



F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

2 0 1 3
JOURNAL



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WITH SPECIAL THANKS TO

Professor Sheila Coronel, Professor Ari Goldman, Dr. Jack Hughes, Professor Lisa Lerman, Professor Eric Muller, Professor Kevin Spicer, Professor LeRoy Walters, and Rabbi Nancy Wiener.

Lead support for FASPE is provided by C. David Goldman, Frederick and Margaret Marino, and the Eder Family Foundation. Additional support has been provided by Carol and Bill Goldman and The Conference on Jewish Material Claims Against Germany

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COVER PHOTOS COURTESY 2013 FASPE FELLOWS

THIS JOURNAL HAS BEEN PREPARED BY FASPE IN CONJUNCTION WITH THE
MUSEUM OF JEWISH HERITAGE—A LIVING MEMORIAL TO THE HOLOCAUST.

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THE BASIS FOR FASPE

This past summer marked FASPE's fifth year in operation. Since its first pilot trip in 2009 FASPE has chosen 211 Fellows, many of whom now serve as lawyers, doctors, journalists, and religious leaders. We share pride in their successes and hope that the FASPE experience continues to spur these future leaders of civil society to think carefully about the ethical implications of their actions.

A concern about the ethical ideals of our civic leaders comprised one of the two driving forces behind the development of FASPE. We have seen a constant stream of highly publicized breakdowns among professionals: lawyers defrauding clients; journalists misleading readers; religious leaders failing to address improper behavior; and doctors more interested in profits than the wellbeing of their patients. Such failures by professionals undermine the fabric of our society. Less often discussed, but equally important, are the ethical issues that are not so apparent or obvious. It is these issues that arise in the nuances of work that require even more vigilance.

The second motivation for FASPE stemmed from a realization that with each passing year the Holocaust is becoming more distant and more difficult for future generations to comprehend. My generation grew up in relative proximity to the events and repercussions of the Holocaust. We knew victims and survivors from within our families or among our friends. Their stories, and often also their silence, were present in our lives. But as the years pass and the number of survivors dwindle, the ability to relate to that history and its ramifications becomes harder. It is our challenge to draw contemporary meaning from the increasingly distant Nazi period.

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

The 2013 FASPE Fellows are an impressive group. Their experiences last summer validate the core principles of FASPE: namely, that exploring the actions and choices of professionals during the Holocaust, through visits to historical sites and in-depth seminars, creates a transformative experience for each Fellow and establishes an ethical grounding for those who will be the future leaders in their professions.

On behalf of FASPE, I congratulate the 2013 FASPE Fellows and am pleased to present a small sample of their work.

C. DAVID GOLDMAN, CHAIR
FASPE STEERING COMMITTEE

FASPE OVERVIEW

The 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 history as a launching point for explorations into present-day ethical issues.

Piloted initially in 2009, between 10 and 15 Fellows from each profession are chosen to participate in FASPE each year through a competitive process that draws applicants from around the world. In 2013, 57 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). Law and Journalism students also visited Nuremberg. Over the course of 12 days, these students attended seminars with leading scholars and visited such sites 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 1,000,000 people were murdered. Throughout the program the Fellows met, both formally and informally, to explore and discuss 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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PROJECTS

INTRODUCTION TO THE JOURNALISM PROJECTS

Every FASPE trip has its magical moments. One of ours came when we walked into the Topography of Terror, a museum and documentation center in Berlin. There, a new exhibition had just opened about journalism called *Between the Lines*. In panel after panel, we saw how the Nazis took a vibrant and free press and turned it into a propaganda tool that spread hate and lies. We had to wonder: how did they know that we journalism fellows were coming? Was all this just for us? When you travel with FASPE things sometimes seem that way.

FASPE was an extraordinary experience for our fellows. The night we saw the *Between the Lines* exhibit, we toured the newsroom of one of modern Germany's newspapers, *Der Tagesspiegel*, and then made ourselves at home in their building to discuss our experiences and begin to produce our own articles. That wasn't magic; that was planning. But with this great combination of luck and planning, both in Germany and in Poland, our fellows produced great journalism. Some of our work was done on a tight deadline as we traveled and was posted on our website (www.faspe.info/journalism2013) under "Daily Dispatches." Longer, more thoughtful pieces were added after our return from Europe. These articles are in some ways the heart of the FASPE experience. They are a chance for our fellows to take something away from our journey and apply it to contemporary issues. They are proof that the FASPE magic keeps happening after we go our separate ways.

In these pages we proudly present some of the exemplary work of our fellows. The article by Bogdan Mohora, "Covering Hate," explores a reporter in North Dakota who struggled with the ethical implications of writing about neo-Nazis and white supremacists. Do these people deserve to be quoted or exposed? Will harm or good come from such a story?

Anna Boiko-Weyrauch deals with related ethical issues in her article "Jailhouse Interviews: The Ethics of Interviewing Murderers and Child Molesters." Anna canvases several reporters from *The Seattle Times* about decisions they made in such sensitive interviews and finds that they worked hard to balance the interests of their readers, on the one hand, and the interests of the victims and the families, on the other.

Another one of our fellows, Gosia Glouszek, looks at a case of journalistic malfeasance where the reporter pushed too hard. Gosia's article is called "How important is the story? The Case of Wiera Gran, the Survivor Who Just Wanted to Be Left Alone."

Finally, Claire Ward examines a case where the reporter and the subject got too close. In her article, "The Documenter and the Documented: Not an Equal Relationship," Claire sorts out the give-and-take relationship that reporting sometimes involves.

All of these articles, and the other "Features" that you can find on our website, demonstrate that although FASPE begins in Central Europe, it doesn't end there. Its ethical and journalistic lessons are without borders.

ARI L. GOLDMAN
FASPE FACULTY
PROFESSOR
COLUMBIA UNIVERSITY GRADUATE SCHOOL OF JOURNALISM

Covering Hate

By Bogdan Mohora

After more than 30 years as a reporter, Lauren Donovan found herself immersed in unfamiliar territory. She had been tipped off that a well-known white supremacist and neo-Nazi had been quietly buying up land in a small North Dakota town with the aim of creating a white nationalist community. Over the course of a year, Craig Paul Cobb, a fugitive wanted in Canada for inciting hate, purchased 13 lots in Leith, a town of just 19 residents. In the meantime, through white nationalist websites, Cobb encouraged likeminded individuals to take up residence in and near Leith and to seek public office and influence legislation.

Before long, Donovan was interviewing Cobb at his home. He was a man who was described by the Southern Poverty Law Center and Hatewatch blog editor, Mark Potok, as “one of the most vicious neo-Nazi activists around.”

Donovan broke the story, which originally ran in the *Bismarck Tribune*, before making its way to media outlets across the country. It was most of America’s introduction to Craig Cobb who, with 13 properties, has become the most successful neo-Nazi activist to attempt an all-white enclave.



National Socialist Movement members pose for a group photo at a June 2009 “Meet & Greet” in Tupelo, Miss (Courtesy of Southern Poverty Law Center)

“As a reporter, I hadn’t had the opportunity to think about these issues. I had no contact with people like this before,” Donovan said in a recent interview. “In the last two weeks [of reporting], I’ve had an education.”

Donovan saw her lack of experience reporting on white nationalist groups as an advantage when it came to telling Cobb’s story. “I’d never been exposed to the language they use and the way of thinking they share. I only wanted to give a fair portrayal of who he is and what he believes without trying to second guess myself.”

Donovan’s encounter with Cobb raises questions for journalists reporting on racist and extremist groups. Is it possible to give a fair portrayal of a man like Cobb whose ideology appropriates that of the Nazi party? How should journalists write about groups that promote white racial superiority and whose members seek public office to advance their ideals?

“This is always the crux of journalism,” said Lauren. “In the case of Craig Cobb, I was most interested in being fair and accurate and letting readers come to a more complete understanding of the man and his philosophies so that they could draw their own conclusions. I don’t believe journalism proselytizes; rather, it informs.”

Last year, the Southern Poverty Law Center reported that there has been a surge in the number of hate groups in the U.S., from 602 in 2000 to 1,018 in 2011. On the heels of that report, *The Daily*

Beast wrote that there was a “stampede” of white supremacists seeking (and winning significant votes) for public office.

If the trend continues, more journalists will have to navigate the challenges of reporting on hate groups. Since the movements are generally more active in smaller cities and towns, one of the challenges will be having enough resources to dig deep into them.

“I didn’t have any reporting backup or assistance. A story of this magnitude should have had two, or three reporters working various angles. I did my best to grasp the topic in the time that I had,” said Donovan.

With more coverage also comes the risk that journalists can unknowingly become publicists for these groups’ causes. While many white nationalist groups vigilantly guard themselves against the media, ultimately they have agendas to promote and are not always averse to media attention.

“If you give them more ink, you give them more credibility,” said Sven Berg, a reporter for the *Idaho Statesman*. But as a journalist, he added “you have to believe that more information is better.”

Last year, Berg found that Hammerfest, a large gathering of skinheads, was set to take place in Boise, Idaho. The festival was organized by the Hammerskins, a group the Anti-Defamation League describes as, “the most violent and best-organized neo-Nazi skinhead group in the United States,” and whose members have been convicted of murder and other crimes. Wade Michael Page, who shot and killed six and wounded four others at a Sikh temple in Wisconsin last year, was a Hammerskin.

“I’m interested in what moves people outside of the mainstream to adopt the positions that most people would consider vile,” said Berg.

People in Boise, a city of 200,000, were nervous about the gathering, partially fueled by the fact that the Hammerskins were keeping the exact location a secret. “The fact that days before the event, no one knew where it would be held, spoke to a certain mentality,” Berg said. “It was trying, in a way, to investigate. They have a deep mistrust of the media.” Like the Hammerskins and Craig Cobb, many groups with white nationalist agendas often operate surreptitiously, which, coupled with some groups’ reputation for violence, creates a unique challenge for reporters.

While attacks against journalists by racist groups are rare, they do happen. In one instance, in June 2012, *Jerusalem Post* reporter Gil Shefler was attacked, while he was in Athens covering Golden Dawn, an extremist organization whose activities have been compared to that of neo-Nazis.

Neither Berg nor Donovan felt in danger at any time, but Donovan experienced some unexpected fallout. The day after she broke the story of Craig Cobb’s land grab, the neo-Nazi’s employer pulled him aside and fired him.

“When he told me he was fired, his attitude was, ‘This has happened before,’” Lauren said. “That the exposure cost him his job but that the benefit was that it drew attention to his cause.”

In her profile of Cobb, Donovan wrote that he was prepared to protect and defend himself, short of a Molotov cocktail being thrown through his front window. Those were Cobb’s words. But some people sympathetic to his cause considered this an incitement of violence; that her work was subversively encouraging violence against Cobb.

After her stories had circulated online, a colleague called Donovan to let her know that photos of her, along with personal details and information about her children, had been posted on white supremacist websites. It was a reaction that had not even crossed her mind. “It was unsettling, to say the least, that someone went through the trouble to find photos,” Donovan said, adding that the threats wouldn’t deter her from reporting on the activities of men like Cobb in the future.

Jailhouse Interviews: The Ethics of Interviewing Murderers and Child Molesters

By Anna Boiko-Weyrauch

In the fall of 2009 the Seattle area experienced a rash of cop murders. Less than a month apart two men went on shooting sprees, resulting in the death of five police officers sitting in their patrol car or at a local coffee shop. Jonathan Martin, a reporter for *The Seattle Times*, wanted to help readers understand what was going on. He started looking into the background of one of the alleged perpetrators, Christopher Monfort, and wrote a nearly 3,000-word Sunday story that tried to get into the mindset of an accused killer.

The comments on *The Seattle Times* website highlighted some of the ethical challenges presented by such reporting. A reader identified as “needle mountain” made a popular point, “Why are we reading this loser’s resume? Why is the S.T. giving him publicity like he is someone special? Hellloooooo? He’s a BAD person.”

Others dissented, saying it was valuable to understand the mind of a killer. Commenter “cpflames” wrote, “I have friends who are loners...And, you know, after reading this article, it makes me want to check up on them, and make sure they’re okay.”

People murder, molest, and rape every day and the public is left wondering why. But when journalists write profiles of killers, they draw broader attention to them as they seek to understand the crimes. But such exposure comes with risks. Articles can further traumatize the families of victims and offend readers. When it comes to serial killers and child molesters, is any attention too much attention? How do journalists grapple with the consequences of giving voice to perpetrators? If journalists tell the story of the killers do they have an obligation to give equal time to the victims?

In an effort to answer these questions, I spoke with three veteran reporters at *The Seattle Times* about their coverage of perpetrators.

Jonathan Martin on interviewing alleged cop-killer Christopher Monfort

Christopher Monfort lived by a political ideology that twisted the Constitution and Revolutionary War-era patriots to justify his alleged shooting spree against police officers. The prosecution theorized he targeted cops to retaliate for police brutality. Martin thought it was worth listening to Monfort’s reasoning.



Jonathan Martin, *The Seattle Times*

“What if what Monfort is saying, as bat-shit crazy as it is, actually reflects a true, grassroots concern in society?” Martin said.

Martin attempted to speak to the widow of a fallen officer multiple times through her sister and several police intermediaries, but the widow declined to talk. Instead of balancing the perpetrator’s voice with that of the victim – what he associated with “checklist journalism” – Martin balanced it with the facts of the case.

“Without the interview, it’s just as relevant to put his actions in the context of civic terrorism,” Martin said.

When he travels to prison to interview alleged perpetrators, Martin packs a large dose of skepticism. Journalists have a duty to explain the truth without glorifying perpetrators, Martin said, so he leans on court documents to describe crimes “in the clearest, starkest detail.” That context is especially important because inmates use jailhouse interviews to exonerate themselves, explain away their deeds, or accuse the judicial system for being unjust. Martin keeps the details of the alleged crime at the forefront of his mind when he sits across from alleged perpetrators during an interview. He approaches it almost as a “hostile interview.”

“This is not the time to smile and nod and let somebody ramble on as much as they can,” Martin said. “You really need to have your duty to the people they killed and to society to push them on why they’re saying what they’re saying.”

Mike Carter on interviewing serial killer Arthur Gary Bishop

During his time at *The Salt Lake Tribune* in the late 1980’s, current *The Seattle Times* courts reporter Mike Carter covered the story of serial killer Arthur Gary Bishop, who had kidnapped and murdered five boys. Carter began corresponding with Bishop, who said that he later dropped his appeal of the death penalty so his story would disappear from the news, and the families of his young victims’ would attain peace. Carter helped Bishop publish an article he wrote from prison about preventing children from being kidnapped and murdered. In prison, Bishop reflected on the death penalty and what he had done. He tried to feel bad about it, but he didn’t know how to, Carter said.



Mike Carter, *The Seattle Times*.
(Photo by Ken Lambert/*The Seattle Times*.)

“There was more than one dimension to him,” said Carter. Bishop appeared totally normal on the outside, except for his addiction to brutalizing small boys. “I would argue that what he had to say about the bogeyman and about the death penalty was something the public should hear,

whether they want to or not,” Carter said.

Carter puts “tremendous thought” into the stories he writes about perpetrators, engaging in conversations with editors and his own intuition. He routinely questions if the information he writes is necessary and would mean something to the public.

“Is it tasteful? Is it legitimate? Is there a reason to put that in the story? What verb am I using? How am I describing an act, a crime?” Carter deliberates over his verbs – slashed or cut? – choosing the least sensational ones he can. “It’s sad enough to describe what happened,” he said.

Jack Broom on interviewing Wesley Allan Dodd

Like Arthur Gary Bishop, Wesley Alan Dodd was convicted of murdering boys for sexual gratification, sentenced to the death penalty, and decided not to appeal. He was the first person executed in Washington State after the Supreme Court lifted a hiatus on executions in 1976.

General assignment reporter Jack Broom and his editor discussed the value of interviewing Dodd in person. “What can we learn about why he committed his crimes; what can we learn about what his thinking is now?”



Jack Broom, *The Seattle Times*

The biggest lesson is prevention, Broom said. Reporting revealed that Dodd had progressed from exposing himself to young boys to molesting them and eventually killing them. The article Broom wrote showed Dodd had been punished lightly enough so he could continue to prey on children. “There are other Wesley Dodds being created out there right now,” Broom said. “What do we need to know if we can turn them in a different direction or protect ourselves and our children better?”

Conclusion

The amount of attention the media bestows on perpetrators continues to crop up even after the bogeymen of the past fade from view. The August 2013 issue of *Rolling Stone Magazine* featured Boston Marathon bombing suspect Dzhokhar Tsarnaev in an intimate pose that evoked Jim Morrison. Critics charged the cover glamorized the alleged perpetrator of a bombing that killed three people and injured 170. But *Rolling Stone*’s editors defended their actions, saying the profile sought to unpack how a normal-seeming young person could become transformed into a terrorist.

The journalists I interviewed thought through each small decision on their way to the finished article. They had conversations with their editors about the right format a profile should take, the right facts to include, and the right tone to set in the articles. Ultimately, they said that they published the pieces because the stories were news: timely, relevant, interesting, educational, and, perhaps most of all, might prevent future murders. The biggest challenge was not whether to cover the perpetrators, but how. As online comments and the *Rolling Stone* cover controversy show, any strong light shined on perpetrators will be too much for some readers. These journalists sought to cover the stories not because of their salacious details or entertainment value. Ultimately, they said, it was about getting to the truth and telling it in a way that could be most helpful to society.

How Important Is the Story? The Case of Wiera Gran, the Survivor who Just Wanted to Be Left Alone

By Gosia Głouszek



Agata Tuszyńska, author of *Vera Gran: The Accused*. (Photo from www.Polki.pl)

It's spring 2003. After weeks of phone calls, Agata Tuszyńska will finally have a chance to conduct an interview for a biography she is writing of Wiera Gran, a Polish-Jewish singer, who was very popular in Poland before and during World War II. Gran is now in her 90s, sick, paranoid, and lets it be known that she is not willing to talk to anyone – and certainly not to a journalist. Not discouraged, Tuszyńska arrives in a very elegant, 16th district in Paris, close to the Eiffel Tower.

Tuszyńska enters an old tenement house where Gran lives on the first floor. Above the front door is a sign, in French: “Frappe fort!” – “Knock loudly!” She knocks and very soon an old, hunched lady with her hair in a grey bun pulls the door open. It is clear that Tuszyńska won't be let inside; not yet. There is a chair prepared in the staircase, they will sit and talk there.

Gran is unfriendly, even rude, but agrees to talk simply to have some peace. “You want to enter to my soul through the rectum” – she tells Tuszyńska – “Just like this. And you think it's normal and I should agree on this. Because you want. Because you plan to. You have no conscience, you, scribbler. No understanding... You just come and ask for an interview. I don't invite. I don't let it. You journalists have special professional deformation. Cruelty and no empathy.” They'll spend a week talking in the staircase until Gran surrenders and invites the journalist inside into the neglected, dark flat, which nobody was supposed to see. Now, everyone can – there are pictures of the flat in the book and in the documentary movie.

The overly persistent and aggressive behavior of Tuszyńska raises several ethical questions about reporting. Tuszyńska, in the interview for the Polish daily newspaper *Gazeta Wyborcza* said this about her work as a reporter: "Writing a biography demands features like: patience, humility, luck, craziness. The key to my work is also an understanding." I am not sure that all of those are good or even ethical qualities. Wiera Gran clearly didn't want to talk to the reporter. She made a decision to avoid the outside world, didn't go out, didn't see or invite anyone to her apartment. She took care of herself, treating her home as a shelter. Even in good faith, does a reporter have a right to cross the doorstep and to enter, at any price? Is the story that Tuszyńska got worth the invasion of Gran's life? If Tuszyńska indeed wanted to rehabilitate the singer and tell her story, why didn't she respect the privacy and will of the old, ill lady?

Wiera Gran came from a poor, Polish-Jewish family, and was raised in a small town called Wołomin. She began her singing career as a teenager and quickly gained popularity. With her low-alto, deep voice, she enchanted Warsaw audiences. When World War II began, Gran and her family, like other Jews, were forced to move into the Warsaw ghetto. In the spring of 1941, with the war still surging, she began singing in Polish and Yiddish at Sztuka, a café frequently visited by Jewish intellectuals in the ghetto. One of her accompanists was Władysław Szpilman, whose life would later be chronicled in Roman Polanski's Oscar-winning movie *The Pianist*. During the war, she dyed her hair blond and managed to escape to the other side of the ghetto wall. She survived the Holocaust by hiding in a small town near Warsaw and marrying a local doctor.

Holocaust survivors, specifically Jews, had to face many questions in post-war Poland: "You're alive? How did you survive? Who helped you?" Gran faced many of these questions, too. Some rumors spread around the city that she collaborated with the Gestapo. Szpilman, who worked for Polish Radio 1 immediately after the war, was suspicious of Gran. When she asked him for a job as a singer on the radio, Szpilman refused. Next accusations appeared one after another, from very respected and well-known survivors, including Marek Edelman (the commander of the Warsaw Ghetto Uprising) and Irena Sendler (head of children's section of Żegota). Most importantly, Jonas Turkow, who investigated cases of collaboration after the war, believed that Gran was a collaborator. Someone reported that they saw her in a cab with a Nazi. Someone else heard her singing at a concert for the Gestapo. In 1947, Turkow brought an action against Gran before the Central Committee of Polish Jews. The process lasted two and a half years and included hundred witnesses. In the end nothing was proven and Gran was proclaimed innocent.

Nonetheless, her life and career in Poland were finished. Moreover, when she tried to organize a singing tour in Israel, she learned that the audience planned to appear in striped clothes, like the ones worn by prisoners in Auschwitz. In 1950, she immigrated to France, and largely kept to herself until that day in 2003 when Tuszyńska came to visit.

From the very beginning, Tuszyńska claimed that she wanted to defend Gran and rehabilitate her tarnished reputation. Tuszyńska, a journalist, is most famous for being a biographer. She published a book about the Nobel Prize winning writer Isaac Bashevis Singer, and another about Irena Krzywicka, a Polish-Jewish writer and feminist. In 2005, Tuszyńska released a sort of autobiography, called *Exercises in Loss*. It is a story about the illness and death of her husband, Henryk Dasko. The account is realistic, expressive, even brutal. She writes about his body failing, about his appearance deteriorating. Reading that book raised an essential question for me

that came up as well with the Gran book. Do we have a right to go into such intimate details about someone's physiology? About changes in the appearance and behavior, which a person cannot control? Does a biographer have the right to invade someone's privacy in the name of journalism?

I found that I was not alone in my discomfort with Tuszyńska's style. Hanna Samson, a Polish journalist, writer, and feminist, claimed that Tuszyńska exploited Gran. She said: "Tuszyńska was let to the doorstep, later to the apartment, inaccessible for the others. It wasn't easy. Wiera Gran was afraid that she would regret, but she agrees, surrenders. And all of her notes, even private ones, were revealed. Even the dust in her flat. Hair not washed for a long time. She handled also her aversion for pictures. She took pictures of an old lady with a finger in her mouth. But for what?"

But the biggest controversies of the book are of a different kind. Gran, who died in 2007, had an obsession with Szpilman and claimed that it was him – and not her – who collaborated with the Germans. She told Tuszyńska that she saw him in the ghetto, with a police cap on his head, dragging some Jewish women by the hair. What did Tuszyńska do? Despite the fact that she couldn't find proof from any other source, she decided not to censor her character and published Gran's accusations. In her defense, Tuszyńska emphasizes that she was not expressing her personal belief, but only quoting Gran. "My book presents a portrait of a singer," Tuszyńska said in an interview for the Polish weekly magazine *Przekrój*. "The pianist was a part of her life; it wasn't possible to erase him." And then she added: "I decided not to censor her, erase it from her biography. I don't share Gran's opinion. I only gave her a voice, allowed her to speak. I am not responsible for the content."

Is she really not? She decided to tell Gran's story because there was Polanski before, who told Szpilman's in 2002. But shouldn't the journalist choose less harm? Her story places blame on a person who can't defend himself (Szpilman died in 2000) and may hurt relatives who are still alive.

The ethical issues of forcing someone to grant an interview and then using what they say to harm another's reputation raise yet another ethical issue: to what point can we trust the memories of Holocaust victims, especially if they are mentally unstable people? Does the journalist have a responsibility to censor or comment? Agata Tuszyńska herself posed those questions to Władysław Bartoszewski, an Auschwitz prisoner and former Home Army soldier, who is now a Polish public figure and former minister of Foreign Affairs. He told her: "If you caught me in the mental hospital, ill and confused, asked me for an interview, and published it after my death – I would be grateful for my son, to sue you."

That, in fact, is what happened with Szpilman. His son, Andrzej Szpilman, charged Tuszyńska with dishonesty. Although Szpilman lost the case in the court in Poland, in Germany the higher court in Hamburg decided to cut the fragments that insult Szpilman from the book. The next trial will take place in the U.S where the book was published in February.

A recent review of *Vera Gran – The Accused* in *The New York Times* was critical, mainly from an ethical point of view. The reviewer, James Lasdun, wrote: "One would think Tuszyńska might

therefore be careful to quarantine the allegation in thick disclaimers. But on the contrary, without quite endorsing it, she plays it up to the maximum, feverishly empathizing with her subject.” Then he adds: “You can gauge the quality of Tuszyńska’s reasoning from this simultaneously muddled and devious conversion of uncertainty into fact.” His review revives many of the same ethical questions. To what degree should we rely on the testimonies of victims? How are we supposed to tell their stories? And what should we do, if we are not sure about the truthfulness of their stories?

There are no easy answers. I have serious doubts if Tuszyńska acted ethically and I feel uncomfortable about her journalistic methods. The German court thought she went too far and, even though the Polish court ruled in her favor, that doesn’t mean she acted ethically; only within the limits of the law. Tuszyńska did manage to tell the story of a forgotten Jewish diva, but, to my mind, the story came at too great a cost. An old and vulnerable person who wants to be left alone is not fair game for an inquiring journalist. In the end, Tuszyńska did not rehabilitate her. While claiming to be her defender, Tuszyńska only caused a scandal. All this may bring Tuszyńska fame and book royalties, but it may not make her an example for journalists to follow.

The Documenter and the Documented: Not an Equal Relationship

By Claire Ward



Documentary filmmaker Claire Ward filming founder of Colalife Simon Berry in Zambia.

In the summer of 2012, I traveled to Zambia to independently film the activities of Colalife, a charity that had been peddling an innovative idea to the media: they were going to design a package for basic medicines that fits between bottles of crated Coca-Cola. The idea was to facilitate more effective distribution of public health products by piggybacking on Coke's pervasive supply route. It wasn't the first time I'd heard the idea; I'd often heard foreign aid and development workers sigh, "Why can I buy a Coke in a village that doesn't even have clean drinking water?" The question begged exploration.

After a few promising Skype chats with Colalife founder Simon Berry, we agreed that I could shadow him as he traveled around Zambia to set up a trial. At this point, Simon and his team had narrowed the focus of the project to address diarrhea in children under age five. Diarrhea is a major cause of child deaths in many developing countries. The Coke crates would be fitted with kits containing oral rehydration salts and zinc, which combat dehydration resulting from diarrhea. The understanding was that I would be a fly on the wall as the trial got underway. Beyond this, we didn't really discuss our relationship as documentarian and subject, nor did we agree to any set of objectives for the film. My documentary, which became my master's thesis for New York University, was an attempt at "solutions" journalism—showing the "how" behind an innovative initiative designed to benefit the public and bring about social good. Colalife likely saw an opportunity for good press and welcomed me in.

Colalife's initial trial was funded by the UK's Department for International Development, UNICEF, Honda, Johnson & Johnson, COMESA/TMSA, and Grand Challenges Canada. I,

however, was funded by a modest but successful Indiegogo crowdfunding campaign as well as a small grant from the National Academy of Television Arts and Sciences.

Fast forward to the first week of August 2012. Simon and I were sitting under a drafty, thatched roof hut equipped with a braai, about half a kilometer off the red dusty thoroughfare in southern Zambia. Another power outage meant we were dining in the dark again. On this night, that came as a relief. Simon had me—the nosy young journalist—by the collar.

We'd just finished meeting health workers in a rural community not far away. On the drive back to the lodge, I mentioned to Simon that I was going to try to film a local health post where I would quite likely discover children suffering from bad cases of diarrhea and dehydration. I told him that it is necessary to show the burden that his project hopes to address. I can't show the solution without showing the problem. Simple.

Simon's response was swift and aggressive: if I went ahead with this, I would be placing his life's work in jeopardy. By virtue of traveling together – not to mention being the only other white person there – both of us were, in the villagers' eyes, associated with Colalife. Anything I did would therefore reflect on him. He was worried that my actions would undermine the groundwork he had laid to become accepted by the community. I realized in this moment that though I had been operating independently, the perception of our relationship, rather than the reality, would work against me and potentially have a negative impact on his work. So we agreed to pursue permissions from the local authorities together. Like it or not, I had embedded with Colalife in the sense that the fates of both our projects were now linked. From this moment forward, I struggled with how to stay independent working within this framework. I found myself actively resisting promoting Colalife's work while at the same time highlighting what I thought was an important story about innovation, public-private partnerships, and the changing face of development in Africa.

Striking this balance was difficult. I'll never forget Simon's moment of hesitation when I handed him a release form at the end of those five weeks (rookie mistake!). His concerns undoubtedly shifted from how I would conduct myself during the filming to what I would do with the footage after I went away. As a favorite professor of mine likes to say, "editing is manipulation"—there's no way around it. Sure enough, I was the hand of god in the editing studio, utilizing the full suite of cinematic tools—cuts, transitions, music, narration—to achieve a vision of the story that only occurred after the fact, beyond anyone's control but mine.

It was when I was back in New York, sitting in that editing studio, that I really began to understand Simon's concerns. The power I had to represent him, his work, Zambia, and the people I met there was immense. For many viewers, I would be the sole author of the story. I realized that as much as I am an observer of my subjects, I am also part of the soup. Like it or not, my presence, both during the filming and in the editing, has an impact on the lives of my subjects in a way that may not necessarily be obvious in the end product.

I addressed this by lifting the veil a little—leaving in some production "mistakes," like camera shake and operator sounds, letting my voice be heard in interviews and including a scene where one character, a Zambian social worker named Albert, breaks the fourth wall and calls out to me

by name. These Hitchcockian moments were an effort to address the complex mix of motivations at work, to remind viewers that there was a person behind the camera deciding where to point it. Also, that this person is a tall white blonde stomping around remote Zambian villages with a camera on her shoulder—undoubtedly having an impact on her surroundings, as discreet as I like to think I can be.

Whether these small efforts addressed the power imbalance sufficiently, I don't know. I was ever aware of Simon's sensitivities, how he might want his story told versus how I felt it was best portrayed. But ultimately, what was more interesting to me was the idea, not the man—and my objectives as a filmmaker found a kind of harmony with his objectives as an advocate.

But our discussions about representation have continued well beyond that night in the hut. A couple weeks ago, Simon and I met up on Skype to discuss the debate, and admittedly, the strain we dealt with in coming to terms with our sometimes competing, sometimes complementary objectives in the making of this film. The following is a transcript of that conversation, which has been edited for length and clarity.

CW: So. That got tense.

SB: Yeah. I mean, I was quite interested to read your perspective on what happened. Because it wasn't what I perceived happened.

CW: Oh no?

SB: In that you said you wanted to go and film in the village, in Siachitema, and I think Albert and I didn't say 'No you can't do that'. I think what we said was, 'No you can't just do that.' In other words, we had to clear it with the relevant people otherwise it would have put the project in jeopardy. For me the bigger picture wasn't a successful documentary, the bigger picture was—25 years of work—trying to get this trial set up and everything going pretty well and you know, the danger of that being jeopardized by you pitching up in a village and spending a weekend there and expecting people to be happy about you filming them.

CW: We were thinking we'd do it on the fly and your approach is obviously much more structured. And successful, ultimately. But that's a question of permissions. I thought there was another element of you objecting to us filming in the health centers and taking advantage of people who were in sensitive situations.

SB: Filming is a very powerful thing, isn't it? You know that trailer you did before you left? In that short thing, you had a picture of women in health centers and the camera went onto a dirty broken mattress. Do you remember that?

CW: Yes.

SB: That was a difficult moment for me. It said a lot about what a dreadful state some Zambian health centers are in. I don't think it's necessarily taking advantage and filming sick children, but it's about creating an impression which is disrespectful and maybe isn't totally true of the people or the environment you're filming in. Those health centers are full of hugely dedicated people

who work their socks off against incredible odds and so that's the impression ideally that would come away from a documentary about that. Rather than the fact that the mattresses are dirty and or the equipment isn't there or whatever.

CW: But if those hardworking people need help or funding from their own government or from NGOs, doesn't this kind of footage illustrate their need? Isn't there a public interest argument to be made for showing those conditions?

SB: Yeah, I think there is, but the challenge is balancing it. It's probably an impossible situation, but the public interest would be served when a balanced picture is shown. So a lot of people will look at the dirty, holy mattress thing and think 'God, they can't even look after...that was a perfectly good mattress.' Uninformed people looking at that might not necessarily come away with the idea that these people need help, they might come away with the idea that these people haven't a clue about running a health center.

CW: That's definitely a balance I tried to strike—showing the positive as well as the negative. But I also didn't want to create a story that left the audience feeling comfy and indifferent to what they'd seen. Like 'OK well, we shouldn't worry too much because it looks like things are under control.' Kids are dying, and it can be prevented. I wanted to show that in a way that could potentially mobilize will toward making a sustainable change.

SB: I think you did that in the documentary, I think that was achieved, definitely. But I do feel I wouldn't have another documentary made.

CW: Why not?

SB: Well because of the lack of control of what comes out at the end. If people could see all the footage you took maybe it would be fine but I just think the angle that a journalist can put on something, especially a filmmaker, it's very powerful. And it isn't an equal relationship. As a subject, you open yourself up completely to the documentary maker who then goes away and puts together what they want. And that may or may not be what you wish to portray, wrongly or rightly. As it happened, we wished to portray something similar to what you wished to portray.

CW: But from a journalist's point of view, if you're working in covering nonprofits, you don't want to appear to be promotional or else no one will take your work seriously.

SB: I showed the film to [one of our funders] and she hit the roof. I think that could have been avoided if I had introduced it by saying 'Look, this is an independent documentary. It's not a promotional film. A documentary maker came here and followed us around and this is the story of that.' And it would have been fine, I think. But it just makes me very anxious about it I suppose, having gone through the process once. What could have happened, how it could have gone awfully wrong.

CW: Changing tracks here, some NGOs have gotten a lot of criticism over the years for using sick children in their ads, depicting Africa as a miserable place where starving kids stand around with flies on their faces. That may part of a bigger picture but it's reductive, and exploiting that

to further funding efforts is problematic. Where do you stand on using people's images to promote your work? For instance, your website has an image where a kid looks quite sick with dehydration. Did the photographer pursue permission, written or verbal, from the mother of the child?

SB: I don't think she did.

CW: Right, so what are the ethical considerations in that scenario where that image of that kid is all over the internet now.

SB: I don't think it is all over the internet.

CW: It's around. It can be viewed by anyone and she and his family probably have no idea. What are the ethical considerations here? Is it serving the greater good that you're illustrating what dehydration really looks like or is it kind of taking advantage of him or both?

SB: I think probably both.

CW: Does that sit right?

SB: I suppose it's the one picture that's in our press gallery that I would replace. An interesting thing is that if I'd taken it, which I don't think I would have done, would it be in our press gallery? I don't know. These are difficult questions. But I'm not a flies-on-the-face person. I think you serve the cause much better by painting a positive picture. Not a false picture. But a picture that we use a lot is of a little girl holding the [medicine] kit in her hands. There's lots of pleasure and love and caring and in that picture, which is essentially what is going on in African villages. They don't have all the resources that we have and they have much bigger challenges, but they're not living a life of misery.

CW: I agree with that. It communicates something with a different kind of power as the sick child lying there with no help. But it's time to wrap things up. Any closing thoughts?

SB: Those release forms are really scary. There needs to be a more gentle introduction right at the beginning between the subject and the documentary maker about what the objectives are. Exactly how those objectives are achieved is down to the creativity of the documentary maker, but I do think there needs to be an agreed set of objectives. I would never go into a documentary situation again without that. Having said that, I am pleased the documentary is independent and non-promotional and I think it is better for being both. I think it will do a lot of good.

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

2013
JOURNAL

LAW PROJECTS

INTRODUCTION TO THE LAW PROJECTS

It's a fleeting digression in a devastating movie called *Conspiracy*. Fifteen bureaucrats sit around a conference table in a well-appointed Berlin lakeside villa in January of 1942, gathered to ratify a plan for murdering all of Europe's Jews. A representative of the Reich Interior Ministry proposes mass sterilization rather than mass murder because this, unlike outright genocide, could be done consistently with German law. A Nazi Party representative interrupts: "We make the law we need!" "Why am I telling you this?" he adds in exasperation. "How many lawyers are in this room?" he asks. "Raise your hands."

Nine of the 15 men put their hands in the air.

The conversation swiftly shifts back to genocide, and before long the focus is the grisly logistics and mechanics of killing. Shocking stuff. But for the 14 FASPE Law Fellows who screened the film on the first evening of the 2013 law program, the most stunning moment may have been that little digression. The nine raised hands make clear that it was *lawyers* who murdered the Jews of Europe.

My co-teacher Lisa Lerman and I had the privilege of accompanying and guiding these 14 students through 12 powerful days of coming to grips with this realization. They came from 14 different law schools and from widely divergent backgrounds in the United States, Great Britain, Germany, and Poland. What they shared was a desire to confront the darkest reaches of lawyer misconduct in order to deepen their own moral and ethical commitments in the practice of law.

Words cannot fully describe the FASPE Law experience. We can list the sites of horror we visited, recite what we learned from Thorsten Wagner's and Thorin Tritter's historical tours and lectures, review our readings, and retell the jokes we enjoyed over fine food and Żubrówka, and still we do not capture the power of the trip.

But lawyers do deal in words; they are our stock in trade. The essays that follow are several of the outstanding pieces of writing that the FASPE Law Fellows completed after returning home. Their chosen topics and approaches were as varied as their own marvelous intellects and temperaments. However, all of the Fellows' work reflected deep, even transformative engagement with the FASPE project of connecting the moral and ethical practice of law today with the horrors of lawyering gone awry in Germany between 1933 and 1945.

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Ethical Boundaries: Advising Clients about the Consequences of Non-Compliance with Deportation Laws

By David Jakus

Introduction

In the opening pages of *Survival in Auschwitz*, a memoir about the author's experiences during the Holocaust, Primo Levi describes the plight of prisoners in the Nazi concentration camp in Fossoli, Italy with these words (emphasis added):

A few had given themselves up spontaneously, reduced to desperation by the vagabond life, or because they lacked means to survive, or to avoid separation from a captured relation, *or even – absurdly – “to be in conformity with the law.”*¹

Levi's description of the “absurdity” of those prisoners, who turned themselves over to “conform[] with the law,” seems rational. In 1938, the publication of the *Manifesto on Race* paved the way for subsequent passage of anti-Semitic laws in Italy banning Jews from, among other things, owning land, serving in the military, and marrying Aryans, purely on the basis of their race.² By 1944, when Levi was interned at Fossoli, much of Italy had fallen under German occupation, and the Germans imposed anti-Jewish laws calling for the round-up and ultimate deportation of Italian Jews.³ Many of those around Levi were ultimately deported to other Nazi concentration camps outside Italy, including Auschwitz-Birkenau, where the vast majority of them were murdered.⁴ How could one describe a Jewish person's decision to conform to such laws as anything other than absurd?

But what if a lawyer in Fascist Italy were approached by a Jewish person subject to deportation under Nazi law? Could the lawyer counsel the client that compliance with the law would be “absurd”? Could the lawyer even inform the client of the consequences of avoiding compliance? The answers to these questions highlight the ethical complexity attorneys face when dealing with their conflicting duties to protect their clients' interests while also upholding the letter of the law, particularly when advising clients on morally difficult decisions and potentially criminal acts.

In order to explore such ethical dilemmas, this paper begins by summarizing the Model Rules of Professional Conduct (“MRCP”)⁵ governing the ethics of giving legal advice on the consequences of criminal acts. The discussion is supplemented by an ethical framework created by the legal scholar Stephen Pepper to assess the ethics of advising clients on non-compliance

¹ Primo Levi, *Survival in Auschwitz* (New York: Touchstone, 1996), 4.

² Joshua D. Zimmerman, ed. *Jews in Italy under Fascist and Nazi Rule, 1922-1945* (New York: Cambridge University Press, 2009), 3.

³ “Italy,” *Holocaust Encyclopedia*, United States Holocaust Memorial Museum, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005411>

⁴ “Italy,” *Holocaust Encyclopedia*, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005455> (4,733 Italian Jews were deported to Auschwitz-Birkenau, and only 314 survived).

⁵ Model Rules of Professional Conduct, Rule 1.2(d) (American Bar Association, 2013).

with the law.⁶ Then, the paper applies the Rule and the framework to two hypothetical fact patterns: a lawyer advising a Jewish client facing deportation regarding non-compliance with Nazi law during the Holocaust, and a contemporary lawyer advising an undocumented immigrant facing deportation on staying in the country in violation of U.S. Federal law. While the Holocaust and contemporary deportation scenarios are certainly different in important ways, the former extreme situation will be used to support the view that the ethics of giving legal advice on legal non-compliance should be analyzed in the context of what Pepper termed the “real wrongfulness”⁷ of the advised client conduct. This paper thus argues that even in the less extreme scenario of an undocumented immigrant facing deportation today, advice on non-compliance may be ethically appropriate.

The MRCP and an Ethical Continuum Governing Advice on Legal Non-compliance

MRCP Rule 1.2(d) prohibits lawyers from being complicit in a client’s crime:
A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client...⁸

The Rule makes clear that a lawyer may not actively or directly “assist” a client in committing a crime or fraud, for example by being an “accomplice,” or by actively participating in the crime or fraud.⁹ But, when does mere counseling as to the “legal consequences” of an action cross over from ethical advice to unethical assistance? The Comments to the Rule acknowledge that certain advice about the illegality of an action may be given without reaching the level of unethical assistance by stating that “[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.”¹⁰ However, it is not immediately clear how to make this “critical distinction.”

Many scholars argue that the Rule leaves a blurred line between mere advice on the criminality of conduct, and unethical “assistance” in committing a crime.¹¹ When writing about the ethics of “counseling at the limits of the law,” Stephen Pepper acknowledges that this ethical gray area exists, but argues that lawyers should start with a rebuttable presumption that it is ethical to provide any and all advice that educates the client about the law, even if it relates to criminal activity.¹² From there, Pepper suggests that legal advice regarding criminal acts exists on a sort of ethical continuum ranging from unethical advice that induces criminal violation of the law to ethical advice that merely educates the client without much cost to society.¹³

⁶ Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, The Yale Law Journal 104 (1995): 1545, 1579.

⁷ Pepper, “Counseling at the Limits of the Law.”

⁸ Model Rules of Professional Conduct, Rule 1.2(d).

⁹ Alec Rothrock, “Is Assisting Medical Marijuana Dispensaries Hazardous to a Lawyer’s Professional Health?” *Denver University Law Review* 89 (2012): 1047, 1052, 1054 (noting that leading scholars interpret the Rule as prohibiting a lawyer from ‘actively’ participating in or being an ‘accessory’ to a client’s crime or fraud.)

¹⁰ Model Rules of Professional Conduct, Rule 1.2(d) Comment [9].

¹¹ See, Rothrock, “Is Assisting Medical Marijuana Dispensaries Hazardous to a Lawyer’s Professional Health?” 1050–51; Christine N. Cimini, “Ask, Don’t Tell: Ethical Issues Surrounding Undocumented Workers’ Status in Employment Litigation,” *Stanford Law Review* 61 (2008): 355, 369.

¹² Pepper, “Counseling at the Limits of the Law,” 1599.

¹³ Pepper, “Counseling at the Limits of the Law,” 1587.

Pepper identifies several key factors that may be used to determine when giving advice on questionable client behavior becomes unethical. Of most relevance to the fact patterns discussed in this paper is an assessment of the real “wrongfulness” of the client’s prospective unlawful conduct.¹⁴ Pepper argues that even if a lawyer gives advice regarding client conduct that, strictly interpreted, could be construed as non-compliant with the law, the less “wrongful” the client’s conduct is considered by society “in some fundamental or serious way,” the less ethical concern a lawyer should have in offering the advice.¹⁵ In other words, in certain situations, the benefits of informing the client about the law and the consequences of disobeying it may outweigh the benefits of ensuring strict obedience to the law, particularly where the disobedience causes limited moral and societal harm. Thus, professional legal ethics should be less concerned with advice regarding such disobedience.

The Ethics of Advising Clients on Legal Non-Compliance to Avoid Nazi Deportation

Despite how “absurd” it would be for a Jew in Fascist Italy to voluntarily comply with Nazi laws leading to his or her own deportation and death, contemporary legal ethics, as exemplified by MRPC Rule 1.2(d), still places some real limits on a lawyer’s ability to assist a client in skirting even such immoral laws.¹⁶ For example, actively and directly assisting a Jewish client in hiding from deportation, helping him or her forge fake documents, or finding the client a hiding place, would almost certainly be considered assistance in the commission of a crime or fraud in violation of the Rule.¹⁷ However, in such an extreme situation of life or death, the lawyer could still advise the client without violating the Rule by merely heeding the guidance of the Rule Comments and “presenting an analysis of [the] legal aspects” of such methods of non-compliance,¹⁸ so long as there was no active participation or knowing facilitation of the crime on the part of the lawyer. Such counseling would fall into the ethical gray area between advice and assistance. The Rule thus leaves lawyers some flexibility to act ethically in a manner consistent with the moral instinct that underlies Levi’s comment regarding the absurdity of a Jew complying with anti-Semitic Nazi law.¹⁹

Likewise, Pepper’s ethical framework would almost certainly permit a lawyer to inform a Jewish client about ways to avoid complying with Nazi law. As Pepper describes, the less “wrongful” the proposed client conduct, the less ethical risk a lawyer faces by advising the client about the legality of the conduct.²⁰ By “wrongful,” Pepper means, among other things, conduct considered morally objectionable, conduct that causes unjustifiable harm to other specific persons, and conduct that might be generally harmful to society.²¹ In our hypothetical, the “wrongfulness” of a Jewish person hiding or falsifying documents to evade Nazi capture would be minute. Such conduct would almost certainly cause minimal harm to others, and avoiding deportation would cause almost no moral or broader societal harm. In fact, one could argue that the cost to society of counseling a Jewish client to comply with the anti-Semitic law and facilitate genocide would

¹⁴ Pepper, “Counseling at the Limits of the Law,” 1587.

¹⁵ Pepper, “Counseling at the Limits of the Law,” 1579.

¹⁶ Model Rules of Professional Conduct.

¹⁷ Model Rules of Professional Conduct.

¹⁸ Model Rules of Professional Conduct, Rule 1.2(d) Comment [9].

¹⁹ Levi, *Survival in Auschwitz*, 4.

²⁰ Pepper, “Counseling at the Limits of the Law,” 1579.

²¹ Pepper, “Counseling at the Limits of the Law,” 1563-64.

be even larger than any societal harm caused by the client disobeying the law. This extreme example of a law whose violation causes minimal harm to others and to society helps illustrate the utility of Pepper's "wrongfulness" continuum analysis. A lawyer should be free to ethically advise a client on morally sound conduct that would cause minimal harm to others, even if the conduct exists at the edge of legality.

Ethically Advising Undocumented Immigrants on Remaining in the United States

Shifting to a contemporary ethical issue, what if a lawyer is approached by an undocumented immigrant residing in the United States who currently has no options for obtaining legal status here, but who may obtain said options at some point in the future?²² For example, there are several scenarios in which an immigrant is present in the country without legal documentation, but may be eligible to gain legal status in the future (e.g. by seeking asylum, by marrying a citizen, by later gaining amnesty, or by applying for and gaining a visa renewal).²³ As an undocumented immigrant in one of these scenarios, continuing to stay in the country without registering as an alien may in some cases violate Federal law,²⁴ while in other cases self-reporting creates the risk of being deported before ever having the chance to gain legal status.²⁵ Though the "absurdity" of volunteering oneself for deportation is certainly not as obvious in contemporary America as it was in the case of Jews in Fascist Italy, some immigrants in America without documentation certainly risk personal harm if they are forced to return to their countries of origin. If a lawyer has such a client, what should the lawyer advise the client to do? What are the ethical limitations on the lawyer regarding educating the client about the option of remaining in the country illegally?

Once again, Rule 1.2(d) explicitly prohibits a lawyer from assisting a client in committing a crime or fraud.²⁶ Thus, a lawyer may not actively assist an undocumented client in staying in the United States illegally, say by forging documents or hiding the client from the government. However, providing the client with information on the consequences of staying illegally, and on any reduced enforcement of immigration laws, may be consistent with a lawyer's ethical obligations under the Rules, if provided as a "legal analysis" rather than as assistance.²⁷ As we saw with the Holocaust hypothetical, the Rule appears to leave an attorney with enough flexibility to ethically provide the client with sufficient information to decide whether to accept the risk associated with non-compliance.²⁸ Though the lawyer must be careful not to cross the line from advice to assistance, achieving this goal is possible under the Rule if done without knowledge that the client intends to commit a crime.²⁹

²² This fact pattern is based on a hypothetical proposed in a blog post by immigration attorney Cyrus Mehta, who is the Chair of the Ethics Committee of the American Immigration Lawyers Association (AILA). Cyrus Mehta, "The Role of the Immigration Lawyer in Advising Undocumented Immigrants," Blog Post, July 29, 2011, last accessed September 29, 2013, <http://blog.cyrusmehta.com/2011/07/role-of-immigration-lawyer-in-advising.html>

²³ Mehta, "The Role of the Immigration Lawyer in Advising Undocumented Immigrants."

²⁴ Cimini, "Ask, Don't Tell," 355, 366 ("willful failure to register as an alien after thirty days and entry and presence in the United States after a deportation order have been found to be continuing crimes") (internal citations omitted).

²⁵ Mehta, "The Role of the Immigration Lawyer in Advising Undocumented Immigrants"; Model Rules of Professional Conduct,.

²⁶ Model Rules of Professional Conduct, Rule 1.2(d) (ABA 2013).

²⁷ Model Rules of Professional Conduct, Rule 1.2(d) Comment [9].

²⁸ Mehta, "The Role of the Immigration Lawyer in Advising Undocumented Immigrants."

²⁹ Model Rules of Professional Conduct, Rule 1.2(d) (ABA 2013).

Applying Pepper's "wrongfulness" framework, we once again find that in this circumstance, a lawyer should have some freedom to advise a client as to the consequences of staying in the country, even if such client conduct runs the risk of violating immigration law. As with the Holocaust scenario, the questionable conduct of remaining in the country would almost certainly cause no direct harm to another specific person.³⁰ Any costs are sufficiently outweighed by the benefit: supplying information necessary to make an intelligent decision about legal non-compliance to a client who has a chance of gaining future citizenship if he or she risks staying in the country illegally. Of course, slightly changing the facts could tilt the scale in this ethical gray area back toward prohibiting legal advice on the consequences on legal non-compliance. But by adopting a framework that takes moral and societal "wrongfulness" into consideration, the legal community is able to flexibly set the ethical bounds for when advising client on the consequences of legal non-compliance is permissible.

Conclusion

The Holocaust deportation hypothetical proposed above, based loosely on the situation of some of those who shared the same dismal fate as Primo Levi, highlights the value of incorporating moral and societal utilitarian considerations into a flexible ethical framework for determining when lawyers may ethically advise clients about questionable conduct undertaken to avoid deportation. This framework helps fill in the gray area left by the Model Rules, allowing lawyers to provide helpful client advice consistent with a broader sense of morality. Thus, when a contemporary lawyer is faced with a situation, in which a client has the potential to save him or her self from harm through non-compliance with the law, with minimal cost to society, the lawyer, depending on the facts, should be able to consider ethically advising the client on the consequences of such conduct. Of course, the scenarios used in this paper are not the only ones in which the duty to serve the client's interest and the obligation to strictly comply with the law are in conflict. More often than not, the latter will outweigh the former. But in certain extreme situations, where the moral balance shifts the other way, the Rules and norms of professional ethics should, and do, allow lawyers to make the morally "right" decision.

³⁰ Pepper, "Counseling at the Limits of the Law," 1563-64.

When Defenders of the Law Choose Not to Defend: Attorney General Kane and Pennsylvania's Ban on Same-Sex Marriage

By Johnston Chen

"I cannot ethically defend Pennsylvania's version of DOMA where I believe it to be wholly unconstitutional."¹ With these words Pennsylvania Attorney General Kathleen Kane refused to defend the state's ban on same-sex marriage. Her announcement provides a contemporary example of the enduring problem lawyers face when they confront ethical problems, and find that their professional responsibilities clash with their own ethical ideals.

Under Pennsylvania law, it is Attorney General Kane's duty "to represent the Commonwealth...in *any action* brought by or against the Commonwealth."² The Pennsylvania Constitution stipulates one explicit exception to the rule. If efficiency or the state's best interests are at stake, the Attorney General can resign from her role, a clause Attorney General Kane failed to invoke when justifying her inaction. Beyond these measures, it is not explicitly within the Attorney General's prerogative to determine a law's constitutionality. Opponents have been quick to point this out. The president of the Pennsylvania Family Institute remarked, "no one elected her to be a judge."³ Instead, Attorney General Kane's justification centered on general principles of equality, analogizing discrimination against same-sex couples to discrimination against racial minorities and women. She explained:

"Equality is the fundamental significance of a democratic society. We have progressed in society over our great history... [W]ithout this equality, our society would never have achieved desegregation of schools, marriage equality between interracial couples, and women would still not be able to vote or hold office. Denying equality is the very definition of discrimination. We have always stood strong in the face of discrimination... It is now the time here in Pennsylvania to end another wave of discrimination."⁴

Kane's only legal explanations for her actions were not legal justifications at all. In addressing her legal reasoning, she simply recited the 14th Amendment of the U.S. Constitution and the Pennsylvania Constitution's prohibition against denying "to any person the enjoyment of any civil right."⁵ She did not refer to any binding or persuasive authority, nor did she issue a document outlining her legal analysis. Her lack of attention to any binding case law reveals that her legal justifications were tenuous at best, and that her decision was much more likely an

¹ Trip Gabriel, "Move for Gay Marriage Gets a Lift in Pennsylvania," *New York Times*, July 11, 2013,

² Commonwealth Attorneys Act (1980) P.A. P.L. 950, No. 164, § 204(c), <http://www.legis.state.pa.us/WU01/LI/LI/US/PDF/1980/0/0164..PDF>. Although not crucial for understanding Attorney General Kane's position, the Pennsylvania Constitution does not enumerate the specific duties of the Attorney General, but rather states that the Attorney General "shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law." P.A. Const. art. IV, § 4(1), <http://www.attorneygeneral.gov/theoffice.aspx?id=168>.

³ Megan Rogers, "Pennsylvania AG Kane will not defend DOMA," *Pittsburgh Post-Gazette*, July 11, 2013, <http://www.post-gazette.com/stories/local/state/pennsylvania-ag-kane-will-not-defend-doma-695103/>.

⁴ Kathleen Kane Press Conference, National Constitution Center, Philadelphia, July 11, 2013, available at: <http://www.youtube.com/watch?v=0HFVNBND2oE>.

⁵ Kathleen Kane Press Conference, July 11, 2013.

ethical one. Nor did the Attorney General mask her true intentions. She concluded her remarks by saying, “It is up to every single one of us to stand up against injustice. And when we do that, we create a tiny ripple.”⁶

Attorney General Kane is not the only Attorney General, or member of an executive branch, to refuse to defend a law limiting the rights of LGBT persons. In fact, her case was at least the fourth time that a state attorney general refused to defend a ban on same-sex marriage by declaring their belief in the law’s unconstitutionality.⁷ In 2010, the California Attorney General refused to defend Proposition 8.⁸ Two years later, the Attorney General of Illinois refused to defend a similar law, stating “I’m not going to defend something I believe is in violation of the constitution.”⁹ Even on a federal level, in 2011 Attorney General Eric Holder refused to defend the Defense of Marriage, citing President Obama’s conclusion that the law was unconstitutional. As recently as July, New Mexico’s Attorney General stated that he would not defend New Mexico’s ban on same-sex marriage because he believed it to be unconstitutional.¹⁰ Like Attorney General Kane, these lawyers have refused to defend a law they concluded, individually, was unconstitutional.

Despite this history of decisions, it is not clear if there is a particular virtue in choosing not to enforce a law because of an individual’s beliefs. On the one hand, many proponents of same-sex marriage would gladly support arguable acts of valor by individuals acting based on their conscience when confronted with important social issues. As Attorney General Kane intimated, one reason for her decision not to defend the law was that “it is up to every single one of us to stand up against injustice.” On the other hand, a critical element of a democratic system of governance is adherence to the rule of law and to a belief in due process. Despite the many inefficiencies, the rules of due process structure our system to prevent the consolidation of power that lends itself to a frighteningly efficient method of upending the law in the name of the greater good.

One of the most striking ethical problems with Attorney General Kane’s decision is that, under the state Constitution, Attorney General Kane has an ethical duty to defend all statutes in court. The Pennsylvania Governor captured this sentiment when he responded to the Attorney General’s press conference. “We are surprised that the Attorney General, contrary to her constitutional duty...has decided not to defend a Pennsylvania statute lawfully enacted by the General Assembly, merely because of her personal beliefs.”¹¹ The problem his statement elucidates is an ethical question faced by all lawyers. In line with the Governor’s perspective, individuals work within a system with discrete roles. The Attorney General has a duty to defend the laws of Pennsylvania and her failure to do so can therefore have serious consequences.

⁶ Kathleen Kane Press Conference, July 11, 2013.

⁷ Tammy Webber, “Illinois Gay Marriage: State Prosecutors Refuse to Defend Gay Marriage Ban,” *Huffington Post*, June 21, 2012, http://www.huffingtonpost.com/2012/06/21/illinois-gay-marriage-sta_0_n_1615170.html.

⁸ Maura Dolan and Carol J. Williams, “Jerry Brown says Prop. 8 Should be Struck Down,” *Los Angeles Times*, June 13, 2009.

⁹ Webber, “Illinois Gay Marriage: State Prosecutors Refuse to Defend Gay Marriage Ban.”

¹⁰ “AG King Won’t Defend Ban on Gay Marriage,” *Associated Press* and *Santa Fe New Mexican*, July 22, 2013, http://www.santafenewmexican.com/news/local_news/article_7a23f6b6-f60b-5132-a955-d7aae976ee1f.html.

¹¹ “Pennsylvania Attorney General Won’t Defend Gay Marriage Ban,” *ABC News*, July 11, 2013, <http://abclocal.go.com/wpvi/story?section=news/local&id=9169245>.

For one, an Attorney General's decision not to defend the law potentially undermines the democratic system and the attorney general's role within that system. While Attorney General Kane made her announcement in a room full of supporters, it can be difficult to accept a democratic system's credibility when its public actors choose to fulfill their public duties at their own discretion. As Rob Dreher of *The American Conservative* points out, "What if Pennsylvania backed [same-sex marriage]... and the Attorney General, a Catholic, refused to defend the law because he personally disagreed with it?"¹² If one is comfortable when an attorney general refuses to defend a law prohibiting same-sex marriage, Dreher's hypothetical challenged his readers to consider a system in which all persons behaved this way. Under such a system, a principle such as "The Attorney General should always defend the law, unless he or she strongly believes in the immorality of the law" could lead to wildly fluctuating levels of enforcement of laws, particularly with respect to social issues. Such a principle also undermines the predictability of the democratic process, as citizens would not be able to rely on certain procedural processes.

One more palatable alternative might be a principle such as: "The Attorney General should always defend the law, unless the law discriminates against a discrete group of people." Much like the Supreme Court has created opportunities under the 14th Amendment to strike laws which impinge upon fundamental liberties or violate equal protection of the law, perhaps an adherence to the rights of individuals over individual morality could reconcile the problem of Attorneys General individually choosing not to defend a law. Of course, definitions of discrimination also differ across cultural periods and amongst people. And, even if that were not the case, no one elected Attorney General Kane to be a judge.

On the other hand, strict adherence to the Governor's statements could lead to the type of legal positivism that executes the law regardless of any consideration of its ethical underpinnings. Legal positivists, who believe that the question of what law *is* should be separate from what the law *ought to be*, conclude that there is no necessary link between law and morality.¹³ This approach is problematic. A strict adherence to the belief that a law should be followed simply for the sake of its existence can lead to laws devoid of any rational moral underpinning. One striking example of this was a law enacted by Nazi Germany in regard to heaters in Nazi concentration camps. The barracks within Auschwitz held prisoners in abject, overcrowded conditions that subjected them to some of the worst atrocities in recorded history. And yet, the Germans fastidiously provided prisoners with a furnace in each barrack for warmth. The rationale? A German law requiring that all housing have heating. This irony underscores the perversion of the law when it is followed simply for the sake of following the law. Surely if Attorney General Kane had to defend a law similar to that passed by the Nazis, but also duly promulgated by the Pennsylvania legislature, it would be her moral duty not to defend literally "any action" before her.

Our general belief that there are certain limits to the rationality, legitimacy, and constitutionality of a law, even if we are not judges, reflects our understanding that a law is not always a just law.

¹² Rod Dreher, "Our Elite Governing Caste," *The American Conservative*, July 11, 2013.

¹³ Kenny Yang, "The Rise of Legal Positivism in Germany: A Prelude to Nazi Arbitrariness?" *The Western Australian Jurist* 3 (2012): 245-246.

Whether unjust laws are fought through filing lawsuits, through demonstrations, or, in Attorney General Kane's case, through refusing to defend an unjust law, the recognition that laws can be unjust buttresses us from the dangers of blind adherence to legal positivism. Of course, when a public official continuously refuses to defend multiple laws, his or her actions speed us toward arbitrariness, which may under public confidence in their credibility, or even justify removal. In that situation, we would rely on the political process to remove such a person from office. However, when used sparingly, and only for laws which seriously tug on one's moral conscience, refusing to defend a law can send a powerful message.

Ethical Dilemmas in Defining the Enemy: From “Jew” to “Associated Forces”

By Leslie Esbrook

The sun shone, the birds chirped, and a slight breeze drafted across the river Havel onto the balcony of the Wannsee villa, where fourteen ambitious American law students sat debating the culpability of men who had planned genocide over a midday meal at this very spot nearly seventy-one years ago. The Wannsee Conference of January 20, 1942 marked the culmination of German civilian and military leaders’ evolving plans of discrimination, persecution, and, ultimately, systematic killing of the Jews of Europe.¹ Our research guide remarked that, horrible as Wannsee was, people had not physically died in this space.

Yet, the bureaucratic nature of the meeting only served to underscore the inherent dangers in wartime policy making. One freshly minted law had the power to cause incalculable death and destruction across the continent. Issues of the scope and nature of those being targeted would become a key debate in the discussions at Wannsee and, earlier, at the drafting of the 1935 Nuremberg Laws. How did Germany want to define “the enemy”? Two men, Interior Ministry Legal Counsel Bernhard Loesener and Reich Minister of the Interior Wilhelm Stuckart, advocated for more lenient definitions of “Jew” as classified by grandparental lineage, effectively shaping a policy that helped some in interfaith marriages and children of these marriages escape persecution or death.² Their reasons for restraint are questionable; and as our heated FASPE discussions prove, we may never fully understand their reasoning or come to terms with possible gradations of guilt to assign them.³ But the larger idea of debate over defining the enemy strikes a chord with contemporary issues of justice in American national security policy. The government has interpreted Congress’ Authorization for the Use of Military Force (AUMF) to permit the President to act against “persons who were part of, or substantially support, Taliban or al Qaida forces or associated forces that are engaged in hostilities against the United States (...).”⁴ How should we define “associated forces,” and what are the consequences when we make this decision?

Like Germany in 1914 and 1939, the U.S. is now a nation at war and a nation with an “enemy” that is culturally different, and at times castigated for these differences. Wartime exacerbates hawkish, nationalist sentiment and promotes an “us versus them” mentality. A tendency towards an over-expansive definition of the enemy, “associated forces,” may result from this, as well as

¹ “Wannsee Conference” and “Final Solution,” *Holocaust Encyclopedia*, United States Holocaust Memorial Museum, accessed July 14, 2013, <http://www.ushmm.org/wlc/en/article.php?Module=10005477>.

² Christian Gerlach, “The Wannsee Conference, the Fate of German Jews, and Hitler’s Decision in Principle to Exterminate All European Jews,” *Journal of Modern History* 70 (1998): 759, 778-779, 795; Karl A. Schleunes, ed, *Legislating the Holocaust: The Bernhard Loesener Memoirs and Supporting Documents* (Boulder, CO: Westview Press, 2001).

³ Loesener was interrogated and held until early 1947 by Russian and subsequently American forces before being released without trial. See Schleunes, *Legislating the Holocaust*, 103. Stuckart was held for trial until 1949 when he was released for lack of evidence. See “Wilhelm Stuckart (1902-1953),” Jewish Virtual Library, accessed July 14, 2013. <http://www.jewishvirtuallibrary.org/jsource/biography/Stuckart.html> ; see also Jasch Hans-Christian, “The Role of the Reich’s Ministry of Interior in the Preparation of the Holocaust of the European Jews: The Case of State-Secretary Dr. Wilhelm Stuckart (1902-1953),” *Die Verwaltung* 43 (2010): 217.

⁴ *Hamilly v. Obama*, 616 F. Supp. 2d 63, 66 (D.D.C. 2009). The Court defines associated forces as “‘co-belligerents’ as that term is understood under the laws of war,” 74-75.

general anti-Muslim sentiment and distrust, which has been on the rise since 9/11.⁵ Many in the United States government, supported by their constituents at home, advocate for an expansive definition of associated forces to include splinter cells, small scale terrorist groups, even those who have been expelled from Al Qaeda, like Mokhtar bel Mokhtar, the recent orchestrator of the Algerian oil plant kidnappings, or those who deliberately declined an alliance, like the split faction of al-Nusra in Syria.⁶ As the government steps up talks to exit Afghanistan and wind down the war authorized by the AUMF, discussions have shifted to the next phase of the fight against terrorism. Talks about the possibility of a new AUMF to authorize force against “associated forces”⁷ and potential future unknown terrorists highlight the gravity of definitions. The more inclusive a definition of the enemy, the longer we remain at war, the more enemies we give ourselves, and the greater a domestic divide between cultures.

When Bernhard Loesener submitted his draft of the Nuremberg Laws and requested Hitler define “Jew” as anyone with four Jewish grandparents, rather than the more broadly encompassing definition of anyone with two Jewish great-grandparents, he hoped his law would save some Jews from discriminatory policies.⁸ The year was 1935. By 1939, his advocacy of exclusionary clauses for German children of mixed marriages would save them from sterilization, deportation, and death.⁹ The stakes in America today are similarly grave for an expanded definition of “associated forces,” which the Congressional Research Service has deemed “a category of indeterminate breadth.”¹⁰ The President has the authority to “use all necessary and appropriate force.”¹¹ Ideally, this means a determination of feasible capture of a target would be made before considering targeted killing. Practically, though, recent years have shown the government’s difficulties with capture and detainment and, by contrast, an apparent election to kill enemies if

⁵ The recent Boston bombings by the Muslim Chechen Tsarnaev brothers have released a fresh wave of Islamophobia. According to one poll, nearly a majority of Americans see Muslims as untrustworthy and violent. John Sides, “Americans who Distrust Muslims are Likelier to Back the War on Terror,” *Washington Post*, April 21, 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/04/21/americans-who-distrust-muslims-are-likelier-to-back-the-war-on-terror>. See also Alex Kane, “Boston Marathon Bombings Unleash a New Wave of Islamophobia,” *Mondoweiss*, April 19, 2013, <http://mondoweiss.net/2013/04/marathon-bombings-islamophobia.html>; Anthony Asadullah Samad, “Islamophobia is America’s Latest Fear,” *Los Angeles Wave*, May 2, 2013, http://wavenewspapers.com/opinion/between_the_lines/article_de5dbd8c-b355-11e2-87a4-001a4bcf6878.html.

⁶ Damien McElroy, “Al-Qaeda’s Scathing Letter to Troublesome Employee Mokhtar Belmokhtar Reveals Inner Workings of Terrorist Group,” *The Telegraph*, May 29, 2013, <http://www.telegraph.co.uk/news/worldnews/al-qaeda/10085716/Al-Qaedas-scathing-letter-to-troublesome-employee-Mokhtar-Belmokhtar-reveals-inner-workings-of-terrorist-group.html>; Richard Spencer, “Syria: Jabhat al-Nusra Split After Leader’s Pledge of Support for Al-Qaeda,” *The Telegraph*, May 19, 2013, <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10067318/Syria-Jabhat-al-Nusra-split-after-leaders-pledge-of-support-for-al-Qaeda.html>.

⁷ For a good summary of the various proposals and the problems centered on a never-ending list of enemies, see Jennifer Daskal and Stephen I. Vladeck, “Don’t Expand the War on Terror,” *New York Times*, May 15, 2013, <http://www.nytimes.com/2013/05/16/opinion/dont-expand-the-war-on-terror.html?partner=rssnyt&emc=rss>. See also President Barack Obama, “Remarks at the National Defense University on the Future of our Fight Against Terrorism,” May 23, 2013. (“So America is at a crossroads. We must define the nature and scope of this struggle or it will define us...”).

⁸ Schleunes, *Legislating the Holocaust*, 9, 18.

⁹ Schleunes, *Legislating the Holocaust*, 32.

¹⁰ Jennifer K. Elsea and Michael John Garcia, *The National Defense Authorization Act for FY2012 and Beyond: Detainee Matters*, Congressional Research Service, R42142 (2012).

¹¹ Authorization for the Use of Military Force 50 U.S.C. § 1541 (2001).

possible.¹² Were capture and detainment an option, the legality of indefinite detention at Guantanamo, prevarication on the *habeus* rights of prisoners, and the legality of proceedings at military commissions make the detention option little better from the perspective of wartime rule of law.¹³

The expanded definition of “associated forces” implicates the possible targeting of hundreds of thousands of additional persons, including U.S. citizens,¹⁴ for inscription on the United States’ kill list. This is worrisome for two reasons. First, because of what it says about the United States as a standard bearer of human rights and dignity. As the country integral to the creation of the United Nations, NATO, and the prosecution of war criminals at Nuremberg in a court of law, to name a few examples, the United States takes pride in promoting itself as a leader in the respect for human rights and the rule of law. A never-ending kill list based on overly broad criteria for drone strikes threatens to undermine the image the United States has worked hard to cultivate. In Nazi Germany, Stuckart recognized the danger of repeating the mistakes of the past by creating innumerable enemies. In a letter to Himmler he justified his restricted definition of Jewish enemies of the state, and predicted that once the debate on degrees starts, “there is no recognizable limit, natural or logical, to its continued spread to ever remoter Mischling [mixed] degrees...”¹⁵ These words ring true in relation to criteria for classification of “associated forces.” The effects of drone strikes are not limited to the enemy target; they damage infrastructure, account for an untold number of collateral deaths, uproot families, and cause entire communities to live in fear of perpetual buzzing overhead.¹⁶ While a legal policy option that serves a necessary and effective part of our military arsenal, the decision regarding who comes under the crosshairs is one not to be taken lightly.

The potential harms of an overly expansive definition of the enemy are equally dangerous for precedential reasons. It is no secret that fears of terrorist threats have led to an escalating lack of discriminatory procedure with the revelations of PRISM and other surveillance programs, to the outcry of all Americans. Yet, the primary concerns of vocal Americans against drones are not the possibly indiscriminate kill lists, or their effects on members of the international community. Instead, the press focuses on the public’s concerns over domestic drone surveillance and rights to

¹² For a summary of the events leading up to this conclusion, see Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (New York: Houghton Mifflin, 2012).

¹³ As Guantanamo will not accept new detainees, the basic question of where to house future captives remains unresolved. Baher Azmy, “The Face of Indefinite Detention,” *New York Times*, September 14, 2012, <http://www.nytimes.com/2012/09/14/opinion/life-and-death-at-guantanamo-bay.html>; “The Court Retreats on Habeas,” *New York Times*, June 13, 2012, <http://www.nytimes.com/2012/06/14/opinion/the-supreme-court-retreats-on-habeas.html>; Ed Pilkington, “US Government Identifies Men on Guantanamo ‘Indefinite Detainee’ List,” *The Guardian*, June 17, 2013, <http://www.guardian.co.uk/world/2013/jun/17/us-identifies-guantanamo-bay-detainees>.

¹⁴ Charlie Savage, “US Acknowledges It Has Killed 4 US Citizens in Drone Strikes,” *New York Times*, May 23, 2013, <http://www.bostonglobe.com/news/nation/2013/05/23/drones-have-killed-citizens-suspected-terrorist-acts/rJoGINxYLZ1t0K3vTyImEL/story.html>.

¹⁵ Schleunes, *Legislating the Holocaust*, 86.

¹⁶ See Center for Civilians in Conflict and Human Rights Clinic at Columbia Law School, *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions*, (New York: 2012). <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf>

privacy.¹⁷ A broad definition of associated forces both sends tacit support for the government's wide invasive policies in other contexts of national security, like surveillance, and will remain uncontested as it slips through the net of Americans' more pressing domestic concerns. Who dares to fight for the rights of foreign and U.S. nationals when the President of the United States of America has labeled them terrorists?

In his letter to Himmler, Stuckart quipped: "It has always been my aim to find a reasonable balance between the extent of the actual danger and the severity of measures that situation requires."¹⁸ Stuckart's policies of prudence are the best hope in today's fight against the enemy. A tailored, balanced, individualized assessment of each actor participating in a splinter cell or other non-Al Qaeda non-Taliban fighting unit is needed to assess who they are, what their aims are, how they plan to achieve their goals, and for what purposes. This will ensure that "associated force" does not become synonymous with "Muslim with a gun," or even "Muslim who has browsed the internet for bomb-making instructions."¹⁹ The closest thing we currently have to a legal policy for drones comes from the heavily redacted Justice Department's Office of Legal Counsel's (OLC) White Paper for the use of force in targeted killings against U.S. citizens.²⁰ While a start, all of the steps of the policy are broad enough for interpretation, and there is still no guidance as to the definition of "associated forces."

For all of the dangers of how to define the enemy, one of the largest issues arises from the lack of transparency in either the Bush or Obama administrations. Only in May 2013, twenty months after the killing of Anwar Al-Aulaqi, did the government publicly acknowledge that it had targeted U.S. citizens with drone strikes.²¹ Apart from that announcement, the government still has not officially stated that it pursues a policy of targeted killings, leading to the recent *ACLU v. CIA* case in which Judge Garland, replying to the CIA's Glomar response to deny a Freedom of Information Act request for information on drones, wrote "the Agency's declaration that 'no authorized CIA or Executive Branch official has disclosed whether or not the CIA...has an interest in drone strikes,' is at this point neither logical nor plausible."²² Despite Judge Garland's perturbed reaction to the CIA's repeated denial of drones, his insistence on the most minimal of public disclosure does little to help the public practically understand drone policy or the question of "associated forces."

It may be difficult to follow developments in the definition of the enemy given the scant publically available information. Yet, we may take comfort knowing that at least certain voices in the White House do advocate for a more tempered, restrictive definition of whom to target and that, on at least one occasion, the President heeded those opinions. In the period from 2009-2011,

¹⁷ Joan Lowy, "AP-NCC Poll: A Third of the Public Fears Police Use of Drones for Surveillance Will Erode Their Privacy," *Associated Press*, September 27, 2012, <http://ap-gfkpoll.com/uncategorized/our-latest-poll-findings-13>.

¹⁸ Schleunes, *Legislating the Holocaust*, 83.

¹⁹ On home-made bomb how-to publications, see Max Fisher, "Knowledge of Pressure-Cooker Bombs is Not Limited to Readers of al-Qaeda's 'Inspire' Magazine," *New York Times*, April 16, 2013, <http://www.washingtonpost.com/blogs/worldviews/wp/2013/04/16/knowledge-of-pressure-cooker-bombs-is-not-limited-to-readers-of-al-qaedas-inspire-magazine>.

²⁰ Department of Justice Office of Legal Counsel, *White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al Qaeda or an Associated Force* (2013).

²¹ Savage, "US Acknowledges It Has Killed 4 US Citizens in Drone Strikes."

²² *ACLU v. CIA*, No. 11-5320, slip op. at 11 (D.D.C., March 15, 2013).

the President's former Legal Adviser to the State Department, Harold Koh, and former top Pentagon legal counsel Jeh Johnson sparred repeatedly over the level of material support necessary for non-Al Qaeda members to be considered threats rising to the level of AUMF-approved targeting. Johnson argued that the U.S. could widen its net of targets to anyone participating in an affiliate Al-Qaeda group, while Koh argued for more restrictive assessments of the level of support given by each member of the affiliate group. He would place on the kill list anyone who contributed enough to make the attack outside the official zone of combat rise to the level of self-defense in accordance with customary international law.²³ Koh's more restrained definition won the day in debates to target Robow, the third in command of Al-Shabab in Mali. Koh saw Robow as working towards destabilizing the regime in Somalia, rather than actively targeting the U.S., a prerequisite for the use of self-defense.²⁴ With both Koh and Johnson out of the administration, and their replacements as yet undecided, an important question remains on who in the administration will defend the limits to the executive policy to kill.²⁵

Ethical issues in the law tend to repeat themselves. Today the United States government tries to define "associated forces" for a policy of targeted killing, while seventy years ago the Nazi government tried to define their enemy, the "Jew," to target for genocide. In both cases a broad spectrum of options existed, all of which were and are considered legal. The more important question for the tides of history is: are they ethical? So long as a robust and open debate on the definition continues behind the closed doors of the highest levels of government, the administration does its part to weigh the facts. Hopefully, the government will work out a policy that balances the "actual danger" with the required "severity of measures." Ideally, these debates would be shared more publically, in order for all of us as Americans to understand more concretely just how fraught with ethical dilemmas questions of national security are.

²³ Charlie Savage, "At White House, Weighing Limits of Terror Fight," *New York Times*, September 15, 2011. <http://www.nytimes.com/2011/09/16/us/white-house-weighs-limits-of-terror-fight.html?pagewanted=all>; Charlie Savage, "Obama Team is Divided on Anti-Terror Tactics," *New York Times*, March 28, 2010, <http://www.nytimes.com/2010/03/29/us/politics/29force.html?pagewanted=all>.

²⁴ Daniel Klaidman, *Kill or Capture*, 221-224.

²⁵ Positions unfilled as of mid-July, 2013. Koh left the State Department in January 2013, and Johnson left the Defense Department in December 2012. Charlie Savage, "Top State Dept. Lawyer is Leaving," *New York Times*, December 12, 2012, <http://thecaucus.blogs.nytimes.com/2012/12/12/top-state-dept-lawyer-is-leaving>.

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

2013
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MEDICAL
PROJECTS

INTRODUCTION TO THE MEDICAL PROJECTS

Joining the 15 exceptionally talented FASPE Medical Fellows again this year was a privilege and a pleasure.

As in previous years, the FASPE trip allowed us to examine a range of contemporary issues in medical ethics in the settings where Nazi physicians routinely violated their obligations to their fellow human beings. In formal sessions, small group discussions, and in the constant exchanges we had with each other and with the Seminary Fellows who were our colleagues, we reflected on a series of painful questions: how could one of the most advanced civilizations have lapsed into the routine exercise of inhuman behavior? And how could a medical profession that was the model of scientific practice and professional competence have comported itself so badly? Even if not directly participating in the “selection” on the ramp at Birkenau or involved in the unimaginably cruel human experiments, how could members of our profession have condoned, accepted, or ignored these actions? And knowing what we do about the Nazis, how could members of our profession commit the inexcusable abuses at Guantanamo or Abu Ghraib in the service of our own government?

With this backdrop, we examined other questions: What safeguards are sufficient to protect human subjects of medical experiments? How do we resolve the dilemma of dual loyalties, when we are obligated not only to our patients but also to our society or our military? Can physicians not just assist in the dying process, but accelerate it in exceptional circumstances? How can we set limits on our uncontrolled health care spending without designating some lives as not worth saving, as the Nazis did?

And finally, we were compelled to ask the following: might the medical profession, which we would expect to be particularly resistant to the kinds of moral failings recorded in the Holocaust, instead be particularly susceptible to those failings, by virtue of the training we receive, the pressures we work under, or because of who we are when we are selected to join the profession? Although the topics we considered were difficult and our discussions intense, we did have time to enjoy our travels and each others’ company. As in past years, this group of Fellows was not only bright, articulate, compassionate, and motivated, but also excellent traveling companions. They are also excellent analysts and essayists, as is demonstrated in the three essays that follow – chosen in a necessarily somewhat arbitrary process from among an impressive group of papers.

FASPE works because it is thoughtfully conceived, well-constructed, and capably organized. It also works because of the quality of the Fellows it attracts, who can take what they learn and help us all remember the things that we must never forget.

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Anatomy of Evil: Eduard Pernkopf's *Topographische Anatomie des Menschen*

By Jordan Cohen

“To the Editor.—The abuses of medicine perpetrated during the Hitler regime pervaded the entire medical profession of the Third Reich including the academic elite. One legacy of that tragic era endures today through the continued publication of a critically acclaimed atlas, *Pernkopf Anatomy*.”¹

Dr. Howard A. Israel, an oral surgeon at Columbia University, wrote these words to the editor of the *Journal of the American Medical Association (JAMA)* in 1996, bringing to light the controversy surrounding one of the most widely used and acclaimed anatomy textbooks. In this letter, Dr. Israel calls for an investigation into the work of Eduard Pernkopf, the renowned anatomist and ardent member of the Nazi party. “The precise origins of the cadavers used in Pernkopf’s work are unknown, but evidence suggests they may have been victims of political terror.”² As a medical community, we must judge sources of medical knowledge by our current ethical context and decide when and how to incorporate this knowledge into contemporary medical education. This paper will explore the controversy of Eduard Pernkopf’s work, compare similar ethical controversies in anatomy, and examine arguments for how to deal with such work in medical education.

Pernkopf was born in a small rural community in Austria in 1888. He studied at Vienna Medical School in 1907, becoming a mentee of the famous anatomy professor Ferdinand Hostetter. With the help of his mentor, Pernkopf became an associate professor of anatomy at the University of Vienna in 1926. Like many of his peers, Pernkopf joined the Nazi party in 1933, accelerating his ascension in the University to dean of medicine and finally, to president. In 1938, he led the “cleansing” of Jewish students and faculty from the University, leading to the expulsion of 153 of 197 faculty members.³

The idea to create an anatomy atlas came in 1933 when Pernkopf was working under Hochstetter. He created a brief dissection manual for students that caught the eye of a major publishing company in Austria, Urban and Schwazenberg.⁴ Pernkopf signed a contract for his anatomy atlas and began working on it in October 1933. With the help of four German artists, Batke, Endtresser, Schrott, and Lepier, he worked feverously on the project until the war ended in 1945. Soon after this, Pernkopf was dismissed from the University of Vienna. While traveling later that year, he was captured by allied forces and held in a prison camp with other members of the Nazi party for three years. Upon his release from the camp, he reconnected with the four original artists and worked obsessively on the atlas until his premature death in 1955 from a massive stroke.

¹ Howard A. Israel and William E. Seidelman, “Nazi Origins of an Anatomy Text: The Pernkopf Atlas,” *Journal of the American Medical Association (JAMA)* 276, no. 20 (1996): 1633.

² Israel and Seidelman, “Nazi Origins of an Anatomy Text: The Pernkopf Atlas,” 1634.

³ For more on Pernkopf see Uri Weinberg and Shmuel Reis, “Pandora’s box of anatomy,” *Harefuah* 147, no. 5 (2008): 455-458, 476; and Edzard Ernst, “A Leading Medical School Seriously Damaged: Vienna, 1938,” *Annals of Internal Medicine* 122 (1995): 789-792.

⁴ David J. Williams, “The history of Eduard Pernkopf’s *Topographische Anatomie des Menschen*,” *Journal of Biocommunication* 15, no. 2 (1988): 2-12.

To this day, there is still no hard evidence that links specific victims of Nazi war crimes to Pernkopf's atlas. However, there is a growing body of circumstantial evidence that strongly suggests the source of these cadavers. First, the strong Nazi ideology of Pernkopf and his artists is undeniable. In the second edition of the atlas published in the 1960s, Nazi swastikas and symbols were airbrushed out of many of the plates published in the first edition. Three of four artists signed their work with Nazi symbols to show their strong support for the party. Pernkopf and his artists proudly adopted the dogma of Nazi racial purity, which set the stage for accusations of ethical wrongdoing during the creation of his atlas.⁵

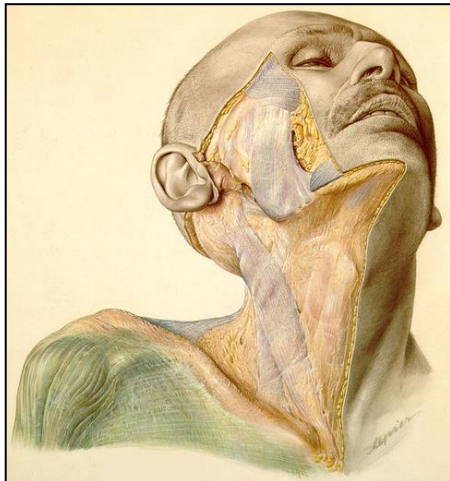


Figure 1: Image from Pernkopf Anatomy showing an emaciated subject reminiscent of concentration camp victim. (Illustration by Erich Lepier. Reproduced from Pernkopf: Atlas of Topographical and Applied Human Anatomy, 2nd Ed. 1980, Urban & Schwarzenberg, Baltimore-Munich.)

The composition of the images depicted in Pernkopf's atlas is the most significant evidence that supports the use of cadavers from concentration camps. The emaciated appearance and the coarsely shaven heads of subjects bear striking resemblance to the faces seen in the Nazi concentration camps.⁶ (See Figure 1) In addition, at least one subject in the atlas was circumcised, which was strictly a Jewish practice at the time, and not commonly performed for medical reasons.⁷ Professor Israel comments in his letter to JAMA that the Second Anatomy Institute under Pernkopf received many cadavers from the Vienna District Court between 1938 and 1945. This court was responsible for political executions by the Gestapo, which included Jewish prisoners.⁸

With this body of evidence, Professor Israel demanded in 1996 that the University of Vienna conduct an investigation into the sources of the cadavers used in this atlas. The resulting Pernkopf Commission was responsible for this investigation and concluded that it was highly likely that

victims of Nazi terror were used. The atlas was still published, but with the addition of a small note in each atlas asking the reader to make their own decision about the usage of the material.

Controversy over sourcing cadavers for dissection is not unique to Pernkopf or the Nazi era. At the same time that the ethical shadow over Pernkopf's atlas was coming to light, a similarly controversial project was just beginning. In 1994, the National Library of Medicine launched the Visible Human Project. The aim of the project was to digitize cross sectional images of a human cadaver to be used for medical education. The subject would need to be immediately flash-frozen after death and sliced into 1mm sections. The only way that this ambitious project would work is

⁵ Dillon Arango, Patrick Greiffenstein, and James O'Leary, "Selected Anatomists: At the Boundary of Contemporary Ethics," *Journal of the American Medical Association (JAMA) Surgery* 148, no. 1 (2013): 94-98.

⁶ Williams, "The history of Eduard Pernkopf's Topographische Anatomie des Menschen."

⁷ Chris Hubbard, "Eduard Pernkopf's atlas of topographical and applied human anatomy: The continuing ethical controversy," *Anatomical Record* 265, no. 5 (2001): 207-211.

⁸ Israel and Seidelman, "Nazi Origins of an Anatomy Text: The Pernkopf Atlas," 1634. Also see Ernst, "A Leading Medical School Seriously Damaged: Vienna, 1938," and M. Lehner, *Medizinische Fakultät der Universität in den Jahren 1938-1945* (PhD diss., University of Vienna, 1990).

if the source was a person who died of unnatural causes in a controlled setting. Ultimately the individual who was chosen was a convicted murderer on death row. Before his execution, he gave consent to the prison priest that his body be used for scientific research.⁹

In the case of the Visible Human Project, controversy arose over the nature of the consent and the manner of procurement of the cadaver. The sister of the subject brought up the concern that he only donated his body to spare the family the expense of burial.¹⁰ In this way, the prisoner was coerced by financial incentives into giving his consent for medical usage of his body. This argument begs the question; can one truly consent in his position? Along the same lines, this man was a prisoner, not unlike the Jewish victims used in Pernkopf's images. Prisoners do not have the same free will and options available, and thus their "consent" is not equal to a free individual. And while capital punishment is legal in the U.S., international concerns were raised about this practice and the ethics of using subjects who are euthanized by the judicial system. These arguments undermine the moral and ethical foundation of this project, casting the same shadow as on Pernkopf's atlas.

The question still remains, what do we as a medical community do with knowledge gained in an ethically dubious manner? The response of the Pernkopf Commission, which investigated the sources for the atlas, was to include an insert into circulating copies that stated it is "within the individual user's ethical responsibility to decide whether and in which way he wishes to use this book."¹¹ This hardly seems like an adequate response to such a complicated ethical question. It should not be the responsibility of young medical students who have little grasp or experience in medical ethics to make their own decisions. Rather, we as a medical community should decide how to present ethically questionable material such as this to the newest members of the profession. After all, medicine is guided by moral boundaries that are set by the profession. Ethical issues in medical education should be treated the same, with standardized guidelines of what material is appropriate and how we present it.

The issue of Pernkopf's atlas is complicated because, as it stands today, there is no hard evidence that proves the cadavers used were Nazi victims. Nor is it certain that Pernkopf had any role in carrying out Nazi war crimes. All we have is circumstantial evidence that places doubt in the mind of the medical community. In the original letter to JAMA in 1996, Dr. Seidelman states:

"Many historians and ethicists concur that the Nazi medical legacy should be expunged from our legitimate professional heritage and literature, preserved symbolically to remind us that Pernkopf and his ilk were outside the bounds of human decency. I don't believe that any other considerations pertain or that any rationalization to distribute the atlas is adequate. I believe that our moral obligation to society, to victims and survivors of Nazism, and to posterity is to repudiate Pernkopf and all he represented."¹²

⁹ U.S. National Library of Medicine, "Fact Sheet, The Visible Human Project," accessed September 2013, http://www.nlm.nih.gov/pubs/factsheets/visible_human.html.

¹⁰ Trond Markestad, "Use of the dataset 'The Visible Human Project' in research" [in Norwegian], *Tidsskr Nor Laegeforen*, 129, no. 6 (2009): 505.

¹¹ Michel Atlas, "Ethics and access to teaching materials in the medical library: the case of the Pernkopf atlas," *Bulletin of the Medical Library Association* 89, no. 1 (2001): 51-58.

¹² Israel and Seidelman, "Nazi Origins of an Anatomy Text."

This opinion represents the extreme in the direction of discontinuing use of the atlas. Many who support this argument say that the example set by physicians such as Pernkopf, who choose not to consider the ethical integrity of their pursuit of medical knowledge, must not be tolerated. If we continue to teach today's medical students with this atlas, we are in a sense condoning the actions taken. It is though we are saying that it is acceptable to stray outside the bounds of our profession, as long as the work we create is exceptional.

Many who argue for the use of this atlas say “the information itself, however obtained, is amoral.”¹³ In essence, they believe that the exceptional work presented in the atlas is so worthy of teaching that the basis for it is not important. This is a dangerous road to travel. If we as a medical community decide that information gained from experimentation is amoral, then the end will always justify the means, even if the means are horrific. This logic would even absolve the information gained from the horrific and widely repudiated experiments of Joseph Mengele.

Instead of eradicating the textbook from use or absolving the material as amoral, the best option could be a compromise between the two. If we eradicate the atlas from medical education, we also lose the opportunity to use this controversy as a teaching point in ethics. This case is a perfect example of the fine line that physicians walk in pursuing knowledge through research. Pernkopf may have used Nazi victims as subjects, but may not have known or participated in harvesting the specimens. Even so, he is culpable because he did not systematically and rigorously examine the ethics of his studies. This is an important concept in research that is often overlooked even today. Medical students should learn early in their career to constantly assess and re-assess the ethical foundation of their work.

Though challenging, there is room for acknowledging both the beauty and the horror of the magnificent work represented in *Pernkopf Anatomy*. In this way, the atlas could be used to teach human anatomy and the ethical dilemmas faced by physicians in the pursuit of knowledge. It is clear through the recent example of the Visible Human Project that we have not learned from past mistakes. Rather than hide our past, we as physicians should present our ethical failures as a lesson to the newest members of the profession. If we own up to our past, then future generations of physicians will not be doomed to repeat it.

¹³ Hubbard, “Eduard Pernkopf’s atlas of topographical and applied human anatomy,” 211.

Is Informed Consent Restraining Autonomy?

By Katharine Manning

“A physician who merely spreads an array of vendibles in front of the patient and then says, ‘Go ahead and choose, it’s your life,’ is guilty of shirking his duty, if not of malpractice.”

– Franz Ingelfinger, M.D., 1980

Informed consent in this day and age is used almost synonymously with autonomy. It seems, to most, the obvious mechanism for best protecting patient autonomy in clinical decision-making. Yet, since its birth earlier in the 20th century, informed consent has grown into a legal formulation that has actually veered away from its original intent. What started out as a means of protecting patients from physician paternalism has ended up constraining autonomy in its own unique way.

The Nuremberg Code

The Nuremberg Code of 1947 was one of the first documents to outline the components of what it might look like in practice to protect autonomy. As is seen in other similar legal doctrines, Nuremberg’s description of protecting autonomy rested on two main tenets – the ability to have choice – to give consent – and the right to be adequately informed about the options involved in that choice. As written in the Nuremberg Code:

“The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved, as to enable him to make an understanding and enlightened decision. This latter element requires that, before the acceptance of an affirmative decision by the experimental subject, there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person, which may possibly come from his participation in the experiment.”¹

The Nuremberg Code has remained an essential document in human subjects research, and has become required reading for every new researcher. Although drafted in 1947, it captured the essence of the main ethical issues at stake in human subjects research, which has remained largely unchanged in the intervening years. Additionally, the scope of Nuremberg’s applicability quickly moved beyond just the research sphere and into the clinic as well.

¹ “The Nuremberg Code,” accessed September 2013, <http://www.hhs.gov/ohrp/archive/nurcode.html>.

What has informed consent become now?

While Nuremberg referred specifically to the human subjects research setting, the concept it created – informed consent – has now become a part of individual clinical decision-making as well. But what brought about this shift, from medical experimentation – where the goal was passively protecting patients against attacks on their rights – to clinical decision-making, where informed consent seems more a mechanism for active patient empowerment? While one can point to certain court cases that legally supported its creation (which will be examined later in this paper), informed consent also came into existence during a broader social shift in the U.S. during the last decades of the 20th century toward more individualist values in general.² Specially, informed consent moved into the clinical realm in order to counteract physician paternalism. As Neil Levy wrote in his 2011 piece in the *Journal of Medical Ethics*, “[i]nformed consent was well defined to deal with the problem of everyday paternalism, which was once widespread among doctors who were genuinely seeking to do the best by their patients.”³

Paternalism used to be the rule in the doctor-patient relationship. In fact, it is even written into the original wording of the Hippocratic Oath. The oath demanded of doctors that they “[p]erform [their duties] calmly and adroitly, concealing most things from the patient...revealing nothing of the patient’s future or present condition.”⁴ Despite its negative connotation today, paternalism, throughout much of medical history, has actually been viewed as a *positive* quality in the doctor-patient relationship – one that facilitated trust. The physician, backed by years of study and practice, took on both the medical and emotional challenges of the decision-making process, in an attempt to best take care of the patient; to uphold the ethical principle of beneficence.

In fact, though paternalism is out of favor today, it was not that long ago that it was still quite common practice. As Janet Dolgin reports in *The Legal Development of the Informed Consent Doctrine: Past and Present*, a survey described in *JAMA* in 1961 reported that almost 90 percent of doctors generally refrained from telling patients about a cancer diagnosis. A study published in *JAMA* 18 years later (1979), reported that about 98 percent of doctors generally did inform a patient about a cancer diagnosis.⁵ While not telling a patient they have cancer certainly violates the principle of autonomy in some way (and in essentially all circumstances would not be tolerated ethically or legally today), might it be possible that paternalism was also attempting to *protect* autonomy in its own way? Or is this merely an example of two of our basic principles of medical ethics – autonomy and beneficence – being balanced differently 50 years ago?

A shift in the balance

If it comes down to a shift in balance between autonomy and beneficence, what brought it about? Why did people begin viewing paternalism not as beneficence on the part of the doctor, but instead as a violation of autonomy? The shift seems to have occurred in line with a general trend towards individualism within U.S. society.⁶ People had always valued choice, but increasingly,

² Janet L. Dolgin, “The Legal Development of the Informed Consent Doctrine: Past and Present,” *Cambridge Quarterly of Healthcare Ethics* 19 (2010): 97–109.

³ Neil Levy, “Forced to Be Free? Increasing Patient Autonomy by Constraining It,” *Journal of Medical Ethics* doi:10.1136/medethics-2011-100207, 1.

⁴ Quoted in Dolgin, “The Legal Development of the Informed Consent Doctrine,” 97. Original from Hippocrates, *Decorum*, W. Jones, translator (Cambridge, MA: Harvard University Press, 1967), 297.

⁵ Dolgin, “The Legal Development of the Informed Consent Doctrine,” 100.

⁶ Dolgin, “The Legal Development of the Informed Consent Doctrine,” 99.

and especially with the growth of the modern conception of liberalism (perhaps most influentially described by John Rawls), society embraced a more enlightened concept of choice – one that valued allowing individuals to choose not only what made them happiest in life, but also how to define that happiness in the first place.⁷ Rawls calls this defining our own “conception of the good,” and in many ways it is what underlies the movement against paternalism.

Thus, it is not that society moved away from paternalism because it was being used maliciously. Rather, paternalism was constraining the ability of patients to define their own conception of the good; doctors were not even aware that there could be alternative conceptions aside from their own. Would a patient with cancer want to fight to the end, trying every new chemotherapy? Undergoing multiple surgeries? Or would they want to stop treatment, go home, and spend their remaining time with their family? While for some clinical scenarios, choosing a certain option might plausibly provide greater quality of life for just about all patients; however, the shift away from paternalism made it clear that this number of scenarios was likely smaller than expected. For many patients, the correct choice was something only they could decide.

The legal history of informed consent

Thus, informed consent’s entry into the clinical sphere initially seemed justified, at least when framed in medical ethical principles, as above. Yet, the history of informed consent from a legal perspective is slightly different in spirit. As Gerald Dworkin wrote in 2003, looking through the lens of the legal system, this shift in balance between autonomy and beneficence represented a shift from “doctor knows best” to “it’s my body.”⁸ The first cases brought against doctors for denying choice to their patients accused doctors of a kind of “assault” on patients.⁹ As Dolgin writes, legal scholars often refer back to the 1914 decision *Schloendorff v. New York Hospital* as one of the founding cases in the creation of the legal principle of informed consent (though the term was not yet used). In that case, a patient, Mary Schloendorff, went to see a physician about a gynecologic problem. Her physician felt she was “too nervous” for an exam while awake, so recommended an exam under anesthesia. While Ms. Schloendorff agreed to the exam, she expressly *did not* agree to surgery; however, while under anesthesia, her doctor nonetheless performed a hysterectomy, supposedly in Ms. Schloendorff’s best interest. The court ruled in Ms. Schloendorff’s favor.

The actual term *informed consent* was first used by a California court in 1957 in *Salgo v. Leland Stanford Jr. University*, which stated in its decision: “a physician violates his duty to his patient and subjects himself from liability if he withholds any facts...necessary to form the basis of an intelligent consent by the patient to the proposed treatment.”¹⁰ (Of note, the decision also included a clause that allowed physicians to withhold facts in light of a patient’s “mental and emotional condition,” though this ambivalent aspect of the decision was largely ignored in its implementation). Over the following decades, most states widely accepted the informed consent doctrine, and in the 1970s, two key decisions, one in a federal court in Washington, D.C., and one in a state court in California, recognized a comprehensive new version of informed consent that defined the two tenets it continues to embrace today. As Dolgin says, “that patients be given

⁷ John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press. 1971).

⁸ Gerald Dworkin, “Can You Trust Autonomy?” *Hastings Center Report* 33 (2003): 42-44.

⁹ Dolgin, “The Legal Development of the Informed Consent Doctrine,” 98.

¹⁰ Dolgin, “The Legal Development of the Informed Consent Doctrine,” 98.

the right to consent to or to refuse healthcare *and* that they be provided with all information material to a decision to consent to or to refuse healthcare.”¹¹

At this point, it is useful to return to more basic principles – to remember that informed consent came about in an attempt to shift the balance between beneficence and autonomy. As the legal doctrine of informed consent has become cemented into clinical culture, society has adopted it as almost an ethical principle in and of itself; as though it is synonymous with autonomy. But, we must remember, it is not. It is a *mechanism* for attempting to uphold the principle of autonomy, yet it is neither always effective in achieving this aim, nor is it necessarily the best way to attempt to do so. In fact, one could go so far as to say, informed consent in its current formulation in clinical practice is likely *not* the best way to protect autonomy. There may not be a better mechanism in existence yet, but that doesn’t mean we shouldn’t strive for improvement.

Where did the doctrine of informed consent go wrong?

Before delving into exactly why this is so, it is first useful to discuss what is even meant by autonomy. While the ethical community may not have one universally agreed-upon definition, looking at doctrines that have attempted to uphold it – whether or not their means are successful – can perhaps point us towards the ends we seem to be striving for. The Nuremberg Code and the doctrine of informed consent seem to point us toward a two-pronged definition. First, patients must actually have choice; they must have self-rule. As is written in the Nuremberg Code, they require freedom from “fraud, deceit, duress, over-reaching, or other ulterior forms of constraint or coercion.”¹² Second, they must have both the knowledge and comprehension to make their decisions meaningful. Going back to basic principles, ideally, if we achieve these two aims, we can give patients autonomy to make decisions that align with their own values; with their own ‘conceptions of the good.’

Yet, in its current conception, informed consent is simply not achieving this aim. Specifically, the current manifestation of the legal doctrine of informed consent is failing to provide patients with both knowledge and comprehension regarding the decisions they are making. It is doing this by trying very hard to protect against any kind of outside force or coercion; by trying to avoid paternalism at all costs. Currently, the informed consent process in clinical medicine involves physicians explaining to patients the risks, benefits, alternatives, and prognoses (among other things) of their options – as an onslaught of information that is meant to be presented “free of bias.” Patients are to be told “the facts” and are to then use their rational decision-making capabilities to come up with a choice consistent with their deepest held values. Yet, this model fails to incorporate the agents to whom it is being applied. As Neil Levy says, “[t]he picture of the rational individual that underlies the doctrine of informed consent is not psychologically realistic.”¹³ As the fields of psychology and behavioral economics tell us, humans are far from purely rational in their decision-making, so to expect them to make such purely rational decisions, especially in a time of heightened emotion as accompanies illness, cannot possibly lead to the best outcomes, or best respect their capabilities as decision-makers.

¹¹ Dolgin, “The Legal Development of the Informed Consent Doctrine,” 99.

¹² The Nuremberg Code.

¹³ Levy, “Forced to Be Free?” 1.

The fallibilities of human reason

In his 2011 *JME* article, Levy discusses some of the major biases humans have that make them “systematically bad reasoners.”¹⁴ He explains “many of [human beings’] reasoning faults can be expected to affect the kind of judgment that they make when they are called upon to give informed consent.” He goes on to list four of the most salient biases he believes make human beings poor decision-makers. The first of these is “myopia for the future,” which causes patients to incorrectly value events that will happen in the future more than events that are happening in the present, and also to oscillate with regards to their preferences over time. While a patient might prefer surgery over medical therapy today, at some time in the future, when the actual moment of surgery is nearer and thus they are feeling afraid, they might switch and prefer medical therapy, even though at a time when they were less influenced by acute emotions they reasoned that surgery would be the best option.

A second fallibility of human reason that Levy describes is “motivated reasoning,” which causes us to “defend views to which we are antecedently attached and discount evidence that is inconsistent with these views.” Thirdly, he explains that we also fall victim to “affective forecasting,” which causes people to “overestimate the effects of events and changes in circumstances on their level of well-being.” In reality, we adapt much better than we think we will to changes in our lives that we predict will make us unhappier (i.e., becoming physically disabled), and tend to not experience quite as much of an increase in quality of life as we think we will from events we predict will make us happier (i.e., winning the lottery).

Lastly, Levy describes the phenomenon of “affective recall” which works much like affective forecasting, however refers to our inability to judge “how past events actually made us feel. We are not even as reliable as we might think when it comes to judging whether an experience we are having is positive or negative while we are undergoing it, which will make recalling its actual qualities extremely difficult.” Levy describes how in reality, what we remember about an event has mainly to do with the peak intensity of emotions we felt, and also what we felt right at the end of the experience. What emotions we felt during the majority of the experience might not even make it into our consciousness, much less into our memory.

Another bias humans have that makes us poor reasoners, one discussed by Lisa Rosenbaum in her 2013 piece *How Should Doctors Share Impossible Decisions with Their Patients?*, is the “affective heuristic.”¹⁵ What if it were impossible that bias-free “facts” could ever truly be exchanged between two people in such different situations as doctor and patient? Every piece of information – and in particular the *language* used to impart that information – is interpreted both intellectually and emotionally when it falls on human ears. When a physician tells a patient a fact, the patient is actually receiving two facts for every one given. They do hear the fact itself, but then they also hear their own emotional response to that fact. In reality, these affective responses are used as information with almost equivalent weight in decision-making as are actual “facts” themselves. Until the affective experience of the patient in decision-making is incorporated into our informed consent process, we will not be achieving our goal of disseminating truthful information to patients. Additionally, there are certain pieces of

¹⁴ This paragraph draws from Levy “Forced to Be Free?” 3.

¹⁵ Lisa Rosenbaum, “How Should Doctors Share Impossible Decisions with Their Patients?” *The New Yorker*, July 5, 2013.

information the patients *do not* hear that physicians *do* hear. As the former *New England Journal of Medicine* editor Franz Ingelfinger said “physicians tend to use terms that laymen either do not understand or misinterpret...even if the patient uses words such as ‘myocardial infarction,’ does he really appreciate the spectrum of pathologic, diagnostic, prognostic, and therapeutic implications that this common expression conveys to the physician?”¹⁶ Lisa Rosenbaum reminds us that “[f]or now, we can at least agree that physicians can never fully grasp, nor anticipate, the subjective nature of their patients’ experiences.”¹⁷

Another important factor playing a role in physicians’ inability to truly empower patients to make autonomous decisions is the belief, likely given to physicians from the legal system, that there is a way to present facts in the doctor-patient relationship that is *wholly* not coercive. As Eric Cassell wrote in his 2005 piece in the *New England Journal of Medicine*, “Physicians want to believe that their authority resides in their expert advice, not their social power, and that consent to their inclinations reflects acknowledgment of that expertise.”¹⁸ Yet, try as a physician might, the power dynamic between doctor and patient is a force that will always have a huge presence in the doctor-patient interaction. To ignore it is irresponsible; unethical, even. Cassell goes on to say “we should accept the propensity of sick patients to seek our approbation, celebrate our expertise, and acknowledge the legitimacy of our authority by doing as they think we wish. These tendencies present us with the difficult responsibility of, first, probing carefully to discover what patients believe to be best for them and, second, ensuring that their best interests guide both what we ask of them and our own actions.”

Supporting evidence in the literature

A fascinating study showing many of the above biases in action was carried out in 2012 by a team led by Jane Weeks.¹⁹ In their study, 1193 patients with newly diagnosed stage IV (incurable) metastatic lung and colon cancer who had decided to undergo palliative chemotherapy (i.e., chemotherapy with the intent of alleviating symptoms, and with *no* chance of cure) were surveyed by professional interviewers shortly after their diagnoses with regards to their beliefs about their decision-making, experience of care, and outcomes. Of the patients surveyed, 69 percent of patients with lung cancer and 81 percent of those with colorectal cancer gave responses indicating inaccurate expectations about the curative potential of their chemotherapy. In other words, they believed there was still a chance the chemotherapy would cure them. Additionally, patients who reported having had better communication with their physician were *more* likely to have false beliefs that chemotherapy might cure their cancer.

What could be causing this? Thinking back to Levy’s biases, motivated reasoning could perhaps bring about such a belief. If a patient truly believes that they will live through their cancer, and that they will recover (a likely assumption to make, especially soon after a new diagnosis) that patient might be likely to interpret any medical intervention as consistent with that view; or, in other words, as having some curative intent. Secondly, thinking about affective heuristics,

¹⁶ Franz Ingelfinger, “Arrogance,” *New England Journal of Medicine* 303 (1980): 1507-1511.

¹⁷ Rosenbaum, “How Should Doctors Share Impossible Decisions with Their Patients?”

¹⁸ Eric Cassell, “Consent or Obedience? Power and Authority in Medicine,” *New England Journal of Medicine* 352, no. 4 (January 27, 2005): 328-30.

¹⁹ Jane C. Weeks, et al., “Patients’ Expectations about Effects of Chemotherapy for Advanced Cancer,” *New England Journal of Medicine* 367, no. 17 (2012): 1616-1625.

patients are less familiar with using chemotherapy as palliation as opposed to as cure. Chemotherapy is, after all, a *therapy*. Isn't a therapy designed to *fix* things? While a physician may be able to hear the word chemotherapy and view it interchangeably as a curative treatment and as a palliative one, it may not be possible for a patient to discuss chemotherapy and not instinctively believe it is meant to cure. Lastly, we must consider the issue of the physician-patient power dynamic. In the study, having *better* communication with the physician caused patients to have *more* false hope. Exactly as Cassell explained, sick patients *want* to put their trust in an expert, want to be given recommendations. Rather than fight against patients in this matter, physicians must recognize there is no way *not* to influence patients' decisions, no matter how unbiased they try to be as they frame an issue. Instead, physicians must recognize this inevitable power; embrace that they will necessarily bias patients one way or another (especially if that patient feels they have a good relationship), and *choose*, consciously, which direction they want to encourage their patients to go. All of this must be done, however, based on a deep knowledge of and respect for patient preferences, and having had a conversation in which the patient is made aware that their physician is knowingly giving recommendations. The patient must be told that the facts they are receiving are not "bias-free." If then they choose, as they often will, to nonetheless hear those recommendations, doctors must respect and embrace that choice.

Along similar lines, another study, by McKneally and Martin, looked more deeply into notions of trust in patient decision-making.²⁰ They conducted face-to-face interviews with 36 patients who had recently recovered from an esophagectomy to treat their cancer, asking the patients about the factors involved in their decision-making processes. As written in the study results "[t]he concept of patient autonomy did not come up unless the interviewer raised it. When [we] suggested that textbooks of medicine, ethics, and law prescribe the processing of information, weighing of alternatives, assessment of risks and benefits, and evaluation of advice as part of the patient's responsibility as an autonomous decision-maker, our patients rejected these notions as inappropriate to their circumstances." Instead, what emerged from the patient interviews was the concept of *entrustment*. Rather than weighing the options themselves, when it came down to making the final decision, patients felt that they were deciding what to do because they trusted their surgeon. Is this bad? Franz Ingelfinger thinks not. In a piece he wrote for the *NEJM* in 1980 he said "a certain amount of authoritarianism, paternalism, and domination are the essence of the physician's effectiveness...[a] physician who merely spreads an array of vendibles in front of the patient and then says, 'Go ahead and choose, it's your life,' is guilty of shirking his duty, if not of malpractice."²¹

The Nuremberg Code requires that patients be adequately informed such that they are able to "make an understanding and enlightened decision."²² If 'enlightened' is what we are striving for, a process of 'informing' that ignores innate biases in human reasoning, the affect heuristic, and the unavoidable, even if well-intentioned, coercion inherent in the physician-patient power dynamic, cannot possibly be achieving the goal. The informed consent process, in its current

²⁰ M. F. McKneally and D. K. Martin, "An Entrustment Model of Consent for Surgical Treatment of Life-Threatening Illness: Perspective of Patients Requiring Esophagectomy," *Journal of Thoracic Cardiovascular Surgery* 120, no. 2 (August 2000): 264-9.

²¹ Ingelfinger, "Arrogance," 1507.

²² The Nuremberg Code.

conception, is no longer the best way to protect patient autonomy. Ironically enough, it seems that adding more of the physician's opinion back into the mix might end up better protecting autonomy than the doctrine originally designed to protect it from paternalism in the first place.

What can be done to better protect autonomy?

As Rosenbaum points out in her *New Yorker* article, healthcare has to some degree recognized this failure of informed consent, and created "shared decision-making" (S.D.M.) in an attempt to fill in the gaps.²³ S.D.M. ideally encourages more collaboration between patients and physicians in the decision-making practice. However, as Rosenbaum points out, S.D.M. may have caught the attention of policy leaders, investors and researchers, but it has yet to become truly integrated into clinical practice. Furthermore, there is no evidence that S.D.M. will necessarily address all the biases discussed above.

So then, what system could we possibly create to address all the above biases? Could we design an S.D.M. tool that walks physicians through every single possible bias, and teaches physicians how to recognize them, and help their patients avoid them? Though possible, it seems as though physician-patient interactions might begin to read more like a script, and might become very overwhelming for patients as well. The American Society of Clinical Oncology Statement: Toward Individualized Care for Patients with Advanced Cancer, recommends that details regarding how much information is given to patients with regards to end-of-life decisions be "tailored to the individual patient."²⁴ Yet, then they also spell out *exactly* what this should entail: "the patient must be told the likelihood of response, the nature of response (i.e., symptoms improvement, shrinking tumors, slowing progression, improving survival rates), and the toxicities to which they will be exposed. Provision of both pessimistic information...and optimistic information...leads to better understanding and informed decision making than presentation of an optimistic picture alone." While it is widely agreed that the physician must make every attempt to tell their patient this information, as has been discussed at length in this paper, making them understand that is an entirely different issue.

So then, what is the answer? If an S.D.M. tool would be too detailed and complicated for a physician to carry out, is there another option? Yes there is, and it starts with medical education; education that begins in medical school and focuses on teaching *communication*. It could start with something as simple as a course teaching medical students how to talk to patients. Certainly medical schools have courses with some degree of this instruction, but not enough. While on the one hand students are being socialized into medicine, and into medical jargon, why not simultaneously teach them to remember how to speak non-medical language as well? As Ingelfinger points out, in addressing the difficulties in communication between doctor and patient "[t]he first component is simply a matter of language."²⁵ Next, more attention should be put on institutionalizing the teaching of interpersonal skills. In the past, educators may have thrown their hands up and said that "empathy" was not something that could be taught. Perhaps that is true. But humility is something that *can* be taught. Humility with regards to patients' conceptions of the good – humility with regards to recognizing that a physician's explanation

²³ Rosenbaum, "How Should Doctors Share Impossible Decisions with Their Patients?"

²⁴ Jeffrey M. Peppercorn, et al., "American Society of Clinical Oncology Statement: Toward Individualized Care for Patients with Advanced Cancer," *American Journal of Clinical Oncology* 29, no. 6 (February 20, 2011): 755-60.

²⁵ Ingelfinger, "Arrogance," 1509.

may not actually be adequate and the persistence to work with a patient until the physician understands that patient's values – these are skills that can be taught. And then, most importantly, physicians must pick up the torch of their responsibility to give recommendations. As Levy says “[w]e may be justified in interfering with choice when we do so to make people better able to pursue their own conception of the good.”²⁶ Protecting patients' right to autonomy *does not* mean making them the chooser in *every* decision. It means working with them so that they can choose their conception of the good, their ultimate values. It means recognizing that if they are *asking* for recommendations, asking what we, as physicians, would do in their same situation it is because we have failed to communicate with them in a patient-centered and humanistic way. Autonomy is a patient-centered concept. So, too, must be the mechanism we use to protect it.

²⁶ Levy, “Forced to Be Free?” 2.

A Moral Chameleon: Medical Hierarchy and the Medical Student

By Jessi Gold

I can still hear my patient screaming as she writhed in pain. She was a 70 year-old woman admitted for a resistant COPD (chronic obstructive pulmonary disease) exacerbation that I had been following for most of my month-long medicine rotation. Our team was paged by her nurse and called to her floor for complaints of new onset chest pain. The residents scrambled to follow the standard protocol: they got a stat EKG, they took blood for serial troponins, and they called for a chest X-ray. While they fiddled with the leads and undressed my patient, all I was focused on was the look in her eyes and the screams coming from her bed. She was fluent in English, but during her severe pain episodes she only spoke Spanish, repeatedly screaming “*Ay dios mios*” as she looked toward “God” in the ceiling of the room.

Thinking of her feelings before the diagnosis, I ran to her side and held her hand. I asked permission as to not invade her space, and I quietly whispered, “It is going to be okay. We are all here to help you.” In that instant, I looked around and realized no one else was acknowledging her suffering. There were a lot of people, and a lot of actions, but no one else was extending a hand or kind words of comfort. No one else seemed to notice her humanity.

Seeing the actions of my team I wondered, had I just lied to my patient, or were we all there helping her just in different ways? I thought perhaps I was simply naïve and did not understand that in emergencies, the medical protocols, and not the patient, took precedence. I questioned if I was missing some amount of medical knowledge that the team had garnered over their somewhat longer careers. And I questioned why I was the only one who still appeared to have empathy for the patient.

While I thought about whether my residents were right or whether they had simply lost touch with caring, I never once asked them. I was on a team where I felt very much included, but because my question could be perceived as a criticism of authority, I did not feel should ask. For fear of repercussions, for fear of poor evaluations, and due to some unspoken understanding and respect for the medical hierarchy, the words would not come out. Deep down, even if I felt I was right, I was still a student and it was not my place, nor my role, to question the decisions of other more knowledgeable, and higher ranked individuals. I was, after all, *just* the medical student.

Thinking about my own justifications for violating my core ethical beliefs, and on the heels of the 12-day FASPE trip to Europe, I began to understand what it might have been like to be a young physician during the Nazi regime in Germany. Usurping the same sense of respect for authority and the team structure inherent to medicine, the Nazi Party’s medical system made it simple for doctors to violate their own ethics. After all, the lower end of the hierarchical totem pole, typically students or residents, are used to doing what their superiors ask of them often without understanding exactly why.¹ This is because obedience to authority and conformity are essential ideals to medical practice and training. Often the argument “because this is the way we

¹ For more on hierarchy felt by medical students see Alessandra Colaiani, “A Long Shadow: Nazi doctors, moral vulnerability and contemporary medical culture,” *Journal of Medical Ethics*, 38, no. 7 (May 3, 2012): 435-8.

do things in the hospital” becomes an adequate answer for mistreatment and ethical erosion.² The Nazi philosophy, like medicine, mandated rule following, respected authority and rank, and rewarded obedience.³ Melding the two systems, it was thus easy to manipulate the team dynamic to coerce physicians into murder. As Robert Lifton says,

In young doctor[s]...enthusiasm for practical Nazi achievements merged with a sense of mythic communal power. Communal ethos was so strong that, even when one was deeply troubled by Nazi policies, one hesitated to oppose them because that meant ‘you become a traitor and stab your own people in the back.’ One either adheres to the sacred community or is seen (and sees oneself) as a murderous cowardly traitor.⁴

The newly created hierarchy answered not only to the medical system, but also to the state. National loyalty and wartime spirit were the focus of recruitment as the Nazi Party appealed to the physicians “national duty as soldiers.”⁵ In fact, the front-line doctors -- the ones doing much of the killing -- were typically chosen, according to Lifton “for their combination of inexperience and political enthusiasm.”⁶ Ignorance and inexperience, combined with their understandings of hierarchy, also allowed young physicians to adjust more easily to their new reality. Working in the concentration camps, they saw the senior doctors lead “selections,” assist in gassings, and perform research experiments. This soon became their understanding of the culture of the camp.⁷ In the words of one doctor, just like soldiers at the front lines, young physicians had to “do things they did not like.” In order to cope with their ethical dilemma and to assimilate into this new physician culture, the young doctors would “comply [and]...do what was expected.” By following orders and their senior physician role models, murderous actions that once seemed impossible, instead became routine.⁸

Additionally, just like in our current medical system, resistance was discouraged and often futile. As a young physician in training, I am taught not to ask questions, and not to question the decisions of authority. The young Nazi doctors were taught the same things. The new medical system within the Nazi state celebrated certainty and disparaged doubt.⁹ Military hierarchy and discipline prospered. Questioning authority disappeared. As one doctor described:

The whole system radiated that authority. Like it or not, I was part of it...I had no choice. I was in this web-this network of authority. If you talk to people [in

² Omar Sulatan Haque, Julian De Freitas, Ivana Viani, Bradley Niederschulte, and Harold Bursztajn, “Why Did So Many German Doctors Join the Nazi Party Early?” *International Journal of Law and Psychiatry*, 35, no. 5-6 (Sep-Dec 2012): 473-9.

³ Omar Sulatan Haque, et al, “Why Did So Many German Doctors Join the Nazi Party Early?”

⁴ Robert Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books; 2000), 434.

⁵ Colaanni, “A Long Shadow,” 436.

⁶ Lifton, *The Nazi Doctors*, 73.

⁷ Colaanni, “A Long Shadow,” 436.

⁸ Quotes from Lifton, *The Nazi Doctors*, 59, 106, 195.

⁹ Omar Sulatan Haque, et al, “Why Did So Many German Doctors Join the Nazi Party Early?”

general terms about possibly leaving] they would say, you have to stay wherever you are...where you are needed. Don't disturb this organization.¹⁰

Perhaps this sense explains the lack of resistance from physicians. There were some silent acts of courage, like diagnosing a schizophrenic person as neurotic, thus saving them from euthanasia or sterilization, or minimizing a mentally handicapped person's inability to perform work. More typically, physicians would speak more freely and voice objections only when drinking, a response that led to few repercussions and little change. To some degree, physicians may have felt the system provided safety, as the hierarchy served to prevent individuals from having direct responsibility in the killings. Lifton writes that the "structure served to diffuse individual responsibility...there was at no point a sense of personal responsibility for, or even involvement in, the murder of another human being. Each participant could feel like no more than a small cog in a vast, officially sanctioned, medical machine."¹¹

Given the deadly mistakes of the medical system during the Nazi regime, one might wonder why such a hierarchy, with power differentials and abuse of the lower rung of the ladder, is still in existence today. While "education by humiliation" has a long tradition in medical training, many of the accreditation boards have more recently added "professionalism" to their competencies in the hope of reducing this practice. Unfortunately, disrespect and silence are engrained in medical school culture. According to a 2012 study, 14-17 percent of students still report being subjected to or witnessing some form of mistreatment.¹² In addition, this behavior is often tolerated and accepted as a sign of rank or standing. As one scholar wrote "the ability to disrespect others with impunity is a measure of status."¹³

Using "bullying" as a method of controlling those below and more general abuse within the medical hierarchy can lead to unethical behavior by students and other members of a medical team. In one survey, 80 percent of students felt like they had acted unethically or willfully misled their patients, and 54 percent felt like an accomplice in an unethical behavior performed by a teammate. Additionally, 43 percent of students had done something to put themselves at personal risk, most often due to the pressure from senior medical personnel.¹⁴ Ultimately, the hierarchical training structure and its abuse causes students' own morals to erode over time, particularly in the clinical years. This also helps to explain why medical students, when compared to other professional groups, have lower ratings of moral maturity than others of the same age.¹⁵

In order for our morals to erode, however, we must first choose to participate in acts we know are wrong. One theory for why medical students make these unethical clinical decisions is

¹⁰ Quoted in Lifton, *The Nazi Doctors*, 106.

¹¹ Lifton, *The Nazi Doctors*, 55; For resistance see Lifton *The Nazi Doctors*, 81, 196.

¹² Lucian Leape, Miles Shore, Jules Dienstag, Robert Mayer, Susan Edgman-Levitan, Gregg Meyer, et al., "Perspective: A Culture of Respect, Part 1: The Nature and Causes of Disrespectful Behavior by Physicians," *Academic Medicine*, 87, no. 7 (July 2012): 845-52.

¹³ Leape, et al, "Perspective," 850.

¹⁴ Chris Feudtner, Dimitri Christakis, and Nicholas Christakis, "Do Clinical Clerks Suffer Ethical Erosion? Students' Perceptions of Their Ethical Environment and Personal Development," *Academic Medicine*, 69, no. 8 (August 1994): 670-9.

¹⁵ William T. Branch, Jr, "Supporting The Moral Development of Medical Students," *Journal of General Internal Medicine*, 15, no. 7 (July 2000): 503-8.

grounded in their lack of knowledge. The authors of one *Hasting Report* summed this view up saying:

The disparity of knowledge and perspective, magnified by the role that knowledge plays in legitimating the medical hierarchy of authority and power, has stark implications for students' ethical development. Since clinical clerks labor in a world that esteems technical medical knowledge, their position as the most "medically ignorant" member on the team sometimes causes them to wonder whether they also are the most "ethically ignorant" or "naïve."¹⁶

Medical students thus believe in the idea of "ethical postponement" -- that even if they do not know the answer now, with more knowledge and authority, they will make more ethical decisions.¹⁷ Without enough knowledge, medical students are rendered incapable of challenging authority, or questioning the appropriateness of a decision. Students may have greater personal familiarity with a particular patient, but without the medical knowledge in which to ground their arguments, students are reluctant to question their superiors.¹⁸ Their lack of knowledge creates structural silence, where mistakes are not discussed or questioned, and the hierarchy is preserved.¹⁹

Another argument for our ethical erosion is that we are forced to break our ethical standards in the process of gaining a clinical education. As the authors of a 1993 study wrote, medical students "must learn procedures by subjecting a few patients to the trial of novice efforts so that, in the end, these students will be able to help most people."²⁰ It might seem harmless for a resident to ask a student to put in a nasogastric tube or take an arterial blood gas, but for a student who has never done these tasks, it can feel unethical and inhumane to keep practicing on a suffering, trusting patient. One student echoed these concerns by stating "often in the hospital setting, I feel I intrude into people's lives, take what I want, and move on."²¹ Medical students are not alone in these feelings, as residents themselves feel they often deceive or lie to a patient for the sake of education. One resident reported: "It's that whole tension between what I need to do to become a better resident... I had to get through a certain amount of procedures.... I don't know that I would have known that there would be these situations where my learning would happen...at the expense of the patient."²²

One final, and perhaps the most significant, explanation for the weakening of ethical behavior among medical students has to do with the student's role within the hierarchy of a team dynamic.

¹⁶ Chris Feudtner and Dimitri Christakis, "Making the Rounds. The Ethical Development of Medical Students in the Context of Clinical Rotations," *The Hastings Center Report*, 24, no. 1 (Jan-Feb 1994): 6-12.

¹⁷ Feudtner, et al, "Do Clinical Clerks Suffer Ethical Erosion?"

¹⁸ Dimitri Christakis and Chris Feudtner, "Ethics in a Short White Coat: The Ethical Dilemmas That Medical Students Confront," *Academic Medicine*, 68, no. 4 (1993): 249-54.

¹⁹ Feudtner and Christakis, "Making the Rounds."

²⁰ Feudtner and Christakis, "Ethics in a Short White Coat."

²¹ Quoted in Feudtner and Christakis, "Making the Rounds."

²² Quoted in Julie Rosenbaum, Elizabeth Bradley, Eric Holmboe, Michael Farrell, Harlan Krumholz, "Sources of Ethical Conflict in Medical Housestaff Training: A Qualitative Study," *The American Journal of Medicine*, 116, no. 6 (March 15, 2004): 405.

The student position creates rather than informs an ethical dilemma.²³ One study found that students report high rates (40 percent) of doing something unethical to fit in with a team.²⁴ The unethical act may be simply withholding information from a patient, since that is not the student's role. A student who is not "allowed" to deliver bad news, for example, must wait for the attending to arrive and may lie to the patient about the results in the meantime. Students might also be asked by a resident to write progress notes on patients who the students have not examined. In both of these circumstances, students will lie or deceive as way of yielding to the team and as part of an effort to be a useful part of the team. As the authors of one study wrote,

"Constantly subject to supervisory surveillance, and thrust into a loosely defined role of unprecedented personal responsibility and work-load, they must prove themselves repeatedly. Engulfed in these often bewildering surroundings, with their lofty expectations, students usually find security by becoming diligent members of the team."²⁵

Students also fear how residents might react to their failures, and how this reaction, in turn, will affect evaluations.²⁶ In general, students learn that professionalism may be more important than other characteristics, but professionalism, as one pair of scholars wrote in 2007, is in the eye of the beholder:

We believe that our peers learn that showing up on time and covering up minor mistakes is far more likely to be evaluated as "professional" than will other avowed professional values such as honesty and respect for patients.... Our observations show that students become "professional" and "ethical" chameleons because it is the only way to navigate the minefield of an unprofessional medical school or hospital culture.²⁷

To be "professional" and be evaluated strongly, students must often learn to become flexible with their own ideals in order to fit in with a team. Often this forces students to feel like they have to choose between fitting in with the team and advocating for themselves.²⁸

Becoming an ethical chameleon is not without repercussions. We often feel powerless or drained. One 2012 study found 53 percent of medical students feeling burned out and 14 percent developing clinically significant depression.²⁹ Also, as students often feel a strong bond with their patients, choosing not to intervene can make students feel "guilty and personally weak because of sacrificing his/her commitment to patients' autonomy."³⁰ By altering our moral compass, we become emotionally affected, but also complacent. As we are often rewarded for mimicking the behavior of our educators, what was once morally reprehensible to us, becomes

²³ Feudtner and Christakis, "Making the Rounds."

²⁴ Feudtner, et al, "Do Clinical Clerks Suffer Ethical Erosion?"

²⁵ Feudtner and Christakis, "Making the Rounds," 7.

²⁶ Feudtner and Christakis, "Ethics in a Short White Coat."

²⁷ Andrew Brainard, Heather Brislen, "Viewpoint: Learning Professionalism: A View from the Trenches," *Academic Medicine*, 82, no. 11 (November 2007): 1012.

²⁸ Branch, "Supporting The Moral Development of Medical Students," 504.

²⁹ Leape, et al, "Perspective."

³⁰ Branch, "Supporting The Moral Development of Medical Students," 504.

typical clinical management.³¹ Not surprisingly, students who reported witnessing unethical behaviors are more likely to have acted unethically themselves, and are more likely to have stated that their own ethical development was negative.³² More significantly, as we adopt these bad behaviors we become negative role models for future students. As one study noted:

The student who suppresses his or her dismay at the mistreatment of a patient in a first year clinic will no longer perceive the same act as constituting mistreatment by the third year of medical school and will perpetuate it himself or herself when he or she becomes a house officer. The house officer who accommodates to unethical behavior...becomes the practitioner or the tenured professor who is still waiting for the right moment to act when he or she becomes emeritus.³³

Like the students during the Nazi regime, in today's medical culture, the hierarchy very much controls our decision making process. By not intervening for our patients, and not questioning those above us, unethical behavior becomes commonplace and we create a cycle of acceptance of abuse and mistreatment. While hierarchy has its significance in the apprenticeship model of medical education, we must find a balance between learning skills and preserving our ethics.

It was a typical afternoon when a quiet elderly woman came in to the Emergency Department with trouble breathing. When we asked her "what brought you in," she could not answer. Each response was a whisper as she struggled to get any words out. With each new question, she became more uncomfortable. Yet, we continued to question her on about her past medical history. My insides squirmed.

I wondered to myself, "Wasn't the first rule in taking a patient's history for the patient to be well enough to give a history, and comfortable enough to tolerate it?" While I once again extended my hand, I searched my residents' faces for some degree of struggle examining this ill woman. I found nothing.

After we had left her bedside, I found the courage to ask my resident if he thought we should have waited to talk to her. Knowing that I could be judged or poorly evaluated for my question, I felt proud to even confront the issue. Without so much as a care about the origin of my thoughts, he replied, "We needed to get a history. That was our job. How else would we get her answers?" Extremely aggravated and frustrated by his response at the time, I now no longer question if I was right and he was wrong. Instead, I believe that he was immune and I was still empathetic. By asking my question, I was able to preserve my moral values that I no longer am willing to compromise. Even if the outcome was the same, I knew I had thought of the patient first. This was my act of resistance.

I am done being a moral chameleon. I just want to be me.

³¹ Brainard and Brislen, "Viewpoint."

³² Feudtner, et al, "Do Clinical Clerks Suffer Ethical Erosion?"

³³ Leon Eisenberg, "Essay: Human Rights, Personal Responsibility, and the Teaching of Medicine," *International Journal of Law and Psychiatry*, 16, no. 3-4 (Summer-Autumn 1993): 393-402.

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

2013
JOURNAL

SEMINARY
PROJECTS

INTRODUCTION TO THE SEMINARY PROJECTS

In 2013, the FASPE Seminary faculty – Nancy Wiener, Kevin Spicer, and I – worked together as a team for the first time, bringing backgrounds in three religious traditions -- Judaism, Catholicism, and Protestantism – to a wonderful group of students.

The 14 seminarians in the 2013 program were a select group, chosen from an international pool of 245 applicants and representing religious traditions that included Judaism, Islam, and several branches of Christianity. Virtually all of the Fellows were training to be chaplains or leaders of congregations (rabbis, priests, imams, or ministers), but as a group we represented a wide diversity of undergraduate majors, life experiences, and world-views. During the trip our appreciation for each other and for each other's faith traditions grew. We also came to understand our own traditions better through the interfaith dialogue that FASPE intentionally fosters.

Our group's interaction with the medical school students and faculty who traveled with us also proved to be invaluable. Whether in the joint sessions that were co-led by seminary and medical faculty or in the intensive discussions that took place on bus trips, during tours, at meals, and in shared hotel rooms, the interdisciplinary relationships formed during the trip will undoubtedly carry forward into the future.

Each of us holds special memories associated with our June 2013 study trip. At a distance of five months the following moments stand out as I think back to our time together:

- Hearing the testimony of Holocaust survivor Bronia Brandman
- Visiting the memorial at the site of the Brandenburg killing center, one of six killing centers involved in the so-called "ethanasia" program
- Walking among the gray pillars at the Memorial for the Murdered Jews of Europe and reflecting on the millions of lives cut short by the actions of vicious perpetrators and the inaction of passive bystanders
- Admiring the courage of Ephraim Oshry, Elisabeth Schmitz, and Bernhard Lichtenberg
- Attending a Shabbat service at Remuh Synagogue in Kraków, then joining members of the congregation for a lively dinner at the Jewish Community Center
- Grieving – and being unsure about what to do or say – during and after our visits to Auschwitz I and Birkenau

The papers on the following pages, which represent a small sample of the work produced by the 2013 Seminary Fellows after the completion of the trip, suggest some of the ways our group was affected by these profound experiences. We are proud to share their work.

The members of the 2013 seminary group are now scattered. Some are in school, while others have begun work in their professions. Nancy, Kevin, and I are deeply grateful for our time with these students.

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**The Struggle of Overcoming Particularism in Inter-Faith Discussions:
A Sermon Given on the Jewish New Year, 2013
By Andrew Scheer**

The unique *Amidah*, silent meditation prayer, Jews say on *Rosh HaShana*, contains a completely different liturgy than the prayers we recite the rest of the year. Whereas the standard *Amidah* prayer is divided into *shevach* (praise), *bakasha* (request) and *hoda'ah* (gratitude), the *Rosh HaShana Amidah*, recited by Jews for over a thousand years, emphasizes a different set of values. The *Rosh HaShana Amidah* begins with *malkhiyot* (kingship) leading into *zikhronot* (remembrances), and concludes with *shofrot* (shofar blasts). As *Rosh HaShana* marks the culmination of the period known colloquially as *Aseret Yemay Teshuva* (The Ten Days of Repentance), we are tempted to skip over the *malkhiyot* and jump straight into the *zikhronot*. *Hashem's* kingship over the universe and all of His creations represents such an esoteric idea that to even attempt to comprehend His ways could appear arrogant and foolish. Therefore, we work on what we can remember, what we can look back on and perform *teshuva* (repentance) so that when we are faced with the same scenario the next year, we will act more justly. In taking stock of the previous year, I recalled an event that continues to trouble me because, faced with the same set of circumstances, I would still not know how to act.

Standing on the ground in Birkenau, at the site where an incomprehensible number of our people were gassed for the crime of being born a Jew, I stand in consultation with two fellow Jewish spiritual leaders. The somberness of the place contrasts with the light and warmth of Oświęcim, Poland in mid-July. The sun beats down on our group of medical students and seminarians, who huddle into a circle under some trees for shade. I cannot recall now, and perhaps it is of no importance, whether the leaders and participants of the trip asked us, Jewish clergy, to help make meaning of the moment we were sharing, or whether we decided to intervene on our own. Perhaps we felt the need to demonstrate why the three of us cling so faithfully to a G-d, who did not intervene while His people were being slaughtered on the very spot we inhabited at that moment. Surely, there must be something in our thousands of years of tradition, be it prayer, meditation, a word or something that speaks to helping mortals understand the utter lack of ethics and morals that enable fellow human beings to commit such heinous acts against others. In any event, we Jews think, we consult, we discuss, as only Talmudically trained Jews can, and we decide to say the Mourners' Kaddish prayer, recited by every Jew for eleven months following the death of a parent. Clearly, nearly seven decades later, we are not finished mourning.

Yitgadal v'yitkadash shmay rabba, b'alma divra kheerutay v'yamlich malchutay...Oseh shalom b'mromov, Hu ya'aseh shalom alaynu, v'al kol Yisrael, v'imru Amen.

We recite the prayer in unified voice in the morose cadence recognizable to anyone familiar with the cries of a mourner, sounds medical students and seminarians will no doubt encounter. At the conclusion of our prayer, I decide to perform an activity for the benefit of the group. I translate our prayer; and I regret it immensely.

As the first words "Magnified and sanctified may His great name be" pass through my lips, I am immediately aware that I am committing a grievous mistake. "May His great name be blessed forever and all time," the prayer continues, although my soul does not. "Blessed and praised,

glorified and exalted, raised and honored, uplifted and lauded be the name of the Holy One, blessed be He, beyond any blessing... ." The superlatives I am ascribing to *Hashem* in that moment feel worse than inappropriate. I exhibit downright disrespect to the souls interred at that most holiest of places and I conclude, ashamed.

Translating the Kaddish represents one of the more complicated challenges I faced throughout my Fellowship at Auschwitz for the Study of Professional Ethics. How do I represent my Judaism, and moreover my denomination's views on theodicy and the Holocaust to the thirty or so seminarians and medical students traveling with me? Of even more significance, what are the lessons that I can take home from my experience and bring back to my own faith community?

After we visited Birkenau, in a group processing session, several Christian seminarians debated an idea with which I am unfamiliar, that of economy of abundance vs. economy of scarcity. The contrast between the abstractness of their theological to and fro juxtaposed with the concreteness of the horrors we had just borne witness to stupefied me, but I allowed their exchange to continue unabated, actively choosing not to intervene. Although the tone of the discussion at first appeared callous and removed from the place we inhabited, after some time I realized I was bringing my own biases to their words. The fact that I did not understand economy of abundance vs. economy of scarcity as it relates to the Holocaust does not make their content any less valid. The moment revealed the inherent beauty and use of particularism. To make the Holocaust a universal lesson to humanity, we cannot use the vocabulary of only one faith tradition. We need all the help we can get.

One of the participants on the trip is descended from slaveowners, another descended from slaves. I am descended from Holocaust survivors; another participant from Holocaust perpetrators. We can only view an experience through our own eyes and life experience. Therefore, the challenge I faced and continue to face remains how I translate my feelings and thoughts into somebody else's language. I strongly believe prayer has the ability to be that unifying factor. Prayer can divide and bifurcate, as it did that afternoon in Birkenau, or it can bring together, as the sole Muslim participant showed when he brought our session to a close with an extemporaneous plea to the Divine he made on behalf of our group the evening before.

However, prayer is not enough. G-d Himself even rebukes the people's prayers in Isaiah 1:11, 13 "For what purpose do I need your multitude of sacrifices? (...) They are an abomination unto me," because the people's actions did not bear out the prayers they recited to G-d. Our prayers are not for G-d. He was, He is, and He will be. We mortals are the temporal ones, here alive on the world He created for a brief stay to make a lasting impact through our actions.

A particular reading, stories of Polish Righteous Among the Nations, underscores the importance of action. Our group went story by story, each time asking the same question a seminarian had asked after visiting Auschwitz: "Would I have acted as a perpetrator, bystander, or savior?" The narratives of the many gentiles who sacrificed for their neighbors, an "other," serve as the true inspiration to the next generation and provide a very high bar of humanity to live up to. They decided they did not want to live their entire lives with the *zikhronot* (memories) of how they could have acted differently. These holiest of souls embraced *malkhiyot*, bringing G-d's kingship into the world by providing for their fellow human beings at tremendous personal risk.

I am left with the question, however, of what inspired the Righteous to voluntarily accept the danger of harboring those destined for death and opening themselves up to the same fate as those they were hiding. Was it the particularism of their faith traditions' teachings to take care of those most in danger, or was it an overriding sense of universalism that all human beings are born with inherent value and thus deserving of an opportunity to live a full life? After speaking with my colleagues on the trip, I believe the answer is both. I learned that seminarians possess a deep desire to teach from their scripture, but not only to their flock. If we believe what we have is good, then we would be foolish to limit our audience only to those who are already invested in what our faith tradition teaches. By the same token, the medical students demonstrate a profound sense of the worth of individual lives, since they do not treat populations, but patients. They care for the person in front of them all the while knowing that whether the patient identifies as Catholic, Protestant, Muslim, Jewish or any other faith, the human body, its processes and its maladies are the same for everyone.

When I began a hospital chaplaincy rotation at New York Presbyterian a few months before participating in FASPE, a seasoned hospital chaplain taught us about the difference between curing, the doctor's domain, versus healing – the chaplain's. Doctors cure the body. Chaplains heal the soul. At the time, I thought her delineation of responsibility sounded beautiful, as if clergy and doctors work in concert for the patient's holistic well-being. After a conversation I had with a medical student colleague I am less certain of the dichotomy. She proceeded to educate me with story after story from her residency of conversations she'd had with her patients about their lives, their hopes, and their fears. In turn, I spoke to a seminarian who had completed Clinical Pastoral Education training and informed me that she often discussed practical medical decision making with both doctors and patients. These exchanges imbued me with the sense that the body and the soul cannot be viewed as separate and distinct parts. They are intimately intertwined, if not physically, then spiritually and certainly emotionally. So, too, are our professions, the doctor and the pastor.

We are bound to make mistakes this year. That is why G-d already scheduled next year's *Rosh HaShana* and *Yom Kippur*. Our challenge over the next ten days is to delve into ourselves and recognize moments where we failed. I still don't know what I would have said or done after that Kaddish; maybe nothing would have been the most appropriate. But, I truly and sincerely believe that what G-d wants most of all is our struggles; our struggles to get closer to him and to the most perfect version of ourselves. That is our mission on these High Holidays, and I wish us all fortitude in our difficult task ahead.

Baptismal Identity and the Dangers of Creating the “Other”

By Alissa Oleson

After returning from two intense weeks of sights, lectures, and conversations about the Holocaust, I yearned to go to church, where I could slump securely in the pews of my own Lutheran faith tradition. I craved to walk through the doors, to splash a little water on my forehead, and to take communion in one bite and coffee cake in the next as I talked to my friends in the narthex. The coffee cake didn't disappoint that Sunday, and I assumed that sitting in on the communal conversation surrounding a woman's upcoming baptism wouldn't either. The format of the conversation was lovely, driven by questions from the individual who was about to be baptized. Those questions were also wrestled with by the whole community who would be asked on that same day to surround and support the woman as she was splashed in the waters of baptism. The woman asked difficult questions about the Trinity, the apparent lack of modern day miracles, and the different ways in which people were typically baptized. All her questions were met by thoughtful and genuine answers from different voices in the congregation. Why, I wondered, could I feel myself getting frustrated, angry, almost in tears?

I've thought a lot about that Sunday when I returned to church after the 12-day FASPE program and realized that my disappointment didn't come from what was being talked about in the church. Instead, my sadness, shame, and anger stemmed from the absence in those discussions of everything I had become so keenly aware of over the previous two weeks: the church's role in fostering intolerance and division. I had realized that baptism was not only an initiation into a community and life of joy, forgiveness, and resurrection. It also meant entering into a life that called for incredible responsibility and contained baggage infused with a history of every “ism” one could think of. Baptism meant confronting a history that included continual abuse of privilege and power. Baptismal identity, I had come to see, has been used not only in the promotion of peace, but also in the promotion of division. As someone who looks forward to not only having the privilege of performing baptisms but also walking with people on their baptismal journeys, I had come to realize that I, along with my clergy colleagues, have a responsibility to include in discussions some of that painful history and baggage that is tied to baptismal identity. This includes addressing the exclusive rhetoric frequently used when talking about baptismal identity, often-time artificial hierarchies and barriers set-up over time that tell us who we are called to love and serve, the difference between cheap and costly grace, and how we might embrace difference in unity.

Baptismal Identity and Costly Grace

Walking through the Polish town of Oświęcim, known in German as Auschwitz, I was startled at how close the houses, roads, and everyday busyness of the town is to the gates of the concentration camp. There was a part of me that hoped that there would have been a tangible separation. If there was a great distance, I had reasoned, there might have been some sort of logical explanation for why and how so much evil could be done without being put to a stop. Instead, my own physical experience of these places made me question how one could be a bystander, complacent to the horror that was happening in one's backyard. How could Christians ignore the call to love their neighbor, when evil was literally in their own neighborhood? While there were many reasons for their complacency, I wonder if a community's theology, particularly

Protestants' sacramental theology, could have been a factor to their inaction.¹ More importantly, I wonder how this plays out today.

Clergy are in a critical position to help their congregants differentiate between what Dietrich Bonhoeffer, the German Lutheran pastor who became known for his staunch resistance to the Nazi dictatorship, called “cheap” and “costly” grace. All too often, clergy from my tradition preach to their congregants about grace, quickly urging them, as stated in the Church’s statement on peace, to return daily “to our baptism, die again with Christ to sin's power, and be raised anew to live by the Spirit.”² But we need to be wary of this becoming cheap grace which takes for granted that forgiveness will come regardless of whether one’s actions are based on good intentions or not. More is required of Christians, I believe, than simply admitting to being a sinner. Elisabeth Schmitz, a German theologically trained schoolteacher who was one of the most forceful Christian voices against the Nazis, recognized the problem of cheap grace when she spoke of the recklessness of careless sins. “The church itself can at no time live otherwise than on the basis of the forgiveness of sins. But how will she hope for forgiveness when, day after day, she abandons her members in their desperate distress, tolerates the mockery of all God’s commandments, and does not even dare to confess the public sin – but instead remains silent?”³

God graciously forgives our hateful words and even our hateful silence, but out of this forgiveness Christians should and must respond accordingly. This response takes the shape of being responsible for and loving one’s neighbor, even if it makes us uncomfortable or comes at a great cost. I’ve come to believe, as Bonhoeffer did, that this is what returning to one’s baptismal identity is all about. As Bonhoeffer would personally find out, returning to your baptismal identity doesn’t always lead to easy decisions and it shouldn’t lead one to a position of inaction.

Baptismal Identity: The “Ins” and “Outs”

In one of the buildings in Auschwitz there is a wall covered with photographs of prisoners. The Nazis took these pictures to identify each individual, labeling why they had been brought to the camp (i.e. political prisoner, Jewish, homosexual, etc). In one or two words, each person’s rich and complex life story is reduced to a single label: outsider or non-Aryan. With these images in my mind, I returned from FASPE and read the social statement given from my own tradition about war and peace which declares that as Christians we should re-frame the questions of peacemaking daily by returning to our baptism.

This urge is predicated on the assumption that the recalling of our identity in baptism provides the basis of peacemaking for all creation. I have to wonder if the constant return to baptism throughout history also leads to the continual reinforcement of broadly labeling who is “in” and who is “out”- filling the world’s walls with photos of the excluded. These labels ideally empower

¹ For some of the factors, see Doris Bergen, *War and Genocide: a Concise History of the Holocaust* (Lanham, MD: Rowman & Littlefield Publishers, 2009).

² Evangelical Lutheran Church in America, “Social Statement on Peace,” August 20, 1995, accessed September 2013, <http://www.elca.org/What-We-Believe/Social-Issues/Social-Statements/Peace.aspx>.

³ Elisabeth Schmitz, “On the Church’s Responsibility to the Jews in Germany” (1935-1936). German original in Dietgard Meyer, “Elisabeth Schmitz: Die Denkschrift ‘Zur Lage der deutschen Nichtarier,’” in *Dokumenation: Band I, 1903-1942*, ed. Hannelore Erhart, Ilse Meseberg-Haubold, Dietgard Meyer, and Katharina Staritz (Neukirchen-Vluyn: Neukirchner Verlag, 1999), 219, 239-246.

one to peacemaking, but they can just as easily give Christians the tools for exclusion, opening the door for violence against the excluded. As clergy, our duty is to instill a certain amount of tension or discomfort in our congregants when we assign any sort of labels about who is “in” and who is “out,” including when we label the baptized or unbaptized.

Negative Rhetoric and Baptismal Identity

For the majority of Christian clergy, education has been steeped in the study of theologians who refer negatively to those who haven’t been baptized. Even during FASPE I was struck by how many of our conversations referred to past theologians and writers, many of whom had drawn similar lines. These conversations reinforced my concern that clergy must tread carefully when we talk about baptism.

Even the writings of Bonhoeffer, who many uphold as a prophetic voice of inclusion and justice, are sprinkled with anti-Semitic rhetoric. On the one hand you have him calling for inclusion. In an essay written in June of 1933 titled “The Church and the Jewish Question,” Bonhoeffer posited the need for German Christians to embrace those of Jewish ancestry who had converted to Christianity and shared in a baptismal identity. He wrote; “It is the duty of Christian proclamation to say: here, where Jew and German together stand under God’s Word, is church; here it will be proven whether or not the church is still church.”⁴ Bonhoeffer asserts that baptismal identity trumps ethnic identity and that one’s membership into the body of Christ is solely dependent on the sacrament of Baptism. In another pen stroke in the same essay, however, Bonhoeffer scolds those who would exclude baptized Jews by using “Jewish” as a derogatory term. For Bonhoeffer, excluding Jews from the church would be to “lower oneself” to the level of Jewish laws. He wrote, “To exclude persons who are racially Jewish from our ethnically German church would mean to make it into a church of the Jewish Christian type. Such exclusion is therefore not possible in the church.”⁵ While trying to be inclusive of those who were ethnically Jewish, Bonhoeffer uses anti-Semitic rhetoric. As clergy, we need to ensure that when we talk of inclusion we are not using words with exclusionary implications; and we need to challenge our parishioners to do the same.

The two sides of Bonhoeffer’s writings should come as no surprise as the theology in which he was, and we are, steeped in is embedded with anti-Semitic language. Martin Luther, known for starting the Protestant Reformation in the 16th century, wrote with much contempt about Jews. I believe that clergy, especially clergy who continue to quote and rely on theological documents which are embedded with anti-Semitic sentiments, or which make strong claims about who is “in” or “out,” must recognize that there is a fine dance to be performed to ensure that the rhetoric and exclusionary ideas of the past do not inadvertently appear in our own work today. As clergy, it is only responsible to hand down theological writings to future generations if we pass them along with some explication of the tensions that should be explored when studying, teaching, and preaching from them.

⁴ Dietrich Bonhoeffer, “The Church and the Jewish Question,” reprinted in *Dietrich Bonhoeffer, Berlin 1932-1933*, ed. Larry L. Rasmussen (Minneapolis, MN: Fortress Press, 2009), 370.

⁵ Bonhoeffer, “The Church and the Jewish Question,” 369.

Privilege, Power, and Baptismal Identity

The “German Christian” movement in Nazi Germany provides an example of one group that saw no need to question the exclusionary language they found in the writings of earlier theologians.⁶ They proposed a policy, most clearly shown in what is referred to as the Aryan Paragraph, which sought to exclude non-Aryans from the clergy. This text quickly alarmed another group of clergy, including Martin Niemöller, who responded by creating a “Pastors’ Emergency League” to fight the policy.⁷ On the one hand, Niemöller and his followers saw that any church practices that discriminated on the basis of ethnic identity implied that ethnic identity superseded baptismal identity, calling into question the efficacy of both ordination and the sacrament of baptism. On the other hand, opposition to the Aryan Paragraph was also motivated by Niemöller’s own concern for his power and independence. Reflecting this concern, Bonhoeffer wrote: “The church cannot allow the state to prescribe for it the way it treats its members. A baptized Jew is a member of our church. For the church, the Jewish question is therefore different from what it is for the state.”⁸ Regrettably the pastors who chose to speak out against Nazi policies only did so when fellow clergy members became targets of persecution. Today I look back at the actions of the pastors who raised their voice against oppression in the 1930s with critical self-reflection. Clergy must not only stand with those endowed by the pulpit with power and privilege, but with all who are unjustly persecuted.

Difference in Unity

Baptismal identity, as well as communal participation in other Christian rituals, can lead to a feeling of unity and belonging. As I mentioned, after the tough emotional work of FASPE’s two-week trip I craved to sit among the faith community where I feel the comfort of belonging. I hope and pray that the woman who was about to be baptized that Sunday will experience the belonging and comfort that baptismal identity can provide. At the same time, I hope that my sister in Christ will also understand the history and complexity of what is at stake when unity is held up as an ideal. While I think that this striving for unity and belonging on earth is noble and part of our call as Christians, I’m cautious that our call does not compromise justice and peacemaking efforts with all people – Christians and non-Christians alike. Unity is not synonymous with peace, nor is it synonymous with like-mindedness. Instead, unity must flow out of our faith in Christ and extend to the love of our neighbors. We should recognize that often unity comes at a cost; and when that cost is violence, it is not justified.

The scholar Robert Ericksen points out that the cost of prioritizing Christian unity over peacemaking for the Protestant regional churches during World War II was very high. “[t]he [German Christians] convinced Protestant regional churches to sacrifice their accustomed independence in favor of a national church structure.”⁹ While losing some independence for accountability to a larger body can, in some instances, be a powerful peacemaking force,

⁶ For more on the German Christian movement see Doris Bergen, *Twisted Cross: The German Christian Movement in the Third Reich* (Chapel Hill: The University of North Carolina Press, 1996.); Doris Bergen, “The Ecclesiastical Final Solution: The German Christian Movement and the Anti-Jewish Church,” in *The Holocaust and History: The Known, the Unknown, the Disputed and the Reexamined*, ed. Michael Berenbaum and Abraham J. Peck (Bloomington, IN: Indiana University Press, 1998).

⁷ Robert P. Ericksen, “Protestants,” in *The Oxford Handbook of Holocaust Studies*, ed. Peter Hayes and John K. Roth, (New York: Oxford University Press, 2011), 251.

⁸ Bonhoeffer, “The Church and the Jewish Question,” 368.

⁹ Ericksen, “Protestants,” 251.

Ericksen describes how it also drowned out the independent voices that raised concerns about Nazi action. It was left to outsiders, like Elisabeth Schmitz, to call attention for the need to help other members of the community, despite their differences. Speaking harshly, she highlighted the newfound unity of Germans in “the God of Race,” and the severe consequences of this unity: “From Sweden this devastating word was reported right at the start: ‘The Germans have a new God. It is the God of Race. And they bring human sacrifices to this God’ – Who dares to say this is a lie?”¹⁰

The social statement from my own tradition speaks of a Christian unity that I find encouraging as I reflect on my FASPE experience. First, it urges that clergy should be specific in urging Christians towards a vision of unity with others. Secondly, it asks that Christians foster a dynamic vision that calls us to engage differences, rather than ignoring them.¹¹ The end goal is not unity for its own sake, but unity that holds the community accountable to the well-being of its own members and the rest of humanity. This unity requires engagement with difference. It is this vision of unity that challenges and calls me to hold onto those people pictured on the wall in Auschwitz, and to those who remained silent, or were forced to remain silent, while evil happened in their own neighborhoods. I pray that the joy of community and baptismal identity will contain within it the tears and frustrations that come with acknowledging a rhetoric of exclusion, artificial barriers about who we may love, and the difference between cheap and costly grace, so that we all may faithfully live in peace and unity.

¹⁰ Schmitz, “On the Church’s Responsibility to the Jews in Germany” (1935-1936), 2.

¹¹ Evangelical Lutheran Church in America, “Social Statement on Peace.”

Sermon: Imagining Memorials

Joshua 4:1-9

By Griff Gatewood

I wonder if you remember how Jacob responded to his wrestling match with God? He took a stone, poured oil on it, and named that place Bethel. Or, how about Samuel when the Lord delivered the Israelites from the Philistines? Samuel takes a stone, he anoints it, and he names that place Ebenezer. Samuel and Jacob connect remembering God's works with markers in this world. Today, our Old Testament passage continues this theme.

Let me remind you of what has happened thus far in Joshua. Moses is dead. Joshua is now in command. Spies have crossed the Jordan and come back. The people are on the banks of the Jordan ready to cross into the Promised Land. Joshua commands the priest to go before the people and begin crossing. But, it is harvest time. The Jordan is at flood stage. However, the priests go ahead. As soon as their feet touch the water, the Jordan stops flowing. The priests continue out from the edge to the middle of the river. They stop there as the waters hold back. Now, the people follow them and then pass by them to the other side. Just as the Lord delivered their parents from Egypt, God has delivered his people into the Promised Land.

This brings us to our Old Testament reading for today from Joshua 4:1-9.

4 When the entire nation had finished crossing over the Jordan, the LORD said to Joshua: 2 "Select twelve men from the people, one from each tribe, 3 and command them, 'Take twelve stones from here out of the middle of the Jordan, from the place where the priests' feet stood, carry them over with you, and lay them down in the place where you camp tonight.'" 4 Then Joshua summoned the twelve men from the Israelites, whom he had appointed, one from each tribe. 5 Joshua said to them, "Pass on before the ark of the LORD your God into the middle of the Jordan, and each of you take up a stone on his shoulder, one for each of the tribes of the Israelites, 6 so that this may be a sign among you. When your children ask in time to come, 'What do those stones mean to you?' 7 then you shall tell them that the waters of the Jordan were cut off in front of the ark of the covenant of the LORD. When it crossed over the Jordan, the waters of the Jordan were cut off. So these stones shall be to the Israelites a memorial forever."

8 The Israelites did as Joshua commanded. They took up twelve stones out of the middle of the Jordan, according to the number of the tribes of the Israelites, as the LORD told Joshua, carried them over with them to the place where they camped, and laid them down there. 9 (Joshua set up twelve stones in the middle of the Jordan, in the place where the feet of the priests bearing the ark of the covenant had stood; and they are there to this day.) (NRSV)

Joshua commands the Israelites to build a memorial, to make a sign among the people so that they might remember how they came into the land. The sign points to a story that makes it clear that the people did not write their own ticket when they crossed the Jordan. The Lord has brought them there. They did not build a bridge or find a ford to cross. God made a way for them to cross. Once again, they see that the Lord their God is the one who delivers them from wandering in the wilderness to living in a land of milk and honey. Their present and their future must be lived in light of this past.

Today, I want to reflect with you about memorials and about what Joshua teaches us about remembering the events of our past so that they might inform how we live in our present.

First, notice what kind of memorial Joshua tells the people to build. It does not depict this historical moment like the bronze statue of the Raising of the Flag at Iwo Jima at Arlington Cemetery. It does not evoke a grand ideal like the Statue of Liberty. It is not a wonder of the world like an Egyptian Pyramid. Rather, it is simple, and it is an invitation. Joshua tells the people to make a sign with twelve stones taken from the middle of the River. Can you see them? Big stones: heavy enough to test a man's strength as he heaves them on his shoulder. Smooth stones: shaped by the passing current and made smooth by the sand of the river bed. Twelve of them: each made from the same material, but each uniquely shaped and formed like each tribe of Israel. The Israelites take these stones and build a memorial. They build a sign to remember that "the flow of the Jordan was cut off before the ark of the covenant of the Lord. When it crossed the Jordan, the waters of the Jordan were cut off."¹ This memorial is an invitation. It will invite remembering and storytelling about the Lord who brought the people into the Land.

The cross is like Joshua's memorial on the banks of the Jordan. It remembers the Lord's deliverance of all people. And, like Joshua's twelve stones, the cross is an invitation to tell a story. It only makes sense as Good News if we know it in the context of hearing the story of Jesus. But, there is an added twist. Joshua builds a memorial to remember a good beginning. The church's central symbol of Jesus' life remembers a bad ending: his death on the cross. However, given that God vindicates Jesus' life and death in God's resurrection of Jesus from the dead, the cross is not a sign of failure, but a sign of God's love. In his death, we see Jesus' identity with our death; in his death, we see that God will give his only Son to bring all God's children home.

Memorials have been on my mind lately. This summer I traveled with a group of future pastors and medical doctors to Poland and Germany to learn about the Holocaust and see what lessons it has to teach us all as young professionals. We ended our trip with three days in Berlin. Berlin was the heart of Nazi Germany. In the past few decades, as the generation who lived as perpetrators, collaborators and bystanders has begun to die, a new generation has begun to wrestle anew with how to remember Germany's Nazi past. In many different places, Germans have asked how they should remember that they as a people murdered six million Jews.

One memorial marks the place where students at the University of Berlin burned books written by Jewish authors. The burning happened right on the paved quad of the university. When you visit this square today, there is no large imposing memorial that tries to bring the books back from the ashes or memorialize the murdered Jewish authors. Instead, there is just a clear glass window in the middle of the courtyard. It is no bigger than a card table. When you look down into the ground, you look into a room with bookshelves on each of the four walls. All the bookshelves are empty. A



¹ Joshua 4:7

few paces away from this window is a simple plaque that tells of the book burning and includes this 19th century quote “Where they burn books, they will in the end also burn people.”² This



memorial invites passersby to remember the past, but also to reflect on their present.

Another memorial is on the outskirts of Berlin in beautiful Grunewald. Dietrich Bonhoeffer lived there. Nestled in the heart of lovely homes set on gentle curving streets is the commuter train station built in the late 19th century. The station is nothing but quaint. It is built to resemble a castle gate with a beautiful arched stone entrance, topped by exposed timber framing and white stucco. Picture perfect. In the 1930s and 40s, trains departed from here to death camps in Eastern Europe.

From this lovely spot, Jews were sent to die. Still today, residents of this suburb come here to board trains and go to work. In the midst of life moving on, a memorial at Platform 17 remembers the horrific events that took place in the shadows of these quaint buildings. Trains no longer leave from this specific platform where deportations occurred. Now, above the tracks, on the platform, are a series of 186 simple metal grates. On each one is something like this: “April 17, 1943. 100 Jews. Berlin-Theresienstadt.” Each plate states the details of one of the 186 transports that collectively sent over 50,000 Berliners to concentration camps. Here one is confronted with unbelievable evil unfolding right in the midst of a comfortable suburban neighborhood.

I think Joshua would like these memorials. Each resembles the twelve stones that created that memorial on the banks of the river Jordan. They do not make grand gestures in order to make reparations for German atrocity. They do not try to console the victims or ease the mind of the perpetrators and bystanders. Nor do they try to redeem the books that went up in ashes, or the lives that ended at the end of the train line. Rather, like those twelve stones, they invite children to ask questions. They invite wise folks to tell stories. They invite the ignorant to learn and remember. They ask the viewer to join in the work of memory.³

² In my examples of memorials I kept the details to a minimum. This memorial was designed by Micha Ullman. The name of the square is Bebelplatz. The quote is by Heinrich Heine from his play *Almansor* (1821). See “Bebelplatz,” in *Wikipedia, The Free Encyclopedia*, accessed September 4, 2013, <http://en.wikipedia.org/wiki/Bebelplatz>

³ Throughout this sermon I am indebted to an article Thorsten Wagner recommended to me about memorials by James Young. Here in particular I lean on Young’s categories for the work monuments accomplish. See James E. Young, “Memory, Counter-Memory and the End of the Monument,” in *Image and Remembrance*, ed. Shelley Hornstein and Florence Jacobowitz (Bloomington, IN: Indiana University Press, 2003), 59-78.

As I walked among these memorials in Germany, I began to wonder how we here in Durham remember moments in our past when racial hatred won the day. I wonder what kind of memorials we might have to our Jim Crow past. Do we honor the memory of the victims of our racism and hatred? Might we learn from Germany as it tries to remember its past? Is there an invitation for us to remember as a way of seeking healing?

I wonder if you know the name Booker T. Spicely. On July 8, 1944, towards the end of World War II, Private Spicely was visiting Durham from the U.S. Army base in nearby Butner. He was African-American. He boarded a bus a few blocks from my house, on the corner of Club Avenue and Broad Street. He and his friends sat in the front row of the bus. The bus driver told them to move to the back of the bus. His friends did; he did not. Words were exchanged. Tempers flared. White soldiers intervened. When Spicely left the bus, the white bus driver followed and shot him dead. Later acquitted; a jury found the bus driver's killing of Spicely was an act of self-defense.⁴ How should we remember this kind of tragedy and the world that made it possible?



Injustice does not always happen so dramatically. If Private Spicely has been in downtown Durham on that day, he wouldn't have been allowed to sit in the white waiting room at the bus station, but would have had to sit in the one marked "colored." Nor would he have been allowed to check out the same books from the library as white citizens. The Laws of Jim Crow divided this city and much of America into separate places that made it clear who was best, who was worthy, who was valued. I wonder how many of you can remember these laws and the signs that brought about injustice in most spheres of life. Some of us might have benefited from the world these laws created. Some of us might still feel the searing pain of the injustice and hatred they wrought. (The above picture is of the bus station in Downtown Durham, 1940.)

As Durham becomes a more eclectic city populated by just as many folks from New Jersey and Ohio, as from North Carolina and Georgia, what should we do to preserve the memory of the past? How can we live more transparently with this past? How can we continue to remember, especially as the pain of this past still smites the memory of many of our citizens?

One other memorial from Berlin has tickled my imagination as I have pondered these questions. This memorial is in a neighborhood of Berlin called Bayerische Platz. There eighty signs hang on lamp posts



⁴ Gary Keuber, "Spicely, Booker T." OpenDurham.com, accessed September 5, 2013, <http://www.opendurham.org/people/spicely-booker-t>

throughout the neighborhood.⁵ Each one spells out one of the hundreds of Nazi laws and rules that gradually dehumanized Berlin's Jewish population. One has a music staff and notes on one side. On the other side, it reads, "Jews are banned from choral societies."⁶ Another has a picture of a telephone on one side; on the other it reads, "Jews are not allowed to use phones." Albert Einstein and many other Jews lived in this neighborhood. Before this installation, many people did not remember the laws or the residents who were affected by them. The memorial works to preserve this memory while reminding those living there today that injustice does not happen overnight, but takes time and requires the tacit acknowledgment of neighbors. The monument invites present residents of this part of Berlin to navigate their current lives with the memory of their past.⁷

I wonder if a similar type of memorial might have a place in our midst. As Downtown Durham revitalizes, how might we remember the Jim Crow past? As we go to the Carolina Theatre to watch a movie, or to The Parlor for rich and delicious ice cream, or to Dame's for chicken and waffles, what would it be like if we walked passed signs that remind us that our black brothers and sisters had to sit upstairs to watch a movie, or had to use a different water fountain, or pick up their food from the back of the restaurant?

Hold that question in your mind as we return to Joshua and his memorial of twelve stones. Joshua tells the people of Israel, "*When your children ask in time to come, 'What do those stones mean to you?' then you shall tell them that the waters of the Jordan were cut off in front of the ark of the covenant of the LORD.*"⁸ Joshua makes a memorial to remember God's deliverance. Memorials in Germany differ from Joshua's memorial. They do not remember deliverance but death. The only positive aspect of many of these memorials is their simple existence. Nazi Germany wanted to wipe out the memory of the Jews. The existence of these memorials gestures towards the fact that this did not happen. The Nazis did not win. However, the cultural imagination from which these memorials arise does not have a rich vocabulary for redemption or hope. Germany's treatment of the Jews eroded the religious vocabulary that remained in Germany after 200 years of modernity.

Life in Durham has similarities with life in Germany. We no longer live in a city with a single source of moral authority: Christianity. Rather, sources now come from all different angles: Christianity, Buddhism, Judaism, secularism, capitalism, paganism, and materialism. All these bubble in the waters of our collective moral imaginations. In Durham we, too, lack a shared and rich vocabulary for redemption and hope. The memorials our city builds should follow those of Germany. They should be invitations for remembering and reflection. These might create spaces and invitations for festering wounds to be aired out, broken hearts to grieve, and newcomers to learn.

⁵ Young, "Memory, Counter-Memory and the End of the Monument," 73.

⁶ Ian Johnson, "'Jews Aren't Allowed to Use Phones': Berlin's Most Unsettling Memorial," *New York Times Books Review*, accessed June 15, 2013, <http://www.nybooks.com/blogs/nyrblog/2013/jun/15/jews-arent-allowed-use-telephones-berlin-memorial/>

⁷ Young, "Memory, Counter-Memory and the End of the Monument," 74.

⁸ Joshua 4:6b-7.

But, here is the secret. Life within the Church is different from life in Germany or in Durham. We have great hope for redemption. Just as Joshua's stones signified not tragedy but deliverance, and the cross, too, signifies not defeat but victory, so too can memorials – to Nazi Germany or the Jim Crow south – signify more than memory of horror. With a Christian vocabulary and story of redemption through Christ, they too can point forward toward redemption. We trust that the story of this world does not end in sadness, despair, and darkness. The way we live with the knowledge of our past is a witness to hope in the midst of despair. We believe that God works redemption out of all circumstances. This is why our chief memorial is the cross. We mark ourselves with it, we adorn our bodies with it, we pray in its presence. We do this because it reminds us to tell the story of Jesus. The worst circumstances – the crucifixion of Jesus – become a source of flourishing and new life. On the cross, we see God entering fully into our human condition. We see God going all the way down in our mess, undoing death's sting, and bringing life by the power of his resurrection. Here, we see that death, injustice, genocide, do not have the last word. In light of this hope, we are a people who become a living memorial. We stand like those twelve stones joining in Israel's witness that the Lord is the God of deliverance. We witness to the hope that the terror of National Socialism is not the last word on Germany, and the shame of Jim Crow is not the last word on Durham.

In the name of the Father, Son and Holy Spirit.
Amen.

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