With special thanks to
Professor Susan Carle, Professor Mary Gentile, Dr. John Hughes, Professor Gabriel Kahn, Dr. Mark Mercurio, Professor Eric Muller, Rabbi James Ponet, Professor Ilene Prusher, Professor Markus Scholz and Fr. Kevin Spicer.

Lead support for FASPE is provided by 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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INTRODUCTION
Introduction

What does Germany from 1933 to 1945 have to do with today? Wasn’t the Holocaust a singular act of malevolence perpetrated by a group of evil and deranged madmen?

What do professionals and the professions have to do with mass murder and genocide?

What do contemporary ethics have to do with Adolf Hitler?

These are the questions that underlie the FASPE mission.

In fact, it was the professionals in Germany and portions of occupied Europe who designed and enabled the actions that led to genocide. It was the professionals who executed the laws and policies that they designed. Lawyers wrote and enforced the Nuremberg Laws. Doctors designed and carried out the first murders of the handicapped and the opposition. Journalists became propagandists. Business executives used slave labor and entered into contracts with the Nazi regime to produce the weapons of genocide. Pastors and priests too often collaborated and condoned, even promoted, Nazi policies. And, to be sure, their actions were voluntary, not carried out at gunpoint.

FASPE begins by studying the perpetrators, the professionals who looked like, were educated in the same fashion as, and played the same leadership roles in their society as, today’s professionals. How and why did they make the transition from ordinary professionals to becoming accessories to or enablers of mass murder? The answer is that it happened day by day, decision by decision, often in the service of ambition and prestige and not ideology.

In FASPE’s focus on contemporary ethics in the professions, we do not seek analogies or equivalencies to Nazi Germany. Instead, we seek to display the importance of ethical behavior — even on the “little issues” — and to highlight the leadership role that professionals must play in their communities. We want our professionals to identify ethical issues and to develop tactics to address them.
We hope that the essays in this year’s journal display the seriousness with which FASPE Fellows accept their responsibilities. Our Fellows give us reason for optimism as they become ethical leaders in their professions.

On behalf of FASPE, I congratulate the 2017 class of FASPE Fellows and welcome them to our community of over 430 alumni Fellows. We look forward to your leadership.

David Goldman
Chairman
FASPE operates fellowship programs for graduate students in professional schools — business, journalism, law, medical and seminary — and early stage practitioners in those professions, which challenge its Fellows to become acutely aware of their responsibilities as respected professionals in their communities and to act in an ethical fashion.

FASPE fellowships are comprised of intense two-week study trips to Germany and Poland where Fellows study the actions and choices of their professional counterparts between 1933 and 1945. Through this examination of the ethical failures of the professions in what was a progressive, modern society, Fellows learn about the critical role that professionals play in society and the consequences of their actions — positive or negative — on the world around them.

FASPE offers a contemporary approach to the study of the Holocaust by focusing on the actions of the perpetrators rather than on the victims. Drawing on the powers of place, the study of history and a rich contextual education, FASPE creates a uniquely effective means for studying professional ethics — well beyond what is achieved by the rules-based approach often seen in the traditional university classroom.

Originally piloted in 2009 and launched in 2010, FASPE marked its eighth year of operation in 2017. A highly competitive program, FASPE accepts only 65 Fellows (12 - 15 in each of the five professions) from nearly 1,000 applications per year. Its faculty is drawn from international Holocaust historians, practicing professionals and leading academics.

FASPE seminars engage Fellows in thinking across several themes, including: defining professionalism; considering a professional’s responsibility to the larger society; and the tactics of enacting an ethical decision. Seminars also focus on topics that are discipline specific, such as:

- **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:** How do journalists balance the costs and benefits of access? What ethical issues arise in political reporting? What challenges arise in fact-checking a victim’s story? Does advocacy fit into journalism?
• **Law:** How do attorneys 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:** What are the ethical issues involved in medical research on human subjects? Should physicians participate in assisted suicide? How should doctors deal with resource limitations in making healthcare decisions?

• **Seminary:** What is the role of religious leaders as ethical, and not just religious, educators? When and how should they address political issues with a congregation? What are 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 the professions at large, improving the practices of all business executives, clergy, doctors, journalists and lawyers.
BUSINESS PAPERS
The 2017 Business cohort included 12 MBA students who came from varied backgrounds and had a range of career interests. Regardless of their differences, these engaged and astute Fellows quickly found common ground, establishing a seminar space where they could laugh together, delve deeply into serious topics and speak freely.

Two faculty members led this group in discussion, drawing on their experiences of teaching the program over the previous two years: Mary Gentile, Creator and Director of Giving Voice to Values and a Professor of Practice at the University of Virginia's Darden School of Business; and Markus Scholz, who holds the Endowed Chair of Corporate Governance and Business Ethics at FH Wien University of Applied Sciences in Vienna.

For two weeks this group traveled together, struggling to confront a painful past and to draw lessons from it for their own career futures. After the program, the Business Fellows were asked to write short papers exploring a contemporary issue in business ethics. Two examples of these papers are included here and offer a sense of the lessons Business Fellows draw from the FASPE program.

The first paper is by Emily Anding, who examines the challenges faced by HR employees at large corporations and how HR professionals serve as a bridge between corporate executives, who lay out brand strategies in response to market pressures, and the line workers, who staff factories and production facilities. Emily concludes her paper by highlighting the way in which the Giving Voice to Values curriculum, developed by Mary Gentile and integrated into the FASPE program, strengthens skills that can help HR employees do their jobs more effectively.

The second piece, by Sean Singer, looks at the sports industry, focusing on the numerous scandals that have recently plagued the International Olympic Committee, Fédération Internationale de Football Association (FIFA), the International Basketball Federation and other international sports organizations. Sean argues that there are four myths that underpin international sports as a system and that these myths must be challenged before any meaningful reforms can be made.
I thank these authors and the other FASPE Business Fellows for their participation during the program, their search to understand the actions of business leaders in Nazi Europe and their willingness to question the tendencies and temptations of the profession they have chosen as their own.

*Thorin Tritter*
*Executive Director*
Corporate Values Conflicted
A Top-Down Approach

BY EMILY ANDING

After my time with FASPE, I joined a consumer packaged goods (CPG) company as a business associate and work systems designer in their Human Resources (HR) department. In this paper, I will explore what it means for a major corporation to build a culture around its values, both at corporate headquarters and at its manufacturing plants, while also discussing the role that HR professionals play in bridging the communication gap between headquarters and the company’s production facilities.

In many organizations, employees across a global platform are presented with overarching company values, a purpose, a mission, expected behaviors and function-specific competencies (marketing, logistics, finance, etc.). For example, a product developer may be required to have the ability to empathize with consumers and bring creativity to the workplace. Each of these layers is what a company expects of its employees and is there to anchor the employee in the company’s purpose, while also designed to bind employees to the company’s core mission.

There is potential for disconnect, however, between those working at corporate headquarters (who craft the company’s mission statements, determine company values and set the standards by which employee performance is measured), and the employees who work at the manufacturing plants, who are also expected to embody corporate values through their work. An average operator at many Fortune 500 manufacturing facilities likely does not have a college degree and spends, at a minimum, 12 hours per shift completing routinized jobs, from processing raw materials to supporting packaging operations.

Corporate initiatives pave the way in developing high level strategy and outlining an abundance of pursuits whose intentions can get lost or misinterpreted by the time they are transmitted to a plant worker. The environment and culture at corporate headquarters can be staunchly different from that of the production floor. How then, is a multilayered and ambitious vision set forth by headquarters effectively communicated to manufacturing technicians in a manner that motivates and inspires them, while simultaneously invoking a sense of company pride?
New marketing slogans placed on packaging, touting innovations like “25 percent more ‘x’” or “now with extra ‘x’” may entice consumers and rejuvenate stale brands, but the overall product remains the same.¹ When seen through the eyes of the technicians who actually create the end product, they still see the same exact product they have been making for decades. Companies are increasingly finding themselves faced with the choice of either promoting their existing brands with new messaging or investing in the development of entirely new products. Marketers at many corporations spend very little, if any, time in the manufacturing plants and often have sparse knowledge of the manufacturing process and little awareness of those who are actually producing the final good that is the core of their business.² At the plant, safety comes first, while at corporate headquarters, safety is less outwardly apparent (or relevant), while all employees (at corporate or manufacturing facilities) are expected to uphold the company’s mission, pursuits and values.

In the 21st century, the CPG industry is rapidly changing as multinational corporations are learning the importance of quickly adapting to changing consumer demands and preferences. In order to maintain profits, CPG companies have been resorting to cost-cutting measures and organizational restructures designed to streamline corporate communications.³ Corporate communications experts now have the responsibility of disseminating information to the end consumer in a way that continues to protect the company’s core brands.

Human resources (HR) departments at corporations are often viewed as the bridge between corporate headquarters and those working at the manufacturing plants.⁴ In the face of immense global change, change management has become increasingly critical to getting those at manufacturing plants aligned with a company’s new goals and operations standards. Corporate headquarters tend to view HR’s role as providing a clear voice from headquarters and consistent company directives as the company moves toward standardizing its operations globally. Many line operators, however, believe that they could make better products without HR’s intervention. The schism between those working in the plants and those in the executive suites highlights the fact that those in corporate headquarters often do not understand how their products are actually made and who is making them. Therefore, when sweeping changes occur, there inevitably is significant push back, mistrust and misalignment across all parties.

⁴ “6 HR Functions That Drive Results in Manufacturing,” The Overture Group, http://www.theoverturegroup.com/blog/6-hr-functions-that-drive-results-in-manufacturing.
Staffing and talent management — another key function of HR — has become increasingly important during periods of rapid growth or, alternately, during times of retrenchment and cost cutting. Often viewed as the gatekeepers or bearers of bad news, plant HR departments are responsible for implementing the directives of corporate HR, including downsizing and reorganizations.

Reorganizations may occur when headquarters partners with an internal strategy group or an external firm, which then pass along their recommendations for which positions to terminate or eliminate. The role of plant HR departments can therefore be described, in part, as that of a messenger; that is, they communicate the messages from corporate HR. Nevertheless, plant HR departments are simultaneously responsible for advocating for their particular plants and the employees in them. They can influence the broader business and those in positions of power in a manner that protects employees and the plant as a whole. Those working in HR must continually ask themselves: who do I advocate for? What positions do I frame as integral to the business function, despite what my peers at consulting firms are advising senior leadership? This too is a dilemma of ethical leadership.

HR’s direct role in hiring and firing also comes with its own set of ethical dilemmas. When hiring, it is crucial that the HR person be unbiased and impartial. As a hiring facilitator, it is HR’s responsibility to be impartial and ensure that those on the team are performing reviews and interviews in a manner that is non-discriminatory and does not breech any ethical codes. Moreover, it is critical that the HR person tasked with terminating a particular employee first understand the composition and leaders of the team with which that employee is working, prior to any termination occurring. Without consistent review of performance evaluations, a termination might come with little foresight. When receiving pushback from a manager who might be interested in terminating someone on his or her team, it is HR’s responsibility to ensure that the firing is just and warranted, and that it is also carried out in a manner that leaves the terminated employee’s dignity intact. Although an HR manager may feel pressured to acquiesce to a manager’s wishes to terminate an employee, he or she may use delay tactics, such as looping in the legal department, which might then serve as a non-biased third party who can advise of potential risks and red flags the company might be opening itself to. This way, a manager will be forced to slow down to clearly document (and prove) the performance issues associated with that employee in question. Otherwise, it is up to the HR manager to ensure that he or she is adequately up to date on the performance of all residing in a particular client group.

Without clear and continuous communication between HR and department managers, periodic evaluations might falsely give the impression that employees are succeeding, when in fact, there are reservations about performance. In this situation, an employee (and the HR manager) does not have any awareness that there are performance issues, leaving the issues to fester and become insurmountable until the manager advocates for
termination. Had the HR manager remained in constant contact with the manager and with the team employees regarding performance, and had she or he stayed abreast of all performance evaluations, this may have been avoided.

A significant component of being an effective HR manager lies in the discussion, framing and process of listening to others’ values in relation to an end goal. All stakeholders must feel comfortable voicing their values and feel that they are being heard. Giving Voice to Values (GVV), a novel approach to leadership pioneered by University of Virginia Darden School of Business professor Mary Gentile, emphasizes that to be an effective influencer of your own values, it does not require you to preach to others. In the field of HR, it is possible to navigate a process of outlining your values, anticipating how they will be received, strategizing appropriate responses to critique from others and also practicing how such exchanges might go prior to their occurrence. The GVV framework provides a way for HR managers to listen and respond more attentively to the grievances of employees.

On a day-to-day basis, an HR role in a manufacturing facility requires one to build trust with employees, some of whom have PhDs, while others only have GEDs. Various tactics of critical listening must be employed to keep a finger on the pulse of the morale and health of the workforce. Once an HR manager has a strong understanding of his or her employees and the local culture, with GVV serving as a guide, the HR manager can anticipate likely reactions to corporate policy changes or reorganizations. He or she will understand which employees are seen as plant-wide influencers and will be able to provide support by translating messaging from headquarters in a manner that will inspire trust and commitment among plant workers. Before this can occur, however, it is critical to lay the foundation by engaging in direct conversations on the manufacturing floor. When an HR manager chooses to put on steel toes and a hard hat, manufacturing operators and corporate representatives are able to engage in dialogue in a more robust and effective capacity.

Emily Anding is currently an HR Business Associate with a major US corporation. She received her MBA degree from the Raymond A. Mason School of Business at the College of William & Mary in 2017.
Ethical quandaries surrounding the Olympic Games and other major sporting events are certainly not a new phenomenon. When Theodor Lewald advocated for Weimar Germany to host the 1936 Games, he hardly expected Adolph Hitler, who in 1932 had declared the Olympics “an invention of Jews and Freemasons,” to preside over them. In the lead up to the games, it was only through legal finesse and the promise to resign immediately upon the Games’ conclusion that Lewald — problematically the son of a Jewish convert to Protestantism — managed to preserve his position. It was the first of many compromises Lewald made with the Nazis, which included his extensive efforts to exclude Jews from Germany’s Olympic team. Whatever its initial reservations were, the Nazi leadership was quick to recognize the Games’ propaganda value. After Germany won three gold medals on the first day of competition, Joseph Goebbels, writing in his diary, credited “the reawakening of national pride.” He continued, “I am so pleased about it. We can be proud of Germany once again.”

In the 80 years since the Berlin Games, the world of sports has been transformed in countless ways, perhaps the most significant of which are the financial changes that have occurred. In 2016, Transparency International estimated that sports generate $145 billion in revenue annually. Thus, in addition to the political value that Hitler and Goebbels saw in the 1936 Olympic Games, international sports have taken on an economic power with the potential to both enrich individuals and to bring financial ruin to nations. Despite these changes, the national, continental and global bodies that govern sports — the International Olympic Committee (IOC), Fédération Internationale de Football Association (FIFA), International Basketball Federation (FIBA), International Association of Athletics Federations (IAAF), etc. — are, structurally, beholden to a bygone era. As Gareth Sweeney, editor of Transparency International’s Global Corruption Report, notes:

Sports organizations are afforded ‘non-profit’ or ‘non-governmental organization’ status in most jurisdictions. This allows them to operate without any effective external oversight (or interference, depending on perspective). The statutes of most sports associations therefore require that reforms are

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initiated and approved by the same individuals who will be most directly affected by them.\textsuperscript{2}

Dry language obscures the seriousness of this fundamental flaw in the governance of sports organizations. Since 2010, seven of 10 people on FIFA’s executive committee, for example, have been charged or accused of criminal wrongdoing in United States courts. Preparations for the 2022 World Cup in Qatar have been dominated by allegations of unsafe and inhumane labor conditions for construction workers.\textsuperscript{3} Since the much-hyped 2016 Olympic Games in Rio de Janeiro, street robberies have increased by 48 percent, deadly assaults by 26 percent and the organizing committee still holds $32 million in outstanding debt\textsuperscript{4} — a far cry from the Olympic promise to transform Brazil’s biggest city for the better. In the aftermath of the 2012 Sochi Games in Sochi, Russia — which, at a cost of $51-67 billion, were the most expensive Games ever — the Olympics have been plagued by a doping scandal that has reached the upper echelons of the Russian government and featured the involvement of the Russian Federal Security Service (FSB), the successor organization to the KGB.\textsuperscript{5}

These scandals are not restricted to undemocratic or developing countries. The recent trial, conviction and sentencing of Larry Nassar, who sexually abused more than 160 young female American gymnasts over more than two decades, provides the most disturbing example in recent memory of a sports federation’s malfeasance at the expense of the safety and security of the athletes it is obliged to protect.\textsuperscript{6}

Corruption and ethical breaches manifested themselves differently in each of the aforementioned incidents: bribe taking, unsafe labor conditions, wasteful government spending that further contributed to poverty and other social ills, cheating that imperiled athlete health and delegitimized competition, as well as sexual abuse. This starkly contrasts with the IOC’s self-proclaimed mission to “create a way of life based on the joy found in effort, the educational value of good example and respect for universal fundamental ethical principles.”\textsuperscript{7}

Media coverage of such sports scandals tends to focus on the nefarious, and at times buffoonish, behavior of the particular individuals involved, rather than on the systemic

\textsuperscript{3} Robert Booth, “Qatar World Cup Construction ‘Will Leave 4,000 Migrant Workers Dead,’” The Guardian, September 26, 2013.
\textsuperscript{5} See Bryan Vogel, Icarus, Netflix (Los Angeles: Netflix, 2017), for a detailed look at Russian government involvement in doping.
pitfalls that enable such behavior. There was Chuck Blazer, the former General Secretary of the Confederation of North, Central American and Caribbean Association Football (CONCACAF), who expensed a luxury apartment in New York’s Trump Tower for the exclusive use of his cats.8 Or Patrick Hickey, who took his duties as IOC Delegate Member for Autonomy rather seriously when he refused to cooperate with an Irish investigation into his role in a ticket scalping scheme at the 2016 Rio Games. Justice Carroll Moran, a former judge at the Irish High Court who conducted the investigation, criticized “the failure by so many principal participants to engage with the Inquiry” as a major impediment to preparing his report.9 More chillingly, the head of Bahrain’s Olympic Committee, Sheikh Nasser Ben Hamda al-Khalifa, is alleged to have directed the detention and torture of 150 Bahraini athletes who participated in anti-government protests during the Arab Spring in 2011.10 As disturbing as individual cases of unethical behavior are, the last 20 years have made clear that a system that thrives on conflicts of interest will survive even the most well-intentioned reform efforts.

This paper posits that four myths underpin international sports as a system. Efforts to reform international sports and equip managers to make ethical decisions depend upon challenging those myths. These myths may be summarized with four concepts: organizational autonomy, non-profit status, putting athletes first and international development. I will briefly explain each of these myths before positing potential ways to challenge them.

Organizational Autonomy

According to the Olympic Charter, “the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organizations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied.”11 As has been abundantly clear since 1936, if not earlier, the notion that the Olympic Games are autonomous or free from outside influence is farcical. China’s Olympic Committee leadership, for example, overlaps significantly with its federal sports ministry, which is controlled by the Communist Party. But it is not just the Olympics and the IOC that are influenced by political or other outside forces. In Turkey, where I spent three years working in the sports industry, the country’s

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11 International Olympic Committee, Olympic Charter.
president intervened in the 2016 elections for the president of the Turkish Basketball Federation, instructing the incumbent candidate to bow out in favor of another retired athlete who at the time was also serving as one of the president’s chief advisors.  

And, as James M. Dorsey, a veteran journalist who has reported extensively on sports, notes, the Asian Football Confederation, like FIFA itself, “is an inherently political grouping, despite its insistence on the fiction of a separation of sports and politics.”

Non-Profit Status

Most international sports organizations are legally characterized as non-profits, and, therefore, as University of Colorado political science professor Roger Pielke Jr. writes, “in general they are not subject to national or international laws or norms that govern business practices.” Additionally, Swiss law shields non-profits from the fiscal transparency that is mandated in most advanced democracies. As a result, these organizations police themselves, lack external directors and are not accountable to any external body.

The revenues and business practices of many international and national sports organizations have more in common with Fortune 500 companies than they do with those of a cash-strapped or fiscally responsible non-profit. The IOC, for example, generated an estimated annual revenue of $1.375 billion from 2013-2016, including $25-50 million per year from major sponsors. The IOC retains 10 percent of the money it takes in, distributing the rest throughout its network of sports organizations, which include international sports federations (such as FIFA, FIBA, and FINA – Fédération Internationale de Natation) and the National Olympic Committees (NOCs). IOC members travel the world for conferences and meetings, regularly flying first class and staying overnight at luxury hotels with room fees that range from $450-$900 per day. The president of the IOC, Thomas Bach, does not receive a salary but does receive an annual $251,000 “allowance” and lives rent-free in a 5-star hotel. Moreover, whereas IOC members are not salaried employees, many come from the sports and entertainment sector and can leverage their IOC positions for personal gain.

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13 James M. Doresy, “Political Interference, Power Struggles, Corruption and Greed: The Undermining of Football Governance in Asia,” Global Corruption in Sport, 41-42.
16 Hobson, “Olympic Executives Cash In on a ‘Movement.’”
Putting Athletes First

The international sports community asserts that it exists to support and inspire athletes around the world. The Olympic Charter claims that the interests of athletes “constitute a fundamental element to the Olympic Movement’s action.” Yet, as two-time US Olympian javelin thrower Cyrus Hostetler put it in talking to The Washington Post for a 2016 article, “The athletes are at the very bottom of a trickle-down system, and there’s just not much left for us. They [sports administrators] take care of themselves first, and us last.” And a 2012 study found that only six percent of US Olympic Committee spending directly supports athletes through cash payments. Two-time gold medalist Olympic rower Caroline Lind stated in the same Washington Post story that “There’s not really a concern for the individual athletes.”

The NOCs also severely restrict an athlete’s ability to pursue individual sponsorships that conflict with NOC sponsorships. For example, since Nike sponsors US Track and Field, Adidas would have limited opportunities to leverage sponsorship of a US runner, thus limiting an athlete’s earning potential.

Putting athletes second extends beyond the Olympics. FIBA, which governs basketball, has implemented a new competition calendar that features soccer-like windows in the fall and spring for national team games. The lack of player consultation in the design and implementation of this process drew public criticism from prominent European players, Turkey’s Sinan Güler and Italy’s Luigi Datome among them. Whereas in the US, the National Basketball Association (NBA) is seeking to maximize player rest to prevent injuries, in Geneva, FIBA administrators are seeking to maximize short-term revenue by lengthening the season and forcing players to compete even more. As legendary Italian basketball coach Ettore Messina said at a press conference following a 2017 FIBA EuroBasket game, “All coaches and players think the same thing, but there are no coaches or players in the room where decisions are taken.”

International Development

The final myth that underpins international sports is that it somehow contributes to advancing international development. FIFA and World Cup organizing committee officials visited the United Nations in March 2016 to discuss with then-UN Secretary General Ban

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17 Hobson, “Olympic Executives Cash In on a ‘Movement.’”
18 Hobson, “Olympic Executives Cash In on a ‘Movement.’”
19 For example, “Fenerbahçe Doğuş oyuncularından milli takım kararı” [National Team Decision from Fenerbahçe Doğuş National Team Players], NTVS, November 6, 2017, https://www.ntv.com.tr/spor/fenerbahce-dogus-oyuncularindan-milli-takim-karari,N_Akf712HU6Bx_aVuJ5WQ.
Ki Moon the contribution that mega sports events make to sustainable development. Milan Verkhunova, Head of Sustainability for the FIFA World Cup (FWC) 2018 Local Organizing Committee stated at the time that:

There is so much to speak about and we want to look not only on tangible legacies, but also consider intangible impact of the World Cup. Besides new stadiums, airports, road infrastructure, utilities and urban beautification that are being developed, we are implementing more than 100 projects and activities in health and safety, inclusivity and equality, healthy living and sport legacy areas, as well as acting in biodiversity and environment protection. 21

Such optimism would surprise veterans of Brazil’s 2014 FIFA World Cup experience. Infrastructure projects were quickly abandoned after the games ended, and 40 trains purchased for a light rail system sit unused in a yard to this day. Total government expenditure amounted to $8.5 billion in a “country where 36.6 percent of the 49.2 million urban households are not connected to a sewage system.”22 The 2016 Olympics also did little to reinvigorate Rio de Janeiro or Brazil as a whole. The 31-tower athletes’ village now sits vacant and will not be transformed into luxury condominiums as originally planned. The handball arena that was built for the Games will not be converted into four new state schools. “They are white elephants today,” Brazilian federal prosecutor Leandro Mitidieri said of the Olympic venues, “What we are trying to look at here is how to turn this into something usable.”23

The development boost, so often and easily promised from international sporting events, rarely materializes. Whether it is crippling debt — as was the case with Montreal and Athens — or a landscape of abandoned arenas — as occurred in Beijing and Rio — hosting the Olympics often proves to have a deleterious economic effect on its host city rather than a positive one. As authors Chris Dempsey and Andrew Zimbalist, who led the No Boston Olympics campaign, write in their book, “Until and unless a comprehensive reform to the IOC’s long-standing auction process takes place, the general trend of uneconomic, budget-busting bids is likely to continue.”24

Conclusion

Hosting major international sporting events such as the Olympics, World Cup or world championships in myriad sports, presents many ethical challenges to government officials

and sports business professionals. In addition to preventing the bribes and backroom dealing that has long characterized the industry, proper athlete compensation, responsible investment in infrastructure and public engagement, all represent challenges to the status quo. Decision-makers, be they the IOC or FIFA’s executive council, ultimately are not stakeholders in a host city’s future. “The IOC’s priorities trump those of the voters and residents back home,” Dempsey and Zimbalist write.25 Having explored the myths of organizational autonomy, non-profit status, putting athletes first and international development, which allow international sports organizations to operate in a manner that is ethically highly questionable, I’d like to briefly propose several means of reforming this system.

Referenda

In Boston, Hamburg, Warsaw and Oslo, through concerted action, local citizens have taken it upon themselves to weigh in on the decision to host sporting events. By informing themselves as to the real economic impact of large-scale sporting events and by using the organizing tools modern technology provides and the openness of democratic societies to publicly debate the merit of hosting major events, they have managed to have an impact. Sporting institutions are inherently political and should, where possible, answer to democratic political processes such as referenda in prospective host cities. State governments should consider mandating such referenda before proceeding with a hosting bid, admittedly a practice of limited utility in undemocratic societies.

Professionalization

The notion that the president of the IOC, IOC members, NOC presidents or the president of FIFA are “volunteers” or non-professionals is inaccurate. Rather than receive their compensation in the form of extravagant benefits, the upper echelons of sports administrators should be paid a salary and be denied the right to “double-dip” by concurrently working in sports-related industries, as is currently often the case.

Transparency

In recent years Switzerland has reformed laws governing banking secrecy and bribery. Pressure on the Swiss to reform laws governing non-profits could lead to greater transparency regarding compensation and budgets at major sports organizations. The age of total autonomy should come to an end. The alleged commitment of sports organizations to fairness and “clean games” should apply equally to their annual reports. The European Union, in particular, has the potential to play a more active role in challenging these organizations’ claims to autonomy.

25 Dempsey and Zimbalist, 170.
Competition

In an age of disruption, an opportunity exists for entrepreneurs and athletes to challenge the dominance of a select number of sports institutions, all based in Europe. In 2018, the US National Hockey League did not send players to the Olympics for the first time in 20 years due to the IOC’s refusal to share revenue (which would have been shared with players). And Euroleague — Europe’s top professional basketball league — has thus far resisted FIBA’s efforts to reshape it. Integrating players into governance structures either through collective bargaining, or otherwise, represents a potential threat to the current global sports business model.

Whistle Blower Protections

Finally, greater protections must be in place for whistleblowers within these major sports organizations. Consultants, administrators and government officials must know that there are consequences to engaging in unethical behavior. Safe and secure means for individuals to report wrongdoing at all levels of sports are essential. The opacity of international sports creates opportunities to invoke plausible deniability when it comes to wrongdoing. Greater support — of all kinds — for those willing to step forward in potentially dangerous circumstances will contribute to greater openness in the long term.

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JOURNALISM PAPERS
Introduction to
Selected Journalism Papers

The 2017 Journalism program was led by Ilene Prusher, a professor at the Florida Atlantic University School of Communication and Multimedia Studies, and Gabriel Kahn, a professor at the USC Annenberg School for Communication and Journalism. Under their guidance, this year’s 11 thoughtful and committed Journalism Fellows discussed and debated the many ethical challenges facing journalists today, and in the process, developed tight-knit bonds and lasting friendships.

The Journalism Fellows participate in seminar discussions and explore historic sites, much like the Fellows in all FASPE programs. However, unlike those in other fields, the Journalism Fellows also practice their craft while traveling, meeting in the “FASPE Newsroom” to write, edit and publish pieces about the trip, which they then publish on the FASPE Journalism blog. A final piece of writing is completed after the trip ends, when Fellows submit longer feature stories that explore a contemporary ethical issue in journalism. The three pieces included in this journal are examples of these feature stories.

The first story is by Daina Beth Solomon, who describes a growing effort by media outlets to combat accusations of “fake news” by increasing transparency about how they gather information and report the news. Daina points out, however, that this sharing of information both breaks with the approach news organizations have taken in the past and raises the potential of new ethical breaches by exposing sources or revealing sensitive information.

The second story, by Laura Howells, zeroes in on the relationship between journalists and sources, highlighting the ways in which sources may not fully understand the implications of being named in a story. Laura asks to what degree journalists should adopt the informed consent standards used in medicine and the social sciences and how much a journalist should explain to a source about the process of reporting. At a time when the credibility of the press is being challenged, Laura points out the particular importance of thinking about how sources will perceive the way they were interviewed and used in a story.

The third piece, by Sonner Kehrt, also looks at the expectations sources have when being interviewed, exploring additional steps journalists need to take to protect sources from their own words, particularly given new cybersecurity concerns. Sonner concludes that
while journalists should not assume liability for a source’s decision to come forward, they should recognize the risks a source is taking and be clear with that source about what protections the journalist can and cannot provide.

I offer my thanks to these three authors, the FASPE Journalism faculty and all the Fellows for their dedication, thoughtfulness and desire to make a difference in the world.

Thorin Tritter
Executive Director
Peeling Back Reporting, Building Up Trust

BY DAÏNA BETH SOLOMON

Just before losing his job as White House communications director, Anthony Scaramucci vented his distrust of journalists on Twitter, writing: “I made a mistake in trusting a reporter. It won't happen again.”

The New Yorker had just published Scaramucci’s profanity-laden attacks against his White House colleagues, which he had shared with a reporter. The magazine recounted much of the details of the interview, undercutting Scaramucci’s outrage by emphasizing that its editorial staff had acted fairly.

As the Trump administration’s war against the press remains a central theme of his presidency, media outlets are turning to transparency as an effective way to maintain trust with their readers and viewers. By being clear and open about how they report, journalists can help their audiences shrug off Trump’s mockery of the press as “fake news” and “the enemy of the people.” This trust is essential not only to boost circulation and digital subscriptions, but also to help journalists effectively deliver the news — particularly about topics that are divisive, sensitive, challenging and painful.

Historical Stop-Signs

News organizations have traditionally shied away from total transparency, preferring to dole out the news as if it had arrived through divine intervention rather than phone calls, public records and on-the-street interviews and observations. Journalists also counted on impartiality and objectivity to win reader loyalty. For many decades, while print newspapers commanded mass circulations, this strategy worked. As internet scholar David Weinberger wrote on his blog, “Joho,” in 2009, “During the Age of Paper, we got used to the idea that authority comes in the form of a stop sign: You’ve reached a source whose reliability requires no further inquiry.”

The World Wide Web’s arrival in the mid-1990s changed everything, showering consumers with an overwhelming supply of information. Faced with competition, media
organizations struggled to prove their worth and began to recognize the value of shining a light on their inner workings.

“Transparency is the new objectivity,” Weinberger declared in the same 2013 blog post, summing up a growing consensus among journalists and media scholars that openness may be journalism’s best bet to keep reader trust and attention.

What are journalists up against today? The latest Reuters Institute Digital News Report found that 38 percent of Americans it surveyed trust the news. While that’s an increase from 33 percent the year before, the United States still ranks 28th out of 36 countries on this measure. (Finland scored the highest at 62 percent; Greece and South Korea hit rock bottom at 23 percent each.)

Learning to Open Up

*The New Yorker* may have taken a crack at boosting those numbers in the US with reporter Ryan Lizza’s blow-by-blow account of the Scaramucci call. “Scaramucci, who initiated the call, did not ask for the conversation to be off the record or on background,” Lizza wrote. A few days later, Lizza recorded a 13-minute podcast that provided further details and actual tape from the call.

“When you have the White House communications director, a conversation like that, you set some ground rules,” Lizza explained. “But there were no ground rules set. Off-the-record and on-background are bargains set between a source and a journalist.”

It’s a basic rule, drilled into the heads of cub reporters in Journalism 101. Sources in communications roles or top public offices hardly merit any leeway. And yet, Scaramucci got it wrong.

The episode underscored a bigger problem — that news consumers have a vague understanding of basic reporting practices and standards. *The New Yorker* did a tremendous service by explaining these standards to the public in simple language, without apology, defensiveness or condescension. In doing so, it cleared up any confusion that could lead to distrust.

Other organizations are also embracing transparency as a way to educate readers and build credibility, often using creative websites, social media and videos.

*The New York Times Insider* website, launched in 2015, urges readers to: “Go beyond the headlines, side-by-side with the people who report them ... See their decisions. Hear the debates.” In recent weeks, *Insider* explained how freelance “stringers” contribute to the *Times*, offered a reporter’s take on meeting White House press secretary Sarah Huckabee
Sanders and presented a reporter’s rationale for doing a ride-along with Immigration and Customs Enforcement. It even offered copy-editing quizzes that reveal the minute decisions behind every word and punctuation mark.

Last December, *Los Angeles Times* reporters took to Reddit to discuss their OxyContin investigations. “We’re back with new reports on how the drug that set off America’s opioid epidemic is now going global. Ask Us Anything,” they wrote. The thread generated 530 comments, and the *Times* reporters wrote 20 responses.

*The Wall Street Journal’s* “Face of Real News” video campaign, launched in March 2017, gave reporters an opportunity to explain how they tackled tough, controversial stories. A China correspondent interviewed dozens of business people and politicians to understand the yuan exchange rate, for example, and an economics editor probed the discontent in small-town America that ended up contributing to Trump’s presidential victory. The videos close with the tagline, “Real journalists and real news from America’s most trusted newspaper,” clearly taking aim at accusations of “fake news.”

## Treading Carefully

Even as some new organizations take stabs at weaving transparency into the culture of daily reporting, others appear wary of getting in too deep, and, perhaps, exposing themselves to criticism. The weekly public radio program “This American Life” published its seven-chapter investigative podcast “S-Town” on a beautifully illustrated website, but without much extra information, ignoring obvious ethical questions about how the piece was reported.

And CNN observed a code of silence around its retraction of a thinly sourced piece about Scaramucci and a Russian investment fund. Its explanation was one sentence long: “That story did not meet CNN’s editorial standards and has been retracted.” The public was left guessing at what transpired, and Trump saw the incident as a personal triumph. Shortly after, he tweeted, “Wow. CNN had to retract big story on ‘Russia,’ with three employees forced to resign. What about all the other phony stories they do? FAKE NEWS!” He also tweeted a video in which he tackled someone whose face was superimposed with a CNN logo. The caption read: “#FraudNewsCNN #FNN.”

An analysis by *The Washington Post* — which presumably took weeks of reporting — did little to clarify what happened. It’s possible that CNN did not want to become a political punching bag by revealing its inner workings. But that kind of attitude does not encourage credibility with the public. And if CNN — a newsroom with 4,000 employees worldwide — can’t stand up to scrutiny and criticism, then who can? The outlet should have grasped the bigger picture and used the mistake as a way to foster understanding and trust with consumers. Instead, the episode bred confusion and uncertainty.
Transparency can come with pitfalls, of course. Journalists need to protect their sources, explaining their reporting processes without revealing sensitive information. The good news is that journalists are masters of communication. Every day, we gather stories of pain and conflict from around the world and deliver them to the public. Surely, we can learn to reveal a bit of ourselves too.

**Daina Beth Solomon** is a reporter for Reuters news agency in Mexico City. She received her master of journalism degree from the USC Annenberg School of Communication and Journalism in 2015.
'Can I Quote You on That?'
Examining the Relationship Between Reporters and Sources

BY LAURA HOWELLS

At 5:03 p.m., while putting the finishing edits on my story, I got a frantic text from a man I’d interviewed that morning.

“Can you call me right away?” it said. “I don’t want my name used.”

My heart sank. My deadline was three minutes ago.

“I didn’t realize you were going to use my name,” he said on the phone. “I thought I was just giving quotes.”

I roll my eyes and fight the urge to bid him tough luck. He’d expressed no hesitations or wariness just a few hours ago. We’d talked for a solid 30 minutes and he eagerly spelled his name when I had asked. Had he texted me an hour later, it would have been too late. But then again, I never explicitly told him I’d be printing his name.

“Hi there. My name is Laura Howells, I’m a reporter with Newspaper X. I’m working on a story about Y. Do you have a few minutes to talk?”

Journalists often only identify themselves and their employer in order to gain consent for an interview. But this relies on the assumption that the general public understands exactly what they’re consenting to.

If the person on the other end of the line says yes, we’re off to the races. They’re saying quotes; I’m typing; news is happening. Such is the process — right?

“You can talk to a person for a half hour, and only when you say, ‘And you spell your name...?’ will their features cloud as the terrible realization dawns upon them that you have been jotting down their words for an ulterior motive,” writes Chicago Sun-Times columnist Neil Steinberg in his 2012 book, You Were Never in Chicago.
Maybe the source thinks he’s just having a chat, not realizing that every word he says could be splashed across the front page of a national newspaper. Or maybe he does understand this, but doesn’t realize how that publicity will affect his life. Journalists know how the media sausage is made; we live and breathe it daily. But there is often a knowledge gap between us and the people we cover — and with the media’s credibility increasingly under attack, we need to better bridge that gap in our daily work. Abiding by professional norms may no longer be enough, and reporters today could do more to explain the reporting process to our sources — even if that means scaring some of them off.

Daina Goldfinger thought she’d found the perfect main character. She was working on a feature story about a drug used in addiction treatment and had found a clinic worker with a compelling personal story. Goldfinger reached out, explained her project, and the woman agreed to talk.

Goldfinger, a graduate journalism student in Toronto, flew across the country for her story. She spent hours following her source around the clinic, taking notes. But after Goldfinger got home, the woman called and off-handedly mentioned that she’d need a fake name.

Goldfinger was stunned. She and her source had never discussed anonymity. She had been upfront about her intentions, and the woman knew she was talking to a journalist.

“She just didn’t seem so clear on how that information would be used,” Goldfinger reflects months later.

But should we really be so surprised? This woman wasn’t a communications professional; she had no journalistic training. If Anthony Scaramucci is confused about when he’s “on the record,” the average Joe might be too.

“People don’t understand that once you talk to a reporter, it’s the reporter’s story,” says Kathy English, public editor at The Toronto Star. “Now, a good reporter will be fair to the story, to the subject, to the source. But it’s still the reporter’s story. It’s still the news organization who decides how to play the story.”

English says we must take particular care to explain the process to vulnerable sources — individuals who are not media savvy or those thrust into the news through no will of their own. Of course, defining a vulnerable source is subjective. Children and people with developmental disabilities seem like obvious examples. But where does one draw the line? When does treating a source as “vulnerable” simply become paternalistic?
English was part of the Canadian Association of Journalists’ (CAJ) 2014 panel, “On the Record: Is It Really Consent Without Discussion of Consequences,” which examined informed consent in journalistic practice.

The report that emerged from the panel cites columnist Neil Steinberg’s “speech”—a short disclaimer he’d give at the beginning of every interview to ensure his subjects knew exactly what they were getting themselves into.

“You understand I write for a newspaper,” Steinberg would say. “That I’m talking to you because I’m going to put what you say into an article, which will appear in the newspaper, which people will then read.”

There are cues that journalists can employ to remind their sources that they’re speaking on the record. It could be as simple as taking out a recorder, very obviously hitting record and keeping the recorder in plain view throughout the interview. Or it could involve asking somebody to say and spell their name at the start of the interview. But perhaps we should all be delivering versions of Steinberg’s “speech,” even in situations in which it might seem like we are stating the obvious or even appear patronizing.

But a person who understands exactly what talking to a reporter entails may nevertheless not understand how being thrust into the public eye could affect his or her life.

“Publicizing private information is not a neutral act,” writes University of Western Ontario journalism professor Meredith Levine in her 2010 Master of Journalism thesis titled Consent and Consequences: Journalists’ Duty to Inform Subjects of Potential Harms. “Those who do,” she adds, “frequently experience a shift in their lives, sometimes only fleeting, other times more lasting; sometimes the change is for the better, and other times things get worse.”

In her thesis, Levine describes an experience she had as a producer for a national current affairs radio program. A woman who Levine tracked down willingly agreed to tell her story of childhood sexual abuse in front of a microphone. But several months later, the woman contacted Levine saying that she had been hospitalized with severe depression and that she blamed her depression on the negative fallout from having done that interview. After publicizing her private history, she said, her intimate relationships were in shambles and awkward stares followed her at work.

“Did I have an obligation to inform this woman that publicizing intimate information could have an impact on her life and her relationships? Back then, this question never occurred to me,” Levine writes.

Levine, who was also part of the CAJ panel, argues that journalists have a duty to talk to their subjects about potential harms. She suggests we can learn from informed consent
protocols used in healthcare and in health and social science research (although she acknowledges there are problems with such protocols, and says consent requirements in journalism should avoid rigid and bureaucratic processes).

Journalists can’t anticipate every possible consequence of publicizing private information, but we do often know more than our subjects, she says, “yet rarely share this information.”

Of course, discussing the negative consequences of talking to the media may stop some people from speaking out or from agreeing to be interviewed. Public distrust of “unnamed sources,” and the ethical issues involved in using them, puts added pressure on journalists to get sources on the record; yet, showing more compassion and sensitivity to our sources could also improve public trust long-term.

So where do we draw the line? Should we tell a transgender woman that if she talks to us, she’s likely to get inundated with hateful comments online? Should we tell a 19-year-old that criticizing the government might limit his future job prospects? And if they still agree to talk, should we ever override their own judgement?

Last year, I was reporting on the French election from Saint Pierre and Miquelon, a tiny French colony off the coast of Newfoundland, Canada. One evening, I interviewed a 16-year-old girl who told me she was a big supporter of Marine Le Pen. The girl knew we were on the record — she was speaking into a radio microphone — and she had no qualms about her convictions. I was initially glad to talk to her; she was one of the few open Le Pen supporters I could find. But when it came time to write the story, I couldn’t bring myself to incorporate her quotes. She was 16, sure, but she was still a minor, and I worried that publicizing her political beliefs could have unforeseen consequences down the road. Youthful opinions are malleable, but an online story lives forever. I wanted to protect her, but to this day, I still question my decision to withhold. It felt paternalistic; if she had been 18, I probably would not have hesitated to put her in the story. Then again, what is the difference between a 16-year-old and an 18-year-old? Or a 65-year-old who doesn’t understand the internet?

Jim Rankin, a reporter at The Toronto Star, believes it’s imperative that journalists minimize harm — even if that means losing a quote or two.

Rankin has reported extensively on police carding and racial profiling in Toronto. When he’s working with vulnerable sources, such as young people or those without media experience, Rankin is careful to explain what talking to a journalist means and to ensure that they understand that what they say will be out there “for good.” He talks to people about potential consequences and the possibilities of online backlash, while also discussing the benefits of speaking out.
If someone is particularly nervous and unfamiliar with the media, Rankin doesn’t mind reading back that person’s parts of the story to them prior to publication — and giving them the opportunity to “take something back.”

It’s a controversial standpoint, but Rankin says it’s “the right thing to do.” He would never give politicians or spokespeople that option, he says, but he has no problem doing it with vulnerable sources. Plus, he adds, going over what someone said can be a form of fact-checking.

Ann Rauhala, a professor of journalism at Ryerson University in Toronto (for whom I am currently working as a research assistant), finds that being clear with one’s sources has the opposite effect of what one might anticipate. The more explicit she is with sources about what she’s doing, Rauhala finds, the more they open up to her.

Rauhala says that when first starting out as a journalist, she felt like she was trying to “trick” or “seduce” her sources into speaking frankly and quickly. The older she got, the more she found herself thinking about her sources and considering how aware they were of the journalistic process.

“When you’re an inexperienced reporter, you don’t take time to turn the interview into a real conversation,” says Rauhala. “Once you start getting to the point where you’re comfortable enough to have conversations with people, then you are sort of innately recognizing their humanity.”

Journalists are often encouraged to be aggressive, Rankin says, but that can be harmful for the industry’s overall reputation. If someone has a bad experience with one reporter, that can taint their overall perception of journalism.

“Especially in this day and age, with the media’s reputation being called into question ... we should all be looking at ways to make what we do way more transparent,” he notes.

Rauhala now teaches her first-year reporting students to treat a source as if they were “the mother or father of someone you’re madly in love with, who you’re meeting for the first time.” Be more polite, respectful and clear than you would ever normally be — and try to give them the benefit of the doubt, she counsels.

Ultimately, Toronto Star public editor English says journalists need to be constantly asking themselves, “Is this fair?” And sometimes this means “saving people from themselves”: calling back, double checking and asking them if that’s really what they mean ... even if they’ve given you an excellent quote.

Journalists ascribe tremendous importance to spoken words. Quotes and “real human voices” are often the lynchpins of good stories. But people speak carelessly constantly.
What many of us say in conversation is rarely well-articulated or thoroughly-considered. And yet journalists will use these words as the basis for a headline or a key voice in a story.

Many journalists may disagree with Levine’s suggestions about informed consent, or the idea that we could ever allow a source to renege on a quote. But perhaps we should start having these arguments — both in our newsrooms and in the public sphere — if only to help build trust in an industry that badly needs it.

“We can’t forget that it comes down to us ... Anyone who you deal with, how they perceive journalism may well come down to only how they perceive their interaction with you,” says English.

“We all carry our own internal code of what we will do, what we believe is fair. And that doesn’t mean you stop being a human being.”

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**Laura Howells** is currently completing her master of journalism degree at Ryerson University in Toronto, Canada.
The Unspoken Obligation

BY SONNER KEHRT

In March 2018, the trial of Reality Leigh Winner will begin. Winner was an intelligence specialist who leaked classified information to The Intercept, a national security media outlet. The story ran and mere moments later, Winner was arrested, in part due to The Intercept’s carelessness. Winner is being held in prison, having been twice denied bail. The Intercept received some bad press, but that was about it. This is the way journalism works: We rely on sources to do what we do, but when things go south for them, as journalists, we’re largely unaffected. It’s a relationship which is often unbalanced, and, as with any imbalance, it raises ethical questions. Yet within the modern norms of journalism, these questions remain under-examined.

As journalists, we believe our craft is in pursuit of a greater good — and when we practice it responsibly, it is. But just because our reporting serves a higher purpose doesn’t mean that the stories we work on can’t inflict collateral damage on the sources on whom we rely. The question of what, if anything, we owe our sources is not well explored, and, as a result, there aren’t strong guidelines for journalists in this area.

Rather, journalism ethics tend to focus on other things, like truthfulness and objectivity. And if we follow these ethical rules — if we are accurate and fair and if our story appears to be for the public good — there is little that compels us to take stock of how our journalism may affect those we write about or depend on for information.

In her 1990 book on journalism ethics, The Journalist and the Murderer, Janet Malcolm writes, “Every journalist who is not too stupid or too full of himself to notice what is going on knows that what he does is morally indefensible. He is a kind of confidence man, preying on people’s vanity, ignorance or loneliness, gaining their trust and betraying them without remorse.” It’s not entirely a fair accusation: The best traditions of journalism are not only morally defensible; they are morally necessary. But the idea of betrayal highlights an issue that is conspicuously absent from current discussions of media ethics. As journalists, we have a responsibility to inform the public — and we also have a responsibility to protect our sources. These sometimes come into conflict with each other and when they do, the default position tends to be that our responsibility to inform trumps our responsibility to protect. But is this a fair assumption? What do we, as journalists and as decent human beings, owe the sources and subjects on whom we depend?
In a discussion during the FASPE program this summer, Kate Harloe, a 2017 FASPE Journalism Fellow, summed up a critical fact at the root of this issue: “The raw material of our profession is other people’s lives.” The practice of journalism demands that we mine others for pieces of information, anecdotes, ideas and details that we can then use to build a story. Edward Wasserman, a media ethicist and dean of the Graduate School of Journalism at the University of California, Berkeley, where I attend J-School, says he thinks that journalists often view sources as a resource rather than as independent actors who have much to gain or lose from engaging with the media.

As Wasserman puts it, “You don’t ask the ore how it feels being processed into gold.”

In the United States, we laud the broad protections provided by the First Amendment, and we largely feel secure in its ability to defend us as journalists. But our sources — our raw material, our ore, as it were — are not considered part of the press and, as such, they remain vulnerable. A reporter may be celebrated for breaking a critical story, but the story’s impact on its sources is simply accepted as the cost of doing business, if it is examined at all. In the case of “small fish,” that is, sources generally not in the public eye, we rarely pause to consider the potential fallout they may face from speaking with the press. Bigger sources, those who provide us access to privileged information, may be prosecuted or jailed for stories that win reporters accolades.

But the machinery of a story starts long before the presses roll, and if we are interested in acting ethically, we need to consider the reality that our craft inherently depends on human beings who will be affected by the stories we write. The balance between our responsibility to inform the public and our responsibility to protect our sources can shift depending on the information at hand, and to assess this moral calculus, we need, at least, to be willing to question some of the general practices of journalism.

We tend to assume that sources know the rules we play by. Often, they do. Public relations professionals, government officials, media moguls and others who regularly interact with the press, or whose job it is to interact with the press, are as happy to manipulate us as we are them. But less media-savvy sources — private individuals who usually have no occasion to interact with the press — have little familiarity with the standards that guide reporting. A journalist approaches a man on the street, identifies herself as a reporter, notebook in hand, and asks for a reaction. If the man starts speaking, journalistic standards allow for the reporter to quote him. But the man may not actually be aware of this, as is demonstrated by the fact that it’s not uncommon for such a source to end an interview by saying, “You can quote me on that,” as if he assumes that whether or not he will be quoted were up for debate until that point.

Similarly, we may expect that people know the risks they face when choosing to speak with us. But again, this is not always the case. Particularly when it comes to vulnerable
populations, we should consider whether we have a moral burden to better inform them ahead of time of the rules and risks of speaking with us.

Levi Bridges, an independent journalist based in Mexico, has been working on a story about deported immigrants trying to cross back into the US. The individuals he interviews can be put in danger if they go on the record with him and their names are published. Because of this, he tries to be cautious when finding sources. He informs them that talking to a journalist about their immigration status could have negative repercussions and that they are free not to answer questions that make them uncomfortable. To some extent, this approach flies in the face of the traditional journalistic mandate to get the story, no matter what.

“Oftentimes I feel like I’m trying to convince people not to talk to me, and like this isn’t the best way to start an interview,” he says. “Yet nothing else feels ethically right.”

No one knows what the repercussions of a particular story will be. A journalist can offer warnings, but he or she cannot offer guarantees, and sources often have their own motivations for speaking to journalists. But particularly in cases in which a source is not accustomed to interacting with the media, there exists a power differential between the journalist and the source. In her essay, "Truth and Consequences" — which appeared in the book *Telling True Stories*, put out by the Nieman Foundation for Journalism at Harvard University — Pulitzer Prize winning journalist Katherine Boo writes, “As a journalist I have more power than the people in my stories. There’s no way around that.” By being more upfront about the rules of the game and the potential outcomes and risks, we can at least minimize that power differential.

In citing another example of how to rethink interactions with sources, Berkeley J-School professor Wasserman points to a case study that the school’s students discussed during a media ethics class. In the 1980s, a small-town paper in New England ran a story about the first baby born in the new year. The article was intended to be a simple filler piece, but it turned out that the mother of this particular baby was a single mother on welfare, who was more than happy to talk about how her reliance on government assistance made the decision to have a second child easy. The wires picked up the story, and at a time when talk of Reagan’s “welfare queens” was dominating the political and cultural discourse, the woman suddenly found herself a poster child for indolence. The public’s reaction was so severe that she ended up too scared to leave her apartment.

The question Wasserman asks is whether the reporter in this instance had any responsibility to inform the woman of the repercussions her statements might have. The knee-jerk journalistic response is, “Of course not.” As reporters, it sometimes seems as if we live for juicy statements like the ones this woman provided. Moreover, the topic of what went into her decision to have a second child is not necessarily trivial. Information about how tax dollars are spent serves the public interest. But does our mission to inform the
public override our responsibility to protect a source — even if we’re protecting her from herself?

Wasserman argues that this dilemma tends to arise particularly when journalists are “driven by genre.” The story about the first birth of the new year was supposed to be a short, light piece, and that’s what it ran as. But the reporter and the editor must have known that it contained information worthy of deeper journalistic probing: Was this mother actually abusing the system? Was this a widespread problem? The story did not dive into these issues; rather, it simply included several explosive quotes which, devoid of context, suggested a particular narrative, which was then picked up by political and cultural commentators to use for their own ends.

It’s not a journalistic priority to protect sources from themselves if they don’t deserve protection. If the mother had been abusing the welfare system, it would have been worth reporting on, and the story would have been made richer by her colorful quotes. But this wasn’t the focus of the story that was reported and merely including her quotes in that story, suggests a larger narrative that was not fully reported out, thereby shortchanging the source as well as the public.

Of course, there are times when we do report out the full story, and these instances come with their own calculus, which brings us back to Reality Winner and the story broken by The Intercept. In this case, the story was inherently worthwhile. The information Winner leaked pertained to Russian interference in the 2016 US presidential election, and The Intercept had a clear responsibility to report it in order to inform the public.

Yet, this doesn’t mean the site’s responsibility to its source was necessarily less, and the particulars of how Winner and The Intercept interacted do raise important questions about how we prioritize these competing responsibilities. Winner approached The Intercept with information. The Intercept did not solicit her for it. Moreover, Winner was an intelligence specialist, vetted for a security clearance and not a random person on the street. We assume — although we cannot be sure — that, given her position, Winner knew what she was risking. And she did little to protect herself. Winner was one of only six people who had access to the document she leaked, which made her particularly vulnerable, and she used her work computer to communicate with The Intercept.

Nevertheless, these particulars do not necessarily absolve journalists of responsibility. While it is not our role as journalists to assume liability for a source’s decisions, we do need to recognize that sources and reporters enter into agreements with each other with very different things at stake, and it’s not always clear to a source what a promise to protect them actually means. The Intercept did not intentionally reveal Winner as its source. She was identified when The Intercept sent copies of the documents she leaked to the NSA, and in looking at the copies, the FBI realized that the originals had been creased and thus likely printed and hand-carried, which ultimately led the NSA to Winner. But in a world of
increasingly sophisticated surveillance, these reveals are becoming more likely. In 2011, the executive director of the Reporters Committee for Freedom of the Press wrote that a national security representative told her that they wouldn’t subpoena reporters in the future. “We don’t need to. We know who you’re talking to.”

Given increasingly sophisticated powers of surveillance, we should ask ourselves whether we owe our sources more. Certainly, we should be careful, even obsessive, about our digital security, and The Intercept has been rightfully pilloried for its carelessness in this case. But if sources’ identities can be readily found out, what are we doing by promising not to reveal names, other than advertising our supposed virtue? Should we promise more? Should our relationship with our sources end when we can no longer protect them? Do we owe them a public defense and the public recognition that we could not do our work without them? In the absence of a broader ethical discussion about source relations, the answers are unclear. That should trouble us.

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Introduction to
Selected Law Papers

The 2017 Law program was taught by Eric Muller, the Dan K. Moore Distinguished Professor of Law in Jurisprudence and Ethics at the University of North Carolina School of Law, and Susan Carle, a Professor of Law at American University’s Washington College of Law, and included 12 Law Fellows from nine different law schools. This was an intelligent and dedicated group of Fellows who engaged in rich discussions about the ethical challenges they will face as lawyers.

Over the course of the two-week trip, this group discussed both the large-scale issues facing the legal profession and the smaller day-to-day dilemmas faced by individual practicing attorneys. Perhaps as important, talk often turned from how to make an ethical decision to how to enact a decision once it has been made, particularly as a young attorney working within the hierarchy of a law firm or government office.

After the trip, the 2017 Law Fellows were asked to submit final papers that explored a contemporary legal ethics issue. The two papers that follow are examples of these final papers and provide a sense of what the Law Fellows took from the discussions that they had on the trip.

In the first paper, Kristin Marshall turns her attention to the American legal system and explores the implications of comments made about Donald Trump by United States Supreme Court Justice Ruth Bader Ginsberg during the 2016 Presidential election. In particular, Kristin focuses on the question of whether Justice Ginsberg should recuse herself from any case involving President Trump’s travel ban, given her statements criticizing then candidate Trump. Kristin concludes by examining what types of situations might lead a Supreme Court Justice to recuse him or herself.

In the second paper, Duncan Pickard addresses the ethical challenges faced by lawyers working in international law. As Duncan points out, the fact that international tribunals cannot haul unwilling defendants into court pushes lawyers into the role of diplomats and forces them to confront the fact that winning a case may not necessarily be the best way to solve a dispute. Duncan offers four examples that offer different perspectives on the limitations of the international legal system and asks the reader to consider that sometimes it is more important for a lawyer be a good negotiator than a good litigator.
Together, these papers provide a glimpse into some of the discussions from the FASPE Law trip and also demonstrate how these Fellows build connections between the history of their profession during the Third Reich and the issues facing attorneys today.

My heartfelt thanks and commendation, not only to these authors, but also to the entire FASPE Law group.

Thorin Tritter  
*Executive Director*
Justice Ginsburg and the Ethics of Recusing

BY KRISTIN MARSHALL

“Imagine a prominent federal judge gives a media interview in which the judge disparages a potential litigant. Imagine further that the judge expresses a clear preference for a given practical outcome in potential litigation. Imagine further that these opinions are expressed in strong terms and made repeatedly, over the course of several interviews, and that such comments continue even after the judge receives criticism for the initial remarks. Is there any question that the judge would be obligated to recuse if the anticipated litigation comes to that judge’s court? And if that judge failed to recuse, would not that be grounds to criticize the judge’s conduct and question that jurist’s judgment?”

To some, this is not a hypothetical scenario. United States Supreme Court Justice Ruth Bader Ginsburg’s comments leading up to the 2016 presidential election regarding Donald Trump’s fitness for office shocked many Americans, lawyers and legal ethicists — on both sides of the aisle. This paper will detail Justice Ginsburg’s comments, their potential impact on a prominent case before the United States Supreme Court and the ethical considerations around a possible recusal.

Justice Ginsburg’s Comments

By most accounts, Ginsburg made extraordinary — some would say, shocking — comments in the lead up to the 2016 presidential election. Contrary to decades of well-accepted practice, Ginsburg aired her political opinions during this recent election cycle.

In a July 7, 2016 interview with the Associated Press, Ginsburg responded to an inquiry about what she would do if Trump won the presidency as follows: “I don’t want to think about that possibility, but if it should be, then everything is up for grabs.” The next day, in

an interview with The New York Times, Ginsburg said that she couldn’t “imagine what this place would be — I can’t imagine what the country would be — with Donald Trump as our president. For the country, it could be four years. For the court, it could be — I don’t even want to contemplate that.” She then referred to something she thought her late husband would have said, “Now it’s time for us to move to New Zealand.” Three days after The New York Times interview, Ginsburg told CNN that then-presidential candidate Trump was “a faker. He has no consistency about him. He says whatever comes into his head at the moment. He really has an ego. ... How has he gotten away with not turning over his tax returns? The press seems to be very gentle with him on that.” She said that she thought it funny at first, but “[t]o think there’s a possibility that he could be president.”

She also weighed in on the issue of Trump disclosing his income tax returns.3

The criticism and backlash from these comments was nearly immediate. As The Guardian reporter Megan Carpentier noted, “Even Dahlia Lithwick, the senior legal correspondent at Slate, expressed surprise that Ginsburg would weigh in on a Trump presidency in 2016. ‘With an election pending? Wow.’”4 Presumably, as Carpentier implies, Lithwick would have otherwise agreed with Ginsburg on the substance of her views.

Trump called for Ginsburg’s resignation via Twitter. Even The New York Times, known during the campaign for being openly critical of Trump, expressed its views that Ginsburg had gone too far.

As a result of the criticism she faced, Ginsburg pulled back on her earlier statements. “On reflection, my recent remarks in response to press inquiries were ill-advised, and I regret making them,” she said, “Judges should avoid commenting on a candidate for public office. In the future I will be more circumspect.” Shortly thereafter, she described her comments as “incautious.” When asked if she had made a mistake by expressing these opinions, Ginsburg remarked: “I did something I should not have done. It’s over and done with, and I don’t want to discuss it anymore.”5

But Ginsburg continued to face criticism when she opted not to attend President Trump’s February 2017 Address to the Joint Session of Congress — an address made by a newly elected president, equivalent to the State of the Union address made annually after the first year in office. Ginsburg had attended all of President Obama’s State of the Union addresses. Many critics noted that her decision to forgo attending President Trump’s speech was “deliberate,” intending to send a message as to her political disagreement with the President. A month later, Ginsburg told The Washington Times that the US was not

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“experiencing the best of times” under President Trump. She also said “[s]ome terrible things have happened in the United States but one can only hope that we learn from those bad things.”

The Current Case

Shortly after taking office, President Trump issued an executive order that temporarily banned visitors to the US from Iraq, Iran, Syria, Yemen, Libya, Sudan and Somalia. The administration claimed that this 90-day stay would allow it to review and strengthen immigration vetting procedures. Many opponents to the ban believed, however, that it amounted to one based on religion and that it was a fulfillment of Trump’s campaign promise to ban all Muslims from immigrating to the United States. There was a strong backlash to the ban, both in the US and abroad. Multiple lawsuits were filed, and several federal district courts put the travel ban on hold. The Trump administration then issued a “watered down” version of the travel ban, which the US Supreme Court permitted to take effect, subject to certain limitations.

On June 26, 2017, the Supreme Court also announced that it would hear oral arguments on the travel ban. That same day, 58 Republican members of the US House of Representatives called for Ginsburg to recuse herself from the case. The letter stated, “[t]here is no doubt that your impartiality can be reasonably questioned; indeed, it would be unreasonable not to question your impartiality. Failure to recuse yourself from any such case would violate the law and undermine the credibility of the Supreme Court of the United States.” Fifty-seven men and one woman signed the letter.

It is unlikely that Ginsburg will recuse herself from this case. She took part in the Court’s decision to hear arguments on the case while permitting part of the ban to take effect in the meantime. “I would take that as a signal that she is not going to recuse,” Michael Moreland, a law professor at Villanova University told The Washington Post, “The [C]ourt issued an unsigned per curiam opinion, so Justice Ginsburg didn’t reveal her personal leanings, but her participation signals she’s not likely to step aside.” Supreme Court justices feel an obligation to hear a case due to the small number of justices on the Court.

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8 Zanona, “How Trump’s Travel Ban Evolved.”
Unlike at lower levels of the court system, at the Supreme Court, there is not a ready replacement to step into the shoes of a recused justice.11

**Ethical Considerations**

US law requires any “justice, judge or magistrate judge of the United States” to disqualify himself when, *inter alia*, the judge’s “impartiality might reasonably be questioned” or when the judge has a “personal bias or prejudice concerning a party.”12 But, it is unclear whether this statute or even the general ethics code governing most US judges binds US Supreme Court justices. In 2011, Chief Justice John Roberts wrote that while the justices do consult the ethical code, “the limits of Congress’s power to require recusal have never been tested … [T]he individual Justices decide for themselves whether recusal is warranted.” He continued to state that he had “complete confidence in the capability of [his] colleagues to determine when recusal is warranted” but admitted that there is “no higher court to review a Justice’s decision not to recuse in a particular case.” He went on to say that, “the Supreme Court does not sit in judgment of one of its own Members’ decision whether to recuse in the course of deciding a case.” Short of impeachment, there are no other restraints on Ginsburg. Of course, Congress may act. In fact, some members of Congress have introduced legislation that would bind Supreme Court justices to the judicial code of ethics.13

While the debate as to whether Ginsburg should recuse herself will likely continue beyond the Court’s issuance of an opinion in the case, most everyone agrees that Ginsburg herself will have to make the decision as to whether to recuse herself. Voluntary recusals are not rare. But, motions for recusal are unusual. Here, however, a party to the case did not make the recusal request. There is no rule prohibiting interested groups from requesting recusal, but, as Charles Geyh, a professor at Indiana University Maurer School of Law–Bloomington, commented when interviewed for an article on the website FindLaw “the Court is understandably loath to permit the disqualification process to be hijacked as a tool for interest groups to target disfavored judges.”14

Ultimately, this is a question for legal ethicists. Some say that Ginsburg should recuse herself given the hostile nature of her statements regarding the Trump administration. Some say, specific aspects of the arguments under the Court’s review indicate that she should recuse herself. Still others argue that there would be a stronger case for recusal if President Trump were a named party. The last camp of commentators does not see a problem with Ginsburg weighing in on the case. Of course, the ultimate question is

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14 Vogeler, “Is RBG ‘Bound by Law’ to Recuse Herself on Travel Ban Case?”
whether Ginsburg can, as Robert Tuttle, a law professor at George Washington University, asks, “give the president’s policy a fair hearing . . . [put another way], whether it effectively makes [her] incapable of judging the case independently.”

The first group of commentators argues that it is impossible for her to be impartial. Since she has expressed her clear opposition to the election of Donald Trump, any “vote to strike down a Trump policy would be under a cloud.” In response, some argue that only Ginsburg, or any other similarly situated judge, can determine whether he or she is capable of impartiality.

Some argue that the nature of the arguments at the Court of Appeals should disqualify Ginsburg from the case. The Supreme Court will be reviewing the Fourth Circuit’s opinion to strike down the travel ban. In its majority opinion, the Fourth Circuit found that Trump’s reason for issuing the travel ban was “provided in bad faith, as a pretext for its religious purpose.” The Fourth Circuit noted that, while President Trump stated he was acting to protect the public, in fact, the ban was to punish Muslims. This conclusion was based on Trump’s campaign speech — the same speech that Ginsburg criticized in 2016. Recall that, during the election, Ginsburg labeled Trump a “faker” who “says whatever comes into his head at the moment.” As one commentator stated, “[w]ith that history, no rational person could have a shred of confidence that she will be an impartial judge of whether Pres[ident] Trump acted in good or bad faith in stating his reason for the ban.”

Others assert that the argument for recusal would be stronger if Trump himself was a named party since Ginsburg has not publicly commented on the travel ban itself. In 2004, then-US Vice President Dick Cheney was involved in a suit before the Court regarding the transparency of an energy advisory committee he led. The suit, Cheney v. United States District Court, named Dick Cheney as a party. The Sierra Club, a party to the suit, requested Justice Antonin Scalia’s recusal because the two were hunting buddies. But, Scalia refused, stating that while “friendship is a ground for recusal of a justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally not been a ground for recusal where official action is at issue, no matter how important the official action was to the ambitions or the reputation of the government officer.”

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15 Swayer, “House Republicans Demand Ginsburg’s Recusal from Trump Travel Ban Case.”
16 Adler, “Justice Ginsburg Fails an Important Test of Judicial Ethics.”
17 Swayer, “House Republicans Demand Ginsburg’s Recusal from Trump Travel Ban Case.”
18 Weisberg, “Opinion: Ginsburg Should Recuse Herself from Trump Travel Ban Case.”
19 “While it seems clear Ginsburg won’t invite Trump to her retirement party, she hasn’t said anything about his travel ban — yet. Hofstra University law professor James Sample told the National Law Journal that Ginsburg’s comments did not specifically address the travel ban, ‘Were a case to come before the court that more directly involved President Trump as an individual party, the arguments for Justice Ginsburg’s recusal would be stronger than they are here.’” Tony Mauro, “Should Ginsburg Recuse in SCOTUS Travel Ban Case?” National Law Journal, June 28, 2017, http://www.law.com/sites/almstaff/2017/06/28/should-ginsburg-recuse-in-scotus-travel-ban-case/?slreturn=20170726165546.
20 Tony Mauro, “Should Ginsburg Recuse in SCOTUS Travel Ban Case?”
the person who is the named party, would seem to be less” of a ground for refusal, commented Lumen Mulligan, associate dean at the University of Kansas School of Law. It is important to note that Scalia did recuse himself from a different case after he publically criticized a lower court’s decision.21

Some believe that Ginsburg’s comments are not problematic. There are two strains of arguments to support this point. First, several commentators argue that it is no secret that Justices have political leanings and affiliations. “Did anybody think she’d be a Trump supporter? ... I don’t think we need to pretend that judges are apolitical for them to be effective,” says Scott Lemieux, a professor of political science at the University of Washington, “If no Supreme Court justice is allowed to have a political opinion, then no one should have ruled on Bush v. Gore.”22 Further, other justices have been more overtly political in the past without recusing themselves from particular cases. In 2000, then-Justice Sandra Day O’Connor was criticized after she reportedly said, “this is terrible” at an election-night watch party after Florida was prematurely called for Al Gore, but she did not recuse herself from Bush v. Gore.23 Before joining the Supreme Court in 1965, Justice Abe Fortas had served as a political advisor to then-President Lyndon B. Johnson. Many judges who preceded Fortas were much more politically active than even he was. Charles Evans Hughes, Chief Justice of the Court in the 1930s, for example, had run for president in 1916. And several other justices had sought the vice-presidential nomination during the early-to-mid 1900s prior to being appointed to the Supreme Court.24

Conclusion

Under our modern understanding of separation of powers, Ginsburg’s comments have caused serious concerns about her ability to impartially judge the actions of the executive branch. The situation raises many interesting legal considerations, but ultimately, absent Congressional action, the decision as to whether to recuse will be up to Ginsburg herself. Assuming that there will be more cases challenging actions of the current administration, it will be interesting to see how the ethical calculus changes depending on the legal issue before the Court.

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21 Swayer, “House Republicans Demand Ginsburg’s Recusal from Trump Travel Ban Case.”
22 Carpentier, “Was Ruth Bader Ginsburg Wrong to Weigh in on Trump?”
24 Carpentier, “Was Ruth Bader Ginsburg Wrong to Weigh in on Trump?”
Lawyers as Diplomats

BY DUNCAN PICKARD

Hersch Lauterpacht, the renowned Polish-British lawyer and judge, famously described international law as an “immature” legal system. Lauterpacht made this observation in the context of his pioneering postwar work to promote individuals as subjects of international law and, therefore, capable of protection under the emerging field of human rights. In this brief paper, I hope to call attention to some ethical considerations that international lawyers face when working in such a system.

At the core of the contemporary argument for the immaturity of international law is that it lacks an enforcement mechanism, which has led some philosophers to question whether, without one, international law is really even law. The international lawyer’s classic response is that a state’s violation of law is penalized through “countermeasures,” or proportionate responses by other states acting on their own or collectively, such as economic sanctions or the use of force. It is not hard to see, as many scholars have pointed out from the right and the left, how this definition of international law can be circular, or how it privileges the interests of powerful states over weaker ones. If international law cannot be enforced except by strong states and only when it is in their interest to do so, the argument goes, then perhaps it does more harm than good.

Notwithstanding the important critique of the uneven application of international law, I believe that concerns about the lack of enforcement mechanisms miss the point about what international law is trying to achieve. In my view, the law that governs the relations between states should aspire to maintain peace and solve transnational collective-action problems, such as climate change, nuclear proliferation or management of the oceans (even consider links between them). International law, then, must be tailored to adopt the correct institutional design for the problem it is trying to solve, to marry form and function.3 If states do not comply with the legal regime, the problem could be in the institutional design, or it could be that a state calculates that the benefits of non-

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compliance outweigh the costs. In an iterative game of transnational collective-action problems, describing a state’s conduct as legal or illegal raises the cost of non-compliance. In this way, there is a critical element of diplomacy in the work of international lawyers — in planning their litigation strategy, they have to consider not only how they can win a judgment but how they can get the other side to comply if they do.

What are the ethical responsibilities of a lawyer in such an international system? More specifically, should lawyers consider the effect of bringing a case on the international legal system as a whole, even if they calculate a decent chance of winning before an international court? What should lawyers do, for example, when they are sure that they will win but that their adversary will not comply? In physics, an observer effect is the impact that simply looking at an experiment has on its outcome, such as by casting light waves on extremely sensitive particles, which is at once the only way to see them and a sure way to knock them off course. In the delicate world of international affairs, simply calling attention to even a manifest violation of international law can distort the underlying politics with ripple effects on the conflict itself and international dispute resolution as a whole, as I will try to show in the examples below.

I will discuss several cases that involve interstate negotiations over how to settle a dispute. Because international courts cannot haul unwilling defendants into court, states must negotiate their consent to the jurisdiction of a court or tribunal before they can present the merits of their case. The process of negotiating jurisdictional clauses can have a profound impact on the underlying disputes and the ability of states to resolve them. Furthermore, the problems that states confront under international law are often quite complex, even if the question they agree to present to the tribunal is narrow; resolving only the narrow question while leaving the others unsettled can destabilize the situation. The stories below highlight the diplomatic roles that lawyers play in negotiating jurisdiction and compliance. I describe four conflicts, two of which were resolved through negotiating the states’ consent to jurisdiction, and two in which disputes around jurisdiction deepened the conflict. I conclude with some lessons from these cases about the ethics of lawyering and diplomacy in interstate disputes.

Resolving Conflict? The Iran–United States Claims Tribunal and the Taba Arbitration

Extensive negotiations before a case is filed have resolved countless international disputes. This section discusses two ways in which such negotiations over jurisdiction

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5 The fascinating ethical challenges of state representation — starting with the law professor’s favorite brain teaser, “who is the client?” — intersect with my framing of lawyers as diplomats, but for the sake of space I will largely leave these issues aside.
have helped to resolve the underlying conflict, allowing lawyer-diplomats to preempt the question of how to ensure that parties will comply with a later judgment.

First, negotiations over jurisdiction can lead to the resolution of a broader dispute between rivals. The Algiers Accords, which established the Iran–United States Claims Tribunal (IUSCT), is an example. The IUSCT was created in 1981 to settle claims arising out of the 1979 Iranian revolution. Before the revolution, the United States had signed hundreds of contracts with Iran, then an ally, to sell it military equipment. When the hostile Islamist regime took power in Iran, the military sales relationship collapsed. This left hundreds of millions of dollars of outstanding claims between the two countries and their citizens: claims both by US companies for breached contracts and expropriated properties, and Iranian demands for the delivery of equipment that Iran had already paid for but not received and the return of its assets — not to mention the issue of the 52 Americans that Iran then held hostage. The United States and Iran had severed diplomatic relations, leaving no forum in which to settle these disputes. The countries worked through Algerian intermediaries to negotiate the Algiers Accords, in which Iran agreed to release the hostages in exchange for the United States' unfreezing of Iranian assets. The agreement also established the IUSCT to settle the outstanding disputes, including many claims for which American companies had already filed lawsuits in US courts. Iran made the release of the hostages contingent upon the transfer of the pending claims to the IUSCT. Negotiations over the Algiers Accords settled a broad dispute by finding diplomatic solutions to deeply vexing problems and referring the narrow issues that remained (about military sales contracts) to the IUSCT.

The success of these negotiations, and the subsequent establishment of the IUSCT, stand in contrast to the judgment against Iran that the United States won before the International Court of Justice. While participating in the Algiers Accords, the United States brought a parallel case against Iran to the ICJ — decided in 1980 — alleging violations of the Vienna Convention on Consular Relations (VCCR) sustained through Iran's attack on the US Embassy and its continued detention of American diplomats. Iran refused to participate in the merits phase of the proceeding and did not comply with the judgment against it, which had ordered that it pay reparations and that it release the hostages. It took the negotiations around the Algiers Accords to resolve the dispute in full.

Second, negotiations of international disputes can provide a platform in which rivals can agree to settle their dispute amicably on agreed-upon terms. The 1988 Taba arbitration,

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6 Soon after taking office as president, Ronald Reagan issued an executive order to suspend these claims in US courts, a move which the Supreme Court upheld in Dames & Moore v. Regan, 453 U.S. 654 (1981). In a testament to the urgency of the case, the court issued its decision a mere eight days after it heard oral arguments. Then-Justice William Rehnquist described the need for the president to respond with flexibility to “international crises.”

which concerned a border dispute between Israel and Egypt, serves as an example of this.\(^8\) Egypt disputed Israel’s claim to Taba, a small resort town on the Red Sea, and in particular to the hotel that an Israeli company continued to operate there. The dispute arose in the context of the negotiations leading up to the 1979 peace treaty between the two countries, which ended the Yom Kippur War. Abraham Sofaer, then the State Department’s Legal Adviser, encouraged the two parties to submit the dispute to arbitration. The three states worked for over two years to develop the consent to jurisdiction, or *compromis*. These negotiations provided a forum in which the three states could then discuss the larger matter of the implementation of the 1979 treaty, and, according to Sofaer, the arbitration “helped the parties prevent the issue from causing a deterioration of their relations.”\(^9\) The well-constructed *compromis* contributed to its swift implementation: Israel returned Taba following the ruling against it in 1989, and the parties have retained diplomatic ties ever since.

Deepening Conflict? *Philippines v. China* and *Nicaragua v. United States*

The cases discussed above demonstrate the effective use of negotiations and well-crafted arbitration agreements to provide for comprehensive settlements to international disputes. By contrast, arbitrations that fail to provide comprehensive or sustainable agreements can deepen conflict. The lesson here is that lawyers should consider how different approaches to conflict resolution, including arbitration and litigation, can make a lasting settlement more or less likely.

Take the recent example of the arbitration between the Philippines and China over disputed territory in the South China Sea. The arbitration, administered by the Permanent Court of Arbitration in The Hague, hinged on the interpretation of historical treaties between the two countries and interpretations of the word “rock” under international law. But the case was *really* about environmental degradation, military superiority and control of one of the world’s most important shipping lanes.\(^10\) China lodged a perfectly reasonable challenge to the tribunal’s jurisdiction and refused to take part in any phase of the arbitration.\(^11\) China, then, had no say in the constitution of the tribunal. The eminent

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\(^11\) A position paper that China published online, but did not formally submit in the arbitration, argued that the case involved questions of national security which did not fall under the scope of the UN Convention on the Law of the Sea.
experts on the tribunal turned to, among other sources, the *Oxford English Dictionary* to solve a case with global implications on national security and trade. The mismatch was striking.12 China unsurprisingly has refused to comply with the decision, and Rodrigo Duterte, who was elected president of the Philippines after the decision was handed down, has distanced himself from it.13

The approach of the Philippines in the South China Sea case stands in contrast to the approach of the three parties in the Taba case. Boundary disputes are the paradigmatic case of a legally narrow question with tremendous consequences. In the Taba case, the parties worked for two years to drill down the precise question at issue and to resolve the surrounding questions that would not have been appropriate for presentation to a tribunal; in the South China Sea case, the Philippines pursued litigation even when the other party signaled from the beginning that it would not appear before the tribunal.

Paul Reichler, the lawyer who represented the Philippines in the South China Sea case, has, according to *The New York Times*, made a career out of “defending David against the world’s Goliaths in international court.”14 He got his start by representing Nicaragua in a case against the United States before the ICJ in which the Court ordered that the United States pay Nicaragua reparations for its support of the contras during the rebellion against the Sandinista government.15 The United States at first agreed to participate in the tribunal to contest the case on jurisdictional grounds, but after the ICJ agreed to hear the case, the United States refused to participate and has, to this day, not paid the judgment ordered against it. Even worse, the United States subsequently withdrew its assent to the general jurisdiction of the ICJ over all future cases, meaning that states that wish to bring a case against the United States must first obtain consent from the United States.

On the other side of the ledger, *Nicaragua v. United States* represented a significant moment for the ICJ: for the first time, it rendered a judgment in favor of a small state against a large one. The case bolstered the credibility of the court as a forum in which states can seek neutral justice, an important quality for the advancement of international law. Furthermore, the judgments against the United States in the Nicaragua case and

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12 The tribunal proceeded through an extremely close analysis of “several textual elements [in Article 121(3)] that merit consideration, including the terms (a) ‘rocks’, (b) ‘cannot’, (c) ‘sustain’, (d) ‘human habitation’, (e) ‘or’, and (f) ‘economic life of their own.’” See *The Republic of Philippines v. The People’s Republic of China (The South China Sea Arbitration)* 2016 Permanent Court of Arbitration, 205. The tribunal turned to ask whether Article 121(3) was “intended to apply only to features that are composed of solid rock or that are otherwise rock-like in nature.” Citing the *Oxford English Dictionary*, it concluded that the “dictionary meaning of ‘rock’ does not confine the term so strictly” as to limit it to features composed of solid rock, and that “rocks may consist of aggregates of minerals ... and occasionally also organic matter ... They vary in hardness, and include soft materials such as clays.”


China in the South China Sea case place these states’ conduct in a legal framework and allow the international community to talk about state actions as being in violation of international law. International law thus provides a normative framework for discussing state behavior within a diplomatic context. The table is now set for a debate (which I will defer to a later time) about whether the benefits of judgments against non-compliant states like the United States and China outweigh the costs of their non-compliance on the specific conflicts to which they are party and to the integrity of international law as a whole.

**Conclusion: An International Lawyer’s Ethical Duties**

The complexity of securing compliance with international law — even with judgments by its highest courts — highlights the role of lawyers as diplomats as well as litigators. Lawyers cannot rely on the power of international courts to enforce judgments that they have won, even unquestionably, on the merits of the case alone. Negotiating the consent to jurisdiction therefore is crucial and, as discussed above, can even help resolve underlying disputes.

More importantly for our purposes, the genuine limits of international law — or, rather, the conditions required to make international law effective — raise questions about the appropriate role of lawyers in helping to resolve these disputes. As seen in the South China Sea arbitration, lawyers should be aware of the challenges of enforcing even a sweeping victory for their clients and of the impact that a particular case can have on the ability of the international system to ensure compliance with international law in the future. There are no easy answers to these questions, and perhaps, like Zhou Enlai’s (perhaps mistranslated) view in 1968 on the success of the 1789 French Revolution, it might be “too soon to say” what effect these important cases have on the international legal system as a whole.

Fundamentally, these questions are the same that Lauterpacht struggled with throughout his career: how to promote justice in an incomplete legal system. In approaching this enduring difficulty, I draw inspiration from his commitment to changing the international legal system for the better, principally by recalling that all forms of law should exist to promote the wellbeing of individuals.

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Introduction to Selected Medical Papers

The 2017 Medical cohort included a group of 15 caring and intelligent medical students from 13 different medical schools. Led by veteran FASPE faculty members Dr. Mark Mercurio and Dr. Jack Hughes, both from Yale Medical School, these Fellows engaged in a series of discussions and debates about specific ethical challenges faced by individual physicians and the broader ethical dilemmas confronting the medical profession as a whole.

The starting point for these discussions was the frightening fact that Nazi physicians were neither evil monsters nor a crazed minority, but had largely been trained in the German medical system, which was considered one of the foremost in the world at the time. If Nazi physicians could have lost their professional moorings, how can physicians today avoid doing so? This question was at the heart of many of the FASPE Medical discussions.

After the trip, Medical Fellows were asked to submit a short paper about a particular issue in medical ethics that interested them. The two essays that follow are examples of the approaches taken by the Fellows as they delved more deeply into some of the questions raised during the trip and represent the high quality of analysis done by this cohort of medical students.

The first essay is by Yuntong Ma, who explores the large role Nazi atrocities had in shaping post-war medical ethics, spurring an emphasis on the principles of patient autonomy, informed consent and preserving life at all costs. Yuntong goes on to argue, however, that adhering dogmatically to these principles today raises its own set of ethical concerns, particularly in the ICU setting. She concludes that doctors should be willing to offer more guidance in end-of-life situations and should consider more carefully how treatments can diminish the quality of life for the patients in their care.

The second essay is written by Alexa Kanbergs, who focuses on circumstances in which pressures from state authorities or institutions can lead doctors to prioritize third-party loyalties over the interests of their patients. In particular, Alexa examines the challenges faced by doctors working within the prison system, where their obligations to patients sometimes come into conflict with the requirements of a prison’s security procedures. In the end, Alexa calls for improved ethics education, particularly for physicians who may be working in prisons or other contexts in which dual loyalty comes into play.
On behalf of FASPE, I am grateful for having had the privilege of traveling with this group of medical students, and I thank the faculty for all their efforts to enrich the journey for everyone.

Thorin Tritter  
*Executive Director*
Life! End of Discussion

End-of-Life Discussions in the Intensive Care Setting

BY YUNTONG MA

On a cloudless day in June, I stood in front of a barrack at the Auschwitz I camp along with 30 other FASPE Fellows. This brick-red building has not been restored or reconstructed as part of the permanent exhibition of the Auschwitz-Birkenau Memorial and Museum, but instead, has been preserved in its original state. Here, women and children who were the subject of “scientific” experiments by Nazi physicians were once imprisoned. The walls were dusty and slate-colored. Slivers of afternoon sunlight filtered through and illuminated the emptiness of rooms once used for sterilization, freezing and other experiments by Nazi physicians, the most infamous of whom was Josef Mengele. These experiments were painful, often deadly, and performed on prisoners without their consent. In our FASPE seminar discussions, we discussed the step-by-step ideological distortions that led Nazi physicians to go from early sterilization experiments and euthanasia of the elderly and disabled — those deemed a burden to society — to the large-scale extermination of Jews and others termed “racial undesirables.”

Six weeks later, I was working a month-long rotation in a hospital intensive care unit (ICU). One of my patients was an elderly man, who had formerly been a professor of English literature at a prestigious university in India. After a fall leading to traumatic brain injury, he suffered severe neurologic damage and a prolonged hospital stay due to respiratory failure, bowel obstruction and repeated infections. During our latest meeting with the patient’s family to discuss the goals of care, the attending physician had stated that even after trying “everything possible,” the patient had still not improved, and he therefore recommended withdrawal of interventions and the start of comfort care. Upon hearing this, the patient’s wife became emotional and began hurling a series of accusations at us, stating that we had been “experimenting on him,” “not doing anything for him,” and now that we were done, we were “giving up on him.”

Back in the workroom, the wife’s accusations were dismissed easily by those at the meeting as an irrational, emotional outburst — a failure on her part to confront the reality of her husband’s situation. But the incident disturbed me. How different, I thought, was the situation of patients being cared for in the ICU from that of prisoners being experimented upon in concentration camps? Why did I find that the wife’s words made me think of how Nazi physicians had experimented on prisoners and carried out the involuntary euthanasia of those deemed “incurably sick” or labeled as “burdensome lives”?²

At a time when the right-to-die and death with dignity movements are evolving, when debates around the exorbitant costs of the American healthcare system and “rationing” are ongoing, end-of-life care remains a morally ambiguous landscape that physicians, especially in the intensive-care setting, are required to navigate on a regular basis. Physician recommendations for “do not resuscitate/do not intubate” (DNR/DNI) or non-escalation of interventions can stray dangerously close to the territory of determining for another person whether his or her life is “worthy of living.” In the post-Holocaust world, this can evoke the awful legacy of the Nazi designation of “life unworthy of life” (in German: *lebensunwertes Leben*) for segments of the population targeted for “euthanasia.”³ Patients who are nonverbal or severely disabled are even more vulnerable to these calculations of the value of a human life.

After FASPE, I have continued to grapple with how to navigate end-of-life care in the intensive care setting in a manner that is moral and sensitive and that is mindful of history and the many perspectives on the issues that arise in this context. Specifically, my questions are: What is our role and duty as physicians in counseling patients and their families regarding end-of-life medical care? And, on what basis do we make our recommendations?

In this paper, I will start by exploring how the reaction to Nazi atrocities has shaped post-Holocaust medical ethics in the United States, how it has led to an ethos that errs on the side of always preserving life and has been guided by principles of patient autonomy and informed consent. Second, I will examine how dogmatic adherence to these principles can become problematic in the ICU setting. Third, I propose that in order to provide better care to those at the end of their lives we must begin by challenging and reorienting ourselves around some of the existing orthodoxies and principles in medical ethics.

One of the most significant lessons that I took away from the history of Nazi medical atrocities is that they resulted, not from a breakdown of morality or a sinister dive into evil, but rather that they grew out of a progressive, stepwise ideological distortion of what

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it means to heal. They represented a “transmutation of values”⁴ that enabled medicalized killing to be seen as a therapeutic cleansing of the body politic, and that allowed daily, bureaucratic medical tasks to be cut off from ethical reasoning.

Over time, the Nazi classification of “life unworthy of life” was extended. Initially used to characterize and label the physically disabled and mentally ill in order to justify their coerced sterilization and murder,⁵ it was later extended to people who were considered “racially impure” according to Nazi racial policy, culminating in the mass killings at extermination camps.

Furthermore, central to Nazi grassroots health propaganda was one of Hitler’s maxims: “What is useful for the community has priority over what is useful for the individual” (in German: *Gemeinnutz geht vor Eigennutz*). This led to a medical ethos that not only favored paternalism, but also, eventually, a total disregard for the individual as an individual.⁶

The medical experiments performed by Nazi physicians on concentration camp prisoners over the course of World War II, as well as other abuses perpetrated by the medical profession, such as the Tuskegee Syphilis Experiment (in which treatment for syphilis was withheld from rural African-American men without their knowledge over a 40-year period), have left a legacy of distrust of the medical profession, especially when it comes to its treatment of the poor and other vulnerable populations.

Many aspects of the principles of modern American medical care may be viewed as a corrective to 20th-century abuses in the medical profession. The historical experience of Nazi atrocities, some have argued, provides post-Holocaust physicians with an “absolute and infinite moral obligation to care for severely, chronically and non-rehabilitable sick individuals,”⁷ giving rise to a medico-legal system that protects life sedulously. In the arenas of cardiopulmonary resuscitation and intensive care, this sedulous protection of life has come to be called “erring on the side of life,” i.e. any chance to prolong a life tips the scale towards intervention.⁸

In the decades following the Holocaust, medical care in the US has also evolved from one that took a paternalistic approach to one that emphasizes patient autonomy and patient-centered care. The principle of patient autonomy is generally understood to mean that

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⁴ Lifton.
⁵ Lifton.
physicians allow patients to make their own decisions regarding what interventions they will or will not receive.

Closely tied to patient autonomy is the principle of informed consent, according to which a physician informs the patient of the nature of the intervention, its risks and benefits and reasonable alternatives, but then leaves the burden of the final decision to the patient (or their surrogate decision-makers). Those participating in medical research must similarly be adequately informed of the nature of the experiment in which they are participating and, if they are ill, their options for treatment.

Starting in the mid-20th century, therefore, “erring on the side of life” became medical dogma, and patient autonomy, informed consent and the overarching theme of “patient-centered care” became fundamental, unquestioned tenets of the practice of modern medicine.

The history of medical abuse perpetrated by the Nazis certainly serves as a humbling reminder to remain thoughtful and to engage in a constant reevaluation of our actions as moral agents in our daily work. But it also serves as a cautionary tale to take the crucial step that Nazi physicians failed to do, which is to question the prevailing medical orthodoxies and ideologies when we sense that they may be wrong. In the context of modern-day medicine, therefore, it would mean continuously reanalyzing and reorienting ourselves as to what the concepts of patient autonomy, patient-centered care and, more broadly, “the sanctity of life” and “death with dignity” should actually mean.

I would like to argue that a dogmatic adherence to these principles is not unlike the blind obedience of Nazi physicians to the distorted ideologies of “healing” the Volk or people at the expense of the individual, and that the tenets of modern medicine, when adopted without a more thoughtful consideration of their consequences, may ultimately lead to more harm than good. Evidence for this may be especially salient in the ICU setting, where physicians may be unwilling to make strong recommendations regarding end-of-life care for fear that it will cause depression, take away hope or approach the slippery slope of assigning value to a person’s life.

Fifty percent of patients with lung cancer, for example, live to within two months prior to death before being presented with hospice care as an option. Sixty percent of oncologists prefer not to discuss advanced medical directives, code status or even hospice until all treatments have been exhausted. As a result, patients with terminal or life-threatening conditions lose time with their families, or for reflection, because they spend more time in

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the hospital and the ICU.\textsuperscript{11} For physicians, performing resuscitative interventions on terminally-ill patients or those likely to have a poor prognosis also presents a significant source of moral distress.\textsuperscript{12}

Moreover, despite the great strides that have been made in increasing referrals to hospice facilities and palliative care and in formalizing patient-physician discussions around end-of-life care wishes and advanced directives, end-of-life care continues to be characterized by aggressive medical intervention as well as runaway costs. Of the close to $554 billion spent by Medicare in the year 2011, 28 percent (about $170 billion) was spent on patients in the last six months of life.\textsuperscript{13}

With this data in mind, my question is: What is our role and what can we do to become better at caring for patients at the end-of-life?

In the ICU setting, concepts of autonomy and informed consent become problematic when the physician-patient discussions focus on specific interventions rather than on the overarching goals of care. These discussions most often take the form of asking patients questions, such as “Do you want me to pound on your chest or put a tube down your throat to help you breathe?” Observational studies have documented physicians asking very specific questions, such as: “Do you want an insulin drip?” “If we turn off the insulin drip, are you OK if we don’t check blood sugars?” and “Do you still want antibiotics even if we’re not drawing labs?”\textsuperscript{14} Even when patients decline heroic or invasive resuscitative measures, they find it challenging to make decisions about the bewildering array of other medical interventions available. Although it adheres to the rules of informed consent and patient autonomy, this approach fails to recognize that most patients and families have no basis on which to make these decisions, and it leaves them shouldering the responsibility for end results that would have occurred regardless of their decisions.

In the transformation of medicine from a paternalistic practice to a patient-centered one, physicians have struggled to define the boundary between where their clinical decision-making ends and patient autonomy begins. In an essay published posthumously in the \textit{New England Journal of Medicine} (NEJM), Franz Ingelfinger, a former editor of the NEJM who died from esophageal cancer, described what he sought from his own physicians at the end of his life that may help us to begin to better approach the issues surrounding this. He wrote, “A physician who merely spreads an array of vendibles in


front of the patient and then says, ‘Go ahead and choose, it’s your life,’ . . . does not warrant the somewhat tarnished but still distinguished title of doctor.”

We, as physicians, should challenge ourselves to recognize that patient autonomy is not synonymous with endless choice, and, moreover, that shifting the burden of decision-making from us to our patients or their families is not patient-centered care. Especially when it pertains to end-of-life care, the data suggests that some patients prefer a more physician-driven decision-making process. A meaningful in-road towards becoming better physicians for patients at the end-of-life may start with actively eliciting the preferences of patients and their families about whether they wish to receive recommendations concerning life support. This is not an abnegation of responsibility, but rather an approach that is likely to engender trust.

Moreover, while prolonging life is clearly one of the main goals of medicine, I would argue that doing so should not be the sine qua non of what it means to care for a patient. The path of least resistance may be to follow the hemodynamic parameters and serological markers as surrogates for preserving life for patients who are intubated, on a ventilator and being fed through a gastrostomy tube in the ICU, but more fundamental to the idea of recognizing and protecting the sanctity of life is the need to understand a patient’s unique perspective on what gives his or her life meaning in a setting replete with depersonalizing devices. Rather than responding to the Nazi legacy of “life unworthy of life” with “life for the sake of life,” we should always attempt to recognize the intrinsic, unconditional quality of human life and to consider each patient’s goals and values when we offer our interventions. And we should understand the choice to die with dignity over living too long a life deprived of meaning.

Conversely, we should also be careful not to hold onto or fetishize an ideal of the good death or death with dignity that is held by many who work in end-of-life care. Many times in the ICU, when we encounter patients or families who resist a change in code status to DNR/DNI or who continue to desire a full-court press of medical interventions despite our judgment that this will not alter the disease course or the prognosis, their insistence is met with exasperated sighs and the unspoken assumption that they are unreasonable, deluded, religious or some combination of the three. Oftentimes, once they are labeled as such, we stop listening to or eliciting their concerns. But this is wrong. We must be understanding of the fact that not everyone meets the end-of-life period with peace and acceptance and that almost all balk at deception and desire clear and compassionate communication from their physicians. As Leah Rosenberg and David Doolittle, palliative care physicians at Massachusetts General Hospital write, “We must be willing to tolerate and support the

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varied end-of-life choices and experiences of our patients, which are often as fraught and unique as the lives that they led.”17

Leo Alexander, who investigated crimes committed by German physicians under Nazi rule and who served as an advisor at the Nuremberg trials, writes about the subtle shifts in the attitude of physicians that arose from “small beginnings” but resulted in the mass extermination of millions of people:

Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually, the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the non-rehabilitable sick.18

Alexander is a cogent proponent of the slippery slope argument, but his explanation should challenge those of us who live in the world after Nuremberg not to throw out the slope altogether in fear of our sliding down it uncontrollably, but rather to remember the relative ease with which commitments to “care” and to “heal” were manipulated and betrayed due to a failure on the part of medical professionals to recognize and act upon their own moral agency. As one German nurse wrote, “I sensed that the killings were wrong ... I carried out the deeds as prescribed, because I viewed it as my duty, inasmuch as my superior told me to.”19 The small, incremental steps towards the commitment of atrocities, taken unwaveringly in the name of “duty” to their profession, is one of the biggest reminders to me of the dangers of dogmatic, unreflective adherence to the guidelines and protocols that underpin the modern medical profession. Even principles as wholesome and routinely unquestioned as patient autonomy, informed consent and patient-centered care can become harmful if we stop evaluating whether our actions in service of these principles are causing good or harm.

One of the key personal responsibilities impressed upon me as a new physician is the development of powers of discernment and judgment regarding the task of aligning my actions and interventions as a medical professional with medicine’s overarching goals.

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19 Derse, “Erring on the Side of Life.”
the intensive care setting, Hippocrates' enjoinder — to “cure sometimes, treat often, comfort always” — becomes especially salient. Through thoughtful, continuous evaluation of our actions as moral agents, we can begin to understand how our backgrounds both inform and obscure our values and beliefs about life, death and dying, and our role as doctors to care and heal even in the face of terminal illness.

Practically speaking, the current medical education system needs to improve by providing the requisite medical education to prepare physicians to lead compassionate and effective end-of-life conversations. Medical education needs to treat it like any other core competency, such as placing a central line or choosing appropriate sedation. On a wider policy level, we need to develop standards for patient-physician communication about end-of-life preferences that are actionable, scalable and evidence-based, and we need to establish the structures necessary to support whatever decisions are made.

During my second week of working in the ICU, my patient, the former English professor, died. His wife and children were present. On the wall above his hospital bed, someone had taped a quote from his favorite poet, Rabindranath Tagore: “Clouds come floating into my life, no longer to carry rain or usher storm, but to add color to my sunset sky.”

Yuntong Ma is currently in her first year of residency at Santa Clara Valley Medical Center. She graduated from the Washington University School of Medicine in St. Louis in 2017.

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The Challenge of Dual Loyalty in Correctional Health Care

BY ALEXA KANBERGS

This organization is not only a professional organization of physicians, but a military one too. Our members are first and foremost Nazis and then only are they doctors. They represent the nation as a whole and should put aside their own personal interests and become leaders who strive for the interests of the whole German nation.1

These words, written by Dr. Hans Deuschel, director of the National Socialists Physician’s League and head of the Fuhrer School of German Medicine, should alarm any physician. Dating back to the time of Hippocrates, physicians have recognized the importance of the physician-patient relationship and the primacy of their responsibility to help and not harm their patients. The Hippocratic Oath states, “Whatever houses I may visit, I will come for the benefit of the sick, remaining free of all intentional injustice.” More modern versions of medical professional oaths also highlight the duty of a physician to his patients. The Declaration of Geneva, which was born out of the medical crimes perpetrated by the Nazis during World War II, states for example, that “The health of my patient will be my first consideration.”2 Such declarations of a physician’s loyalty to his or her patients stand in stark contrast to Deuschel’s words, which illustrate the thinking of a physician with dual loyalties. A physician with loyalties to something other than his or her patient can end up violating the patient-physician relationship and often in a very egregious manner, as has been amply demonstrated by the history of physicians in Nazi Germany.

This paper focuses on how pressure from a state authority or institution can lead a health professional (or professionals) to prioritize third party loyalties over the interests of their patients, identifies the most pressing examples of dual loyalties and the ethical dilemmas within the United States prison system, and offers suggestions of how to mitigate these ethical dilemmas.

1 Tessa Chelouche and Geoffrey Brahmer, Casebook on Bioethics and the Holocaust (Haifa, Israel: University of Haifa, 2013), 48.
Defining Dual Loyalty

Dual loyalty conflicts arise in situations in which a health professional has simultaneous obligations to a patient and a third party, generally a private employer or government body. In prison settings, apart from loyalty to their patients and their employers or administrative systems, “multiple loyalties” can arise for physicians as they can also have loyalties to others, including other prisoners, the public and the health care provider’s own self. Ethical dilemmas due to these multiple loyalties occur when a physician or other health care provider finds him or herself caught between the competing interests of different parties. Determining which party’s interest should win out over another or where one’s loyalties should lie is ethically challenging. This paper will examine how work with a specific population, the prison population, creates ethical issues for the treating physician.

Many professional societies and government agencies, including the US Department of Justice, the National Commission on Correctional Health Care and the American Correctional Health Services Association, provide recommendations for best practices for prison health care. The general conclusion reached by these organizations is that regardless of the environment in which health care providers work, they are bound by the ethics codes of their profession. Global organizations, such as the World Medical Association, have also made multiple statements regarding ethical conflicts resulting from multiple loyalties in which they come down on the side of loyalty to the patient.3

There are professional and societal expectations that a clinician conduct him or herself in a way that 1) prevents harm to patients, 2) benefits the patient and 3) maintains the patient’s confidentially. The notion of clinician loyalty to patients is a necessary precondition for patient trust, and it is a patient’s trust in the clinician that allows a patient to disclose information that may be needed to administer proper care, such as substance abuse, infidelity or mental illness. Violations of loyalty to a patient do irreparable damage to the patient-physician relationship, and, historically, those that suffer the most are the most vulnerable members of society.4

The prison population in the United States consists predominantly of non-white individuals from low-income backgrounds with a high likelihood of having been medically underserved5 As prison may be an individual’s first point of contact with professional health care providers, the therapeutic nature of the patient-physician relationship becomes especially critical here. In order to ensure prisoners receive the best possible health care, a physician must create an environment in which the patient feels comfortable

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enough to truthfully disclose his health history, including any drug or alcohol use or any history of physical or mental abuse, circumstances which are more prevalent among the prison population.6 Furthermore, prioritizing patient loyalty is not only important for promoting individual health, but to a large extent public health as well, as it will encourage our prison population to trust the medical community and to continue to seek care once released from prison.

When Loyalty to Others Displaces Loyalty to One’s Patient

In his paper on clinical loyalties and the social purposes of medicine, physician and Georgetown Law professor M. Gregg Bloche describes three categories of interests that may be incongruent with patient loyalty: 1) pursuit of public health; 2) non-medical reasons that further social aims; and 3) medical assessment for the ascription of rights, responsibility and opportunity. Bloche’s categories offer an organized approach to discussing some of the circumstances in which dual loyalty impacts prison health providers.7

Pursuit of Public Health

The use of technical physician expertise for the good of the prison population’s health (public health) is one of the more palatable examples of dual loyalty. Instances arise in which it is ethically permissible to consider one’s duties to a patient as secondary to those of the public, and in some instances, it is not only ethically permissible to elevate population interests over personal interests, it is a legal duty to do so. However, in other circumstances, the ethically permissible action is not as clear cut.

In two cases decided by the California Supreme Court in 1974 and 1976, respectively now known as Tarasoff I and Tarasoff II, the court found that providers have a duty to protect individuals who face a serious threat of physical harm. Tarasoff II concluded:

When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps. Thus, it may call for him to warn the intended victim, to notify the police, or to take whatever steps are reasonably necessary under the circumstances.8

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8 Tarasoff v. Regents of the University of California (Tarasoff II), 17 Cal. 3D 425 (1976).
As a result of the Tarasoff cases, the law is clear: health care providers do not just have the ability to breach confidentiality, but may have a duty to breach confidentiality in certain instances. However, “Tarasoff Duties,” or the duty to report, can become more ethically and legally unclear when dealing with an incarcerated patient who makes a threat directed at a person residing outside the prison. While in many instances the fact that a prisoner is behind bars eliminates any imminent danger to an individual outside the prison targeted by the prisoner, credible threats in which a prisoner has a means of contacting and organizing actions to carry out his threat should be taken seriously and a provider would be ethically and legally justified in breaking confidentiality and putting the public’s interests over that of the patient’s. Furthermore, putting the interests of the public at the forefront may actually be a beneficent act for the patient as the physician’s action may prevent consequential punishment directed toward the patient down the line.9

One of the more ethically challenging situations for health care providers occurs when they learn that a patient is breaking prison rules. For example, what is a provider’s obligation if in a confidential exchange with a patient the provider learns that the patient has been using or smuggling drugs onto prison premises or has come into possession of a cell phone? A confidentiality breach in this instance generally has no direct therapeutic value for the patient and could cause irreparable harm to the provider-patient relationship. Further, it could even harm the prison population’s view of health care providers in general.

In situations like these, in which providers face the need to weigh the risk to the public vs. loyalty to the patient, the decision should be based on 1) the degree of danger, 2) guidance provided by the law and 3) consideration of what would be done under circumstances free of pressures from the prison authority. It is legally and ethically justifiable to commit breaches of the patient-physician relationship when there is imminent harm to the patient, a fellow inmate or prison personnel, but as a rule, it is harder to legally and ethically justify breaches that are purely driven by a prison’s security procedures.

To ensure informed consent and to operate with transparency, a physician has a responsibility to inform patients that there are limits to the patient-provider relationship in a prison setting; a patient in the prison context needs to be aware that not all information he or she shares with a provider can remain confidential, especially if it involves harm to oneself or another. When a breach of confidentiality is necessary, it must be done in the most limited manner possible. For example, if a health care provider feels it necessary to share a prisoner’s personal health information, he or she may only share the least amount of information possible to the smallest number of parties necessary.

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Ascribing Rights

State and federal health care systems within prisons, like those of the country at large, face budget constraints and physicians are often the key authority in determining which patients are to receive various items or services. For example:

- Providers make decisions about what diet a prisoner can be on, which can put pressure on kitchen staff and create extra work.
- Items such as night guards, or lumbar support pillows or double mattresses are considered medical items and must be linked to a current diagnosis in order for a patient to receive them.
- Providers determine when an inmate may receive specialty care, such as transport out of the prison for a dermatology appointment or treatment for hepatitis C.

According to the concepts of patient loyalty and the medical ethical principle of beneficence, a determination of what services a patient should receive would be made purely based on what would best serve the interest of the patient. However, this way of reasoning is not always practical and, in the context of the prison system, a patient or the prison administration may have ulterior, often financial, motives for requesting or denying a particular course of care.

As Dr. Kim Marie Thorbun writes in *Western Journal of Medicine*, providers serving in a prison are vulnerable to malingering from patients’ leaving providers torn between their duty to a patient and the potential for being manipulated by the patient. Conversely, prison administrations may pressure health care professionals not to provide evidence-based treatments, widely available to the community outside the prison, for financial reasons; for example, such as treatment for hepatitis C. If a physician denies care solely based on pressure from the prison administration or budgets, he or she runs the risk of violating the principle of “equivalence of health care.”

Non-Medical Aims

There exist many examples in which prison physicians employ their clinical skills to achieve non-medical aims because of a perceived or real dual loyalty to patients and prison authorities. Examples include, subduing patients with sedatives out of convenience, participating in state or federal sponsored executions, or involvement in any other type of punishment. However, these practices are much less widely accepted among the public, health care providers in general and the community of ethics professionals at large and may, moreover, be considered to be violations of the legal protections of prisoners.

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Mitigating the Challenge of Dual Loyalty

While some argue that ethical principles represent absolutes that should be upheld no matter the circumstances, the law and a significant portion of the bioethics community believe that circumstances may arise that justify confidentiality breaches within the patient-physician relationship. Thus, there is a need to train physicians to recognize when such a breach is justified and to draft a set of regulations to help in assessing such circumstances so that physicians can more confidently navigate situations in which they are being pulled in different directions due to multiple loyalties.

Standardized Training

In a study titled “Correctional Health Curriculum Enhancement through Focus Groups” published in *Teaching and Learning in Medicine*, researchers conducted a qualitative analysis of the results of focus groups composed of correctional health clinicians. The results of this analysis suggest that the “successful provision of health care in correctional settings requires specialized knowledge, skills, and awareness not typically available in other health care training settings.” Despite the existence of guidelines from professional societies, an education component is critical for preparing prison health providers for the nuances and complexities of the environment in which they will work. While multiple programs exist for training correctional physicians, no national standards have been established and training for correctional health care workers varies dramatically from program to program. To ensure continuity and quality of health care delivery in prisons, providers should undertake a standard number of courses and rotations to prepare them for prison health care, with one of those requirements being bioethics training.

Ethics Education

While all medical schools must provide a minimum of bioethics training as required by the Liaison Committee on Medical Education, a strong bioethics background is particularly necessary for those working in the prison health care system. When confronted with ethical dilemmas regarding loyalty to patients, physicians need a thorough understanding of bioethics principles in order to be able to make these principles the basis for their deliberations in situations in which they must make case-by-case value judgments.

Consultation Service

In their article titled “Bioethics in Corrections,” published in *Correctional Health Today* authors David Thomas and Nicholas Thomas argue that the best way to address ethical

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dilemmas in prison health care is through a bioethics forum, similar to those found in hospitals, run by a private national organization. Even without a national umbrella organization, ensuring that each prison facility has access to an outside consultation service that could provide input when ethical conflicts arise would be incredibly useful for practitioners in the prison health care setting. Having either a national or more locally-based established service would allow a casuistry method of bioethics to emerge in which trends and cases could be tracked and established to solve future ethical dilemmas. Attention to ethics standards and reform in the prison health care system is relatively new and not well documented; therefore, establishing a database of cases with proposed resolutions would be a helpful step toward providing a framework for responding when prison health care workers are challenged with similar dilemmas. However, despite the many potential benefits that would result from a consultation service, there are an equal number of challenges that may arise should one be developed. It may be difficult to support a service financially given the strained budgets at federal and state prisons, and a volunteer-based ethics committee could face quality control challenges. Additionally, given the wide degree of variation in state and federal laws regulating prison health care, a large-scale or national consultation service could be logistically difficult to manage.

**Standardizing the Allocation of Scarce Medical Resources**

In an article on justice, autonomy and cost containment in the *New England Journal of Medicine*, Harvard University bioethicist Norman Daniels examines why it is so difficult for physicians in the United States to say “no” to patients, by comparing medical care in the US and Great Britain. Daniels finds that what distinguishes Britain is that the allocation of health care there occurs under two unique constraints: 1) Britain provides universal access to health care and 2) turning down a patient’s requests takes place within the context of a closed system with a regionally centralized budget. One could argue that health care in the US prison system — as opposed to American society overall — operates with many similarities to the British health care system. All individuals within the penal system have access to care, and there is rationing that occurs on a facility, state and federal level. Standardizing health care service distribution across prisons could help 1) prevent provider subjectivity in determining who should receive resources and 2) shield providers from bureaucratic pressure to make the consideration of the financial needs of the prison a priority when assessing what services to provide which patients.

**Separation of Roles**

Finally, and most importantly, a strong argument should be made for the complete separation of the role of provider from the role of an agent of the corrections department.

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13 Thomas and Thomas, “Bioethics in Corrections.”
As British medical ethicist Margaret Brazier has noted, “No individual, however skilled and compassionate a doctor, can maintain a normal doctor-patient relationship with a man who the next day he may acquiesce in subjection to solitary confinement.”

However, by acknowledging the damage that competing loyalties may do to the provider-patient relationship and mitigating that damage by preventing dual loyalties from arising in the first place — as proposed above — some semblance of normalcy can be maintained.

As much as there is an emphasis on maintaining traditional physician duties in a prison setting, it is naive to believe that the practice of medicine can be the same in an environment in which a physician finds himself pulled in multiple directions by loyalties and obligations to parties other than his patient. Physician-patient confidentiality, as the concept is traditionally understood, does not exist in the prison context. That reality must be acknowledged and corrected for by arming physicians and other health professionals with the necessary knowledge and tools to navigate the ethical dilemmas that will therefore arise. Physicians in this setting must receive proper training and would benefit from access to ethics consultation services. Furthermore, creating a clear separation between a provider’s role as a healer and as an agent of the corrections system must be made a priority across the federal and state penal systems. Only through awareness of the complexities of confidentiality can a physician strive to meet the standards of health care, while conforming to the guidelines of bioethics and correctional health care organizations.

Conclusion

Dual loyalty has troubled the medical profession from its beginnings, leaving physicians vulnerable to abandoning their duty to the individual patient. Physicians must be vigilant in recognizing the external forces that drive medical decision-making, including the pressure to use technical expertise or medical privilege in a manner that is incongruent with undivided loyalty to the patient and which perpetuates exploitation of our most vulnerable populations. This is not to suggest that there are never circumstances in which a provider must place the interests of a patient secondary to another entity, but given the fragility and importance of the patient-physician relationship, especially in the prison setting, it must be done in a thoughtful manner.

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SEMINARY PAPERS
Introduction to
Selected Seminary Papers

In 2017, the FASPE Seminary program was led by Rabbi Jim Ponet, the Emeritus Howard M. Holtzmann Jewish Chaplain at Yale University, and Fr. Kevin Spicer, C.S.C., the James J. Kenneally Distinguished Professor of History at Stonehill College. This thoughtful team led a caring and deep-thinking group of 12 Seminary Fellows who represented religious traditions that included Catholicism, Judaism and several branches of Protestantism.

This group bridged religious differences to embrace each other, recognizing that they would share many of the same ethical challenges in their day-to-day work as religious leaders. Confronted by a history of the Holocaust that includes few good role models in Christian churches, our group faced the realization that religious leaders are not immune to ethical failings and that silent complicity can have the same effect as active participation.

The two papers that follow are examples of the essays and sermons that the Fellows submitted after the FASPE program. They represent the kind of deep-thinking and emotionally mature students who are attracted to the FASPE Seminary program.

The first is a paper written by Philippe Andal, who reflects on the FASPE program and concludes on a need for prophetic preaching. He writes that he is a witness to a nation “plagued by scourges” and calls on American religious leaders to draw on prophetic texts to “put the voices and experiences of the marginalized at the center of our concerns.” Although written as an academic paper, Philippe’s power as an orator shines through the text.

The second paper is a sermon written by Heidi Thorsen Oxford, who weaves together some of the experiences she had during the FASPE program to explore the challenges of thinking of ourselves as potential perpetrators both in the past and in the present day. She asks her listeners to think about where they fail to own up to their complicity. Drawing on a story in the Gospel of Mark, she pushes herself and her listeners to even think of Jesus as a man who, at least in one instance, appears to have been blind to his power and privilege. For Heidi, the story is a warning to all to remember that we are responsible for the plight of others.
On behalf of FASPE, I thank the Seminary faculty and Fellows for all they shared with me and each other, enriching the experience for everyone.

Thorin Tritter
Executive Director
Who Will Go for Us?
Speaking the Word of the Lord Through Prophetic Preaching in Times of National Crisis

BY PHILIPPE E. C. ANDAL

May 23, 2016, is a day I will not soon forget. In addition to being the date of my seminary graduation, it was also the date of my ordination. While much of it seems like a blur now, there are two things I remember vividly: One, the ceremony of the laying on of hands, when members of the clergy surrounded me to officially set me aside for the ministry; and two, the sermon preached for the occasion. As my pastor stood behind the pulpit without a single page of notes in front of him, he preached with a prophetic boldness from the Hebrew prophet Isaiah’s commission as recorded in Isaiah chapter 6, from where I borrow the title of this essay. In a vision, Isaiah hears the Lord ask, “Who will go for us?” In his simultaneously inspiring and sobering message, my pastor challenged me to pick up the mantle of Isaiah and the prophets, and to preach boldly the word of the Lord, for the rest of my life and ministry. It is a charge I took seriously, and one I am trying to faithfully fulfill every day.

June 20, 2017, is also a day I will not soon forget. On that day, I was sitting in a classroom in Berlin, Germany, while FASPE Seminary instructors passed around several primary sources of publications by clergy living in Nazi Germany. One such source was “A Sermon on Bußtag [Day of Atonement]” that was preached by Julius Von Jan. In his equally inspiring and sobering message — and following in the prophetic tradition of Jeremiah, another Hebrew prophet — Von Jan mounted the pulpit and boldly spoke the word of the Lord to preach against the injustice his fellow Germans were committing by imprisoning Jews in concentration camps in November 1938.

While there are many things I cannot forget from the two weeks I spent with FASPE visiting the sites of Nazi crimes in Germany and Poland, since returning home, it is the words of Von Jan, as well as those of my pastor at my ordination, that will not let me go. The haunting question of Isaiah, “Who will go for us?” and the command of Jeremiah to

1 Isaiah 6:8
“speak the word of the Lord”\textsuperscript{2} has gripped me as I reflect on how to apply my FASPE experience to more faithfully answer the divine summons on my life by using these ancient words and examples to inform my contemporary dilemma. To be sure, it will likely take more than a lifetime to answer this question sufficiently, but I am now persuaded that part of the answer lies in a return to prophetic preaching.

As I witness my own nation plagued by scourges that I feel strongly we should not abide — nationalist and xenophobic rhetoric spewed from the Oval Office, the removal of protections for Dreamers, the health of millions put in jeopardy by lawmakers whose constituents’ taxes insure their own access to excellent healthcare, immature world leaders threatening the global community with total nuclear war, white supremacists openly marching and spreading terror and violence (this time without hoods, shamelessly bearing naked faces), black and brown people lying dead in cold blood in the streets with no justice for their renegade murderers in blue — I see an obvious and renewed need for prophetic preaching by American religious leaders.

What Is Prophetic Preaching?

In \textit{The Practice of Prophetic Imagination}, the American Protestant theologian and Old Testament scholar Walter Brueggemann offers the following definition of prophetic preaching:

\begin{quote}
Prophetic proclamation is an attempt to imagine the world as though YHWH — the creator of the world, the deliverer of Israel, the Father of our Lord Jesus Christ whom we Christians come to name as Father, Son, and Spirit — were a real character and an effective agent in the world.\textsuperscript{3}
\end{quote}

Brueggemann argues there is a dominant narrative in the world that stands in direct contradiction to God’s narrative for the world. He goes on to write:

\begin{quote}
Prophetic proclamation is the staging and performance of a contest between two narrative accounts of the world and an effort to show that the YHWH account of reality is more adequate and finally more reliable than the dominant narrative account that is cast among us as though it were true and beyond critique.\textsuperscript{4}
\end{quote}

So then, if this definition is accepted as true, prophetic preaching is preaching that considers the actual circumstances, affairs and state of the world, juxtaposes it with God’s desire for the world, and powerfully communicates this desire so that listeners are

\textsuperscript{2} Jeremiah 22:29
\textsuperscript{4} Brueggemann, 3.
persuaded to accept it as better and true and the only viable option. Prophetic preaching enables those listening to view their current situation through a future vision of divine potential. Prophetic preaching helps those who hear to see the world as it is and to see the world for what it can be through God. Prophetic preaching presents clearly previously obscured alternatives and allows people to choose what they wish for their lives and for their world, and it offers them a path whereby they might partner with God to achieve it. Prophetic preaching is what gives hope to the despairing, strength to the wounded, sight to the myopic and raises new life out of death and destruction.

How Can Modern Preachers Preach Prophetically?

Fortunately, prophetic preaching is an ancient tradition that has been passed down from the ancient Hebrew prophets and has managed to survive through a vocal minority of prophets who, in each generation, sacrificed something of their own lives to answer the holy call of God to “speak the word of the Lord” as it concerned the conditions of their times. Analyzing Von Jan’s sermon against the commentaries of several homileticians and biblical scholars who specialize in prophetic preaching, I will spend the rest of this essay offering methods by which modern preachers can return to prophetic preaching.

Modern Prophetic Preachers Must Reclaim the Text

There is a difficulty in preaching any ancient sacred text as we are far removed from its original context. While there is an extraordinary amount of historical-critical commentary available today, truly understanding the original context and meaning of an ancient text is a next-to-impossible task, especially for a congregational pastor who cannot devote his or her entire time to textual study and interpretation, but must also meet such demands as administering a congregation’s budget and attending to the pastoral needs of parishioners, while also maintaining balance in attending to his or her own personal life. Nevertheless, ancient sacred texts are the basis of prophetic teachings and those desiring to be prophetic preachers must be dedicated to their study. Yet, as biblical scholar and Howard University professor Cain Hope Felder warns, in doing so, preachers must not become “so preoccupied with what the Bible meant in various ancient settings that they … postpone the task of determining what the Bible text means today.”5

When attempting to preach ancient texts, prophetic preachers must take extreme care and exhibit due consideration in how they read, exegete and interpret texts. Too often, texts have been used by oppressors to oppress. Preachers are often guilty of forgetting that, as Virginia-based pastor and author Jerome Ross has argued, “Scripture was written by people who were oppressed and living under one of six kinds of oppression (from Egyptian

oppression to Roman oppression).” When preachers forget this, it can lead to what both Brueggemann and Colgate professor and theologian Marvin McMickle have termed “royal consciousness,” whereby the currently dominant societal power structure is reinforced and the preacher only offers his or her listeners a vision of the future that reflects their current reality and accepts it as God’s will.

Von Jan’s sermon, by contrast, exhibits the type of reclamation of ancient texts as the voice of the oppressed that is called for. Von Jan moved from the ancient sacred text of Jeremiah (specifically, Jeremiah 22:1-9) to the reality of Nazi Germany by proclaiming that the marginalized were “either in concentration camps or have been silenced.” He spoke out directly against the sentiments and views dominant among the German populace at the time, declaring the events of his time as an injustice that “the people at the top will not admit,” and attempting to raise the consciousness of his listeners with the words of Jeremiah, “Hear the word of the Lord!”

Modern prophetic preachers must follow Von Jan’s example. They must reclaim prophetic texts in such a way that they put the voices and experiences of the marginalized at the center of our concerns, even when the preacher is not a member of the marginalized group of people about whom he or she is preaching. Preachers must empathetically enter into the realities of the marginalized and experience the ancient texts from their perspective in the midst of present-day realities. This means that today’s preachers must view the text through a variety of lenses and step into the shoes of women, Muslims, LGBTQIA persons, immigrants, black people and other people of color, and they must hear the word of the Lord concerning these groups and those who seek to oppress them, and they must be prepared to speak the word of the Lord on behalf of today’s oppressed.

Modern Prophetic Preachers Must Reimagine the World

Inasmuch as preachers must “hear the word of the Lord,” from the perspective of the marginalized, their interpretation of text and their preaching must move beyond naming the plight of those who are oppressed either in the text or in present-day society. Prophetic preachers must offer an alternative vision rooted in divine revelation.

Von Jan’s sermon reimagined the world. He unflinchingly declared God’s “retribution” toward and “wrath” against the German Volk or people for its actions and inaction. He

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9 Rohm and Thierfelder.
imagined a “horrific harvest” that might be avoided if only the German people would repent of their ways.\textsuperscript{10} Von Jan reimagined the dominant German narrative of the time and offered an alternative vision for the future, albeit one that was apocalyptic.

Von Jan’s example suggests two things must occur in prophetic preaching: One, the current reality must be condemned; and two, the alternative vision must go beyond the dominant narrative. Preachers must stand in the shoes of the ancient prophets such as Jeremiah, Isaiah and others, and declare the judgment of God for current injustices, while simultaneously “out-imagining” the dominant narrative of their present reality.\textsuperscript{11} To be sure, this is a most difficult task — one that may even put the modern preacher in danger with regards to his or her career, church and society at large. However, this is the call of the modern prophetic preacher — to be, as Columbia University professor and theologian Obery Hendricks puts it, “uncompromising” as this is, as he goes on to say, the defining characteristic of prophetic preachers.\textsuperscript{12} If the modern prophetic preacher has reclaimed the text, has heard a word from the Lord and takes seriously the task of “out-imagining” the dominant narrative, then to be anything but uncompromising is to be profoundly unprophetic. Modern prophetic preachers must go so far in their uncompromising imagination that they and their communities become a manifestation of the alternative reality they are preaching. On this, theologian and Union Theological Seminary professor James Cone writes, “if it [the Church] lives according to the old order (as it usually has), then no one will believe its message.”\textsuperscript{13}

Modern Prophetic Preaching Must Revisit the Call of the Preacher

Prophetic preaching is not only taxing on the soul; it is also taxing on the entire being of the preacher. The prophetic mantle often cost the ancient prophets social standing and even caused great personal and familial tension. Modern prophetic preachers, therefore, must intentionally take care of themselves. If modern prophetic preachers are to become a visible manifestation of the alternative reality they are preaching, this must also be reflected in the preacher’s personal life.

Von Jan makes this move at the end of his sermon, as he confessed that that moment of prophetic preaching was for him “like throwing off a huge burden.”\textsuperscript{14} In fact, he was so free

\textsuperscript{10} Rohm and Thierfelder.

\textsuperscript{11} Brueggemann, 28.


\textsuperscript{13} James H. Cone, A Black Theology of Liberation (Maryknoll, NY: Orbis Books, 2013), 140.

\textsuperscript{14} Rohm and Thierfelder.
in that moment that he exclaimed, “Praise God!” He brought his sermon to a close by asserting a confidence in God’s care for him, as he proclaimed, “It has been spoken before God and in God’s name. Now let the world do with us what it will. We are in God’s hands.”

Modern prophetic preachers must return to what Hendricks calls “a tradition of interiority, of going silently inward to hear the voice of God.” In their attempt to free the world from the dominant narrative, prophetic preachers must themselves experience freedom. Modern prophetic preachers must experience a wholeness not only in the message that they are preaching, but in the God of the message, who is true and who is still speaking through God’s prophetic preachers. Modern prophetic preachers must continually experience the God of eternity, who speaks from and through even the most horrific of histories of the imperfect present to move us toward the prophesied future.

Rev. Philippe E. C. Andal currently serves as pastor of the Community Baptist Church in New Haven, CT. He received his master of divinity degree from Yale Divinity School in 2016.

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15 Rohm and Thierfelder.
16 Carruthers, 84.
Lessons from the Fig Tree
A Sermon to Progressive Churches on White Guilt

BY HEIDI THORSEN OXFORD

Mark 11:12-25

Guilt is a funny thing. It may be one of the earliest concepts that we learn as children. We understand guilt as soon as we consider the age old question, “Who stole the cookie from the cookie jar?” As we grow older our understanding of guilt becomes more sophisticated. We learn from lawyers that guilt is an objective thing — that is, it can be proven with the help of witnesses, evidence and a fair trial. Then again, we learn from psychologists that guilt is a subjective thing — that is, we don’t always know why we experience guilt, but we know what it is when we feel it. As Christians, many of us have been told that we were born guilty. Christians call this original sin. This kind of guilt isn’t something that we earn; it’s something we were born with. Happily, our religious leaders and scriptures tell us that guilt is also something that can be taken away — expunged through our faith in a higher power, mediated by the person of Jesus.

Original sin. For me, these words trigger a kind of negative, gut reaction. I don’t want to believe that human beings are by nature evil, instead of good. I refuse to believe that the tiniest baby is already caught in the clutches of sin. Western Christianity is sin-obsessed. We spend so much time talking about the Fall that we forget to talk about the Garden. We worship the doctrine of original sin and obscure the doctrine of original goodness. Having grown up in an evangelical church that focused exclusively on the sinfulness of human beings, I have spent the majority of my adult life rebelling against the doctrine of original sin. I was a Christian in recovery. Scarred by the concept of original sin, I had to search for other ways of defining my faith and my relationship with God.

I had more or less gotten over the idea of original sin when July 2013 happened. For years I had tuned out the news, but that year I tuned in: Michael Brown, a young black man, was shot by a police officer without just cause on the streets of Ferguson, Missouri, and for the first time in my adult life I was jolted to an awareness of the ways in which racism is still alive and thriving in the United States. For the first time in my life I felt an aching sense of
culpability that was distinctly attached to the color of my skin. For the first time in my life I experienced white guilt — and it felt a lot like original sin.

What does it mean to be guilty? Even more so, what does it mean to be born guilty? These are questions that I’ve started to ask with a deeper sense of faith since July 2013. That year I felt a wave of guilt, suggesting all the ways that I have been complicit in the oppression of people of color by simply believing that racism was a thing of the past. That is my wakeup story, and perhaps you have one too.

It isn’t a stretch to think of Nazi Germany when we reflect on the idea of original sin. The Holocaust, for so many people, marks one of the darkest moments in human history. If ever there were a time to abandon the doctrine of original goodness, and cling to the doctrine of original sin, the Holocaust is that moment. German guilt is, in many ways, a parallel phenomenon to the experience of white guilt. Generations of Germans have had to grapple with the legacy of Holocaust atrocities, just as generations of Americans have had to grapple with the legacy of slavery. But it’s also important to remember that there is no equivalence between these histories, as author Ta-Nehisi Coates has written. Nazi insignias were almost immediately outlawed in Germany following World War II, while Confederate flags are still brazenly displayed throughout the United States, flying above government buildings and etched into the stained glass of churches.¹

While the Holocaust in Europe and slavery in America are by no means equivalent or interchangeable stories, they are both important touch points on matters of human dignity, human responsibility and guilt. I had the opportunity to explore these connections firsthand in June 2017, when I travelled to Germany and Poland with a group of eleven other seminarians as a FASPE Fellow. We were Christians from many different denominations — Lutheran, Episcopalian, Roman Catholic, Baptist. We were fortunate to be accompanied by two rabbis, one a student and the other an instructor, whose presence was especially meaningful given that the purpose of our trip was to study the Holocaust. Walking through the streets of Berlin and the dusty rubble of Auschwitz, we were invited to consider the ethical questions that we face on a daily basis as religious leaders who exercise authority in our respective communities.

The most powerful aspect of our trip, by far, was that we weren’t encouraged to identify primarily with the victims, as is often the case in educational programs and museums about the Holocaust in the United States. Instead, we were told to imagine ourselves as the perpetrators. It’s almost unnatural to do this. We don’t want to see ourselves as the bad guys, the guilty ones. No, we want to see ourselves as the heroes in the story. And if we can’t be the heroes, at least let us be the victims. Let us be the ones whom history regards with charity, sympathy and a certain degree of awe for having survived so much.

Despite this natural resistance, I committed to the task at hand and walked through the gates of Auschwitz with heaviness in my heart. I told myself: I did this. Or, if I didn’t do this, I certainly could have done it. I could have been caught in this web of power that led many people to profit from the eviction of their Jewish neighbors, buying up cheap furniture and working blindly for the war effort. Or even worse, I could have been the one to denounce my neighbor. I could have been the one to type up their death certificate, sitting in a cushy office in the Polish town of Oswiecim.

As I walked along the abandoned railroad inside Auschwitz, the rubble of gas chambers and the meadows that bear the traces of human remains, I found myself turning to my faith. But the first prayer that came to my lips wasn’t *Kyrie Eleison* — “Lord, have mercy” — but rather a prayer of confession. In the silence of my mind I repeated, over and over again, the confession that we say each Sunday as part of our liturgy in the Episcopal Church:

Most merciful God,
We confess that we have sinned against you
In thought, word, and deed,
By what we have done,
And by what we have left undone.
We have not loved you with our whole heart;
We have not loved our neighbors as ourselves.
We are truly sorry and we humbly repent.
For the sake of your Son Jesus Christ,
Have mercy on us and forgive us;
That we may delight in your will,
And walk in your ways,
To the glory of your Name. Amen.

For better and for worse, our churches are in the business of managing guilt. In some ways I’m really glad that this is the case. I look forward to the confession every Sunday, not because I enjoy being reminded of my guilt, but because I need to be reminded of the ways that I am hurting God and other people around me. In the confession we balance out the doctrine of original goodness with the doctrine of original sin. I am invited to see myself as I truly am: the good parts with the bad.

But I sometimes wonder whether confession alone is good enough. Hannah Arendt, a Jewish philosopher and chronicler of Nazi trials after the Holocaust, speaks to this insufficiency. “Where all are guilty, no one is;” she writes in her book *Crises of the Republic*, “confessions of collective guilt are the best possible safeguard against the discovery of culprits, and the very magnitude of the crime the best excuse for doing nothing.”

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As members of so-called progressive churches — Episcopal, Lutheran, PCUSA, UCC and more — we are no strangers to the concept of corporate confession. We are also not strangers to the concept of white guilt. We decorate our churches with progressive slogans, peace poles and rainbow flags. We march in protests and host food pantries. We walk the walk and talk the talk. But is our collective confession enough? Is our social activism enough? Perhaps we’ve spent so much time trying to be like Jesus that we always see ourselves as either the victim or the hero. But we struggle to see ourselves in that third category, a category that we certainly would never associate with Jesus. We struggle to see ourselves as the perpetrators. This, in a nutshell, is the phenomenon of white guilt: we may admit our feelings of guiltiness, but we fail to own up to our complicity.

Perhaps matters would be different — perhaps we would know what to do — if we felt like Jesus could relate to us in our experience of white guilt. This, after all, is the concept at the heart of incarnational theology. Christianity revolves around the conviction that Jesus became human as we are human, and in this way God understands our suffering. So the question remains: Can this incarnational God join us in the very real, painful and confusing experience of white guilt?

Before I go on, I have to say that the very idea of identifying Jesus with the perpetrators, instead of the oppressed, is a difficult and perhaps even foolish thing to do. The Jesus that we know from the gospels is a person who walked, first and foremost, with those who were oppressed. He was friends with the sick, the lame, children, Samaritans and Jews who were beaten down by the Roman Empire. But it is also true that Jesus associated with those who were higher up within the systems of power. Jesus associated with centurions and tax collectors. I have to believe that if Jesus cared about the tax collector then Jesus cares about people who are tangled up in other systems of oppression. Jesus cares about people like you and me.

But I don’t just want to know that Jesus cares about people like me. I want to know that Jesus understands people like me, in a deep incarnational way. I want to know whether Jesus understands what it feels like to wield the power of a perpetrator. Looking to the Bible, I found it: the story I needed to hear as a white person in 2017. It’s a strange little anecdote, mentioned in the Gospel of Matthew and the Gospel of Mark (though I’ll focus more on Mark from here on out). It is the story of Jesus cursing the fig tree.

Christians struggle with this story. It just feels so out of character. The day after Jesus’ triumphal entry into Jerusalem, in the days preceding his death and sacrifice, Jesus is walking down the road in Bethany and he’s hungry. Fortunately, he sees a fig tree in leaf not too far away. He bends down to pick the fruit, but finds that there’s nothing on the bush — which is not surprising, given that, as the writer of the story tells us, it was not the season for figs. Jesus then curses the fig tree, saying aloud so his disciples can hear it.

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3 Mark 11:12-25.
“May no one ever eat fruit from you again!” Then he and his disciples continue on their merry way.

The next day is a big one for Jesus. Now here’s a story we are all familiar with: Jesus marches into the Temple in Jerusalem, only to find it crowded with merchants and money changers. Jesus, being the social justice warrior that he is, flips over the tables, boldly proclaims that the people have turned their house of prayer into a den of robbers and then walks clear out of the city. Mic drop.

The next day Jesus and the disciples are strolling along, and they happen to pass by the same fig tree. But this time, the fig tree has withered away to its roots. Jesus explains some business about, “Whatever you ask for in prayer, you will receive,” and then some more business about forgiving each other, and then the story is over. That’s all we hear about the fig tree in the Gospel of Mark.

Now you can understand why this story might be a little bit disconcerting to Christian commentators. We generally don’t like to think of our Lord and Savior as the kind of person who would curse a fig tree to wither and die, purely out of spite. For this reason, scores of Biblical commentators have sought to explain away the complications of this story. Some commentators have gone a horticultural route, explaining that the fig tree actually should have been in fruit based on the Biblical chronology, or explaining that the tree would have shown evidence as to whether or not it could bear fruit in the future. Other commentators focus on Jesus’ teachings following the disciples’ discovery of the withered tree, emphasizing that this is a story about the amazing things that people can do through prayer. Of course, this still fails to explain why Jesus would pray for such a destructive thing in the first place.

As a modern reader, peering through the lens of centuries of criticism and historical detail, I believe this story is here for a reason. I believe this story is here to show us that Jesus — yes, even Jesus — wielded the power to inflict unnecessary harm on other living things. Jesus doesn’t go so far as to do the truly sinful things that we, as humans do, in the harm that we inflict on one another. Nevertheless, Jesus models a kind of selfish behavior that we are all too capable of falling into when we stand in positions of power and privilege.

Most importantly, Jesus’ behavior towards the fig tree reminds me of what white guilt looks like in my life. How many times have I, as a white person of privilege, cast judgment on another person simply because they didn’t have the same opportunities that I have had? How many times have white people cursed black and brown communities, like Jesus cursed the fig tree, when they didn’t bear the fruits that we wanted or expected — even though the climate and the season have never been ripe for their flourishing? And furthermore, how many times have we indulged this kind of prejudice only to walk into the Temple the next day and flip a few tables? We rest on the laurels of a few social justice moments — that one time we walked in a march, the handful of times we posted on
Facebook — but we don’t examine ourselves for the kinds of subtle racist attitudes and actions that we commit each day. We are not always the victims or the heroes of the story. Sometimes, we are the perpetrators.

When I read the story of the fig tree today, I hear God’s voice calling out to me over the centuries saying that I need to come clean about the truth that I have just as much ability to do harm, as I have to do good. I remember what it felt like to walk through the streets of Berlin and to be in Auschwitz and to feel this truth firsthand. And while I don’t always know what the best next steps are for me to counteract the sin of racism in my life, I know that I cannot continue to walk in my faith until I face the harm that I have inflicted on others.

In the story of Jesus and the fig tree, it is important to remember that Jesus doesn’t simply brush off Peter when he notices the fig tree on the road back to Bethany. Instead, Jesus stops, examines his past actions, and seeks to learn something from them. Now I have to admit that Jesus’ lesson to his disciples about the fig tree still remains enigmatic to me, as it does to many commentators as well. Nevertheless, Jesus tries to make sense of this thing that he has done. And I think this is a reminder to us to do the same — to wrestle with our wrongdoing, to try and make sense of the framework behind our actions and to resolve to act differently in the future.

There is no absolution in the world that can absolve us of white guilt. This is a frightening reality, but it’s true. It’s true because racism is not an individual sin, and as soon as we seek forgiveness, racism will rear its ugly head in this world and we will be complicit in it. But I encourage us to never tire of confessing. Never tire of humbling yourself and recognizing the evil that other people have had to put up with at your expense. Never tire of being vulnerable when your stories of striving and failure can make a difference.

I want to conclude with the absolution for our sin — and I hope you will hear this, not as a gesture of comfort, but as a call to action. Remember, in the silence that follows, there is more to be done. There is so much more to be done. Please join with me, as you feel called:

Almighty God have mercy on us, forgive us all our sins through our Lord Jesus Christ, strengthen us in all goodness, and by the power of the Holy Spirit keep us in eternal life. Amen.

Heidi Thorsen Oxford is currently completing a chaplain residency at Yale New Haven Hospital. She received her master of divinity degree from Union Theological Seminary in 2017.
Introduction to Selected Alumni Papers

With the addition of the 2017 Fellows, FASPE now counts over 430 professionals among its alumni, all of whom are sharing the lessons of FASPE through a wide array of personal and public channels, including in blogs, on op-ed pages, in major newspapers and magazines and in academic journals.

The four pieces that follow are just a small sample of the material being published on a regular basis by our alumni around the country. These articles and papers hint at the resonance of the FASPE experience and the impact our Fellows seek to have in the larger society.

The first piece included here is written by Dr. Charles Odonkor, a 2011 FASPE Medical Fellow who is a postdoctoral fellow at Stanford University. Originally published earlier in 2018, Charles’s op-ed reflects on his experience caring for a dying patient who also happened to be a noted physician and teacher. As Charles points out, this patient taught him much about how he and others should teach medical trainees.

The second piece is written by Laura Smith, a 2015 FASPE Journalism Fellow who now writes for Timeline. Like all our Journalism Fellows, Laura writes for a living, and this article is only one of hundreds that she has reported and penned. We chose to include it here because in this piece Laura connects the work of PR firm Burson-Marsteller with a larger question about the role of business leaders and journalists in enabling Hitler to come to power.

The third piece is written by Rev. David Stark, a 2015 FASPE Seminary Fellow who is completing his doctoral studies in homiletics and Hebrew Bible at Duke University and who was recently named the 2017-2018 Styberg Teaching Fellow at Garrett-Evangelical Theological Seminary. Originally published in the International Journal of Homiletics, David’s article is written from the perspective of an American living in Leipzig, Germany during the 2016 American presidential election and speaks to the role religious leaders should play in political debates.

The final piece is by Dr. Christine Henneberg, a 2012 FASPE Medical Fellow who is now a practicing physician in California. Christine, or Chrissy as we know her, steps into the emotionally charged debate about abortion in this op-ed for the San Francisco Chronicle.
to discuss the medical challenges faced by doctors who are confronted with patients who seek to “reverse” an abortion.

I am grateful to these authors for sharing their work with FASPE and to all our Fellows for their dedication to their professions.

Thorin Tritter  
Executive Director
What’s Love Got to Do with It?
Lessons from a Dying Physician

BY CHARLES ODONKOR

Full Circle

They came from all corners of the globe to bid him farewell. He looked cachectic, his frail form interrupted by swelling in his abdomen and legs, a result of end stage pancreatic cancer. It was Dr. Yeat’s last week in the hospital before being transferred to a nearby hospice. He was now on morphine and despite severe fatigue and difficulty breathing, he always managed a smile. He would sit up, head propped against the hospital pillow as he received those who had come to pay him homage.
Some of his visitors were former colleagues; others were friends, previous medical trainees and mentees. Amidst moments of laughter, crying, and sober reflection, each recounted one anecdote after another of their encounters with Dr. Yeat at some point in their long medical training. One common thread emerged from their stories: Dr. Yeat was a revered clinician and teacher; he was matchless in his boundless medical knowledge, compassionate and thoughtful, with unrivaled bedside manner. His affability endeared him to trainees, hospital staff, and patients. But above all else, he was loved.

A reputable internist, he had served as the chair of the medicine department 30 years ago, at the same medical center where he was now receiving care. I met him on a palliative care rotation in my third year of medical school. Although Dr. Yeat was slowly wasting away, there was an air of solemnity about him. I’m not sure when exactly it dawned on me, but the spectacle of one protégé after another genuflecting at his bedside or squeezing his hands tightly in a bespoken gesture of gratitude left an indelible impression on me.

It was my first experience caring for a dying patient who also happened to be a physician. On morning rounds, Dr. Yeat would listen intently as my attending made some teaching point or other at the bedside. Then he would ask simple questions that seemed rather like common medical knowledge. I found it curious that he usually deferred to the care team and rarely interfered with the treatment plan, except to ask for the rationale behind medical decisions. Each day before leaving for home, I would stop by his bedside and he would ask me what I learned that day. Even as he was nearing the end, he showed that he cared.

Some physicians who become patients participate extensively in decisions about their care, sometimes subverting the team’s care plan. Others may be subject to VIP syndrome, where they receive obsequious or preferential treatment. The desire to respect a physician’s expertise — due to our inclination to apply the golden rule when it’s one of our own — further complicates matters and makes caring for sick doctors even more challenging.

The Entanglement of Self-Doctoring

As physicians, caring for a dying doctor reminds us of our own mortality, and we are more likely to identify acutely with their suffering. A sacred transmutation occurs when a physician becomes the patient: he arrives as a new citizen in the kingdom of the unwell with first-hand experience of a patient’s plight in the medical system. In the face of terminal illness, negotiating between stewardship by the care team versus allowing a semblance of control by the sick physician highlights a real tension.

To what degree should we make room for self-doctoring? For any sick patient, having a degree of control helps temper the anxiety of the unknown. For sick physicians —
acculturated to strive for perfectionism during medical training — control appears necessary for survival. While care of any terminally ill patient has its own unique challenges, care of the dying physician engenders an internal conflict of detangling the personal versus the professional self for both the caring physician and the sick physician.

Since providing care to others appears to be a physician’s default modus operandi, it may feel unnatural to be at the receiving end of care. In the context of the terminally ill physician, establishing clear end-of-life goals and forming a therapeutic partnership may help negotiate this difficult scenario. Although seldom addressed in medical training, care of the sick or dying physician reminds us of our own fragility and humanity. The illogical arbitrariness of illness is a humbling reminder that without notice, any of us could be seeking care for a terminal condition rather than providing it.

Within the framework of an ongoing national dialogue about the rise in physician suicides, it may behoove medical and clinician educators to model for our trainees how best to care for each other. How do we support a colleague facing a disabling condition or terminal illness? How do we engender a spirit of equanimity in our training environments as well as within our medical trainees?

Acknowledging our own vulnerability and modeling for trainees how to seek help are critical first steps. Incorporating conversations about strategies to deal with fear and anxiety during training may help equip us in managing difficult situations when we or our colleagues experience personal suffering, disabling or terminal illness.

**Lessons in Love**

All trainees can point to an experience in medicine that shaped their view of doctoring. Whether it involved surreal moments with patients on morning rounds, or an unforgettable procedure in the operating room, these life threads get woven into the narratives of our own medical journeys.

Which brings me to lessons from my encounter with Dr. Yeat. In a remarkable display of equipoise, Dr. Yeat allowed himself to be vulnerable, letting go of his professional identity and embracing the role of patient. Despite his poor prognosis, he gifted the care team with his calming presence. He asked questions where appropriate and together with the team, designed a care plan that aligned with his wishes. Even as a patient, he was the ultimate teacher at the bedside, showing us how best to establish a therapeutic bond in caring for a physician-patient.

It is no secret that for every great pupil, there is always a great teacher: Socrates for Plato; Anne Sullivan for Helen Keller. Following this logic, clinician teachers today beget the
clinician teachers of tomorrow. In his lifetime, Dr. Yeat gave his all as a clinician teacher, leaving little shards of kindness in all of his trainees. It is only fitting that this love came back to him multiplied a thousand fold in his most vulnerable moments, on the other side of the stethoscope.

Witnessing the outpouring of love for Dr. Yeat at the end of his life really put things in perspective for me then, as a trainee: no matter the accomplishments of any physician, nothing beats the power of loving and being loved. I was filled with gratitude for all my teachers: for Mr. K — unparalleled in his enthusiasm for biology — who helped shape my early interest in the sciences in high school, and subsequently, my pursuit of medicine; for Prof. O, whose encouragement in my advanced college English literature class nurtured a passion for writing; and for Dr. D, from medical school, who remains the embodiment of an elegant physician, and modeled for me excellence in the teaching and practice of medicine.

Amongst laments about the many problems currently plaguing the medical profession are these unanswered questions: what makes good clinical teaching? Are our medical institutions doing a good job equipping trainees to become exemplary clinician teachers? While the science of teaching remains to be unraveled, the essence of the art of teaching appears to be love.

With love, Dr. Yeat brought out the best in all his trainees. He showed that beyond developing grit and resilience, we could all use a little bit of love. What if love drove how we treat and teach our trainees? There is no telling how many more Dr. Yeats we would produce, but rest assured, we would be establishing a legacy of love in medicine.

So what’s teaching got to do with love? “It’s love in its purest form...”

Charles A. Odonkor, MD, graduated from Yale School of Medicine, trained in physiatry at Johns Hopkins University and is now a postdoctoral fellow at Stanford University. He was a 2011 FASPE Medical Fellow.

[Note: This article was originally published on Doximity’s Op-(m)ed.com on January 18, 2018.]
This American PR Firm Has Made Millions Representing War Criminals and Ruthless Corporations

BY LAURA SMITH

For more than 50 years, Burson-Marsteller has been the go-to mouthpiece for dictators and companies in trouble.

A group of demonstrators are held by police during an anti-government rally in Buenos Aires during Argentina’s Dirty War — the seven-year military dictatorship which resulted in the killing, or disappearance, of an estimated 30,000 people. (Horacio Villalobos/Corbis via Getty Images)
Emilio Mignone was startled awake by the sound of his doorbell. It was 5 a.m. in Buenos Aires in the spring of 1976. He hurried over to the peephole where he saw five men in military trousers standing on the other side of the door.

“Who is it?” he asked.

“Open up, it’s the army,” they replied.

When he asked for identification, one of the men waved a machine gun instead. Then Mignone, a lawyer and university professor, did something that he would regret for the rest of his life. He opened the door.

Emilio assumed that the men were there for him — the university where he taught was progressive, and he had supported the predecessor to the military government that had seized power only six weeks before. But they had not come for him; they were there for his daughter.

Monica Mignone was a beautiful 24-year-old educational psychologist with high cheekbones and long dark hair. She was sick with the flu in the other room. The men ordered her to dress, and before her father could fully process what was happening, she was out the door and into the apartment’s small elevator, cramped beside the hulking, machine gun-wielding men. She looked terrified. Her family never saw her again.

The disappearance, recounted in Iain Guest’s *Behind the Disappearances*, was typical of Argentina’s “Dirty War.” In the 1970s and 80s, the military dictatorship lead by army commander Jorge Rafael Videla, systematically gathered and murdered socialists, journalists, union organizers, and people who had ties to the previous administration, in an effort to stamp out leftist political dissidence. Victims were interrogated, tortured, drugged, and then dropped live from an airplane over the Atlantic. Official inquiries into the death toll found that 9,000 people were disappeared, though relatives suggest the number was closer to 30,000.

To the world, the Argentine military dictatorship looked quite bad. The Inter-American Commission on Human Rights from the Organization of American States was set to hold a hearing on human rights abuses and the government was worried about their bottom line. Chatter about such things might scare off foreign investors. They needed a public relations makeover.

There was one obvious place to go for the job: Burson-Marsteller.

Headquartered in New York City, it is one of the largest PR firms in the world and rescuing indefensible clients from public relations disasters has long been their bread and butter. For the price of $1.2 million a year, Burson-Marsteller kicked off an ad campaign: cards
that would be circulated by the government that read in Spanish, “We are right and human” — to create an aura of morality surrounding the country. As Temma Kaplan explained in her book, *Taking Back the Streets*, the campaign was “an attempt to discount the stories of the disappearances.” For the Argentine government, Burson-Marsteller crafted a 31-page advertising supplement in *Business Week* that read, “few governments in history have been as encouraging to private investment ... We are in a true social revolution and we seek partners. We are unburdening ourselves of statism, and believe firmly in the all-important role of the private sector.” The South America expert from London’s *Observer*, would later say, “It was one of the most repulsive exercises in PR that I have ever known.”

But among Burson’s clients, that’s not an easy call to make.

Harold Burson, who founded the firm in 1953 alongside Bill Marsteller, put a more generous spin on their work in 2008, writing, “We are in the business of helping companies through difficult situations.” Their client list (which they no longer make public) has, at one point or another, included Union Carbide after the Bhopal gas leak disaster that killed roughly 15,000 people; the Nigerian government, after it was accused of genocide in the Biafran war; Romanian dictator Nicolae Ceausescu; and the Indonesian government.
shortly after 250 East-Timorese were shot while protesting in favor of independence from Indonesia. When the private military company Blackwater shot 14 unarmed Iraqi civilians and the company’s founder was called into Congress to testify, Burson-Marsteller was brought on to help him prepare. As Rachel Maddow said in 2009, “When evil needs public relations, evil has Burson-Marsteller on speed dial.”

Their influence was enormous. As Sheldon Rampton and John Stauber wrote in Trust Us, We’re Experts, “Companies like B-M have become important arbiters in determining which experts appear on the public stage.” Throughout the years, their work would raise uncomfortable questions about what — if anything — defines morality in the corporate landscape.

In his 2017 book The Business of Persuasion, Burson wrote, “Throughout its existence, Burson-Marsteller has conducted business with the underlying assumption that living up to the highest professional, ethical, and moral standards is not only doing what’s right but also doing what’s best for business.” In some instances, this marriage of public interest and the bottom line appeared viable. When seven people died from taking Tylenol pills that had been laced with cyanide by someone who had tampered with the packaging, Burson-Marsteller saved the company, restoring the public’s faith by introducing the tamper-proof...
seal. (The distinction in this instance being that Tylenol wasn’t responsible for the deaths.) But in too many cases, this claim that what was good for business was good for the public proved dubious at best. When dictators and reckless companies came knocking on Burson-Marsteller’s door and critics objected, executives hid behind the company’s other credo:

“All members of the society, even those we consider to be reprehensible, are entitled to representation by professional public relations counsel.”

Burson-Marsteller executives are styling themselves as noble defense attorneys here, just doing their jobs as part of a system that ultimately seeks justice. But the court of public opinion is not the court of law — PR companies with gleaming offices on Madison Avenue are not a legal right. A PR company’s job is to amplify their client’s desired messaging, to finesse public perception for their purposes. While Burson-Marsteller argued that they were just providing a service, others pointed out that they were bolstering the already strong arms of power.

In his book, Burson explained that no employee would be required to work on business “which is in conflict with the individual’s conscience.” But in a corporate culture where every tyrant is “entitled” to representation, Burson-Marsteller executives’ consciences proved damningly unplumbed.

The spin doctors believed their own spin, but their stories weren’t necessarily convincing to outsiders. When Marguerite Feitlowitz interviewed Victor Emmanuel, the young account executive in charge of the Argentine deal for her book *A Lexicon of Terror*, he enthused, “It was fascinating, enormous, we could say awesome.” The military dictatorship was just trying “to get the mess over as soon as possible. A lot of innocent people were probably killed. But I wouldn’t point the finger at any one party. There are always two sides to any story ... it’s the nature of people to find fault and criticize.”

Of their work after the Bhopal disaster, the aging Harold Burson told a reporter at *PR Week*, “We are frequently criticized for this but I am proud of it, as we helped the media...
cover the story.” That’s a far cry from Burson’s early career tenets. Before building his public relations empire, he was a reporter who covered the Nuremberg trials.

The logical question becomes: Is there anyone Burson-Marsteller wouldn’t represent? Shortly following the death of Burson executive Michael Horton, a writer in The Spectator recalled asking Horton, in 1988, if the firm would represent Albert Speer, the economics minister of the Third Reich. Horton paused and then, in a remarkable display of bush-league PR, said, “I suppose in theory . . . if we chose to we could. We are a private company. We would have to make a value judgment whether an assignment would be of benefit to our employees and our shareholders.”

As Hitler said in 1938, “Without the loudspeaker, we never would have conquered Germany.”

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Laura Smith is a staff writer for Timeline. Her book, The Art of Vanishing: A Memoir of Wanderlust, was published by Viking in 2018. Laura holds a master of journalism degree from the NYU Arthur L. Carter Journalism Institute and was a 2015 FASPE Journalism Fellow.

[Note: This article was originally published in Timeline in a slightly different version on July 5, 2017.]
Preaching Politics

BY DAVID M. STARK

As an American homiletician living in Leipzig, Germany, I am often asked for my thoughts on American Christianity and the current presidential administration. I never know how to reply. What do you say about something so globally and personally affecting?

Do I tell them that I am still grappling with the role different forms of Christian proclamation played in the election? A reported 81 percent of evangelicals supported one candidate. A large proportion of white voters did the same. What does this mean for evangelicalism and for my own mainline denomination, which is 94 percent white? More pressing, what does this mean for black, Latinx and LGBTQ communities? Or, for Muslims, the poor, immigrants, refugees and women?

I learned of the presidential election results on November 9th, just as ceremonies were underway in Leipzig to remember the victims of Kristallnacht. It is a frightening connection that many others have made. With the political rhetoric in 1930s Germany and in the US today, many American pastors and professors have called for a new Confessing Church movement, even crafting statements of confession (see confessingfaculty.org). I think about this kind of resistance every time the congregation prays the Lord’s Prayer. “Dein Reich komme.”

But, then, I also wonder about how effective a new Confessing Church movement could be. At its strongest it seems to offer a type of prophetic, poetic preaching that counters the prosaic worldview of domination. At its weakest, it may be overly subtle — too vague to foster resistance in its hearers.

Some leaders in my denomination are currently calling for preaching that focuses on unity. While well-intentioned, such a call may risk encouraging an unreflective kind of preaching that undermines the invitation to repentance, normalizes oppressive action and silences the

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1 See Walter Brueggeman, Finally Comes the Poet: Daring Speech for Proclamation (Minneapolis: Fortress, 1989), 3.
2 See William Skiles, Preaching to Nazi Germany, UCSD Dissertation, 2016. “The data indicates that if one were to sit in a confessing church during the Nazi dictatorship, one would hear — but only rarely — a critical comment about the Nazi regime, its ideology, and policies. On that rare occasion, the parishioner would hear a sermon like any other — a testimony about God’s work in the world in times past and present. But she would also hear a brief comment, perhaps only buried in the commentary about the biblical text, which undermines Nazi leaders, National Socialism, or its persecution of Christians. ... No doubt it would take concentration, refection, and will-power for this parishioner to actually be moved to some kind of action based on the pastor’s criticism” (281).
vulnerable. I am reminded of what Albert Raboteau wrote in *Slave Religion* about the ways an overly-spiritualized faith has been used to assuage the guilt of policies that exploit (especially) black bodies. Could focusing on preaching unity be a new form of spiritualizing faith?

A few of my pastoral colleagues in the US, who are engaged in bold preaching and protest, have advised me to enjoy my respite from the American church and politics. I have considered it, but Dietrich Bonhoeffer and Martin Luther King, Jr. keep disturbing me.

And, my desk overlooks Nikolaikirche, the cradle of the Peaceful Revolution that energized resistance in 1980’s East Germany. Every Monday the church was open for all people. A colleague here calls this Leipzig’s original Moral Monday protest, the fruit of which is remembered each November 9th as the fall of the Berlin Wall.

Nikolaikirche reminds me of the foolishness of God. Who would use prayer as a form of resistance, preaching as a counter to police brutality, and candles as an agent of change? Surely only the God who chooses Israel, a people caught in the shadows of superpowers. Surely only God, the one who works deliverance as a disruption of Pharaoh’s economy and a mockery of Rome’s power. It is this God whose scriptures consistently refer to such politicized themes as refugees, immigrants, women and care for the poor and sick.

Living in an international context, I still don’t know exactly what to say to a new acquaintance who asks me about the presidential administration or even what I will preach next. But, it seems to me that the homiletical question can no longer be whether or not to offer a political word. Rather, the question is whose politics does our preaching explicitly and implicitly support?

**Rev. David Stark** is a doctor of theology candidate at Duke Divinity School and an elder in the United Methodist Church. He studied at Leipzig University, Germany, in 2016-2017. He was a 2015 FASPE Seminary Fellow.

[Note: This article was originally published in *International Journal of Homiletics, 2* (2017).]

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4 I think specifically of Dietrich Bonhoeffer’s words to Reinhold Niebuhr about why he had to return to his home country: “I must live through this difficult period of our national history with the Christian people of Germany. I will have no right to participate in the reconstruction of Christian life in Germany after the war if I do not share the trials of this time with my people…” (Dietrich Bonhoeffer Works, Volume 16: Conspiracy and Imprisonment 1940-1945, 1).

5 “I must confess that over the last few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro’s great stumbling block in the stride toward freedom is not the White Citizens Councillor or the Ku Klux Klanner but the white moderate who is more devoted to order than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says, ‘I agree with you in the goal you seek, but I can’t agree with your methods of direct action;’ who paternalistically feels that he can set the timetable for another man’s freedom; who lives by the myth of time; and who constantly advises the Negro to wait until a ‘more convenient season,’” (Martin Luther King, Jr., “Letter from Birmingham Jail,” August 16, 1963).
Changing Mind Mid-Abortion
Not Necessarily Simple or Safe

BY CHRISTINE HENNEBERG

Recently a young woman, 16 weeks pregnant, came to me asking for help. “Please, doctor, you have to save my baby.”

Carmen had come to our clinic the day before seeking a surgical abortion. She had been counseled and had signed the appropriate consents. A colleague working that day had
reviewed the case with me by phone. She then placed mechanical dilators to soften and open Carmen’s cervix overnight, and instructed her to return the next morning to complete the procedure.

Instead, Carmen showed up that morning asking me to “reverse” her abortion.

My colleagues and I hear all kinds of reasons from patients seeking abortion “reversal”:

• A husband or boyfriend urged her to have an abortion she didn’t want.
• A husband or boyfriend persuaded her to keep the baby.
• Someone told her abortion was wrong.
• A pregnancy crisis center advised it wasn’t too late to change her mind.
• She thought about it long and hard, and came to her own conclusion that abortion isn’t right for her.

Many expect requests for reversal to become more common. We in the pro-choice movement know antiabortion groups are increasingly targeting women undergoing medication abortion (in which the patient takes one medication in the clinic that blocks critical pregnancy hormones, and a second medication one to two days later, at home, to induce miscarriage). They catch the women as they leave the clinic, telling them about an antidote to the pill they’ve just swallowed. One prominent website capitalizes on language that has traditionally belonged to our side of the debate: “It is your choice to change your mind.”

But to “reverse” any abortion once it’s begun is not a simple — or necessarily safe — proposition.

To be clear, we are not talking about restoring pregnancy after an abortion is complete (a biological impossibility), but rather interrupting certain two-step abortion protocols. Such practices (including medication abortion “antidotes”) are experimental. Because ethical and practical limitations preclude controlled studies of these situations, we have very little data to give women on rates of live births or complications after an interrupted abortion.

The best we can do is extrapolate from similar, serious conditions in desired pregnancies, such as cervical incompetence (where the cervix starts to open prematurely), preterm rupture of membranes, and endometritis (inflammation of the lining of the uterus). Given that Carmen’s cervix had been dilated for nearly 24 hours, I felt that what she was asking me to do was unlikely to end well, and I told her so.

“That’s OK,” she said. “At least I’ll know I tried.”
We in the pro-choice movement must decide how we will respond.

To fall back on the argument that we don’t have enough scientific evidence on reversal methods is a cop-out. Eventually, even if only through retrospective case studies, we will learn more about the safety and efficacy of these options. At that point, if certain protocols prove to be safe for mother and fetus, patients will be left with two morally equivalent choices: the choice to have an abortion and the choice to try to reverse it.

To keep women at the center of our movement, we must find an ethical and responsible way to care for them, to support their decisions and to stand by our cause. I believe the answer lies in reframing the movement and its values. That is, to move away from the language of “choice” and toward a language of “trust.”

The “trust women” movement would focus on something unquantifiable and inviolable within each woman: her deep, internal knowledge of her own life and body.

Putting such an intangible notion at the center of our movement will make many clinicians and activists uncomfortable. They will ask how we are to achieve trust in an environment where ideology is constantly being used to undermine medical expertise and evidence. In particular, how are we to trust women like Carmen, who change their minds overnight, putting themselves and their fetus at risk?

Certainly, the goal of ensuring that each woman’s decision is uncoerced — and final — must remain at the center of abortion care. But these decisions are complicated, especially for pregnant women, who face an onslaught of messages from all sides that they are not to be trusted with their own bodies.

When I trust the woman in front of me, I allow that many factors and opinions are influencing her. I believe that she is capable of sorting through it all and making her decision, even if it is not the decision I would make for her.

After our conversation, I concluded that Carmen had been sure of her decision to have an abortion yesterday, and she was sure of the opposite today. My job was to support her decision, safely.

After having her sign yet another consent form, I carefully removed the dilators from Carmen’s cervix, wrote a detailed letter to her regular obstetrician, and sent her home.

“Thank you, Doctor,” she said, with tears in her eyes. “Thank you for saving my baby.”
I never believed I was saving Carmen’s baby. I believe she will experience a preterm delivery of a nonviable fetus or severely disabled infant. I made it clear that this was what I expected and feared for her. But in the face of my expert advice and scary-sounding consent forms, Carmen stuck with her decision. And I trusted her.

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[Note: This article was originally published in the San Francisco Chronicle on November 9, 2017.]