwas Reader* (Duke University Press, 2001), 332.

²⁰ Stanley Hauerwas, “Reforming Christian Social Ethics: Ten Theses,” *The Hauerwas Reader* (Duke University Press, 2001).

Certain common elements of religious orientation that the great majority of Americans share. These have played a crucial role in the development of American institutions and still provide a religious dimension for the whole fabric of American life, including the political sphere. This public religious dimension is expressed in a set of beliefs, symbols, and rituals.²¹

As with the German Christians, the narrative of ACR has borrowed heavily and selectively from the Christian narrative. Indeed, Ernst Troeltsch asserts that Reformed theology “has merged with and to some extent produced that political and social way of life which may be described as ‘Americanism.’”²² Bellah points out that this has allowed ACR to coexist with Christianity in the U.S. without the average American Christian perceiving any conflict between the two.²³ Yet if the German Christian civil religion could not practically coexist with orthodox Christianity, is ACR able to do so?

As with German Christianity, ACR arose out of a present social psychological need that defined the collective memory of the past. Though America’s founding fathers did not intend civil religion to be a substitute for Christianity, their creation of a distinct civil religious narrative used familiar Judeo-Christian language to unify the fledgling country with a common story: “Europe is Egypt; America, the promised land. God has led his people to establish a new sort of social order that shall be a light unto all the nations.”²⁴ The need to unify and promote a sense of national identity necessitates that this memory and consequent narrative omit darker moments in early American history, such as massacre of Native Americans and persecution of religious minorities.

Bellah points out that though ACR emerged out of a particular historical moment, influenced by Enlightenment philosophy and several strands of Protestantism, the narrative remains strong in contemporary public discourse in America.²⁵ Though its foundations are outdated both philosophically and theologically, Americans still need a story to unify and promote a sense of national pride. We celebrate this national cult through rituals such as our national “holy days:” Thanksgiving, Memorial Day and Independence Day.²⁶ Its themes are also commonly woven into presidential speeches. Indeed, President Obama’s inaugural address brimmed with references to the ACR narrative:

On this day, we gather because we have chosen hope over fear, unity of purpose over conflict and discord... We remain a young nation. But in the words of Scripture, the time has come to set aside childish things. The time has come to reaffirm our enduring spirit; to choose our better history; to carry forward that precious gift, that noble idea passed on from generation to generation: the God-given promise that all are equal, all are free, and all deserve a chance to pursue their full measure of happiness.²⁷

Yet what of the dark underbelly of the ACR narrative? What of the atrocities of American history, the moments in which Americans were the persecutors, not the triumphant righteous?

²¹ Robert Bellah, “Civil Religion in America,” *Journal of the American Academy of Arts and Sciences*, 96(1) (1967): 1-21, 3.

²² Ernst Troeltsch, *The Social Teaching of the Christian Churches*, Vol. 2 (1992): 577.

²³ Bellah, 10.

²⁴ Bellah, 6.

²⁵ Bellah, 7.

²⁶ Bellah, 9.

²⁷ “President Barack Obama’s Inaugural Address,” <http://www.whitehouse.gov/blog/inaugural-address/>, accessed August 30, 2011.

It would seem somewhat sacrilegious, or at least gauche, to publicly recall the Trail of Tears on Independence Day, the hegemonic atrocities of the Vietnam and Iraq wars on Memorial Day, or the barbarisms of slavery and Jim Crow on Thanksgiving. Indeed, Bellah contends that the image of the United States as the new Israel can lead to a troubling fusion of “God, country, and flag” on the domestic front and to an imperialistic sense of manifest destiny internationally.²⁸

Such disquieting themes can readily be found in contemporary American political discourse. For instance, former President George W. Bush used apocalyptic imagery in his 2002 State of the Union address, creating a good/evil dichotomy presumably to capture a sense of patriotism, solidarity, and support for a costly foreign war among the American people:

States like [North Korea, Iran and Iraq], and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger... all nations should know: America will do what is necessary to ensure our nation's security... History has called America and our allies to action, and it is both our responsibility and our privilege to fight freedom's fight... Our enemies believed America was weak and materialistic, that we would splinter in fear and selfishness. They were as wrong as they are evil.²⁹

This dynamic is present in domestic politics as well. In August 2011, Presidential hopeful Rick Perry organized a rally to pray and fast for “God to save a nation in crisis,” while former House Speaker Newt Gingrich has vowed “to defend his grandchildren from the imminent threat of ‘a secular atheist country’ or, somewhat inconsistently, political domination by radical Islamists.”³⁰

These few examples suggest that use of ACR in political discourse is capable of, if not prone to, creating an “other,” an “us” versus “them,” a good guy and an enemy. As with the German Christian narrative, ACR is able to justify the exclusion of the other and the wrongs we have committed against them. Yet according to the orthodox Christian narrative, the U.S. is not the new Israel; depending on one’s theology, the new Israel is either considered to be the church or simply an apocalyptic expectation that gave hope to ancient Hebrews in exile. It seems that ACR, like German Christianity, selectively plucks religious symbols from their original context and reassigns their meaning. Consequently, because it uses the same symbols with different meaning and context, the ACR narrative competes with the orthodox narrative of the church. One cannot believe both that this nation is the “city on a hill” and the church is the “city on a hill,” as the first excludes those who are not deemed to be a legitimate part of American society. As with the Aryan Clause (though certainly not as extreme), misuse of Christian language and symbol creates a disenfranchised other: the illegal alien, the welfare queen and the Muslim terrorist.

Lessons for the American Church from the German Christian Movement

Matthew Hockenos, in his examination of the ways in which German Protestants have dealt with their past, bemoans that German clergy have encouraged their congregations to acknowledge their guilt before a merciful God while essentially ignoring any notion of political

²⁸Bellah, 11-12.

²⁹ “President George W. Bush’s State of the Union Address, 2002,”

<http://www.johnstonsarchive.net/policy/bushstun2002.html>, accessed August 30, 2011.

³⁰ Michael Wolraich, “Republicans Race to Prove Christian Cred,” CNN.com, August 10, 2011,

http://edition.cnn.com/2011/OPINION/08/10/wolraich.perry.christian/index.html?hpt=po_bn1.

culpability.³¹ Consequently, while there may have been spiritual remorse in the German church during the years following the Holocaust, there was no move to alter the church's theology or political philosophy in light of its complicity with the Nazi regime. Instead there was a move for a fresh start, "rechristianizing" the German people in a way that was free of this-worldly implications.³² Hockenos writes that even "Barth himself – his Reformed theological background notwithstanding – failed to see the link between his Christian convictions and political behavior."³³ Shall the church in America too be so blind?

Michael Emerson and Christian Smith have noted that because American evangelicals "view their primary task as evangelism and discipleship, they tend to avoid issues that hinder these activities ... [so] they most consistently call for changes in persons that leave the dominant social structures, institutions, and culture intact."³⁴ Thus the more conservative – and most populous – branch of the church in the United States generally embraces an attitude much like that of the German Christians. Rather than speaking prophetically to society out of the Christian narrative, the ACR story is often employed to embrace and buoy the status quo. It indeed follows that Sunday morning remains the most segregated time in America.

Perhaps the American and German churches could take some lessons from German societal efforts to remember and reform. In Germany, the government has taken substantial steps to publicly memorialize the atrocities of the Holocaust. "Memorials of absence" have been favored as a way to curb the pride and nationalism that is typically provoked by more grandiose memorials. Berlin contains an array of sites that highlight a lack of the good, leaving visitors with a sense of profound tragedy and loss. For instance, to remember the burning of the books in Berlin, a memorial has been placed underground. Passers-by can look into a window in the ground, which simply reveals a room of empty bookshelves. This type of creative memorial paves the way to affect national collective memory that is inclusive of the tragic, rather than simply moving past the darker moments of national history. In Germany, Holocaust education programs are also built into school curricula, teaching children not only about the crimes their government perpetrated, but also about tolerance and human rights. It is only after we remember that we can move ahead, repenting of our actions and forging a new way with the lessons we have learned.

Conclusion

It is unfortunate when a government becomes a prophetic witness to the church. Yet only when the church in America, and in Germany, concretely engage and repent for their complicity in past offenses can they move forward in a way that is true to the Gospel narrative. This-worldly repentance leads to this-worldly forgiveness and reconciliation. From there we might forge ahead, once again taking up the mantle of becoming a prophetic critique to the status quo of the dominant culture.

³¹ Matthew D. Hockenos, A Church Divided: German Protestants Confront the Nazi Past (Indiana University Press, 2004), 171-172.

³² Hockenos, 172.

³³ Hockenos, 173.

³⁴ Michael Emerson and Christian Smith, Divided by Faith (Oxford University Press, 2000), 21.

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