



FASPE

Fellowships at
Auschwitz
for the Study of
Professional Ethics

2018 JOURNAL





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COVER PHOTO

Scenes from the 2018 FASPE Fellowship Programs. DORIAN JĘDRASIEWICZ / FASPE

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ABOUT FASPE

Fellowships at Auschwitz for the Study of Professional Ethics (FASPE) is a program that challenges young professionals to develop as ethical and responsible leaders. In a modern civil society, professionals play a critical role in shaping public discourse and in influencing actions in both the private and public sectors. FASPE impresses upon its Fellows the importance of their roles as professionals.

FASPE Fellows begin their examination of professional ethics by studying professionals in Nazi Germany, recognizing that it was their failure to act ethically and assert ethical leadership that enabled the devastating policies of National Socialism. Against this historical backdrop, Fellows then consider the ethical issues currently facing professionals in their respective fields, including how to identify, analyze, and respond to them.

Professionals designed, executed, and enabled Nazi policies. Lawyers drafted the Nuremberg Laws. Doctors conducted the first gassings of the handicapped. Business executives used slave labor and produced the tools of genocide. Journalists became propagandists. Pastors and priests promoted or condoned racist policies.

Studying these perpetrators powerfully conveys the influence that professionals wield, creates a compelling context for discussing the ethical issues that Fellows will face in their careers, and underscores the urgency for ethical leadership today. Through its use of the power of place and its focus on the professionals as perpetrators, FASPE has created a unique means for studying contemporary professional ethics—and simultaneously has contributed an important and creative approach to Holocaust education.

OUR FELLOWSHIP PROGRAMS

FASPE currently conducts five fellowship programs—in Business, Journalism, Law, Medical, and Seminary—with fellowships offered to graduate students and early-career professionals. Each FASPE Fellowship consists of a fully funded two-week study trip in Europe.

FASPE Fellowships take place in Berlin, Krakow, and Oświęcim, where Fellows visit sites of Nazi history, including the former Nazi concentration camp of Auschwitz. Daily seminars are held at sites where professionals planned and enacted Nazi policies.

Each year, FASPE accepts between 65 and 75 Fellows across the five disciplines from a diverse and competitive pool of international applicants. Each program travels with at least one other program, allowing Fellows to benefit from cross-disciplinary perspectives.

FASPE Fellowships were developed in consultation with leading practitioners, preeminent academic institutions, and noted scholars. FASPE's faculty is drawn from practicing professionals, ethicists and historians.

OUR FELLOWS

The FASPE experience extends well beyond the two-week fellowship. Fellows build strong bonds during the program that deepen through FASPE's annual reunions, regular regional gatherings, professional networks, and other resources. Fellows also participate in FASPE's programming and governance.

Our Fellows greatly value the FASPE community and draw regularly on their FASPE experiences. FASPE Fellows are better prepared to confront ethical issues at work and beyond as a result of having participated in a fellowship program and through their ongoing contact with FASPE.

FASPE Fellows go on to pursue distinguished careers, enriching FASPE with their experiences and expertise and, most importantly, applying principles of ethical leadership to their work and to their engagement with their communities. Through our Fellows and their influence, FASPE seeks to have a lasting positive impact on contemporary civil society.

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Introduction

BY DAVID GOLDMAN

One might think that history does not change. That history is engrained and permanent without acknowledging that we discover new facts, that we have new insights. One might think that what is and is not ethical behavior is black and white. That ethical behavior is objective and apparent. One might think that leadership is obvious. That the leaders know who they are and they lead.

FASPE takes us back to the drawing board. And, each summer, we perform these redrawing exercises with our Fellowship Programs.

In many respects, 2018 was a clarifying year for FASPE. The imperative to understand history, ethics, and leadership became even clearer—and certainly not because life became simpler. The realities of life—public, personal, vocational, political, financial—grow geometrically more difficult each year. Still, 2018 seemed to be a winner of a year. Words on a page cannot give justice to our anxiety around it all, from artificial intelligence to the dangerous and misused elements of nationalism to global attacks on almost every norm that we hold dear. Yikes.

The FASPE mission in response?

- Study the perpetrators. By learning more about why they acted as they did, we learn more about ourselves and our own predilections. FASPE is placing added emphasis on seeking to understand the individual perpetrators in Nazi Germany. We are increasing our historic research on individual behavior as a way to better train the next generation of leaders.
- Identify ethical issues and ask the right questions. It is more important to search for questions than to pretend that there are obvious answers. FASPE challenges our Fellows to ask the questions; and not to be so arrogant as to think that they know the answers. Where do the risks lie in artificial intelligence? What is the source of inaccurate reporting? What is the role of clergy with rapidly diminishing church attendance? How should law and business respond to the unlimited availability of personal data? And more. Asking is more important than pretending to have the answer.

- **Lead.** We often ask ourselves why the Fellows should go to Auschwitz. The response comes from our Fellows: to empower them to act and to lead. We have come to realize just how important ethical leadership is. Yes, we leave Auschwitz with often inconsolable sadness. But, we also leave with an absolute recognition that we can do better. We hope that the FASPE Fellows return to their schools and law firms, churches, beats, hospitals, corner offices, and elsewhere, knowing that they can do better in their professions, with their colleagues (bosses, peers, and juniors), and in their larger communities. Not to prevent another genocide, but in their day to day activities and interactions. They can ask the right questions and seek to act ethically.

FASPE is entering its tenth year in 2019. We are gratified and proud of what we have accomplished. The best evidence of our efforts, though, resides in the work of our Fellows. This Journal includes the written work of some of our 2018 Fellows and of previous Fellows. We hope that these pieces give you a glimpse into our Fellows and their questions around history, ethics, and leadership. We think that you will find the essays interesting.

As always, we are grateful for the support of our many donors. Our fellowship programs are truly unique (a much overused word). We combine the study of the perpetrators with a cross-disciplinary approach to professional ethics and ethical leadership. Thank you for your interest and your assistance.

David Goldman is Chair of FASPE and its founder.

Business Papers

Introduction

BY LEIGH HAFREY

The 2018 FASPE Business program group consisted of 11 Fellows from various American MBA programs and two faculty members: Michael Eichenwald, Advisory Leader with LRN, a consulting firm in New York, and me. The syllabus for the Business program drew on both the historical materials provided by Thorsten Wagner (FASPE's Academic Director) and Thorin Tritter (FASPE's Executive Director at the time) and our areas of interest and expertise: in my case, professional ethics and leadership, with attention to shareholder/stakeholder value, corporate social responsibility, and corporate personhood; in Eichenwald's case, governance, culture, and leadership in organizations like those with which he consults for LRN.

Early assignments included reading Milton Friedman's essay "The Social Responsibility of Business Is to Increase Its Profits" (1970) juxtaposed with an article by business law scholar Lynn Stout, author of *The Shareholder Value Myth* (2012). Fellows also engaged in a small-group exercise taken from Mary Gentile's enormously popular business ethics series, *Giving Voice to Values*, and worked through additional sessions on moral imagination, the Rwandan genocide of 1994, Yahoo operations in China, and compassion in business. As the program's seminars moved on to focus on more recent events in the private sector, the group considered how to build workplaces that better address the need for diversity and equity; discussed Blackrock CEO Larry Fink's 2018 "Letter to CEOs: A Sense of Purpose"; explored the ethical implications of the growing institutional collection and use of digital data; and ended with reflections by the Fellows on their experiences on the road with FASPE.

Following completion of the program, Eichenwald and I set up a blog on which Fellows were asked to post entries over the summer in response to four prompts:

1. What are your deepest and most important values? What challenges do you anticipate in embodying them in your work life? What steps can you take today to help you fully meet these challenges?

2. What experience or discussion or reading from our time together continues to challenge you? What difficulty does it present? What kinds of solutions does it call for?
3. Have you faced an ethical dilemma since returning from our trip that you feel comfortable sharing with the group—in business or personal life? If not, is there one from your prior experience that you can share? What happened? How did you deal with it? Did the experiences or learning with FASPE change how you think about your own behaviors, the behaviors of others, or the situation more broadly?
4. What is the purpose of business and what is one thing business (in general) or a business (one company) could do to better achieve it?

Business Fellows were also asked to use the blog to support or challenge one another and, in so doing, continue the collective learning that they began together in Europe. By the end of the summer, participants had amassed a significant collection of sometimes humorous, sometimes sobering, always thoughtful views. Here, we present five of their musings.

***Leigh Hafrey** is a senior lecturer in behavioral and policy sciences at the MIT Sloan School of Management. In 2018, he co-led the FASPE Business Fellowship Program with **Michael Eichenwald**, Advisory Leader with LRN.*

Values

Empathy as a Business Tool

BY MARC TOLEDO

At the core of my system of beliefs today is the aspiration to “understand others’ feelings” and “treat others as I wish to be treated myself.” These outweigh any other values I could compare them to.

I envision empathy as the ultimate instrument to frame one’s thinking on utilitarianism and as a necessary anchor for one’s moral compass in order to avoid falling into the ethical abyss that we explored during FASPE in visiting Auschwitz and other sites related to the Holocaust and Nazi Germany.

My main issue using this virtue effectively is limitation of scope. While I think many of our business decisions carry with them an ethical component, at times the lack of foresight can diminish my own certainty about them. How can I know if my current employer makes decisions ethically? Even when I avoid “ethically unclear” projects, does the fact that my employer is involved in such projects make working for this employer unethical? And *how* unethical at that? Should I become the agent of change within a non-ethical organization, or should I leave the organization and risk the possibility of being less effective fighting those injustices from the outside? How much and what exactly am I willing to sacrifice for doing so? How would I change my actions if I were directly affected by some sort of unethically collateral damage? How bad do things need to be to start asking these questions?

The way I try to broaden my perspective in order to understand these questions is through open communication and by developing a culture of honesty and open-mindedness.

I try my best to find the right stakeholders to ask the most uncomfortable questions I might have about a current or future employer, and I make sure that the company’s culture accepts those questions and accountability checks as openly as possible. I value the chances I have to talk with people who have had to make similar decisions in the past, as well as to individuals directly affected by a situation, and to see what these various individuals think could be done differently to make things better.

I also try to make sure that I do not think in terms of sunk cost and that I am ready to act—whether that means talking to a superior, seeking allies, reporting unethical behavior, or ultimately leaving a firm. Putting myself in someone else’s shoes and constantly evaluating how my actions are affecting others are tools that define my plan of choices in any given scenario.

Ultimately, I try not to become overconfident in my own progress in making ethical decisions by feeding my vanity or any feelings of infallibility. One of the most valuable takeaways from my experience with FASPE is that all of us, at any point and regardless of our past record, can become collaborators in malpractice or unethical scenarios. As often as possible, I question my own values, not taking wisdom for granted and dismissing the perception that my sense of empathy might be failsafe.

***Marc Toledo** is a senior consultant, implementing cybersecurity, artificial intelligence, and digital transformation strategies for large multinationals. He received an MBA from the Fuqua School of Business at Duke University in 2018.*

Challenges Weaning Myself Off Social Media

BY JENNIFER GILBERT

The readings from the FASPE Business program could easily fill a college course, and many of them resonated with me. Like other Fellows, I've struggled quite a bit with how much acting as a perpetrator is normalized in the world around me. One of the readings for the program which most challenged me was a short story by Ursula K. Le Guin, called "The Ones Who Walk Away from Omelas," which portrays an idyllic city where all are happy, but one: a mentally disabled child who is kept locked in a basement broom closet. The idea behind the story is that we have built a society where the majority may benefit from the suffering of a select few. However, the FASPE readings that may have had the most direct impact on me were from one of our final discussions, which focused on how social media can both simplify and radicalize our viewpoints by recommending progressively more extreme pieces to read based on our browsing history.

When we discussed *The Road to Unfreedom: Russia, Europe, America*—the most recent book by Timothy Snyder, in which the Holocaust historian trains his eye on the current rise of nationalism and authoritarianism—I was struck by the idea that boundless capitalism could breed fascism by promoting extremism. I have been very concerned with the way social media has influenced debate and discussion among my friends, family, and fellow students at my MBA program. Major misunderstandings are spread by simplified sources and discussion and by recommended links that nudge one further into the depths of an echo chamber. I feel this is especially dire given the political state of the U.S. today.

A few weeks after FASPE, I noticed how much social media had this effect on me, and I decided to delete all of my social media applications from my phone so that I would break the chain of idly allowing Facebook recommendations to influence me and so I would also only have vetted news sources available from which to easily get my news. This was still not as big a step as directly closing all of my accounts—and I have since added back one or two social media apps, albeit with more restricted access. Still, deleting these apps from my phone at least severely curtailed the amount of data and time I give to companies that I do not trust to protect either, and which would much

rather use my data and time in a way that is profitable for them rather than in ways that would protect my best interests.

I would highly recommend trying this initial step to anyone who is not ready to completely pull the plug and delete their social media accounts permanently from all their devices. Realizing how much idle time I spent on these apps was shocking to me and has given me a lot more space to think critically on my own about the information I receive and how it influences me.

Jennifer Gilbert is Senior Associate in Management Consulting at PwC. She received an MBA from the Yale School of Management in 2018.

Ethical Dilemma

The Search Continues

BY HO YEE CYNTHIA LAM

“Made it!”

I sighed with relief as I slid into the cool, air-conditioned seat. With just one minute to spare, I had made it onto the 5:15 pm New Jersey Transit train going from Trenton to New York Penn Station. Leaning back, I closed my eyes and prepared myself for a nice, peaceful nap. *Ah, time to sleep...*

Just as I was about to doze off, a chorus of tense voices interrupted my slumber. From the corner of my eye, I could see the train conductor standing before an older man with a small dog in his lap, sitting several rows away from me.

“I’m sorry, sir, but you have to leave. You can’t bring a service animal on board without your service card. That’s the rule.”

“No, I’m not going anywhere. I told you already—I dropped my card on the tracks. I paid my way, and I’m staying on the train.”

“Sir, you cannot be on here. It’s the rules. Please don’t make me escort you off. This is your last chance.”

“You can’t make me do anything. I’m not leaving.”

“Well, then I’m going to get the NJ Transit police.”

As the conductor brushed past me on his way to get back-up, I could feel the tension in the air. It was 5:38 pm—way past the 5:15 pm departure time—and the train had not moved. People around me were getting restless. They were whispering, pointing, and openly gawking at the man. He sat silently in his seat, holding onto his dog firmly.

One young woman stood up and kindly offered to help him look for his service card: “Why don’t you tell me where you dropped it? We can go find it together.”

He shook his head and crossed his arms. “I told you—I’m not going anywhere. I’m staying on the train. I need to get home.”

Another woman jumped in. “We all want to get home too! You’re holding us up.”

Others around her nodded in agreement.

“Come on, man, just take the next one. You’re making this hard for everyone,” said someone else.

The man sat stoically in his seat, staring straight ahead. I purposely turned away, because I did not want to add to the scene. As a bystander, I felt out of place, and I did not know what I could or should have done. So I sat quietly and listened.

Minutes later, a squad of NJ Transit police officers entered the train. Multiple attempts at reconciliation were made, but the man refused to move. Use of mace was mentioned. Eventually, our entire car was evacuated, so he could be escorted off. The train finally departed the station at 6:26 pm.

As we pulled away, I felt incredibly conflicted. There were clearly multiple factors at play, but at its core, this conflict stemmed from the need to follow a set of rules. Rules are put in place for a reason, and I understood why the NJ Transit system required travelers to carry proper documentation for service animals. But at the same time, I could not help but wonder whether following a rule was worth all this trouble. The conductor could have easily made an exception, before the situation escalated and erupted into a huge scene. How much would the system have really suffered?

In the past, I had rarely questioned authority. FASPE has taught me to challenge myself and challenge others in everyday situations. I still do not know the answer. But I do know that I am constantly, relentlessly seeking it.

***Ho Yee Cynthia Lam** is a Law Clerk at Skadden, Arps, Slate, Meagher & Flom LLP. She received both an MBA from The Wharton School at the University of Pennsylvania and a JD from the University of Pennsylvania School of Law in 2018.*

Purpose of Business Stakeholders

BY PAUL SCHOLTEN

To my memory, one of the more vigorous debates the FASPE Business Fellows had during our two weeks in Europe, and rightfully so, was also one of the first: Should the objective of a business be to maximize shareholder value?

The benefits of this approach are clear. It's clean, objective, and blissfully free of the myriad conflicts, anglings and spin that can confuse the issue. It allows us to measure the success of management against the company's history and its competitors. Why wouldn't this be the purpose of business?

Unfortunately, in business, as in life, things are rarely so simple. Which is why I don't think we can define the purpose of business in this narrow, Friedmanian way. (The economist Milton Friedman is famous, among other things, for having espoused the idea that a company's sole responsibility is to maximize profits for its shareholders.)

I think a better way forward is to define the purpose of business as serving our stakeholders.

This will inevitably be messier and more difficult to disseminate via a spreadsheet or a graph in an earnings report, but it does a better job of encompassing the multiple constituencies (and their differing priorities) that a business must serve. Shareholders are certainly stakeholders, and perhaps they should be given the most weight in the calculus of how a business serves its stakeholders, but they are far from the only ones. Employees, customers, community members, suppliers, etc. must all be well-served by a business, and each group doesn't necessarily place share price above all else.

It seems to me that, in practice, many companies already attempt to serve their various stakeholders to a certain degree, but under the guise of it being part of shareholder maximization, as in: "We must invest in our communities to attract the best talent, which will lead to better management of our business, which in turn will lead to higher shareholder value." I think it is time businesses become more explicit

about all of the stakeholders they serve and the divergent priorities therein. Instead of seeing investment in communities as a roundabout way of achieving a higher stock price, companies should invest in communities because part of their purpose is to serve the communities in which they operate.

Change is clearly happening. The increasing numbers of companies seeking a B Corp certification—which is based on how well a company is meeting both social responsibility and environmental stewardship standards to balance profit and purpose—and the types of companies that are certifying as such (Danone North America, maker of Dannon yogurt and many other retail food brands, recently became the largest B Corp company in the world with annual revenues of \$6 billion) is a testament to the changing idea of what business should be. There are prime examples in the business world that demonstrate handsome profits and social responsibility are not mutually exclusive. The clothing and outdoor gear company Patagonia and the ice cream manufacturer Ben & Jerry's provide two such examples.

The question remains, will the broader market see value in these pursuits or penalize companies who don't slavishly follow a shareholder maximization strategy? Without widespread acceptance from the business/investment world, it seems that these sorts of changes may never grow beyond the margin.

***Paul Scholten** is Assistant Brand Manager at RB. He received an MBA from Indiana University Kelley School of Business in 2018.*

Purpose of Business Allocation of Resources

BY KEN HAMPSHIRE

As human beings, we have a seemingly innate compulsion to categorize things neatly into dualisms. The thread of good versus evil is woven into the fabric of countless societal narratives since time immemorial. As I reflect on our discussions at FASPE, I realize that we have cast the purpose of business into the same framework. The purpose of business is thus presented as either to maximize shareholder value, or to maximize corporate social responsibility to the point of extending into influencing policy. The exact antagonist to the shareholder value theory is often nebulous, but can be cast as “anti-profit maximization,” for lack of a better phrase. But the characterization of both sides is incorrect.

The purpose of business is not to exclusively maximize shareholder value, nor is it only to serve as a pseudo-governmental policymaker bent upon forming the world according to whatever image it deems currently fashionable. As many have correctly pointed out, a slavish devotion to the former can oftentimes result in ethical breakdowns justified by a narrowly defined and conveniently quantifiable objective. But the latter has its own problems, chief among them being that as corporations grow in influence, they have the potential to act as arbiters of policy, at least in shaping public opinion. One need look no further than recent headlines about Facebook’s refusal to censor Holocaust deniers to imagine how this might go awry. A company’s influence on social policy can be a blessing or a curse, depending upon whether or not you agree with that company’s stance on the particular issue. Yet, in no instance is the company beholden to the wishes of the majority, as would be a democratically elected official or governing body. It might be said that the people can “vote with their money,” but who could afford to live offline if all smartphone producers claimed that human rights violations in their supply chains were not their problem?

The purpose of any business is simple: the allocation of resources. Why would anyone endeavor to practice business for any other reason? A company ultimately takes resources from a particular environment to transform them into other resources with increased value. For instance, a person might allocate his or her time to receive

economic benefit so that he or she can then use said benefit to gain a different resource. Corporations facilitate this exchange. Even corporate social responsibility falls under this definition. In exerting influence to change a particular policy or public opinion, corporations are in a sense converting economic benefit into an ostensible societal benefit.

Both views (shareholder value and corporate social responsibility) are thus represented by this definition. Viewing business as a resource allocator necessarily demands consideration of profit maximization in order to have enough influence to affect societal change. Of course, either taken to its extreme can have negative consequences. On the one hand, we might risk enabling human rights abuses to produce cheaply, while on the other hand, we could risk obsolescence by misappropriating resources for quixotic campaigns that serve policy ends.

To better realize its main purpose as being an allocator of resources, business in general would do well to take a more nuanced approach. In short, business should recognize that its function is to allocate resources, but in a way that does not cause or enable damage to people or the planet. Tradeoffs will have to be made, of course, which is why business is a profession requiring leadership. If business can begin to expand its scope of stakeholders beyond the bottom line while also realizing that the bottom line enables its survival, we can all begin to view business as it should be viewed: as a tool to improve the society and world in which it operates.

Ken Hampshire is a student at the MIT Sloan School of Management and the MIT School of Engineering. He will graduate with MBA and MS degrees in 2019.

Journalism Papers

Introduction

BY ANDIE TUCHER AND MARGUERITE HOLLOWAY

Journalism can be lonely work. We spend time talking to people, of course; we interview and question and sometimes challenge them. But then comes the hardest part: we sit down in front of that blank computer screen and wrestle the contents of our notebooks or photo cards or phones into a story that—we hope—is thorough, informative, thoughtful, and fair. And these days many of us do it without much, if any, help from an editor.

The FASPE Journalism program enriched all of us in many ways, but high up among the benefits was that we got to talk to one another. Our group—two co-leaders and 13 Fellows, including both current graduate students and early-career working journalists—spent our two weeks in near-constant conversation, sharing thoughts and worries and advice and action plans with people who were grappling with the same questions. Many of our discussions concerned what we were seeing and experiencing and learning on the trip itself. What would we have done in that situation? How would we have responded to censorship or protected sources who were terrified for their lives or persuaded readers to believe the unbelievable? But it was impossible *not* to extend the conversation to the work we're all doing now and the eternal concerns journalists face every day: fairness and how to achieve it, objectivity and whether it's possible, privacy and where the lines are.

We wrote a lot, too, of course. Every day one or two Fellows posted on our website brief reflections that explored the events and experiences—and, yes, the discussions—of the day. And upon our return home, each Fellow reported and wrote a feature story taking a broader view on an issue of journalistic ethics, again building on what we'd wrangled with on the trip.

We've included three of those feature stories here.

Tape recorders are standard tools in the journalist's arsenal, but as Erin McKinstry reports, the guidelines for how to use them and when to tell a subject you're recording the interview aren't standard at all. There are legal guidelines, of course, but that's

only the beginning of the debate. Journalists also need to balance ethical concerns about transparency and trust with the practical imperatives of nailing the story: Will your subjects clam up if they know the tape is rolling? Will they tailor their responses differently?

Jordyn Holman's piece looks at how a news organization should cover the sensitive subject of suicide. Most won't cover suicides by private citizens, but Holman explores how that question took on a particular urgency for one reporter after he himself saw a woman end her life by jumping off a building. He ended up writing a story that addressed the woman's death in the larger context of the growing epidemic of suicides in the U.S. The goal, he said, was to "help tell a larger story of what's happening in a community, city, or society."

Belle Cushing explores a dilemma she herself faced while covering the complicated and consequential immigration beat. A cardinal rule of journalism holds that the reporter must remain neutral and not intervene in the story, but what happens when a mother is searching for a daughter who was separated from her at the U.S.-Mexico border—and the reporter knows where to find the girl? What's more important: following a long-held ethical standard or sharing information with a frantic parent?

Grey zones, all of them, full of hard choices and difficult dilemmas. But as our FASPE journey made clear, we're all in the grey zones together.

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The Ethics of Pressing the Record Button

BY ERIN MCKINSTRY

One evening during a journalism conference, I was discussing interviewing etiquette with another reporter. I confessed that I'd forgotten to disclose that I was recording a phone conversation on occasion, but that working in radio had broken me of the habit. I was surprised when the journalist said he rarely tells sources he is recording phone calls. Why did they need to know? He only records to back up his notes.

This reporter works in print and almost always interviews sources who regularly deal with the press. I, on the other hand, tend to talk to people who aren't used to media contact, so I was intrigued. The reporter said sometimes he records with his phone in plain view without asking. If he stopped to ask, he said, the source might clam up. But, if they asked him to stop recording, he would. He does it to cover his bases.

Obviously, there are legal questions around recording without explicit permission if the reporter is dealing with a two-party consent state. But what intrigued me more were the ethical questions. In my training, I'd always been taught that asking permission to record was vital, lest the reporter appear deceitful or untrustworthy. The only grounds on which one could forgo permission were those set out by the Society of Professional Journalists for undercover reporting: the story must have a compelling public interest and be impossible to get any other way. And then, it still always required a conversation with your editor.

But what happens when the power dynamic is shifted in the source's favor, as often is the case in political reporting? Or when the person is a public figure? Is verbally asking permission required or is laying your recorder on the table, holding a microphone, or wearing press credentials enough?

Lynn Walsh works as a project manager for TrustingNews.org and currently sits on SPJ's ethics board. In the past, she's worked as a television reporter and has worked on some undercover assignments. "Undercover, there are times we don't tell people. And we have those conversations from an ethical standpoint, serious conversations.

Do we need to do this? Do we need to go in and conceal our identity?” Walsh said. “And how can you minimize the harm to those people that may be in that area?”

Otherwise, she said, you should always err on the side of transparency and tell sources you’re recording and what the purpose of the recording is before you start. But, Walsh said, particularly with public officials and those who work with the media often, you don’t always have to verbally ask permission. It can work just like note-taking. “If you are very visibly pulling your phone out and pressing a red button or pulling out a tape recorder, it’s easy to see visibly that you’re doing it,” she said. “That’s enough.”

In what’s now been criticized as a political move, Jacqui Helbert, a former reporter for the Chattanooga public radio station WUTC, was fired from her job in 2017 because she was accused by a Tennessee lawmaker of not identifying herself as a reporter and not disclosing that she was recording. Helbert followed a group of high school students to the capital as they went to talk to members of the legislature about a transgender bathroom bill. She wore WUTC press credentials and headphones and carried a large microphone. When an inflammatory quote from a lawmaker appeared on the evening news, he complained to the station, and she was fired for an ethics violation.

Helbert’s firing has been widely criticized for a variety of reasons, but was she in the wrong ethically? Should she have identified herself? Walsh says she should have, particularly before using any of the audio in a radio broadcast.

“If you have a camera, if you have a big microphone, if you visibly are looking like you’re carrying recording equipment and you will be recording ... you don’t have to necessarily tell people you’re recording, it’s understood. Those are kind of legal arguments,” she said. “But ethically, I think you still should tell them that you’re recording and show that you’re not trying to be sneaky.”

Former *Denver Post* reporter Fred Brown agrees that transparency is important, but thinks there are situations when a journalist needn’t disclose that they’re recording. “If you’re doing an investigative-type story and dealing with a source you know to be hostile or uncooperative, then it’s *not* a good idea to disclose that you’re recording,” he said. “But you must have [a] solid reason to believe that the interviewee is going to be evasive or dishonest.”

Another situation is in a public setting. “If a public figure is speaking to a group—even if it’s officially ‘closed to the press’ and you’ve somehow managed to get in—I’d

say you're on solid ground if you're recording the speech," he said. "The closed nature of the gathering makes it inherently an uncooperative or hostile source/setting."

What Happens When They Clam Up?

While working on a story about gun violence, I was interviewing two sources at once. Before starting the interview, I described what the story was about, that it was for print, and I asked permission to record using my cell phone for note-taking purposes. Then, I set the phone in plain view on the table. In the middle of the interview, a third source that knew who I was and why I was there came into the interview late. He introduced himself briefly and the interview continued. The other two sources were in the middle of sharing a story, and I didn't want to disrupt the flow. But then, one of the interviewees stopped, turned to the man who'd just entered the room and said, "Just so you know, she's recording." Suddenly, the atmosphere shifted.

I was embarrassed and felt like I hadn't done my due diligence. And the sources were stiffer and more formal for a while after the interruption. But, at the time, I'd thought, "It's only for note-taking purposes. He can see me taking notes. Why is recording any different? If anything, it just ensures accuracy."

As a radio reporter, I now know even more intimately how a microphone can make a source clam up. I've talked with a source freely on the phone for 30 minutes to an hour only to have them give me short, clipped quotes once I start recording. Often, they'll restart sentences and breathe a sigh of relief when the recording is finished. And I'm far from an intimidating person.

That's one of the reasons why Paul Fletcher, a veteran journalist and an adjunct professor at Virginia Commonwealth University, stopped recording his interviews a long time ago.

"I agree that recording equipment can cause a source to become clinched and can make the interview less of a conversation," he wrote in an email. In addition, he said, his notes weren't as good when he used a recorder. But Fletcher added, if he *were* still recording he would ask for permission; it's important to always be up-front.

But What About the Little Stuff?

A common practice for radio reporters is to always have your recorder rolling. That way, you can catch the sound of a doorbell ringing or the "Nice to meet you!" to help

set up a scene. In a phone interview, you might get the phone ringing and the initial “hello” that you could use for part of the story later.

I’ve always wondered: Is that ethical? Is it okay to ask permission to use the audio after the fact? If the interview has been set up ahead of time and they know it’s for radio, does that make it okay?

Walsh said there are often workarounds. “You’ve had conversations before. You can ask ahead of time,” she said.

Both *National Public Radio* and *The New York Times* forbid recording without the consent of the interviewee, except in very rare circumstances that warrant undercover reporting.

“In the case of recording, if ... you’re using it to play it back to get everything correct, tell them. If it’s an interview for broadcast, tell them,” Alex Veeneman, SPJ Ethics Committee Member, said. “Have it all arranged in advance. Again, honesty is the best policy—and it’s based on trust. The more upfront you are, the better.”

And when a reporter is recording someone’s refusal to talk to them? That person obviously didn’t give consent. Even when you try to draw a line in the sand, there are always grey areas.

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Newsrooms Rethink a Topic They've Long Been Told to Avoid

BY JORDYN HOLMAN

For nearly three decades, journalists have covered the suicides of famous people using guidelines formulated in the 1980s. Now some of them are grappling with how to apply those guidelines when deciding whether to write about private citizens who take their own lives.

Chicago Sun-Times reporter Frank Main is one of those journalists. He knew about the industry's long-standing directive, which, for the most part, urged outlets to shy away from reporting on non-public figures who died by suicide. Yet on the morning of May 6, 2016, Main looked out the balcony window of his apartment and watched a woman jump off the roof of a building. He immediately felt involved.

Initially, Main started digging into Kendra Smith's story because people in his apartment complex wanted to know why she chose to die in a public setting. As a 20-year-veteran investigative reporter, Main had the access and skills to get some of those answers. He requested Smith's incident report from the police department. "I really didn't think this was a story at the time," Main said. "I mean these things happen and we don't write about them normally."

He eventually approached his editor with what he had learned about Smith. Main asked for the green light to officially report, despite the newsroom precedent of rarely covering "jumpers." What resulted was a more than 5,100-word story. Since then, Main said he has been reflecting on how his newsroom continues to think about and approach this sensitive subject.

It's becoming an increasingly urgent topic. In the United States, suicide rates rose in nearly all states between 1999 and 2016. Suicide is now the tenth leading cause of death: each year, almost 45,000 Americans die in that manner, according to data from the Centers for Disease Control and Prevention (CDC). The recent celebrity deaths of fashion icon Kate Spade and TV chef Anthony Bourdain have elevated suicide to a national conversation. And Netflix's show "13 Reasons Why" has brought the discussion into thousands of households for two seasons and was renewed for a third.

Yet many newsrooms have not formalized the rules about reporting on suicide. For the *Chicago Sun-Times*, “we work off the seat of our pants,” Main said. The approach seems common. In a 2017 study, researchers found that two-thirds of reporters said that while their news organizations had policies on when and how to cover suicides, many of those journalists said the guidelines were informal. If a news organization did decide to cover a suicide, the study noted, the rationale was that it had an element of “publicness.”

In 2015, the *AP Stylebook*—which most newsrooms follow—updated its guidelines for writing stories about suicides. It emphasized that articles shouldn’t go into detail about the methods used. In addition, reporters should avoid using the term “committed suicide,” except when in direct quotations from authorities, because it suggests that it was an illegal act. Better phrases are “killed himself,” “took her own life,” or “died by suicide.” Many of these changes were recommended by public health officials, who regularly point to the danger of “suicide contagion”—in which media reports of suicide can lead to a spike in suicidal behaviors generally.

Media professionals and public health officials have worked together in this way on this issue before—giving rise to the first guidelines on reporting on suicides. In 1989, during a national workshop in Washington D.C., high-level media professionals and epidemiologists sketched out best practices to reduce suicide contagion, according to Jennifer Michael Hecht, a historian and author of *Stay: A History of Suicide and the Philosophies Against It*. Recommendations included encouraging public officials to comment when a journalist called, keeping reports concise and factual, and avoiding repetitive coverage. The CDC also endorsed these recommendations. With the advent of social media, avoiding copy-cat stories has become a bigger challenge, Hecht said.

Writing these stories might require journalists to deviate from their normal routine or beat. Main usually reports on crime and corruption in Chicago, but he said he felt his article wasn’t “some average police story.” So he included his first-person account of witnessing Smith jump. He reached out to Smith’s family members and friends. He also spoke to a University of Chicago researcher to better understand the impact of public suicides and the legitimacy of the concept of “suicide contagion.” *Sun-Times* editors also added a note explaining why the paper bucked industry tradition and published the story.

In the end, Main’s story didn’t provide one explanation for why Smith decided to take her life. That wasn’t his main objective. “The point of the story wasn’t to do harm,” he said. Madelyn Gould, a professor of epidemiology in psychiatry at the Columbia University Medical Center, said an approach like Main’s is the right one to take. Main

also inserted contact information for the National Suicide Prevention Lifeline at the end of the piece—a move that has become standard since about 2005, Gould said.

Main doesn't think his story will lead the *Chicago Sun-Times* to create a new standard for reporting on private citizens who die by suicide. But he does think similar stories, when written, can help tell a larger story of what's happening in a community, city, or society. "This is a pretty unusual kind of a story. It may happen once or twice in somebody's career," he said. "We're not going to create a policy where we're going to cover every one of these, but maybe this one story will explain something about all these public suicides that go on in Chicago."

***Jordyn Holman** is a business reporter for Bloomberg News in New York City. She received a BA in journalism from the USC Annenberg School of Communication and Journalism in 2016.*

The Journalist and the Immigrant Reporting on Family Separation

BY BELLE CUSHING

The first thing Consuela said to me when I reached her on the phone was, “Do you know where she is?”

I had gotten Consuela’s name and number off a spreadsheet listing unaccompanied minors who were in the custody of the United States Department of Health and Human Services’ Office of Refugee Resettlement (ORR) and who were being held at a contracted shelter near Tucson, Arizona. Consuela was listed as the sponsor for a 16-year-old girl who had been separated from her mother at the U.S.–Mexico border near McAllen, Texas. The list appeared in a cache of emails released by a former employee of the shelter and shared with the news organization where I work.

I did know where the girl in custody was—at least, I knew that as of June 9, the date of the last email, she was still in a shelter in Arizona. And I told Consuela what I knew.

In journalism, information generally flows one way. A reporter wants to know something; a source provides this information. The information then determined to be relevant and newsworthy is disseminated as part of the resulting published piece, not to the individual source or sources, but to the public at large. As I made that phone call to Consuela, I knew more than she did.

On April 6, 2018, then U.S. Attorney General Jeff Sessions publicly announced a zero-tolerance policy in prosecuting border crossers for the misdemeanor crime of illegal entry. The intended consequence of this enforcement decision was that children who had crossed the border with one or both parents would be separated from them, re-designated as unaccompanied minors, and placed in a shelter like the one in Tucson. It wasn’t until June 15, 2018, that the U.S. Department of Homeland Security (DHS) confirmed that it had separated nearly 2,000 children as of the end of May. Five days later, an executive order announced the end of the family separation policy. A DHS official told reporters that they would not, however, reunite parents and children who had already been separated. Hours later, another official said the opposite. As of July

9, 2018, a day before a court-ordered deadline to reunite the 101 children under five years of age still in government custody, there was no sense of whether all separated children had been located or whether plans were in place to reunite families.

The implementation of “zero tolerance” was marked by a stark lack of information. Day after day, news reports chronicled confusion about the process. Federal judge Dana Sabraw, in his ruling requiring the government to reunite separated parents and children, wrote, “the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children.”

But I, sitting at my desk, was looking at a cache of emails released by the former shelter employee. I knew there was a system, albeit a rudimentary one. Each child had an “Alien Registration Number” or “A-Number” assigned to him or her by Immigration and Customs Enforcement (ICE) or by Customs and Border Protection (CBP) when he or she was apprehended at the border. Parents were also listed with a distinct A-Number, which often only differed by one digit from their child’s. The emails revealed evidence of at least some internal databases and tracking systems. Why was the government withholding such information from the press? Why were lawyers who called into the hotline being stonewalled? This was a time when journalists needed to step in, but was it enough to publish findings? If we knew the A-Numbers for 50 separated children and the names of their parents, should we intervene on an individual basis?

Around the time I was calling Consuela, another news producer in my organization made a similar call to a woman living in Alabama. The woman, named Ledvi, was waiting for her seven-year-old nephew who had crossed the border with his father, her brother. She did not know where her nephew was. She had received one call from her brother while he was in a detention center, but the other times he had tried to reach her, the call dropped, or perhaps he didn’t have enough money on his card to complete the call. The producer had found the family through the same cache of emails I had used; she knew in which ORR-contracted shelter the nephew was.

The producer didn’t tell Ledvi where her nephew was. Though she felt uneasy about this decision, she held onto the importance of not intervening: as a journalist she was not to change the situation. Because the father had been apprehended under the “zero tolerance” policy, he was charged with the crime of illegal border crossing and had been assigned a public defender in his criminal case. This producer could call that lawyer, who was continuing to represent the father in his immigration proceedings. She could call family members in Alabama and Guatemala, who were also in touch

with the lawyer. But the information could not flow to Ledvi directly through the journalist herself.

This rule, though, is based on a miscalculation of neutrality. The presence of media is inherently non-neutral. When the producer called up the lawyer to inquire about the father's whereabouts, she was already intervening. This overworked lawyer, who did not practice immigration law and who had merely been assigned to represent the father in a non-immigration-related criminal proceeding, now appeared committed to tracking down this man with whom he had spent five minutes in a crowded El Paso courtroom. The lawyer had no obligation to continue to have contact with the father, and it's not clear that he would have put in the time and effort to do so without a producer and a camera following him around as he drove from the detention center to a county jail, looking for the man who had once been his client.

If one starts from a position of non-neutrality, a journalist's calculation looks different. If a journalist's engagement with a source is in and of itself already viewed as an intervention, there is no detached observer position from which to deviate. The journalist is already involved, so why shouldn't she provide more information if it could help? In this particular situation, the information at stake is knowledge that *should* have been available. This is a case of government accountability.

A reporter is just another actor with whom an immigrant may interact once he or she crosses the border: lawyer, ICE agent, social worker, advocate. An immigrant can request help from some of these actors. Others are not to be trusted. A journalist falls somewhere in between.

One immigration reporter told me that she struggles frequently with the level of involvement with her sources. While reporting on women held in family detention, she was often asked for legal advice or to contact a family member on the outside. Her initial instinct to maintain a strict distance soon gave way. "I decided to screw whatever ethical concerns if I can get someone to safety," this reporter told me. For her, the question became not whether to intervene, but how to disclose this personal involvement in her reporting. "With immigration journalism, there's something that is exploitative about it," she said. This reporter came to view it as an obligation to the source to provide what information she could, but also as an obligation to the reader to disclose any involvement she had with the source.

Providing information occupies a grey zone of intervention. It is not the same as providing money or food or direct legal advice. But information is also the currency of journalists—this is our material and our power. As I talked on the phone with

immigration lawyers, advocates, press officers, and implicated families, day after day I saw a situation in which each one of us was acting on incomplete information and was just trying to figure out what was going on. When withholding information in the name of the neutrality of journalism risks endangering a source, the choice of action seems clear. But this situation did not need to get to this point. The government has an obligation, moral or court-ordered, to provide information on its activities. This underlying obligation seems even more urgent in the case of a father who doesn't know where his son is. If DHS fails to provide such information, journalists can draw attention to this lack. Many would also argue that in such instances, if a journalist has the information, she can step in and provide some of that information herself.

The video producer continued to follow Ledvi and her brother and nephew in their efforts to be reunited. The production team recorded phone calls between the lawyer and the ORR hotline, and calls with social workers, case workers, and other lawyers, as the brother tried to locate Ledvi's nephew. It took two weeks before the lawyer confirmed the seven-year-old boy's location. He was in the same ORR-contracted shelter noted in the original tip.

***Belle Cushing** is an Associate Producer with VICE News Tonight on HBO. She received a BA in comparative literature from Brown University in 2013.*

Law Papers

Introduction

BY SUSAN CARLE

Last summer I had the great privilege of co-leading the FASPE Law program for the second time—again with Eric Muller, a professor of law and ethics at the University of North Carolina, Chapel Hill, as well as with 12 new Law Fellows, who were some of the most impressive and interesting law students one could ever wish to meet.

As I write this introduction many moments from the program come to mind. I recall looking into the barracks at Birkenau, visiting the Memorial to the Murdered Jews of Europe in Berlin, and viewing the exhibit curated by Israel in one of the Auschwitz barracks. Particularly relevant to and meaningful for the study of law was our visit to the House of the Wannsee Conference where we were invited to work with copies of primary documents and to think from new perspectives about the role that lawyers played in the drafting of the Nuremberg Laws, in abolishing constitutional protections, and in providing support for the euthanasia and medical experimentation inflicted on the disabled and many others. Lawyers under the Nazis were involved with many other acts that were at one and the same time heinous and also simply variations on the sort of commonplace manipulations and interpretations of law and legal categories that lawyers engage in every day.

Each day of the FASPE Law program is filled with seminars and site visits. Our best teaching day in 2018, from my perspective, occurred on the final day of the program when the Fellows presented their memorials to the downfall of the professions in Nazi Germany. This year, the Law Fellows, and the Business and Journalism Fellows with whom they travelled, regularly met in small interdisciplinary groups throughout the duration of the program to design a way to commemorate the failure of the professions during this period of history. The Fellows presented deeply thoughtful, intellectually creative, visually sophisticated, and emotionally evocative works that they had conjured after just two weeks of studying the history of memorialization under historian and FASPE Academic Director Thorsten Wagner.

As always, the backbone of the trip was the Fellows. Chosen from some of the most elite students in law schools today, each Fellow brought something unique to the

program: from prior military service to social justice work to past professional music careers; from various religious commitments to polyglot language abilities to a wide range of academic interests. With mutual affection and respect, the students supported each other and their faculty, while also exploring points of disagreement and grey areas of moral uncertainty. Our daily and often hourly WhatsApp communications ranged from where everyone was going for Polish dumplings to the most serious subjects of genocide and history. We have continued to stay in touch in this way since the end of the program, taking turns relating the lessons of FASPE to contemporary events.

The essays presented here are a representative sample of the 2018 FASPE Law Fellows' final papers. They were selected with an eye toward showing how Fellows related the themes and lessons of FASPE to a range of topics. Choosing which essays to include was not easy, but reading all of the Law Fellows' papers was a task full of joy. Each paper reflects the concerns that led these individuals to travel together to experience the deeply intense yet strangely uplifting experience that is FASPE.

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Label Your Luggage

Dehumanization and the Law in Nazi Tactics

BY TESS GRAHAM

Discussions of Nazi crimes often emphasize the dehumanizing rhetoric, tactics, and ideology of the perpetrators. These accounts directly or indirectly ask, “How could humans do such awful things to other humans?” They then answer their own question by focusing on the ways that the perpetrators denied the humanity of their victims. By implication, then, these accounts posit that humans in fact *cannot* do such awful things to other humans so long as perpetrators continue to view their victims as human. These accounts thereby suggest that dehumanization is necessary to the kind of atrocities committed by the Nazis.

During FASPE, I began to think about an alternative explanation: while some degree of dehumanization may be necessary to carry out atrocities (it almost always coincides), a recognition of the humanity of the victims is equally necessary. The Holocaust might not have been possible without the dehumanizing rhetoric and tactics of its perpetrators. But neither would it have been possible if its perpetrators truly viewed its victims as nonhuman, because the execution of this genocidal project required a manipulation of the rationality, emotions, and expectations of the victims. Such manipulation in turn requires a recognition that the victims are governed by human thoughts and emotions.

As a lawyer, what particularly interests me is that this manipulation was accomplished, in part, using law. The following reflection will first explore the inconsistencies between the dehumanization thesis and Nazi tactics. It will then discuss the role that laws played in the Nazis’ manipulation of their victims’ rationality and emotions to implement their genocidal goals.

I was primed to reflect on the ways that perpetrators recognize the minds—the humanity—of their victims by a 2017 article by Paul Bloom, a professor of psychology at Yale University.¹ In his piece, Bloom synthesizes material from several recent books to argue that cruelty cannot be explained by the dehumanization of the victim

¹ Paul Bloom, “The Root of All Cruelty?” *The New Yorker*, November 27, 2017, <https://www.newyorker.com/magazine/2017/11/27/the-root-of-all-cruelty>.

by the perpetrator. On the contrary, Bloom contends, cruelty requires a deep recognition of the mind and rationality of the victim.

Bloom draws on examples from the Holocaust to illustrate his point. He observes that upon the annexation of Austria in 1938, Jews were forced to perform demeaning physical labor, including scrubbing the streets with toothbrushes. Crowds gathered to observe the spectacle. Bloom points out that, “The Jews who were forced to scrub the streets—not to mention those subjected to far worse degradations—were not thought of as lacking human emotions. Indeed, if the Jews had been thought to be indifferent to their treatment, there would have been nothing to watch here.” He concludes, “The logic of such brutality is the logic of metaphor: to assert a likeness between two different things holds power only in the light of that difference. The sadism of treating human beings like vermin lies precisely in the recognition that they are not.”²

Bloom then extends his analysis to other forms of cruelty and violence, including misogyny, torture, suicide bombings, and concentration camps. He cites Kate Manne’s discussion of “the banality of misogyny,” the idea that “people may know full well that those they treat in brutally degrading and inhuman ways are fellow human beings, underneath a more or less thin veneer of false consciousness,” and Johannes Lang’s suggestion regarding Nazi death camps that “what might look like the dehumanization of the other is instead a way to exert power over another human.” Bloom’s overall point is that dehumanization cannot explain cruelty; indeed, a recognition of the humanity and agency of the victim is *necessary* for the exercise of cruelty in its fullest sense. In acts of cruelty, “The victim is also the audience; her imagined response figures large in the perpetrator’s imagination.”³ Far from denying the humanity of their victims, perpetrators are counting on it for the achievement of their goals.

What is the relationship between cruelty, dehumanization, and Nazi crimes? The *Oxford English Dictionary* defines “cruel” as “willfully causing pain or suffering to others, or feeling no concern about it,” a definition which does not specify whether cruelty requires an understanding of the victim’s mind.⁴ *Merriam-Webster’s Collegiate Dictionary* lists “inhumanity” as a synonym for “cruelty”—but also “sadism,” “fiendishness,” “brutality,” “viciousness,” and “savagery,” terms which

² Bloom, “The Root of All Cruelty?”

³ Bloom, “The Root of All Cruelty?”

⁴ *Oxford English Dictionary*, “Cruel,” accessed February 26, 2019, <https://en.oxforddictionaries.com/definition/cruel>.

suggest deliberation and an understanding on the part of the perpetrators of the impact their actions will have on the victims.⁵

As a factual matter, the acts of the Nazi genocide were unspeakably, unconscionably cruel, and some perpetrators clearly acted out of a desire to punish their victims for imaginary or invented wrongs (such as the “stab in the back” myth that falsely attributed Germany’s World War I defeat to Jewish perfidy⁶) or for purely sadistic reasons. But the relation between the Holocaust and cruelty is complex.

Although the motivations of Nazi perpetrators are likely as varied and numerous as the perpetrators themselves, attempts to broadly understand these motivations from both historical and psychological perspectives reveal that relatively few perpetrators were motivated by “cruelty” in a strict sense.⁷ For many Nazis—from high-level architects of the genocide to the average low-level perpetrators—the motivation for participation was not primarily a desire to punish or inflict pain, but rather a desire to achieve the bureaucratic task set to them, or to fit in with the larger society.⁸ The notes of the Wannsee Conference reveal horrifying callousness, oblique euphemisms, and certainly dehumanization, but not cruelty in the sense of sadism or even viciousness.⁹ Public statements by the Nazi perpetrators, particularly speeches, simultaneously attest to the dehumanization of their victims and deny that their treatment was born out of cruelty. In a now infamous speech from October 1943, Heinrich Himmler, head of the SS, declared, “We shall never be rough and heartless when it is not necessary, that is clear. We Germans, who are the only people in the world who have a decent attitude towards animals, will also assume a decent attitude towards these human animals.”¹⁰ Based on such statements, then, we might conclude that Bloom is incorrect to identify the Holocaust as an example of cruelty in which the mind of the victim is integrally involved in the perpetrator’s goals. The Holocaust is

⁵Merriam-Webster’s Collegiate Dictionary. “Cruelty,” accessed February 26, 2019 <https://www.merriam-webster.com/dictionary/cruelty>.

⁶ David Mikics, “The Jews Who Stabbed Germany in the Back,” *Tablet Magazine*, November 9, 2017, <https://www.tabletmag.com/jewish-arts-and-culture/books/248615/jews-who-stabbed-germany-in-the-back>.

⁷ Christopher R. Browning, “Revisiting the Holocaust Perpetrators. Why Did They Kill?” The Raul Hilberg Memorial Lecture, October 17, 2011. In describing the spectrum of motivations and justifications by Nazi perpetrators and identifying the salience of social conformity for enabling atrocities, Browning notes that a general propensity toward cruelty did not appear to be a characteristic feature of these perpetrators.

⁸ Browning, “Revisiting the Holocaust Perpetrators.”

⁹ Doris L. Bergen, *War and Genocide: A Concise History of the Holocaust* (Maryland: Rowman & Littlefield, 2016), 208-210.

¹⁰Bergen, 217, quoting Heinrich Himmler, October 1943. Although such public speeches were certainly self-serving and should not be taken at face value, they provide a hint at how Nazis thought about the relative positions of themselves and their victims.

an example of dehumanization and atrocity, but perhaps not cruelty in the sense that Bloom means it.

Yet an awareness of the victim's mind and humanity is horrifyingly evident in other aspects of the Nazi project. For example, the Nazis quickly realized that when their victims became aware of the Nazis' ultimate goals, they resisted: "For Jews, armed resistance tended to emerge from hopelessness: as the Germans' genocidal intentions became clear over the course of 1942, many Jews, especially young people, concluded ... that they had nothing to lose, so they might as well die fighting."¹¹ In response, the Nazis developed techniques of manipulation that depended on a profound understanding that their victims were humans with minds, expectations, and motivations. Far from denying the humanity of those they brutalized, the Nazis recognized that they could make perverse use of the profoundly human drive to preserve hope. They then designed their genocidal techniques to stimulate this useful hope in their victims.

For example, rather than attempt to separate mothers from their infant children on the selection platform at Auschwitz-Birkenau, the Nazis decided to send young mothers who might otherwise have been found fit for work straight to the gas chambers with their infants. The Nazis recognized that separating infants from mothers might trigger widespread panic at the arrival platform. Likewise, in the waiting area outside the gas chamber buildings, the Nazis attempted to keep grass growing and offered water to those waiting to enter. These token gestures of comfort were designed to keep a shred of hope alive in the victims, hope that prevented panic which might interrupt the genocidal project. These pragmatic calculations reflect an understanding of basic biological impulses, but also demonstrate a recognition of the victims' ability to feel and to draw rational conclusions. In short, these calculations engaged with the victims' minds.

However, mere engagement with their victims' biological impulses is not the only evidence that the Nazis recognized their victims' minds. In the Nazi toolbox of manipulation, the law played a prominent role, in part because of its unique engagement with human rationality.

On the arrival platform at Auschwitz-Birkenau, prisoners were told to label their possessions. They were assured that their luggage would be returned to them once they had washed and been assigned housing. Many, sometimes all, of these prisoners were then immediately marched to the gas chambers, where they were murdered. Even if the prisoners were detained for forced labor, their possessions were never

¹¹Bergen, 266.

returned to them. Why, then, were the new arrivals ordered to label their luggage? Why maintain a façade of respect for property rights?

Inside the walls of the prison camp at Auschwitz I, one building functioned as a courthouse and jail. Inside this building, prisoners who attempted to escape the camp or committed other offenses were tried, sentenced, and executed. Outside this courthouse, in the camp at large, prisoners could be and were murdered for any reason or no reason whatsoever. Why then did the camp administrators bother to devote scarce resources and space to a courthouse and jail within this prison and death camp?

Labelling luggage is meaningless to an animal, as are facades of courtroom justice. These examples are fundamentally incompatible with the dehumanization thesis—the view that the Nazis regarded their victims as literally non-human. Law (or the appearance of it) in these cases engaged deeply with the rationality of the victims to further genocidal ends.

The law is vaunted for its ability to take “the edge” off power: “Knowing that one can count on the law’s protecting property and personal rights gives each citizen some certainty about what he can rely on in his dealings with other people,”¹² writes Jeffery Waldron, a professor of law and philosophy at New York University. But in the context of the Holocaust, the law certainly did not constrain power. Instead, it served other purposes, including to prevent panic among the victims of genocide. The Nazis employing these means understood that 1) panicked people are powerful because they have nothing to lose; 2) hopeful people are obedient because they still have something to lose; and 3) the semblance of the rule of law suppresses panic and generates hope. The exercise of having people label their luggage before murdering them *en masse* entails a subtle understanding of the rationality of the victims—and the role that a semblance of law plays in shaping expectations.

Law engages a person’s rationality while abstracting from emotion. Proponents of the rule of law point out that the law is uniquely able to support the dignity of human rationality without submitting to the whims of emotion.¹³ But this very strength—engagement with rationality, with the mind, without engaging emotions—makes the

¹² Jeremy Waldron, “The Rule of Law,” *Stanford Encyclopedia of Philosophy*, June 22, 2016, <https://plato.stanford.edu/entries/rule-of-law/#ValueRuleLaw>.

¹³ See e.g. Waldron, “The Rule of Law.” Waldron summarizes Harvard legal philosopher Lon Fuller’s widely-cited claim that the rule of law is a moral concept: “[The eight principles of rule of law] also constituted a morality of respect for the freedom and dignity of the agents addressed by the law: what they made possible was a mode of governance that worked through ordinary human agency rather than short-circuiting it through manipulation or terror.”

law the perfect tool with which to perform the carefully calibrated dehumanization necessary to carry out a genocide. Research on the Holocaust and other genocides confirms the dehumanization thesis to some extent, revealing that a degree of dehumanization is a statistically significant common factor among genocide perpetrators.¹⁴ But as the examples above show, this dehumanization cannot be complete, because in order to be able to placate their victims, perpetrators must also recognize that their victims have functional minds just like their own. Through their carefully structured separation of rationality from emotion, legal tools enable perpetrators to distance themselves from the emotional and moral weight of their actions while understanding the rationality of their victims enough to manipulate it. Meanwhile, the law's apparent stability and rationality engage the victims to foster a false sense of hope that discourages resistance. The law thus serves two functions for two "audiences." Through the lens of law, the perpetrator sees the rationality but not the attendant moral value of their victim, while for victims, the veneer of law provides a sliver of pacifying hope.

These reflections lead to dark conclusions. Far from the potentially comforting proposition of the dehumanization thesis—that humans cannot inflict such suffering on other humans without first denying their victims' humanity—the above observations suggest that under certain circumstances, humans are perfectly capable of committing abhorrent acts against others they recognize as human in some respects. The Nazis who designed the arrival platform at Auschwitz-Birkenau understood that their victims were human enough to be somewhat reassured by an order to label their luggage. Crucially for a lawyer, the methods employed by the Nazis to manipulate their victims included the tools of our trade.

The law's usefulness in this type of project must be a source of constant discomfort to its practitioners, an unceasing danger for lawyers. Law can provide stable ground for the private ordering of life and support human dignity through honoring expectations—but it can also be used cynically to support a structure of expectations that tamp down panic and quiet dissent among those whose existence depends on resistance. As practitioners, we must be aware of this danger. Legal complexity can support human dignity¹⁵ or degrade it by providing a false sense of security. We must

¹⁴ Browning, "Revisiting the Holocaust Perpetrators." Browning describes work by psychiatrist Athanase Hagengimana on perpetrators of the Rwandan genocide. In interviews with perpetrators, Hagengimana found that dehumanization of the victim is a common factor in their internal rationalization of their acts.

¹⁵ See e.g. Waldron, "The Rule of Law." "Noting that despotic governments tend to have very simple laws which they administered peremptorily with little respect for procedural delicacy, Montesquieu argued that legal and procedural complexity tended to be associated with respect for people's dignity ... This emphasis on the value of complexity—the way in which complicated laws, particularly laws of property, provide hedges beneath which people can find shelter from the intrusive demands of power—has continued to fascinate modern theorists of the rule of law."

be prepared regularly to take a step back from our work to assess which role we are playing.

A genocidal operation on the scale of the Holocaust would not have been possible if the perpetrators truly lost sight of their victims' humanity. The Nazis' recognition of their victims' minds is evident in the strategies they used to engender compliance. In significant, atrocious ways, the Nazis treated their victims as less than human. But the Nazis also implicitly acknowledged their victims' humanity by manipulating their rationality and used that rationality as a tool to facilitate mass murder. Lawyers should be aware that dehumanization is not the only marker of atrocity. Sometimes law forms the bridge between the humanity of the victims and their destruction.

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A Legal Ethics Minefield at Guantanamo

BY SARAH GRANT

The United States military detention and trial system set up to deal with “enemy combatants” captured during the “Global War on Terror,” is in disarray. It has been, in truth, from the start of this war, which was launched by the U.S. in cooperation with its allies following September 11. I have closely followed the military commissions over the past few years and have been struck by the fundamental dysfunction of the system and the attendant ethical challenges for those pulled into its orbit. Whereas fairness may not, in reality, be guaranteed in the civilian legal system, it has seemed wholly foreign to the wartime system at times. At key moments, however, the government’s power has been checked and the meaningful, impartial rule of law has been defended.

What became clear to me at FASPE is that the rule of law depends not only on the legal structures we have in place but also on the courage of individuals to stand up for what is right and fight against injustice even if they are not personally affected. The Nazi regime both preyed upon people’s fears and capitalized upon indifference. Certainly, many Germans harbored anti-Semitic animus that the Nazi regime encouraged as it rose to power, but many others did not. The Nazis did not need everyone to hate the Jews, they just needed the majority of the population to look the other way as the regime passed discriminatory laws and set up alternative legal structures targeting political dissidents. They needed non-Jews to adopt the attitude that as long as they themselves did not stand to be harmed, the degradation of the rule of law did not matter.

The U.S. military commissions are not Nazi Germany—the defendants were captured and detained for having allegedly participated in acts of terrorism or for engaging in combat against the United States. They were targeted by the state not for who they are but rather for what they did. Nonetheless, in our treatment of these detainees, our government has repeatedly failed to live up to our values, and it is therefore deserving of criticism. Because this is an area of our national life that the vast majority of people are unaware of or indifferent to, there is little if any political pressure on the government to hold itself to a higher standard of ethical conduct. But, unlike in Nazi

Germany, an independent judiciary and morally courageous individuals have, over the years, been able to act as a check and hold the government accountable for how it operates the military commission system. In this essay, I consider various developments that helped maintain some semblance of justice in the midst of these extraordinary, politically charged, wartime judicial proceedings.

First, I will provide some background on the military commissions to help frame the discussion.

On September 18, 2001, the U.S. Congress passed a Joint Resolution authorizing the use of military force “against those responsible for the recent attacks launched against the United States” (hereinafter “AUMF”).¹ On November 13, 2001, President George W. Bush issued a military order declaring that in order “[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks,” it was necessary that non-citizens suspected of involvement with al Qaida or other terrorist groups threatening U.S. interests “be detained, and, when tried, [] be tried for violations of the laws of war and other applicable laws by military tribunals.”² Bush found it “not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts,”³ and delegated to the Secretary of Defense the authority to issue orders and regulations establishing “rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys.”⁴ However, Bush ordered that, at minimum, the commissions must provide “a full and fair trial.”⁵

The military transported the first “enemy combatant” detainees to Naval Station Guantanamo Bay in January 2002,⁶ and over the next few years the Secretary of Defense and the Deputy Secretary of Defense issued numerous instructions laying out

¹ U.S. Congress, Senate and House, *Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States* (Authorization for Use of Military Force), Act of 2001, S.J. Res. 23, 107th Congress, September 18, 2001, *Congressional Record* 147.

² U.S. President, Military Order, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” Federal Register 66, no. 222 (November 13, 2001): 57831, section 1(3), <https://fas.org/irp/offdocs/eo/mo-111301.htm>.

³ “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” section 1(f).

⁴ “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” section 4(c).

⁵ “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” section 4(c)(2).

⁶ “Shackled Detainees Arrive in Guantanamo,” *CNN*, January 11, 2002, <http://edition.cnn.com/2002/WORLD/asiapcf/central/01/11/ret.detainee.transfer/index.html>.

various procedures for the military commissions.⁷ Meanwhile, the rights of Guantanamo detainees were also litigated in civilian federal court. Here is a very brief description of a few key cases that offer a sense of the sorts of fundamental rule-of-law questions that the military detention and commission system raises:

- In 2004, in *Rasul v. Bush*,⁸ by a vote of 6-3, the U.S. Supreme Court ruled that the U.S. exercises sufficient control over the Guantanamo Bay military facility to consider it under sovereign control, such that habeas corpus rights extend to individuals detained there.⁹ The Court also determined that habeas rights do not depend on citizenship status, and the detainees' challenge could therefore proceed.¹⁰
- Also in 2004, in *Hamdi v. Rumsfeld*,¹¹ the Supreme Court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker."¹² A plurality of the court, for which Justice Sandra Day O'Connor wrote the decision, also concluded that the 2001 AUMF authorized the detention of "enemy combatants" in the Global War on Terror, including petitioner Yaser Hamdi, as an incidental exercise of the "necessary and appropriate force" Congress authorized the President to use.¹³ Justices Souter and Ginsburg concurred with the due process ruling to form the majority, but dissented on the congressional authorization holding.
- In 2006, in *Hamdan v. Rumsfeld*,¹⁴ the Supreme Court declared unlawful the military commission convened to try one of the first Guantanamo defendants, Salim Hamdan,¹⁵ "because its structure and procedures violate both the [Uniform Code of Military Justice] and the Geneva Conventions."¹⁶ Four justices also concluded that the offense with which Hamdan was charged—"conspiracy to

⁷ Military Commission Orders, Military Commission Instructions, Appointing Authority Regulations, and Presiding Officer Memoranda can be viewed on the Office of the Military Commissions website: <https://www.mc.mil/LEGALRESOURCES/MilitaryCommissionsDocuments/HistoricalDocuments.aspx>.

⁸ *Rasul v. Bush*, 542 U.S. 466 (2004).

⁹ *Rasul v. Bush*, 484.

¹⁰ *Rasul v. Bush*, 484.

¹¹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹² *Hamdi v. Rumsfeld*, 509–10.

¹³ *Hamdi v. Rumsfeld*, 518.

¹⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁵ "Military Commissions History," *Office of the Military Commissions*, accessed March 7, 2019, <https://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx>.

¹⁶ *Hamdan v. Rumsfeld*, 567.

commit offenses triable by military commission”¹⁷—was not an offense that could be tried, pursuant to the law of war, by a military commission.¹⁸

- In 2008, in *Boumediene v. Bush*,¹⁹ the Supreme Court invalidated Congress’s attempt in the Military Commissions Act (MCA) of 2006²⁰ to eliminate the federal courts’ jurisdiction to hear habeas applications from Guantanamo detainees. In a five-to-four vote, the Court held that the Suspension Clause of the Constitution²¹ extends to Guantanamo Bay; that the Combatant Status Review Tribunals established to review detainee category determinations in lieu of habeas proceedings were an inadequate substitute; and that the jurisdiction-stripping provision of the 2006 MCA therefore amounted to an unconstitutional suspension of the writ of habeas corpus.

In sum, over this initial period of the post-9/11 military commissions, the Supreme Court pushed back against the preferences of the Executive branch and of Congress, and tried to bring the military detention and trial system into greater compliance with traditional notions of justice and the rule of law—that is, to make military detention and trial less extraordinary.

Following the enactment of the 2006 MCA and the publication of a manual for implementation in 2007, several defendants, including Hamdan, were convicted by military commission according to reformed procedures.²²

Immediately upon taking office in January 2009, President Barack Obama called for a comprehensive review of detention operations and the military commissions, and he sought a stay of all military commission proceedings until the review was complete.²³ In May 2009, Obama announced that he intended to reform the rules and procedures of the military commission system rather than get rid of it.²⁴ In October, Congress passed the Military Commissions Act of 2009,²⁵ which incorporated a number of significant changes to remedy the constitutional defects of the 2006 MCA and further regularize the military commissions, i.e., make them look more like military courts-

¹⁷ *Hamdan v. Rumsfeld*, 566 (internal quotation marks omitted).

¹⁸ *Hamdan v. Rumsfeld*, 567.

¹⁹ *Boumediene v. Bush*, 553 U.S. 723 (2008).

²⁰ *Military Commissions Act of 2006*, U.S. Code 10 (2006): 948–949.

²¹ U.S. Constitution, art. I, sec. 9, cl. 2.

²² “Military Commissions History,” *Office of the Military Commissions*.

²³ Jeff Mason, “Obama Orders Guantanamo’s Closure Within a Year,” *Reuters*, January 21, 2009, <https://www.reuters.com/article/us-guantanamo-obama-idUSTRE50K5M320090122>.

²⁴ The White House, “Statement of President Barack Obama on Military Commissions,” The White House of President Barack Obama, May 15, 2009, <https://obamawhitehouse.archives.gov/the-press-office/statement-president-barack-obama-military-commissions>.

²⁵ *Military Commissions Act of 2009*, U.S. Code 10 (2009), ch. 47A.

martial and civilian federal courts.²⁶ For example, the 2009 revision mandated exclusion of “statements elicited through torture as well as cruel, inhuman, or degrading treatment,”²⁷ heightened evidence admissibility standards,²⁸ and specified that defendants in capital cases are entitled to be represented, “to the greatest extent practicable, by at least one additional counsel who is learned in applicable law.”²⁹

Since then, commission proceedings have plodded along. Five individuals have pleaded guilty to various terrorism-related charges, and seven others have been charged and are currently in pre-trial proceedings.³⁰ A total of 40 detainees remain at Guantanamo.³¹

I will now turn my attention to one particular case, that of Abd al-Rahim al-Nashiri, and focus more closely on several serious ethical challenges that have emerged recently in relation to it. Al-Nashiri is a citizen of Saudi Arabia accused of participating in an attempted bombing of the USS The Sullivans in January 2000, the bombing of the USS Cole in October 2000, and an attack on the MV Limburg in October 2002. In 2011, al-Nashiri was charged with perfidy, murder in violation of the law of war, attempted murder in violation of the law of war, terrorism, conspiracy, intentionally causing serious bodily injury, attacking civilians, attacking civilian objects, and hazarding a vessel.

In October of 2017, Marine Corps Brigadier General John Baker, Chief Defense Counsel for the Military Commissions Defense Organization, seemingly suddenly disbanded the trial team defending al-Nashiri, including death penalty counsel Richard Kammen and two additional civilian attorneys, Rosa Eliades and Mary Spears.³² In a public statement, Kammen wrote that there “ha[d] been repeated intrusions into defense teams, which have compromised attorney-client confidentiality” and that Baker had been informed a few months prior “of facts, which remain classified, that meant [the defense attorneys] could not have confidence that

²⁶ U.S. Library of Congress, Congressional Research Service, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, by Jennifer Elsea R41163 (2014), <https://fas.org/sgp/crs/natsec/R41163.pdf>.

²⁷ *Military Commissions Act of 2009*, U.S. Code 10 (2009): 948(r).

²⁸ *Military Commissions Act of 2009*, U.S. Code 10 (2009): 949.

²⁹ *Military Commissions Act of 2009*, U.S. Code 10 (2009): 949.

³⁰ “Military Commissions History,” *Office of the Military Commissions*, accessed March 7, 2019, <https://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx>.

³¹ “The Guantanamo Docket: Current Detainees,” *The New York Times*, last updated May 2, 2018, <https://www.nytimes.com/interactive/projects/guantanamo/detainees/current>.

³² Matthew Khan, “Press Release: Military Commissions Chief Defense Counsel Disbands Nashiri Defense Team,” *Lawfare*, October 13, 2017, <https://www.lawfareblog.com/press-release-military-commissions-chief-defense-counsel-disbands-nashiri-defense-team>.

[their] communications with [al-Nashiri] were in fact truly private.”³³ Consequently, and after seeking the advice of a legal ethics expert, the defense attorneys concluded they could no longer ethically proceed in their representation of al-Nashiri.³⁴ Later on, it was revealed that the attorneys discovered a disabled microphone in their meeting room and were denied the ability to investigate or inform al-Nashiri why they could no longer meet with him.³⁵

Baker’s decision set off a chain reaction which would ultimately result in the indefinite abatement of pre-trial proceedings in February 2018.³⁶

At first, Baker’s directive only released the civilian attorneys on the case, not al-Nashiri’s assigned military defense counsel, Navy Lieutenant Alaric Piette. With Kammen’s departure, al-Nashiri was no longer represented by a trained capital defense attorney. Piette notified the court that he believed al-Nashiri had a statutory right to be represented by learned counsel at every stage of the proceedings. Accordingly, he asked for an abatement until a replacement for Kammen could be appointed, as it would be improper for Piette to represent al-Nashiri alone. The presiding military judge, Air Force Colonel Vance Spath, disagreed, concluding that representation by capital counsel was only required to the extent practicable and was not an absolute right. The judge therefore planned to continue with business as scheduled, without Kammen or a replacement.³⁷ Despite Judge Spath’s ruling, from that point forward, Piette stood firm and refused to actively participate.

At the same time, Spath rejected the idea that Baker had the unilateral authority to dismiss the civilian defense attorneys and ordered them to return for subsequent hearings. Spath also denied the defense’s abatement request after finding that: no good cause existed to warrant excusing civilian defense counsel; no evidence had been presented to demonstrate intrusions on attorney-client confidentiality which would

³³ Kahn, “Press Release: Military Commissions Chief Defense Counsel Disbands Nashiri Defense Team.”

³⁴ Michel Paradis, “Why the Collapse of Al-Nashiri’s Defense Team Matters,” *Lawfare*, October 17, 2017, <https://www.lawfareblog.com/why-collapse-al-nashiris-defense-team-matters>.

³⁵ Carol Rosenberg, “Now We Know Why Defense Attorneys Quit the USS Cole Case. They Found a Microphone,” *Miami Herald*, March 7, 2018, <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article203916094.html>. According to a government filing, the listening device had been installed when the room was used previously for purposes other than as an attorney-client meeting space, and it was unconnected to any recording device at all times while al-Nashiri’s team used the room.

³⁶ All subsequent discussion draws on court filings and transcripts, which I and others previously summarized for the website *Lawfare*. More in-depth summaries can be found on *Lawfare*’s al-Nashiri case page, starting here: <https://www.lawfareblog.com/week-military-commissions-1031-session-sturm-and-drang-al-nashiri-defense>.

³⁷ In response, the Military Commissions Defense Organization sought a preliminary injunction from the U.S. District Court for the District of Columbia, which has oversight of the commissions, to bar further proceedings until a new capital counsel could be appointed.

ethically require withdrawal or disqualification of outside appointed learned counsel; and excusing outside appointed learned counsel prejudiced al-Nashiri's due process rights.

Baker refused to carry out Spath's directive to summon the attorneys to return, and he refused to testify about his decision, citing concerns about divulging privileged information and violating his obligations under state ethics rules to protect confidential information. As a result, in a special hearing convened for the purpose, Spath held Baker in contempt and sentenced him to pay a \$1000 fine and to be confined to on-base quarters, albeit with telephone and internet access, for 21 days. Baker appealed the contempt conviction, first through the military commission system to the Convening Authority. The Convening Authority agreed with Judge Spath and upheld the conviction, but exempted Baker from the fine and the remainder of his confinement sentence. Baker then elevated his appeal to the District Court in D.C., which in June 2018 ruled in favor of Baker, finding that Spath lacked the authority on his own to hold Baker in contempt.³⁸

While Baker's appeals were pending, however, Judge Spath became increasingly frustrated with the defense team's refusal to obey his orders and to continue to participate in commission proceedings. After trying various methods to compel the attendance and cooperation of the civilian defense attorneys to no avail, Spath finally yielded. In February 2018, he decided to abate the proceedings until a superior court resolved the issues of Baker's conduct, the civilian attorneys' continued absence, and Spath's authority to demand compliance in order to proceed.

In July 2018, Spath announced that he would be retiring from the Air Force effective November 1, 2018. He was replaced as presiding judge in the case by Air Force Colonel Shelly Schools,³⁹ and in October 2018 the Court of Military Commission Review reversed the abatement and ordered the proceedings to resume.⁴⁰ However, in the past few months, another wrinkle has emerged: it has come to light that Judge Spath, while presiding over *al-Nashiri*, pursued a job opportunity as a federal

³⁸ Matthew Khan, "Document: Judge Lamberth Rules in Gitmo Defense Counsel Habeas Case," *Lawfare*, June 18, 2018, <https://www.lawfareblog.com/document-judge-lamberth-rules-gitmo-defense-counsel-habeas-case>.

³⁹ Carol Rosenberg, "New Air Force Colonel to Preside in Guantánamo's Stalled USS Cole Case," *Miami Herald*, August 9, 2018, <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article216365075.html>.

⁴⁰ Sarah Grant, "Abatement in Al-Nashiri Is Reversed," *Lawfare*, October 15, 2018, <https://www.lawfareblog.com/abatement-al-nashiri-reversed>.

immigration judge, likely creating a conflict of interest.⁴¹ Al-Nashiri's attorneys raised this issue before the D.C. Circuit, which is now considering whether Spath's rulings going back several years should be vacated. Judge Schools likewise has decided to retire and take a position as an immigration judge.⁴² It will now be on a new, yet-to-be-determined judge's shoulders to figure out how to bring the case back on track and ensure al-Nashiri a "full and fair" opportunity to be heard.

The last 14 months in *al-Nashiri* have been a particularly extreme case study in military commission dysfunction, but trouble has also surfaced elsewhere. One instance occurred in February 2018, when the military commissions' convening authority, Harvey Rishikof, and Gary Brown, the legal adviser to the convening authority, were abruptly removed from their positions by Secretary of Defense James Mattis, at the request of Department of Defense Acting General Counsel William Castle.⁴³ The reasons for their firing are still contested: Mattis and Castle claim that they lost confidence in Rishikof and Brown for a number of reasons, including that Rishikof and Brown repeatedly violated proper procedures. But five of the Guantanamo detainees (Khalid Shaikh Mohammad, Walid Bin 'Attash, Ramzi Bin al Shibh, Ali Abdul Aziz Ali, and Mustafa al Hawsawi), who are being tried together for their alleged role in the 9/11 conspiracy, allege that Rishikof and Brown may have been fired because they were considering a potential plea deal in the case.⁴⁴

In a second instance, in August 2018, the judge in the 9/11 case (officially, *United States v. Khalid Shaikh Mohammad et al.*), Army Colonel James Pohl (who has since been replaced), ruled that the government would not be permitted to use the defendants' statements obtained by FBI "clean teams"—law enforcement personnel brought in to conduct new, from-scratch investigations and interrogations of the defendants after previous conduct by the CIA made certain evidence inadmissible at trial.⁴⁵ Pohl decided that exclusion of the statements, which played a key role in the

⁴¹ Carol Rosenberg, "War Court Judge Pursued Immigration Job for Years While Presiding Over USS Cole Case," *Miami Herald*, November 20, 2018, <https://www.mcclatchydc.com/latest-news/article221557485.html>.

⁴² Carol Rosenberg, "New USS Cole Case Judge Quitting the Military to Join Immigration Court," *Miami Herald*, January 7, 2019, <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article223975080.html>.

⁴³ Sarah Grant, "Convening Authority and Legal Adviser for Military Commissions Removed from Office," *Lawfare*, February 6, 2018, <https://www.lawfareblog.com/convening-authority-and-legal-adviser-military-commissions-removed-office>.

⁴⁴ Stephen Szrom, "Summary: Declarations Regarding the Removal of Military Commission Convening Authority Rishikof," *Lawfare*, March 23, 2018, <https://www.lawfareblog.com/summary-declarations-regarding-removal-military-commission-convening-authority-rishikof>.

⁴⁵ Sarah Grant, "Military Commission Judge Bars Government from Using Defendants' Statements to FBI 'Clean Teams' in 9/11 Case," *Lawfare*, August 19, 2018, <https://www.lawfareblog.com/military-commission-judge-bars-government-using-defendants-statements-fbi-clean-teams-911-case>. In this case, the defendants were captured and tortured by the CIA before being turned over to military custody.

government's case, was necessary to level the playing field given how severely the deck is otherwise stacked against the defendants as a result of security classification restrictions on their attorneys' ability to investigate and interview potential witnesses.

As the discussion above demonstrates, the U.S. military commissions have, lamentably, presented one ethical quandary after another for the attorneys, judges, and others involved. The extraordinary nature of the system, attempts at reform notwithstanding, continues to impede the pursuit of a fair trial for the accused, and ultimately hampers the cause of justice.

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Because of the use of torture, any statements the defendants made to CIA interrogation personnel would be inadmissible in court. Consequently, the defendants were all re-interrogated by FBI personnel who, according to the government, had no prior contact with the defendants or access to information previously obtained by the CIA through the use of torture. As long as the FBI clean team was genuinely walled off from tainted material, the fruits of the new interrogations would likely be considered admissible evidence.

Impact Litigators and the Tension of Loyalty

BY SOPHIE KRAMER

Imagine a lawyer committed to social justice—be it racial equality, LGBTQ rights, immigrants' rights, reproductive rights, disability rights, or any other civil liberties issue about which she is passionate. She wants to work on behalf of those discriminated against, but she doesn't want to help just one client at a time. The scale of this injustice is immense, and she wants to change the systems, the institutions, and the laws that create and reinforce this inequality. This lawyer therefore chooses to work at an organization where she can engage in impact litigation.

In this work, the lawyer is an agent of social change. She, or her organization, has a vision for a more just legal system, and her work is in service of that goal. She seeks to benefit not just one client with one claim, but all individuals like her client. In this way, impact litigators work on cases with multiple stakeholders: their individual client, those similarly situated to the client, and the broader society. The lawyer is aware of her obligations to her client—new lawyers are taught these are paramount. Yet the express purpose of the lawyer's work is to have a broader societal impact beyond her client and achieve legal reform that benefits the other stakeholders in the issue. Therein lies the tension. The lawyer risks losing sight of her client and his interests amid her broader strategy for social change. Though well-intentioned, she risks using her client as a means to an end and thereby shortchanging the representation and advocacy he is entitled to receive.

There are thus questions to consider around the ethical responsibilities of impact litigators. Should they follow a traditional client-centered model of lawyering and prioritize their clients' wishes and interests when they conflict with broader social goals? Or can impact litigators ethically subordinate their clients' particular interests in order to promote social change and a more just legal system for all? For the sake of simplicity and clarity, these competing interests will be referred to respectively as the duties to the client and the duties to the cause. This paper explores the balance between these duties and the ethical implications of sacrificing an individual client's interests to a cause. Ultimately this paper argues cause lawyers should seek to avoid

such tradeoffs and aim to advance social justice without disempowering the individuals they strive to lift up as a community.

Impact Litigation

Impact litigation is legal action that seeks to change laws and achieve a wide impact. Though it can, and often does, encompass class action lawsuits, this paper will not include such lawsuits in its analysis, focusing instead on individual claims that nevertheless have a broader significance. Cases that have litigated the scope of marriage, such as *Loving v. Virginia*, *Lawrence v. Texas*, and *Obergefell v. Hodges*, are examples of the latter sort of claim.¹ In these landmark cases, one individual or one couple was the plaintiff and their unique stories were the basis for the complaints. Nevertheless, the litigation yielded far-reaching rulings that struck down discriminatory state laws across the country.

There is much literature devoted to cause lawyering, defined as work “directed at altering some aspect of the social, economic, and/or political status quo.”² The work of cause lawyers includes, but is not limited to, impact litigation, but this paper will use the terms cause lawyering and impact litigation interchangeably.

Framing the Tension

Lawyers face two sets of loyalties, or responsibilities, in impact litigation: a duty to the client and a duty to the cause. Relatedly, the problem or wrong can be framed in multiple ways. There is an injustice to your client; an injustice to the hundreds, thousands, or millions like your client; and an injustice to society. Therefore, the goal of legal action could be a remedy with which your client is satisfied or a change in the law that gave rise to this systemic wrong in the first place. Although these two duties and the resulting goals of litigation may align initially, some conflict between them is possible, even likely.

An impact litigator has numerous responsibilities to her client, including those expressly delineated in the American Bar Association’s *Model Rules of Professional Conduct*. The lawyer has a responsibility to zealously advocate for her client. The client determines the objectives of representation, and although the lawyer makes tactical, strategic decisions in consultation with the client, she must follow the client’s

¹ *Loving v. Virginia*, 388 U.S. 1 (1967); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 1315 S. Ct. 2584 (2015).

² Karen L. Loewy, “Lawyering for Social Change,” *Fordham Urban Law Journal* 27 (2000): 1870-71.

decisions regarding the goals of representation.³ Impact litigation does not undermine the zeal of the lawyer's advocacy, but the object of that advocacy could become murky. "Cause lawyers are focused on the broader stakes of litigation rather than on the justiciable conflict ... or on the narrow interests of the parties to that conflict," writes political scientist Stuart Scheingold in his article "The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle."⁴ Is the lawyer advocating for the client's individual interests or for the cause the client represents?⁵ When these are identical, the distinction is merely semantics. However, it is likely they are not completely identical, and zealous advocacy on behalf of the client may therefore be compromised. As University of Colorado law professor Deborah Cantrell notes in a 2007 article, "achieving a goal for an individual is the goal of a cause lawyer only if the individual's goal is in harmony with the cause's goal."⁶

A client's right to zealous advocacy is not important simply because it is dictated by the *Model Rules*. Clients have a right to justice and autonomy. Given that access to our legal system's protections is predicated upon access to representation, the individual attorney-client relationship and the lawyer advocating on behalf of the client's interests is critical to realizing these ideals. Moreover, the power imbalance between attorney and client is exacerbated when clients are disadvantaged or structurally disempowered, as is often true in circumstances from which impact litigation arises. This heightens the need to carefully attend to the client's autonomy to mitigate what New York Law School professor Stephen Ellman points to in a 1992 article on cause lawyering: the "inevitable danger that the lawyer who sets out to help disadvantaged people as members of groups may inadvertently succeed in oppressing them ... as individuals."⁷

Though the *Model Rules* do not recognize representation of causes or any representation beyond that of an individual client or entity, they do recognize a lawyer's responsibilities to broader ideals. The *Model Rules* urge lawyers to "protect the system that safeguards individual rights in order to preserve societal values."⁸ In this way, lawyers' responsibilities do not end with zealous advocacy of a client's

³ American Bar Association, *Model Rules of Professional Conduct* (Chicago: ABA Publishing, 2013), 1.2(a).

⁴ Stuart Scheingold, "The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle," in *Cause Lawyering: Political Commitments and Professional Responsibilities*, edited by Austin Sarat and Stuart Scheingold (Oxford: Oxford University Press, 1998), 118.

⁵ Melanie Garcia, "The Lawyer as Gatekeeper: Ethical Guidelines for Representing a Client with a Social Change Agenda," *Georgetown Journal of Legal Ethics* 24 (2011): 559.

⁶ Deborah J. Cantrell, "Sensational Reports: The Ethical Duty of Cause Lawyers to be Competent in Public Advocacy," *Hamline Law Review* 30 (2007): 571.

⁷ Stephen Ellman, "Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups," *Virginia Law Review* 78 (1992): 1106.

⁸ Loewy, "Lawyering for Social Change," 1871.

interests; lawyers also have a professional duty to advance the legal system. Cause lawyers can therefore point to the *Model Rules* to justify the assertion that the impact litigator's duty of competency should be to the cause and not only the client.⁹

Beyond a codified responsibility to be a guardian of the law, many lawyers feel a moral obligation to advance justice. Rather than seeing themselves as neutral partisans, these lawyers view themselves also as activists or moral activists, motivated by an internal sense of what is right.¹⁰ The extensive debate over the merits of this professional philosophy will not be outlined here, but it is likely a guiding force for many impact litigators and their sense of responsibility to promote social change.

In addition, access to the legal system is constrained by access to representation. Georgetown University law professor and moral philosopher David Luban therefore argues that to maintain a legitimate legal system, lawyers must guarantee the availability of legal services. He asserts that it is permissible to represent clients in a politicized manner in an effort to reform the law to advance social goals.¹¹

In this way, a lawyer engaged in impact litigation faces an array of professional and moral responsibilities, some of which she will rank more highly than others. Ideally, a cause lawyer can faithfully and competently serve her client and zealously advocate for his interests, while also bettering the legal system, advancing social goals, and following her sense of morality. Most impact litigators would surely seek to maximize the alignment between these duties. Yet it is not hard to imagine how these duties could diverge, leaving the impact litigator to face a choice.

For example, imagine a lawyer representing a trans student challenging his exclusion from the school locker room associated with his gender identity. During litigation, the school district offers a settlement that the client is satisfied with but which is not sufficiently far-reaching from the lawyer's social advocacy perspective. How should the lawyer counsel the client? Alternatively, imagine that client and lawyer were initially aligned in their understanding of the ideal legal remedy, as evident from their lengthy discussions at the beginning of their attorney-client relationship. However, now that a settlement has been offered, the client feels the remedy would not go far enough and wants a more radical change, which the lawyer believes is both unattainable and politically damaging for their cause. How does the lawyer proceed?

⁹ Loewy, "Lawyering for Social Change," 1871-72.

¹⁰ David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988), 160-74.

¹¹ Loewy, "Lawyering for Social Change," 1891, citing Luban, *Lawyers and Justice*, 251-255, 238.

In these instances, the client's interests and the cause's interests have diverged. What is an impact litigator to do?

Obstacles to Seeing the Tension

Our emotions and subconscious biases make it all the more complicated to resolve this ethical dilemma and tease out the boundaries between these potentially divergent professional responsibilities. First, the goals of impact litigation necessarily cloud the lawyer's perceptions of the client. The lawyer's desired outcome (the "impact" of impact litigation) is determined before the client is identified. The first interactions with the potential client are necessarily shaped by the goals of impact litigation, as the lawyer must determine whether this individual is a suitable plaintiff to help her achieve the predetermined and desired outcome. The client must fit into the mold pre-defined by the lawyer. This will inevitably influence the lawyer's perception of the client's interests, wishes, and goals. The lawyer has stopped being a neutral partisan and is an activist with an agenda, thus biasing how she sees the client.

Moreover, lawyers are taught that the client's interests are paramount, so when the client's particular interests conflict with an impact litigation strategy to advance social justice, a cause lawyer will try to reconcile this tension. One approach she may take, consciously or unconsciously, is to erase the distinctions between her responsibilities to the client and her sense of obligation to the cause. Harvard law professor William B. Rubenstein articulates this framework when he suggests that cause lawyering could be understood as a "more robust vision of client loyalty [that] in this circumstance would ask the litigator to acknowledge the larger client—the community—and thus to consider the consequences of her tactics on the community's interests."¹² Here, the tension between duties to client and cause is not merely reconciled; it is obliterated.

This solution is problematic, however. At its worst, this way of framing the impact litigator's role would subjugate a client's autonomy to the lawyer's paternalistic interpretation of what's best for the client's community, as defined by the attorney. Viewed more generously, Rubenstein's vision of cause lawyering is not so different from the professional duty to justice. However, it fails to articulate two distinct sets of interests, which eliminates space for potential tension between them. Failing to distinguish the responsibility to the client and to the broader community accelerates the danger of losing sight of the client's interests.

¹² William B. Rubenstein, "Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns," *Yale Law Journal* 106 (1997): 1653.

Ethical Analysis

This paper has laid out the impact litigator's responsibilities to her client and to the cause. Some lawyers will recognize a duty to the client above all else, regardless of the impact on the social change agenda. Others will prioritize the larger effect on society, and responsibilities to the cause will trump those to the client. For lawyers inclined to the latter approach, this paper cautions against casually dismissing the client and his interests. The impact litigator's agenda of social change is critical and worthy of protection. However, this need not and ethically should not come at the expense of the client.

Impact litigators predominantly serve systemically disempowered communities, so they should not be in the business of further oppressing individuals from these communities, regardless of a litigator's good intentions. Rather than reinforcing power imbalances and a lack of voice, cause lawyers can use their position to empower. Though their cases are a powerful means of creating change for scores of people, this should not justify, in my opinion, anything less than the utmost respect for the individual client's interests.

The first step to achieving such an outcome is stating it. The distinction between the duties to client and cause, and the potential tension therein, must be recognized as a prerequisite for any ethical analysis. Lawyers should also be aware of the biases at play that can blur this distinction. Awareness may not eliminate biases but it helps keep them in check.

Strategies that impact litigators use at the outset of the attorney-client relationship can be directed toward identifying opportunities to improve the client's protections. For example, the impact litigator's greatest risk management tool in this area is the opportunity to select the client. The desired "impact" is set and then the ideal plaintiff is found, and parameters for an "ideal plaintiff" would include one whose goals are aligned with those of the lawyer. Once the potential plaintiff/client is identified, the lawyer should engage in full disclosure at the outset as to her own goals. The more transparent she is regarding her objectives, their relative priority, and how she would handle potential conflicts between her client's interests and those of the cause, the better. This process should involve continuous self-reflection to ensure it is protective of the client's autonomy.

Conclusion

Impact litigation serves an important role in protecting and advancing social values. This paper does not intend to denigrate cause lawyers or weaken their ability to achieve their objectives. However, cause lawyering should not seek to make legal progress for marginalized communities at the expense of the voice and autonomy of individuals within such communities. The ethical analysis presented here regarding the tension between an impact litigator's duties to her client and to the cause reveals the strains cause lawyering places on traditional client-centered notions of lawyering. Although this client-centered conception of lawyering may, in truth, be too narrow to fully encompass the array of legal professions and the scope of concerns lawyers address, it is useful for capturing the value of the individual client's right to justice and the client's right to a voice in the legal system. Shrinking this right should be a step taken with great caution, and impact litigators should be conscious of the potential costs to the clients they serve.

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Medical Papers

Introduction

BY JEFFREY R. BOTKIN

Dr. Sara Goldkind and I had the privilege of working with 13 extraordinary medical students from across the U.S. and one from Germany during the 2018 FASPE Medical Fellowship Program. This highly select group proved to be insightful, passionate about ethics, and fully engaged with their colleagues and the historical learning environments offered by FASPE. The focus of the experience is, of course, the study of professional ethics. For medical students, this includes the study of ethics in the practice of medicine, biomedical research, and public health.

The historical context of Nazi Germany challenges us to understand how it was that physicians who were dedicated to health and healing and to the science of medicine could become committed designers and participants in mass murder on a massive scale. The primary focus of our attempts at understanding this were the perpetrators, with the notion that without an understanding of our own ethical concepts, strengths, and vulnerabilities, we too could be swept up by misguided philosophies to commit small and large atrocities.

As instructors, our task was to prepare a curriculum that addressed contemporary ethical issues in medicine with roots or relevance to Nazi medicine. Using primarily a case-based approach, the FASPE Medical program's seminars dealt with issues such as the nature of a profession, the role of race and heritage in healthcare, the value of human life, the dual obligations of physicians in war, the allocation of scarce resources, the emotions that arise in patient care, speaking truth to power, and the ethical conduct of biomedical research. In interdisciplinary sessions with the Seminary Fellows, we explored ethical issues at the end of life and the enduring question of why evil exists.

Once home, the Medical Fellows were invited to submit a short essay on a topic of their choosing. Not surprisingly, given the extraordinary quality of this group of Fellows, we received thoughtful essays across a broad range of topics from a consideration of how to approach parents who are skeptical of vaccines to an exploration of the role of disgust to the ethics of naming diseases after physicians in

Germany who were implicated in the Holocaust. Here we present three of the papers we received.

Kelly Schuering's beautifully written piece addresses the role of ethical reflection and moral communities in the training of physicians, a topic directly relevant to the FASPE enterprise. Melissa Lavoie's thoughtful essay addresses the concept of futility when managing patients with severe anorexia nervosa. Is it ever appropriate to transition such patients into palliative care rather than persist with treatments and hopes of recovery? And Amelia Haj adeptly explores the myriad ethical issues that will arise as medicine comes to rely ever more heavily on artificial intelligence for the purposes of diagnosing disease.

On behalf of Sara Goldkind and myself, it was a privilege to explore the complicated and important issues with these talented young scholars and future leaders.

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The Moral Community of Medicine and Its Role in Medical Training

BY KELLY SCHUERING

Physicians are given a privileged position in society to serve people at their most vulnerable, openly discuss patients' intimate problems, and perform acts that are otherwise considered taboo. However, with this privilege comes societal expectations that the physician subscribe to higher ideals of the greater good and be dedicated to something other than self-interest: namely the welfare of the patient.¹ Medicine is thus an inherently moral enterprise, which—as medical ethicists Edmund Pellegrino and David C. Thomasma write in their book, *The Virtues in Medical Practice*—combined with physicians' shared moral purpose of “healing, helping, and caring in a special kind of human relationship,” binds physicians together into a moral community.² Because of the trust placed in physicians, society is rightly interested in the character of physicians as reflected in the belief that “only a good person can be a good physician.”³

However, medicine and the moral community of physicians are not incorruptible, as revealed, among other instances, by the role that physicians played in euthanasia and killing during the Holocaust, the infamous Tuskegee experiment, and the financial conflicts of interests that exist today in the provision of care. In fact, the statement cited above on what makes a good physician was made by Rudolf Ramm, a leading Nazi ethicist, who through his influential medical ethics textbook spread the Nazi ideals of the authoritarian physician, the unequal value of humans, racial purity, and an overarching emphasis on a particular notion of public health.⁴ The history of physicians abusing their power points to the need for a continued emphasis on ethics within the medical moral community and the need to develop not only medical competence but also strong morals in medical trainees in order to prepare them for

¹ Edmund D. Pellegrino and David C. Thomasma, *The Virtues in Medical Practice* (New York: Oxford University Press, 1993), 32.

² Pellegrino and Thomasma, 3 and 21.

³ Robert Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Harper Collins, 1986), 17.

⁴ Florian Bruns and Tessa Chelouche, “Lectures on Inhumanity: Teaching Medical Ethics in German Medical Schools Under Nazism,” *Annals of Internal Medicine* 166 (8) (April 18, 2017): 591-96. doi:10.7326/m16-2758.

their privileged role in society. Only by embracing its role as a moral community can medicine more clearly define its norms to prevent the moral drift that led to atrocities in the past, best meet the needs of current patients, and ensure an ethical future for medicine.

Promoting a more ethical medical community first requires agreeing upon what norms and virtues medicine should espouse. Throughout history, physicians have sought to formalize the ethical commitments of the profession through credos like the Hippocratic Oath. More recently, groups including the American Medical Association, American College of Surgeons, American Board of Internal Medicine, American College of Physicians, and the European Federation of Internal Medicine have each come out with ethics statements of their own.^{5,6,7} Generally agreed upon principles, including beneficence, non-maleficence, autonomy, and justice, predominate in discussions of biomedical ethics today.⁸ Numerous and varied ethical credos promote the primacy of patient concerns, medical competence, the just distribution of resources, respect for and collegiality with other medical professionals, cultural sensitivity, and full disclosure of conflicts of interests. Nevertheless, such codes of conduct and physicians' claims to moral grounding are not in and of themselves self-justifying. As Pellegrino and Thomasma write, they must be grounded in "something more fundamental, on a philosophy of medicine."⁹ Such a philosophy is still based upon general moral principles that are themselves subject to independent evaluation. Deciding upon the norms of medicine, therefore, also requires agreement upon acceptable moral standards.

As contemporary Western society has become more pluralistic, it has become increasingly challenging to agree upon one moral code of conduct within medicine due to competing values and beliefs. Throughout history, many have appealed to religious doctrine or human reason to ground their beliefs.¹⁰ Today, appeals are often made to other values, such as legality or efficiency, or in the case of medicine, the benefit to

⁵ American Medical Association, "AMA Code of Medical Ethics," accessed December 6, 2018, <https://www.ama-assn.org/delivering-care/ama-code-medical-ethics>.

⁶ "Statements on Principles," April 12, 2016, *American College of Surgeons*, accessed December 06, 2018, <https://www.facs.org/about-ac/s/statements/stonprin>.

⁷ American Board of Internal Medicine Foundation, American College of Physicians-American Society of Internal Medicine Foundation, European Foundation of Internal Medicine, "Medical Professionalism in the New Millennium: A Physician Charter," *Annals of Internal Medicine* 136 (3) (February 05, 2002): 243-46, doi:10.7326/0003-4819-136-3-200202050-00012.

⁸ Warren A. Kinghorn et al., "Viewpoint: Professionalism in Modern Medicine: Does the Emperor Have Any Clothes?" *Academic Medicine* 82 (1) (January 01, 2007): 40-45, doi:10.1097/01.acm.0000249911.79915.4d.

⁹ Pellegrino and Thomasma, 42.

¹⁰ Lauris Christopher Kaldjian, *Practicing Medicine and Ethics: Integrating Wisdom, Conscience and Goals of Care* (New York: Cambridge University Press, 2014), 105.

the patient.¹¹ However, the validity of these principles is still subject to evaluation, which inevitably occurs within the context of one's background and community. As a group of academic physicians outline in a 2011 article on professionalism in medical education, "virtues have to be generated within communities that articulate and sustain them within their histories, institutions, and with practical wisdom."¹² Alasdair MacIntyre, a leading moral and political philosopher, agrees, arguing further that moral traditions and moral reflection are inherently situated in a particular culture and history.¹³ The rise of new ethical approaches, such as feminist ethics, has challenged prevailing moral norms and led societies to question more broadly who should define morals and the moral life.¹⁴ Due to their privileged position in society, physicians have retained the ability to define their own ethical norms within the broader societal boundaries of the law as a distinct moral community.

Although it is important that physicians acknowledge their privilege in being able to establish their own ethical professional norms, they remain best suited to do so. Ideally, physicians share the same commitment to caring for patients and are best positioned to hold each other accountable through open, pluralistic dialogue. A community's influence on how moral questions are framed and the moral conclusions drawn by the individuals within it are usually tempered by a person's level of identification with that moral community.¹⁵ Physicians, in particular, usually strongly identify with the medical profession. Furthermore, the collegial, but specialized nature of medicine creates both a strong sense of accountability to other practitioners and a respect for the individual contributions and choices made by colleagues. This recognition of fellow physicians as moral agents is critical to their continued engagement with each other in working to define and enforce ethical norms. As peers working toward the common goal of the good of the patient, physicians are best positioned to question each other's moral reasoning and actions through open dialogue. These conversations can only be successful when the full range of perspectives held by physicians are encouraged and expressed, while the influence of moral communities outside of medicine are also acknowledged. Physicians must be open to dialogue and to engagement with different ideas in order to forestall the defensiveness that is all too often the starting point of conversations between those with opposing viewpoints today. As medical ethicist and physician Lauris

¹¹ Farr A. Curlin et al., "Religion, Conscience, and Controversial Clinical Practices," *New England Journal of Medicine* 356 (18) (May 03, 2007): 593-600, doi:10.1056/nejmc070628.

¹² Timothy P. Daaleman, et al., "Rethinking Professionalism in Medical Education Through Formation," *Family Medicine* 53 (5) (May 2011): 326.

¹³ Alasdair C. Macintyre, *After Virtue: A Study in Moral Theory* (Notre Dame, IN: University of Notre Dame Press, 1981).

¹⁴ Margaret Urban Walker, *Moral Understandings: A Feminist Study in Ethics* (New York: Oxford University Press, 2008).

¹⁵ Kaldjian, 113.

Kaldjian writes in his book, *Practicing Medicine and Ethics: Integrating Wisdom, Conscience, and Goals of Care*, “We should expect persons who make conscience-based claims to describe how their moral beliefs and commitments are related to their moral positions and choices.”¹⁶ Shifting the norm for dealing with ethical conflict towards ongoing conversation will lead to greater discernment and ultimately “the courage to be decisive without the pretense of being definitive.”¹⁷ Because ethics is situational and thus greatly influenced by the circumstances surrounding a dilemma, a willingness to refrain from definitiveness further contributes to a culture where dialogue is valued and encouraged.

Through open dialogue, individual medical practitioners are not only further formed themselves, but also contribute to the continued development of the wider medical moral community. As Kaldjian notes, “as the norms of society influence the development of an individual’s conscience, so also the words and actions of individuals sustain, challenge, or weaken the ethos of their community.”¹⁸ The tension and debate fostered by conflicting views can provide balance and prevent one idea or one individual’s claims from having a tyrannical hold on the community:

Moral communities provide socially sanctioned norms that are internalized within an individual’s conscience, creating an equilibrium between the moral values of the community and the moral values of the individuals. This places checks on individuals against the risk of moral self-delusion, even as it also allows individuals to challenge and sustain the reigning values of the community.¹⁹

Continued dialogue that acknowledges the principles outside of medicine upon which medical ethical beliefs and judgements are grounded is necessary to further individual formation and to refine the norms and values of the medical moral community. Only through this continual refinement can medicine reach its ultimate goal of achieving the best possible outcomes for patients.

Fostering open dialogue about ethical norms and conflicts requires having ethically-formed physicians who are willing to speak out and challenge prevailing views. Despite the ongoing struggle to ground medical ethics education in one particular approach, the fact that ethical training is incorporated into medical school curricula demonstrates that the medical field is generally committed to the ethical formation of

¹⁶ Kaldjian, 104.

¹⁷ Larry R. Churchill, “Conscience and Moral Tyranny,” *Perspectives in Biology and Medicine* 58 (4) (2015): 526-34, doi:10.1353/pbm.2015.0037 533.

¹⁸ Kaldjian, 114.

¹⁹ Kaldjian, 121.

future physicians.²⁰ Discussions of ethics can all too easily become stalled in semantics, and as new discoveries and new technology rapidly appear, along with their attendant ethical dilemmas, a return to virtue ethics may actually better serve society. Virtue ethics focuses on the character of a person performing an action rather than their duties or the consequences of their actions. As Pellegrino and Thomasma astutely comment, “the character of the physician is an irreducible factor in the healing relationship. How he or she interprets the moral principles, selects the values that will predominate, and shapes self-interest will be more important than how the moral principles are formulated or described.”²¹ The medical community and medical educators, in particular, must therefore recognize their role in character formation in addition to instruction in ethics.

One common objection to the need for ethical education among medical students is that individuals are already morally formed by the time they matriculate. This is undoubtedly true. Students are members of various familial, cultural, and/or religious communities that have shaped their individual views and values.²² Medical school admissions committees screen for qualities that are valued by the medical community like altruism, justice, and honesty. However, moral formation is a lifelong process; additional virtues can be fostered, and individuals must learn to apply old virtues to new situations. Students, in particular, are still malleable, especially with respect to the traits that will serve them as future physicians. As Pellegrino and Thomasma note, “What we can hope to teach in medical school are those virtues appropriate to medicine—those that make for a good physician judged in terms of the telos of medicine, that is, a right and good healing action for a particular patient.”²³ Despite coming to medicine with preexisting moral beliefs, medical students can and should develop morally throughout their training in order to be better equipped to manage the unique ethical challenges posed by medicine.

Trainee education must include formal instruction in medical ethics, for as Pellegrino and Thomasma say, ethics is ultimately “the only discipline that can place moral constraint on self-interest.”²⁴ Formal ethical curricula can help students recognize ethical issues or dilemmas, reflect critically on their own values, defend their reasoning for making certain choices, respond to challenging viewpoints, and foster self-criticism. However, formal training is not sufficient. At the time of the Holocaust, Germany had the most developed ethical instruction in medical schools worldwide.

²⁰ Joseph A. Carrese et al., “The Essential Role of Medical Ethics Education in Achieving Professionalism,” *Academic Medicine* 90 (6) (2015): 744-52, doi:10.1097/acm.0000000000000715.

²¹ Pellegrino and Thomasma, 29.

²² Kinghorn et al., “Viewpoint: Professionalism in Modern Medicine,” 41.

²³ Pellegrino and Thomasma, 176.

²⁴ Pellegrino and Thomasma, 38.

Physicians with strong ties to the Nazi party taught the curricula which emphasized the physician as a “health leader” responsible for the betterment of society through his contribution to racial purification.²⁵ This history again points to the need for pluralism within the moral medical community because, as psychiatrist Warren Kinghorn and his co-researchers discuss in their paper on developing trainee professionalism:

The risk of a student being influenced by particular moral traditions that did not undergird commonly held professional virtues such as altruism, justice, and honesty, would be mitigated by the ability of particular traditions to come into conversation with one another and by the deep inculcation in the virtues that many, if not most, other students would experience.²⁶

Though necessary for laying a foundation from which to approach ethical challenges, a formal ethics curriculum is far from sufficient to instill moral values in future physicians as evidenced by the Nazi regime.

Medical education should recognize and embrace the roles of narrative, emotion, humility, focused reflection, and maintaining engagement with outside moral communities in furthering the ethical formation of medical trainees. The humanities and narratives, in particular, highlight the interweaving of motivations, actions, and consequences.²⁷ Narratives help to refine one’s ethics, for as ontology philosopher Annemarie Mol argues in her book *The Logic of Care: Health and the Problem of Patient Choice*, “conflicting stories tend to enrich each other. And while adding up arguments leads to a conclusion, adding on stories is more likely to be a way of raising ever more questions.”²⁸ Through the use of narrative, individuals can come to better appreciate the shades of gray that color many ethical dilemmas today. Medicine must also recognize that emotions have a role to play in ethical formation. As psychologist Sidney Callahan argues in her chapter in *Medicine and the Ethics of Care*, “persons cannot engage in effective moral deliberation without activating their subjective responses of emotion, intuition, and imagination, all of which operate within the implicit assumptions and narratives of their communities.”²⁹ Beyond acknowledging emotions within the medical moral community, physicians can foster the emotion of

²⁵ Bruns and Chelouche, “Lectures on Inhumanity,” 593.

²⁶ Kinghorn et al., “Viewpoint: Professionalism in Modern Medicine,” 44.

²⁷ Kaldjian, 111.

²⁸ Annemarie Mol, *The Logic of Care: Health and the Problem of Patient Choice* (London: Routledge, 2011), 88.

²⁹ Sidney Callahan, “The Psychology of Emotion and the Ethics of Care,” in *Medicine and the Ethics of Care*, edited by Diana Fritz Cates and Paul Lauritzen (Washington D.C.: Georgetown University Press, 2002), 144.

care. Caring increases moral functioning by helping the physician to gather more information about people, the environment, and the relationships between the two to better inform ethical decisions.³⁰ However, engaging with various narratives and emotions is difficult without humility and an openness to change. Approaching ethical dilemmas with humility primes one, as Kaldjian says, to “learn from the experiences of others, acknowledge prejudices, and modify judgments in the light of more information or better insights.”³¹ If medicine, and in particular medical educators, were to more highly value narrative, emotion, and humility, it would help trainees to explore a wider range of viewpoints and new ideas that inevitably contribute to moral formation.

Encouraging trainees to reflect on their values and experiences can also further ethical formation. For many students, managing increasing patient loads and staying up to date with rapidly expanding medical knowledge limits time for reflection. Only with reflection, are students able to process the cognitive dissonance they may feel in seeing the discrepancies between the idealized medicine they have studied and the day-to-day realities of the wards. Without the chance to re-examine their values and the reasoning underlying their beliefs, people often change their beliefs in response to cognitive dissonance if they feel limited in the ability to change their behaviors.³² Medical schools can further students’ ethical formation by setting aside “dedicated time for trainees to debrief emotionally challenging situations, such as the death of a patient, and for reflection on positive and negative experiences and the implicit messages that contribute to the formation of professional identity,” write several academic physicians in a recent position paper by the American College of Physicians on the medical learning environment and professionalism.³³ By building this time into the curriculum, medical educators can instill in their students a sense of the importance of reflection, which will continue to benefit them as they progress in their careers as physicians.

Finally, maintaining meaningful relationships with moral communities beyond the medical community is important in helping medical trainees gauge how they are changing over the course of their studies and for providing a meaningful outlet for processing and reflection. Inhabiting roles outside of medicine also increases empathy; students can recognize parts of themselves and the people they care about in their

³⁰ Callahan, “The Psychology of Emotion and the Ethics of Care,” 153.

³¹ Kaldjian, 112.

³² Christopher R. Browning, “Revisiting the Holocaust Perpetrators. Why Did They Kill,” The Raul Hilberg Memorial Lecture, University of Vermont, Burlington, VT, October 17, 2011.

³³ Lisa Soleymani Lehmann, Lois Snyder Sulmasy, and Sanjay Desai, “Hidden Curricula, Ethics, and Professionalism: Optimizing Clinical Learning Environments in Becoming and Being a Physician: A Position Paper of the American College of Physicians,” *Annals of Internal Medicine* 168 (7) (April 3, 2018): 506-508, doi:10.7326/m17-2058, Appendix.

patients and thus be reminded of their common humanity. By providing additional points of view, these communities outside of medicine contribute to the pluralism that is so critical for continued ethical formation. These communities can also help students develop the critical virtues of temperance and practical wisdom. As Pellegrino writes in his article “Professionalism, Profession, and the Virtues of the Good Physician,” “The virtue-based physician is also compelled on the basis of virtues of parent and husband to be faithful to his commitments to his family, friends, and society. He would, however, recognize what the limits of legitimate self-interest are and when that set of interests should be set aside in the interests of his patient or vice versa.”³⁴ Having multiple roles to fill also allows a physician to find meaning in life outside medicine and may thereby reduce the sense of risk involved in speaking out about ethical considerations. Relationships beyond medicine remind physicians of the ultimate aim of medicine and of their shared humanity with patients.

In an opinion piece for *Academic Medicine*, physician Warren Kinghorn and his coauthors write that in order to develop a meaningful professionalism, ethics education should:

... embody an open pluralism, giving voice to diverse moral communities, encouraging critical self-exploration and discussion about the truth claims of these communities, and, if possible, facilitating the integration of students’ professional development with their ongoing participation in these communities.³⁵

Even when starting from an ideal, open environment, it can be a struggle for students to integrate their beliefs and actions. Only by approaching moral formation in multiple ways, including through encouraging open dialogue that values narrative, emotion, and humility, focused reflection, and participation in moral communities outside medicine, can medicine hope to achieve moral formation in trainees that actively impacts their day-to-day practice.

However, all of these efforts to improve moral formation will still have a limited impact if students do not have the opportunity to see their mentors actively apply ethical principles and if they have no chance to practice applying what they have learned themselves. Trainees are often more formed by what they actually observe while practicing medicine in clinics and on the wards than by what they are taught in the classroom. Students’ desires to perform well and be liked make them particularly susceptible to being influenced by their superiors. Studies like the Milgram

³⁴ Edmund D. Pellegrino, “Professionalism, Profession, and the Virtues of the Good Physician,” *The Mount Sinai Journal of Medicine* 69 (6) (November 2002): 378-84, 382.

³⁵ Kinghorn et al., “Viewpoint: Professionalism in Modern Medicine,” 40.

experiments have shown that conformity is a powerful force, especially within a hierarchical system.³⁶ Because students seek to identify with their superiors, they are particularly susceptible to following unethical instructions without pausing for further evaluation. Even when students know that what they are observing or are asked to do is morally wrong, “under the pressure to conform in order to succeed and not to imperil a career, even a virtuous student will need extra courage to resist,” note Pellegrino and Thomasma.³⁷ Especially in environments in which individuals know their performance is being assessed, human beings will tend to judge themselves by group norms and how others view them rather than against their own individual principles and standards. Basing one’s self-esteem on external evaluation has been shown to lead to a realignment of morals.³⁸ Furthermore, many students have limited prior clinical experience and may assume whatever they see modeled is the norm. In addition to witnessing various clinical approaches, students observe the words used, policies, practices, and institutional structures in clinical settings, and thus medical faculty members inevitably influence the ethical and moral development of their students by example alone. All too often students observe contradictions between what they have been taught about ethics and professionalism and what they observe in clinical practice. The negative effects of this “hidden curriculum” was recognized as early as 1994, when one study reported that 62 percent of medical students felt some of their ethical principles had eroded during the course of their training.³⁹ Recognizing and correcting the negative hidden curriculum observed by impressionable medical trainees is thus a critical step to forming ethical physicians.

Few clinical faculty members explicitly acknowledge being responsible for their students’ ethical formation. According to an American College of Physicians (ACP) position paper, in order to promote greater professionalism, “what is taught in the classroom must be reinforced and enhanced by what is practiced at the bedside,” especially as, “the intensity of medical training is a cultural immersion in which values are often communicated and adopted without adequate reflection and critique.”⁴⁰ For example, the emphasis on efficiency and dangerous levels of pride in professional skill and knowledge often conflicts with the primacy of what is best for

³⁶ Stephen D. Reicher, S. Alexander Haslam, and Joanne R. Smith, “Working Toward the Experimenter: Reconceptualizing Obedience Within the Milgram Paradigm as Identification-Based Followership,” *Perspectives on Psychological Science* 7 (4) (June 29, 2012): 315-25, doi:10.1177/1745691612448482.

³⁷ Pellegrino and Thomasma, 177.

³⁸ Browning, “Revisiting the Holocaust Perpetrators. Why Did They Kill.”

³⁹ Chris Feudtner, Dimitri A. Christakis, and Nicholas A. Christakis, “Do Clinical Clerks Suffer Ethical Erosion? Students’ Perceptions of Their Ethical Environment and Personal Development,” *Academic Medicine* 69 (8) (1994), doi:10.1097/00001888-199408000-00017.

⁴⁰ Lehmann, Sulmasy, and Desai, “Hidden Curricula, Ethics, and Professionalism,” 507.

the patient.⁴¹ How students see these conflicts resolved affects their sense of medical norms and inevitably affects their moral formation, especially when time for reflection is not embedded into their training. Alternately, witnessing strong professionalism and ethical behavior can be just as influential. The ACP paper continues, “If they participate in a culture of compassion, curiosity, respect, and empathy, they are more likely to adopt these virtues, especially when they are identified as explicit values and expectations.”⁴² Physicians must take responsibility for modeling professionalism to better align the hidden curriculum with formal instruction in order to strengthen the medical moral community and foster the ethical development of trainees.

Ethical formation occurs within a community that provides guidelines and feedback; the medical moral community is no exception. Daaleman and his co-authors describe the ideal formation of a physician as the “ongoing integration of an individual who grows in self-awareness, with a group of companions who share both their interior and outwardly lived experiences as they participate in the common mission of the community.”⁴³ This statement succinctly expresses the reflection, action, and shared mission that must all coexist to define and advance sustainable ethics within a community. The medical community needs to more fully embrace its role as a moral community in order to best serve patients and train the next generation of ethical providers. Such efforts would strengthen not only trainees, but current physicians as well. Daalemen, et al. write:

Formation—medical learners, faculty mentors discovering who they are becoming as they move along together in lives of service within the environment of the medical home—offers a way to awaken, enrich, and sustain the virtues of both emerging and established physicians, and their capacities of caring, for the long haul.⁴⁴

This formation is critical to all in the moral medical community in order to ensure that medicine is able to confront current and future ethical challenges. As Pellegrino and Thomasma note:

Internalization of the right and the good through training and disposition will not only ensure application of the meaning of moral rules to life circumstances but will also lead to refinements of the moral principles and even to new moral theories that will try to resolve the new issues of the day.⁴⁵

⁴¹ Bruno Bettelheim, Afterword to *Auschwitz: A Doctor's Eyewitness Account* by Robert Jay Lifton (New York, NY: Arcade Publishing, 1960).

⁴² Lehmann, Sulmasy, and Desai, “Hidden Curricula, Ethics, and Professionalism,” Appendix.

⁴³ Daaleman et al., “Rethinking Professionalism in Medical Education Through Formation,” 327.

⁴⁴ Daaleman et al., “Rethinking Professionalism in Medical Education Through Formation,” 328.

⁴⁵ Pellegrino and Thomasma, 29.

Both trainees and current physicians can contribute to and learn from a stronger moral community within medicine for the good of current and future patients.

Only by banding together and embracing their role as a moral community can physicians and medical trainees more clearly define their ethical norms, advance professionalism in the day-to-day practice of medicine to better serve patients, and prepare leaders in health care to confront new ethical issues that will inevitably arise in the future. As Pellegrino and Thomasma conclude, physicians must:

...for the first time in medical history establish themselves as a true moral community, as a group of persons dedicated to something other than their own self-interest, as a group that recognizes its responsibility to support the ethical members of its company, to repel or reject those who are not faithful to the ethical bonds that unite the community, and to advocate the cause of the sick, even when society and politics militate against it. These duties flow not only from the characteristics of the healing community, ... but also from the qualities of professional commitment.⁴⁶

This is medicine's main hope to resist the small compromises that subtly and incrementally have led to gross human rights violations in the past. Physicians and medical trainees must respond to the faith that society has placed in them by embracing a stronger emphasis on ethics to best care for patients both now and in the future.

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⁴⁶ Pellegrino and Thomasma, 39.

Palliative Care and the Concept of Futility in Severe Anorexia Nervosa

BY MELISSA LAVOIE

Anorexia nervosa has the highest mortality rate of any mental illness.¹ A diagnosis of anorexia requires several features: restricted energy intake leading to low body weight, poor insight or perceptions surrounding body weight or shape, and either a fear of fatness or behavior that interferes with weight gain.² Malnutrition in patients with extreme anorexia affects nearly every organ system, causing fractures, liver failure, and cardiac arrhythmias. Severely malnourished patients with anorexia require emergency treatment to prevent sudden death from cardiac complications and to normalize life-threatening electrolyte disturbances. Individuals with anorexia are nearly six times more likely to die than their peers without the disorder.³

Case reports have described patients with severe, unremitting anorexia nervosa who were withdrawn from involuntary treatment and transitioned to palliative care.^{4,5,6} Often appealing to medical notions of futility, proponents of this approach have argued that the prognosis is poor for patients with severe anorexia who have already undergone multiple treatment attempts. They have also asserted that some patients with severe anorexia nervosa have the capacity to decide whether to receive life-sustaining care, and that involuntary treatment may violate autonomy. One report describes a 30-year-old woman, identified as Ms. A.⁷ Ms. A presented to an eating disorder clinic at a height of 5'4", a weight of 64 pounds and a body mass index

¹ Frédérique Smink, Daphne Van Hoeken, and Hans W. Hoek, "Epidemiology of Eating Disorders: Incidence, Prevalence, and Mortality Rates," *Current Psychiatry Reports* 14 (4) (2012): 406-14.

² American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Arlington, VA: American Psychiatric Publishing, 2013).

³ Smink, Van Hoeken, and Hoek, "Epidemiology of Eating Disorders."

⁴ Amy Lopez, Joel Yager, and Robert Feinstein, "Medical Futility and Psychiatry: Palliative Care and Hospice Care as a Last Resort in the Treatment of Refractory Anorexia Nervosa," *International Journal of Eating Disorders* 43 (4) (2010): 372-377.

⁵ Robin Mackenzie, "Ms. X: A Promising New View of Anorexia Nervosa, Futility, and End-of-Life Decisions in a Very Recent English Case," *American Journal of Bioethics* 15 (7) (2015): 57-58.

⁶ Joseph O'Neill, Tony Crowther, and Gwyneth Sampson, "A Case Study: Anorexia Nervosa. Palliative Care of Terminal Psychiatric Disease," *American Journal of Hospice and Palliative Medicine* 11 (6) (1994): 36-38.

⁷ Lopez, Yager, and Feinstein, "Medical Futility and Psychiatry."

(BMI) of 10.9.⁸ She was diagnosed with anorexia nervosa at age 19 and had undergone multiple prior unsuccessful treatment attempts. She was admitted to the hospital from the clinic, and after medical stabilization, she refused to continue treatment. Her team concluded that her disorder was unlikely to respond to further treatment. Rather than pursue involuntary treatment, the team, in consultation with the hospital ethics committee, decided to transition her to a palliative care approach. She was told that she would not be asked to participate in any treatment she did not want, and she was discharged from the hospital at a weight of 85 pounds and a BMI of 14.6. At home, Ms. A received weekly visits from a palliative care nurse. She died several months later in inpatient hospice due to complications from her anorexia.

Had Ms. A not entered palliative care and instead received treatment in an inpatient eating disorder program, she would have likely been placed on a weight gain protocol. As part of that protocol, programs typically require patients to eat a prescribed amount of food at meals. If patients fail to receive adequate calorie intake through meals, they may eventually receive nutrition through a nasogastric tube.

I argue here that the concept of futility, which is used in medicine to assess the potential benefit of treatment, is ethically unsubstantiated as applied to even the most severely ill patients with anorexia. Physicians have a moral obligation to pursue involuntary treatment for patients with life-threatening anorexia nervosa who refuse care. I first examine the concept of futility in general. I then describe several challenges with applying the concept of futility to anorexia nervosa. Lastly, I discuss the risks of extending the notion of futility even to specific cases where the treatment team might feel the patient has the capacity to refuse treatment and the prognosis is poor. Here I also refer to statements made by Nazi physicians and even Adolf Hitler himself, which serve as sobering reminders of the danger of deeming psychiatric treatment futile for particular patients. Nazi physicians claimed to be able to determine with complete certainty which mentally ill patients were “incurable,” and these claims masked a deep-seated disgust towards patients whose lives they saw as worthless.

The medical literature has coalesced around three broad categories of medical futility: physiological, quantitative, and qualitative.⁹ Physiologically futile interventions have no chance of being effective. The use of antibiotics (which can only treat bacterial infections) for viral infections is an example of physiological futility. Quantitative futility applies to cases where the *likelihood* that an intervention will benefit a

⁸ A BMI between 18.5 and 25 is considered healthy, and a BMI below 15 is considered extreme anorexia, the most severe subtype of the disorder.

⁹ Thaddeus Pope, “Futility,” in *Guidance for Healthcare Ethics Committees*, edited by D. Micah Hester and Toby Schonfeld (Cambridge, UK: Cambridge University Press, 2012): 88-97.

patient is exceedingly poor, whereas qualitative futility applies to those situations where the *quality* of the benefit the patient will receive from a particular intervention is exceedingly poor.

Of these categories, bioethicist and psychiatrist Cynthia Geppert argues that only qualitative futility could conceivably apply to severe anorexia nervosa.¹⁰ Malnourishment is not physically irreversible and even severely starved patients remain physiologically able to respond to refeeding. Nor does quantitative futility apply. Geppert refers to a 2012 study which compared 41 anorexia patients with the most severe levels of malnutrition and an average BMI of 10.1 to 443 less malnourished patients with less severe anorexia nervosa.¹¹ The authors found that compared to the less malnourished patients, seven percent of the patients with severe malnutrition died over a six-year period (versus 1.2 percent in the less severe group) and 41 percent recovered (versus 62 percent in the less severe group). While the prognosis for patients with the most severe form of anorexia is grimmer than for those with more mild manifestations of the disorder, a disease that over two fifths of patients recover from within six years falls far short of any standard that has been used in medical care for quantitative futility.

Qualitative futility, on the other hand, applies when treatment is unlikely to provide an adequate quality of life or the harms of treatment outweigh the benefits. Some physicians have argued that qualitative futility may apply to certain cases of anorexia where the patient feels her quality of life is so poor that continuing life-sustaining treatment is not worthwhile.¹²

Anorexia is marked by poor insight and judgment relating to weight, body image, and eating. It therefore becomes ethically problematic to assume or conclude that patients suffering from the illness retain intact decision-making capabilities with regards to anorexia treatment. One of the criteria given for anorexia in *the Diagnostic and Statistical Manual of Mental Disorders 5* (DSM-5) (the standard manual used by mental health professionals to diagnose and assess mental illness) entails “disturbance in the way one’s body weight or shape is experienced, undue influence of body shape and weight on self-evaluation, or persistent lack of recognition of the seriousness of the current low body weight.”¹³ Patients with anorexia may be

¹⁰ Cynthia Geppert, “Futility in Chronic Anorexia Nervosa: A Concept Whose Time Has Not Yet Come,” *American Journal of Bioethics* 15 (7) (2015): 34-43.

¹¹ Daniel Rigaud, Isabelle Tallonneau, Marie-Claude Brindisi, and Bruno Verges, “Prognosis in 41 Severely Malnourished Anorexia Nervosa Patients,” *Clinical Nutrition* 31 (5) (2012): 693-698.

¹² Joel Yager, “The Futility of Arguing About Medical Futility in Anorexia Nervosa: The Question Is How Would You Handle Highly Specific Circumstances?” *American Journal of Bioethics* 15 (7) (2015): 47-50.

¹³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*.

convinced they are overweight when in fact they are severely underweight. Moreover, they may not appreciate the serious medical complications associated with low body weight. While patients with anorexia may retain the capacity to make other types of medical decisions, their insight and judgment surrounding weight is often so impaired that it renders them incapable of adequately assessing the risks and benefits of eating disorder treatment.

Furthermore, research has suggested that malnutrition itself inhibits decision-making capacity and worsens symptoms of anorexia. The Minnesota Starvation Study from 1945-46 remains one of the most detailed investigations into the impact of malnutrition on psychological functioning. As the previously healthy participants in the program lost up to a quarter of their body weight on a calorie-restricted diet, they exhibited behavior patterns often seen in anorexia. They became preoccupied with food, engaged in complex food rituals, and withdrew socially.¹⁴ They also developed misperceptions relating to body size, including overestimating the width of their own faces.¹⁵ Importantly, these abnormalities tended to resolve with weight normalization.

The Minnesota Starvation Study illustrates that starvation impairs thinking, and that for severely malnourished patients weight restoration is a critical step in improving insight. While allowing patients to pursue a palliative care approach may appear to be more consistent with the value of autonomy, paradoxically, refeeding enables patients to regain their decision-making capacity.

Some of the patients described in the literature who received palliative care for chronic anorexia nervosa do not appear to meet the criteria for the capacity to refuse eating disorder treatment. Ms. A, the patient who received palliative care for her eating disorder, refused to sign a “Do Not Resuscitate” order because she did not believe she would die. Formal assessments of medical decision-making capacity typically examine the patient’s understanding of her condition and the risks and benefits of various treatment options. Given that Ms. A did not believe her eating disorder would lead to her death, she likely did not appreciate the severity of her condition and the harms associated with treatment refusal. This raises questions about her capacity to refuse care.

What appears to be treatment unresponsiveness may also represent poor access to high-quality, evidence-based care. Many levels of care and approaches to anorexia treatment exist, and numerous programs utilize approaches supported by little or no

¹⁴ Leah Kalm and Richard Semba, “They Starved So That Others Be Better Fed: Remembering Ancel Keys and the Minnesota Experiment,” *The Journal of Nutrition* 135 (6) (2005): 1347-1352.

¹⁵ Leah Kalm and Richard Semba, “They Starved So That Others Be Better Fed.”

evidence.¹⁶ So, while a patient who has not recovered after numerous treatment programs may seem treatment-resistant, she might also simply have yet to receive the most appropriate care. This is different from fields such as oncology, where large clinical trials have evaluated the efficacy of treatments, and the protocols for chemotherapy are more similar across institutions. A woman with a history of anorexia writes in *The American Journal of Bioethics*:

In my case it was more than 12 years before I began to recover, and I experienced numerous failed interventions ... including behavior modification (a reward/punishment system), Freudian, group, individual, occupational, and cognitive behavioral therapy. The successful treatment program was far more comprehensive than any I had previously experienced.”¹⁷

With such a wide range of treatment approaches in use and variable access to quality care, it is unlikely that any patient has exhausted all the options available.

Given the severity of impaired thinking in patients with anorexia, it is important not to accept as fact statements from patients about the hopelessness of treatment. Patients with anorexia often claim that their prognosis is poor and that future treatment would be useless. A study of physician aid in dying in the Netherlands found that a patient’s feeling of hopelessness was one of the most important criteria affecting a physician’s perception of the appropriateness of euthanasia.¹⁸ Christopher Williams, a researcher at the University of Leeds, writes in *The BMJ*, “When low weight levels are reached, staff may accept at face value statements that previous treatments have been ineffective, or assume that no other treatments will be effective in the future, and therefore cease active treatment for a distressed patient who is not improving.”¹⁹ It is crucial for clinicians to understand that a patient’s expression of hopelessness may not be rooted in clinical reality.

Joel Yager, a psychiatrist and eating disorder specialist at the University of Colorado, has suggested that there are certain cases in which palliative care is appropriate for

¹⁶ Erica Goode, “Centers to Treat Eating Disorders Are Growing, and Raising Concerns,” *The New York Times*, March 14, 2016, <https://www.nytimes.com/2016/03/15/health/eating-disorders-anorexia-bulimia-treatment-centers.html>.

¹⁷ Cushla McKinney, “Is Resistance (N)ever Futile? A Response to ‘Futility in Chronic Anorexia Nervosa: A Concept Whose Time Has Not yet Come’ by Cynthia Geppert,” *American Journal of Bioethics* 15 (7) (2015): 53-54.

¹⁸ Alan Ogilvie and SG Potts, “Assisted Suicide for Depression: The Slippery Slope in Action?” *The BMJ* 309(6953) (1994): 492-493.

¹⁹ Christopher Williams, “Does Palliative Care Have a Role in Treatment of Anorexia Nervosa? We Should Strive to Keep Patients Alive,” *The BMJ* 317 (7152) (1998): 195-196.

patients with anorexia. He writes that he remains “highly suspect of arguments that (even if everyone could agree on a definition) considerations of ‘futility’ might never ever be suitable for a given patient.”²⁰ Yager describes severely malnourished patients who expressed an enduring wish to discontinue treatment and consistently asserted that continued treatment was certain to do more harm than good. They had failed to recover after years of therapy and numerous inpatient admissions for anorexia. Yager asserts that these patients were able to separate their beliefs about quality of life and the costs and benefits of treatment from thoughts induced by the eating disorder itself.

I argue above that the impaired insight and judgment caused by anorexia, the wide range of approaches to anorexia treatment and poor access to care, and the challenges of distinguishing treatment-unresponsiveness from patient hopelessness make it unethical to discontinue life-sustaining care in most if not all eating disorder patients. However, even if a patient meets Yager’s description of someone with an enduring opposition to treatment and a clear understanding of its risks and benefits, making these decisions remains morally problematic.

There is no evidence, expert consensus, or clinical guideline that would enable psychiatrists to determine whether or not a patient is exceedingly unlikely to recover from severe anorexia.²¹ This makes seemingly objective prognostic assessments vulnerable to value judgments about the types of lives that are worth living. These kinds of value judgments played a central role in claims by Nazi physicians that certain conditions were incurable.

Alfred Hoche and Karl Binding’s 1920 book *The Permission to Destroy Life Unworthy of Life* illustrates the tendency of Nazi physicians to invoke absolute prognostic certainty when sending patients to be murdered. Hoche, a Nazi psychiatrist, described a concept of “mental death” in which individuals with mental illness were considered “human ballast.”²² About these patients he wrote, “the physician has no doubt about the hundred-percent certainty of correct selection” and “proven scientific criteria” to establish the “*impossibility of improvement* of a mentally dead person.”²³ He expressed a completely unsubstantiated claim about the physician’s ability to assess a patient’s prognosis with regards to mental illness, a claim that would be unjustified even today. Entangled with this “medical hubris,” as psychiatrist and

²⁰ Joel Yager, “The Futility of Arguing about Medical Futility in Anorexia Nervosa.”

²¹ Cynthia Geppert, “Futility in Chronic Anorexia Nervosa.”

²² Robert Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Harper Collins, 1986), 47.

²³ Lifton, 47.

author Robert Jay Lifton describes it, was the Nazi biomedical worldview that killing mentally ill individuals was necessary for the health of the *Volk*.²⁴

Hitler invoked Hoche's belief in the "impossibility of improvement" in his "Führer Decree" of 1939, in which he wrote: "Reich Leader Bouhler and Dr. Brandt are charged with the responsibility for expanding the authority of physicians ... to the end that patients considered incurable according to the best available human judgment of their state of health, can be granted a mercy death."²⁵ While not expressing the same degree of medical hubris as Hoche, Hitler asserted that some patients are incurable. Yet, as with Hoche, this belief is inseparable from his vision for strengthening the *Volk*. Both men made disingenuous claims of medical authority to promote eugenic policies while masking their disgust towards those whose lives they considered worthless.

As Hoche and Hitler's words demonstrate, the concept of qualitative futility carries with it an intrinsic danger: assertions of futility may easily stem from judgments about which lives have value. In the case of psychiatric illness, this risk looms particularly large. Qualitative futility requires consideration of a patient's quality of life, an inherently subjective task that is difficult to separate from value judgments. Patients with mental illness face continued stigma and marginalization. That there is no evidence base that could inform a conclusion of qualitative futility in anorexia makes these conclusions even more morally problematic. While anorexia is a life-threatening condition, most patients survive and many recover. Even those who do not recover still lead lives worth living. Physicians caring for patients with severe anorexia should proceed from that standpoint and engage their patients in life-saving treatment with the goal of eventual recovery.

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²⁴ Lifton, 47.

²⁵ Lifton, 63.

Artificial Intelligence and Physician Conscience

BY AMELIA HAJ

In viewing the crimes of Nazi-era physicians, it is easy to find ourselves passing judgment. It is difficult to imagine any but the most depraved doctors willingly participating in murdering the disabled, experimenting on and torturing innocents, and supporting a regime that worked tirelessly to exterminate entire swaths of the population. No authority in this day and age, we think, could possibly compel us to set aside our morals so effortlessly. In the decades since the 1930s and 1940s, the practice of medicine has changed dramatically: advances in medical knowledge and in standards of patient-physician interaction have both empowered patients to be active participants in their care and have also created expectations of near perfection in physicians' diagnostic and treatment abilities. In our ongoing effort to further improve our standards of care, artificial intelligence (AI) software is being developed that can in some cases outperform physicians, and a future in which doctors' actions are guided by computerized algorithms no longer seems fantastical. Here, I argue that modern day physicians face a far more insidious, well-intentioned authoritative threat than did their Nazi-era counterparts: the gradual incorporation of AI into medical diagnostics and decision-making, a shift that will require physicians to carefully examine the role of their own consciences in their daily work to a greater degree than they already do.

Artificial Intelligence and Medicine

At its most basic, a medical diagnosis carried out by a physician could be said to rely on algorithms of a sort: a patient's symptom(s) or complaint triggers a series of questions, each leading the clinician down a path to a diagnosis and subsequent treatment. Years of study go into developing an understanding of these algorithms and learning when to apply them. Then, with experience, physicians can go on to gain a deeper understanding of the population they treat and can begin to account for less tangible factors, such as minor, seemingly irrelevant details in a patient's history, subtle changes in body language, or an unusual blip on a scan. It is these intangibles, this "gut sense" attained after seeing hundreds of cases, that make physicians more

than simply mouthpieces for medical textbooks. Anyone with enough coding skills to write a series of if/else statements could develop a tool that would roughly approximate the stepwise process used by a clinician to determine the cause of a symptom such as chest pain, for instance. Only in recent years, however, has software engineering become sophisticated enough to begin to dynamically adapt to new information much as the human brain would.

Many definitions of artificial intelligence (AI) exist, but all converge around the use of software that can mimic human decision-making. Simpler forms of AI usually rely on convoluted decision trees, but machine learning, a more sophisticated subtype of AI, incorporates the ability to learn by recognizing patterns in datasets. Deep learning is a subcategory of machine learning that trains artificial neural networks on large datasets, so that these networks then emerge with the ability to look at and interpret documents and images, much as humans can learn to recognize patterns without a conscious awareness of having learned discrete facts. Incredibly, and somewhat troublingly, a neural network cannot provide clear step-by-step rationales for its decisions. It may be able to accurately identify photos of chickens, say, and you could tease apart the factors it weighed to determine what it considered most important in identifying a particular bird as a chicken, but it could not provide you with a protocol for improving your own ability to distinguish chickens from parakeets.

Artificial intelligence is already seamlessly integrated into our lives. Individualized Netflix suggestions, tailored Google search results, and optimized driving routes on Google Maps are all driven by AI. Smart assistants such as Siri and Alexa use AI to understand our verbalized demands, and dating sites such as Hinge are now exploring the use of machine learning to improve their suggestions. Far from being a futuristic prospect, our actions and beliefs are already guided and shaped by decisions made by computer algorithms and neural networks.

Researchers have, of course, already begun to train machine learning software on medical datasets. A group of dermatologists published a letter in the journal *Nature* in 2017 describing their use of a deep neural network to classify photographs of skin lesions as either benign or malignant.¹ On average, the neural network outperformed dermatologists, suggesting that the technology has the capacity to very quickly and accurately reach levels of mastery in skills that humans take years to learn to a lesser degree of accuracy. Some have gone so far as to assert that certain tasks, especially those requiring image analysis, will soon be taken over entirely by deep learning

¹ Andre Esteva, et al., “Dermatologist-Level Classification of Skin Cancer with Deep Neural Networks,” *Nature* 542 (7639) (2017): 115–18, doi:10.1038/nature21056.

algorithms, as physician and author Siddhartha Mukherjee describes in his 2017 piece on the subject for *The New Yorker*.²

There are many other avenues for artificial intelligence to become integrated into medical practice. The broad movement towards using electronic health records (EHRs) creates an obvious opening for the use of natural language processing software, which can “understand” human-written language, to analyze and form recommendations based on patterns in patients’ written medical records. Indeed, researchers have already explored the use of deep neural networks for earlier prediction of diseases and for predicting events relevant to hospital performance metrics, such as hospital readmissions. Some have suggested using AI technologies to assist patients with dementia, and others make the case for developing AI tools that can approximate the decisions incapacitated patients would have made had they still possessed all their faculties in order to ease the difficulty of relying on surrogate decision makers. Given the integration of AI into other areas of our lives and the advances in its use in medical contexts, it is reasonable to expect that we will increasingly see its use for medical purposes in the coming years.

Ethical Concerns

Many of the ethical considerations surrounding the use of AI in medicine center on the largely “black box” nature of machine learning software. Without knowing how decisions are being made, we run the risk that AI tools will unwittingly perpetuate and amplify human biases based on the datasets that are entered by humans into the software. One of the most oft-cited examples of this is the use of risk-assessment tools by criminal justice systems to predict the likelihood that a person convicted of a crime will reoffend. In an investigation conducted by the news site ProPublica, these algorithms were nearly twice as likely to incorrectly predict that black defendants would reoffend than white defendants.³ Remarkably, the algorithms did not use direct data about the races of the individual defendants, but rather relied on defendants’ answers to a series of questions, demonstrating that bias can still emerge even in scenarios that appear to be deliberately neutral. It is not difficult to imagine machine learning software intended to predict the best individualized treatment plan for a particular condition inadvertently exacerbating healthcare disparities along racial or health literacy lines.

² Siddhartha Mukherjee, “A.I. Versus M.D.,” *The New Yorker*, June 19, 2017, www.newyorker.com/magazine/2017/04/03/ai-versus-md.

³ Julia Angwin, et al., “Machine Bias,” *ProPublica*, May 23, 2016, www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

Sometimes, algorithms can simply misinterpret the information they are given, with potentially devastating consequences. In one striking example, a machine learning tool was trained to predict the risk of a patient dying of pneumonia and offer a recommendation as to whether the patient should be treated as an inpatient or whether he/she could safely be treated as an outpatient.⁴ Paradoxically, the tool determined that pneumonia patients who also suffered from asthma had a considerably lower risk of death and recommended that they be treated as outpatients. In reality, such patients are generally at a much higher risk of death and more consistently receive ICU levels of care, and as a result ultimately have better outcomes. This led the algorithm to the erroneous (and circular) conclusion that because this subset of pneumonia patients generally had good outcomes, they could be treated safely as outpatients. The researchers in this study noted that because they used an “intelligible” machine learning tool to predict patient outcomes, they were able to identify the software’s reasoning; had the researchers used a neural network, it would have likely come to the same conclusions, but in a more opaque fashion, making it much more difficult for the researchers to identify the source of the error.

The competing motivations of AI software creators, buyers, and users are also an important consideration.⁵ Even though we generally trust them to have their patients’ best interests in mind, physicians are not, of course, flawlessly unbiased actors; employers’ expectations of profits and physicians’ fears of malpractice lawsuits can often lead to unnecessary testing and overtreatment of conditions. In theory, AI could be taught to neutralize motivations that threaten to compromise patient care, but in a profit-driven healthcare system, it is reasonable to assume that the software employed may reflect motives beyond simply improved patient care.

Conscience and Authority in Medical Decision-Making

A future in which AI software governs a physician’s every move is not on the horizon quite yet. The idea of such an extreme, however, offers an opportunity to explore how physicians should respond in situations in which their authority is supplanted by a supposedly superior, yet still fallible, authority. To develop a framework for how physicians can navigate this hypothetical new world, we must first establish how to determine whether an authority is legitimate and what this means in a medical

⁴ Rich Caruana, et al., “Intelligible Models for HealthCare: Predicting Pneumonia Risk and Hospital 30-Day Readmission,” *Proceedings of the 21th ACM SIGKDD International Conference on Knowledge Discovery and Data Mining - KDD '15*, Sydney, Australia, August 10-13, 2015, doi:10.1145/2783258.2788613.

⁵ Danton S. Char, et al., “Implementing Machine Learning in Health Care—Addressing Ethical Challenges,” *New England Journal of Medicine* 378 (11) (2018): 981–983, doi:10.1056/NEJMp1714229.

context and then identify how an individual physician's conscience operates in normal medical settings.

The concept of authority is typically defined within political and legal contexts, but it is relevant to attempt to apply these definitions to medicine, which is notoriously hierarchical. The word "authority" can be used in a theoretical sense to describe someone who is an expert, and it can be used in a practical sense to describe a person or entity that has the right and power to guide and control a group of people. There are different views on how to determine whether a practical authority is legitimate, but for the purposes of this discussion, I will define a legitimate authority as one that is "right, justified, [and] supported by good reasons"⁶ and that carries some requirement that it be obeyed, even though obedience may be inconsistently enforced.

In an ideal 21st-century patient-doctor relationship, the physician acts as a theoretical authority, but the practical authority is distributed across the patient, the physician, and a set of collectively-held expectations that the standard of care for the patient's situation will be available and offered. No longer is the physician the paternalistic authority figure from a bygone era. Today, physicians are obligated to make available the standard of care, as determined by the broader medical community, while still ensuring that the patient is an active participant in his or her care decisions. The legitimacy of the physician's and healthcare system's authority is granted by ongoing trust from the patient that both the physician and the system are committed to making decisions in the best interest of each patient; conflicting interests, such as the desire to increase profits, deliver a blow to the credibility of the physician and healthcare system.

When a physician perceives that his or her professional and moral obligations diverge, the role of the physician's conscience comes into play. Conscience is a nuanced concept that can be defined in a multitude of ways, but for our purposes here, I will use one of the definitions offered by the *Stanford Encyclopedia of Philosophy*: conscience can be considered an internal "sense of duty" that compels us to "act according to moral principles or beliefs we already possess."⁷ An individual's conscience does not always correspond to perceived objective morality and does not need to originate in any particular source; it can arise from a religious background, one's own moral code, or an intuitive sense of right and wrong. A simple example of a conscience-triggering conflict would be a case in which a patient requires a lifesaving abortion, but the

⁶ Michael Lacewing, "Authority and Legitimacy," (London: Routledge, 2018), cw.routledge.com/textbooks/alevelphilosophy/data/AS/WhyShouldIBeGoverned/Authorityandlegitimacy.pdf.

⁷ "Conscience," *Stanford Encyclopedia of Philosophy*, last modified December 2, 2016, plato.stanford.edu/entries/conscience/#ConsMotiActMora.

physician treating the patient believes that abortion is murder and does not want to be complicit by performing or assisting with the abortion.⁸ In this scenario, the physician's conscience serves as a check of sorts on the actions other practical authorities (the patient and medical establishment) are expecting him or her to perform. Essentially, the exercise of one's conscience can provide a means of overriding an authority in situations where a physician perceives the authority's judgment to be in error. A survey of physicians found that 42 percent believed that physicians should never be expected to do something that conflicts with their conscience, reflecting how important it is to many physicians to maintain their individual moral integrity.⁹ The American Medical Association recognizes that doctors are human beings who cannot be expected to divorce their personal beliefs from their actions at work. It therefore offers guidelines for how doctors can maintain their personal moral integrity while also ensuring that their patients receive the appropriate standard of care.¹⁰ If a physician's conscience can be said to act as a check on the overreach of other authorities, then the recommendations put forth by the AMA close the loop by acting as a check on the unfettered exercise of a physician's conscience—which could itself lead to overreach and diminish the quality of patient care—and thereby also ensure that the physician's authority remains legitimate.

Physician Conscience and Artificial Intelligence

Subjects in Stanley Milgram's well-known electric shock experiments demonstrated the human propensity for following authority without question, in part offering a possible explanation for why physicians in Nazi Germany were able to seemingly unquestioningly commit atrocities. In both situations, the actions being committed—"euthanizing" disabled children, on the one hand, for example, and delivering (fake) fatal doses of electricity, on the other—were objectively bad, despite the fact that those ordering them often presented such actions as means to positive ends. Taken to its logical conclusion, a healthcare system driven by AI would be one in which a new source of authority is introduced—potentially to the exclusion of the current three sources of authority outlined above, since, as we have seen, deep neural networks have the capacity to outperform humans at complex tasks. In this scenario, the authority would likely be intended as a genuine improvement upon a healthcare system that relies on the efforts of well-meaning yet error-prone humans. Yet the

⁸ Martha S. Swartz, "'Conscience Clauses' or 'Unconscionable Clauses': Personal Beliefs Versus Professional Responsibilities," *Yale Journal of Health Policy, Law, and Ethics* 6 (2) (2006): 269–350.

⁹ Ryan Lawrence et al., "Physicians' Beliefs About Conscience in Medicine: A National Survey," *Academic Medicine* 84 (9) (2009): 1276–82.

¹⁰ American Medical Association, "Code of Medical Ethics Opinion 1.1.7," *Ethics: Physician Exercise of Conscience*, accessed September 28, 2018, www.ama-assn.org/delivering-care/physician-exercise-conscience.

potential pitfalls seem nearly as varied as the humans the algorithms could one day replace, and the potential for error just as grave or worse.

The growing use of AI in medicine will undoubtedly create situations in which a physician disagrees with a computer's decision. Perhaps a computer algorithm deems a woman's very severe abdominal pain to be insufficiently suggestive of ovarian torsion and recommends outpatient treatment for constipation. Perhaps it decides that a white man's MELD (Model for End-Stage Liver Disease) score of 34 is more deserving of a liver transplant than a black man's MELD score of 35. Perhaps it performs a behind-the-scenes cost-effectiveness analysis and determines that a suicidal teenager's inpatient psychiatric care should not be covered by insurance. In such situations, the appeal to a physician's conscience may be expanded from an expression of personal morality to a tool for patient advocacy. The potential risks to the physician in speaking up, however, remain, making such situations especially challenging. In an era of defensive medicine, it may feel safer to defer to the algorithms—it may seem preferable, for instance, that a malpractice lawsuit land in the lap of the software manufacturer who failed to correctly fine-tune the algorithms to distinguish between constipation and ovarian torsion than in the lap of a physician who chose to override the computer's suggestion to give the patient Miralax with a decision to perform emergency surgery.

A careful approach to implementing AI in medicine will require an ongoing dialogue among physicians, healthcare administrators, and software developers regarding the legitimacy of AI's authority. Is it "right, justified, [and] supported by good reasons"? Will we hold onto the expectation that physicians deliver a certain standard of care, or will that standard be relaxed if the algorithm says it should be? Will practical authority one day reside only in AI, or will AI simply have a seat at the table, along with the other sources of medical authority? Certainly, we will need to be mindful of historical precedent and create an environment where conscientious human decision-making is explicitly allowed and encouraged. A road paved with good intentions will not lead to hell if it is engineered with an understanding of the potential risks along the way and traveled on with caution.

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Seminary Papers

Introduction

BY JAMES PONET

The year 2018 marked the first time FASPE Fellows visited the German Resistance Memorial Center in Berlin, a site that documents and presents exhibits on resistance to National Socialism. Although a full-fledged German resistance to Adolf Hitler never developed, there were individuals among groups such as Social Democrats and Communists, university students, civil servants, and pastors in the “Confessing Church,” who did express dissent or make active attempts at resistance. By including the stories of these exceptional persons in the itinerary—even though their impact on the course of history was negligible—FASPE affirms that in times of terror and coerced complicity, acts of human decency and solidarity take on a heroic quality, and that these historical narratives need to be recounted so that future generations may find in them inspiration for their own battles against fear, nihilism, and despair. In the face of human evil, stories of goodness become prayers and sermons, ethical goads, reminders of who we really are or may yet become.

This year, there were 13 Fellows in the Seminary program. Following the program, each of them wrote a paper on a topic related to ethics, history, or theology as it ties into the themes discussed at FASPE. The papers covered an inspiring range of topics and spoke to the many present-day dilemmas and questions religious leaders face. The ones published here represent the breadth of inquiry the Fellows pursued and the many ways in which they chose to apply the lessons of FASPE to their own work and thought.

In her outstanding essay, “Discovering Acts of Meccan Resistance in the *Seerah*,” Sondos Kholaki reports that since her FASPE Fellowship she has begun to study the life narrative of Muhammad, *or seerah*, from a different angle. The accounts of individual Meccans who refused to comply with orders from the city’s leaders to attack and expel Muhammad and his followers now capture her attention. These individuals did not resist because it served their own interests or because they were themselves converts to Islam. Rather, they were committed to justice. Had these individuals not been willing to oppose the violent orders of their leaders, Kholaki writes, Islam might well have died in its infancy. She concludes that their example

should inspire others to stand up against oppression, even if they are not sure whether their actions will make a difference.

What happens when a violent past is not properly addressed, and it continues to bleed its unexamined toxins into the bloodstream of the present? A report released by a grand jury of the Commonwealth of Pennsylvania in August, 2018, demonstrated how the Catholic Church systematically covered up a spate of sexual abuse perpetrated by its clergy. In a brave and searching essay, Ariell Watson asks “what aberrant form of ethics” those involved in the abuse and its cover-up were following? She then goes on to trace the root causes back to three ways that those involved misconstrued the teachings and mission of the Church. Watson implies, at least to this reader, that the Church must consciously take upon itself the excruciating work of self-re-conception.

Finally, in her paper, “Remembrance and Reconciliation,” Julia Wallace explores Germany’s struggle with truth and memory in the aftermath of World War II. Inspired by the German culture of memorialization and remembrance that has emerged in the past several decades, Julia trains her eyes on a horrific event that took place in Waco, Texas, in 1916. That year, a 17-year-old black man was brutally tortured and lynched, while thousands of white citizens looked on. To this day, this event has not yet been formally incorporated into Waco’s historical memory. Julia concludes her stirring essay with an affirmation of the power and the concomitant pain of memorialization that adequately honors and recognizes the victims.

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Discovering Acts of Meccan Resistance in the *Seerah*

A Sermon

BY SONDOS KHOLAKI

Muslims often talk about the Prophet Muhammad (peace and blessings upon him) as a change maker of his time and region—uniting disparate Arab tribes, elevating the status of the poor and needy, and returning Arabs to the pure worship of One God. From the *seerah*, or life narrative of the Prophet Muhammad, Muslims learn about the early followers of Islam who risked or sacrificed their lives for their faith. Since my recent trip to Germany and Poland to study ethics in the context of World War II, I began to study the *seerah* from a different angle, specifically searching for Meccans who did not share Muhammad's beliefs but still resisted the Quraysh leaders' insistence on condemning and harming their fellow members. The Quraysh was the dominant tribe in Mecca at the time and consisted of several clans. Muhammad was a member of the Quraysh tribe, as were many of his early followers. The Meccan resisters, both within and outside the Quraysh, did not resist because they benefited in some way; they did not convert to Islam or even necessarily agree with the Prophet's beliefs. Rather, they were individuals who acknowledged the existence of injustice and oppression and decided to resist out of a general commitment to honor.

In Berlin this past summer, I toured the German Resistance Memorial Center with a group of 12 other Seminary Fellows as part of FASPE. At the Memorial Center, we learned about individuals and groups that made a conscious and brave decision to counter Nazi propaganda by writing pieces criticizing the National Socialist party, hiding or employing Jews, and refusing military service, among other acts of resistance. These acts of resistance were not organized or methodical; there was no united movement toward resistance. These German resisters independently acknowledged the mistreatment of human beings and acted within their center of influence to affect change, no matter how disparate or incremental. Of note, these German resisters did not identify as Jew, Roman, or Sinta; they did not benefit from resisting in any way. They could have turned a blind eye to the situation like the majority of German society, but they chose instead to risk their lives to uphold justice.

While similar examples of resisters prove few within existing *seerah* literature, they do exist. Meccan individuals from various social strata and differing political views worked independently within their circles of influence to counter the mistreatment of Muhammad and his early followers by the powerful Quraysh leaders. The Prophet's uncle, Abu Talib, is one of the first Meccans to defy the Quraysh even though he was not a believer in his nephew's faith. A member of the Muttalib clan of the Quraysh (Muhammad was part of the Banu Hashim clan), Abu Talib was a respected figure among Meccans and, despite fierce backlash, pledged his protection of the Prophet Muhammad when nobody else dared. To emphasize the magnitude of this risk: after Abu Talib's death and later in Muhammad's prophethood, most others turned down Muhammad when he requested protection from Meccans.¹ The Quraysh leaders in Mecca spread terrible rumors about Muhammad, forced the clans to disown anybody who turned to Islam, and infamously threw garbage and refuse on Muhammad as he walked by.² Per the Arabian honor code of the time, Abu Talib's protection meant that the Quraysh were prevented from doing worse than this to harm or abuse Muhammad.

At one point, the Quraysh leaders demanded that Abu Talib hand over Muhammad to them, and Abu Talib openly refused. Doing so put the entire Muttalib clan at risk. The Quraysh leaders responded by including the Muttalib clan in a decreed banishment from Mecca, its society, and its protection. The banishment stipulated that no Meccan was to continue contact—for marriage, family ties, trade, or business—with the Banu Hashim or Muttalib clans until Muhammad stopped preaching against the Quraysh idols.³ The oppressive banishment and boycott of the Banu Hashim and Muttalib clans lasted for three long years, in which many suffered greatly—emotionally, spiritually, and physically.

I found two notable acts of resistance by Meccans within this time period. First, relatives of the banished clans risked their own lives to sneak in food and other items to sustain the Muttalib and Banu Hashim members.⁴ Second, although Abu Lahab and Abu Jahal, the initiators of the banishment decree, remained ferocious figures in Mecca, some individuals gathered the courage to stand up for their fellow Hashim and Muttalib members. The boycott situation became so intolerable for the Meccans that many felt uncomfortable morally. In front of a crowd gathered around the Kaaba—a monument that is the focal point of Mecca—one individual commented loudly that the banishment and boycott of their fellow clans was wrong. This courageous individual

¹ Tariq Ramadan, *In the Footsteps of the Prophet: Lessons from the Life of Muhammad* (New York: Oxford University Press, 2007), 70.

² Ramadan, 45.

³ Ramadan, 66.

⁴ Ramadan, 66.

sparked a conversation among the rest of the crowd in support of lifting the ban. Encouraged by the size of the crowd and its opposition to the boycott, one by one, people joined the outspoken man. Abu Lahab and Abu Jahl tried to silence the crowd but to no avail. Finally, somebody took the written decree and tore it up, and the boycott ended. With the brave initiative of that one man as an example, others felt empowered to speak their dissent, and change occurred.⁵

Another example of resistance in the form of extending protection to the early Muslims occurred when Um Salamah, a woman from an elite clan among the Quraysh, traveled alone with her son to Medina to find her husband and escape persecution. On her journey there, a man named Uthman ibn Talhah, who was not a Muslim, found her and offered to journey with her so that she could benefit from his clan protection. Like Abu Talib, Uthman was aware of the circumstances under which he was offering her escort and the risks he was taking. It is said that Um Salamah proudly retold this story often, praising the young man for his courage.⁶

Yet another principled individual risked his life to protect early Muslims from abuse. Just as the Prophet was making his final migration to Yathrib to escape the Meccan leaders' plan to execute him, a Bedouin named Abdullah ibn Urayqat guided Prophet Muhammad and his traveling companion, Abu Bakr, out of Mecca toward Yathrib with members of the Quraysh fast on their heels.⁷ Should the Quraysh members have caught them, all three would have been killed on the spot. Abdullah ibn Urayqat, as well as Uthman ibn Talhah and the crowd gathered at the Kaaba, were polytheists, and they did not personally benefit from protecting Muhammad or his early followers in Mecca. Yet, these small acts of resistance, seemingly insignificant and disconnected, changed the course of history for the Muslim community.

Perhaps one of the most effective acts of resistance against the Quraysh leaders came from the Abyssinian King, called "the Negus," who granted refuge to early Muslims fleeing persecution in Mecca.⁸ The Negus was Christian, and while he did not share the early Muslims' religious or cultural background, people knew him for his justice. The Prophet said of the Negus, "If you went to the land of the Abyssinians, you would find there a king under whose command nobody suffers injustice. It is a land of sincerity in religion."⁹ Soon after the early Muslims arrived in Abyssinia, the Quraysh sent emissaries to convince the Negus to return the Muslims to Mecca, where they would have certainly been punished for fleeing. The Negus invited both the Quraysh

⁵ Ramadan, 67.

⁶ Ramadan, 77.

⁷ Ramadan, 83.

⁸ Ramadan, 62.

⁹ Ramadan, 59.

and the Muslim delegations to make their case, and he exercised his judgment in understanding the situation for what it was. This point remains particularly poignant for those in leadership currently. Under the Negus's protection, early Muslims enjoyed freedom from persecution by the Quraysh in Mecca, and they were able to grow as a community.

A final but noteworthy example of resistance took place not in Mecca, but in the neighboring city of Taif. The *seerah* recounts the famous story of a time when the citizens of Taif drove out Muhammad by chasing him and pelting him with stones and garbage. Muhammad took refuge by hiding in an orchard where he sat under a tree and wept openly to God, a most touching and intimate moment in the Prophet's life. The two orchard owners saw the abuse that had occurred and coordinated with their servant to deliver grapes to Muhammad as he sat under the tree, bleeding and dejected. In some narrations, the orchard owners even had Muhammad's wounds dressed. Knowing the way their fellow citizens felt toward this man, the orchard owners could have pushed Muhammad out of the orchard or turned him into the Taif leadership. Instead, the orchard owners allowed Muhammad to find respite for a moment and even provided him with some sustenance and healing.¹⁰

These examples of resistance serve to remind us of the impact of resistance, no matter how small, on those caught in oppressive or unjust situations. Similar to the situation in Germany and Poland in World War II, more Arabians shunned and mistreated the Prophet and the early Muslims than resisted the oppressive forces in leadership. I could find only a handful of such resistors recorded in the *seerah*, and we may never know of others whose actions never made it into the narrative. Over and over in these stories, we find that the resistors acted not for personal benefit or even from a shared belief system but out of sympathy or a universal commitment to justice, an action praised and upheld by the Prophet himself, according to Tariq Ramadan, a philosopher and professor of theology and religion at the University of Oxford: "[T]he Prophet clearly acknowledges the validity of adhering to principles of justice and defending the oppressed, regardless of whether those principles come from inside Islam or outside it."¹¹ The Prophet recognized the Negus for his values. Abu Talib was recognized in the *seerah* for his honor. The individual at the Kaaba, whose name and status remains unknown, is remembered for his courage. Um Salamah memorialized how Uthman ibn Talhah protected her and her child.

When we define ourselves by ethics and values, we transcend the negative pressures around us. When we can no longer define ourselves by our titles or careers or usual

¹⁰ Ramadan, 69.

¹¹ Ramadan, 21.

markers, who or what defines us? Culture changes, ideology changes, people change, but universal principles of justice and equality remain timeless. We cannot allow power or social/economic/political interests to blind us from maintaining our principles of respect for God's creation and upholding its dignity. God says clearly in the Qur'an, "... and when you testify, be just, even if [it concerns] a near relative."¹² And in another verse, God states, "O you who have believed, be persistently standing firm for God, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness."¹³ I find it notable that God recognizes that our hatred, or, more generally, our emotions and our ego, can distort our reality enough to where we may rationalize injustice toward others. The statement that being just is "nearer to righteousness" implies that being just is not always an easy task; it takes work and training and awareness.

As religious leaders, then, we must constantly reassess our motivations behind saying what we say, preaching what we preach, doing what we do. We, as religious leaders, should own our responsibility for being the first to espouse messages and teachings that honor the worth and value of every human soul and spirit. I learned in studying the events leading up to the Holocaust that genocides do not start with mass murder. They start with words and an ideology. In the *seerah*, the Quraysh leaders set up a system of exclusion and persecution that began with verbal negotiations with the Prophet and his allies, and then rumors that the Prophet was an evil sorcerer, followed by mocking and humiliating verbal assaults;¹⁴ from there, the hatred and fear escalated to manifest itself in physical and violent abuse. Notably, this oppression came from the tribal and ideological leadership of Mecca which acted out of a motivation of hatred, emotion, and ego—all characteristics that God warns us about in the verse mentioned above. The Quraysh leaders play the roles of the "bad guys" in the narrative of the *seerah*, but God's message indicates that we are all susceptible to succumbing to this kind of inclination toward injustice.

Where, in our community, do we see groups struggling with marginalization and dehumanization? When we witness such injustice, we often jump to the conclusion that there is not much we can do. We ask ourselves: "What change can I possibly affect?" However, as we see in the examples of the resisters in Mecca, the point is not *how much* can we help but rather *that we help*, period. The quantity or "how much" we help remains less important than the mere fact of helping, at whatever level, as a daily and embodied ethos. For ultimately, God is the One who may magnify the seemingly smallest of acts depending on our sincerity, or *ikhlas*, an integral concept in

¹² Qur'an 6:152.

¹³ Qur'an 5:8.

¹⁴ Ramadan, 46.

Islam. Conversely, God may lessen the impact of good deeds that appear weighty, based on a doer's intention and motivation. The *hadith*—or saying by the Prophet Muhammad—"Do not belittle even the seemingly slightest of good works," speaks to this meaning. Something has to shift inside of us for us to own the responsibility to act. To the early Muslims suffering from the boycott of the Muttalib and Banu Hashim clans, it was not about how much food was smuggled in by sympathetic Meccans, it was that there existed a group of individuals who cared. The message was, "We will get through this together." Hope was sustained. Lastly, consider this: without these "small" acts of resistance, the Quraysh leaders' attempts to snuff out Islam—a religion that now has nearly two billion adherents and has made numerous significant contributions to world thought—may have succeeded. I wonder how many other communities could and should have been saved by individuals willing to resist for the sake of doing what is right.

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Aberrant Ethics and the Clerical Sexual Abuse Crisis

A Reading of a Grand Jury Report

BY ARIELL WATSON

From 2016 to 2018, a Pennsylvania grand jury, under the leadership of the Pennsylvania attorney general, investigated the history of sexual abuse by Catholic clergy in six Pennsylvania dioceses over a period of seven decades. The grand jury identified over a 1,000 child victims using church records. At the directive of the state supreme court, the grand jury released a redacted version of its findings to the public in August 2018. In its over 600 pages, the report draws from witness accounts and internal diocesan documents to chronicle many stories of sexual abuse perpetrated by priests, as well as attempts within the Catholic Church to cover up the abuse. The report contains a list of the over 300 priests accused of sexual abuse.¹

In the introduction to its report, the grand jury states among its goals that, “we hope there will also be self-reflection within the church, and a deep commitment to creating a safer environment for its children.”² This paper endeavors to engage in that self-reflection, exploring the material documented by the grand jury in order to understand the factors that have led to this widespread abuse and to the ethical violations by leaders in the Roman Catholic Church.

Every Catholic leader named in the report—from priests to bishops to the rare lay minister—had, by virtue of his (or her) position, undergone years of spiritual formation and theological education. All of them were highly-trained professionals, expected to uphold a sacred code of ethics. Yet, as the report details, a large number of these leaders violated this ethical code by committing sexual offenses against minors; and others were complicit in these offenses by willfully ignoring them, covering them up, allowing them to continue, and even directly lying about them. The scope of the investigation in Pennsylvania makes clear that this was not merely the ethical failure of a few bad actors, or something that could be chalked up to causes such as mental

¹ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th Statewide Investigating Grand Jury* (Harrisburg, PA: Office of Attorney General, Commonwealth of Pennsylvania, 2018), 1.

² Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*.

illness or addiction. The widespread cooperation with evil that occurred in this instance reveals systemic breaches of professional ethics—or, perhaps, adherence to an alternate ethical system. Thus, writing off these stories as exceptional cases within an otherwise moral institution will no longer suffice. The prevalence of these behaviors raises a deeper question: if these were not the atypical acts of a few exceptionally evil men violating their ethical code, then what aberrant form of ethics are these people following? This paper identifies some of these ethical aberrations: a misconstrual of the aims of sexual morality, of the purpose of ordained ministries, and of the mission of the institutional church.

The Aims of Sexual Morality

Undeniably, the sexual misconduct of priests violated the sexual morality espoused by the Roman Catholic Church. Catholic interpretation of Scripture and magisterial teaching uniformly and unequivocally condemns such acts. The Catechism of the Catholic Church calls rape an “intrinsically evil act” which “causes grave damage that can mark the victim for life.” It elaborates, “Graver still is the rape of children committed by parents (incest) or those responsible for the education of the children entrusted to them.”³ Surely the actions of these priests, as those entrusted with the formation of children who called them “Father,” fall under this moral injunction. Any sound Catholic moral theology would determine that these offenses are sins. The documents and testimony collected by the grand jury indicate many instances of pedophile priests making confession of these actions, showing that they themselves had the moral clarity to identify them as sinful. The trouble then, in many of these cases, is not in any technical understanding of the boundaries surrounding sexual morality. Instead, the ethical breakdown comes from a misconstrual of the *aims* of Catholic sexual morality. While these offenders identified their behavior as spiritually sinful, they were not able to understand the human consequences of their sins, i.e. they were unable to understand the full impact of their sin, even while they recognized it as sinful. For example, based on its 2017 interview of Edmond Parrakow—a priest in active ministry in New York and the Diocese of Greensburg, Pennsylvania from the late 1960s through the late 1980s—the grand jury reports:

Parrakow testified that he confessed his crimes to his fellow priests, but admitted he would offend again after he received absolution. During a particular exchange with the attorney for the Commonwealth, Parrakow conceded that he could not be cured of his desires and indicated that he was unaware of the ‘serious effects’ of his criminal actions.⁴

³ *Catechism of the Catholic Church*, 2nd ed. (Vatican City: Vatican Press, 1997), 2356.

⁴ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 128.

Parrakow identified his behavior as worthy of confession—in other words, he regarded it as sin. Nonetheless, he could not comprehend the “serious effects” of these sins. If one understands sin primarily as a stain on one’s soul, then absolution can wash the sin away; if one understands it primarily as an offense against God, then a fellow priest acting *in persona Christi* can assure of God’s forgiveness. Based on these understandings of sin, absolution has the power to remove all the consequences of one’s actions. Absolution does not, however, mitigate the temporal consequences of sin: the harm done to oneself, to other people, to communities, or to the environment. Parrakow’s testimony reveals his limited view of sin. He seemed to view it only as a spiritual offense against God, and therefore something for which he could simply confess his offenses against God and receive absolution from their spiritual consequences. Because Parrakow did not grasp that his sins also harmed other people, he failed to perceive that the temporal consequences of his sin continued to mount, despite the fact that he was granted spiritual absolution.

Parrakow’s case exemplifies what occurs when sexual morality becomes overly spiritualized and distanced from its temporal impetus and from its human consequences.

Unfortunately, Parrakow’s myopic view of sin is not exceptional, and was even reinforced by Church leadership. According to the grand jury’s findings, upon being accused of sexual misconduct, Father Michael Lawrence, a priest who retained his clerical status with the Diocese of Allentown from 1973 until his death in 2015, went to Monsignor Anthony Muntone of the chancery of the Diocese of Allentown and said “Please help me. I sexually molested a boy.”⁵ Muntone’s report about this incident, developed in consultation with the Catholic treatment center to which Lawrence was referred, concluded that “the experience will not necessarily be a horrendous trauma’ for the victim.”⁶ Lawrence’s confession and request for help reveal that he had some sense of the consequences of his actions and that he wanted to address his sin beyond simply receiving absolution. The diocese’s response, however, minimized the temporal consequences of Lawrence’s actions. Its response allowed both priest and diocese alike to imagine that, once the spiritual consequences of the sin were addressed, Lawrence could return to active ministry with minors. By ignoring how sin harms victims, the diocese could rationalize not providing meaningful restitution and failing to aid the victim, and not taking measures to protect future victims.

The sacrament of reconciliation and the theology of sin are wonderful resources of the Catholic faith, which help individuals to understand the spiritual consequences of

⁵ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 51.

⁶ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 51.

their actions and to experience forgiveness and grace. Understanding sin as a spiritual phenomenon to the exclusion of recognizing its temporal consequences, however, is a theological distortion. Sadly, this distortion has fostered an aberrant sexual ethic in which those who have committed sexual assault against children, once absolved, are not responsible for any further consequences. Rectifying this problem within the Church will require a reexamination of sexual morality and a reframing to emphasize that sexual propriety is not simply a spiritual goal to preserve one's own holiness; it is also an ethical mandate for the welfare of other human beings and the community.

Purpose of Ordained Ministries

The behavior of and statements by both priests and bishops, as revealed in the grand jury's report, also show a gross misconception of the purpose of ordained ministries in the Church. Ministry, by definition, exists to serve. Instead of understanding their office as a mandate to care pastorally for the people of God, the priests identified in the grand jury report used their positions to wield power abusively over others. Meanwhile, bishops used their positions to care for priests to the exclusion of caring for the victims, whom they, as shepherds of the local Church, were entrusted with at episcopal ordination.

Victims' accounts show that the priests involved explicitly used their clerical authority to perpetrate abuse. To take just two examples, one victim remembers Father Edward Graff, a priest of the Diocese of Allentown who raped children throughout his 45-year career in schools and parishes,⁷ telling him that the abusive behavior was "'OK' because he was 'an instrument of God'"⁸; another victim recalls that Father William Presley, a priest of the Diocese of Erie defrocked in 2006 after two decades of accusations, said his abusive behavior was "okay 'because he was a priest.'"⁹ As the grand jury put it, Presley "used his position as a spiritual guide to further the abuse."¹⁰ It is reasonable to conclude that each and every offender priest named in the report did so. This is a vast misuse of the clerical office. The Second Vatican Council's Decree on the Ministry and Life of Priests describes a priest's vocation as participating in carrying on the evangelizing work of Jesus Christ by

⁷ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 30.

⁸ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 45.

⁹ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 87.

¹⁰ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 87.

following his example.¹¹ Jesus' example of leadership is one of humility and service. In the Gospel of Mark, Jesus told his disciples:

You know that among the Gentiles those whom they recognize as their rulers lord it over them, and their great ones are tyrants over them. But it is not so among you; but whoever wishes to become great among you must be your servant, and whoever wishes to be first among you must be slave of all. For the Son of Man came not to be served but to serve, and to give his life as a ransom for many.¹²

The priests discussed in the grand jury report used their clerical status to rule tyrannically over the children in their communities. Whereas Jesus modelled humility and servant leadership, these priests, ordained to participate in his saving work, manipulated their office to abuse the very people they were commissioned to serve. Sadly, a culture of clericalism within the Catholic Church made this possible by playing into this warped view of priesthood. One victim, identified as Julianne, testified before the grand jury about her experience of the priesthood in Catholicism: "They—there wasn't anybody that was more important than, not just him, but any priest. They were—and to some degree still are, but they are much above anybody else in your family or they are God in the flesh."¹³ Christianity teaches that God humbled Godself to become human, in order to serve; Julianne's testimony shows how clericalism inverts this model, inflating priests to a god-like status, which creates conditions under which abuse is more likely to occur. Addressing this ethical crisis within the Catholic Church will require that lay people and clergy alike reexamine the purpose of the priesthood to eliminate clericalism in favor of a model of priesthood which emphasizes service over power.

The grand jury's report makes evident that time and time again, the bishops of Pennsylvania sacrificed pastoral care and protection of the faithful in their dioceses in order to support pedophile priests. This is a distortion of the ministry of bishops. The Second Vatican Council's Decree Concerning the Pastoral Office of Bishops in the Church opens its discussion of diocesan bishops by stating, "A diocese is a portion of the people of God which is entrusted to a bishop to be shepherded by him with the cooperation of the presbytery."¹⁴ Note the group with whose pastoral care the bishop

¹¹ Second Vatican Council, "Decree on the Ministry and Life of Priests, *Presbyterorum Ordinis*, 7 December, 1965," in *Vatican Council II: The Conciliar and Post Conciliar Documents*, edited by Austin Flannery (New York: Costello, 1975), sec. 2-3.

¹² Mark 10:42-45, New Revised Standard Version Catholic Edition.

¹³ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 21.

¹⁴ Second Vatican Council, "Decree Concerning the Pastoral Office of Bishops in the Church, *Christus Dominus*, 28 October, 1965," in *Vatican Council II: The Conciliar and Post Conciliar Documents*, edited by Austin Flannery (New York: Costello, 1975), sec. 11.

is entrusted: the people of God in that diocese. Priests configure in the bishop's mission by cooperating in their ministry, *not* by being the primary recipients of that ministry. The grand jury report demonstrates how bishops have reversed this order, acting as if their primary responsibility were to minister to priests, and as if lay people were mere instruments toward that end. The grand jury identified this attitude clearly in its commentary on one bishop's response after an incident in his diocese:

...a priest raped a girl, got her pregnant, and arranged an abortion. The bishop expressed his feelings in a letter: 'This is a very difficult time in your life, and I realize how upset you are. I too share your grief.' But the letter was not for the girl. It was addressed to the rapist.¹⁵

This bishop directed his pastoral care toward the perpetrator instead of the victim. Like the other bishops discussed in the report, he had a misguided sense that his pastoral attentions were to be directed primarily toward priests, with the lay faithful as an afterthought. This is also borne out in the fact that many offender priests received psychological, spiritual, and financial assistance from their dioceses, whereas few victims received these resources. Because of their misguided sense of duty to priests over and against the faithful, bishops responded to accusations of sexual misconduct by taking the side of clergy. Not only did bishops choose to believe and defend priests over their accusers—as in the case of a student expelled from school after reporting abuse by her teacher¹⁶—but they repeatedly took measures to smear the reputations of the victims in order to cast doubt on their stories. To take just one of many examples: the grand jury found that “Having received a report that one of their priests had violated children, the Diocese and its attorney immediately began to exchange information meant to discredit the victim with unrelated and irrelevant attacks on her and her family.”¹⁷ These behaviors demonstrate these bishops' twisted view of their role as protecting and caring for priests, which in these cases runs counter to their mandate from the Church to care for *all* members of their dioceses. Like priests who view their office as one designed for power instead of service, bishops who view their responsibility as being to priests rather than to the faithful operate by an aberrant ethical code. This code departs from the normative ethics laid out by Catholic teaching and opens up bishops to perpetuating the abuses reported by the grand jury.

¹⁵ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 6.

¹⁶ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 22.

¹⁷ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 25.

Mission of the Institutional Church

The grand jury's report also shows how a distorted understanding of the Church's mission has given way to aberrant ethics. Instead of seeing its primary aim as working toward the Kingdom of God on earth, Church leaders have functioned as if the Church's mission were one of self-preservation. Consequently, they have prioritized avoiding scandal and maintaining the status quo over the protection of vulnerable people.

The grand jury's report states that, during the period in question, the main aim of the Catholic dioceses in Pennsylvania, "was not to help children, but to avoid 'scandal.'"¹⁸ Toward that end, leaders minimized and denied the real problem of pedophilia by using euphemisms in their reports on these incidents,¹⁹ attributing them to more socially-acceptable problems like alcoholism,²⁰ hiding documents from even the Church's own internal investigators,²¹ and directly lying about the issue to the media.²² The decisions Catholic leaders made over decades show that they believed that publicly acknowledging wrongdoing was worse than allowing it to continue. These behaviors reveal an ethical framework in which the Church's mission is self-perpetuation, rendering scandal the ultimate evil.

The Catholic Church's efforts to protect the status quo have also included maximizing the number of ordained priests in order to provide priestly services to as many of the faithful as possible. The shortage of priests in the United States, which grew during the period investigated by the grand jury, puts significant pressure on bishops to ordain candidates and to keep priests in active ministry. This may partially explain—though never justify—why bishops continually reassigned unfit priests, resisted their laicization, and even ordained them in the first place. In its self-reflection in the wake of the grand jury's report, the Catholic Church must address this issue by reexamining its dependence upon clergy. The victimization of children is too high a price to pay to have a priest in each parish. Genuinely addressing the problem of sexual abuse in the Church may well mean a dip in the priestly ranks. Catholics must resolve to make this sacrifice for the protection of their children. Scripture warns "Not many of you should become teachers, my brothers and sisters, for you know that we who teach will be judged with greater strictness."²³ The Church would do well to heed

¹⁸ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 2.

¹⁹ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 3.

²⁰ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 31.

²¹ Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 169.

²² Pennsylvania Statewide Investigating Grand Jury, *Report I of the 40th*, 111.

²³ James 3:1.

this warning as an exhortation toward a leaner priesthood, but one which can meet the high standards to which leaders must be held.

Jesus stated that his mission was “to bring good news to the poor ... to proclaim release to the captives, and recovery of sight to the blind, to let the oppressed go free, to proclaim the year of the Lord’s favor.”²⁴ In order to participate in this mission, the Church must prioritize liberating people from oppression and suffering, paying particular attention to the vulnerable, including children. In their misconstrual of the church’s mission as self-preservation, some Catholic leaders have lost sight of this gospel mission to such an extent that they have become agents of harm to the very people they have been charged with healing.

Conclusion

The prevalence of misconduct and criminal behavior on the part of its ministers, as detailed in the Pennsylvania grand jury report, points to an aberrant ethic operating within the Roman Catholic Church. Characterized by the spiritualization of sexual morality, the distortion of the purpose of ministerial offices, and a misconstrual of the Church’s mission, this ethic has created the conditions under which countless children have been abused and silenced. The work of building a safer church must begin with anchoring ethics in re-centered theologies of sin, ministry, and Church.

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²⁴ Luke 4:18-19.

Remembrance and Reconciliation

BY JULIA WALLACE

In the decades directly following World War II Germany faced a complex challenge: deciding whether or not, and how, to remember victims of the war and the atrocities perpetrated by the Nazi state. Immediately after the war ended questions emerged on whether to destroy or preserve sites that marked Nazi terror, and whether to forget or to remember. The complexity of this question was compounded by further considerations, such as whose perspective should be represented if public memorialization were to occur. This collective post-war struggle to remember—honestly and publicly—Germany's history revealed a potent truth: that there is a politics to memory.

Although Germany lends itself as a case study of the politics of memory in post-conflict societies, such complexities are not unique to Germany. Most post-conflict societies, including the United States with its history of racial discrimination and violence, face similar challenges: Should we remember past atrocities? If so, how? How do we reconcile the differing narratives that may emerge? Is it possible to present a faithful—or unified—account of past events when historical accounts emerge phenomenologically in the subjective experience of individuals and groups? While a simple response to these questions may not exist, one can look to the German experience post-WWII to better understand the complexity of memory as well as the need for public remembrance.

The Politics of Memory in Germany After World War II

After the war ended German society had to decide what to do with the physical remains of the Nazi regime—those buildings and sites built or used by the Nazis that still stood after the regime fell—as well as what to do with the vacant spaces that the victims once filled. The question of memorialization became two-fold: What should be torn down and what should be built up? Should concentration camps remain standing as a reminder of the atrocities perpetrated by the state, or should that symbol of dehumanization, torture, and death be destroyed? Should monuments be erected to remember the lives that were taken during the Holocaust? If so, how do you

remember in a way that is sensitive and beneficial to survivors and their families while also taking into account social cohesion?

The balance between collectively remembering and collectively forgetting is one that, as professor and critic Ann Rigney writes, is “fraught with more moral, emotive, and political difficulties than the optimistic belief in a clean transition might suggest.”¹ Given the usually twin, but not necessarily coinciding, goals of attempting to offer recognition or even healing to the victims (or their surviving kin) while preserving social cohesion, societies emerging from conflict try to find a balance between which past events they acknowledge in the present and which they relegate to the past. Public memorialization can be a double-edged sword in its ability to both mend broken relationships through communal acknowledgment and remembrance, or further solidify divisions by eternalizing the memory of abuse and division.²

For the first few decades after the war most of German society chose collective amnesia. Most Germans remained silent and sought to forget the events that took place between 1933 and 1945. Between 1945 and 1960, most memorials erected in Germany were initiated by survivors or relatives of victims, with little to no initiation by the state.³ However, state voices supporting efforts at memorialization did eventually emerge to remember German soldiers and civilian victims in what scholar Jenny Wüstenburg describes as a “dominant narrative whereby everyone had suffered under Hitler and, apart from a few bad apples, all were to be honored for having served the fatherland.”⁴ Through both *forgetting* and *selectively remembering*, the German state began to distort the narrative surrounding Germany’s role in the war and in the Holocaust against the Jews.

‘Dig Where You Stand’: Grassroots Movements

While this distorted narrative took hold in the initial decades following WW II in parts of the German psyche, a significant shift in public memorialization emerged in the 1980s and 1990s. Influenced largely by persons such as Sven Lindqvist—whose book *Dig Where You Stand: How to Do Research on a Job* advocated for grassroots investigation into the history of industries—German citizens began their own efforts at “memory activism.”⁵ Struck by Lindqvist’s assertion that the powerful control historical narratives and transmit them with biased partiality, many Germans were

¹ Ann Rigney, “Reconciliation and Remembering: (How) Does it Work?” *Memory Studies* 5 (3) (2012): 253.

² Rigney, “Reconciliation,” 252.

³ Jenny Wüstenburg, *Civil Society in Postwar Germany* (Cambridge: Cambridge University Press, 2017), 32.

⁴ Wüstenburg, 33.

⁵ Wüstenburg, 5.

inspired to follow his call for ordinary workers to bring a new and balancing perspective to the table. As a result, ordinary citizens began to lead grassroots efforts to commemorate the murdered victims of the Nazi state leading to the erection of more memorials and plaques during the 1980s than were erected in the entire period between 1933 and 1980.⁶

One of the most notable examples of this social action occurred on May 5, 1985. On that date, a group of citizens gathered at a vacant lot in the middle of West Berlin with shovels. Forty years prior this spot had been the headquarters of the Gestapo, but by 1985 it had become a vacant and overgrown lot. These activists—who adopted the phrase “dig where you stand”—began to symbolically and literally dig up the past.⁷ Today the Topography of Terror Documentation Center, one of Berlin’s most visited museums, stands on this spot.

These grassroots movements not only demanded that Germans actively and publicly engage with the past, but they worked to ensure that public memory reflected historical truth. Although these activists were primarily from the side of the perpetrators, they sought to discover and elevate the narratives of the victims. These new narratives that emerged contextualized and challenged the centralized, state-sanctioned narratives from previous decades, and for the first time “perpetrators, sites of crimes, and the range of Nazism’s victims were explicitly named and commemorated.”⁸

Although memory and memorialization can still stir up controversy in Germany, the decades since the 1980s have given rise to a new culture of memorializing the Holocaust and the atrocities committed under the Nazis. Where once a distorted narrative or silence predominated, a new and complex narrative has emerged which reflects with much greater accuracy the history of a people who elected Hitler and participated, either directly or indirectly, in the murder of nearly 6 million Jews. While this revision of the narrative to include the victims and their experiences has led to painful remembrances, it has opened up a process for continual renewal and engagement with Germany’s past. Despite the pain, Germans have recognized that telling the *whole* story gives recognition to the victims and their stories and serves as a step toward Germany’s own social healing. Moreover, they have recognized the function of public remembrance to serve as a warning of one’s own capacity for evil.

⁶ Wüstenberg, 63.

⁷ Wüstenberg, 1.

⁸ Wüstenberg, 3.

The ‘Waco Horror’

Many Americans miss the irony of condemning Nazi Germany while ignoring their own history of racial violence and terror. Between 1889 and 1918, the United States experienced 3,224 lynchings. This amounted to one lynching every three days. Of those lynched during this period, 80 percent were black.⁹ Justifications for lynching ranged from punitive justice to proactive self-defense “against the Negro criminal as a race.”¹⁰ A minority of white Americans did publicly denounce lynchings—some because of its role in racial terror, many out of concern for the preservation of law and order—but through the mid-1900s lynching was still considered acceptable throughout the United States. Although public opinion evolved slowly, one particularly brutal incident brought lynchings to the forefront of public discourse and galvanized efforts to outlaw the practice.

On May 15, 1916, 17-year old Jesse Washington was savagely tortured and lynched in Waco, Texas. At the time Waco was a “city reputed to be an enlightened, respectable, middle-class community,” writes James SoRelle, professor of history at Baylor University.¹¹ With its 63 churches and the Baptist-affiliated Baylor (the oldest university in Texas), Waco had gained nicknames such as the “Wonder City,” the “Athens of Texas,” and the “City with a Soul.”¹² Yet comingled with this religiosity and education was a deep-seated racial animosity, exhibited in its racial segregation and violence. Like Germany in the 1930s and 1940s, the lynching of Jesse Washington in Waco exposed the sobering reality that—as writer and theologian Richard Rubenstein said of the Holocaust—“it is an error to imagine that civilization and savage cruelty are antithesis.”¹³

The events leading up to the lynching of Washington began on May 8, 1916, when 53-year-old Lucy Fryer was found murdered on her farm in Robinson, Texas. Suspicions fell almost immediately onto Washington, a 17-year-old black farm hand who had been hired a few months prior. Washington was arrested and taken to the Waco jail before being quickly transferred to Hillsboro and then to Dallas to avoid mob violence. This relocation was prudent; that evening around 500 citizens showed up at the Waco jail demanding Washington, unaware that he had been relocated.¹⁴

⁹ James M. SoRelle, “The ‘Waco Horror’: The Lynching of Jesse Washington,” *The Southwestern Historical Quarterly* 86 (4) (April 1983): 517.

¹⁰ SoRelle, “The ‘Waco Horror,’” 517.

¹¹ SoRelle, “The ‘Waco Horror,’” 519.

¹² Patricia Bernstein, *The First Waco Horror: The Lynching of Jesse Washington and the Rise of the NAACP* (College Station, TX: Texas A&M University Press, 2005), 11-12.

¹³ Cited in Zygmunt Bauman, *Modernity and the Holocaust* (Ithaca, NY: Cornell University Press, 2001), 9.

¹⁴ SoRelle, “The ‘Waco Horror,’” 521.

The following Monday, on May 15, 1916, Washington was brought back to Waco for trial. Although debate still surrounds his innocence, Washington pled guilty to rape and murder in front of a packed courtroom. After deliberating for only four minutes the jury returned a guilty verdict. As the judge was recording the verdict—which warranted the death penalty—chaos erupted and an unidentified white spectator, using a racial epithet, yelled to “get” Washington.¹⁵ A group grabbed Washington and took him down the back stairs of the courthouse, where approximately 400 people waited in an alley.

Once outside they threw a chain around Washington’s neck and dragged him toward city hall. Along the short route Washington was stabbed with knives and battered with fists, bricks, clubs, and shovels.¹⁶ By the time they arrived outside of city hall—where a group had been waiting and preparing a bonfire—Washington was semiconscious and bleeding profusely. The group doused his body with coal oil, hung him up on a tree by the chain around his neck, cut off his fingers, ears, and toes, and then lit the combustibles that had been piled underneath him. His body was then raised and lowered into the flames while 15,000 people—approximately half of Waco’s population at the time—stood and watched, and law enforcement did nothing to intervene.¹⁷

Responses to the Lynching

The response of the local white population to the lynching varied from shame to indifference to a sense of self-righteous approval. Although there was some public condemnation—including from a special committee of Baylor faculty—denouncements were few and far between. And of those that did publicly denounce the event, many focused on the excessive cruelty or the external reproach this event would bring upon Waco rather than on the lynching itself.¹⁸

The local black response was generally one of public regret and condemnation for Washington’s purported crime, yet geographic proximity and fear limited authentic and open responses to the lynching on the part of blacks. Elizabeth Freeman, the NAACP reporter assigned to investigate this case, described a feeling among black Wacoans that “while they had one rotten member of their race the whites had

¹⁵ SoRelle, “The ‘Waco Horror,’” 526.

¹⁶ SoRelle, “The ‘Waco Horror,’” 526.

¹⁷ SoRelle, “The ‘Waco Horror,’” 528.

¹⁸ SoRelle, “The ‘Waco Horror,’” 530.

15,000.”¹⁹ Through Freeman’s reporting we also know that there was great disappointment among local blacks that white clergy in Waco had not been more outspoken on the brutal and extralegal killing of Washington. A week after the event, Freeman reported that, “So far I have not found a Christian minister who has protested against the action of the Waco folk.”²⁰

On the national level this event sparked significant debate and backlash. It was one of the few lynchings documented while it occurred, and graphic images of the lynching emerged and spread across America.²¹ The NAACP—which had already identified lynching as one of the most pressing barriers for racial advancement—saw this incident as a cause célèbre which could help galvanize their national anti-lynching efforts.²²

Remembering (Forgetting?) the ‘Waco Horror’

Today no marker or monument exists in Waco to commemorate Washington or to remember Waco’s history of lynchings. Over time, the story of Washington’s lynching has been repressed or forgotten altogether in the city’s collective consciousness. Local history books did not even mention the event until the late 1960s.²³

Local public attention to the “Waco Horror” was renewed in 1998 when Waco Councilman Lawrence Johnson—who heard about the lynching for the first time during a visit to the National Civil Rights Museum in Memphis—chose to read the story aloud at the swearing-in for his next term. Johnson also called for a formal condemnation of the event by the City of Waco and for the erection of a monument or memorial to remember the event; neither occurred.²⁴

In 2002, public attention was drawn yet again to Washington and Waco’s history of lynchings when an image of a hanging tree was discovered in a painting in the lobby of the McLennan County Courthouse, which is located in Waco, the county seat. The image—which shows a noose hanging over a tree between the Courthouse and City Hall—was discovered during the renovation of the 16-panel mural depicting Waco’s

¹⁹ SoRelle, “The ‘Waco Horror,’” 530.

²⁰ SoRelle, “The ‘Waco Horror,’” 529.

²¹ Local photographer Fred A. Gildersleeve, who was given advance notice of the lynching, took pictures from a window inside city hall. Many of these pictures were later sold as postcards. (SoRelle, “The ‘Waco Horror,’” 527).

²² SoRelle, “The ‘Waco Horror,’” 518.

²³ J.B. Smith, “‘Waco Horror’ at 100: Why Jesse Washington’s Lynching Still Matters,” *Waco Tribune-Herald*, May 15, 2016.

²⁴ Smith, “‘Waco Horror’ at 100.”

history. While some defended the image as a harmless reminder of what they called Waco's "Wild West" past, black citizens were vocal in denouncing it as a symbol of racial terror and violence. After the discovery of the painting, County Commissioner Lester Gibson, who is African-American, introduced a resolution before the Commissioners Court, which condemned the history of lynching in McLennan County. Gibson indicated his desire to place the resolution on a plaque next to the mural in order to keep the memory of this dark chapter in Waco's history alive and to symbolize the city's current communal condemnation of its lynching past.²⁵ The proposition was met with silence. Since no second motion was made, the resolution did not pass that year.

Gibson continued to pursue the resolution, however, and was finally able to get it passed in 2006. It took another five years, until 2011, for Gibson to get approval to have the one-page resolution put on display next to the mural in the courthouse. Although it condemns lynching, the resolution does not mention any victims by name. Progress toward honoring Washington by name was finally made in May 2016—the centennial anniversary of Washington's lynching—when the Mayor and City Council issued a proclamation reiterating the 2006 resolution and explicitly denouncing the "heinous lynching of Jesse Washington."²⁶

Prior to the anniversary of Washington's lynching, a planning committee had also approached the McLennan County Historical Commission about submitting an application to the state to place a historical marker somewhere in Waco as a symbol "that this is our dedication as a community to acknowledge our past and commit to never letting this happen again."²⁷ While these plans did not materialize in time for the centennial, the Texas Historical Commission approved the application in July of 2016. However, no marker has yet appeared anywhere in Waco.

A Call to Remember

Memory matters. The narratives we tell about the past are sedimented in the present and they affect our future. On a collective scale that is why public acts of remembrance matter. As Rigney writes, they are "as much about shaping the future as about recollecting the past."²⁸ But simply remembering does not suffice to fully recognize the suffering of the victim nor bring social healing. The remembering may

²⁵Armando Villafranca. "Controversy Born Over Courthouse Mural," *Houston Chronicle*. June 30, 2002.

²⁶Smith, "Waco Horror' at 100."

²⁷ Kristin Hoppa, "County Historical Group Supports Marker Commemorating Jesse Washington Lynching," *Waco Tribune-Herald*, February 11, 2016.

²⁸ Rigney, "Reconciliation," 251.

be selective, and selective memory may be as detrimental, if not more so, than collective forgetting. In order to engage the truth in history we must be willing to engage with the whole story, which requires extending a platform to the voices of those who were victimized and silenced. In Germany, it meant hearing the stories of Jews; in the United States, it means listening to the voices and stories of African-Americans and other minorities; and in Waco, it means engaging with a painful past of lynching and racial terror, including the lynching of Jesse Washington. By *fully* remembering and memorializing the events of the past, we allow for the start of healing, we strengthen social bonds of connection, and we remind ourselves of our own insidious and continued capacity for evil.

As the poet Maya Angelou wrote in her poem, “On the Pulse of Morning,” which she recited at the first inauguration of President Bill Clinton:

*History, despite its wrenching pain,
Cannot be unlived, but if faced
With courage, need not be lived again.*²⁹

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²⁹ Angelou, Maya, *On the Pulse of Morning* (New York: Random House, 1993).

Alumni Papers

Introduction

BY ELLEN GILLEY

The 2018 FASPE Fellowship Programs marked an exciting development for FASPE: with the addition of the 2018 Fellows, FASPE now counts over 500 professionals among its alumni. Our Fellows continue to share the lessons of FASPE after the programs end through a combination of personal and public channels, including through their writings for major newspapers and magazines, academic journals, various op-ed pages, blogs, and social media.

In their work, FASPE alumni Fellows often address pressing issues in their fields, including ethical ones, asking the difficult questions and attempting to find answers with nuance, erudition, and thoughtfulness. FASPE seeks to actively support its alumni Fellows as they move forward in their careers and grow as leaders. As part of this effort and in order to further professional ethics generally we find it valuable to share our alumni's written work.

Each year, we reprint several papers by Fellows that have recently appeared in leading general-interest or academic journals. This year, we have selected three articles that showcase not only the impact of participating in a FASPE program but also the impact our Fellows seek to have in the larger society.

The first piece is written by 2012 FASPE Medical Fellow Dr. Dhruv Khullar, who regularly contributes to *The New York Times* and other major papers. In his article, which originally appeared in *The Times*, Khullar addresses the general public's declining trust in medical professionals and healthcare providers. This trust plays a key role in achieving positive outcomes in patient care, and Khullar ends his discussion by exploring how doctors, the government, and various other stakeholders in the health care system can start rebuilding it.

The second piece is written by Laura Rena Murray, a 2011 FASPE Journalism Fellow who currently works as an investigative journalist. In her piece, which was first published online in *Broadly*, Murray describes how arbitration clauses—and the arbitral process—can silence sexual harassment and gender discrimination

complaints. Given the confidential nature of arbitrations, Murray explains, patterns of harassment and discrimination within companies often remain hidden, ultimately preventing the law from developing in ways that would further protect against harassment and discrimination.

The final alumni piece is by 2016 FASPE Medical Fellow Dr. Jason Han, a regular contributor to *The Philadelphia Inquirer*, as well as academic journals. In an article for the *Journal of the American College of Cardiology*, Han examines the ethical issues arising from increased organ donation due, in part, to the opioid epidemic. From the perspective of a cardiothoracic surgeon, Han explores his ethical duties as a member of the transplant community, a member of the healthcare profession, and a member of society.

We are grateful to our Fellows for allowing us to share these pieces and to all of our Fellows for their dedication to ethical practice.

Ellen Gilley is Director of Programs and Strategy at FASPE.

Do You Trust the Medical Profession?

BY DHRUV KHULLAR

Trust, in each other and in American institutions, is vital for our social and economic well-being: It allows us to work, buy, sell, and vote with some reasonable expectation that our behavior will be met with fairness and good will.

But trust has been declining for decades, and the most tangible and immediate damage may be to public health and safety. Mistrust in the medical profession—particularly during emergencies like epidemics—can have deadly consequences.

In 1966, more than three-fourths of Americans had great confidence in medical leaders; today, only 34 percent do. Compared with people in other developed countries, Americans are considerably less likely to trust doctors, and only a quarter express confidence in the health system.

During some recent disease outbreaks, less than one-third of Americans said they trusted public health officials to share complete and accurate information. Only 14 percent trust the federal government to do what's right most of the time.

Less Likely to Engage in Healthful Behaviors

Trust is the cornerstone of the doctor-patient relationship, and patients who trust their doctors are more likely to follow treatment plans. One study found that nearly two-thirds of patients with high levels of trust always take their medications, but only 14 percent of those with low levels of trust do.

Another study found that trust is one of the best predictors of whether patients follow a doctor's advice about things like exercise, smoking cessation, and condom use. Mistrust can lead people to skip the flu shot or forgo the measles vaccine for their children—with potentially serious consequences for individual patients and the broader population.

Trust is also critical for patient satisfaction, and makes it more likely that patients keep seeing the same doctor—which can have other positive effects, like fewer emergency department visits.

There are large disparities in trust along socioeconomic and racial lines (often for good reason), and building trust among vulnerable and marginalized patients may be particularly important.

For patients with H.I.V., for instance, trust in medical providers is associated with a higher likelihood of taking antiretroviral drugs, better reported mental and physical health, more clinic visits, and fewer emergency department visits. States with higher levels of social trust tend to have lower rates of late H.I.V. diagnoses—after the disease has progressed—partly because people feel more comfortable seeking care and getting tested.

Stifling Innovation

Low levels of trust can hurt innovation. We think of medical innovation as being driven by doctors, scientists, and entrepreneurs, but patients play an important role, too. They must be willing to try new treatments and technologies for them to spread, but are unlikely to do so if they don't trust in the therapy's effectiveness or the prescriber's motives.

One study found that for cancer patients considering experimental chemotherapy, trust in their physician was one of the most important reasons they enrolled in a clinical trial—on par with the belief that the treatment would be effective.

Today, in the era of wearable devices and electronic health records, trust that personal data will be kept secure and private—and that such technologies are useful—remains a barrier to greater acceptance and use. Despite millions of dollars being poured into telemedicine, Americans are still much less likely to trust diagnoses made remotely than those made in person.

Responding to Epidemics

Perhaps most concerning is evidence that low levels of trust can weaken the ability of governments and public health agencies to respond to epidemics. A recent study suggests that Ebola spread more widely and persisted longer than it otherwise would have if there were higher levels of institutional trust.

Researchers surveyed people in Liberia about their knowledge of Ebola, about how much they trusted the government, and how likely they were to take recommended precautions against Ebola. These precautions included adopting safe burial practices; abiding by restrictions on travel, social gatherings and curfews; keeping a bucket of chlorinated water at home; and avoiding physical contact with those displaying symptoms.

People who didn't trust the government were much less likely to take recommended precautions. They weren't less well informed about Ebola, nor did they hold more erroneous beliefs. They just trusted less.

Can Trust Be Rebuilt?

Trust, of course, requires trustworthiness. Waning trust in the health system is partly a result of the sometimes well-founded public perception that its key players pursue profits at the expense of patients. (The United States is the only wealthy advanced nation that has not committed to universal health care.)

But there are steps medical leaders and public health officials can take to show they deserve to be trusted. People's trust depends fundamentally on three questions: Do you know what you're doing? Will you tell me what you're doing? Are you doing it to help me or help yourself?

Clear, transparent communication and a history of fulfilled trust are important, and health care providers can also build trust by disclosing conflicts of interest; creating expectations for long-term relationships; and promoting shared interests and smaller power differences with patients. Giving patients easier access to their medical notes, for instance, may help them feel more in control of their care and increase trust in their providers—especially for vulnerable populations.

Many patients have also traditionally been wary of the motives and methods of medical research. Partnering with patients and communities to give them greater say in the goals, design, and dissemination of research can help ease a sense that research is being conducted “on them” instead of “with them.”

More engagement between individual patients and physicians through collaborative endeavors may have the added benefit of capitalizing on a paradox of Americans' trust: We're highly trusting of our own doctors and generally satisfied with our own care, but we distrust medical leaders and the health system as a whole.

Governments should also consider using trusted spokesmen and spokeswomanes during crises. In a disease outbreak caused by bioterrorism, for example, Americans are more likely to trust information coming from the Centers for Disease Control and Prevention than the Department of Health and Human Services or the F.B.I. Demonstrably false statements from high-level government officials can have lasting consequences for Americans' trust in institutions.

All institutions are imperfect, and some are plainly corrupt. A degree of skepticism is inevitable and important. But when doubt becomes pervasive, it can erode the glue that binds society together, and the medicine that keeps us healthy.

Dhruv Khullar, MD, MPP, is a physician at NewYork-Presbyterian Hospital and an assistant professor in the Department of Healthcare Policy and Research at Weill Cornell Medical College. He received his medical degree from the Yale School of Medicine and his MPP from the Harvard Kennedy School. In 2012, he was a FASPE Medical Fellow.

This article was originally published in The New York Times on January 23, 2018.

How Arbitration Clauses Silence Women Speaking Out About Harassment

BY LAURA RENA MURRAY

Therese Lawless has noticed an increase in the number of gender discrimination cases landing on her desk. “There are huge issues in the tech industry around gender,” she says, adjusting her plastic-rimmed glasses and tying her long brown hair back. “Women were afraid to say anything about it because they knew their careers would be damaged.” Dressed in a loose-fitting light green tunic and a string of purple beads, the 56-year-old attorney leans back in her swivel chair after closing the large windows of her sunny office overlooking San Francisco’s bustling Financial District.

Over the past decade, Lawless has filed high-profile lawsuits against some of Silicon Valley’s most powerful companies, including Facebook and the venture-capital firm Kleiner Perkins Caufield & Byers. It was the latter case, brought on behalf of junior partner Ellen Pao in 2012, that has arguably shaped Lawless’ career more than any other. In it, Pao claimed gender discrimination when she was passed over for promotion after reporting a senior partner’s sexual harassment. Although a jury ultimately ruled in favor of Kleiner Perkins in 2015, the lawsuit has been credited with spurring a broader conversation about gender discrimination and harassment in the workplaces of Silicon Valley.

Even before the Harvey Weinstein reports broke open the floodgates of #MeToo accounts, women like Susan Fowles at Uber were coming forward with stories of misconduct, and a wave of women entrepreneurs described harassment from the investors they were pitching. Discrimination is also a widespread issue in what is still a male-dominated industry. Earlier this year, the U.S. Department of Labor accused Google of “systemic compensation disparities against women” after suing the company, a federal contractor, for salary information as part of a compliance audit. In September, three women filed a class-action suit against Google for systemic gender discrimination in pay and promotion. Former Twitter engineer Tina Huang is building a case against the social-media company on similar grounds.

The Pao case, Lawless believes, helped encourage the clients who've since sought her out, many of whom work in the tech industry and say they have been denied promotions, fair treatment, desirable assignments, and equal wages to their male counterparts.

"They call it the Pao effect," she says. "Sometimes losing isn't really a loss. You might lose the battle but you'll win the big war."

But Lawless knows firsthand the obstacles that remain in that fight. Large companies have more resources at their disposal than the individual employees seeking accountability. ("You had a bunch of really rich men who were going to fight this until they won," Lawless says about Pao's lawsuit. "I don't even know how much money they spent on that case.") Non-disclosure agreements often prohibit current and former employees from speaking freely about their experiences outside the workplace. And they are often prevented from taking their cases to court because of a growing trend of arbitration clauses in employment contracts.

At Lawless & Lawless, the firm she runs with her sister Barbara, Therese says that more than 90 percent of the cases are discrimination-based, and most of them never reach a jury trial. "Ninety percent of employment cases settle outside of court because it's less expensive," she says, "and companies don't want their dirt exposed."

Settling outside of court can mean mediation, in which the parties try to reach middle ground for a settlement with the assistance of a neutral mediator. It can also mean arbitration, which means that due to an agreement between the parties, sometimes as part of an employment agreement, a claim is adjudicated in a private venue by arbitrators—lawyers or retired judges—who are paid by the hour. In arbitration, there are no rules of evidence and there is no public access to what happens. Arbitration clauses often include language in which the parties agree that the rulings are non-appealable, so the decision of the arbitrators is usually final. While binding, the process and format of arbitration cases are typically less formal than a traditional court setting.

It's a tactic Lawless has seen employers use on a regular basis, requiring new employees to sign mandatory pre-dispute arbitration clauses.

That was the case when AJ Vandermeiden approached Lawless last year with a case against her employer, Tesla, the electric car manufacturing company founded by Elon Musk. After three years there, she had worked her way up to being an operations commodity manager. "AJ was trying to raise issues in the company," Lawless says.

“She wasn’t getting paid as much as her male colleagues and she complained about sexual harassment at work.”

Vandermeiden filed her lawsuit in September 2016, alleging discrimination, retaliation, and other workplace violations. Since Vandermeiden had signed an arbitration agreement when she was first hired by the company in 2013, Tesla successfully filed a motion for arbitration in January and moved Vandermeiden’s case behind closed doors. The case is still ongoing.

After Tesla successfully moved the case to arbitration—and no longer faced the threat of a jury trial—the company fired Vandermeiden on Memorial Day, despite Lawless’ claims that she had great performance reviews. “She’s the sacrificial lamb,” Lawless says. “If you speak out [they’ll] fire you. That’s against the law.”

Tesla insists they had just cause to terminate Vandermeiden for false accusations. When reached for comment about the case, a Tesla spokesperson referred Broadly to earlier statements. “Last year, we conducted a thorough internal investigation and retained a neutral, third-party expert to conduct an independent investigation of Ms. Vandermeiden’s claims,” reads the company’s statement released in May. “After we carefully considered the facts on multiple occasions and were absolutely convinced that Ms. Vandermeiden’s claims were illegitimate, we had no choice but to end her employment at Tesla.”

Lawless was disappointed not to have an opportunity to take Vandermeiden’s case to court and says that arbitration is a strategy corporations use to silence employees. Which is what she believes Tesla is doing.

“They’re forcing people into arbitration so that issues that should be public are not made public,” Lawless says.

“The idea that we have courts is so fundamental to our democracy,” she adds. “Taking these cases and putting them behind closed doors is an outrage.”

The use of arbitration clauses in employment contracts like Vandermeiden’s have proliferated over the past decade as a result of multiple Supreme Court rulings, including extending the Federal Arbitration Act to include employment agreements in 2001.

“For a long time there was a concerted effort made on behalf of businesses to get the Supreme Court to allow the use of arbitration clauses as a shield against class action lawsuits,” explains David Horton, a leading arbitration expert at the University of

California, Davis Law School. “Employers will say an arbitration clause benefits everybody because it allows you to get a ruling that’s quicker and cheaper, and it’s confidential so an employee can be more comfortable sharing embarrassing incidents.”

However, Horton notes that the companies who win the most in arbitration are often large businesses who arbitrate frequently. “Arbitrators repeatedly get business from those companies,” Lawless points out, “so how are they going to rule? Who’s the repeat customer?”

Employees often aren’t aware of the arbitration clauses included in their employment contract, especially when signing off on the paperwork is mandatory to start work.

“In some situations, employees can claim that the agreement is unconscionable or, in rare cases, that it wasn’t properly entered into because they weren’t aware of what they were signing,” says Rachel Arnow-Richman, an expert on employment contracts at the University of Denver Law School. But those cases are rarely granted, especially since employers today are careful to appear more reasonable by omitting clauses that require employees to travel great distances or bear the costs of arbitration.

“The trend is for savvy businesses and attorneys to draft arbitration agreements that are less one-sided than they were 15 years ago,” Arnow-Richman adds. “There’s been a pull-back on the most onerous terms to make arbitration appear more fair because it’s less cost prohibitive and inconvenient than it used to be.”

And since the outcomes are kept confidential, arbitration can shield repeat offenders from public scrutiny, making it more difficult to discern patterns of misconduct like sexual harassment and gender discrimination.

“Because arbitration is confidential, women don’t know that others are experiencing the same behaviors,” Arnow-Richman says. “[Arbitration] prevents the public from seeing patterns amongst bad actors. It also prevents the development of the law in terms of precedent-setting and end-runs the public litigation process that could shine a spotlight on these experiences.”

It’s not just the tech industry. Next year, another class-action suit against Sterling Jewelers is slated to be settled via arbitration. The case includes at least 69,000 former and current female employees alleging widespread discrimination, and hundreds of detailed accounts of women being routinely groped and pressured to accommodate sexual advances from their bosses or else risk losing their jobs. And yet, while the case was originally filed by dozens of women in 2008, it only became public in 2017 after arbitration documents were obtained by *The Washington Post* earlier this year.

Despite the persistent efforts to keep these cases shrouded in secrecy, female employees continue to speak up, in Silicon Valley and now Hollywood, too.

“With Harvey Weinstein, the studio was actively suppressing harassment claims by contractually requiring Harvey to settle with the victims and protecting him if he did so,” Arnow-Richman said. “Arbitration gives companies similar advantages. Because it’s a private forum, it allows them to resolve claims one-by-one, confidentially, and with no public record.”

Lawless readily admits that gender discrimination cases are much harder to prove than sexual harassment cases. There’s often more evidence of a hostile work environment when employees are subjected to crude language, physical touching, or sexual assault. It can be more difficult to demonstrate that promotion decisions are based on gender.

“You have very competent women who do not get the position and much less competent or completely incompetent men get it,” Lawless says. “That’s why we have Trump in the White House, because of the misogyny in our culture. It’s a deep hatred toward women.”

In pursuing the lawsuit against Kleiner Perkins, Pao garnered the support of powerful public figures like Anita Hill and Hillary Clinton. “[Clinton] understood what Ellen was going through,” Lawless says. “She got it.”

Lawless never anticipated that she’d wind up arguing discrimination cases against some of Silicon Valley’s behemoth companies, although her background seemed to predestine some sort of legal career. The ninth of 12 kids, she grew up hearing her lawyer father tell stories from the courtroom; today, three of her siblings are also attorneys. Lawless was also inspired by her mother, who got her nursing degree when she was 45. She remembers the gender dynamics in her family as always being relatively equal. “Everyone had to chip in and clean up after dinner,” she says.

After graduating law school in 1986, she had every intention of practicing environmental law. But she graduated into a recession and nonprofits weren’t able to pay enough to cover her student loans.

“I was an idealistic kid out of law school,” she chuckles. After stints clerking for a federal judge and working for a large law firm in Boston, Lawless joined her older sister Barbara’s firm to try her hand at employment law. Today the sisters work with two additional full-time attorneys and a handful of support staff. For the past few years, they have also partnered with a local private school to have a female high-

schooler work in the office one day a week. The students have come from first-generation immigrant families, and most have gone on to enroll in college.

“We’ve had some go to law school,” Lawless says, a note of pride in her voice. “This is basically a woman-owned business and I want to show them a healthy work environment.”

Sexual harassment cases started becoming more prevalent following *Weeks v. Baker & McKenzie* in 1994, when a Palo Alto-based law firm had to pay \$3.5 million after failing to protect at least nine female employees from the advances of a lecherous attorney. (Incidentally, Alan Exelrod, who represented Weeks, would eventually take on Pao’s suit two decades later, bringing Lawless on as his co-counsel.) As new federal legislation granted employees more workplace protections, the spectrum of Lawless’ employment-discrimination cases broadened to include race, ethnicity, sexual harassment, and wrongful termination suits.

“More people were speaking out and companies were being held accountable for sexual harassment,” she says, noting, “In the past eight years, gender discrimination has really started to come to the forefront.”

Many of her cases come out of Silicon Valley. One of the reasons Lawless believes gender discrimination is especially pervasive in the tech industry is the culture of start-up companies. “They’re usually started by young men, straight out of college,” she explains. “They generally don’t have a human resources department.”

That was the case at UploadVR, where a former employee sued for gender discrimination and sexual harassment earlier this year, alleging the company had a “kink room,” which employees used to have sex, and that it hired sex workers for company parties. (The company has since established an HR department, and the suit was reportedly settled out of court in September.) Kleiner Perkins also lacked a human resources department while Pao was employed by the company.

Losing Pao’s suit was a devastating blow but, Lawless says, “It helped me grow. I think it was good for me. I learned a lot. It showed me what’s important to me and how much work I have to do in the future.”

Today, Lawless takes heart from the Pao case. “[Ellen’s] had a huge impact on the world and on other women,” she says. “If you compare it to what’s happening in Hollywood right now, I think the time is ripe. Women have gotten a certain empowerment. In these particular fields—whether it’s Hollywood or venture capital—

the industries are controlled by men who want to keep women out. Women are fed up and they don't want to deal with it anymore.”

***Laura Rena Murray** is an independent investigative journalist based in San Francisco, CA. She received an MS in investigative journalism from the Columbia University Graduate School of Journalism in 2011 and was a FASPE Journalism Fellow in 2011.*

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A Trainee's View into the Opioid Epidemic and Heart Transplantation

BY JASON J. HAN

The first heart procurement that I observed was from the body of a motor vehicle accident victim in South Carolina. Her face and body were draped by the time our team arrived. I was a second-year medical student, too young to comprehend the bewilderingly complex art and ethics of organ transplantation. By the time I reflected on the loss of her life, I was already astounded by the sight of her heart restoring life to a college-bound teenager in Philadelphia. I believed I had witnessed a miracle, a rare window into our connectedness.

It was not until my fourth year in medical school that I had the chance to process the donor's identity before he was covered. In the suburbs of Philadelphia, I stared at the passive face of a young man whose body appeared remarkably unharmed.

"I'm sorry to ask, but I'm surprised to see a young, healthy-appearing man like him in this situation. How old is he and how did he pass away?" I asked quietly.

"In his 20s. Opioid overdose," the transplant coordinator uttered casually. It was evident in her tone that this was not her first young face.

Another year has since passed, and I am a cardiothoracic surgery resident. I have encountered my third, fourth, and fifth faces. I am no longer a passive observer but an active participant, keen on the details of the operations including the donors' identities. Tragically, and with increasing frequency, I continue to come upon donors who have died from opioid overdose. Hidden under the drapes, their faces were getting younger, presenting one of the most complex ethical challenges in the current era of cardiac surgery.

Transplantation has always been a tragic arrangement. For a recipient, the promise of living longer can only be afforded by a donor's premature death. Because transplantation relies on donors, the main concern in the field over the past two decades has been the stagnant supply of donor organs while the number of people on

the waiting list only continues to grow. Currently, there are approximately 4,000 people in America awaiting heart transplants, but the number of donations available per year has historically remained about 50 percent of those in need.¹ Although various platforms such as ventricular assist devices or extracorporeal membrane oxygenation have been introduced as options to give patients more time and to bridge them to transplantation, 20 percent of heart transplant candidates still died or became too sick to remain on the waiting list in 2017.²

However, the tragedy is now evolving into what one author has described as a “grim irony,” the confluence of two major health crises. Over 33,000 people died from opioid overdose in 2015—an increase of 5,000 from the previous year—with a median age of only 31 years.³ The most common accidental cause of death among adults, for the first time, is drug overdose, not firearms or motor vehicle trauma.⁴ This is an epidemic that knows no socioeconomic or demographic differences, affecting nearly every geographic area.⁵ Incidentally, this dramatic rise in opioid overdose-related brain deaths has also led to a commensurate increase in the availability of organs for transplantation. According to the Organ Procurement and Transplant Network database, the annual heart transplant volume increased from 2,332 to 3,191 patients in the last five years.⁶ While the total number of donors across all causes increased by 24 percent, the number of donors who were overdose victims increased by 144 percent.⁷ Certain regions have seen particularly drastic changes. The New England Organ Bank reported in 2016 that patients who died of an overdose provided 27 percent of the region’s donations, up from four percent in 2010.⁸

From the transplant community’s point-of-view, the opioid epidemic reflects a complicated and unexpected ethical challenge. The Organ Procurement and Transplant Network identifies three main principles involved in transplantation: justice, respect for persons, and utility. Justice demands fair distribution (i.e. allocation) and respect for persons upholds patient autonomy. Utility aims to maximize net benefit to the

¹ Organ Procurement and Transplantation Network. Transplants by Organ Type. U.S. Department of Health and Human Services. United Network for Organ Sharing. 2017.

² Organ Procurement and Transplantation Network. Transplants by Organ Type. U.S. Department of Health and Human Services. United Network for Organ Sharing. 2017.

³ National Center for Health Statistics, Centers for Disease Control and Prevention. Wide-Ranging Online Data or Epidemiologic Research (WONDER). 2017.

⁴ National Center for Health Statistics, Centers for Disease Control and Prevention. Wide-Ranging Online Data or Epidemiologic Research (WONDER). 2017.

⁵ Centers for Disease Control and Prevention. Drug Poisoning Mortality: United States 1999-2014.

⁶ Organ Procurement and Transplantation Network. Transplants by Organ Type. U.S. Department of Health and Human Services. United Network for Organ Sharing. 2017.

⁷ Organ Procurement and Transplantation Network. Transplants by Organ Type. U.S. Department of Health and Human Services. United Network for Organ Sharing. 2017.

⁸ Seelye KQ. As drug deaths soar, a silver lining for transplant patients. New York Times, October 6, 2016:A1.

community, which is a calculus based on the degree of beneficence (doing good) and non-maleficence (avoiding harm).⁹ In this scenario, we encounter these patients at the intersection of beneficence and non-maleficence. Our commitments to save the lives of those who are listed for transplants amid such scarcity motivate us to consider all possibilities,¹⁰ even those who come from a preventable and treatable epidemic.^{11,12} Although we encounter the relentless, tragic loss of young lives, we also observe firsthand how these same organs revive their recipients, bring joy to their loved ones, and serve a meaningful purpose in society. From a societal perspective, whom should physicians serve first?

As a trainee, I wonder how we ought to conceive of the opioid epidemic. While I have encountered organ donors who have passed away from other causes in the past, the drastic nature of this situation has prompted me to reflect further on the issues at hand.

Furthermore, undergoing transition to this highly specialized field has begun to challenge the scope of my ethical thinking. When I was a medical student, I perceived the opioid epidemic as an unequivocal crisis, yet I was cognizant of its influence on organ transplants. Now, as I train to become a cardiothoracic surgeon who will treat patients in need of new hearts, should my priorities adjust accordingly? Must I now reprioritize my duties toward the benefit of my patients?

Should we view this as a tragedy, or dare we frame it as an opportunity? Some of the published data are beginning to explore the latter, recognizing the misfortune but refocusing on the need to maximize its potential to save as many recipients as possible.^{13,14,15} After all, these are young donors who, aside from their addictions, often have no prior medical conditions, which make them the perfect organ donors.¹⁶ Most studies briefly acknowledge the ethical conundrum, but mainly attend to the scientific concerns posing questions such as, if many of these opioid abuse victims are considered

⁹ *Organ Procurement and Transplantation Network. Ethical Principles in the Allocation of Human Organs. 2015.*

¹⁰ Egan, T.M., *Ethical issues in thoracic organ distribution for transplant.* Am J Transplant, 2003. 3(4): p. 366-72.

¹¹ U.S. Department of Health and Human Services. The Opioid Epidemic: by the Numbers. 2016.

¹² American Medical Association Opioid Task Force. Physicians' progress to reverse the nation's opioid epidemic. 2017.

¹³ Glazier AK, Delmonico FL, Koh HK. Organ donation in the era of the opioid crisis: a clinical strategy to maximize transplantation. Transplantation 2017;101:2652-4.

¹⁴ Weiner SG, Malek SK, Price CN. The opioid crisis and its consequences. Transplantation 2017;101:678-81.

¹⁵ Goldberg DS, Blumberg E, McCauley M, Abt P,

Levine M. Improving organ utilization to help overcome the tragedies of the opioid epidemic. Am J Transplant 2016;16:2836-41.

¹⁶ Weiner SG, Malek SK, Price CN. The opioid crisis and its consequences. Transplantation 2017;101:678-81.

“high-risk” intravenous drug users who may have acquired Hepatitis C or human immunodeficiency virus, is it safe to transplant them?¹⁷ How sensitive, both in terms of accuracy and time, are our diagnostic tools for these infections?¹⁸ Or can we transplant these organs regardless of infection status and cure the recipients post-transplant if necessary?

As I progress further in my training, I find myself being drawn to these questions, although they only address a part of the issue. Retaining a broader perspective during specialization is already proving to be a formidable challenge. As my passion for the field and my sense of duty toward my patients continue to swell, the scope of my perspective is commensurately narrowing and refocusing, rendering issues outside of my field less visible and salient.

While I try to be vigilant in my own opioid prescribing practice, it is difficult to devote much time or effort to causes that do not directly fall into the purview of the field. When I eventually transition to independent practice, faced with greater pressures to build a productive practice, to contribute to academia, and to unconditionally advocate for my patients, the challenge will be even greater.

Yet, despite these odds, there is something we can all do. Medically, we need to more actively acknowledge the issue and strive to define our position. And, in addition to relying on this new influx of donors, we need to continue to actively pursue other options to increase the donor pool, such as donation after circulatory death or use of ex vivo perfusion technology, which have significant potentials to maximize beneficence without maleficence.¹⁹ Ethically, we must keep reminding ourselves of the larger and more philosophical questions to ignite these conversations. What is the role of the transplant community amid the opioid epidemic? Should we focus on our immediate goals (i.e. maximizing the use of transplantable organs from the opioid epidemic), or as a profession that sees and experiences firsthand the ruinous effects of this addiction on the donors, do we have a responsibility to help address the greater social issue? At a minimum, as a community of healthcare providers who bear some responsibility in the rise of this epidemic through our prescribing practices, do we not have a duty to remain mindful of this epidemic, and to utilize our influence or leadership as physicians in helping our society overcome it?

¹⁷ Sibulesky L, Javed I, Reyes JD, Limaye AP. Changing the paradigm of organ utilization from PHS increased-risk donors: an opportunity whose time has come? *Clin Transplant* 2015;29:724–7.

¹⁸ Ellingson K, Seem D, Nowicki M, Strong DM, Kuehnert MJ. Estimated risk of human immunodeficiency virus and hepatitis C virus infection among potential organ donors from 17 organ procurement organizations in the United States. *Am J Transplant* 2011;11:1201–8.

¹⁹ Messer S, Page A, Axell R, et al. Outcome after heart transplantation from donation after circulatory-determined death donors. *J Heart Lung Transplant* 2017;36:1311–8.

Last, we ought to remember that the most pertinent perspectives to consider in this epidemic are not ours. It ought to be those of the thousands of young people who continue to die prematurely and those of families that are torn apart by the ever-enlarging opioid epidemic. From a society's point of view, we are failing an unmistakably significant segment of our communities. It is time for all healthcare professionals to become engaged with this epidemic regardless of specialty or degree of involvement in this crisis, as overseers of our society's health.

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