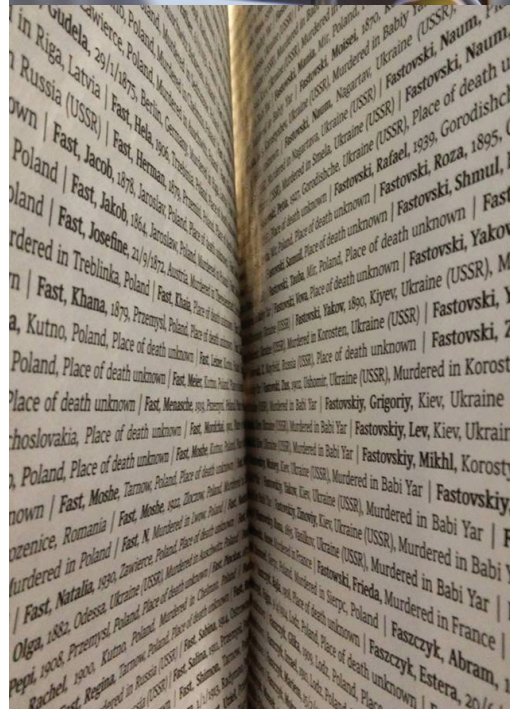




F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

2015 JOURNAL



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WITH SPECIAL THANKS TO

Dr. Mary Gentile, Dr. Sarah Goldkind, Professor Marguerite Holloway, Professor Jack Hughes, Rabbi James Ponet, Professor Dana Remus, Professor Markus Scholz, Professor Kevin Spicer, and Professor Andie Tucher.



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 The Conference on Jewish Material Claims Against Germany.

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COVER PHOTOS COURTESY OF 2015 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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WHY FASPE?

In the years since our pilot trip in 2009 for law and medical students, we have continually sought to reach a larger group of future professionals. In 2010 we added our Seminary component and in 2011 our program in Journalism. And this past summer marked a further expansion as we launched a program for business students and recent graduates of business schools. While we look forward to launching other programs in the future, the current five programs represent what we sought to develop more than seven years ago. It is exciting to report that we have over 320 alumni in the United States and elsewhere — progressing “upward” in their professions and taking with them the FASPE approach to ethics.

FASPE was born in response to two distinct yet interrelated societal forces. One was the growing concern over the rampant breakdown of ethical values in several of our most important and respected professions. The last decade, in particular, has seen a constant stream of highly publicized breakdowns within the professions — perhaps a reflection of the complexities of the age of internet and globalization: lawyers helping clients to manipulate the law; journalists conducting shoddy and incomplete research that has the effort of misinforming readers; religious leaders failing to address improper behavior — both among the clergy and among the public at large; business leaders allowing the profit motive to take priority over ethical choices; and doctors more interested in revenue than the well-being of their patients. FASPE addresses the failures of both the professions and the professionals.

The second motivation for FASPE stemmed from the fact that the Holocaust is becoming more distant in time, though no less difficult to comprehend. How are the Holocaust and its ramifications to be taught and contemplated today, in the twenty-first century? It is FASPE’s challenge to draw contemporary meaning from the increasingly distant Nazi period.

FASPE was developed out of these concerns. It addresses ethical behavior in the professions while establishing a framework for the future study of the Holocaust. It is grounded in the fact that members of the professions — lawyers, doctors, journalists, business executives, and the clergy, among other professions in Nazi Germany — played an instrumental role in the design and implementation of the Holocaust; their failure to fight the breakdown of social mores helped to enable the execution of the Holocaust. The issues are different today than in Nazi Germany, but members of these professions continue to play a crucial role in shaping society.

Finally, why “Auschwitz?” Auschwitz is not merely a site of the killings; it is the ultimate symbol of the twentieth century breakdown of civilized society. Our Fellows go there to see the direct connection between the actions of the professionals and the systemic genocide that Auschwitz represents.

The pages that follow include a small sample of the work done by the 2015 FASPE Fellows and earlier FASPE alumni. These papers reflect the core ideas behind FASPE by showing that an examination of the actions and choices of professionals during the Holocaust can spur contemporary professionals to think more carefully about the ethical implications of their work today. On behalf of FASPE, we congratulate the 2015 FASPE Fellows. We look forward to continuing the discussions we had while we traveled over the many years to come.

C. DAVID GOLDMAN, CHAIR
FASPE STEERING COMMITTEE

FASPE OVERVIEW

The Fellowships at Auschwitz for the Study of Professional Ethics (FASPE) is a set of innovative programs for students in professional schools designed to address contemporary ethical issues through a unique historical context. The fellowships, which are granted to business, journalism, law, medical, and seminary students, are centered in Germany and Poland where the actions of professionals in Nazi Germany serve as a backdrop for a two-week intensive course of study on the current ethical challenges in their respective fields.

Piloted initially in 2009, FASPE invites between 10 and 15 Fellows from each profession to participate each year through a competitive process that draws applicants from around the world. In 2015, FASPE worked with 62 new Fellows, who traveled to Berlin, Krakow, and Oświęcim (Auschwitz).

FASPE programs are designed to elicit ethical inquiry through a consideration of the interplay of past and present. FASPE immerses Fellows in history by taking them to the sites where Nazi-era executives, doctors, lawyers, journalists, and clergy worked and where the consequences of their actions unfolded. It invokes the power of place as a pedagogical tool to emphasize the importance of ethical behavior among professionals today.

Sample topics include the following, many of which cut across multiple professions:

- **BUSINESS:** Are there products that simply should not be sold to particular consumers? What are the responsibilities of the C-Suite, or of the corporation, beyond formalistic legal compliance? What are appropriate penalties for corporate wrongdoing?
- **JOURNALISM:** The role of media in creating the historical narrative; balancing the costs and benefits of access and the speed of today's media world; the challenges of fact-checking a victim's story.
- **LAW:** How do we manage duties of candor and confidentiality? What control do lawyers have over decisions that impact a client? Does the duty to a client supersede all other responsibilities?
- **MEDICAL:** Medical research on human subjects; euthanasia/physician assisted suicide; the impact of limited resources on healthcare decisions.
- **SEMINARY:** The role of religious leaders as ethical, and not just religious, educators; when and how to address political issues with a congregation; the challenges of pastoral care during times of crisis.

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

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BUSINESS
PAPERS

INTRODUCTION TO A SAMPLE OF THE 2015 FASPE BUSINESS PAPERS

When the organizers of FASPE invited me to participate in the inaugural FASPE Business program for MBA students and recent graduates, I was skeptical — a skepticism born of my own reticence and doubt that I could offer anything of use in the face of such horror and such mind-numbing extremes of human behavior.

But then I spent time with the faculty and founders of this program and saw in them such genuine intellectual curiosity, such sincere good will, and such a deep commitment to being a force for good. Every time my doubts would surface, I would find myself drawn again toward a selfish desire to spend more time with and learn from these individuals and the fellowship experience they had crafted.

There was also another inescapable pull that drew me toward FASPE. I have spent most of my professional career trying to develop pedagogy and curricula for values-driven business leadership and have developed an action-oriented approach to this task which I actively share around the world. So I faced a more personal challenge: I began to wonder if the pedagogy I promoted would have anything to offer to counter the shocking sense of futility when facing the Holocaust. Could any education offer real hope that we might do better as a species?

So the FASPE program, for me, started selfishly, as a personal opportunity and a personal test. However, the experience was much more social, more collaborative, and ultimately more broadly transformative than I could have imagined.

To begin with, the FASPE organizers identified a truly committed, insightful, and deeply humane co-teacher in Professor Markus Scholz. Getting to know him, working with him, and sharing not only our intellectual perspectives, but also learning more about his personal perspective on the history of his native Germany, was an incredible gift.

And then there were the Fellows themselves — a bright and warm and thoughtful group of young professionals who were there precisely because they wanted to test their own commitments, their own humanity. They wanted to understand how things could go so terribly wrong in the hope that they could be a bulwark against such horrors in the future. They wanted to push themselves to question the tendencies, pressures, and temptations of the profession they had chosen.

And finally, there was the history itself — the places, the sights, the stories, the data, the emotion, the sheer enormity and extremity of it all. It broke us down even as it pushed us to strive for some way to reconstruct ourselves — our very souls — in a better, stronger, more honest, and more committed fashion.

Spending these two weeks with young professionals who were motivated to take this journey was a gift for every one of us — a gift that I hope each of them will take with them into their careers. The papers that follow provide a hint of the genuine caring and courageous questioning that these Fellows demonstrate. They give us all hope.

MARY C. GENTILE, PhD
FASPE BUSINESS FACULTY
CREATOR/DIRECTOR, GIVING VOICE TO VALUES

The Heart of Darkness

What Floriculture Businesses Do in Ethiopia When the Legal System Is Not Looking

The purity of the business goal, profit maximization, has been diluted by decades of governments and societies setting conditions on that powerful goal. Labor conditions that protect employees were established as a result of tumultuous labor movements in the nineteenth and twentieth centuries, legislation was passed to protect consumers from harmful products and scams, and in recent years, informed consumers are holding companies accountable for unethical and inhumane actions performed in pursuit of profit. As a result, the contemporary business goal is now more complicated: profit maximization + employee well-being + positive social impact.

Not all businesses, however, have yet subscribed to this evolved business goal, particularly not ones that operate in developing countries. In many places in the world, labor movements and legislation to protect consumers have not shaped the norms of modern society. In countries like Ethiopia, small, informal, fragmented, and localized markets largely defined the business sector throughout the twentieth century. There was no critical mass of employees or consumers that organized to fight the ills of big business, nor were there big businesses from which people needed protection.

In the last two decades, however, the floriculture industry in Ethiopia has changed the business landscape. Floriculture, or flower farming, is big business in Ethiopia. It is one of the primary sources of revenue for the country, the fifth largest source of foreign income, and one of the largest employers of rural workers.

The positive economic contribution of the floriculture industry in Ethiopia is undeniable. However, the rapid growth of this industry takes place in a context that does not have regulations limiting the conditions under which profit should and may be maximized. Thus, the business goal in this industry remains pure: profit maximization. The consequences have been unfortunate: farm workers are being exposed to dangerous chemicals and their health suffers.¹ Although this kind of unethical treatment of poor and disempowered employees by big business is not a new problem, laborers in Ethiopia are now having to re-invent the wheel and fight the

¹ Tewodros Worku Nigatu, *Promoting Workers' Right in the African Horticulture: Labour Condition in The Ethiopian Horticulture Industry* (Addis Ababa: The National Federation of Farm, Plantation, Fishery and Agro-Industry Trade Unions of Ethiopia, 2010), <http://www.women-ww.org/documents/Ethiopia-2010-action-research.pdf>.

same social and ethical battles for safe, fair, and positive working conditions that labor movements in other countries fought over 100 years ago.

The first matter to address in analyzing the ethics of this issue is whether a crime has been committed at all? Do we, as citizens of the world, collectively agree on how our fellow humans should be treated in their capacity as employees? Do the acts of Ethiopian floriculture companies violate that agreement?

The answer depends on how we view the authority of the United Nations' International Labor Organization (ILO). The ILO takes extensive measures to define an international standard for labor conditions:²

Decent work sums up the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.

On the topic of health and safety, the ILO's Occupational Safety and Health Convention of 1981 (No. 155) states:³

Article 4

1. Each Member shall, in the light of national conditions and practice, and in consultation with the most representative organizations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.
2. The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimizing, so far as is reasonably practicable, the causes of hazards inherent in the working environment.

Article 16

1. Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.
2. Employers shall be required to ensure that, so far as is reasonably practicable, the chemical, physical and biological substances and agents

² "Decent Work," International Labour Organization, <http://www.ilo.org/global/topics/decent-work/lang-en/index.htm>.

³ "C155 - Occupational Safety and Health Convention," *International Labor Organization of the United Nations Convention Concerning Occupational Safety and Health and the Working Environment*, no. 155 (1981), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312300:NO.

under their control are without risk to health when the appropriate measures of protection are taken.

3. Employers shall be required to provide, where necessary, adequate protective clothing and protective equipment to prevent, so far as is reasonably practicable, risk of accidents or of adverse effects on health.

This convention, ratified by both Ethiopia and the Netherlands, the largest buyer of Ethiopian cut flowers, sets the ethical standard by which companies in both countries should operate.⁴ Furthermore, it holds governments responsible for the enforcement of the labor convention they have ratified. Thus, even if we cannot argue that there is a singular labor standard on safety and health agreed upon by all nations, we can at least hold the governments of Ethiopia and the Netherlands accountable for the social contract they ratified. In signing the ILO Convention with the UN, these countries essentially signed a contract with the world to behave and act in accordance to this convention. As such, the ILO can be described as a reflection of the ethical standards of these two societies and serves as the closest thing to an ethical framework in defining the rules of engagement between businesses and employees within these societies.

In practice, however, the enforcement authority of the ILO is limited and violations of the convention can, and do, go uncontested.

Nevertheless, we can agree that according to the ratified convention, a crime has been committed in exposing flower farm workers in Ethiopia to unhealthy conditions. Within Ethiopia, societal, if not legal, norms have been established for which violators can be held accountable.

Who then are the violators of this social contract to protect the health and safety of employees, as established by the ILO? There are differing degrees of action and responsibility by key stakeholders but generally we can group them into two categories: actors that are directly complicit and those that are indirectly complicit.

Direct Violators

The primary and most responsible violators of this social contract, as set forth by the ILO Convention 155, are the business leaders who own and operate the flower farms. Having set the working conditions, with full knowledge of the hazards to which they are exposing their employees, these business leaders must take the lion's share of the responsibility for the crime that is being committed against employees. Are these harmful acts motivated by pure greed and an un-tempered pursuit of profit maximization or could there be another ethical principle that underpins such actions? While no simple answer exists, several arguments can be made to legitimize the companies' actions.

⁴ "Where Does Ethiopia Export Cut Flowers To? (2013)" Observatory of Economic Complexity, http://atlas.media.mit.edu/en/visualize/tree_map/hs92/export/eth/show/0603/2013/

First, these companies are not in violation of any enforced laws in Ethiopia. On the contrary, the flower industry is collaborating very closely with the Ethiopian government and has complied with all the nations' rules and regulations applicable to the industry.⁵ ILO Convention 155 has not been enforced by the Ethiopian government, and thus it is not an applicable rule in this case. Second, in a country with such high unemployment, these horticultural companies can be viewed as serving the higher purpose of employing poor people, with women making up 80 percent of their work force, and thus strengthening local economies and facilitating social development. Higher production costs in the form of greater safety measures would mean fewer people could be employed.

This consequentialist ethical reasoning is, however, hard to accept. As a society, we have a deontological preference to uphold the value of health above that of employment. However, the preferences of those who must suffer the consequences, i.e. the employees themselves, may be much more complex. If the options are to work under unhealthy conditions or have no employment, many poor heads-of-households, whose children are malnourished and whose employment alternatives are to work under even worse conditions, will choose the former. Judging which should have priority is difficult; a more productive ethical analysis would involve finding ways to minimize the negative consequences of either option.

The second direct violator of the social contract to protect the safety and health of employees is the government of Ethiopia. The actions of the floriculture companies have either remained uninspected or are directly sanctioned by government regulators. While it may be a case of incompetence in managing a new industry, this incompetence is tantamount to negligence considering that the floriculture industry is established across the world and best practices are well known. However, it is more likely that the government of Ethiopia is turning a blind eye to industry practices, because it has prioritized fueling the economic growth of the country through this new industry. It is possible that the tradeoff the government was facing was between getting an influx of new foreign investors who were attracted to Ethiopia's cheap labor market (and its relaxed labor regulation enforcement policies), or making labor more costly by protecting labor conditions and possibly foregoing the economic boost (and letting neighboring countries gain from the foreign investment).

In reality, however, it is likely that labor conditions were never part of the government's initial considerations, as the health of individual workers is a much smaller consideration relative to the economic impact that the industry has made on the country. Thus, the government of Ethiopia most probably applied some ethical considerations to its decision, but the

⁵ Milko Rikken, "Technical Paper: The Global Competitiveness of The Kenyan Flower Industry," (World Bank Group, 2011), 18, <http://www.proverde.nl/Documents/ProVerde%20-%20Worldbank%20Technical%20Paper%20-%20VC5%20Global%20Competitiveness%20Kenyan%20Flower%20Industry.pdf?531dec>

responsibility to create broad economic growth was prioritized above that of the well-being of 200,000 individual workers.

Both direct perpetrators of the crime can therefore make a, “lesser of two evils,” argument to justify the ethical foundation for their choices and actions. The consequentialist reasoning applied here is further supported by the fact that negative consequences impact the wellbeing of a whole nation and are happening in conditions of severe poverty. Especially from the perspective of a poor country’s government, the consequences of missed economic opportunities are not short-lived, nor do they come without significant cost to the health, safety, and food security of its population, values that most would prioritize over decent labor conditions.

Indirect Violators

Three groups can be considered to be indirectly complicit in the violation of the social contract to protect workers’ safety: the commercial buyers of the farms’ products (or foreign importers), shareholders of the farms, and the retail consumers of the horticultural products. These three stakeholders participate to very different degrees, but they all help to facilitate and finance the operation of these farms. The degree of each stakeholder’s contribution to the mistreatment of workers can be determined by how informed they are and what level of power they have to impact the industry’s practices in Ethiopia.

Among this group of indirect violators, investors are the most culpable. As the stakeholders with the greatest rights and access to information and as the providers of funding for these floriculture ventures, they have the means to demand better safety measures. The second most culpable group is the wholesale buyers, who may or may not be informed about safety conditions on Ethiopian floriculture farms. This group may not have access to the details of a particular company’s safety practices, but as buyers they are well informed of the safety requirements that are standard across the industry. As industry experts, neither buyers nor investors can claim ignorance about the conditions under which this low-cost production of cut flowers is taking place in Ethiopia.

It is plausible to assume that, despite the best practices of the industry, these stakeholders opted to be guided by the laws of the country, rather than by their own personal ethics or industry ethics. Ultimately, it is a case of “if it’s legal, it’s ethical.” While it is possible that buyers and investors are using ethical reasoning that strives for a greater good when they ignore the treatment of horticultural employees, considering the low stakes that these parties have in the well-being of Ethiopian workers and the high returns they are earning, it is more likely that their disregard for the safety of employees is motivated by higher profits.

The third indirect abettor is the retail consumer. All power in the markets is derived from the consumer’s willingness to pay for a product. Seen in this way, the consumer becomes a responsible stakeholder in the acts of any company that she empowers with her purchase.

However, because the actual power of one individual consumer is so small and because cut flowers are treated like a commodity good (by consumers), the consumer's power and access to information makes her a very different kind of participant in the violations perpetrated against farm workers. No argument for a higher good can be attributed to the decision of the consumer to buy a bouquet of roses on the streets of Germany or Japan, for example. Rather, consumers tend to have faith in the regulations and systems that govern businesses, and there is a general assumption that, "somebody must be making sure my products are being sourced fairly and safely." Consumers have delegated away their ethical responsibilities and tend to be disinterested and ignorant. They thus help enable and encourage the unsafe conditions under which the affordable flowers were produced.

What Is the Way Forward?

The practical problem is simple: People are suffering from dangerous health conditions, because of their jobs. The ethical problem is complex: A small minority of people are gaining benefits for themselves and their country but they are sacrificing their health. A social contract has been broken — and an ethical principle violated — but upholding it may make the country and the people it is trying to protect worse off. Conditions on the farms will change only if the floriculture companies in Ethiopia collectively decide and agree to uphold employee safety standards. And this will not likely happen without some pressure from important stakeholders, those indirectly complicit in the current conditions.

The most powerful stakeholder would be the consumer, but the fragmented and distracted consumer base is not likely to develop much interest in the conditions under which an unbranded commodity good is produced.

As for the government of Ethiopia, for the time being it will most likely not intervene to enforce fair labor practices, because it views the stakes as too high. There will come a time to fight that battle with companies and investors, but this is not the era in which winning that battle will yield the best returns.

Will it be the wholesale buyers then who will insist on better safety measures and absorb the higher prices, or will it be investors that will ask for improved work conditions and accept diminished profits?

In fact, it is the research community, local NGOs, and community organizations in Ethiopia that are drawing attention to the practical and ethical problems with current labor practices on flower farms — and they are forcing the silent, complicit partners of the big horticultural businesses to reconsider the costs of operation. If their awareness-raising efforts succeed, the floriculture businesses may be forced to confront their role in making their employees unsafe and unhealthy. At best, a domino effect of accountability will occur as consumers demand ethically-sourced cut flowers, making the cost of pursuing unethical practices more costly than that of abiding by ethical practices. However, it takes more than a group of researchers and advocates

in Ethiopia to make a movement large enough and loud enough to influence the purchasing habits of consumers across the world.

Beyond these efforts, there is the possibility of influencing consumer behavior by branding the flowers, thus differentiating them, much as the coffee industry has branded “Fair Trade” coffee. In this way, better safety conditions don’t have to translate into higher unemployment or significantly lower profits; rather, the cost could be shared between the consumer, the buyer, and the producer. The ideal candidates to make such a move would be the leading horticultural companies in Ethiopia. The heads of these companies may already wish to implement more ethical employment practices, but may be hesitating to do so for fear that this would make their companies uncompetitive. These companies could launch a country-industry specific initiative and brand their products as ethically responsible or join larger brand initiatives similar to the Rainforest Alliance or Fair Trade. Nevertheless, such an initiative would be very costly and risky, especially in a commodity market. The only producers that are likely to implement a branding campaign (and have a chance at succeeding), therefore, are the ones that have significant market power, none of which are in Ethiopia.

What Would Friedman Say?

Milton Friedman argues that the ethical responsibility of businesses is, “to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.”⁶

Friedman’s words are dated; they are borne out of a world with strong legal systems that protect each member of a society and an empowered society with ethical customs that inhibit businesses from harming their societies. How would Friedman respond when his elegant philosophy is placed in a context with weak legal systems, limited government regulation, and a disempowered working class? Would he preach profit over safety and health? Would he still argue that “if it’s legal, it’s ethical?”

The Ethiopian business sector is in its infancy and has yet to fully confront the tensions between profit and ethics. Governing bodies in Ethiopia are not yet in a position to protect their citizens from the harms of profit-driven companies. It will be an accomplishment to reach an era when the laws and social conventions of Ethiopia can guarantee the safety and well-being of all employees and all citizens. However, until the political will and the legal systems catch up to the growth of the economic sector, workers in Ethiopia will be at the mercy of the ethical choices of big businesses. And according to Friedman, their responsibility is, “to make as much money as possible.”

⁶ Milton Friedman, “The Social Responsibility of Business Is to Increase its Profits,” The New York Times Magazine, September 13, 1970.

Staying Within the Rules of the Game

A Review of the “Friedman Doctrine” in Light of the Austrian Refugee Crisis

“There is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.” With this sentence the economist Milton Friedman made a strong statement in the 1970s. He said that businesses and managers have no other responsibility than to maximize profits for their shareholders. He even said that they have no legitimate reason to care about political issues or to invest in projects that don’t maximize profits, even when such projects would otherwise benefit society.¹

Friedman’s position was a major topic of discussion throughout the FASPE business program. What is the social responsibility of a business and where are its boundaries? We would discuss this question in connection with historical events and decisions made by business managers under the Third Reich, and we would also discuss the question in relation to current business issues, such the wage discrepancies between workers in Africa or Asia and those in Europe and the United States, or whether businesses can accept lower safety standards to make higher profits.

As a starting point for this paper, I would like to focus on one of our discussions, in particular. We asked ourselves whether a company like Coca Cola could be considered ethical if it instituted ethical business practices, but continued to produce a product that is directly linked to serious health issues.² This also brought some of us to the question: Is it better to manage a small company that has a product that makes the world a better place, but has only a limited impact, or to manage a big company (e.g. Coca Cola) which sells a product with few benefits to society, but which has a global reach? The point was how to evaluate a small change made by a big “bad” company when that change has or is meant to have a positive impact. From Friedman’s point of view, the entire question would be moot, as our only goal should be to increase profits, so long as selling our product is profitable and legal. From his perspective, it would be up to the consumer to decide to stop purchasing soda, for instance, and thereby affect the company’s bottom line. Alternately, the government could pass laws that change the rules of the game, but the company itself, according to Friedman, should not seek to have a positive

¹ Milton Friedman, “The Social Responsibility of Business Is to Increase its Profits,” *The New York Times Magazine*, September 13, 1970.

² “Sugary Drinks and Obesity Fact Sheet,” Harvard T. H. Chan School of Public Health, accessed August 22, 2015, <http://www.hsph.harvard.edu/nutritionsource/sugary-drinks-fact-sheet>.

social impact, nor should it be responsible for shielding consumers from any ill effects its products may have, so long as those products meet government and legal standards.

I would like to raise some additional questions related to our discussion of Friedman and, in light of them, examine the behavior of companies in Austria in response to the current asylum and refugee crisis facing Europe.³

What if, for example, the rules of the game change? Friedman believed the rules of the game were limited to laws, but what happens if you broaden the definition to include public opinion about what is considered appropriate behavior? And how should we view a company whose product or service is perceived as ‘doing good,’ but whose business practices are unethical?

Up until very recently, as a resident of one of the richest and most peaceful countries in the world, and as an Austrian citizen with good access to education and many other excellent goods and services, I felt that corporate social responsibility lay in not taking advantage of people in less developed countries and in not hurting the environment. The political role that companies played in my own country was not of much concern to me. I had no issues with the actions of Austrian corporations, so long as they followed the law, i.e. “the rules of the game.”

Since the outbreak of the last financial crisis in 2008, right-wing and populist parties in Austria, as well as in other European countries, have gained in power, and nationalist, racist, and even pro-Holocaust statements have become increasingly more common and tolerated by a large segment of Austrian society. One indication of this are the large numbers of “hate postings” on Facebook, where people post comments under their real names and with their pictures, espousing such things as “refugees just want our money” or “reactivate the gas chambers again.” Comments such as these may also be found in the comments sections on the Facebook pages of the Freedom Party of Austria (FPÖ) or Facebook pages of similar organizations.⁴ According to current surveys, approximately 31 percent of Austrians would vote for the FPÖ, which would render it the majority party in the Austrian Parliament.⁵ Against this background of rising xenophobia, we have been facing the by now, well-publicized recent large influx of refugees to Europe, coming primarily from conflict-ridden countries such as Syria, Afghanistan, and Iraq.⁶

³ This paper was originally written in September 2015. Although every effort has been made to update the information contained herein to accurately reflect the current situation of refugees in Austria, some facts may have become outdated. The general argument nevertheless holds.

⁴ Eau de Strache, accessed August 22, 2015, <https://www.eaudestrache.at>. Eau de Strache is a website that collects comments to Facebook postings by the FPÖ.

⁵ “Profil-Umfrage: FPÖ klettert auf 31%,” *Profil*, August 22, 2015, accessed August 22, 2015, <http://www.profil.at/oesterreich/umfrage-fpoe-erster-5822911>.

⁶ Asylstatistik: Juni 2015, Austrian Federal Ministry of the Interior, accessed August 22, 2015, http://www.bmi.gv.at/cms/BMI_Asylwesen/statistik/files/2015/Asylstatistik_Juni_2015.pdf.

This context sheds new light on questions concerning the social responsibility and political engagement of corporations, as well as their potential complicity in wrongdoing.

During the current refugee crisis, the Swiss company ORS Service AG has gained great attention. ORS is a for-profit company that specializes in providing housing and care for refugees and asylum seekers. In 2003, the Austrian government privatized the industry that provides support services to refugees, and in 2012, it awarded ORS the contract to run these services.⁷ According to the Austrian Federal Ministry of Internal Affairs, which published parts of the contract with ORS — in response to a motion by Parliament demanding that the contract be made public — ORS receives a fee for each refugee for whom it provides housing and care.⁸ This means that ORS has a financial incentive to house and care for as many refugees as possible. The contract also stipulated that, at the time of signing, the refugee center “Betreuungseinrichtung Ost,” located in the town of Traiskirchen, was to have 480 beds, as well as capacity to expand and accommodate more refugees in the event of an emergency.⁹

Yet by July 2015, there were nearly 4,200 refugees staying at the ORS facility in Traiskirchen. Only 2,300 of them received beds, 480 had to sleep in tents, while the remaining 2,000 or so had to sleep under the open sky.⁹ According to a report at the time by Amnesty International (AI), which visited this center, not only were refugees being housed under conditions that did not comply with ORS’s contract, but conditions were so poor as to constitute human rights violations. The AI report mentioned unsanitary conditions, a fundamental lack of privacy (there were no separate showers for women or even shower curtains), and an inadequate food supply.¹⁰ The fact is that the problems in this camp would have been relatively easy to solve and would have required little more than additional financial investment. However, given that ORS was and is paid based on the total number of people they serve, regardless of the quality of the services they provide, the company had no incentive to improve camp conditions. For ORS any improvements they make, or would have made, only means a reduction in profits. Although conditions in the refugee camps have improved somewhat since last July, they continue to be subpar.

This brings me back to our discussion of Coca Cola and the Friedman doctrine. In fact, comparing Coca Cola and ORS highlights some important considerations. Unlike Coca Cola,

⁷ “Privatisierung der Flüchtlingsbetreuung mit European Homecare,” *no-racism.net*, May 15, 2004, accessed August 22, 2015, <http://no-racism.net/article/749>; “Meilenstein,” ORS Service GmbH, accessed August 22, 2015, <http://www.orsservice.at/%C3%BCber-uns/meilensteine>.

⁸ “Betreuungsvertrag Asylwerberbetreuung: GZ. BMI-FW1600/0037-IV/5/2011,” [Care Agreement Between The Republic of Austria, through the Federal Ministry of the Interior and ORS Service AG], Austrian Federal Ministry of the Interior, accessed August 22, 2015, http://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_05106/imfname_449359.pdf.

⁹ “Neuer Rekord: Knapp 4.300 Flüchtlinge in Traiskirchen,” *Kurier*, July 27, 2015, accessed August 22, 2015, <http://kurier.at/chronik/niederoesterreich/neuer-rekord-knapp-4-300-fluechtlinge-in-traiskirchen/143.701.912>.

¹⁰ “Quo Vadis Austria? Die Situation in Traiskirchen darf nicht die Zukunft der Flüchtlingsbetreuung in Österreich werden,” Amnesty International, August 14, 2015, accessed August 22, 2015, https://www.amnesty.at/de/view/files/download/showDownload/?tool=12&feld=download&sprach_connect=332.

ORS provides a product — in this case a service — that should have an inherent social benefit: providing people in need with accommodations and care, free of political or religious objectives.¹¹ But by doing its job so poorly, to the point of violating human rights, can one say that ORS is behaving in a manner that is worse than Coca Cola, which sells a product linked to obesity and diabetes to people who can nevertheless choose not to buy it?

According to Friedman, ORS may have been doing nothing wrong. The Austrian Federal Ministry of Internal Affairs did not and has not revoked its contract with ORS and has even stated that it is satisfied with ORS's work. For its part, ORS argued that it is not bound by its contract to offer more beds.¹² Even if you broaden the perspective to include accepted norms in Austrian society, ORS appeared to be working within the rules of the game as almost a third of Austrians would vote for a political party that would close Austria's borders to refugees and deport those already in the country as quickly as possible. Even though politicians and organizations, such as Amnesty International and Doctors Without Borders, spoke out on the human rights violations, ORS did not appear to feel enough pressure to change its behavior at the time. Friedman would likely lay the responsibility for improving conditions for refugees at the feet of the government, as the government is responsible for passing laws and has the power of enforcement. In this particular case, however, Austria's government was and continues to be ORS's sole client, equivalent to a customer who can exert pressure on a company by not buying its products. Yet, what sort of client is the government of Austria?

In response to the ongoing refugee crisis, Austria's two main political parties, the conservative Austrian People's Party (ÖVP) and the center-left Social Democratic Party of Austria (SPÖ), have watched with growing concern as a third party, the Austrian Freedom Party (FPÖ), has gained votes. Relying on emotional and populist rhetoric, the FPÖ has increased its support with a twin focus on opposing refugees and a distrust of the European Union.¹³ Aware that they have the most to lose from the rise of the FPÖ, the two main parties have responded by adopting a hard line against illegal immigration. The result is that there are few substantial political efforts to address the plight of the refugees in Austria. Instead of trying to assist the refugees, politicians are discussing what the proper quota of refugees for Austria and other European countries should be, or are engaged in a blame game for the rising problems.¹⁴

In such a political environment, ORS's actions were and, in large part, continue to be tolerated and brushed off with cheap excuses (such as how the large number of refugees has been completely unexpected). Moreover the images of massively overcrowded refugee camps bolster

¹¹ "Leitbild," ORS Service GmbH, accessed August 22, 2015, <http://www.orsservice.at/%C3%BCber-uns/leitbild>.

¹² "Innenministerium mit Flüchtlingsbetreuung durch ORS zufrieden," *Der Standard*, August 11, 2015, accessed August 22, 2015, <http://derstandard.at/2000020592013/Innenministerium-mit-Fluechtlings-Betreuung-durch-ORS-zufrieden>.

¹³ The FPÖ claims that the European Union is undermining the sovereignty of Austria and forcing it to pay for bailing out Greece as well as its own bureaucracy.

¹⁴ For a discussion about how anti-EU sentiment impacts local politics in Austria see: Robert Menasse, *Der Europäische Landbote: die Wut der Bürger und der Friede Europas* (Vienna: Paul Zsolnay Verlag, 2012).

arguments for instituting quotas and/or an end to immigration to Austria altogether. The government, which in this case is both law enforcer and client, seems satisfied with the company's practices, or at the very least, indifferent to its ethical violations. We therefore have a situation, in which neither the law, nor a threat of loss in profits, nor pushback from the company's major client is effective in inhibiting that company from acting unethically. It would seem that according to Friedman's principles, ORS is therefore acting responsibly.

During FASPE, we examined several situations similar to this one. The German National Socialist government was legally elected and its ideas were widely accepted and supported by the nation's citizens. Nevertheless, today we honor anyone who refused to obey the law and worked against the system at the time. I do not mean to equate today's developments with the situation under Nazi rule, but comparing the two does show that managers have a legitimate role to play in preventing human rights abuses, especially at their own companies and when committed by their own companies.

Another important actor in shaping a company's business practices and policies are its shareholders, something which also received a lot attention in our FASPE business sessions.

Friedman and supporters of the shareholder value approach, which prioritizes the interests of shareholders over other stakeholders, would argue that while other parties with relations to a company have formal contracts that secure their interests, the shareholders have the sole remaining claim on company assets and are the residual claimants. Lynn Stout, a leading professor of corporate law, however, has argued that with respect to an operating business (as distinct from one that has filed for bankruptcy) the only residual claimant is the business itself. Shareholders receive a dividend only if the board decides to pay one out. A manager, therefore, has no more, nor less of an obligation to shareholders than it does as to any other stakeholder.¹⁵

In the case of ORS, there is one more stakeholder, however. In fact, it is the largest group of stakeholders and the one most disadvantaged by the company's unchecked business practices: the refugees. What about them? Even though this stakeholder group outnumbers other stakeholders numerically and has to live with the direct consequences of too few beds, dirty washrooms, a lack of privacy, and similarly deplorable conditions, they are the ones with the least power to change anything. Although they are consumers of ORS's services and may have some recourse to Austrian or international law, the refugees are neither in the position of the client who pays for the services, nor in the position of the authorities, which enforce laws mandating ethical practices. It is therefore difficult to locate them in a stakeholder analysis. In the end, this group is highly dependent on ORS's managers and executives to improve conditions, even though this means a decrease in profits for the company.

¹⁵ Lynn A. Stout, "The Problem of Corporate Purpose," *Issues in Governance Studies*: No. 48 (Washington DC: The Brookings Institution, June 2012).

Of course ORS is not to blame for the whole problem. Politicians, whether on a national or European level, are also partly responsible as they have been unable to cope with the scale of the influx of refugees or with oversight of companies like ORS, who have stepped into the situation.

One of the other lessons I learned in participating in FASPE was the need to look beyond perpetrator and victim. There are also bystanders who can see what is going on, and as we discussed, must take action. There is role for citizens to speak up and businesses to act, and, indeed, there are a considerable number of Austrians who do speak out against nationalist agitation, as well as Austrian businesses that act responsibly and ethically.

The Austrian drugstore chain dm-drogeriemarkt (dm) provides an example of how one business has taken action in the current situation. Aware of the shortage of hygiene products in refugee camps, dm started an initiative to provide refugees with these goods. The corporation offers their customers different charity packages through which they can donate a certain amount of money to this initiative. Dm uses the donated money to buy as many hygiene products from its suppliers as it can and then handles all logistics to pick up and deliver these products to refugee centers.¹⁶ Dm does not make any profits in the process and so is not creating what Harvard Business professor Michael Porter called “shared value,” but dm found a way to use its core business — its superior trading position, its established logistics infrastructure, and its know-how — to provide help to the refugees.¹⁷ Moreover, building on its strengths enabled dm to use the donated funds more efficiently and with greater impact than any one individual could.

I recognize that it is important to get multiple perspectives on any issue and that most of the time there is not one single entity, whether a corporation or an individual, to blame for any problem. There is also rarely a single company or hero who can solve a problem and improve the whole world. Examining the actions of ORS or dm, for example, may seem too shortsighted, but their actions matter. The actions of these companies highlight, at least for me, that Friedman’s view of the role of business is not valid in a globalized world where domestic laws have to be coordinated with those of other nations, populists can still lead people in dangerous directions, and companies can have more power than any one country.

The actions of ORS and dm also point to the power of the manager or business executive. If managers are in constant discussion with all stakeholders, I believe the potential for business decisions that are detrimental to society and the environment can be reduced. In the case of ORS, the company should be communicating directly with the refugees and with NGOs that work in the field to determine how ORS can invest some of its profits to improve the situation.

¹⁶ “dm initiiert österreichweite Spendenaktion: ‘dm Flüchtlingshilfe’ startet,” dm press release August 5, 2015, accessed August 29, 2015, http://www.ots.at/presseaussendung/OTS_20150805_OTS0061/dm-initiiert-oesterreichweite-spendenaktion-dm-fluechtlingshilfe-startet-anhaenge.

¹⁷ Michael E. Porter and Mark R. Kramer, “Creating Shared Value,” *Harvard Business Review*, January-February 2011, accessed August 29, 2015, <https://hbr.org/2011/01/the-big-idea-creating-shared-value>.

Treat Them Like People

A Reflection on Migrant Farm Labor in the United States

“I wish they would treat them like people and not like shovels,” my tour guide sighed. We pulled out of a fava bean farm back onto the windy roads of Pescadero, California, a beautiful little town especially on this lazy summer day. With one general store, one tavern, and a few farm stands, it’s easy to see why Pescadero is a common stop for tourists on their way down Highway 1.

But my tour that afternoon showed me a different side to the town fawningly described on Yelp as “charming,” “cute,” and “sweet.” Bill (an alias to protect his privacy), the outreach coordinator for a local social services organization, probably knew all of the 643 residents of Pescadero registered by the United States Census. More impressive, however, was his knowledge of those likely counted less accurately: the migrant families.

We wove down remote roads, past farms and ranches in a Jeep. “There are six single guys living in that place with a shared bathroom and kitchen. And two families living in that one,” he said, pointing to a wooden structure the size of a trailer home covered in peeling yellow paint. “I mean, I know these farms are businesses and all, but I really just wish they would treat these workers as people. They work them 12 hours with backs bent over the entire day and pay them minimum wage. They don’t improve their housing, because no one makes them. Gah, I really just wish they would treat them like people and not like shovels,” he repeated.

Bill’s words sent chills down my spine. Just one month ago, I had stood in Auschwitz, where humans literally had been treated like shovels destined for gas chambers. When Bill and others referred to the migrant homes as “barracks” and “labor camps,” I cringed as I recalled another set of barracks in Birkenau. I could still feel the dank air and see the dirt floors of those brick and wood rooms that slept up to seven people in a single bunk.

My uneasiness was compounded by the fact that I am a business student. Attending an elite university and paying an annual tuition that is three or four times what these workers make each year, I am learning how to run a business, or as skeptics may think, how to exploit people and come out on top in the end. Visiting Pescadero, I acutely felt the guilt of participating in the system that Bill and these workers bewail, the system that “treats people like shovels” or like expenses on a balance sheet rather than as human beings. During the Holocaust, business was the giant that used forced labor to stay afloat, that started Monowitz (Auschwitz III) to produce synthetic rubbers and fuels, and that murdered millions by forcing them to work in the cold,

with no food, and in deplorable conditions. Today, businesspeople are often portrayed as greedy slaves to bottom-line profits, willing to allow the numerical ends to justify the human means. Critics argue that the industry has, in the words of Irish business philosopher Charles Handy, forgotten that “the purpose of a business ... is not to make a profit, full stop. It is to make a profit so that the business can do something more or better.”¹

Should we be alarmed at the plight of migrant workers in America, or is this, so-to-speak, business as usual: the unsavory reality that there will always be haves and have-nots in a capitalist economy? If we should be alarmed, what is the ethical response to such a large-scale problem? In this paper, I would like to briefly examine both of these questions from an individual and a corporate perspective through the lens of the oppression of the Jews during World War II.

As Auschwitz survivor Primo Levi wrote of the Holocaust, “It happened, therefore it can happen again: this is the core of what we have to say.”² Levi’s words are a cautionary call to be on guard against the many levers that, when pulled together, have historically produced genocide of unimaginable magnitude. On an individual level, some of those levers include the marginalization of a people and the use of terror, fear, and hierarchy to command obedience. On a corporate level, there are complex social structures which allow individuals to abdicate responsibility for a large problem because of ignorance and helplessness. While it would be a grave fallacy to equate migrant labor in America with the labor camps of World War II and the death camps of Auschwitz, there are parallels that should set off blaring alarms regarding business as usual on America’s farms. With the benefit of hindsight, historians can reflect on turning points that led to the Holocaust: the cheapening of human life brought on by the bloodshed of World War I, the Nuremberg Laws that forbade marriage between Jews and non-Jews and excluded Jews from Reich citizenship, and in the end, the Wannsee Conference at which Nazi leaders agreed upon the Final Solution, a calculated plan for mass murder of all European Jews. Because we do not yet have hindsight on present-day injustices, and incremental change is notoriously difficult to detect as it is happening, we must be especially wary of the first signs of the systemic marginalization of any group of people in our own times.

Historically, migrant farm workers have been critical to the American agricultural system, but stigmatized and treated as second-class citizens. As a farmer said in the famous 1960 CBS *Harvest of Shame* documentary, “We used to own our slaves; now we just rent them.” Unfortunately, the migrant labor conditions depicted in the work of author John Steinbeck and in the *Harvest of Shame* have not changed much in the last 50 years. In 2012, the U.S. Department of Agriculture estimated that there were nearly one-and-a-half million hired farm workers in the country. Median wages for crop, nursery, and greenhouse workers are \$8.99/hour, yielding an income of just under \$19,000 per year with full employment, and most

¹ Charles Handy, “What’s a Business For?” *Harvard Business Review*, December 2002.

² Primo Levi, *The Drowned and the Saved* (New York: Vintage Books, 1989), 199.

migrants are not even able to obtain full-time work.³ The marginalization of migrant workers is a product of a number of factors. They have weak bargaining power in the fields and have poor access to education and social mobility opportunities. Moreover, they are typically portrayed negatively in the media. In a one-and-a-half year immersive ethnographic study of migrant workers, physician and scholar Seth Holmes found:

Marginalization begets marginalization. The indigenous Mexicans live in migrant camps, because they do not have the resources to rent apartments in town. Because they live in camps, they are given only the worst jobs on the farm. Unofficial farm policies and practices subtly reinforce labor and ethnic hierarchies. The position of the Triqui [indigenous Mexican] workers, at the bottom of the hierarchy, is multiply determined by poverty, education level, language, citizenship status, and ethnicity.⁴

In the worst cases, marginalization is also fed by terror, fear, and hierarchy. Undocumented migrants from Mexico experience terror at the outset as they make the dangerous trek across the border, all too aware that they are unwanted in this country (despite the conspicuous “Help Wanted” signs), and that they could be caught by authorities at any moment. Workplace safety violations, low wages that violate American labor laws, and cases of sexual harassment all go unreported because workers fear deportation and cannot advocate effectively in English. In addition to the extreme power imbalance between migrant workers and their American-citizen bosses, the pressure from inhumane conditions exacerbates hierarchies within the migrant community. Although by no means equivalent, migrant workers who are given authority over their fellow workers, as supervisors or otherwise, inhabit a position that faintly echoes that of the *kapos* in Nazi concentration camps. Just as the Jews had the lowest status in the concentration camps of World War II, so too, most indigenous Mexican migrants are relegated to the most physically taxing work. Other migrant workers (often of other minority ethnicities) who have a higher status, however, are afraid to advocate for those with less power, because they fear losing the privileges that come with their position. These power structures help perpetuate a dehumanizing order, and marginalization thus becomes part of the normal fabric of daily business.

On a corporate level, the plight of migrant workers is easily blamed on big business. If only big agriculture would treat its workers more humanely! However, as Holmes also points out:

The stark reality and precarious future of the farm serve as reminders that the situation is more complex. The corporatization of U.S. agriculture and the growth of international free markets squeeze growers such that

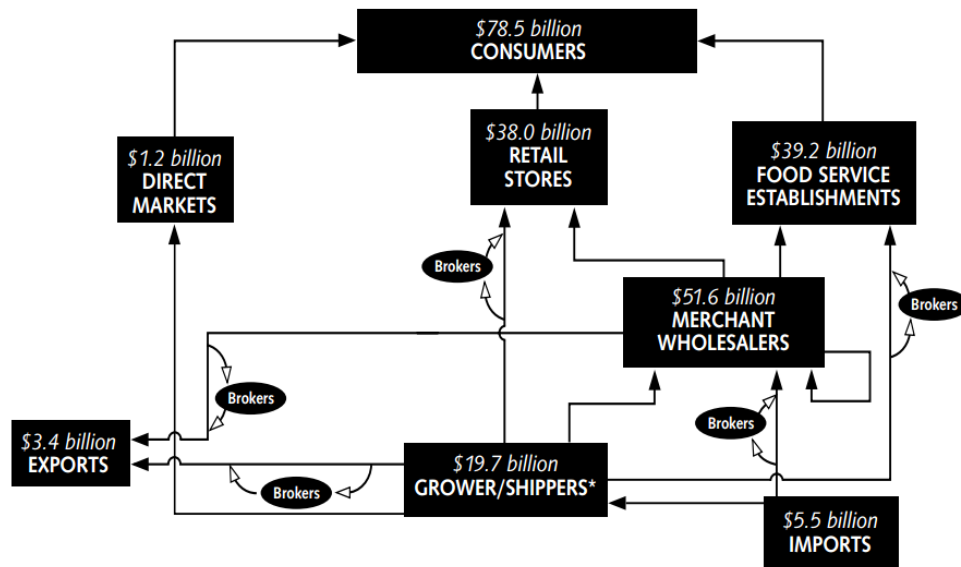
³ “Farm Labor,” United States Department of Agriculture Economic Research Service,” last modified October 20, 2015, <http://www.ers.usda.gov/topics/farm-economy/farm-labor/background.aspx>.

⁴ Seth Holmes, *Fresh Fruit, Broken Bodies* (Berkeley: University of California Press, 2013), 78.

they cannot easily imagine increasing the pay of the pickers or improving the labor camps without bankrupting the farm. In other words, many of the most powerful inputs into the suffering of farmworkers are structural, not willed by individual agents.⁵

The fresh-produce supply chain is complex. Starting with the producers (farm laborers, supervisors, owners), the produce travels via distributors (shippers) to wholesalers, retail grocery stores, and exports (see Figure 1). Each member of the chain is focused on his or her own survival and success. Those who care to think about how they fit into a larger system are acutely aware that they are only one player in a convoluted web that is not easily untangled or remedied. On a daily basis, each member of the supply chain answers mainly to the adjacent link in the chain (i.e., the farm supervisor to the picker or the wholesale buyer to the farm owner). It is easy to see parallels to the words of Adolf Eichmann, the logistics coordinator for the mass deportation of Jews to ghettos and extermination camps: “I was one of the many horses pulling the wagon and couldn't escape left or right because of the will of the driver.”⁶ Individuals along the supply chain feel a sense of helplessness in the face of a labyrinthine system.

U.S. Fresh Fruit and Vegetable Marketing Channels, 2000



*Because data are not available for packing and shipping charges for all commodities, this value underrepresents the total shipping point value for all fresh produce.

Source: Kaufman, et al., 2000, adjusted using CPI for fresh fruits and vegetables.

Figure 1⁷

⁵ Holmes, *Fresh Fruit, Broken Bodies*, 52.

⁶ Peter Edidin, “Eichmann's House: The Bureaucracy of Murder,” *The New York Times*, March 5, 2000.

⁷ Debra Perosio, et. al., “Supply Chain Management in the Produce Industry,” *Research Bulletins, Cornell University, Department of Applied Economics and Management* (September 2001): 3.

But if American consumers and businesses find the living and working conditions of those who pick the nation's produce appalling, are they really helpless to act? Is there a course of action that would make a notable difference in such a large-scale issue which touches politics, business, and more? History serves as a reminder that inaction is not an option, as observing or participating silently can have consequences that are just as dire as active assent. Historian Doris Bergen writes "In any case, leading Nazis found out that unanimous approval was not required. Indifference of the majority was all that was needed to carry out many plans."⁸ Silence is still a form of complicity, especially when it results in the oppression of minority groups. If not silence, what should be heard on this issue today?

Perhaps the first inclination in the face of suffering is to relieve pain on an individual basis by lobbying for more social services and public funding for these often-neglected communities. My summer internship was doing a form of this type of work; I worked directly with funders, social service providers, and school district leaders to design a college access and scholarship initiative for a district in which only 15 percent of graduating seniors go on to attend a four-year college. In interviewing 35 and surveying over 160 local parents and students, I learned of the deeply entrenched barriers to college and social mobility first-hand. While this sort of philanthropic and public work is extremely important to continue, I am also the first to admit that it is not sufficient to address the systemic issues that keep migrant families living and working in such poor conditions. Former migrant worker and union organizer Cesar Chavez once wrote, "We thought the only way we could get out of the circle of poverty was to work our way up and send our kids to college. That's the trap most poor people get themselves into. It's easier for a person to just escape, to get out of poverty, than to change the situation."⁹ If the prevailing conditions and structures do not change, society will not have progressed. As the children of Mexican migrant workers become educated and eligible for better jobs and improved lives, another minority group will simply take their place if nothing is done to change the current deplorable system for picking America's produce. Thus, it is imperative to discuss not only how consumers and businesses can help individuals out of poverty, but also how, as Chavez wrote, they can "change the situation."¹⁰

For consumers, the first step to action is education. Those who eat our nation's produce should also understand how it is cultivated, harvested, and distributed. While the organic and non-GMO movements of the past decades have focused popular attention on what goes into our food, there is still little awareness among the public of who harvests our food. Consumers should educate themselves about the conditions of migrant workers by availing themselves of information provided by advocacy groups like Farmworker Justice and the United Farm Workers union. They should no longer turn a blind eye toward the dilapidated migrant flats visible from the highway. And then they must vote with their ballots, dollars, and voices. They

⁸ Doris L. Bergen, *War and Genocide: A Concise History of the Holocaust* (New York: Rowman and Littlefield, 2009), 60.

⁹ Jacques Levy, *Cesar Chavez: Autobiography of La Causa* (Minneapolis: W.W. Norton and Company, 2007), 89.

¹⁰ Levy, *Cesar Chavez: Autobiography of La Causa*, 89.

must vote for humane working conditions for farm workers, such as paid overtime or access to shade and water during the heat of the day. They must think critically about immigration and temporary work permit debates; the current system invites individuals into the country to harvest our food, but treats them only as shadows of people who do not receive access to adequate healthcare, education, or social services. As much as possible, consumers must vote with their dollars by purchasing food labeled Fair Food and Fair Trade, which is sourced from farms that treat workers with dignity.

For large businesses, one obvious way to treat workers more humanely is to increase profit margins — without squeezing workers — and ensure that profits are distributed more equitably. Increasing profit margins in a way that does not come at the expense of worker pay and benefits requires serious reconsideration of the current system and infrastructure for producing the nation's food supply. Large chains must reexamine their systems to cut extraneous players, reconsider how to minimize wastage, and revisit pricing models to ensure that they are reflecting the work that goes into each fruit and vegetable on the shelf. If businesses are focused on creating more humane environments for their pickers, even a small price increase can make a world of difference. Since 2011, wholesale produce buyers participating in the Fair Food Program, including Walmart, Chipotle, Trader Joe's, Whole Foods, and McDonalds, have agreed to pay an extra one cent premium per pound of tomatoes, which has led to a near doubling of tomato pickers' annual wages.¹¹ The Fair Food agreement is one example of a worker-driven, consumer-powered movement which addresses day-to-day injustices in the fields. In their efforts to improve wages and conditions for their workers, business must not only pay attention to the rules of economics, but be willing to negotiate with unions and understand the role of politics.

Compared to large corporations, food start-ups have more flexibility to pilot innovations that will lead the food industry toward a more sustainable future. Companies like Farmigo, an online farmer's market that connects customers directly to local producers in their area, are using technology to make the Community Supported Agriculture (CSA) movement more scalable, creating shorter, more cost-effective supply chains.¹² Oakland-based Imperfect Produce, which sells what it calls "cosmetically challenged" fruit and vegetables, is working to reduce the six billion pounds of produce wasted on U.S. farms each year by buying directly from local farmers and attempting to eliminate the stigma on "ugly" produce.¹³ These creative strategies bring consumers closer to the farming process and perhaps will encourage Americans to be more appreciative of the hands that harvest each item on their plates.

¹¹ Fair Food Standards Council, *Fair Food Program 2014 Annual Report*, <http://www.fairfoodstandards.org/reports/14SOTP-Web.pdf>.

¹² Susan Adams, "This Entrepreneur Thinks His Startup, Farmigo, Will Kill Off Supermarkets," *Forbes*, May 11, 2015.

¹³ Jennifer Medina, "Getting Ugly Produce Onto Tables So It Stays Out of Trash," *New York Times*, Nov. 23, 2015.

No individual or business has to be a powerless pawn or silently complicit in the systemic injustices against migrant workers in America. Though it will take ingenuity to re-envision the agricultural industry, commitment to long-term change, and persistence to continue, even at cost, consumers and businesses have the resources to influence America's farms for the better. For those empowered by the lens of history, the hindsight of the past can be used to shape the story of the future. Individuals cannot ignore an issue just because it only seems to affect those who seem far removed from them on the social hierarchy. As Protestant pastor Martin Niemöller famously said during the Holocaust:

First they came for the Socialists, and I did not speak out —
because I was not a Socialist.
Then they came for the Trade Unionists, and I did not speak out —
because I was not a Trade Unionist.
Then they came for the Jews, and I did not speak out —
because I was not a Jew.
Then they came for me — and there was no one left to speak for me.¹⁴

In light of history, may our nation become one that advocates for the weakest in society with creativity, humility, and courage. And may we learn to treat people like people.

¹⁴ “Martin Niemöller: First they came for the Socialists...,” *Holocaust Encyclopedia*, United States Holocaust Memorial Museum, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007392>.

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

2015
JOURNAL

JOURNALISM
PAPERS

INTRODUCTION TO A SAMPLE OF THE 2015 FASPE JOURNALISM PAPERS

Most journalists spend their days trying to get answers from others. Who hired the burglars? Why did the levees break? How did the virus spread? Who-what-when-where-why?

FASPE offers young journalists an unaccustomed challenge: facing questions about themselves. During 11 intense days of travel, discussion, and reporting, our group of 12 intelligent, dedicated young professionals often found themselves, they said, with more queries than answers. Some of those questions were the kind everyone asks when confronting the shadow of the Holocaust: Would I have had the courage to resist? How far would I have gone to defend principles important to me? But when our discussions led us to reflect on contemporary situations, some of our settled ideas about our profession of journalism wavered and new questions elbowed in. Fellows rethought decisions they themselves had made. They reconsidered the work of other journalists. They wondered what they'd do when the rules didn't fit or the ethical terrain was complicated. "FASPE completely ruined my life," one Fellow said at the end of the trip. "It made me re-evaluate my past conduct, my future goals, and what I want to do professionally. And that, I think, is the entire point."

For their final assignment, each Fellow drew on his or her experience of the trip to further explore a journalistic dilemma or ethical issue. Four are reprinted here.

Katelyn Verstraten's piece, "The Dilemmas We Face: How Young Journalists Draw Ethical Red Lines," provides a wonderful example of critical self-assessment. In her essay, Verstraten interviews other young journalists and veteran editors about ethical challenges they have faced as a way of finding a rule, a philosophy, she can use. Joanna Plucinska thoughtfully examines another challenge, turning to the difficulties of being an outsider reporting on a culture, or a situation, we don't understand. In her essay, "Western Media and the Hong Kong Protests: A Lesson in Balance," she chronicles some of the mistakes reporters made and shows how difficult doing the right thing can be. Finally, both Lex Talamo and Alexandra Levine examined a third topic: the challenge of trying to protect a vulnerable source while also getting a balanced, thoroughly reported story. In "To Show or Not to Show: Videos of Vulnerable Sources," Talamo writes about coming to terms with what to show to an audience, reflecting on our discussions about photography, sensationalism, and newsworthiness. Levine's "Vulnerable Sources Can Make Journalists Vulnerable" is more self-reflective. Levine uses an example from her own reporting on a vulnerable source she felt misled by and then examines the *Rolling Stone* debacle, in which journalist Sabrina Ruben Erdely did not question her apparently vulnerable source.

Uncertainty can be unnerving, but FASPE compels us to consider that certainty has its own perils too. As one of the Fellows reflected at the end of the trip, "FASPE doesn't just give you a 'this is the correct answer' guidebook to ethical dilemmas; FASPE specializes in plurality, in the context of ethical questions. I feel it's given me the tools to navigate very complex grey areas in the future, rather than an easy checklist of 'how not to be awful.' And that's the most important thing, I think."

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The Dilemmas We Face

How Young Journalists Draw Ethical Red Lines



The author at the House of the Wannsee Conference in May 2015. (Photo by Jessica Davey-Quantick)

This story began when an elderly woman with dementia wandered onto a busy highway in the middle of the night in July 2014 and was killed by a hit-and-run driver. Police found her lifeless body in the morning and notified the family. Her children and grandchildren were devastated. Officers began searching for the driver.

I was the journalist assigned to cover the story for one of Canada's largest mainstream media outlets, an organization I had been working at for just three months. My editor was adamant that

speaking to the woman's family was a top priority, so I immediately called the police to see if the family wanted to talk with me. They didn't, an officer told me, at least not for now. They were grieving and wanted privacy. I assured him I understood.

But my editor did not. "That doesn't matter," he said. "We need to get a quote from the family!"

"But they don't want to speak with the media right now," I said carefully. This man was my boss. I respected both him and his work. Disagreeing too adamantly could earn me a reputation of being difficult to work with, or cost me my job.

"So scour social media, search for the family online," he instructed. "Someone must know something! Let me know what you find and we can send someone to their house." And with that I was dismissed.

Back in my office, I uneasily contemplated my task. I had reached out to the family, and they had declined to comment. My editor still wanted me to speak with them. Something about this felt very wrong.

A year after this ethical quandary occurred, the incident continued to haunt me. I couldn't stop thinking about it. So this summer, I decided to reach out to other young journalists and ask them

about the ethical dilemmas they have faced — or anticipate facing over the course of their careers.

“There are a thousand eager journalism students willing to take my place.”

Jimmy Thomson, a 27-year-old freelance journalist, has reported from all over the world: from China to the Norwegian Arctic, from the Middle East to Russia. Yet when I ask him about the most ethically challenging situation he has been in, he describes his work with one of Canada’s leading publications.

The publication — which Thomson has requested remain anonymous — has partnerships with an organization representing multiple oil companies, partnerships that significantly influence their editorial output. The journalists working at the publication are doing great work, Thomson notes, but the publication is not acting as ethically as it should.

Thomson was told by his editors to write several pieces about the natural resource industries — and that the oil organization would have full editing rights. He believed the publication was being ethically compromised by their connection with the organization, but as a young journalist he felt his ability to object was limited.

“I want to write for them,” says Thomson, who wrote the pieces but asked not to have his name attached to the work. “In the future I want to have that door open, rather than slamming it because of some ethical conundrum ... I didn’t want to sour my relationship.”

Concerns about “souring” a critical mainstream media relationship or being a replaceable commodity are common among my peers.

“I feel like I haven’t gotten a good enough foothold in the journalism profession where I feel safe airing my ethical misgivings,” says a freelancer in her mid-twenties who asked to remain anonymous. She tells me about ethically fraught situations in which she voiced concerns to an editor, and was made to feel “small and replaceable.”

“I’m a young journalist in a highly competitive industry,” she says. “If I disagree, and it’s perceived as dissent, there are a thousand eager journalism students willing to take my place.”

Jessica Davey-Quantick, a FASPE Fellow and journalist who worked in both Canada and Qatar during her twenties, agrees. “If I don’t take that picture, somebody else is going to,” she says. “If I don’t get that quote, or interview someone, someone else is going to. There’s so much competition!”

So how can young journalists follow our ethical compasses while pleasing our editors and reporting the truth?

“I think it can be a real Catch-22.”

After speaking with my peers, I decided to turn to two of my journalism ethical gurus: Kathy English, public editor of *The Toronto Star*, and Kirk LaPointe, former ombudsman for the *Canadian Broadcasting Corporation* and ethics professor at the University of British Columbia’s Graduate School of Journalism.

“It doesn’t matter what your news organization tells you, you have to know within yourself what’s right as a journalist,” English says. “How far do you go for a story? How far do you allow yourself to be pushed? We all have to find our own ethical moral compass for the way we do journalism.”

“But how do we please our editors when they disagree?” I ask.

“I think it can be a real Catch-22,” English says. “It’s easy for me as an idealist to say ‘hold on to your own ethical principles,’ but when you come smack up against the wall of a superior telling you to do something, I’m not sure how you reconcile those things.”

She pauses, and I feel relieved. If one of the most ethically experienced journalists I know finds these issues challenging, it’s no wonder I feel confused early in my career. “It won’t always be easy. There’s no doubt about that,” she continues. “There are true ethical dilemmas for young people. Thinking about it in advance really helps — what you stand for, what you believe, and what your views are rooted in.”

LaPointe agrees.

“You’re going to be your own personal ombudsman,” he says. “You can’t rely on your organization to be doing all these things. You have to have your own framework, and bring it with you.” LaPointe reminds me of the codes of ethics created by both the Society of Professional Journalists and the Canadian Association of Journalists. By using guidelines such as these, he says, young journalists can develop their own ethical code.

“Try to develop reflexivity in your work — and try to do it regularly,” he adds. “So that when you review your own body of work at the end of the week, month, year, you can see where you were congruent to these principles. That, to me, is success for a journalist these days.”

My conversations with LaPointe and English remind me of an epiphany moment I experienced while on the FASPE trip in May 2015. It was a profound ethics fellowship, but a particular moment at the House of the Wannsee Conference in Berlin stood out for me.

Wolf Kaiser, deputy-director of the House of the Wannsee Conference, was leading us in a discussion about the ethical dilemma journalists faced in Nazi Germany. Kaiser said those journalists had four choices: “Become a Nazi, leave the profession, keep working as a journalist

but try to send ‘between the lines’ messages, or immigrate and publish their work outside the Reich.”

“But how did it get to that point?” I asked him. “How can we avoid being in such an extreme ethical dilemma?”

“You need to decide on your ethical principles well, well in advance so you’re not caught off guard in an unethical situation,” he replied. “Draw your ethical red lines when things are good, and then you won’t cross them when things are bad.”

“It’s a constant assessment and reassessment.”

My principles led me to abandon the quest to find the hit-and-run victim’s address. But one of my colleagues was successful in tracking down the family, and went to their home. The family asked again for privacy and declined to comment. Newsroom life went on.

I haven’t forgotten about the grandmother, or how her life ended. The longer I am a journalist, the more I understand the role ethics play in my career. Every day, issues that require a quick ethical decision arise, and every decision is significant, shaping the journalist I will become.

My ethically-minded colleagues may not have all the answers, but they are doing their best to find them.

“I have a strong sense of ethics, but all journalists, myself included, are constantly confronted with situations that defy those ethics,” said the anonymous freelancer. “It’s a constant assessment and reassessment. The best thing I can do to maintain my ethics is not subscribe to a rigid set of guidelines but instead keep talking and reading about ethics.”

“I think there are many ethical red lines, and I prefer to see it as a dart board,” agrees Thomson. “You’re standing in the middle of it and surrounded on all sides by different ethical lines you could cross. And you just have to try not to stray too far from the middle.”

“The biggest thing for journalists is that no matter what your ethical decision, you have to be able to defend whatever it is you do,” said Davey-Quantick. “We can try and arm ourselves as much as we can, but at a certain point we are going to have to sleep at night. And if you can’t, then you have to try and make some changes.”

There are no clear answers when it comes to the ethical dilemmas we face in our careers, but maybe that’s the beauty of it: that as young journalists we can constantly “assess and reassess,” feel confused, lose our way, then learn, and try again.

Western Media and the Hong Kong Protests

A Lesson in Balance

In the fall of 2014, the Occupy Hong Kong movement captured the attention of the world and the Western media. It was the largest protest to ever grip the city — the local media, let alone foreign reporters, had never seen anything like it. Many journalists had to figure out how to report the story without bias as they tried to understand cultural nuances while also churning out daily stories. The cultural complexities and rifts in the city made this extremely difficult, especially for Western media.



The 2014 Hong Kong protests. (Photo Underbar
dk/Wikimedia Commons)

Hong Kong's deep societal divide, evident throughout the protests, originates from the push and pull between China's rule over the former British colony and the democratic values that many residents cling to. In 1997, when the transfer from Britain to China took place, Hong Kongers were told that they would one day have universal suffrage — meaning that eventually they could directly elect all their political representatives. At the time of the handover, Hong Kongers could only elect 35 members of their 70-person Legislative Council, and they had no direct say in the election of their chief executive — a situation that still holds today.

In August 2014, China and Hong Kong's political leadership finally proposed democratic reforms that would allow Hong Kongers to elect their chief executive directly. But there was a catch: the people of Hong Kong could only pick from a set of three pre-selected candidates. The government proposal triggered widespread dissent. Protesters wanted universal suffrage *without* the Chinese government's intervention.

Protesters soon began to occupy the Legislative Council buildings in the Admiralty neighborhood of Hong Kong and to demonstrate in the Causeway Bay area. Throngs of foreign, English-language journalists descended upon Hong Kong, desperate to find out more about the burgeoning revolution. Some of them had no knowledge of Hong Kong politics and had to

quickly gather sources and stories. Many of the pro-democracy protesters were young, eloquent, well-versed in English, and able to speak in sound bites.

For many reporters, these young people were the easiest sources of information. As a result, a simple narrative dominated much of the West's early coverage of the events: the protests represented the democratic struggle of Hong Kongers. "Relatively speaking international media reports related to activists, and the conflict between protests and government," said King-wa Fu, a media professor at Hong Kong University who focuses on the Chinese and Western media coverage of China. As freelance reporter Tom Grundy, who wrote for the *BBC*, *Quartz* and *Global Post*, put it, "Most of the time you were surrounded by pro-democracy protesters and you were just reporting the facts as you saw them."

But according to Western media conventions, reporters should dig below the most visible and accessible information. To produce more nuanced, multifaceted stories, journalists needed to speak not just with the protesters, but also to those who opposed them. This proved challenging, as one side of the protest was not open to conversation. Skeptical of Westerners and profoundly tied to the culture of mainland China, the "anti" protesters proved elusive and even hostile towards foreign reporters.

Rishi Iyengar landed in Hong Kong to start an internship at *TIME* magazine the day the protest movement began. For the next five months, he and a team of two other interns were responsible for the coverage of the movement. All were educated in either the United Kingdom or in the United States, and none of them spoke a word of Cantonese, the local language. None had lived in Hong Kong before.

According to Iyengar, their editors made it clear from the start that they were reporting for an American audience. They weren't to get caught up in the more local details of the revolution — the court cases and the day-to-day squabbles. Instead, Iyengar said, the editors told them to consistently take a 10,000-foot view of the protests and ask themselves: what do our readers want to know?

The answer: democratic struggle and China's disruption of it. After all, 78 percent of *TIME.com*'s readership was based in the U.S. "These guys are fighting for democracy," Iyengar said in a recent interview. "It wasn't about what the people of Hong Kong feel as much."

As the protests went on, however, *TIME*'s reporting became more nuanced. The interns came to better understand the city's political landscape, so they actively sought the voice of the other side. Over the course of months, Iyengar explained, their editors started insisting that each piece needed at least a few sentences of counter-balance. One intern, Elizabeth Barber, was solely responsible for contacting the pro-Beijing government camp, the name given to the legislators who were against the protest movement. They often provided brief sound bites for more

political stories. Iyengar also ventured out to find non-local Chinese people to see how their views might differ from those of Hong Kongers.

But when it came to speaking with Chinese people on the street, things proved difficult. “I’d talk to three, four, five people and they’d all be like, ‘no English sorry,’ before I’d actually get to someone,” Iyengar said. The interns eventually began to ask random Hong Kongers to translate speeches and conversations for them, but it was a time-consuming, inefficient process — one that didn’t weigh down their colleagues who had grown up in the city. Those journalists faced different challenges.

For Kris Cheng, a freelancer who writes for Western publications and was born and raised in Hong Kong, no linguistic barrier existed. Cheng speaks Cantonese fluently and understands local slang. For him, the main challenge was cultural. As a young Hong Konger who attended school with many of the protest leaders, it was difficult for him to understand those who opposed the protests. “Young people like me don’t have friends against the movement,” he explained. “[Even] if you really want to find someone who is against the movement, you can’t find any.”

Cheng made an effort to remove himself from his familiar circle to ensure he covered every part of the story. He would often go to Mong Kok, a suburb of Hong Kong where many of the anti-protest groups gathered.

But he did so at his own risk. When confronted by pro-democracy protesters or even by journalists, those opposed to the protests could become violent. Many journalists complained of veiled threats and physical confrontations with anti-protesters, and videos of scuffles between protesters and police spread across social media. “Sometimes they would talk to you and sometimes you would get hit in the eye. Some of them were very emotional; it depended on the mood of the day,” Cheng said.

Isabella Steger, a reporter for the *Wall Street Journal*, also found that being affiliated with a Western newspaper sometimes hindered her reporting. “There was this conspiracy developing about the foreign media’s involvement in the protests that was being propagated by state media,” said Steger, who also grew up in Hong Kong and speaks Cantonese. “I heard people [saying that] we only report one side of it anyway so what’s in it for them to speak to us.”

These experiences made her more aware of the pro-protestor values many Western journalists had espoused — and how those views could alienate not just the *Journal*’s readership, but also locals. Steger made sure to report the facts and only the facts, even on her social media accounts. “I don’t feel that anyone [at the *Journal*] was overly open, or naked about [their pro-democracy] beliefs in the journalism that they produced,” she said. “We would keep it straight and say ‘this is what’s happening’ without added evaluations of who’s at fault.”

Even the foreign reporters who arrived in Hong Kong solely to cover the protests learned to better recognize their own biases over time, while still trying to cover the story broadly for a global audience. Whether it was through developing local contacts, using translators, or simply spending more time in the city, Cheng says, Western media outlets eventually figured out how they fit into the city's complex identity politics. "[Foreign journalists] tried to get why the whole thing is happening, they got better at understanding why there's a protest culture and why Occupy is more than just a big protest," Cheng said.

Their reporting still ended up differing dramatically from local media coverage. It was less thorough and, ultimately, still somewhat slanted, according to Fu. "The international media took a more critical stance towards the Hong Kong government and China [compared to local media,]" Fu said. But he thinks that Western media outlets are hardly to blame for this — after all, it was a conscious decision on their part. "They have their own interests and that reflects their editorial direction and their readers' interests, so of course you see differences," Fu said. "I don't think it's unique to Hong Kong."

To Show or Not to Show

Videos of Vulnerable Sources

Photographic and video images can reveal great truths, expose wrong doing and neglect, inspire hope and understanding, and connect people around the globe through the language of visual understanding. Photographs can also cause great harm if they are callously intrusive or are manipulated.

— National Press Photographers Association’s Code of Ethics

For decades, viewers have criticized the media for sensationalizing stories to get subscriptions or, more recently, page views. Gory images and grisly videos have proliferated on TV broadcasts and online venues, causing controversy about what’s appropriate for the public to see. When a story contains graphic or potentially offensive content, ethical questions arise about the newsworthiness and purpose of making that content accessible.

For reporters, a tension exists between showing the truth of a situation while being sensitive and respectful to viewers and victims, especially when vulnerable populations are involved. According to the *American Journal of Managed Care*, a “vulnerable population” includes people who are “economically disadvantaged, racial/ethnic minorities ... uninsured ... children,” and those who have chronic health conditions.

The tension between telling an important story and being sensitive was at the center of multimedia work I did for an internship I held over the summer at *News 21*, an investigative unit based in Phoenix, Arizona. *News 21* hired a team of almost 40 student reporters to take a comprehensive look at how legalizing marijuana is affecting the country.

One of my stories involved covering parents who are advocating for access to medical marijuana for their chronically ill children. My reporting took me for a week to Pennsylvania, where medical marijuana is illegal. My team and I traveled to 15 cities throughout the Pittsburgh, Harrisburg, and Philadelphia areas, and met with eight families and several doctors. Several ethical dilemmas resulted from that trip.

The mother of 12-year-old Hannah Pallas, who suffers from intractable epilepsy, had put together a series of *YouTube* videos in an attempt to explain to politicians and legislators what it was like to be the mother of a severely epileptic child. The *YouTube* videos showed Hannah strapped into a bright pink helmet, alternately contorting with pain and lying comatose after a

grand mal seizure. The girl had tried different diets and 18 different seizure medications as well as having a Vagus Nerve Stimulator and a feeding tube installed — but the seizures continued, nevertheless. The mother shared the links to the videos with us and gave us her permission to use them in our project.



Hannah Pallas, 12, wears a helmet to protect her from sudden drop seizures caused by intractable epilepsy. (Photo courtesy of Heather Shuker)

In the end, we didn't use the videos, because *News 21* prefers for us to use our own footage, but we did film Hannah undergoing several seizures, and we included the footage in our final project. Showing these videos to our audience served a journalistic purpose: audiences would better understand what a seizure entails (as well as the devastating long-term effects of repeated seizures) when they saw one, as opposed to just reading a description of one.

Yet, even though her mother wanted Hannah's story publicized, these graphic images of her daughter are now out on the web in perpetuity, leaving the family vulnerable to public comments. Some of them, posted in response to the mother's own *YouTube* videos, are offensive. One reads, "If that was my kid I would move ASAP to a legal state. Even Florida allows growing and consuming since last year for true medical purposes if there is no better alternative. MOVE, your state isn't all that great anyways."

My reporting team was faced with a second ethical dilemma when we had to decide whether to use photographs we had taken of a 17-year-old girl's "drop seizures" — seizures during which the girl violently and unexpectedly collapsed to the floor — which left her with several missing teeth, bruises under her eyes, and stitches in her forehead. The girl's mother allowed us to film her daughter and take photos, saying, "I hate to see her beautiful face like this, but people need to see this." In the end, we decided not to use the photos because of their graphic nature and out of concerns for the daughter's privacy; instead we were able to use some of the mother's thoughts in her own words in the print section of our piece.

Our main ethical issue arose when two of the mothers we were scheduled to interview ended up in the same hospital on the same day with their daughters, both of whom had just experienced a series of life-threatening seizures. We contacted the mothers and received permission to take video gear into the hospital rooms; then we contacted the public relations department of the hospital and received their permission as well.

When we arrived to film, however, we were told by the public relations liaison that we would be flanked by a hospital staff member for the duration of our interviews. I was concerned that

the hospital staff member would report the mothers for advocating for medical marijuana for their children when speaking with us; several mothers in other states had told us they had been reported to child protective services for less. Before I went into the interviews, I called my editor and asked her about potential repercussions. Her response was, “They are adults. They are making the decision to talk with us.” So I did ask questions about medical marijuana and, even in the hospital rooms, the mothers were open in their opinions. We’ve kept in touch with the mothers, and there have been no repercussions from our visit so far.

Thankfully, I had a superb editor at *News 21* who helped guide me through some of the reporting dilemmas I discuss above. But I was left wondering how to handle situations like these as I move forward in my reporting career, and so I started looking into various codes of ethics.

I found some advice online from *A Guide for Journalists Who Report on Crimes and Crime Victims*, which states, “On the one hand, it is important that news organizations do not sanitize the impact of criminal violence in our culture. However, on the other hand, sensational/grisly images often wound victims and their families without informing the public, many of whom are repelled.”

Two recent events, and how they were reported in the media, exemplify this tension. The first was the beheading of James Foley by ISIS. The beheading of James Foley and other victims by ISIS were newsworthy events. Showing the video presented a true and accurate portrayal of the terrorist act. News outlets that decided to show the video attempted to be respectful to viewers by issuing warnings, such as the following by Bret Baier of *Fox News*:

“The images are brutal, they are graphic; they are upsetting. You may want to turn away. You may want to have the children leave the room right now. The reason we are showing you this is to bring you the reality of Islamic terrorism and to label it as such. We feel you need to see it.”

Similarly, *Reuters* defended its decision to show the images by saying that they were indispensable to helping viewers understand the situation. According to their ethics policy, the determining factor in such cases is “whether the material is necessary to an understanding of the reality portrayed or described.”

But the executive editor of the *New York Times*, Dean Baquet, argued, “There is no journalistic value to my mind of showing what a beheading looks like.”

The second event that highlighted the ethical concerns raised by airing visuals, such as photos or film, was the August 2013 sarin gas attack on civilians in a suburb of Damascus, Syria, which killed 1,429 people, an estimated 426 of whom were children. *CBS* reporter Scott Pelley covered this ghastly event on *60 Minutes* in “A Crime Against Humanity” and chose to air a

video segment that showed the effects of the gas on the human body as people were dying. Pelley stated that the footage was necessary for understanding the degree of atrocity committed.

“If you don’t see it, I don’t believe the impact truly hits you. Even though people will be disturbed by what they see, it has to be seen,” Pelley told *60 Minutes Overtime*. “We wanted the world to see what this was in all its ugliness. You can read about [the attack] all day, but if you don’t see it, I don’t believe the impact truly hits you.”

But others do not concur. Recently, an ethics professor at Arizona State University who prepared to show his journalism students the sarin gas video met with resistance. One woman raised her hand and said, “If you show that video, I will walk out. I didn’t come to class to watch kids die.”

An essential element of journalism is bearing witness to reality — a reality that isn’t always pretty. As Andrew Alexander, ombudsman of the *Washington Post*, said about covering a devastating earthquake in Haiti, “There is always this difficult line between respecting the sensibilities of your readers ... but also trying to capture the reality of something.”

To help journalists and editors find the right balance in their reporting, the Radio Television Digital News Association provides questions to help guide a journalist in using graphic content:

- What is the journalistic purpose? Does it clarify/help the audience understand?
- Is this the only way to tell the story? Are there alternatives?
- How will reporters justify the decision to publish the content?
- What are the pros and cons of publishing the graphic content?

These and other guidelines reinforce the advice given to me by my editor and my belief that reporting on graphic content related to vulnerable populations requires truth, but also sensitivity, purpose, as well as permission when minors are involved. During our reporting in Pennsylvania, we were careful to follow a guideline published on the website of the global health organization Americares, which encourages media not to disturb doctors or nurses in their work. We paused our interviews and stepped outside whenever a nurse needed to come in and change a child’s IV or check in with the family.

Other tips online for journalists in similar situations include seeking full permission from the parents of a minor, being respectful and building rapport before filming, and showing films and stories to the parents to make sure everything is correct and appropriately contextualized. To ensure that everything remains correct through to the final edit, the guidelines encourage collaboration between editors and reporters.

Many journalists also strongly recommend being transparent. Accordingly, in our work this summer, we told the parents we interviewed that we were objective journalists dedicated to

accurately portraying their children's stories, but that we were not there to choose sides or to be a catalyst to speed along marijuana legislation. The mothers responded well to our being upfront about our purpose and our coverage's limitations.

Collaborating with sources and including them in the fact-checking process can ensure that victims and their families retain some control and feel empowered by their own stories, while being transparent with sources about the roles and responsibilities of objective journalism helps to maintain a journalist's professional role.

Using graphic images and videos can help viewers have a deeper understanding of the situation. As Susan Sontag wrote in an essay on photography in 2003, "Narratives can make us understand. Photographs do something else: they haunt us." By using meaningful images and video in an ethically responsible manner, visual storytelling can make a story much more powerful and cause it to have a greater impact.

Vulnerable Sources Can Make Journalists Vulnerable

In the wake of a traumatic event, journalists must quickly decide if and how to respond. When writing and reporting on trauma, journalists are tasked with handling stories as ethically and sensitively as possible — with “sensitivity” having a broad range of meanings.

Some journalists may not seem sensitive at all, asking tough questions that might trigger uncomfortable thoughts, painful flashbacks, or defensive reactions from the person being interviewed. It’s debatable whether that makes the writer insensitive or unethical, or whether that is simply a journalist doing her or his job. Other journalists, who might seem relatively more “respectful” of a source’s trauma, may avoid these taxing questions altogether. But omitting those questions leaves the journalist in a dangerous position, with little testimony and few facts.

Trauma victims may become vulnerable and, in a way, re-victimized during an interview. But journalists risk becoming vulnerable by not asking difficult questions, putting their credibility on the line and causing others to doubt their reporting abilities. This dilemma is problematic.

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During my first week at Columbia’s Graduate School of Journalism, I pitched and reported a story on Selis Manor, Manhattan’s only residence specifically for the blind and visually impaired. I was learning classic, shoe-leather reporting, and I walked straight into the building’s office and began interviewing a young, athletic-looking guy named Anthony Butler, who was manning the front desk. Butler, who was 26 at the time, wore dark sunglasses: He told me he had gone blind six years ago as a result of an eye illness.

Just before publishing the article, I googled him as part of a quick fact-check. I discovered a short article written about Butler on a blog on the website of The New School in New York, where he had been a student, and the post explained that he had gone blind after being shot in the head. My stomach dropped. Had he lied to me? Or had he lied on the school blog? I wanted to publish the story as I had it — being the week-old journalist that I was, I was too afraid to go back to him and ask him whether he had, in fact, been shot in the head. I assumed it was too sensitive a subject, and I didn’t want to upset him. My editor did not agree. I had no choice but to verify which story was correct.

I called him, practically holding my breath, and Butler conceded that he had, indeed, been shot in the head. I hung up the phone. This would still not suffice for my editor.

I had to call back. I had to find out the street corner where it happened. I had to know the kind of gun. I had to know which part of his skull the bullet tore through. I had to know what part he remembered and what part he didn't. I had to know who provoked whom. And why. Whether there were drugs or alcohol involved. What he was wearing.

I was scared. I didn't understand how getting at the minutia of what had happened would advance the story. I worried that I might re-traumatize this man. He answered a few of my questions, but soon hung up on me. I wrote: "Anthony Butler, 26, who volunteers in the front office at Selis, went blind six years ago after being shot in the head by a 16-year-old during an altercation on a Bronx street."

I was mortified, having put Butler in this vulnerable, emotionally trying position. But had I not verified his account, I would've been just as vulnerable: I would have published a falsity, because of my own fear.

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This is precisely what happened to acclaimed journalist Sabrina Ruben Erdely.

Last fall, Erdely avoided the minutia. While reporting for *Rolling Stone* on an alleged gang rape at the University of Virginia, Erdely erred too much on the side of caution with her source, "Jackie," who recounted her traumatic experience being mass-raped at a college frat party. Erdely never contacted or interviewed Jackie's alleged rapists — and Jackie never even provided Erdely with verifiable names of her attackers — because the source said she was too afraid to face them, and that it was too psychologically difficult to reopen the gruesome wound. Erdely did not press the issue, having accepted that the trauma was too overwhelming to revisit.

Erdely's ethical dilemma became this: As a journalist, should she respect the victim's wish to avoid her attacker at all costs? Or should she be obliged to bring the alleged attacker into the conversation, which might prolong and amplify the victim's trauma?

After the story, "A Rape on Campus," had been published, people began questioning the credibility of Jackie's account and consequently of Erdely's reporting, one detail at a time. The facts were botched, some made up or unverifiable, and the story was ultimately discredited and retracted. It became widely known as one of the worst pieces of journalism to date. Erdely has since been disgraced and ridiculed, her name tarnished. Her decision to not drill down into Jackie's trauma put Erdely in a vulnerable position, and it may have marked the end of her journalism career.

'A Rape on Campus' **What Went Wrong?**

The headline of a report by the Columbia University Graduate School of Journalism detailing Sabrina Erdely and *Rolling Stone*'s mistakes.

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There are practical guidelines to help journalists navigate the line between re-traumatizing a source and doing due diligence. The DART Center for Journalism and Trauma, run through the Columbia Journalism School, provides resources to journalists doing crisis reporting, covering traumas including homicide, suicide, sexual violence, and natural disasters. But a checklist is only

helpful to a certain extent; “practical” guidelines might not be useful in a situation that is anything but practical or straightforward.

I returned from the FASPE trip with a better handle on how to deal with these sorts of ethical questions. We spent a considerable amount of time discussing how to fact-check a Holocaust survivor, how to interview a trauma victim, and how to distinguish between journalists who are “ethical heroes” and “ethical goats.” But when I dove into my first-ever journalism job, I was truly tested.

Shortly after arriving at *The Jewish Daily Forward*, I was assigned a story for the paper’s annual genetics issue in which I was to interview Eva Mozes Kor, an 81-year-old woman who is one of the last surviving “Mengele Twins” from Auschwitz. These twins were subjected to experimentation by the Nazi doctor, Josef Mengele, who would inject them with different unknown substances, not only to further German medical research, but also to determine the best “recipe” for a superior Aryan race.

So I called her up. I had read books on Kor, seen interviews with her, and knew that she had given lectures many, many times. We spent nearly two hours on the phone. The first hour was fascinating, but almost sounded scripted — I’d hear quotes that were verbatim from other interviews of hers that I had read. But one hour and ten minutes into our phone call, she broke down and began crying into the receiver.

She had been talking about the Chengeri twins, another set of siblings who had made it through Auschwitz with their entire family intact. After liberation, the Chengeris’ mother helped and looked after Eva Kor and her twin sister, Miriam, who had lost the rest of their family. Eva explained the dynamic between herself and the Chengeri family, how painful it was — despite the fact that they were helping Eva and Miriam — to have to live life looking at a family that had not been completely torn apart at the camp, as the Kor family had been. It was this one detail that pushed my interviewee over the edge.

I felt helpless on the other end of the phone line, and would have been less able to handle a situation like this face-to-face. I wondered whether I should apologize, or whether I was compelled to continue the interview. I wondered whether I should verbalize my sympathy or empathy, or whether that was not allowed because feeling for your source is not typically in the job description; in fact, showing any emotional bias is traditionally discouraged.

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It's easy to ask ourselves what is more important: maintaining a source's wellbeing, or publishing a deeply reported, factually accurate story? But there's no easy answer. Pick the former and you risk publishing inaccuracies or being ridiculed for not being thorough enough. Pick the latter and you risk being accused of being "that person" with little regard for a person's feelings, interested only in getting the juicy details and being the first and only reporter to break the news.

FASPE did not provide me with a black-or-white answer to any of these questions, or with a set, textbook way of managing these situations. But it did give me an invaluable framework through which I can begin to assess — one story at a time — how to maximize truth and minimize harm, without making one mutually exclusive of the other.

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

2015
JOURNAL

LAW PAPERS

INTRODUCTION TO A SAMPLE OF THE 2015 FASPE LAW PAPERS

Much of my professional career has focused on teaching and thinking about legal ethics, and I was honored and excited to join the FASPE Law program this past summer. I quickly realized, however, that while I was well prepared for the academic seminars on legal ethics, nothing could have prepared me for the emotional journey that is at the heart of the FASPE program. To draw on the history of such horrendous events and walk in the footsteps of both perpetrators and victims was at times too much to bear.

Thankfully, I had the company of an incredible group of 12 smart, interested, and committed law students — along with a wonderful group of colleagues and historians. We learned together in what was one of the most fulfilling educational programs I have ever been a part of. I hope the Fellows learned as much as I did from our discussions on topics that included the distinctions between law and morality, the ways in which lawyers have the power to make law, the ways in which attorneys can oppose laws, and how emotion can offer both challenges and benefits to legal work. We all took away the frightening lesson that it is all too easy to lose one's ethical compass.

The papers that follow are a sample of the work the Fellows produced after our program ended. They offer hints of both the intellectual richness of our group and the level of careful thinking about the legal profession in which our Fellows engaged.

The first essay is by Adam Mendel, who writes about the ethical challenges attorneys face when they find themselves confronted by the prospect of establishing a precedent that they themselves would find troubling or even repugnant. He asks: What should a lawyer do then?

The second essay looks at the issues facing U.S. attorneys whose foreign clients seek to exploit provisions of the United States Internal Revenue Code to shelter income and assets from tax liability in their home countries. As Carla Pierini Losada points out, there are surprisingly few guidelines for lawyers in this situation, forcing them to evaluate the ethical implications of their involvement independently. Carla's analysis suggests key ideas for these attorneys to consider.

The final paper is by Danielle Abada, who reflects more personally on the FASPE trip while questioning how individuals establish their own ideals, how they can determine if they should reassess those ideals, and what can make a person act in a way that breaks with his or her own beliefs.

While my own work has shifted since the end of FASPE, taking me out of academia to work in government for a year, I find myself frequently reflecting on FASPE and the varied and meaningful discussions we had about legal ethics in practice. In these moments I am once again struck by the compassion of the group I traveled with. They give me great confidence about the American legal system.

PROFESSOR DANA REMUS
FASPE LAW FACULTY
SENIOR COUNSEL AND SPECIAL ASSISTANT TO THE PRESIDENT

Lawyers and the Ethical Use of Precedent

In 1856, Chief Justice Roger Taney issued the infamous decision in *Dred Scott v. Sandford*. In this decision, the Taney Court held that Dred Scott lacked the standing to sue his former master for his freedom, because no slave nor descendent of a slave could be considered a citizen of the United States.¹ Today this case is universally reviled and, in the words of legal scholar Jamal Greene, “we hate it because it abided constitutional evil.”² The debate surrounding *Dred Scott* today is “why the decision was, not if it was wrong.”³ The fact that the case was wrongly decided is taken as a given, and it is perhaps the seminal case of the American anticanon.⁴

Despite the unanimity today in condemning the *Dred Scott* decision, however, it was not always so hated. According to legal historian Paul Finkelman, while “most Northerners were stunned and appalled by the decision ... Southerners generally applauded the decision,” and “[m]ost Northern Democrats accepted it.”⁵ Critically, the fact that it was accepted allowed the *Dred Scott* decision to be used as precedent in several cases, many of which are still considered good law today. Furthermore, while some of these cases draw from *Dred Scott* rather minimally or benignly,⁶ others do so much more extensively.⁷ The fact that *Dred Scott* was accepted as valid precedent for decades allowed for the decision to have a lingering effect on the law, even though the decision itself was overturned by the Fourteenth Amendment.⁸

Law is dictated by precedent, and the use of precedent engrains a line of inquiry deeper and deeper within the legal system. Citing an opinion from a previous case not only advances the position of one or the other litigant in the case at hand, but also impacts the law going forward. Lawyers are therefore faced with a dilemma in dealing with immoral precedents. It is not difficult to imagine an attorney today facing a situation in which she has to make a decision about using precedent she finds morally repugnant in defending a client.

¹ *Dred Scott v. Sandford*, 60 U.S. 93 (1856).

² Jamal Greene, “The Anticanon,” *Harvard Law Review* 125 (2011): 411.

³ Paul Finkelman, “Scott v. Sandford: The Court’s Most Dreadful Case and How It Changed History,” *Chicago-Kent Law Review* 82 (2007): 3, 4.

⁴ See Greene, “The Anticanon,” especially 406-411, 412-416, 417-421, and 422-426.

⁵ Finkelman, “Scott v. Sandford,” 5.

⁶ See *Four Packages v. United States*, 97 U.S. 404, 405 (1878), which states that consent of the parties does not give rise to jurisdiction; *Jackson v. The Magnolia*, 61 U.S. 296, 334 (1857), which argues for an originalist interpretation of the Constitution.

⁷ See *Elk v. Wilkins*, 112 U.S. 94, 100-01 (1884), which provides a basis for the denial of birthright citizenship to American Indians.

⁸ U.S. Const. amend. XIV.

In this paper, I will briefly analyze the moral predicaments in which lawyers may find themselves as a result of troubling precedent, and attempt to chart an ethical course of action for attorneys in such scenarios.

When I use the term immoral decision I am referring to any decision of which an attorney disapproves, on basis of its reasoning or outcome, due to extreme moral disgust. In other words, simple disapproval or disagreement is not enough — an attorney is not expected to agree with every law or precedent, but that does not mean every decision with which the attorney disagrees is immoral. Only those cases which an attorney finds truly morally reprehensible are to be included in my definition going forward. Furthermore, because I intend to address an attorney's internal ethical dilemmas, it is unnecessary to name specific cases which may fit within this definition, since whether a case fits within the definition depends on the subjective opinion of the individual attorney.

Second, I am only including in this definition cases that are beneficial to the client and are either binding or extremely persuasive authorities for the court in which the case is being heard. In other words, for a federal district court, district court cases from within the circuit, circuit court opinions, and Supreme Court decisions, would be included in the definition. For a case being heard in a circuit court of appeals, the past opinions of the circuit, other circuits' decisions, and Supreme Court cases would all be included. I limit the definition to such cases, because attorneys have much greater leeway in deciding not to use less persuasive precedents. For example, a federal district court in Utah would be unlikely to give much weight to a sole decision from a district court in Massachusetts.

As hired attorneys, lawyers are expected to advance arguments on behalf of their clients.⁹ In other words, they are in the position of advocate. But lawyers also have two other roles in society. They are officers of the court with a duty to advance the interests of the institution.¹⁰ And they are community members and citizens, which also obligates them to adhere to a certain code of conduct.¹¹ Immoral opinions can create conflict for a lawyer between the types of morality demanded by each role — the duty to the client demanding the use of precedent to advance a position, the duty to the community and country demanding ethical dissent, and the duty to uphold the legal system. How attorneys address conflicts between these roles has a significant impact on society and the law, as well as on the outcome of a client's case.

The American Bar Association's Model Rules of Professional Conduct are an essential resource for those wishing to understand the professional ethics of practicing attorneys. While not legally

⁹ See American Bar Association, *Model Rules of Professional Conduct* (Chicago: ABA Publishing, 2013), 1.3, cmt. 1, which notes that a "lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

¹⁰ See American Bar Association, *Model Rules*, 3.3, cmt. 2, which notes that lawyers have special duties "as officers of the court to avoid conduct that undermines the integrity of the adjudicative process."

¹¹ See Robert E. Scott, "The Lawyer as Public Citizen," *The University of Toledo Law Review* 31 (2000): 733, which notes that "legally educated citizens, can, and therefore must, strive to make a difference in the world."

binding, this document guides courts and state bar organizations, the bodies that are primarily responsible for implementing the rules governing legal professional ethics. One central tenet of the Model Rules is that lawyers have a duty to zealously advocate on their clients' behalf.¹² As outlined above, this may present an ethical dilemma for practicing attorneys, because there are undoubtedly circumstances under which a client's position may be improved by the use of troubling precedent. While the Comments (annotations to and explanations for the Rules) to the A.B.A. Model Rules provide that a lawyer is expected to "exercise professional discretion in determining the means by which a matter should be pursued," this clause is most commonly understood to limit the use of offensive legal tactics as opposed to the use of precedent with which the attorney disagrees.¹³ It is unlikely that the clause can be read to allow for attorneys to disregard precedential decisions on the basis of the attorney's own moral disgust.

On the other hand, the Model Rules seek to differentiate between the lawyer as an individual and the lawyer as the representative of a litigant, a distinction which makes it easier for lawyers to cite cases, with which they disagree, before the court. For example, Model Rule 1.2 (b) states that a "lawyer's representation of a client ... does not constitute an endorsement of the client's political, economic, social, or moral views or activities."¹⁴ To continue, Comment 5 to Model Rule 1.2 states that "legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities."¹⁵ Taken together, the A.B.A. seems to encourage viewing the positions taken in litigation as independent of a lawyer's personal views. While this makes it easier for a lawyer to advance the position of a litigant without having to worry about being seen as personally endorsing a litigant's position, the Bar would do well to question whether it is beneficial for society to enable such a moral distance between an attorney and her work.

To complicate matters, lawyers may be found guilty of negligence if they fail to bring applicable precedent before the court, even if the precedent is considered immoral. In order to collect damages for negligence, "the plaintiff must prove by a preponderance of the evidence that, but for the defendant lawyer's misconduct, the plaintiff would have obtained a more favorable judgment in the previous action."¹⁶ If a lawyer declines to bring a precedential decision before the court out of moral disapproval, this may hurt a client's position and prevent her from obtaining a more favorable judgment. While there are certainly arguments that can be made that the case was not included for strategic reasons or that the case was not so critical as to be necessary to advance the client's position, an attorney admitting that her own moral judgement was the sole reason she chose not to alert the court to a binding precedential decision

¹² American Bar Association, *Model Rules*, 1.3, cmt. 1.

¹³ *Ibid.*

¹⁴ American Bar Association, *Model Rules*, 1.2 (b).

¹⁵ American Bar Association, *Model Rules*, 1.2, cmt. 5.

¹⁶ American Law Institute, *Restatement of the Law Third: The Law Governing Lawyers* (Philadelphia: ALI, 2000), §53 cmt. b.

would likely open herself up to civil liability. One can barely imagine an easier situation under which a court could find a lawyer negligent.

Situations in which a lawyer finds a societally accepted opinion immoral, therefore, clearly present a unique set of challenges for attorneys. While benefitting the client, the use of such opinions can have the impact of reinforcing legal reasoning that the attorney finds morally repugnant, thus putting her in the position of endorsing laws that she views as damaging the institution. Furthermore, a lawyer must first determine that her distaste for a decision is not solely because she disagrees with it, but because she is morally outraged. The challenge for the attorney is thus twofold.

Determining that an opinion is truly morally repugnant, as opposed to one with which she simply disagrees, is in most instances not an easy task for an attorney. Often it requires calling into question much of the moral fabric of society. Consider again the case of *Dred Scott*. As noted above, while widely (and rightfully) reviled today, the decision had its supporters at the time. As Mark Graber, legal scholar and author of *Dred Scott and Constitutional Evil*, has noted, the idea that black Americans could not be citizens was consistent with much of American public opinion at the time and “reflected beliefs held by the overwhelming majority of antebellum jurists in both the North and the South.”¹⁷ Not only that, but it was not a case which dramatically broke with the law of the day. Critically, only six years earlier the Supreme Court had decided the case of *Strader v. Graham*,¹⁸ in which the Court noted that “the laws of the domiciliary state — not those of a state or territory of prior residence or inhabitation — conclusively determined whether someone was slave or free.”¹⁹ While there were certainly dissenters and reasons to criticize the *Dred Scott* decision, breaking with it would have involved breaking with more than a single legal opinion. It would have involved breaking with a large portion of society and much of the American legal elite — no easy task for a practicing attorney. For vast swaths of the American population, *Dred Scott* could have easily been viewed as an opinion with which there was independent disagreement, but not necessarily the reprehensible immorality that calls for greater action. As Justice Kennedy wrote in *Obergefell v. Hodges*, “[t]he nature of injustice is that we may not always see it in our own times.”²⁰ Indeed, it is not difficult to imagine lawyers of that time failing to see the great depravity of *Dred Scott*.

Assuming that the lawyer does recognize the immorality of a particular decision, the question arises, what can be done about it? Here is a case in which the lawyer may be divided by his triple obligations: to his client; to society to prevent (or at least not further) injustice; and, as an officer of the court, to the legal system to ensure that the law is properly articulated to the

¹⁷ Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (New York: Cambridge University Press, 2006), 28-29.

¹⁸ *Strader v. Graham* 51 U.S. 82 (1851).

¹⁹ Greene, “The Anticanon,” 408.

²⁰ *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015).

court.²¹ In some scenarios a lawyer may be unable to honor all of these obligations simultaneously and be forced to choose.

I would argue that the only way a lawyer can escape this ethical dilemma is by declining to represent the client in the case. Consider each of the attorney's obligations as consisting of both a positive and negative covenant. In representing a client, the attorney not only has promised to zealously advocate on the client's behalf, but also to not harm the client's position.²² With regard to the court, the attorney has a positive obligation to tell the truth and a negative obligation not to lie. And with regard to society, the attorney has the obligation not only to advance the interests of justice, but also to not further injustice. In light of these six obligations, the clearest way by which a lawyer can meet most of her obligations is by declining representation. By declining representation, the lawyer has maintained four of the six obligations, and by side-stepping one of the obligations (to zealously defend a client), she may also have minimized her harm to the client, potentially fulfilling the final obligation.

If one considers each obligation as giving the party to whom the obligation is owed a right, the proposed solution becomes much clearer. The client has a right to zealous advocacy and a right to not have his position harmed by his attorney. In declining or withdrawing from representation, the client maintains the right imparted to her by the negative obligation of the attorney, and yet still preserves her right to zealous advocacy, so long as she can find another attorney to take her case. Even if the client is unable to find another attorney, however, the right is still not abrogated — attorneys decline cases regularly for various reasons, and there is no reason why moral disapproval is a societally worse justification for declining a case than financial infeasibility. For these reasons, I conclude that the best course of action for a lawyer faced with an immoral yet societally accepted opinion is to decline or withdraw from the matter.

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The goal of this paper was to provide a framework for thinking about the different types of obligations which lawyers must meet. Lawyers not only have duties to their clients, but also to the legal system and to society at large. Only by considering all of the covenants which these duties imply, both positive and negative, can lawyers engage in truly ethical decision-making. While I only use one type of immoral opinion to illustrate my points in this paper, my hope is that the framework used above will be widely applicable in considering various types of ethical dilemmas that arise from the use of legal precedent.

²¹ See American Bar Association, *Model Rules*, 3.3 (a) (1), which mandates that “a lawyer shall not knowingly make a false statement...to the tribunal.”

²² See American Bar Association, *Model Rules*, 1.16 (b) (1), which limits an attorney's ability to terminate the representation of a client, but establishes an exception for scenarios in which “withdrawal can be accomplished without material adverse effect on the interests of the client.”

The Ethical Obligations of Lawyers

Helping Foreign Clients to Invest in the United States

The American media frequently covers stories of the United States government fighting foreign tax havens. However, unbeknownst to the vast majority of Americans, the U.S. is the world's largest tax haven. As a result of tax policies largely enacted into law following the Vietnam War, nonresidents can invest in the U.S. virtually tax free with significant confidentiality, privacy, and secrecy. Through these policies, the U.S. has attracted billions of dollars to its economy, which significantly contribute to the nation's liquidity. Yet, because the U.S. legal system allows such nonresident investments to remain obscured, it is impossible to accurately calculate the amount of foreign capital that has been invested over the past decades under these policies. The amassed wealth is believed to be tremendous with some tax specialists remarking that the U.S. would be incapable of sustaining its economy without this significant inflow of foreign capital.¹

Many of these foreign investors hail from developing countries where high tax burdens often inhibit business development and economic growth. The higher tax rates in these countries are rarely justified as most of the governments levying them fail to use the resulting revenue for such purposes as reforming welfare services for the poor or improving infrastructure. This is particularly the case with the corruption-laden governments of Latin America, where regimes enact tax laws with the primary goal of targeting the wealthy, rather than generating more revenue.² The high tax rates are subjective and confiscatory in nature, and the resulting revenues are severely misallocated and frequently rerouted to the bank accounts of politicians. It is not surprising then that the residents seek to take cash out of their home country. And the U.S. has had the good fortune of capitalizing on this desperation.

When investing in the U.S., foreigners often seek out the assistance of U.S. attorneys who are able to navigate the convoluted American tax system. In the U.S., tax evasion is a federal offense and it is a violation of the rules of professional responsibility for an attorney to assist a client to evade paying his taxes to the U.S. government. Unsurprisingly, tax evasion is also a crime in other countries and has consequences, ranging from trivial monetary penalties to imprisonment. The problem, therefore, is that by helping foreign clients invest in the U.S., U.S. attorneys are in effect, aiding foreign clients to evade paying their home countries' taxes.

¹ Dan Mitchell, "The U.S. is a Tax Haven...And That's a Very Good Thing," *International Man*, March 27, 2015, <http://www.internationalman.com/articles/the-us-is-a-tax-haven-and-thats-a-very-good-thing>.

² Denis Kleinfeld, "Investors Need Tax Havens," *NewsMax.com*, July 8, 2013, <http://www.newsmax.com/Finance/Kleinfeld/tax-haven-US-investor/2013/07/08/id/513734/>.

Currently, there are very few international agreements that address this gray area, and the American Bar Association's Model Rules of Professional Conduct for attorneys also offer minimal guidance. For example, Model Rule 1.2 (d) provides that "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent," but this rule presumes that the attorney is abiding by U.S. law, not necessarily by the laws of other nations.³ And then there is the common law principle known as the "revenue rule," which essentially prohibits U.S. courts from recognizing foreign tax judgments.⁴ Arguably, this principle could simply be a pragmatic response to jurisdictional hurdles and a way for the U.S. legal system to avoid having to interpret foreign law. Unfortunately, this principle is therefore no help in determining whether it is professionally "unethical" for a U.S. attorney to assist a foreign client in possibly violating the laws of the client's home country.

Despite the dearth of existing scholarship on this issue, in recent years, some commentators in the general press have begun to turn their attention to the U.S. as a tax haven. Proponents as well as opponents of current tax policies ground their arguments either in the necessity of economic efficiency or in morality. An attorney faced with the ethical dilemma of aiding a foreign client in evading the laws of his/her home country, can, for example, choose from the following two arguments: 1) assisting the foreign client is acceptable because no U.S. laws are being broken and the U.S. profits from this influx of capital (argument of economic efficiency); or 2) assisting the client is unethical because it encourages the violation of the home country's laws and thereby hinders that nation's development (argument based in morality). Several other arguments can be made, but they tend to fall under one of these two broad categories. The following discussion illuminates what public opinion currently is on the matter and what professional expectations could be in the near future.

How is an attorney to act when there are no guidelines to follow? The famed social psychologist Stanley Milgram proposed that "people's behavior is determined largely by what's happening around them".⁵ Applying this idea to the matter of foreign tax evasion, it can be inferred that if a U.S. attorney perceives that other attorneys with national practices are assisting foreign clients to bring their capital to the U.S., then he or she can likely continue with his course of conduct without repercussions. In other words, until the U.S. government enacts legislation by ratifying an international tax treaty, or until the A.B.A. takes a stance on the matter, the status quo is likely to persist; this area of tax law will remain nebulous.

³ American Bar Association, *Model Rules of Professional Conduct* (Chicago: ABA Publishing, 2013), 1.2, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer.html.

⁴ Samuel Brunson, "The U.S. as Tax Haven? Aiding Developing Countries by Revoking the Revenue Rule," *Columbia Journal of Tax Law* 5 (2014): 175.

⁵ Cari Romm, "Rethinking One of Psychology's Most Infamous Experiments," *The Atlantic*, January 28, 2015, <http://www.theatlantic.com/health/archive/2015/01/rethinking-one-of-psychologys-most-infamous-experiments/384913/>.

As previously mentioned, the existing tax structures greatly favor the U.S. According to some financial advisors, these tax structures have created a perfect marriage of economic efficiency and financial security. Amid tightening legislation in traditional tax havens throughout Europe and the Caribbean, more foreign individuals are turning to the U.S. to invest their cash. The turbulent political arena and economic plight of Latin American countries such as Argentina, Bolivia, and Venezuela have also led a substantial number of individuals and corporations to take their money abroad. Consequently, the U.S. reaps the benefits of this cash infusion, which also helps it offset the drawbacks resulting from the considerable number of domestic corporations that have merged with foreign rivals in order to dodge the high corporate tax burden on U.S. residents.⁶ Though money invested by nonresidents is not subject to a tax, and thus cannot be “collected” by the government, it nevertheless does contribute significantly to the U.S.’s healthy cash flow.

In Delaware, which is the most secretive tax jurisdiction in the U.S., a foreign company or individual can form a limited liability company and open a bank account with no U.S. tax or reporting requirements, so long as the investor conducts his or her business outside of the U.S. The investment requirements are nominal and there are myriad advantages for investors. Delaware’s laissez-faire approach to company formation, transparency, and taxes is a highly contested topic that is prominent in online forums on U.S. tax policy. Most media pundits voice opposition to these tax structures, identifying them as self-serving for the U.S. government and discriminatory, because they do not confer the same benefits to American taxpayers that they do to foreigners. It is important to note, in this context, that despite these preferential tax policies, nonresidents nevertheless remain ineligible for grants or incentive programs, or such programs, as Medicaid, Medicare, or Social Security.⁷

For years, nations have tried to implement intergovernmental agreements (IGAs) and tax information exchange agreements (TIEAs), but to no avail. The general aversion to these compromises stems from the special interests of each country; it is challenging to draft provisions which appeal both to the U.S. as well as to the “home” country. Consequently, the consensus among experts is that realizing such agreements is unfeasible until a more compelling impetus for change arises. From a political and economic standpoint, changing the status quo would certainly not benefit the U.S., and it is unlikely that any country would accept a nonreciprocal agreement, according to which the foreign power is obligated to report Americans dodging U.S. tax laws within their own jurisdiction, but the U.S. offers nothing in return. Because Delaware is a state-level jurisdiction within the U.S., it does not have tax treaties with non-U.S. jurisdictions or double tax treaties with other U.S. states.⁸ For this reason, any foreign investments made in Delaware remain impervious to attempts to collect by foreign nations; when combined with the “revenue” rule, which prohibits recognition of foreign tax judgments,

⁶ Lee Sheppard, “Will U.S. Hypocrisy on Information Sharing Continue?” *Tax Analysts*, January 23, 2013, www.taxanalysts.com/www/features.nsf/Articles/0C26B2CFD92F1FBE85257AFC004E8B38?OpenDocument.

⁷ Mitchell, “The U.S. Is a Tax Haven...And That’s a Very Good Thing.”

⁸ Sheppard, “Will U.S. Hypocrisy on Information Sharing Continue?”

foreign investors can currently rest assured that their money is safe in the U.S. Logistics aside, however, the role of an attorney in assisting foreign clients with U.S. investments remains ambiguous, and attorneys who are asked to do so are left with an ethical dilemma.

Professional ethics are generally grounded in natural law, i.e. universally recognized rights and values, which are then molded and codified as positive or written law. The existence of written law creates legal certainty, but conflicts may still arise when natural and positive law misalign, or when there is no broad agreement on how natural law pertains to a specific topic.⁹ In other words, there is potential for legal or societal turmoil when there is no consensus on the rights and values associated with a particular issue.

Another way to think about the ethical tax quandary presented by foreign investments is by comparing *malum prohibitum* — something that is prohibited only because the law says so — to *malum in se* — something that is wrong by its very nature.¹⁰ Yet, the law is fairly silent regarding foreign tax evasion assistance and what is perceived to be “wrong” in this situation varies greatly depending on an individual’s viewpoint. In these types of novel situations, the most valuable way of addressing it is through the exchange of ideas and beliefs by large groups of people. By expressing and examining differing views on the matter, the profession can come one step closer to developing a robust ethical framework that can nevertheless encompass diverse opinions, as exemplified by the A.B.A.’s Model Rules.

Most of the moral arguments against the U.S. as a tax haven stem from the belief that developing countries require the runaway tax money in order to become self-sufficient. However, this argument fails to take into account the tendencies of rapacious governments that much too often produce no discernible public good to justify the exorbitantly high tax rates that they levy. In fact, one could argue that it is unethical to continue providing these despotic governments with money that is not being used to further the common good.¹¹ Moreover, even if the U.S. were to revoke its preferential tax policies, those foreigners currently investing in the U.S. might well not reinvest their capital in their home country.

At issue is substantially more than just the tax benefits offered by the U.S. Foreign investment here is also closely intertwined with the poor regulatory framework in developing countries and the rampant corruption that leads people to invest their money elsewhere.¹² In sum, this issue is much more multifaceted than it at first appears to be, and its complexity is of colossal magnitude. For now, the U.S. government is blamed for making this tax evasion possible, while

⁹ Gustav Radbruch, “Legalized Lawlessness and Extralegal Law,” trans. Alice Kennington, David Luban, and Markus Wagner, 7. First published as “Gesetzliches Unrecht und Übergesetzliches Recht,” *Sddeutsche Juristen-Zeitung* 1 (1946): 105-8. Also see Bonnie Litschewski Paulson and Stanley Paulson, trans., “Statutory Lawlessness and Supra-Statutory Law,” *Oxford Journal of Legal Studies* 26:1 (Spring 2006): 1-11.

¹⁰ Richard Zitrin, Carol Lanford, and Liz Ryan Cole, “Problem 26: Joel S. Newman, The Audit Lottery: Don’t Ask, Don’t Tell?” *Legal Ethics in the Practice of Law* (New Providence, NJ: LexisNexis, 2014), 712.

¹¹ Brunson, “The U.S. as Tax Haven? Aiding Developing Countries by Revoking the Revenue Rule,” 205.

¹² Brunson, “The U.S. as Tax Haven? Aiding Developing Countries by Revoking the Revenue Rule,” 173.

American attorneys for foreign investors have neither a legal barrier that would preclude them from providing guidance nor a clear ethical reason to turn away such clients. Until a code or legal statute is created, no damages can be recognized; and without more clearly defined foreign tax evasion guidelines, attorneys are left to choose their own ethical path.

Given the tumultuous global economy resulting from enduring political revolutions, economic depressions, and the violent persecution of minority groups across many nations, one can expect the steady flow of foreign capital “seeking refuge” in the U.S. to continue. Although it is difficult to predict how the U.S. Congress will continue to handle this flow in the coming decades, one can assume that foreign nations will increasingly demand more information about the residents whom they suspect are “hiding” money in the U.S. Any action taken by the U.S. government will help to determine the role of attorneys. In the interim, U.S. attorneys will have to evaluate the ethical implications of their involvement independently. Should some new legislation be enacted in the future, attorneys and judges will be faced with the task of interpreting and enforcing the new laws. Given the delicacy of the matter and the diplomatic relations at stake, one can expect that this will also give rise to a new set of ethical challenges.

The Intersection of Ethics and Belief

One thing I have been considering since the FASPE trip is how individuals change their beliefs. It seems natural to assume that people change their minds, about many things, over time, as they gain more knowledge and learn from experiences. But to what extent is this indeed true? I have heard of studies that show that a majority of people ascribe to the same political views as their parents.¹ However, it is also clear that people do change their minds and can grow to believe things they did not before. Throughout the FASPE program, and ever since, I have been curious about this possibility to shift one's beliefs. How did non-Jewish German lawyers come to think that the Nuremberg Laws were valid, when they were obviously irreconcilable with then-current German law? Why didn't more Germans step up to oppose Nazi policies in a supposedly democratic Germany? How did their moral compasses shift? These days, I often find myself contemplating when, how, and why people shift their beliefs on issues that are important to them, and specifically on ethics-related beliefs. Of course, on the whole, we would like to think that people are continuously seeking out new information and adjusting their thoughts and beliefs to be consistent with the new information they learn. But when do we want people to change their minds? And when do we, instead, want them to hold on to what they feel strongly about, despite influence from others?

Answering these questions requires a lot more nuance than I would have thought prior to participating in FASPE. When using the Nazi regime as a point of reference, it is easy to think that ethical issues are unambiguously black-and-white. And we certainly discussed some stark examples, such as the views that Nazis held of Jews, and other beliefs along those lines; we studied the rhetoric the Nazis used and the way laws were drafted under the Nazi regime and subsequently changed. A specific example that has stuck with me is that of Bernhard Loesener, a judge we read about during our day at the House of the Wannsee Conference, who, after decades on the bench, started imposing death sentences on Jews for crimes which were once punishable with only a month in prison.²

However, the issues are just as interesting, and maybe more so, when we are talking about legal and/or ethical issues that are not so black and white. For example, during the FASPE trip we discussed what we would do if faced with either of two scenarios. In the first scenario a client approaches a lawyer seeking advice on entering into a fraudulent marriage with someone so that this person can remain in the United States and avoid persecution in their home country. In the

¹ See Linda Lyons, "Teens Stay True to Parents' Political Perspectives," Gallup, January 4, 2005, <http://www.gallup.com/poll/14515/teens-stay-true-parents-political-perspectives.aspx>.

² See Karl Schleunes, ed., *Legislating the Holocaust: The Bernhard Loesener Memoirs and Supporting Documents* (Boulder: Westview Press, 2001).

second scenario a client asks an attorney for advice on a way to structure an account that is only questionably legal, but which would save a significant amount of money in taxes.

I was surprised by the many different opinions of my classmates. Some were willing to work with the clients, for various reasons, and others were adamant that laws were not to be broken. What struck me about this exercise, in particular, was seeing how some people's views changed throughout the course of the discussion; or at the very least, the way people's views were shaped by the context. Many of the Fellows who would have been willing to help a client with the immigration issue would not have been willing to help with the tax issue. It seemed legitimate to them to want to break immigration law, either because they did not believe in it at all, or because they believed that in this case breaking it was the "right" thing to do. These feelings did not translate to the less emotionally appealing corporate tax example. The questions that arose from this exercise have remained with me as I continue my legal education and prepare for a legal career. I am constantly thinking about the ethical "line" and when I may cross it. When is it okay, even desirable, to break the law? We can all think of instances when this has been extremely important, such as during the Civil Rights movement, but we also agree that in many cases we need the law and want it to be upheld. How far does the logic of "it is okay to break the law this time because..." extend before we have totally abandoned either the legal structure or our principles? I have also been thinking about the boundaries of our individual beliefs: Under what circumstances are we willing to take a particular stance that breaks with our general beliefs, but does not force us to change those beliefs altogether, i.e. where do we draw the line between fundamentally revising our beliefs in reaction to a new situation and holding on to our beliefs, while making an exception for a particular situation?

The problem is that we can use Nazi Germany as an example to prove either side of the argument. It may seem appealing to say that it is acceptable to disregard the law under extreme circumstances, when we believe the law to be clearly wrong. However this can easily lead to a delegitimization of the legal system, because the law that one person believes should be broken may be a law that someone else feels should be followed. If everyone picks and chooses the laws they wish to follow, it would lead to chaos. The Nazis redefined laws, choosing some to follow and others to disregard, based on their hatred of Jews. Because we disagree with underlying Nazi ideology, we see their actions as wrong, but could we not be blind to how our own ideologies are shaping the laws we create? On the other hand, if we passively sit by and abide by laws that we believe are inherently wrong or unjust, we help foster a system that runs counter to our own ethical compass. Sometimes, laws *are* illegitimate; Jim Crow laws in the U.S., again, are a perfect example. However, there is a delicate balance in acting on ones beliefs of right and wrong, especially when these values conflict with the law. The only guidance I can offer at this point is a caution to be mindful of what we think, why we think it, why we choose to change convictions when we do, and whether that shift seems reasonable.

Recently I had dinner with some classmates who told me about a study that showed that over the course of five to ten years, lawyers' views often become aligned with those of the

population they generally serve.³ My classmates' discussion centered around corporate lawyers, imagining that these attorneys abandon their morals and their carefully reasoned opinions after just a few years of working with and coming under the influence of "big bad" corporations.

While I have no doubt that many would agree with the concerns my friends voiced, I am not sure that we should be so concerned about attorneys taking on the views of the people that they serve. Could it not be seen as a benefit that once he or she has spent enough time with a client, a lawyer begins to understand how that client thinks and uses the client's perspective when advocating on behalf of that client? There is nothing inherently wrong with changing one's opinion in light of new information or shifting perspectives to frame a problem differently. I found it interesting that my classmates were skeptical of evolving beliefs, when it could be that the original beliefs had been formed reflexively — through intuition or upbringing — and the latter ones had been formed through experience and reason. There is often not one way to be right or one way to be wrong.

A somewhat related issue I have been wrestling with is what information people use to assess whether they should change their views. This relates not only to the actions of lawyers with respect to their clients, but also broader policy decisions concerning the American legal system. It is easy to talk about how our legal system should work and how it is designed, but the fact that so many who are accused of crimes accept plea bargains and plead guilty without ever going through the entire trial proceeding should give us pause in making claims about our system's success. Given the vast reliance on plea bargaining, it would be wrong only to consider the criminal justice system on paper, believing that everyone has access to and utilizes the court system to have their problems solved. Lawmakers face an important question when making policy determinations: Should laws be created or enforced based on the reality on the ground, or should they be based on what we would like the reality to be? We cannot ignore that often reality is quite different from the world imagined by our laws. But at the same time, if we accept that we live in a system where "everyone pleads guilty," we are admitting to a reality that is undesirable, and we run the risk of getting stuck in it.

There are few concrete rules about when or how we should change our beliefs. FASPE has fostered in me a greater interest in observing and understanding when and why people do so. On a personal level, I hope to always challenge myself to think about my beliefs, why I hold them, and to recognize when they might be shifting and why.

Someone asked me a few weeks ago what was one "big takeaway" that I got out of FASPE, and that has stuck with me, as well. Over twelve days where I saw and learned so much, and all through such powerful, deeply intense experiences, it was hard to think about what an appropriate takeaway would be. After I gave the question some thought, however, I answered

³ I believe my friends were talking about John Heinz et. al., *Urban Lawyers: The New Social Structure of the Bar* (Chicago: University of Chicago Press, 2005).

that among other things, I developed a heightened awareness of the fact that everything we do matters. It may seem a little odd, even counterintuitive, to say that in comparison to the Holocaust everything that I do in my comfortable Ivy-league professional school training matters. But throughout the trip it was impressed upon us that although not every tough choice is a drastic life-or-death one, as professionals we will make important decisions on a regular basis, and how we decide to act will and does matter. Holding on to values, to beliefs about what is right and what is wrong, what is ethical and what is not, is important.

One's views evolve. They are not formed in one sitting. Tough choices and big decisions are not formed on the spot. They are the result of the experiences we have had and the choices we have made along the way. Similarly, ethical dilemmas may arise unexpectedly, but often they, too, do not arise in a vacuum and instead lay upon the foundation of other questions we have faced. Even the Holocaust did not happen overnight, or even in the course of a single year. It was a series of events, of decisions, that slowly picked up momentum and then turned into something unimaginable after many pieces had been put into place. I am not suggesting that every time we face a moral qualm or make an ethical decision we are spiraling towards another Holocaust. However, we should not let ourselves be fooled by the seemingly small scale of a question we may be facing. Each decision we make shapes us to a certain extent and sets a precedent for how we will face future ones. It is always easier to say something is not important or to ignore it, but we should be wary of doing so. There is value in engaging in a deep and serious thought process.

All that being said, despite everything — all the powerful conversations with other (current or future) professionals that care about these issues and are committed to thinking them through — I still feel a small sense of hopelessness. On some level, I still wonder what we can really learn from this dark period of history. We can certainly take ethics more seriously and be more ethical in our professional and personal lives. But is that enough? And if it is not, can we do anything about it? We say, “never again,” and yet it has happened again. It has happened more than once. I think of Darfur. Even as my high school collected money, brought in speakers, went to rallies, wrote letters to congressmen ... nothing seemed to change. I look at the world today, and there is still so much suffering, and I don't know what I can do about it. Perhaps I must accept that even if I can't save the world, at least I can keep my eyes open and think about the challenges that face us.

When I think about FASPE, I realize that the experience is not over even though the formal program may be. Even as I finish this paper, FASPE will stay with me. There are rarely going to be answers for the types of questions that FASPE raised for me, and that is exactly why these questions are important. That is exactly why I plan to keep thinking about them, and I feel grateful to have had the opportunity to begin to dive deeper.

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

2015
JOURNAL

MEDICAL
PAPERS

INTRODUCTION TO A SAMPLE OF THE 2015 FASPE MEDICAL PAPERS

This past summer a group of 14 idealistic, passionate, and engaged medical students participated in the FASPE Medical program.

As in previous years, our historians Thorsten Wagner and Thorin Tritter delicately and thoughtfully framed the context in which we grappled with some of the vexing issues central to contemporary medical ethics. While describing the horrendous violations of professional obligations by Nazi physicians, they also raised questions about the “banality of evil” and offered historical background that made us all question if we would have acted so differently.

Within this historic context and with horrific images in our minds, we — and our seminary colleagues — grappled with a broad range of questions, including: What attributes characterize a professional? How should ethics be understood? How can our understanding of the past help prevent us from unwittingly losing sight of the humanity and dignity of our patients? How can we adequately protect and ensure the safety of individuals enrolled in research while still advancing medical therapeutics? How do we think about the appropriate balancing of competing and compelling forces so that we can make morally justifiable, albeit hard, choices in clinical care and clinical research (e.g. constraining health care spending by limiting individual freedom to choose, forcibly feeding prisoners on hunger strikes, rationing/triaging trauma care on the battlefield, promoting national security by assisting in enemy prisoner “interrogations”)?

We were routinely humbled and called to honesty by the stark knowledge that the Nazi physicians, scientists, and medical establishment as a whole functioned at the pinnacle of the advanced and civilized world. If they could lose their professional moorings, then how can we avoid this same travesty? Through formal lectures, case-based small group discussions, and informal conversations, we came to understand that holding steadfast to a common human dignity is one essential component to resisting the degradation of professional ethics. More and more, administrative tasks and limited time threaten to erode the interpersonal interactions that foster and safeguard our professional sensitivities. Yet another challenge with which we struggled!

The selected essays that follow explore some of the questions raised during the trip in greater detail and from contemporary perspectives. They also represent the high caliber of students who are attracted to the experiential learning which FASPE offers. On behalf of the medical faculty, I am grateful for the personal privilege of interacting with inquisitive, energetic, and deep-thinking student leaders; and thank the entire FASPE family for making this difficult journey enriching and, believe it or not, an experience willing to be repeated!

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The Right to Rest in Peace

Performing Non-Consensual Medical Procedures on the Recently Deceased

Teaching procedural skills on the newly deceased is certainly not a new practice in emergency rooms across the United States, but there has been a flurry of activity in the ethical dialogue around this particular topic in recent years. While plenty of attention is being paid to developing guidelines for end-of-life decisions and care, protocols have yet to be established for this distinctly sensitive topic in ethics and medical education.

To be qualified to perform various procedures as a practicing physician, trainees are first required to successfully complete each procedure a specified number of times. Tracheal intubation, central venous catheter placement, and thoracotomy are a few procedures that residents generally have opportunities to perform, as they are routinely called for in the care of ill patients, but those opportunities are gradually decreasing as advances in pre-hospital care result in more procedures being completed in “the field,” before arrival at the hospital.¹ Other procedures, such as a cricothyrotomy, also known as emergency airway puncture, and pericardiocentesis, where fluid is aspirated from the sac enveloping the heart, continue to be rarely performed, yet they remain essential to learn as an emergency medical provider. Furthermore, as emergency rooms at teaching hospitals are frequently inundated with patients waiting for treatment, there are increasingly scarce opportunities for learning in the emergency room.²

Society expects emergency medicine physicians to be clinically competent and able to successfully perform life-saving procedures. To maintain the skills required to perform less frequently used, but nevertheless life-saving procedures, trainees must first have adequate experience to master the procedure. Even seasoned physicians need regular practice. Allowing an inexperienced clinician to attempt an emergently necessary procedure on a live patient increases the patient’s risk of harm, but, for obvious reasons, it would be inappropriate and unethical to perform non-emergent procedures on live patients solely for the purpose of teaching.³ So how do we reconcile this tension between patient safety and medical training?

¹ Jeffrey P. Burns, Frank E. Reardon, and Robert D. Truog, “Using Newly Deceased Patients to Teach Resuscitation Procedures,” *New England Journal of Medicine* 331 (1994): 1652-1655.

² Amer Z. Aldeen and Michael A. Gisondi, “Bedside Teaching in the Emergency,” *Academic Emergency Medicine* 13 (2006): 860-866.

³ Burns, Reardon, and Truog, “Using Newly Deceased Patients to Teach Resuscitation Procedures,” 1652-1655.

For as long as many veteran doctors can remember, recently deceased patients have been used as a valuable resource for teaching skills to training physicians.⁴ After appropriate initial training on models in simulated skills workshops, providers need additional practice that more closely replicates treatment on a live patient. Although technological advances may soon lead to realistic and practical alternatives to training on real patients, such options are not currently widely available, and as a result, physicians have assumed the prerogative to use the recently deceased for this purpose.⁵ The practice of using the newly dead has traditionally been regarded as the closest approximation to the experience of treating a live patient, and it addresses the dilemma by being both beneficial to society while providing an educational opportunity that does not expose living patients to additional risk of harm. While there is near-consensus on the practice of using bodies for this purpose by emergency physicians across the country, the ethical implications of performing postmortem procedures *without first obtaining consent* from the appropriate parties (i.e. the deceased's next of kin) remains controversial.

Physician and bioethicist Kenneth Iserson, who staunchly opposes the requirement of familial or surrogate consent, assumes the "don't ask, don't tell" approach: he postulates, "society trusts the emergency physician will perform lifesaving interventions with the maximum possible proficiency," and society should therefore not interfere with the acquisition of those skills.⁶ Those of the opinion that it is ethically justifiable to perform procedures without consent contend that there exists a "substantial social benefit to be gained."⁷ Conversely, those who believe verbal or written consent should be obtained beforehand reason that failing to do so will decrease trust in health providers.⁸ They argue that private individuals (i.e. doctors) consequently determine the societal responsibilities of other individuals (i.e. patients), a concept that is not in alignment with ideologies of a truly democratic society.⁹

Currently, no laws govern this particular territory where ethics and education converge. Though there are state statutes that prohibit performing certain actions on a dead body, including "mutilation," there are no explicit laws or mandates prohibiting the teaching of procedures on newly dead patients, nor is there legal guidance on whether it is necessary to first obtain consent.¹⁰ It is imperative that members of the medical community openly discuss and decide if and how medical professionals should proceed with this controversial practice. This paper will explore complex logistical, practical, and ethical considerations surrounding the practice of

⁴ Kenneth V. Iserson, "Postmortem Procedures in the Emergency Department: Using the Recently Dead to Practice and Teach," *Journal of Medical Ethics* 19 (1993): 92-98.

⁵ Iserson, "Postmortem Procedures in the Emergency Department: Using the Recently Dead to Practice and Teach," 92-98; Andrew W. Alden, Kristen L. M. Ward, and Gregory P. Moore, "Should Postmortem Procedures Be Practiced on Recently Deceased Patients? A Survey of Relatives' Attitudes," *Academic Emergency Medicine* 6 (1999): 749-752.

⁶ Kenneth V. Iserson, "Law Versus Life: The Ethical Imperative to Practice and Teach Using the Newly Dead Emergency Department Patient," *Annals of Emergency Medicine* 25 (1995): 91-94.

⁷ Burns, Reardon, and Truog, "Using Newly Deceased Patients to Teach Resuscitation Procedures," 1652-1655.

⁸ Iserson, "Postmortem Procedures in the Emergency Department," 92-98.

⁹ Jeffrey T. Berger, Fred Rosner, and Eric J. Cassell, "Ethics of Practicing Medical Procedures on Newly Dead and Nearly Dead Patients," *Journal of General Internal Medicine* 17 (2002): 774-778.

¹⁰ Iserson, "Postmortem Procedures in the Emergency Department," 92-98.

performing postmortem procedures on the newly dead without seeking consent. Ultimately, emergency physicians can and should be able to engage in educational activities using the recently deceased while maintaining their professional integrity, respect for the family, and the dignity of the recently deceased person.

Lessons from History

The Abuse of Physician Powers. Over the twentieth century, a dramatic transformation occurred in the doctor-patient relationship and in the way we practice medicine. No longer do patients collectively defer to the “doctor knows best” notion (the paternalistic model) that prevailed in the early decades of the century when physicians determined the best course of action on behalf of the patient.¹¹ The paternalistic model presumed that the doctor’s approach was always superior to that of the patient, and thus the doctor was justified in seeking to override the patient’s judgment.¹² Public perception of the biomedical professions changed drastically after the atrocities of Nazi doctors and the ethical transgressions of the United States Public Health Service (Tuskegee) scientists were revealed to the world, and in the age of the internet with its widespread availability of information, doctor-patient interactions have evolved to place a higher value on patient-centered services while recognizing patients’ autonomy and decision-making capabilities.

It can be argued that when a patient is pronounced dead, the body and the person are no longer one, and their previously recognized autonomy ceases to exist.¹³ Additionally, the family has no legal property rights to the corpse, which supports the use of the dead without an obligation to obtain consent.¹⁴ Unfortunately, the application of this rationale results in the doctor imposing his or her own belief system onto the patient and his or her family. While healthcare workers are obliged to uphold their fiduciary responsibility to the living patient, paternalistic attitudes and insensitivity to patient preferences, traditions, and cultures can persist — and this is so, even after death. Our society expects its healthcare providers to disclose information and demonstrate honesty to a greater extent than do other societies, and for good reason; the media has exposed both domestic and international healthcare scandals numerous times throughout the last century. The denigration of another’s religious and cultural beliefs in order to impose one’s own agenda and priorities can produce catastrophic results and we should actively work to prevent its occurrence.

Dehumanization in the Nazi Era. The dangers of considering medicine a science entitled to do as it wishes “in the name of science” with no regard for the sanctity of human life and dignity

¹¹ Ezekiel J. Emanuel and Linda L. Emanuel, “Four Models of the Physician-Patient Relationship,” *JAMA* 267 (1992): 2221-2226.

¹² David R. Buchanan, “Autonomy, Paternalism, and Justice: Ethical Priorities in Public Health,” *American Journal of Public Health* 98 (2008): 15.

¹³ Berger, Rosner, and Cassell, “Ethics of Practicing Medical Procedures on Newly Dead and Nearly Dead Patients,” 774-778.

¹⁴ David L. Freedman, “Practicing on the Newly Dead: Is a Corpse Considered Property?” *AHC Media*, February 1, 2000, <http://www.ahcmedia.com/articles/44628-practicing-on-the-newly-dead-is-a-corpse-considered-property>.

were perhaps made most apparent during World War II. At that time, the reigning National Socialist German Workers' Party (Nazi Party) searched zealously for a scientific breakthrough that would allow the German *volk* to swell, while simultaneously purging the nation of those considered "lives not worthy of living" — the mentally and physically disabled, homosexuals, the Roma and Sinti peoples, and Jews.¹⁵ In death camps such as Auschwitz, the *Sonderkommando*, prisoners tasked with stripping the bodies of the murdered of all things deemed valuable by the Nazi regime, first collected coins, jewelry, and clothing. They proceeded to barbarically pry teeth from the bodies to obtain even the tiniest speck of precious metal and would shave hair off the living and the deceased for various uses.¹⁶ The grotesque dehumanization and mutilation of persons was ordered not only by Nazi military men, but also by Nazi physicians, nurses, and medical students. During the Nuremberg Trials, the world learned of the T4 "Euthanasia" Program and Dr. Josef Mengele's now-infamous twin studies — both illustrations of how complete disregard for moral integrity in the name of scientific ideologies and the promise of professional gain comes to lead men and women down a dangerous path of senseless barbarism.

Remarking on medicine and science under the Third Reich, Benno Mueller-Hill, a German biologist who grew up after World War II, said "Scientists espouse objectivity and spurn value judgments. But pure objectivity leads to regarding everything as being feasible. For these scientists objectivity opened the door to every conceivable form of barbarism."¹⁷ This "pure objectivity" and disregard for the will of others corrodes the trust required to maintain the meaningful relationships that medical practitioners should diligently pursue with each patient they encounter. In medical ethicist Jeremiah Barondess' commentary on social Darwinism, racial hygiene, and the Holocaust, he states, "we have learned that ethos is inconsistent with hierarchies of human worth. When we participate in such prioritization, whether it is generated by social structures or within medicine itself, the ethos is deeply corroded and inhumanity follows with frightening ease."¹⁸ To avoid this prioritization, it is imperative that doctors acknowledge and respect others' varying views on the body after death and solicit and honor the preferences of patients as well as their families. It is inappropriate to deem the deceased family's reservations or objections unworthy of respect or of lesser importance than procedural training.

Ethical Crimes on American Soil. A more recently exposed transgression by the medical community involved the manipulation of poor, uneducated African-American males in Macon County, Alabama. To this day, the U.S. Public Health Service Tuskegee Syphilis Study is

¹⁵ Doris L. Bergen, *War and Genocide: A Concise History of the Holocaust* (Lanham, MD: Rowman & Littlefield, 2009).

¹⁶ Miklos Nyiszli, *Auschwitz: A Doctor's Eyewitness Account* (London: Penguin Classics, 2012), 54-55.

¹⁷ Benno Müller-Hill, *Murderous Science: Elimination by Scientific Selection of Jews, Gypsies, and Others in Germany, 1933-1945* (Oxford: Oxford University Press, 1988), 41.

¹⁸ Jeremiah A. Barondess, "Care of the Medical Ethos: Reflections on Social Darwinism, Racial Hygiene, and the Holocaust," *Annals of Internal Medicine* 129 (1998): 891-898.

widely regarded as “the most infamous biomedical research study in U.S. history.”¹⁹ Starting in the 1920s, hundreds of predominantly illiterate black men with syphilis were enrolled in the study to observe the natural history of the disease. Enrollees were not informed of potential dangers, there was no solicitation of informed consent, and they were misled to believe that they would actually benefit from the study. Quite to the contrary: despite the emergence of penicillin as a widely available and definitive cure for syphilis in the late 1940s, treatment was purposefully withheld in order to observe the fatal progression of the disease. James Jones, in his historical review of the study, *Bad Blood: The Tuskegee Syphilis Experiment*, writes that the researchers “perceived no conflict between their own scientific interest in the experiment and attempting to decide what was best for their subjects.” In the researchers’ judgment, the men enrolled in the study were “incapable of understanding the facts of the experiment and forming their own conclusions,” and thus the doctors and scientists saw it fit to assume the role of decision-maker.²⁰ The implications of their actions are far-reaching and ongoing public skepticism of the biomedical professions can, in part, be linked to this scandalous project.

Though the Belmont Report and the Nuremberg Code, written in response to the Tuskegee Syphilis Study and Nazi experimentation, respectively, were primarily penned to protect the rights of those who participate in human subjects research, it is undeniable that clinicians draw from these principles of behavior to guide their approach to patient rights in clinical settings, as well. Reflecting on history should serve to discourage practices that put the health, dignity, and autonomy of those we serve in jeopardy. Simply put, society trusts the medical profession to do what is right and expects the doctor-patient relationship to be free of deception, betrayal, or ulterior motives.

Current Standards

For years, postmortem procedures have been performed by trainees without obtaining consent. In 1994, up to 90 percent of teaching institutions did not consistently obtain permission from the patient before death nor from the family of the deceased.²¹ One frequently cited reason for not obtaining consent is the belief that there is *implied consent*, defined as “consent that is implicit in the fact that the patients used emergency services ... [and are] therefore ... agreeable to all that entails, including being used for teaching.”²² But this applies only to those that come to the emergency room of their own volition, have reasonable knowledge of the procedures to which they would be subject, and assume that any procedures performed on them would be for their benefit. This argument is therefore problematic because many patients present involuntarily, and the practice of postmortem procedures in no way benefits the health of the dead.

¹⁹ Esther Cuerda-Galindo, et. al., “Syphilis and Human Experimentation From World War II to the Present: A Historical Perspective and Reflections on Ethics,” *Actas Dermo-Sifiliográficas (English Edition)* 105 (2014): 847-853.

²⁰ James H. Jones, *Bad Blood: The Tuskegee Syphilis Experiment* (New York: Simon and Schuster, 1993), 196.

²¹ Burns, Reardon, and Truog, “Using Newly Deceased Patients to Teach Resuscitation Procedures,” 1652-1655.

²² Michael Ardagh, “May We Practise Endotracheal Intubation on the Newly Dead?” *Journal of Medical Ethics* 23 (1997): 289-294.

Others apply *presumed consent* as a feasible alternative, whereby consent is presumed in cases of impaired autonomy “if based on a balance of beneficence over maleficence, this patient or another reasonable person would consent in the same circumstances, if he or she were able to.”²³ Many patients who enter the ER demonstrate impaired autonomy (those who are comatose, brain damaged, psychotic, mentally impaired, or in a drug-induced state), rendering consent for any procedure logistically unattainable and providing innumerable opportunities to apply this presumption. While it is likely that the majority of the American public would indeed consent to such postmortem procedures based on the principle of altruism,²⁴ some would not, and would be harmed by a sweeping assumption of presumed consent. Utilization of presumed consent requires a well-informed public and gives people the opportunity to opt out, if they wish to do so.²⁵

Non-Disclosure for the Sake of Medical Education. Physicians against obtaining consent for postmortem procedures contend that families of the deceased who deny trainees the opportunity to perform procedures on their late family members are unjustly interfering with medical education. Bioethicist Iserson states that “families should not be permitted to thwart what could reasonably have been expected to have been the deceased patient’s best wishes,”²⁶ yet the societal need for competent emergency providers continues to compete with claims that not obtaining consent shows a lack of respect.²⁷ While the President’s Commission for the Study of Ethical Problems in Medicine and Research addressed the issue by stating that physicians “are expected to make a reasonable effort to obtain specific consent from next of kin when the research is ‘beyond the normal scope of teaching and research,’” this loose description has actually been used to justify the aforementioned “don’t ask, don’t tell” approach.²⁸

The public trusts physicians not only to be scientists, but also to tell the truth. Failure to correct the existing misconception that surrogate consent would be routinely sought for procedural training on the dead is deceptive. A cultural shift is clearly needed regarding full disclosure of the training procedures used for medical students, residents, and attendings. One study reported that almost 50 percent of medical students, viewed as the bottom of the hierarchy of medical training, experienced incidents during which they felt pressured to act unethically, most often in

²³ Andrew W. Alden, Kristen L. M. Ward, and Gregory P. Moore, “Should Postmortem Procedures Be Practiced on Recently Deceased Patients? A Survey of Relatives’ Attitudes,” *Academic Emergency Medicine* 6 (1999): 749-752.

²⁴ Alden, Ward, and Moore, “Should Should Postmortem Procedures Be Practiced on Recently Deceased Patients? A Survey of Relatives’ Attitudes,” 749-752; Craig A. Manifold, Alan Storow, and Kevin Rodgers, “Patient and Family Attitudes Regarding the Practice of Procedures on the Newly Deceased,” *Academic Emergency Medicine* 6 (1999): 110-115.

²⁵ Manifold, Storow, and Rodgers, “Patient and Family Attitudes Regarding the Practice of Procedures on the Newly Deceased,” 110-115.

²⁶ Kenneth V. Iserson, “Requiring Consent to Practice and Teach Using the Recently Dead,” *The American Journal of Emergency Medicine* 9 (1991): 509-510.

²⁷ Iserson, “Postmortem Procedures in the Emergency Department,” 92-98.

²⁸ Herbert Rakatansky, et al., “Performing Procedures on the Newly Deceased,” *Academic Medicine* 77 (2002): 1212-1216.

situations where a conflict between medical education and patient care arose.²⁹ The same sentiment of secrecy is echoed in a study of inexperienced students performing procedures; trainees regularly withheld information from patients for “fear that the fully informed patient may not allow a student to participate in all aspects of their care ... exclusion from procedures being a leading concern.”³⁰

It is apparent that young doctors are not being held to rigorous standards of full disclosure. Furthermore, as students progress in their training, their sense of responsibility for disclosing their education level has been shown to decrease.³¹ Unsurprisingly, the same “command hierarchy” seen in many political and bureaucratic organizations, such as the Nazi Party and the Public Health Service, is seen in medical education, yet, as in previous instances, the “only following orders” defense does not absolve participants from their moral obligations to those they serve.

Trainee Involvement in Patient Care. The belief that the public has an aversion to the involvement of medical trainees in the care of their loved ones and will therefore deny consent has been used to justify using the dead for procedural teaching without approaching the next of kin. However, many recent studies provide evidence to the contrary; patient views on trainee participation have been shown to be extremely positive. In studying patients’ responses to relatively inexperienced medical students performing procedures, 89 percent of patients stated that they would not mind being the first person on whom a supervised medical student performed a specific procedure.³² In a study conducted in the United Kingdom of patient and staff views regarding medical student teaching in a hospice, a major theme was the importance of patients’ help in educating the next generation of doctors. One patient spoke of an altruistic desire to inform and educate students — “you volunteer for these things in the hope that it might help other people in the future” — and physicians noted that, from their anecdotal experience, these hospice patients (in their last six months of life) feel that “this is some way that they can give something back.”³³

The Question of Insensitivity. Many providers are reluctant to approach the family of the recently deceased with a request to conduct procedures on their loved one, believing it to be uncomfortable and at times, inappropriate. Physicians in a pediatric hospital who were teaching intubation skills using newly deceased infants cited their concern for appearing insensitive as the reason they were less willing to speak with the family about the training. However, studies

²⁹ Lisa K. Hicks, et al., “Understanding the Clinical Dilemmas That Shape Medical Students’ Ethical Development: Questionnaire Survey and Focus Group Study,” *The BMJ* 322 (2001): 709-710.

³⁰ Sally A. Santen, et al., “‘Sorry, It’s My First Time!’ Will Patients Consent to Medical Students Learning Procedures?” *Medical Education* 39 (2005): 365-369.

³¹ Charles T. Williams and Norman Fost, “Ethical Considerations Surrounding First Time Procedures: A Study and Analysis of Patient Attitudes Toward Spinal Taps by Students,” *Kennedy Institute of Ethics Journal* 2 (1992): 217-231.

³² Santen, et al., “‘Sorry, It’s My First Time!’ Will Patients Consent to Medical Students Learning Procedures?”

³³ Milind Arolker, et al., “‘They’ve Got to Learn’: A Qualitative Study Exploring the Views of Patients and Staff Regarding Medical Student Teaching in a Hospice,” *Palliative Medicine* (2010): 419-26.

have shown that the vast majority of families overwhelmingly approve of postmortem procedural training,³⁴ but only under the condition that they are asked for permission before the procedure. The few respondents in a hypothetical scenario who would deny permission to perform postmortem procedures on their deceased family member gave reasons such as, “Let the body rest in peace,” and “Have respect for the body.”³⁵ While a minority have firm religious and cultural objections to manipulation of the body after death, many more can become amenable to the idea if the process and the benefits of such a practice are explained to them. Providers should therefore be properly educated on the appropriate way to address a grieving family to request consent in a sensitive manner.

Looking Forward

In “Teaching Procedures Using the Newly Dead,” a report by the American College of Emergency Physicians (ACEP), the ACEP Ethics Committee acknowledges the need for evidence-based recommendations to navigate the complex ethical dilemma of using the recently deceased for practice and teaching, but provides no such guidance itself, due to the numerous and varied range of positions on the topic and the lack of a comprehensive professional consensus.³⁶ Though many institutions continue to use the practice (almost 50 percent of emergency medicine training programs in 2002), a striking 76 percent of those maintained that they “almost never” obtain consent from family members.³⁷ Given that just four out of 96 emergency medicine programs surveyed in one study have written policies governing the practice,³⁸ this ethically challenging issue will continue to be a topic of debate and conversation in the foreseeable future. Without professional consensus and practical, evidence-based guidelines, the opportunity for scientific over-eagerness to corrode ethical standards remains.

Medical providers and trainees in emergency medical centers should utilize the newly dead as an opportunity for teaching, learning, and practicing procedures and skills, and they have a moral obligation to seek proper consent from appropriate parties. Lessons from history have taught us that “ordinary” people can find themselves in precarious situations when the interests of all involved parties are not represented equally. Barriers to seeking consent include an assumed familial unwillingness to consent, the anticipated difficulty of having the discussion, and a lack of existing protocols. Institutional resources should be appropriately allocated to address these concerns.

Recommendations for achieving these goals include: 1) developing and improving alternative resources to be used as teaching modalities, such as simulation workshops and computerized

³⁴ D. Gary Benfield, et al., “Teaching Intubation Skills Using Newly Deceased Infants,” *JAMA* 265 (1991): 2360-3.

³⁵ Alden, Ward, and Moore, “Should Should Postmortem Procedures Be Practiced on Recently Deceased Patients? A Survey of Relatives’ Attitudes,” 749-752.

³⁶ “Teaching Procedures Using the Newly Dead,” *American College of Emergency Physicians*, January 2003, <http://www.acep.org/Clinical---Practice-Management/Teaching-Procedures-Using-the-Newly-Dead>.

³⁷ Mark W. Fourre, “The Performance of Procedures on the Recently Deceased,” *Academic Emergency Medicine* 9 (2002): 595-598.

³⁸ “Teaching Procedures Using the Newly Dead,” *American College of Emergency Physicians*.

models; 2) educating the public on the practice of postmortem procedural training, taking measures to convey the benefits to society, and allowing for the opportunity to decline; 3) exercising discretion in choosing suitable trainees on the part of teaching physicians, as only residents who have undergone vigorous preparatory training should be selected to utilize this invaluable resource; 4) obtaining familial or surrogate consent for the procedure, after appropriate provider training to engender confidence and agency in approaching families to discuss the topic with sensitivity and due respect; and 5) demonstrating respect for persons and deference to the deceased by performing the procedures in a dignified manner, taking care to avoid any and all obvious disfigurement.

Purely scientific motives introduce the distorted notion that it is necessary to acquire knowledge and skills as efficiently and effectively as possible at any cost, but it is of tantamount importance that physicians uphold their additional responsibility of displaying empathy, compassion, and respect for patients and their families in order to protect the medical ethos. By doing so, medical professionals can learn valuable skills without compromising their moral integrity or the trust of the community. In the words of Barondess:

[T]he current pressures in the health care system push each of us to consider and protect the traditional values of the ethos. History beckons us to scrutinize not only the past but ourselves, to search for the buried links, the hidden echoes, the silent burden that we all bear in our efforts to find expressions of our responsibility for the welfare of medicine itself.³⁹

³⁹ Barondess, "Care of the Medical Ethos: Reflections on Social Darwinism, Racial Hygiene, and the Holocaust," 898.

Healthcare Quality Metrics as a Source of Physician Ethical Erosion

During the Holocaust, physicians exhibited a marked vulnerability to ethical erosion, facilitated largely by the dynamics of their institutional and societal contexts.¹ It is a mistake to assume that contemporary physicians are immune to similar dynamics, even though genocide seems like a distant possibility. Physicians today share many of the moral vulnerabilities of their Nazi colleagues, and lapses in ethical integrity can manifest themselves in ways that are much less obvious than murder.² We would therefore be wise to consider which aspects of our current healthcare systems might facilitate ethical erosion.

The use of metrics to systemically measure and improve the quality of healthcare deserves such scrutiny. Healthcare administrators and regulators use quality metrics to gather information on various aspects of healthcare quality, including processes (e.g. washing hands, prescribing medications) and outcomes (e.g. incidence of post-operative infections).³ Performance information obtained through these metrics is used quite broadly for various purposes, including pay-for-performance, public reporting, continuous quality improvement, and physician management.⁴ Given that the vast majority of practicing physicians in the United States must contend with the presence of quality metrics in some form or another, their potential unintended consequences are indeed worth further investigation.

The purpose of this brief analysis is to argue that healthcare quality metrics facilitate ethical erosion among physicians — that is, they can incentivize behavior that would otherwise be incongruous with a physician's best professional judgment. To demonstrate this, I will explore two characteristics of quality metrics as they are currently used: first, that they are tied to powerful extrinsic incentives; and second, that they are based on inadequate definitions of

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

² Alessa Colaizzi. "A Long Shadow: Nazi Doctors, Moral Vulnerability and Contemporary Medical Culture," *Journal of Medical Ethics*, 38 (2012): 435-438.

³ Avedis Donabedian, "The Quality of Care: How Can It Be Assessed," *JAMA* 260 (1988): 1743-1748.

⁴ For pay-for performance see Donald Berwick, "The Toxicity of Pay for Performance," *Quality Management in Healthcare* 4 (1995): 27-33; David Himmelstein, Dan Ariely, and Stephanie Woolhandler, "Pay-for-Performance: Toxic to Quality? Insights from Behavioral Economics," *International Journal of Health Services* 44 (2014): 203-214; for public reporting see Rachel Werner and David Asch, "The Unintended Consequences of Publicly Reporting Quality Information," *JAMA* 293 (2005): 1239-1244; for quality improvement see Troyen Brennan, "The Role of Regulation in Quality Improvement," *Milbank Quarterly* 76 (1998): 709-731; for physician management see Sheila Leatherman, "Applying Performance Indicators to Health System Improvement," *Measuring Up: Improving Health System Performance in OECD Countries* (Paris: OECD, 2002), 319-333.

healthcare quality.⁵ As we shall see, when physicians are incentivized to perform well on quality metrics that do not perfectly align with ideal medical care, they will at times be forced to choose between the clinical behavior incentivized by a metric and what they would otherwise do in their best professional judgment. This is especially concerning because a physician's motivation to perform well on a metric is tied to extrinsic rewards, rather than to an intrinsic desire to care for a patient.

The current literature typically describes the unintended effects of quality metrics on physician behavior in an amoral fashion, in terms of depersonalized, systemic consequences. In contrast, I hope to highlight the role of individual physicians and their personal moral agency. Performance measurement systems have unintended consequences precisely because individual physicians compromise their own ethical integrity in response to extrinsic incentives. The incentives tied to quality metrics can lead physicians to engage in a variety of morally problematic behaviors, ranging from sub-optimal clinical decision-making to mistreatment of vulnerable patients. An open acknowledgement of physician moral vulnerability should cause us to carefully reconsider how we implement quality metrics and how we interpret the performance information they generate.

Quality Metrics and Physician Motivation

Healthcare quality metrics are tied to extrinsic incentives that are powerful enough to shape physician behavior. The most well-studied example of this is financial incentives used in the context of physician pay-for-performance. While there is little systematic evidence that pay-for-performance actually changes patient health outcomes, it clearly impacts physician behavior, although in complex and unpredictable ways.⁶ On the one hand, introducing financial incentives can lead to improvement in scores on quality metrics, while removing financial incentives can completely reverse any initial improvement induced by an incentive, and even lead to below-baseline performance.⁷ On the other hand, financial incentives can ironically worsen physician performance on quality metrics, perhaps by "crowding out" physicians' intrinsic motivations.⁸ There are also many cases in which financial incentives have no demonstrable impact on physician behavior relative to quality indicators.⁹ For the purposes of this discussion, it is

⁵ J. Frank Wharam, et al., "High Quality Care and Ethical Pay-for-Performance: A Society of General Internal Medicine Policy Analysis," *Journal of General Internal Medicine* 24 (2009): 854-859.

⁶ Gerd Flodgren, et al., "An Overview of Reviews Evaluating the Effectiveness of Financial Incentives in Changing Healthcare Professional Behaviours and Patient Outcomes," *Cochrane Database Systematic Review* 7 (2011): 1-94.

⁷ Matt Sutton, et al., "Reduced Mortality with Hospital Pay for Performance in England," *New England Journal of Medicine* 367 (2012): 1821-1828; Helen Lester, et al., "The Impact of Removing Financial Incentives from Clinical Quality Indicators: Longitudinal Analysis of Four Kaiser Permanente Indicators," *BMJ* 340 (2010): 1-5.

⁸ Bruce Guthrie, Glenna Auerback, and Andrew Bindman, "Health Plan Competition for Medicaid Enrollees Based on Performance Does Not Improve Quality of Care," *Health Affairs* 29 (2010): 1507-1516; Berwick, "The Toxicity of Pay for Performance;" Himmelstein, "Pay-for-Performance: Toxic to Quality? Insights from Behavioral Economics."

⁹ Kathleen Mullen, Richard Frank, and Meredith Rosenthal, "Can You Get What You Pay For? Pay-for-Performance and the Quality of Healthcare Providers," *The Rand Journal of Economics* 41(2010): 64-91.

sufficient to note that tying metrics to financial incentives introduces new motivations that are powerful enough to impact physician behavior in certain cases.

However, most quality metrics are tied to extrinsic incentives other than financial rewards, such as public reporting, continuous quality improvement, and physician management. These uses of metrics introduce powerful motivations into a physician's decision-making process that are understudied and often underappreciated. For example, using metrics to publicly report performance or make accreditation decisions may activate a physician's concern around reputation and self-protection. Continuous quality improvement efforts, which are often monitored by institutional leaders or shared broadly within an institution, may activate similar concerns. Metrics can even be used in the context of physician management to promote, discipline, or fire physicians, which understandably activates a physician's self-interest. Significantly, all of these activities are carried out in the context of the medical team and hierarchy, which physicians are socialized to work within, even in the face of clearly unethical behavior.¹⁰

These universal and powerful human motivators — reputation, the need to belong and function within a social group, and self-interest — undoubtedly affect physicians on some level, whether this occurs consciously or not. In fact, metrics are used precisely because they are thought to create behavior change through a variety of pathways that depend on these and other motivations.¹¹ If financial incentives are able to influence physicians, it is likely that such basic elements of human nature and social interaction also shape physician behavior in some way.

Inadequate Definitions of Quality

If we accept that the extrinsic incentives tied to quality metrics are capable of changing physician behavior, we may naturally wonder what their net effects on physician behavior are. On the whole, do quality metrics lead physicians toward higher quality care, or do they create perverse incentives and facilitate ethical erosion? I believe that, in reality, quality metrics have varied effects on physician behavior, depending on a diverse set of factors including the metric itself, the incentive(s) at stake, the character of the individual physician, and other contextual elements. Having acknowledged this complexity, my point here is simply that in some cases, metrics can facilitate ethical erosion — that is, they can lead physicians to act in a manner incongruous with their best professional judgment. In these cases, individual physicians choose, on some level, the extrinsic incentive tied to the metric over what they would otherwise believe to be the best course of action.

¹⁰ 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 (1994): 670-9.

¹¹ Donald Berwick, Brent James, and Molly Coye, "Connections between quality measurement and improvement. *Medical Care* 41(2003): 130-138.

Quality metrics are able to tap into physicians' moral vulnerabilities in this way because they rest on inadequate definitions of quality; these definitions incentivize something other than ideal care in certain cases. In what follows, I review several empirical studies and opinion pieces in order to conceptually illustrate exactly how definitions of quality can be inadequate. In so doing, I explore four specific problems associated with inadequate definitions of quality, and how these problems can facilitate physician ethical erosion.

The first problem is that many quality metrics, particularly outcome-based metrics, assume a misplaced locus of accountability. The most well-studied metric of this type is mortality after coronary artery bypass graft (CABG) surgeries. When CABG mortality rates were first publicly reported in New York State, CABG mortality declined by 41 percent, ostensibly showing the success of quality metrics in improving the quality of surgical care.¹² Other sources of data, however, show that at least some of this decline (in New York and elsewhere) can be explained by the tendency of cardiac surgeons, in response to the metric, to avoid the sickest and riskiest patients in order to protect their mortality scores.¹³ While there have been attempts made over the last two decades to ameliorate these concerns by making statistical adjustments for patient risk profile, this can never be done perfectly, nor is there a consensus on an adequate approach to this statistical challenge.¹⁴ Similar issues apply to healthcare-outcome metrics in the primary care setting, such as monitoring the percent of diabetic patients with hemoglobin A₁C levels below 7 percent, which encourages primary care physicians to avoid patients who are noncompliant, lack regular access to healthcare, or have multiple illnesses.¹⁵

The implicit definitions of quality underlying outcome-based metrics are fairly straightforward: particular numerical values, such as low post-surgical mortality or laboratory values within a certain range, are defined as high quality. This is problematic because it misplaces the locus of accountability for the health outcome being measured. In other words, these metrics implicitly assume that physicians have control over outcomes that are, in reality, shaped by a complex array of factors in addition to the quality of care provided, such as individual genetic makeup or socioeconomic status. When physicians are tasked to exert control over a variable they cannot reliably alter, they face an uncomfortable choice: be held accountable for "poor" outcomes they may not be responsible for, or resort to other methods for improving apparent performance,

¹² Edward Hannan, et al., "Improving the Outcomes of Coronary Artery Bypass Surgery in New York State," *JAMA* 271(1994): 761-766.

¹³ Joshua Burack, et. al., "Public Reporting of Surgical Mortality: A Survey of New York State Cardiothoracic Surgeons," *The Annals of Thoracic Surgery* 68 (1999): 1195-1200; Nowamagbee Omoigui, et al., "Outmigration for Coronary Bypass Surgery in an Era of Public Dissemination of Clinical Outcomes," *Circulation* 93 (1996): 27-33; Eric Schneider and Arnold Epstein, "Influence of Cardiac-Surgery Performance Reports on Referral Practices and Access to Care: A Survey of Cardiovascular Specialists," *New England Journal of Medicine* 335 (1996): 251-256.

¹⁴ Edward Hannan, et al., "The Value of Adding Laboratory Data to CABG Registry Data to Improve Models for Risk-Adjusting Provider Mortality Rates," *The Annals of Thoracic Surgery* 99 (2015): 495-501.

¹⁵ Clemens Hong, et al., "Relationship Between Patient Panel Characteristics and Primary Care Physician Clinical Performance Rankings," *JAMA* 304 (2010): 1107-1113; Rodney Hayward, "All-or-Nothing Treatment Targets Make Bad Performance Measures," *The American Journal of Managed Care* 13 (2007): 126-128.

such as avoiding particularly sick patients. While it is disturbing to imagine that physicians might engage in such behavior, surveys have shown that surgeons self-report doing so.¹⁶

The second problem is overly simplistic definitions of high-quality care. For example, the American Heart Association and American College of Cardiology publish guidelines carefully specifying which patients should receive anti-cholesterol statin medications.¹⁷ Many organizations, including Medicare and Medicaid, measure physician and patient adherence to such guidelines.¹⁸ However, physicians have expressed concerns that this approach to guiding clinical behavior generally does not account for the complex clinical management of patients who are seriously ill or have multiple comorbidities.¹⁹ We do not know, for instance, whether elderly patients who meet guidelines for statins will actually benefit from statins given their lower life expectancy and increased risk of experiencing adverse events.²⁰

Since contingencies and uncertainties abound in actual medical practice, medicine is neither algorithmic nor formulaic. Thus, metrics which implicitly define quality as physician or patient adherence to clinical guidelines are often inadequate because it is incredibly difficult, if not impossible, to explicitly and succinctly specify the ideal clinical course of action in every particular case. There will nearly always be exceptions to guidelines, no matter how nuanced such guidelines are intended to be. In the above example, current and past guidelines incentivize physicians to prescribe statins to elderly patients, despite the lack of evidence that they are effective for this particular population, and despite the fact that a physician might do otherwise based on his or her clinical judgment.²¹ Again, it is the sickest and most complex patients who are most vulnerable to potential mistreatment as a result of guidelines and metrics, as complex patients are most likely to fall outside the scope of clinical guidelines.

The third problem is that quality metrics by nature focus on a single variable, and therefore implicitly privilege this measured aspect of healthcare quality over other aspects. Consider the

¹⁶ Joshua Burack, "Public Reporting of Surgical Mortality: A Survey of New York State Cardiothoracic Surgeons," *The Annals of Thoracic Surgery* 68 (1999): 1195-1200; Schneider and Epstein, "Influence of Cardiac-Surgery Performance Reports on Referral Practices and Access to Care: A Survey of Cardiovascular Specialists."

¹⁷ Paul Ridker and Nancy Cook, "Statins: New American Guidelines for Prevention of Cardiovascular Disease," *The Lancet* 382 (2013): 1762-1765.

¹⁸ "Quality Measures," Centers for Medicare and Medicaid Services, last modified April 17, 2015, <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityMeasures/index.html>.

¹⁹ Martin Roland and Charlotte Paddison, "Better Management of Patients with Multimorbidity," *BMJ* 346 (2013): 2510; Cynthia Boyd, et al., "Clinical Practice Guidelines and Quality of Care for Older Patients with Multiple Comorbid Diseases: Implications for Pay for Performance," *JAMA* 294 (2005): 716-724; Denise Campbell-Scherer, "Multimorbidity: A Challenge for Evidence-Based Medicine," *Evidence Based Medicine* 15 (2010): 165-166.

²⁰ Michael Johansen and Lee Green, "Statin Use in Very Elderly Individuals: 1999-2012," *JAMA Internal Medicine* 175 (2015): 1715-1716; Samer Noaman, Joseph Ibrahim, and Robert Grenfell, "Prescribing Statins for Cardiovascular Disease Prevention in the Old: An Absence of Evidence and an Absence of Guidelines," *Heart, Lung and Circulation* 23 (2014): 619-624.

²¹ Michael Johansen and Lee Green, "Statin Use in Very Elderly Individuals: 1999-2012," *JAMA Internal Medicine* 175 (2015): 1715-1716; Michael Miedema, et al., "Eligibility for Statin Therapy According to New Cholesterol Guidelines and Prevalent Use of Medication to Lower Lipid Levels in an Older US Cohort: The Atherosclerosis Risk in Communities Study Cohort," *JAMA Internal Medicine* 175 (2015): 138-140.

potential impact of measuring and publicly reporting average surgical wait times for individual hospitals. Attention to this quality metric might ostensibly function to improve patient experience and health outcomes by incentivizing hospitals to provide needed surgical services earlier. However, a retrospective study of hospitals whose average surgical wait times were publicly reported uncovered an interesting pattern: shortening surgical wait times worsened heart attack mortality.²² Likely, this occurred because diverting attention and resources toward elective surgical cases with high wait times (which was measured) distracted from the quality of emergency care (which was unmeasured). The authors note that publicly reporting average surgical wait times in the context of a competitive market “led hospitals to focus their effort on the easily measured activities to the detriment of the unmeasured.”²³

We can draw an important lesson from this example: what we choose to measure is an ethical decision. Given the staggering number of variables we theoretically might measure in our efforts to improve healthcare quality, the decision to measure a particular aspect of healthcare quality is actually an allocation decision; it requires that we carefully prioritize, based on our subjective values, what most deserves our attention and effort. In many cases, as in the example above, healthcare quality metrics make this decision for us.²⁴ By devoting our limited resources to readily measurable quantities, rather than to those unmeasured or unmeasurable aspects of healthcare that we, as physicians, nevertheless believe are more valuable, we compromise our own ethical integrity. This example illustrates how healthcare quality metrics can facilitate ethical erosion by virtue of an inappropriately narrow definition of quality.

The fourth problem is that some quality metrics incentivize something entirely other than high-quality clinical medicine, such as patient satisfaction. While patient satisfaction is obviously a good worth pursuing to some extent, it is at odds with ideal medical practice in many situations. One of the most recognized examples of this conflict occurs in the treatment of pain using prescription narcotics. When patients are surveyed on their satisfaction, they are often explicitly asked whether or not their pain was managed, which places pressure on physicians to prescribe pain medication, even to known opioid addicts.²⁵ It is easy to imagine other such pressures, such as giving in to family members who demand inappropriate treatment. Even though patient satisfaction is determined by factors besides the true quality of medical care, patient satisfaction plays a significant role in public reporting and physician management, which is something about which physicians have expressed significant concerns.²⁶ Patient satisfaction, and metrics

²² Carol Propper, Simon Burgess, and Denise Gossage, “Competition and Quality: Evidence from the NHS Internal Market 1991–9,” *The Economic Journal* 118 (2008): 138–170.

²³ Carol Propper and Deborah Wilson, “The Use and Usefulness of Performance Measures in the Public Sector,” *Oxford Review of Economic Policy* 19 (2003): 250–267.

²⁴ Lawrence Casalino, “The Unintended Consequences of Measuring Quality on the Quality of Medical Care,” *New England Journal of Medicine* 341 (1999): 1147–1150.

²⁵ Anna Lembke, “Why Doctors Prescribe Opioids to Known Opioid Abusers,” *New England Journal of Medicine* 367 (2012): 1580–1581; Aleksandra Zgierska, Michael Miller, and David Rabago, “Patient Satisfaction, Prescription Drug Abuse, and Potential Unintended Consequences,” *JAMA* 307 (2012): 1377–1378.

²⁶ Joshua Fenton, et al., “The Cost of Satisfaction: A National Study of Patient Satisfaction, Health Care Utilization, Expenditures, and Mortality,” *Archives of Internal Medicine* 172 (2012): 405–411; Birdstrike, MD, “The Focus on

like it, prove to be highly problematic because physicians are strongly incentivized to pursue a good that, at times, conflicts with high quality care.

Conclusions

This analysis has explored how current uses of quality metrics can activate powerful extrinsic motivations for physicians, and how this can lead to ethical erosion when quality metrics inadequately describe ideal medical care. In particular, it has highlighted the problem as one of ethical compromise, in which physicians engage in clinical behaviors, which they otherwise would avoid, in order to perform well on a metric.

Several questions naturally follow. First, to what extent does ethical erosion actually occur in response to healthcare quality metrics? How often are metrics leading physicians to treat patients in ways that are incongruous with their best professional judgment? From a policy perspective, this is an important question in weighing the relative costs and benefits of current performance management methods. Unfortunately, this question is currently impossible to answer because the unintended consequences of quality metrics are usually absorbed into unmeasured and unmonitored variables. The empirical studies we do have use previously unreleased data or data from unexpected sources (e.g. clinical laboratories) to uncover the unintended downstream effects of quality metrics. Without the initiative and foresight of these researchers, we would have next to no empirical, quantitative evidence on this important topic. Even though lapses in ethical integrity in response to quality metrics is a potential threat to the contemporary healthcare system, there are currently no systemic plans to gather information on these issues, although there are calls to change the way we collect performance data.²⁷

More importantly, what should our response to these issues be? What is not lacking are creative suggestions for altering or modifying current measurement systems so that they better capture healthcare quality.²⁸ There is a sense that if we just design smarter or more flexible methods of measuring healthcare quality, we can somehow avoid the problems facing current performance measurement systems. However, I tend to agree with a recent editorial: “Current policies, although well-intentioned, tend to make performance measurement an end in itself, rather than a

Patient Satisfaction is Enough to Make You Sick,” *KevinMD.com*, November 19, 2013, <http://www.kevinmd.com/blog/2013/11/focus-patient-satisfaction-sick.html>; Aleksandra Zgierska, David Rabago, and Michael Miller, “Impact of Patient Satisfaction Ratings on Physicians and Clinical Care,” *Patient Preference and Adherence* 8 (2014): 437.

²⁷ Steven Farmer, Bernard Black, and Robert Bonow, “Tension Between Quality Measurement, Public Quality Reporting, and Pay for Performance,” *JAMA* 309 (2013): 349-350.

²⁸ Liana Martirosyan, et al., “A Pilot Qualitative Study to Explore Stakeholder Opinions Regarding Prescribing Quality Indicators,” *BMC Health Services Research* 12 (2012): 191; Leonard Pogach, et al., “Should Mitigating Comorbidities Be Considered in Assessing Healthcare Plan Performance in Achieving Optimal Glycemic Control?” *American Journal of Managed Care* 13 (2007): 133; Donna Zulman, et al., “Quality of Care for Patients with Multiple Chronic Conditions: The Role of Comorbidity Interrelatedness,” *Journal of General Internal Medicine* 29 (2014): 529-537.

²⁹ Pogach, et al., “Should Mitigating Comorbidities Be Considered in Assessing Healthcare Plan Performance in Achieving Optimal Glycemic Control?”

means to better care. The solution cannot be more or different measures: the problem is inherent to imposing performance measurement.”³⁰

What is missing from the conversation is a frank discussion of the nature of the human beings we seek to regulate. Historical atrocities carried out by physicians should lead us toward a clear-eyed examination of our own moral vulnerability and propensity toward ethical compromise. This perspective should not cause us to abandon performance measurement altogether, but rather to recognize the problems inextricably linked to it. Paying attention to our own corruptibility would inspire a healthy degree of skepticism toward the perceived power of metrics to positively impact healthcare quality, as well as suggest careful interpretation of the data produced by metrics.³¹ Most vitally, it would shift our focus from changing physician behavior through extrinsic incentives to fostering the patient-centered values that ought to underlie the medical profession and guide physicians intrinsically toward high-quality care.

³⁰ Lara Goitein, “Virtual Quality: The Failure of Public Reporting and Pay-for-Performance Programs,” *JAMA Internal Medicine* 174 (2014): 1912-1913.

³¹ Dane Pflueger, “Accounting for Quality: On the Relationship between Accounting and Quality Improvement in Healthcare,” *BMC Health Services Research* 15 (2015): 178.

Gradients and Thresholds in Pediatric Autonomy

Standing at the entry to Auschwitz, our historian guide described the way a guard would sometimes take a prisoner's possessions, throw them out past the camp boundaries, and order the prisoner to fetch them. Then the guard would shoot the prisoner as he went to retrieve his belongings. If the prisoner disobeyed and did not fetch his possessions, he was also shot. Our guide grabbed the purse of one of my colleagues and pretended to toss it past the camp fence, to paint a vivid picture.

The American Holocaust scholar Lawrence Langer first coined the term “choiceless choices” for such conflicts.¹ During the Holocaust, the choiceless choices suffered by victims were products of human cruelty, whereas the incomparable difficult choices we face in contemporary medical ethics are more often than not products of circumstance, miscommunication, or resource scarcity. Throughout my FASPE experience, as I engaged in the most thought-provoking, enlightening, and frustrating conversations of my life, I often found myself struggling to find answers to the modern ethical dilemmas we discussed. Choices “a” and “b” both resulted in great suffering, or one was more just while the other was more beneficial. A general, catch-all protocol is insufficient to address each unique patient and each individual medical situation, yet case-by-case variations in care can lead to corruption and injustice.

I found a startling and powerful affirmation of the importance of training in medical ethics when I started my pediatric critical care rotation the day after returning from FASPE. The cases I saw that raised ethical issues were numerous, but most notable were those cases which involved a dissonance between parents and children in end-of-life decision-making.

In one case, a precocious and incredibly thoughtful seven-year-old boy with metastatic rhabdomyosarcoma to his central nervous system was preparing to return home for end-of-life comfort care measures, decided on by his parents after long discussions regarding prognosis and treatment options. He acutely deteriorated one night, and his parents asked for a reversal of his do-not-resuscitate-do-not-intubate order. He wound up intubated for several months and experienced lucid periods during which he expressed his desire to be taken off of the ventilator to go home. He complained of pain and clearly asked for medications, but his parents denied medications that would alter his cognitive function. His disease progressed, resulting in loss of all but brainstem function, and despite his grave prognosis, he underwent several invasive procedures at the request of his parents.

¹ Lawrence Langer, “The Dilemma of Choice in the Death Camps,” *Centerpoint* 4 (1980): 224.

Unable to comprehend his parents' grief and yet understanding their desire to do everything possible for their suffering child, I could not help but feel that communication, patient autonomy, and decision-making could be improved in this tragic situation. During my month-long rotation, I saw other cases with a similar dissonance between children and adolescents and their parents and caregivers. These scenarios made me wonder about the mechanisms in place to evaluate and protect pediatric autonomy in medical decision-making.

In medicine, "capacity" refers to the ability of a person to consent to medical interventions or clinical research.² Capacity for adult patients, as assessed by clinicians, requires four criteria: the ability to communicate choices, to understand relevant information, to appreciate consequences, and to reason about choices.³ Clinicians are tasked to respect the autonomy of patients who are competent, to protect patients who are not, and to recognize the difference. In pediatric practice, capacity is currently assessed on a case-by-case basis, with guidelines and standards differing across countries, states, and institutions. In fact, decisions regarding pediatric autonomy, both medically and legally, are being decided on individual levels in more varied ways now than in the past.⁴ A systematic, standardized approach for assessing pediatric capacity, has not been developed, in part because data are lacking.⁵

Frank discussions regarding pediatric autonomy must begin with basic considerations regarding one's philosophical approach to the topic. A universalist approach would posit that a set of rules should be established that is applied across the board to all patients, whereas a particularist approach argues for individual decisions that take into account the nuances of each case.⁶ Given the complexity of the situation, if a particularist approach is chosen, one should first define pediatric capacity in a generalizable way in order to ensure that patient autonomy is optimally protected. In the following, I will outline the historical and theoretical concepts that impact today's views on pediatric autonomy, then outline the factors that affect pediatric capacity in the hopes of providing such a framework for decision-making.

Historical Context

Modern medical ethics as a field grew from reflections on the abuses in human experimentation and suffering during World War II, which stemmed from a prejudiced attack on vulnerable

² Paul S. Appelbaum and Thomas Grisso, *The MacArthur Competence Assessment Tool for Clinical Research (MacCAT-CR)*, (Sarasota, FL: Professional Resource Press, 2001).

³ Willard Gaylin, "The Competence of Children: No Longer All or None," *Journal of the American Academy of Child and Adolescent Psychiatry* 21 (1982): 157; David G. Scherer, Robert D. Annett, and Janet L. Brody, "Ethical Issues in Adolescent and Parent Informed Consent for Pediatric Asthma Research Participation," *Journal of Asthma* 44 (2007): 491; Laura B. Dunn, et al., "Assessing Decisional Capacity for Clinical Research or Treatment: A Review of Instruments," *The American Journal of Psychiatry* 163 (2006): 1323.

⁴ Gaylin, "The Competence of Children: No Longer All or None" 157.

⁵ Scherer, Annett, and Brody, "Ethical Issues in Adolescent and Parent Informed Consent for Pediatric Asthma Research Participation," 490.

⁶ Alan Gewirth, "Ethical Universalism and Particularism," *The Journal of Philosophy* 85 (1988): 283-302.

populations — minorities, those of low socioeconomic status, and those with disabilities.⁷ In fact, the medicalized and systematic killing of vulnerable populations by Nazis began with children, even before the war.⁸ Designed to test reactions to mass murder of people deemed “handicapped,” the Reich Committee for the Scientific Registration of Serious Hereditary and Congenitally Based Illnesses was formed in August 1939. Doctors and midwives were forced to report all children with deformities to the Committee, made up of both doctors and Nazi administrators, who then decided whether each child should live or die.⁹ In the summer of 1939, this eugenics-based concept was expanded into the creation of a similar program for adults with disabilities and psychiatric conditions, which came to be known as the infamous T-4 Euthanasia Program.¹⁰

Today, children have become one of the most protected groups within medical ethics, particularly as the desire to improve pediatric care has spurred researchers to include children in research projects.¹¹ Regulations and guidelines for involving children in research exist, but until the 1990s children were excluded from trials altogether.¹² In more recent years, the medical community has begun discussing pediatric autonomy more freely and with greater nuance, within the context of their participation in research and for clinical treatment purposes.¹³

Developmental Context

In most countries, when the concept of competence is applied legally, age limits determine whether children and adolescents are capable of giving informed consent, although age limits vary across countries and states.¹⁴ If age cut-offs are applied systematically to decisions regarding capacity, the presumption is that at a certain age, an individual undergoes sudden developmental changes from a state of incapacity, or of not fulfilling the four criteria for capacity, to a state of fulfilling them. The problem with this approach is that its arbitrariness makes it ineffective and unwieldy to implement. The pace of cognitive development varies between children. One thirteen-year-old differs from the next in terms of maturity, life experience, intelligence, emotional stability, and the ability to discern risks and benefits when making decisions.¹⁵ Furthermore, different medical decisions present different risks and

⁷ G. B. Melton, G. P. Koocher, and M. J. Saks, eds., *Children's Competence to Consent* (New York: Plenum Press, 1983); Doris L. Bergen, *War and Genocide: A Concise History of the Holocaust* (Lanham, MD: Rowman & Littlefield Publishers, 2009), 127.

⁸ Bergen, *War and Genocide: A Concise History of the Holocaust*, 127.

⁹ Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, 2000), 52.

¹⁰ Bergen, *War and Genocide: A Concise History of the Holocaust*, 128.

¹¹ Irma M. Hein, et al., “Why Is It Hard to Make Progress in Assessing Children's Decision-Making Competence?” *BMC Medical Ethics* 16 (January 2015): 4, <http://bmcmethics.biomedcentral.com/articles/10.1186/1472-6939-16-1>.

¹² Irma M. Hein, et al., “Accuracy of Assessment Instruments for Patients' Competence to Consent to Medical Treatment or Research,” *Cochrane Database of Systematic Reviews* 5 (2014), DOI: 10.1002/14651858.CD011099.pub2.

¹³ Hein, et al., “Accuracy of Assessment Instruments for Patients' Competence to Consent to Medical Treatment or Research,” 3.

¹⁴ Hein, et al., “Why Is It Hard to Make Progress in Assessing Children's Decision-Making Competence?” 2.

¹⁵ Hein, et al., “Why Is It Hard to Make Progress in Assessing Children's Decision-Making Competence?” 3.

complexities, requiring varying degrees of understanding and maturity. Thus, while they seem simple, age cut-offs do not provide a satisfying solution to determining capacity.

Although age cut-offs introduce potential inaccuracies, such cut-offs are nevertheless generally grounded in our knowledge and understanding of cognitive development. It is reasonable and accepted that up to a certain age, children lack capacity and must be protected. Adolescents, and to a greater degree adults, on the other hand, lack the cognitive limitations of elementary school children. Elementary school children lack certain knowledge, problem-solving skills, and abstract reasoning skills. As a result of physiological and social forces, the brain undergoes changes in adolescence that cause increased efficiency, the capacity for hypothetico-deductive reasoning, metacognitive understanding, and moral reasoning.¹⁶ Nevertheless, adolescents remain at greater risk than adults of applying these abilities inappropriately and making poor decisions. The frontal lobe, critical to executive functions and decision-making, matures late in adolescence or after. Adolescents and adults, therefore, show differing abilities to think or act responsibly, to restrain impulses, and to visualize the long-term impact of a decision.¹⁷

Available Tools

A recently published statement from a multidisciplinary meeting regarding adolescent medical decision-making offers some guidance for approaching these situations, although the concepts have not been studied systematically. Validated tools exist to assess adult capacity, but according to a review by the Dutch researcher Irma Hein and her co-authors, only two studies on pediatric capacity that included the four definitive criteria for determining capacity have been conducted, and neither study included tool validation.¹⁸ Both studies described the feasibility of using an adult-based capacity assessment tool, the MacArthur Competence Assessment Tool for Clinical Research (MacCAT-CR).¹⁹ One study tested the tool with children and adolescents aged 7 to 12 diagnosed with Attention Deficit Hyperactivity, while the other assessed its value for adolescent patients with anorexia nervosa.

A Multifaceted Approach

I will now discuss the more complex factors that impact pediatric autonomy and describe methods for incorporating them into one's approach. The degree to which the risk and complexity of a given decision should factor into determining pediatric capacity is unclear. A seemingly intuitive option is to require a higher level of capacity for consenting to treatments of

¹⁶ Willard Gaylin, "The Competence of Children: No Longer All or None"; Irma M. Hein, et al., "Why Is It Hard to Make Progress in Assessing Children's Decision-Making Competence?" 3.

¹⁷ Andy Piker, "Balancing Liberation and Protection: A Moderate Approach to Adolescent Health Care Decision-Making," *Bioethics* 25 (2011): 202–8; Brian C. Partridge, "Adolescent Psychological Development, Parenting Styles, and Pediatric Decision Making," *Journal of Medicine and Philosophy* 35 (2010): 518–25.

¹⁸ Irma M. Hein, et al., "Why Is It Hard to Make Progress in Assessing Children's Decision-Making Competence?" 3.

¹⁹ Sheri L. Turrell, Michele Peterson-Badali, and Debra K. Katzman, "Consent to Treatment in Adolescents with Anorexia Nervosa," *International Journal of Eating Disorders* 44 (2011): 703–7; Michael Koelch, et al., "Report of an Initial Pilot Study on the Feasibility of Using the MacArthur Competence Assessment Tool for Clinical Research in Children and Adolescents with Attention-Deficit/Hyperactivity Disorder," *Journal of Child and Adolescent Psychopharmacology* 20 (2010): 63–7.

greater risk, for refusing treatments of greater benefit, and for making more complex decisions. However, levels of risk and complexity for various medical procedures or tests are poorly defined. More work is required in order to include these important variables in decisions regarding capacity in a meaningful and systematic way.

The psychiatrist Willard Gaylin outlines several factors that impact patient capacity, including experience.²⁰ Children with chronic illnesses may possess greater insight, understanding, and decision-making capacity than children of the same age without such experience, and this should be considered in evaluations of pediatric capacity.²¹ Physicians must be able to communicate effectively with pediatric patients in order to adequately assess their experience with disease and the healthcare system, be it through their own illness or that of a family member. Physicians should then use their understanding of the impact of this experience on a patient's capacity in making their assessment.

A patient's relationship with his or her parents, physician, and peers is thought to have a great influence on their decision-making capacity.²² In their book, *Deciding for Others*, philosophers Allen Buchanan and Dan Brock describe capacity as dependent on both the nature of the choice and the conditions under which the decision is made. They posit that an individual may be competent to make a decision at a particular time, but incompetent to make a different decision, or the same decision, under different conditions.²³ An adolescent's reaction and ability to make a decision, in particular, is highly dependent on his or her emotional state, described as "cold and hot cognition," such that creating a non-stressful decision-making environment can have a significant impact on capacity.²⁴

This implies that capacity should continually be reevaluated as a fluid concept that varies with a given patient's medical situation, mental status, environment, and the specific decision at hand. Also, as healthcare providers, we can improve a patient's decision-making capacity by creating the most conducive environment for them. Specifically, we can break down decisions into smaller, more manageable choices, and use age-appropriate information-sharing techniques.²⁵ As summarized in the consensus statement by Pierre André Michaud and his fellow researchers in "Assessing an Adolescent's Capacity for Autonomous Decision-Making in Clinical Care," the factors needed to optimize pediatric autonomy are: an empathetic and positive provider-patient relationship; respect for the patient's developmental stage and capacities; avoidance and

²⁰ Scherer, Annett, and Brody, "Ethical Issues in Adolescent and Parent Informed Consent for Pediatric Asthma Research Participation," 490-2.

²¹ Gaylin, "The Competence of Children: No Longer All or None."

²² Gaylin, "The Competence of Children: No Longer All or None."

²³ Allan E. Buchanan and Dan W. Brock, *Deciding for Others: The Ethics of Surrogate Decision Making* (Cambridge: Cambridge University Press. 1989).

²⁴ Paul A. Klaczyński, "A Dual-Process Model of Adolescent Development: Implications for Decision Making, Reasoning, and Identity," *Advances in Child Development and Behavior* 32 (2004): 111; Jelena Obradovic, et al., "Developmental Assessment of Competence from Early Childhood to Middle Adolescence," *Journal of Adolescence* 29 (2006): 880.

²⁵ Hein, et al., "Why Is It Hard to Make Progress in Assessing Children's Decision-Making Competence?" 4.

minimization of coercion and other social forces; inclusion of relevant relatives, peers, teachers, or caregivers with the patient's consent; and a "deliberative stepwise appraisal of the ... decision-making process."²⁶

Conclusion

Ethics refers to what we ought to do, which in this case refers to creating a situation where the pediatric patient is empowered to make decisions and afforded as much autonomy as possible. But when applied to complex patient encounters, the moral line can be elusive. Buchanan and Brock discuss different theories around capacity, assessing a threshold-based definition and a gradient-based one.²⁷ Although some cases, such as that of a patient in a persistent vegetative state, are clear-cut, the majority of patients have limitations in capacity-defining characteristics that are partial. In the same way, our ability to employ the above-described techniques to optimize information-sharing and the decision-making environment is also partial. How are we to ensure that a decision is totally voluntary and totally informed? We cannot. In the end, we must apply our incomplete, gradient-based information to make a threshold-based assessment: Does the patient have capacity to make autonomous decisions?

It is precisely because of this challenging need to assess a gradient-based situation in a threshold-based manner that we must follow a developmentally and ethically-based framework when engaging in these discussions. The framework described by Michaud and his co-authors is a starting point for assessing capacity that allows us to provide a positive, continually reflective environment that takes into account relationships and developmental stage/capacity, while avoiding coercion.²⁸ We can apply such a framework as we interpret the four known components of adult capacity in decisions for pediatric patients.

The Convention on the Rights of the Child states that with the increasing knowledge, understanding, and experience of a child, parents and providers must transition from "direction and guidance into reminders and advice, and later to an exchange on an equal footing."²⁹ We lack concrete definitions for this transition, and providers lack a standardized, evidence-based approach for testing it. Future studies should focus on clearly defining pediatric capacity and assessing tools to help build an evidence-based approach.

²⁶ Pierre-Andre Michaud, et al., "Assessing an Adolescent's Capacity for Autonomous Decision-Making in Clinical Care?" *Journal of Adolescent Health* 57 (2015): 361.

²⁷ Buchanan and Brock, *Deciding for Others: The Ethics of Surrogate Decision Making*.

²⁸ Michaud, et al., "Assessing an Adolescent's Capacity for Autonomous Decision-Making in Clinical Care?" 361.

²⁹ *Convention on the Rights of the Child*, New York, November 2, 1989, United Nations Treaty Series, vol. 1577: 363.

F A S P E

FELLOWSHIPS AT
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2015
JOURNAL

SEMINARY
PAPERS

INTRODUCTION TO A SAMPLE OF THE 2015 FASPE SEMINARY PAPERS

Traveling with a group of FASPE scholars and students to Berlin, Krakow, Auschwitz and Birkenau, as I did for the first time this past summer, is life-changing. Historians Kevin Spicer and Thorsten Wagner, along with our 12 seminary students from Muslim, Christian, and Jewish schools — and an additional cohort of medical students and professors — helped me discover a capacity, even a call, to face the dark horror that radiated from Berlin, overtook Europe, and revealed the human hunger for extinction. Our FASPE group wondered aloud, how could this have happened? Was the Holocaust a deviant blip in human history or a manifestation of a new norm? What if anything might each of us do to assure that it will not happen again? And what lessons can each of us take from this horror to make us better leaders in our communities?

While Christian religious leaders in Nazi Germany largely did not actively participate in the murder and genocide of Jews in the Holocaust, they incurred guilt through passive collusion, through failure to protest, and through theological rationalizations of the status quo. They acted, in other words, in ways many religious leaders might act today. This is why the FASPE seminarians each understood that American clergy and theologians today must work to change the inner life of individual believers and the thought-world of their various religious communities.

After the trip, the Fellows were asked to reflect on their experiences and to connect some aspect of the history of the Holocaust to a contemporary ethical concern for religious leaders today. The following three papers are a sample of the excellent responses.

The first is from Eric Martin, who eloquently challenges his church, the Roman Catholic Church, to give up its theological certainty, let go its notion of exclusive truth, and begin to do theology as a dialogue with other world religions. The “theological humility” for which Eric calls is a challenge to traditional Catholic theology, yet he suggests there does exist a line in Catholic thought from which to draw on for this approach.

The second paper is from Elizabeth Andradi. She writes a deeply personal response to today’s refugee crisis, seeing its unfolding as all too similar to the world’s failure to grant refuge in the 1930s and ’40s to those fleeing Nazi Europe. With confessional honesty, she reminds her reader how we all collude in a status quo that easily turns a blind eye to the suffering of strangers.

The third paper is from David Stark, who meditates on the danger of euphemistic language, its capacity to “undo humanity by its covering over the reality of death,” and to sanction “an inhuman way of thinking about life, and God, and other people.” David warns his community that if we hide behind numbing clichés in order to silence the voice of lamentation in our midst we will fail to struggle against our own racism and Islamophobia.

It may seem odd that religionists would call for a shift in the inner world of the individual as the ethical response to a massive human act of violent destruction. But to call for intellectual humility, emotional awareness, and linguistic honesty is to begin to build the world over again. That may well be the role of religion in the aftermath of the Holocaust.

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Disappearing the Other

On the Theological Duty of Humility

In 1845, the German philosopher Ludwig Feuerbach observed that “to every religion, the gods of other religions are only conceptions of God; but its own conception of God is... God genuinely and truly so.”¹ After the terrible history of the Shoah, we might add a corollary: By viewing those of other faiths to be in error, religions designate other worshipers as mistaken and open a door to the devaluation of their humanity and, potentially, to acts of violence against them. That particular history is, if not the first, perhaps the most dramatic example of the danger inherent in doing and preaching theology. Though religious theory and worship alone did not account for the murder of some six million Jews under the Third Reich, it did help create an atmosphere in which it could take place.

This reality presents an ethical challenge to theologians and preachers of all faiths. What should we make of what the novelist Walker Percy calls a religion’s “rather insolent claim to be true, with the implication that other religions are more or less false?”² Are those who form doctrine through their faith tradition condemned to either surrender the assertions of religious truth or blaze an other-izing path that may culminate in genocide? Is it possible to uphold the core confessions of one’s own religion while simultaneously affirming the full and equal dignity of those who hold different faiths and to do so without defining their religions as necessarily flawed or incomplete?

This is a challenge that Christian, and particularly Catholic, theologians have generally failed to address. Its most celebrated thinkers have almost uniformly rejected the idea that other religions bear their own truth or have their own means to salvation. Even those who attempt to widen the gates to welcome in the non-Christian have largely done so by subsuming whatever they consider to be right in another’s tradition under the definitions given by Christianity; that is, a Jew, Hindu, Muslim, or any other believer may accidentally share in true religion, but only insofar as their faiths align with the Christian faith. Current Catholic doctrine still operates according to this premise, which looks quite curious in light of Feuerbach’s assertion quoted above. Given the disproportionate amount of global power Christianity wields, it is incumbent upon its theologians and preachers to engage in the hard work of creativity by rejecting this approach without abandoning the importance of the Cross at the center of their faith. It may, in

¹ Ludwig Feuerbach, *The Essence of Religion in General*, (London: Savill and Edwards, 1854), 16.

² Percy’s quote is pulled from Kieran Quinlan’s *Walker Percy: The Last Catholic Novelist* (Baton Rouge: Louisiana State University Press, 1996), 161.

the end, demand the refusal to construct systematically closed theologies that claim to have finally “arrived” at the truth, unfiltered and pure.

Making “Inclusivity” Exclusive

The doctrine *extra ecclesiam nulla salus*, or “no salvation outside the church,” has been interpreted in various ways by theologians and clergy. The Jesuit theologian Francis A. Sullivan argued that while the early Church Fathers tended toward a positive attitude regarding the salvation of some outside the church, the doctrine became more exclusive over the centuries.³ A more extreme example is found in the 1302 papal bull of Pope Boniface VIII, *Unam Sanctam*, in which he wrote, “we declare, state, and define that for every human creature it is a matter of strict necessity for salvation to be subject to the Roman Pontiff.”⁴

Once such open exclusion became unpalatable to some theologians after the bitter fate of the Jews in the Shoah, several influential thinkers began to pick up the more inclusive strand of the early Church Fathers. Most notably, Karl Rahner, whose theology was instrumental in modernizing Catholicism during the Second Vatican Council (1962-1965), argued that even people who are neither connected to the Church, nor confessing Christians, might be “anonymous Christians.” He held that people of any faith may still receive God’s universally-extended grace by loving one’s neighbor, for example, thus implicitly loving God and accepting salvation. This openness to transcendence beyond oneself and even one’s religion is a means to salvation “outside” the Church. This kind of “inclusive” theology of the world’s religions became accepted as doctrine during Vatican II. While the council’s documents looked positively on the chance of salvation for Jews, Muslims, and those who do not know God through “no fault of their own,”⁵ the bishops nevertheless made clear that “the Church has been sent by God to all nations that she might be the universal sacrament of salvation.”⁶

However, some consider Rahner’s solution a benevolent colonialism, under which all religions find their dignity and worth in, and only in, the ways they overlap with Christianity. It is still through the salvation offered by Christ that all are saved, and therefore the narrow gate of truth runs through the one holy Church which alone worships him. While the good-will offering of those like Rahner or the Vatican II documents may be preferable to the naked hostility of Boniface VIII, the end result is the same: salvation through Christianity or not at all.

One such good will effort is worth highlighting to illustrate the violence inherent in such a doctrine and stands as a warning to those who teach and preach today. Henri de Lubac, a French Jesuit and fellow architect of Vatican II theology, staunchly opposed Nazism while living in

³ Their particular concern, according to Sullivan, was limited to those who lived before Jesus. Francis A. Sullivan, *Salvation Outside the Church: Tracing the History of the Catholic Response* (New York: Paulist Press, 1992), 14.

⁴ Quoted in Sullivan, *Salvation Outside the Church*, 10.

⁵ Pope Paul VI, “Dogmatic Constitution on the Church - *Lumen Gentium*,” Vatican: the Holy See, Rome (Nov. 21, 1965), §16.

⁶ Pope Paul VI, “Decree on the Church’s Missionary Activity,” Vatican: the Holy See, Rome (Dec. 7, 1965), §1.

Vichy France, helping to run a resistance newspaper called *Témoignage Chrétien* (*Christian Witness*) and petitioning his superiors to take a stronger stance against Hitler's policies. Despite his liberatory aims, however, de Lubac's supersessionist theology only functioned to further entrench the very ideology that dismissed Jews as religiously incomplete and which the Nazis had earlier seized upon. Building on a long-accepted theology in Catholicism, he considered Judaism to be stunted, a faith that never accepted Jesus as their awaited Messiah and therefore remained incomplete. He wrote in 1941 of "the blinded eyes of the synagogue" and a "definitively twisted" institution. Catholicism, on the other hand, was divinely ordained to "conquer all" because "its nature is to burn everything."⁷ That these words were laid down in a chapter called "Christian Resistance to Nazism and to Anti-Semitism," and at a time when Jews were quite literally being burned by Christians in ovens, exemplifies the cruel irony and insidious danger of the mindset observed by Feuerbach.

As professor of Jewish Studies Susannah Heschel has noted, it is this "radical overcoming of Judaism," spelled out by de Lubac, but embedded in the "inclusivist" strand represented by Rahner and the Vatican II documents, that quickly became the "racial overcoming of the Jews." Supersessionism, she says, is "a kind of colonization of Judaism, metaphorically speaking, on the theological level."⁸ That is, it does not seek to destroy Judaism so much as to exploit it for Christian aims. Because Christian scripture claims that Jesus did not come to abolish but to fulfill Jewish scripture by becoming the messiah it awaited, Christianity found itself in perpetual dependence upon Judaism. So it retained its Jewish foundations while moving "beyond" it, in a movement that implicitly suggests (and sometimes explicitly declares) that those who remain Jewish remain in error and fail to possess the fullness of the truth. As Heschel's text elaborates, it was all too easy for the attack on Judaism to become an attack on Jews, for supersessionism to become genocide. Because the religion and the people cannot be extricated from each other, this ideology already bore within it the seeds of the Shoah.

This ideology is not a relic of the past, however, but is very much alive and continues to reside at the forefront of Catholic theology. On September 5, 2000, the Congregation for the Doctrine of the Faith issued *Dominus Iesus*, written by Joseph Ratzinger (who would later become Pope Benedict XVI) and signed by Pope John Paul II. Ratzinger wrote the declaration to reemphasize the centrality of Christ's salvation in the face of a religious pluralism that some theologians had come to embrace and which had long become regarded as self-evident by those aware of other cultures. Ratzinger restated the "inclusive" position in strong terms, writing that, "If it is true that the followers of other religions can receive divine grace, it is also certain that *objectively speaking* they are in a gravely deficient situation," as opposed to Catholics, who "have the fullness of the means of salvation."⁹ Even other Christian churches are denied the status of

⁷ Henri de Lubac, *Theology in History* (San Francisco: Ignatius Press, 1996), 371-388.

⁸ Susannah Heschel, *The Aryan Jesus: Christian Theologians and the Bible in Nazi Germany* (Princeton: Princeton University Press, 2010), 27.

⁹ Congregation for the Doctrine of the Faith, *Dominus Iesus: On the Unicity and Salvific Universality of Jesus Christ and the Church*, 2000, § 22.

“Church” within the declaration and therefore find themselves outside the stated fullness. Jewish theologian Ruth Langer responded that the document easily bred “mistrust” and that “language like this re-irritates [the] still raw nerves” of Jews, some of whom have living memories of what this type of doctrine helped set loose in Europe.¹⁰ She found particularly problematic the document’s assertion regarding “*the necessity of conversion to Jesus Christ and of adherence to the Church through Baptism.*” Ratzinger failed to understand the import of a statement made by the leading twentieth-century Jewish theologian Rabbi Abraham Joshua Heschel that, had he been faced with the choice of the ovens in Auschwitz or a Catholic baptism, he would have preferred the ovens.

Opening the Closed End

In such a context, theologians and preachers must resist the assertion of Christian exceptionalism. A temptation resides not only in the egoistic tendencies toward making oneself normative, which have plagued the Church for centuries, but also in the seductive leisure of hiding behind the protection of ecclesial authorities and their pronouncements. That this exceptionalism is sanctioned and even demanded by the highest church officials creates an atmosphere in which it is easy to proclaim oneself finally and definitively *right*. But this assertion always implies, as Walker Percy observed, that all others are finally and definitively *wrong* – despite the “inclusivist” window dressing one might use to conceal it.

Perhaps the tension between the Christian doctrine of grace and the fact of religious diversity across the globe points to something more radical than a call for mere dogmatic tinkering. It seems to trouble the very notion of a totalizing systematic theology in which defined answers somehow spring forth from a faith in a transcendent God. The act of capturing that which is utterly beyond human grasping in a catechetical jar which can be screwed tight, sealed, and labeled appropriately betrays a lack of basic humility. Given the history of peoples searching for the slightest pretense with which to dominate others, designing closed systems that define who is “in” and who is “out,” which group does and does not possess ultimate truth, seems ethically irresponsible — an invitation to violence. Theologians and preachers need to rethink the very program of seeking to arrive with finality at a coherent soteriology. What does the oft-repeated phrase surrounding the Shoah, “never again,” demand if not a refusal to build the same type of foundations that led to the murder of so many Jews?

Fortunately, those who would allow their theology to be cracked open are not without resources. One may turn to the Jesuit theologian Roger Haight, for example, whose theology respects the fact that human knowledge, even after revelation, is *inherently* limited. “Every actual religion is historically limited, ambiguous, and possibly erroneous in any given practice or belief,” Haight argues, “It is thus impossible to label a religion simply and comprehensively true, just as it is

¹⁰ Ruth Langer, “A Jewish Response,” in *Sic et Non: Encountering Dominus Iesus*, edited by Stephen J. Pope and Charles Heffling (Maryknoll, NY: Orbis Books, 2002), 125.

difficult to imagine an old and vital religious tradition to be simply false or corrupt.”¹¹ He therefore urges Christians to see religious pluralism as a positive, a moment in which the Church can learn from the world’s religions, after its overly long moment of instructing and imposing upon others. “Neither Jesus nor Christianity mediates any complete possession of God,” he writes, “Without a sense of God’s transcendent mystery, without the healthy agnostic sense of what we do not know of God, one will not expect to learn more of God from what has been communicated ... through other revelations and religions.”¹² In this view, the world’s religions should not be seen as making competitive, mutually-exclusive claims, each of which cancels out the other. Rather, the diverse religions stand as reminders of the need for humility and offer the opportunity of learning through dialogue.

It is perhaps not surprising that Haight’s theology was formally condemned by the Vatican. In 2004, the same Joseph Ratzinger of *Dominus Iesus* wrote, and Pope John Paul II approved, a notification announcing that the book contained “serious doctrinal errors.” Highlighting Haight’s desire to “mov[e] beyond Christocentrism,” the document stated that this idea posed a “grave harm to the faithful,” and Haight was banned from teaching.¹³ More might be gleaned, however, from their first complaint against his book listed in the notification. At issue was his method, which assumed that “theology must be done in dialogue” with the world. Haight’s original error, then, was that he mistook theology to be something other than a monologue.

The dilemma facing theologians and preachers of all faiths, therefore — but most pressingly Christians — is how to affirm the central tenets of one’s own faith without constructing a systematic structure that closes and locks the “other” out. As historian Benjamin Dunning notes, one must oppose the “desirability of a still-to-be-discovered final resolution.” What we need is a theology that “resists reduction,”¹⁴ for humans, too, may be reduced in the process. The very substance of the Christian faith rests on the Jesus of the gospels, who consistently lifted up those who were excluded from society. He declared the unassimilable “others” of society were to be included in his reign of justice, to the shock of even his closest disciples. Ironically, therefore, the genetic code of Christianity demands this humility in the face of the temptation to lay claim to truth finally and decisively. Those declaring Christianity normative thus paradoxically cast suspicion on themselves. Those who would teach and preach in the Christian tradition are required not only to *leave open* the systems of thought by which we make sense of that which transcends us, but also to *resist* the voices demanding we close them.

Novelist and philosopher Iris Murdoch argued that what makes “‘totalising’ coherence theories unacceptable is the way in which they in effect ‘disappear’ what is individual ... by equating reality with integration in a system, and degrees of reality with degrees of integration, and by

¹¹ Roger Haight, *Jesus: Symbol of God* (Maryknoll, NY: Orbis Books, 1999), 416.

¹² *Ibid.*, 417.

¹³ Congregation for the Doctrine of the Faith, “Notification on the Book ‘Jesus: Symbol of God,’ by Roger Haight S.J.,” 2004.

¹⁴ Benjamin H. Dunning, *Specters of Paul* (Philadelphia: University of Pennsylvania Press, 2011), 157.

implying that ‘ultimately’ or ‘really’ there is only one system.”¹⁵ It is the duty of theologians to dwell on the way their theories might disappear individuals. When we hear the haunting imperative “never again,” we should not only remember those who fired the ovens of Auschwitz, but also those who carved the theological space in which the flames could be fanned.

¹⁵ Irish Murdoch, *Metaphysics as a Guide to Morals* (New York: Penguin Books, 1992), 196.

And Who Is My Neighbor?

Making sense of the things I experienced with FASPE and applying them to the ethical issues that clergy face today has been an exercise in paying attention to my emotions and making connections between the stories and experiences that keep rising to the surface of my mind as I interact with the world now that I am home. These past months, since our plane landed back in New York, have been hard. One moment early in our trip stayed with me as we travelled, and I still cannot shake it.

I stood on the second floor of the Museum of Jewish Heritage in New York reading a panel that told the story of the voyage of the *St. Louis*. It was 1939 and a ship full of Jewish men, women, and children was trying to find refuge. The group, many of whom had applied for American visas, set out from Hamburg hoping to be accepted into Cuba temporarily. Politics, of which they were unaware, forced almost all of them back out onto the waters. The United States government knew of this ship that was within sight of the Florida coast, but would not accept its occupants. This response was supported by many Americans at the time. Prejudice against Jews was deeply rooted, and we were facing our own economic woes. We told them, “No” when they sought asylum. They were sent back to Europe. Only about half of the 937 passengers survived the years of Nazi terror that followed.¹

Today, as Americans, our response is not much different. The fourteenth anniversary of 9/11 has come and gone, and we are increasingly suspicious of the “other” and what their presence means for our safety, well-being, and freedom. This fear is echoed around the world, and it is not new. Our language and labels for those who look, speak, and worship differently are harsh and dehumanizing and they are amplified through sensationalism in the media and anecdotes passed down through generations. Our collective responses to those we perceive as different are governed by fear and anxiety, and these responses have become so ingrained that we consume them unwittingly and then repeat them in our private thoughts and our conversations without questioning their validity or source. We do not consider the human faces receiving the label of “other.” We disregard the oftentimes horrific things they have seen and experienced on their way to our borders. We forget the names in our own family trees that once bore the label of “immigrant” or “refugee.” We fail to acknowledge that were we to face the same political violence and wars outside of our control we would pray for other countries to let us in so our children might be safe and our stomachs might be full.

¹“Voyage of the St. Louis,” Holocaust Encyclopedia, United States Holocaust Museum, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005267>.

In the midst of all this, the face of a Syrian child flashes across our screens. Over the past months, news and images have poured in alerting the world to the horrific situation and conditions confronting refugees from Syria. Some six months ago, the world watched as Aylan, a three-year-old en route to Canada with his family, washed up dead on the Turkish shore. His father, Abdullah, was the only one of their family of four to have survived.² Mediated through news sources, it was his voice that told the story of his family's pursuit of safety and survival.

At the time, Facebook feeds and the nightly news were flooded with reports of Hungary refusing passage for trains full of Syrians trying to get into Western Europe. The Hungarian town of Keleti was in the spotlight as the crisis grew and conditions surrounding its train station became more squalid. The would-be passengers feared that if they would be taken from the station they would be sent to nearby Hungarian refugee camps.³

The horrific things the Syrian people were and are still experiencing and the treatment they are receiving have been poignant and painful to watch as the months have worn on. Opinions from every angle are being thrown around concerning what should be done. How will governments respond? Who will take in more than their previously agreed upon quota of refugees in response to this crisis? What happens once a fleeing individual or family finally arrives in a new place? Who will pay for their resettlement? How can we be sure they will not bring violence to their new home country or strain its economy? The plight of the Syrian people has been particularly painful for me to engage with, because of the stories and images I saw in New York, Germany, and Poland. The people persecuted by the Nazi regime faced very similar conditions and treatment as they were forced from their homes and tried to find places to resettle, many of which were inhospitable to them.

What is the world to do? Reports describe the current influx of refugees into Europe, of which the above description provides but a brief glimpse, as the worst refugee crisis since World War II. On the eve of World War II the citizens of the world might have been able to claim that they did not know what was happening early enough to be able to do something meaningful, but people today cannot make such a claim. Even though Americans knew of the St. Louis, it was not to the same extent that we today can know of contemporary events, though of course this does not excuse their response any more than we can excuse ours. Nowadays, one reason for inaction in many cases, is the humanitarian crisis we are hearing about at the moment is not the only humanitarian crisis happening. It is not the only tragedy finding its way to the world's televisions and computer screens.

²Joe Parkinson and David George-Cosh, "Image of Drowned Syrian Boy Echoes Around the World," *The Wall Street Journal*, September 3, 2015, <http://www.wsj.com/articles/image-of-syrian-boy-washed-up-on-beach-hits-hard-1441282847>.

³Daniel Nolan and Emma Graham-Harrison, "Hungarian Police Order Refugees Off Train Heading to Austrian Border," *The Guardian*, September 3, 2015, <http://www.theguardian.com/world/2015/sep/03/budapest-station-reopens-no-trains-running-western-europe-migration-crisis-europe>.

Citizens today have the opposite problem of those in the 1930s, which is that we know too much. Not only do we know too much, but the distance between us and the hungry family on the train tracks in Keleti is more than simply half a world away. We also only experience their stories through a screen or on a page. It can be paralyzing because there are so many issues, and they are so complex, and so many of us do not have personal relationships with those who are marginalized and suffering. Moreover, the ease with which we can share an article on Facebook can make us feel like we have already done our part.

At their core the issues above reflect the struggle of ethics. There is no simple answer to give, and we all carry our own motives and fears. It would be easier to look away. It would be easier to let countries that are closer to the crisis deal with it on their own. But after experiencing FASPE and seeing the ramifications of such a lack of response, I cannot stomach it. The problem remains though: What to do? How do individuals respond when the whole thing seems so overwhelming and every seemingly good option is coupled with a complication and a potential negative impact? In order to have a hope of answering these questions we must examine our underlying prejudices and recognize that they are not very different from those that the world held in response to the Jewish refugees in the 1930s.

How do I as a minister, now and in the future, walk with my community as we discover together the questions to ask ourselves and one another that will lead to just and merciful responses to those who are hurting that go beyond inaction or tempered reactions? We cannot respond to everything. How will we know which are our causes to take up? How will we move past the tendency to “otherize” the faces we see on the screen and the stories we read and hear? To answer this question we need to start closer to home, and the role of a minister is to help provide space and language for the people of his or her community to do so. Often offering this space begins with allowing ourselves to be vulnerable about our own struggles and discomfort as we become more educated about the world around us.

So, for the sake of exploring these issues here, I need to start by confessing my own failings. I live in Texas. The neighborhood where I grew up in Austin is home primarily to families who are Hispanic — many are among the first generation to live in the U.S. As a white female I was a minority at my elementary school. Learning Spanish came fairly naturally to me because every item at the grocery store where I shopped was labeled in both English and Spanish. The homes where I had sleepovers spoke both languages. From the time I was young these families were my neighbors, classmates, and friends.

But when I was in high school, and I overheard someone telling a story of how they harassed a group of Mexican students, I didn’t say anything to defend my neighbors when I should have. Earlier that day a group of Mexican students were leaving school when a white student yelled, “*La migra! La migra!*” which is a slang Spanish term for U.S. immigration authorities. It is often shouted as a warning that immigration officers are in the area. Shouted fast and loud, *la migra* incites fear. When this white student shouted *la migra* he was using it to harass his fellow

students. He might as well have yelled, “You’re an illegal! Get out of my country!” Yet, I did not speak up as my friend recounted this scene, because stories and jokes like this were so common. I did not stop to question or consider what those Mexican students felt that day, because I overheard taunting like this directed at and among my friends in elementary school every day. It was the norm. I just laughed like everyone around me, more concerned that my friends continue to like me than with the injustice I was helping to perpetuate. Perhaps the worst part of my behavior was that it happened while I was standing outside my church waiting for a youth group meeting to start. The cruel irony of where we were laughing and what we were laughing about was totally lost on me.

It has taken years of learning about the world and hearing individual stories of the pain and struggle that immigrants and refugees face for empathy to begin to form within me. I tell my story of silence — only one of too many — because I believe it displays the power that everyday speech or silence has to impact our formation as individuals. When we make the seemingly minor choice to not consider the human face and life of our neighbor, who may be injured by our silences, our chuckles, or our outright prejudiced labels, we cripple our ability to respond justly to the larger systemic oppression that exists in our country and world. Simply put, if we cannot see what affect our lack of relationship with and advocacy for our immediate neighbor has on our communities — and our humanity and theirs — then we cannot possibly offer anything more to those fleeing Syria.

Growing up in Texas, I was constantly exposed to discussions concerning border control and security. It is here that jokes like yelling *la migra* to harass immigrants originated. Everyone had an opinion about how our leaders should respond to the growing influx of immigrants. It seems to me that most were of the opinion that Mexicans and others crossing the border into Texas should not be allowed into the U.S. unless they entered legally, which I admit was convincing to me on a lot of levels. As I grew older, however, I learned more about how hard it is to get American citizenship. And I began to realize that many people are not simply coming to Texas in order to have a better life. Many are fleeing for life itself. As the drug wars in Mexico increase in severity, daily danger has increased as well. More often than not, these migrants are escaping very real perils. I still hear too many Christians respond to this fact with the same rhetoric I have heard my whole life. They say it is not the job of U.S. citizens to take on the cost of our neighbor’s medical needs, school fees, and issues of hunger. We Christians say this either explicitly with our words or implicitly with our lack of action. But in the parable of the Good Samaritan in Luke 10:25-37 Jesus teaches the exact opposite. Here we find what our response should be. We must recognize that we can no longer stand perplexed and wondering, “And who is my neighbor?”⁴ Jesus has already given us an answer. We as followers of Christ are the ones to show mercy. How to do so faithfully and responsibly raises so many new questions. We know who our neighbors are. Now, how will we show them mercy?

⁴ Luke 10:29.

David M. Stark

Authentic Speech

Preached Sunday, July 12, 2015
Highland United Methodist Church
Raleigh, NC

*How long, O LORD? Will you forget me forever?
How long will you hide your face from me?
How long must I bear pain in my soul,
and have sorrow in my heart all day long?
How long shall my enemy be exalted over me?*

*Consider and answer me, O LORD my God!
Give light to my eyes, or I will sleep the sleep of death,
and my enemy will say, “I have prevailed”;
my foes will rejoice because I am shaken.*

*But I trusted in your steadfast love;
my heart shall rejoice in your salvation.
I will sing to the LORD,
because he has dealt bountifully with me.
— Psalm 13:1-6*

It is a curious thing — the way we talk to one another and even to God. Have you ever noticed what we say — and don’t say?

This question struck me recently, when I traveled as a FASPE Fellow with a group of religious leaders and doctors to study the Holocaust. I remember a particular moment when we were at the House of the Wannsee Conference on the outskirts of Berlin. We were gathered there at this beautiful three story stone villa. A flower garden was laid out on one side, and a stone deck lined the back of the house and overlooked a lake where the sun was shining and sail boats streamed by.

This was the house where top members of the SS met in January 1942 to talk about the “Final Solution,” meaning genocide — the mass killing of Jews.

An invitation was sent out to all the high ranking officials. It said, “Come for a discussion followed by breakfast.” So they gathered around the large dining room table and discussed the “solution” to the “Jewish question.” Notice their language.

They talked about sterilization, but decided it was too slow. Instead, they chose to employ “accelerated immigration.” Their language. They wanted to speed up the mass killings they had begun a year earlier.

And they said at this same meeting — gathered around the dinner table overlooking the garden and lake — they said, “We’ll pay for this by a ‘migration levy’ imposed upon the Jews.” Mass killing paid for by mass theft. And “we’ll send these Jews,” they said, “to ‘work camps,’ where, of course, they will work, though some will drop out from ‘natural reduction.’”

As I was standing in that dining room at Wannsee I was struck by the dishonesty of their words, their euphemisms. These were people who knew what they were doing. Not only that; some had been to the camps and had seen with their own eyes the effects of these euphemisms on the lives of Jewish men, women, and children. They weren’t fooled. And they weren’t really trying to fool the others at the table.

No, this was not a conference about trickery. This was a meeting about a theology of unreality. If, as the Gospels teach, Jesus came that we may know the way, the truth, and the life, then what was happening at Wannsee was the wink, the ruse, and the lie. If Jesus is the one who’s come that we may have life to the fullest, then what was happening here was the articulation of a way of stealing, killing, and destroying.

What was happening here was propagation of a language of destruction. This is a form of speech that undoes humanity by its dishonesty, by its covering over of the reality of death.

.....

After we left Wannsee, we rode the bus to a Berlin neighborhood called Grunewald. It is a suburban area that looks very familiar. The houses might be a little different ... probably much older, but the neighborhood reminds me of my neighborhood. This neighborhood. Leafy trees. Large houses. People driving fancy cars. Well-manicured yards. It looked like home.

We went to the train station there, which might as well have been a station at Ridge Road and Glen Eden. And, we read about how in that very spot, from 1942 to 1945, over 50,000 Jews were marched through the neighborhood, put on train cars, sent to Auschwitz, and murdered.

I saw, as I stood there in this neighborhood, a house maybe 50 yards from the spot where Jews were loaded into train cars. I wondered about the people who lived there. I wondered if these people are like my neighbors. Are they like me?

I wondered what was happening in their minds. In their hearts. Were they really fooled? Did they really think, “Oh, this is just accelerated immigration”? Surely not!

Today, if we saw people in groups as small as 50 or as large as 1,000, marched through our neighborhood by military police we would surely raise some questions. We might surely guess that something more pernicious was happening.

Our neighbors in Grunewald surely weren’t fooled, either. But, they were invited to fool themselves with Wannsee’s language of destruction. They were invited into an unreality — into an inhuman way of thinking about life, and God, and other people.

.....

One of the values that this church holds dear to its identity is the importance of being authentic, real, honest. This value, of course, might be a value for any person of faith. We need to be honest. To be real about our faith, about the world, about what we see. We need to be honest in our speech.

So, I am very thankful that we have named this as a value for us, because it is not so easy for people like us to be honest. We struggle, bless our hearts. As I look around the congregation, as I look in the mirror, I see that many of our occupations invite us to be the people who create the euphemisms and develop the acronyms that hide what’s really happening. I see that we Southerners are the people who know how to hide our feelings and our thoughts. We struggle to be honest. And yet honesty is exactly what the world needs. It is what our souls cry out for.

.....

A few days after visiting Wannsee and Grunewald, I was standing with our FASPE group in the middle of Auschwitz-Birkenau, the largest of the Nazi killing camps. There before me was a train car symbolizing the place where people were unloaded and separated into two groups: one for the gas chambers and one for the slow murder of work camps.

One of the members of our group had family members who were deported to this site. In fact, this was the last place where his family was together. Soon after they were let out of the train car they were in, a Nazi official — with little more than a glance over — decided that most of my new friend’s family would go straight to the gas chamber, but that one person would be sent to work. This man would become my new friend’s grandfather.

After a few moments of standing in the shadow of that train car, I moved on with the tour group. But, then, behind me, back at the train car, I hear my friend cry out from somewhere deep in his gut. A cry rose up from somewhere in the depths of his soul: “AHHHHHHH.”

And, as I listened to his cry, I couldn't help but think of the words of Psalm 13. The opening words sound — in Hebrew — like a cry: *ad anah*, “How Long”:

Ad anah, O LORD? Will you forget me forever?
Ad anah, will you hide your face from me?
Ad anah, must I bear pain in my soul,
and have sorrow in my heart all day long?
Ad anah, shall my enemy be exalted over me?

How long, O Lord? How long? Perhaps as long as we are willing to order our societies with dishonest and evasive speech.

The Psalms of lament comprise a third of the book of Psalms. Roughly 50 of 150 chapters are lament, and yet how often do we read Psalms of lament? The book of Job is filled with lament and complaint. Job cries out again and again about his pain, suffering, and confusion. Yet we treat Job as little more than a novelty. Many of the prophets — like Jeremiah and Habakkuk — cry out in anguish, and yet we skip over these cries. In fact, the *Revised Common Lectionary* often deliberately cuts out those texts from the church's reading. There is even an entire book called Lamentations, but when is the last time we have read that book?

It seems that especially over the last 100 years, or so, we in white middle class America, we who have reached a certain level of sophistication — so we think — we have moved away from lament and complaint. We may share it privately, but even when friends ask, “How are you,” too often we will simply smile and say, “I'm fine,” when the truth is we are hurting. We struggle with authentic speech.

In his book, *American Cool*, historian Peter Stearns argues that what developed in the early twentieth century was the idea of dispassion, being cool, or at least appearing to have it all together. “With the growth of consumerism, corporate management, and the service sector, the American middle class adopted an emotional style that places great stress on concealing emotional reactions, especially in the workplace where they could interfere with generating profits.”¹ Do you hear that? We have been trained by industry to conceal our deepest reality in order to be more successful in generating profits!

There is something curious then about the way we speak. We keep articulating and propagating a theology of unreality. It is the kind of language that goads us to value property over others' lives. It is the grammar that covers over torture and war. It is the speech pattern that conceals systems of oppression. It is the way that even obstructs our ability to care for those closest to us.

¹ Stearns's argument is summarized by Matt Schlimm in *From Fratricide to Forgiveness: The Language and Ethics of Anger in Genesis* (Winona Lake, IN: Eisenbrauns, 2011), 36. See Peter N. Stearns, *American Cool: Constructing a Twentieth-Century Emotional Style* (New York: New York University Press, 1994), 300-301.

So we say, “He’s gone on to a better place,” and dismiss the pain and loss of death. Or we say, “They’re no longer together,” and smooth over the fact that a relationship that once held so much promise and love is now broken and lost.

In his book, *Good News*, philosopher and theologian Phillip Cary writes, “The idea that Christians are supposed to have a deep inner joy all the time is a terribly cruel notion.”² It is terribly cruel because it turns a would-be comforter into another tormentor. We say, “Feel better, cheer up.” We refer to New Testament passages that seemingly command us to rejoice in the Lord always — and in doing so we make the sufferer feel not just the pain of suffering, but the anxiety of uncertainty about whether he or she is failing in the Christian life.

We, of all people, need the Psalms of lament because they can help us to be honest, and to really offer care and comfort for the other. What if instead of using our euphemisms, instead of acting as though our life is only joy and rejoicing, what if we simply named our experience honestly — like Jesus did when he was in the garden, and said, “Take this cup of suffering from me.” What if we named suffering honestly like Jesus did again on the cross, crying, “My God, my God, why have you forsaken me?” ... or maybe like the Psalmist does today, when he prays:

Consider and answer me, O LORD my God!
Give light to my eyes, or I will sleep the sleep of death,
and my enemy will say, ‘I have prevailed.’

.....

Near the Brandenburg Gate in the heart of Berlin there is a block full of gray, concrete slabs that look like plain sarcophagi rising up out of the ground. This is the Memorial to the Murdered Jews of Europe. As you begin to walk through these raised, symbolic tombs, you descend into darkness. Even though the tombs look roughly even, the ground slopes downward, and without noticing it at first you begin to descend into a place where the tombs tower over you. This felt to me like a place of death and deep darkness. It was a place of shadows and grief.

When I was down there in the shadows I found my heart crying out, “Lead us, O Lord, out of this darkness. Give light to our eyes or we will all sleep the sleep of death.”

And then part of the gift of that place is that as you walk out the stones recede. You see more and more light. As I walked my heart began to sing, “Yes, O Lord, deliver us from darkness. Let us know your light.”

² Phillip Cary, *Good News for Anxious Christians: 10 Practical Things You Don’t Have to Do* (Grand Rapids: Brazos Press, 2010), 139.

One of the features of the Psalms of lament is that they lead you through the process that I just described. They begin with a complaint or lament about suffering: “How long, O Lord?” Then, they lead you through a supplication: “Consider and answer me ... give light to my eyes.” And, in most cases these Psalms end with a word of praise: “I will sing to the LORD, because he has dealt bountifully with me.”

Taken as a whole, the Psalms of lament show us that even in the midst of lament — and maybe especially there — God is present. There is no place where God is not. There is nowhere that God cannot meet us. As scripture proclaims, God will never leave us or forsake us. In fact, there is nothing that can separate us from the love of God. The Psalms of lament remind us of this truth.

Even my walk through the Memorial to the Murdered Jews confirmed it. For here, in this moment, I encountered a Germany that has been changed — not just by martial defeat, but by the love of God. What strikes me about modern Germany is the way that many of the people reflect on the evil they helped to perpetrate. There are monuments and memorials everywhere. Even German businesses lay out banners that say, “Remembrance and Responsibility.”

I did not hear large groups of people claiming that the swastika was an important aspect of honoring their heritage. I did not find masses of people arguing that National Socialism may have gone astray in a few places, but was an otherwise great institution. These views certainly exist, but they are held by a small minority.

Instead, what I encountered is a people who are saying, “We were wrong — terribly wrong.” And by saying that, owning that, many people seem to have been set free. Free from euphemisms, free from double speech, free from the grip of a theology of unreality. Free to support the life and well-being of others.

Seeing that part of Germany made me long for freedom here. It made me long for the day when we come to terms — honest terms — with our lives, our suffering, and our community. I look for the day when the church can be authentic in lament, honest in grief, so that we can be real in our joy as well.

Maybe if we can learn to be honest about our feelings in our prayer life. Maybe if we in church can truly express our suffering, fear, anger, and confusion. Well, maybe then we’d be better at caring for each other.

And maybe then we’d have the resolve to challenge the euphemisms and theologies of unreality that surround our own culture’s struggle with racism and Islamaphobia.

Ad anah, O Lord, how long?

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

2015
JOURNAL

ALUMNI
PAPERS

INTRODUCTION TO A SAMPLE OF FASPE ALUMNI PAPERS

When the FASPE Journal was initially published seven years ago, it was intended to give some insights into what our Fellows learned while traveling and what they took away from the FASPE experience. As FASPE has grown, we now hope that this publication can do more, becoming a venue for broader reflection and analysis of contemporary professional ethics topics.

Our Fellows remain central to this effort, but with the introduction last year of writings from both our most recent Fellows and alumni further into their careers, we hope the FASPE Journal can evolve into a publication of interest to a wider audience.

This year we include only a single paper in this section, but with each passing year we anticipate an increasing number of submissions from our alumni, and perhaps even from scholars outside of FASPE.

The paper that follows is by Yael Shinar, a 2014 Medical Fellow studying medicine at the University of Michigan Medical School. She opens her paper by describing the case of a teenage child, highlighting how respect for a patient's autonomy is not as simple as it sounds when dealing with pediatric cases. Yael, however, does not stop there, explaining that the "Justification for legal intervention in pediatric medical decision-making may be traced through the history of case law regarding Jehovah's Witnesses." This opens one further area of inquiry for Yael, as she explores the challenges posed when religious beliefs clash with medical opinion. Her paper probes the ethical response for doctors facing these difficult cases.

It is our hope that through scholarship like the paper included here, we can help foster inter-disciplinary discussion about the ethical challenges faced by the leaders in a range of professions. Yael Shinar bridges religion and medicine. Next year we hope to have works that broaden the view to include business, law, and journalism.

I hope that our readers find Yael's paper of interest and are inspired to think about submitting their own work to the FASPE Journal next year and in the more distant future.

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MANAGING DIRECTOR, FASPE

The Standard of Care as Moral Authority¹

The contemporary practice of medicine in our pluralistic society lacks a content-full morality to provide definitive guidance in ethical dilemmas.² Hence clinical ethics committees seek to preserve negative liberties and rely on the principle of respect for autonomy, in order to determine ethically permissible courses of action in any given case.³

Challenges to pluralist ethics arise in various ways. One challenge arises when the content of a particular belief cannot be reconciled with current medical practice, as when Jehovah's Witnesses refuse blood transfusions at times when transfusions are medically indicated. Other challenges to pluralist clinical ethics arise when autonomy is compromised, as when the individual whose freedoms are being protected is cognitively or legally vulnerable. This occurs in pediatric cases as a matter of course, where patients have yet to develop legal autonomy.

A case that came to the Pediatric Ethics Committee at the University of Michigan Health System (UMHS) in July revealed that these issues can sometimes get complicated. I'll begin by reviewing this case and summarizing its relevant ethical principles. I'll then explore the moral authority of these ethical principles through the lenses of law and religion. In my analysis, I will ask: What is the moral foundation for the imposition of medical intervention? What belief do we impose, when we impose the standard of care? By what authority do we insist on the righteousness of such an imposition?

Analysis of the presented case in the language of religious experience will augment our understanding of the relationships among medical practice, scientific evidence, and clinical ethics. This may illuminate how the standard of care, as a scientifically informed standard in a pluralistic society, comes to carry the weight of moral authority, especially for children.

The Pediatric Ethics Committee was consulted regarding patient "LT" on July 25, 2015. At that time, LT was a 17.5-year-old male with a history of refractory acute myelogenous leukemia (AML), with the following complications: extramedullary disease and involvement of the

¹ This paper was given as a talk at the 14th Annual Bioethics Conference of the Michigan State Medical Society, in Ann Arbor, Michigan. It is currently being revised for presentation at the 2016 Conference on Medicine and Religion, in Houston, Texas.

² The phrase "content-full morality" comes from the work of philosopher H. Tristram Englehardt. Englehardt contrasts "content-full morality" with "purely procedural morality [centered on] the moral authority of ... consent." H. Tristram Englehardt, *The Foundations of Bioethics* (New York: Oxford University Press, 1996), 7.

³ Isaiah Berlin, *Four Essays on Liberty* (New York: Oxford University Press, 1969), 127.

central nervous system. He had been healthy until March 19, 2015, when he went to an outside hospital for the first time complaining of fatigue, muscle pains, and abdominal pain. He was admitted to the outside hospital, where he twice failed initial phases of therapy. He then came to UMHS.

At the time of his transfer to UMHS, LT understood that the standard therapy would involve a 100 percent chance of death in one to two months. He was offered entry into a phase 1 clinical trial for adults, after an exception to the Internal Review Board was granted. It was reported that the trial would give him a 10-20 percent chance of survival for one year and a 50-60 percent chance of relapse. LT expressed an interest in and willingness to enter the clinical trial. Since the trial was for adults and did not have a pediatric consent form, LT signed the consent form next to his mother's name.

LT was admitted to the bone marrow transplant service on Thursday, July 30, 2015. On admission, he felt physically well and had been enjoying spending time with friends. After completing his first day of chemotherapy, he began to feel ill. The next day, Friday, he expressed a wish to discontinue participation in the trial; he didn't want to feel ill, he didn't want to end up in an ICU again, and he wanted to spend time with his friends. He expressed his understanding that without treatment, he was likely to die in one to two months. After discussion with the treatment team, he agreed to leave the hospital on Friday "on pass" to spend time with his friends and that he would return to the hospital by 8 a.m. the following day. The following day, Saturday, LT still expressed a wish to exit the trial. He resisted coming to the hospital, but finally arrived with his mother around 1 p.m. On arrival at UMHS, he continued to express a wish to exit the trial. LT's parents suggested they might petition the court to "continue treatment," i.e. to continue LT's participation in the research trial, against his wishes.

LT's physician counseled him regarding possible risks and complications of trial participation and felt that LT could be convinced to continue participating in the trial.

The Pediatric Ethics Committee identified the ethical principle at stake as that of respect for autonomy. The consult reads, "An autonomous decision does not have to be the 'correct' decision from an objective viewpoint; however, it does have to be an informed decision, in which the patient has all available knowledge given to [her or him], including those related to side effects, benefits, adverse outcomes, quality of life, etc."⁴

In this case and elsewhere, respect for children's autonomy regarding their own medical decision-making is a complex issue. LT's case, in particular, reveals the moral vulnerabilities of our ethical habits. Namely, we have an ethical habit of denying the right of refusal in pediatric cases, and this leaves us morally vulnerable to the disintegration of respect and shared decision-making.

⁴ Consult, University of Michigan Health System Pediatric Ethics Committee, July 25, 2015.

In pediatric cases, the principle of respect for autonomy is displaced and attenuated. It is displaced from patients to their parents or guardians. It is attenuated, as compared with the robust autonomy preserved for adult patients.

Adult patients maintain autonomous decision-making authority regardless of the content of their decisions, so long as they are able to communicate an understanding of the risks and benefits of their choices. Adolescents may sometimes claim authority in their medical decisions, based on “the mature minor doctrine” (which holds that in certain cases minors may accept or reject treatment without the consent of their parents or guardians) in countries and states where it exists, and in proportion to the consequences of receiving or deferring a proposed intervention.

In his 2009 review of case law regarding the rights of minors to refuse life-preserving treatment, the Belgian lawyer and researcher Christophe Lemmens writes:

A mature minor’s right to refuse treatment is severely influenced by the prognosis and the invasiveness of the care proposed by the physician. A minor’s right to refuse medical treatment is certainly not absolute because that right has to be balanced against the state’s interests in the preservation of life, the protection of the interests of innocent third parties, the prevention of suicide and the maintenance of the ethical integrity of the medical profession. The state’s interest in the preservation of life is generally considered to be the most significant state interest. The state’s interests vary upon the patient’s condition. The given interests will be greater when the patient’s condition is curable or when the prognosis is positive as opposed to when the patient’s condition is terminal or the prognosis is poor.⁵

The denial of a minor’s and his or her parent’s rights to refuse treatment can have dramatic consequences. If minors resist treatment to which their parents have consented, they are cajoled or coerced into compliance. If parents refuse treatment upon which a physician insists, they may be found legally in neglect of their child, and their child may be made a ward of the state for the duration of treatment (or longer). These are heavy eventualities. How are they justified? Where do physicians get the authority to insist on such things?

Justification for legal intervention in pediatric medical decision-making may be traced through the history of case law regarding Jehovah’s Witnesses. Jehovah’s Witnesses are generally known among healthcare professionals for their refusal of blood products, even when such refusal may result in death. Their refusal, known as the “blood ban,” was established in 1945. The ban is based on scriptural interpretation that receipt of blood products results in loss of eternal life.

⁵ Christophe Lemmens, “End-of-Life Decisions and Minors: Do Minors Have the Right to Refuse Life Preserving Medical Treatment? A Comparative Study,” *Medicine and Law* 28 (2009): 479-497.

Jehovah's Witness parents have tried to use the Free Exercise Clause of the First Amendment to maintain their right to refuse blood products for their children. United States courts have generally denied that such an action is a protected form of religious expression. Legal decisions have deployed the concepts of best interests⁶ and parental neglect to justify forced blood transfusions for the minor children of Jehovah's Witnesses.

As summarized by physician Sarah Woolley in her 2005 review of international case law on the subject, denying parental refusal of a blood transfusion is based on four points: (1) minimal danger in the proposed medical intervention, (2) treatment efficacy, (3) lack of alternative treatments, (4) refusal based on religious beliefs.⁷ What is remarkable to me about this list is that the magnitude of what is at stake is appreciated solely from within a medical-legal perspective. That is, for Jehovah's Witness parents, the danger of a blood transfusion is great — it endangers eternal life. And from their perspective, the efficacy of the treatment is minor, because extension of life on earth is a relatively minor concern, as compared with securing eternal life. The fourth of Woolley's points explicitly expresses medical-legal antagonism toward faith-based decisions. Woolley goes on to summarize that, over time, the judicial trend to deny parental rights to refuse medical care came to emphasize the following points: the child's interests and those of the state outweigh parental rights to refuse medical treatment; parental rights do not give parents life and death authority over their children; and parents do not have an *absolute* right to refuse medical treatment for their children based on their religious beliefs.⁸

What then, is the medical care that fulfills the legal requirement for intervention on behalf of a child's and the state's best interests? Generally, this is the "standard of care." Standard of care is a dynamic medical-legal category evolved at least in part through malpractice cases. Court decisions refer to the standard of care as a minimal intervention, such that anything falling short of this may leave a physician legally culpable. In the early part of the twentieth century, the standard of care was defined based on professional custom, such that what was *usually* done by physicians was what *should* be done by physicians. Through the middle of the twentieth century, legal rulings expanded the notion of standard of care to include both customary practices and reasonable practices, such that an intervention, if reasonable, could fulfill a duty to provide care to a certain standard, even if it did not conform to custom. More recently, legal

⁶ Lemmens, "End-of-Life Decisions and Minors: Do Minors Have the Right to Refuse Life Preserving Medical Treatment? A Comparative Study." With regard to best interests, Lemmens elaborates: "The notion of 'best interests' is to be understood in its widest sense. Parental decisions will be overruled not only in emergent and life threatening situations, but also in instances where the overall health, safety or welfare of the child requires it. The court thus has a wide discretion to order medical care over parental objections to ensure the physical, mental, and emotional well-being of minor children, in other words the overall quality of life."

⁷ Sarah Woolley, "Children of Jehovah's Witnesses and Adolescent Jehovah's Witnesses: What Are Their Rights?" *Archives of Disease in Childhood* 90 (2005): 715–719; Woolley, "Children of Jehovah's Witnesses and Adolescent Jehovah's Witnesses: What Are Their Rights?" citing *Morrison v State* 252 S.W.2d 97 (MO C. of A.1952).

⁸ Woolley, "Children of Jehovah's Witnesses and Adolescent Jehovah's Witnesses: What Are Their Rights?"

formulations have defined standard of care as that which may be expected from “a minimally competent physician in [a given] field ... under [the given] circumstances.”⁹

“Clinical practice guidelines,” which are often called “standard of care” in practice, may or may not fulfill the legal category of the standard of care. Clinical practice guidelines arise through research and/or professional consensus. They may sometimes represent custom, other times partake of reasonableness, and sometimes constitute hearsay.¹⁰

In practice, the standard of care is fallible. It is a changing thing, responding to emerging scientific data, changing economies, and competing alternatives. In this way, healthcare practices that have at times met the standard of care have later proven unnecessary or harmful.

For example, various forms of menopausal hormone therapy have come in and out of favor since the early twentieth century. Evidence of the 1970s upset the standard of care of the 1960s, and evidence of the early 2000s upset the standard of care of the 1990s.¹¹ Likewise, hemoglobin thresholds for blood transfusion provide another example where data amassed over time has significantly altered the standard of care.¹² The standard of care does not derive its authority from partaking in durable knowledge about how to achieve ideal outcomes. Rather, it seems to derive its authority from community consensus and reasonableness.

Consensus can lead us astray. History teaches us this, and so do current events.

We may find a theoretical framework regarding the hazards of consensus through Emile Durkheim’s work, *Elementary Forms of Religious Life*, in which he argues that any religion in general is a fundamental expression of society. He asks, “Underneath the disputes of theology, the variations of ritual, the multiplicity of groups and the diversity of individuals, [what are] the fundamental states characteristic of religious mentality in general?” And he answers, “Religion is something eminently social. Religious representations are collective representations which express collective realities.” Thus, from Durkheim, we may understand religion as consisting of

⁹ Peter Moffett and Gregory Moore, “The Standard of Care: Legal History and Definitions: The Bad and Good News,” *The Western Journal of Emergency Medicine* 12 (2011):109-112.

¹⁰ Moffett and Moore, “The Standard of Care: Legal History and Definitions: The Bad and Good News.”

¹¹ Emily Banks, “An Evidence-Based Future for Menopausal Hormone Therapy,” *Women’s Health* 15 (September, 2015): 37. By the 1960s, estrogen-only therapy was customarily used, with the thought that it would generally improve women’s health. By the 1970s, it was known that estrogen-only therapy elevated the risk of endometrial cancer, and so custom moved to using combined estrogen-progesterone therapy, which grew in popularity through the 1990s. The Women’s Health Initiative Trial, which was ended early, in 2002, showed that combined hormone therapy increased the risk of serious disease, including breast cancer, so significantly as to outweigh the beneficial effects on bone density. Other studies have similarly complicated the risks and benefits of hormone therapy.

¹² Jeffrey L. Carson, et al., “Red Blood Cell Transfusion: A Clinical Practice Guideline from the AABB,” *Annals of Internal Medicine* 157 (2012): 49-58, DOI:10.7326/0003-4819-157-1-201206190-00429. Hemoglobin (Hgb) transfusion threshold used to be higher than it now is (it used to be ~10), and in 2012 clinical practice guidelines were published recommending adherence to restrictive guidelines that maximized clinical outcomes (e.g. anemia) and minimized infectious risk (e.g. HCV, HIV, etc.) and non-infectious risk (hemolysis, transfusion -associated circulatory overload, transfusion-related acute lung injury).

the collective concepts and practices that bind and perpetuate communities. If we map medicine within this analysis, we can understand it as a set of concepts and practices that stimulate cohesion and progress for the collective group of physicians and health care providers.¹³

This is not the definition of religion that is popular in the United States, where we think of religion as involving deeply-held beliefs regarding transcendent power. Durkheim's definition might reframe our understanding of the confrontation between religion and medicine. We may understand this confrontation as arising not between two different kinds of attitudes, one faithful and the other rational, but rather as a confrontation between two religious attitudes, each essential to distinct, yet overlapping, collectives.

Now we may understand the moral authority of the standard of care as sociologically akin to religious authority. It does not represent durable knowledge, and it does not always yield best outcomes. The standard of care reflects provisional models for how to aim actions at prioritized outcomes. Its authority is achieved by consensus and sustained by practice. Thus the medical-legal category of the "standard of care" emerges as a kind of religious principle.

The case presented and the discourses summarized here might lead us to see medicine and religion at odds with each other. Instead, we may see similarities that serve as opportunities to communicate. Each of us may prefer one religion to another while still seeing that each responds to a human need. As practitioners in a pluralistic society, we may seek to see that need and seek to address it. Durkheim saw this not as an ethical principle, but as the duty of science:

Religious beliefs and practices undoubtedly seem disconcerting at times, and one is tempted to attribute them to some sort of a deep-rooted error. But one must know how to go underneath the symbol to the reality which it represents and which gives it its meaning. The most barbarous and the most fantastic rites and the strangest myths translate some human need, some aspect of life, either individual or social. The reasons with which the faithful justify them may be, and generally are, erroneous; but the true reasons do not cease to exist, and it is the duty of science to discover them.¹⁴

Thank you for your attention.

¹³ Emile Durkheim, *The Elementary Forms of the Religious Life* (Kindle Edition, 2012), 2-4.

¹⁴ Durkheim, 2-4.

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