



FASPE

Fellowships at  
Auschwitz  
for the Study of  
Professional Ethics

2018 JOURNAL











## 2018 JOURNAL

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# ABOUT FASPE

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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

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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.

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*David Goldman is Chair of FASPE and its founder.*





# Law Papers

## Introduction

BY SUSAN CARLE

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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

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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.<sup>1</sup> In his piece, Bloom synthesizes material from several recent books to argue that cruelty cannot be explained by the dehumanization of the victim

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<sup>1</sup> 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.”<sup>2</sup>

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.”<sup>3</sup> 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.<sup>4</sup> *Merriam-Webster’s Collegiate Dictionary* lists “inhumanity” as a synonym for “cruelty”—but also “sadism,” “fiendishness,” “brutality,” “viciousness,” and “savagery,” terms which

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<sup>2</sup> Bloom, “The Root of All Cruelty?”

<sup>3</sup> Bloom, “The Root of All Cruelty?”

<sup>4</sup> *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.<sup>5</sup>

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 perfidy<sup>6</sup>) 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.”<sup>10</sup> 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

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

<sup>6</sup> 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>.

<sup>7</sup> 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.

<sup>8</sup> Browning, “Revisiting the Holocaust Perpetrators.”

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

<sup>10</sup>Bergen, 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."<sup>11</sup> 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

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<sup>11</sup>Bergen, 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,”<sup>12</sup> 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.<sup>13</sup> But this very strength—engagement with rationality, with the mind, without engaging emotions—makes the

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

<sup>13</sup> 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.<sup>14</sup> 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 dignity<sup>15</sup> or degrade it by providing a false sense of security. We must

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<sup>14</sup> 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.

<sup>15</sup> 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

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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”).<sup>1</sup> 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.”<sup>2</sup> 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,”<sup>3</sup> 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.”<sup>4</sup> However, Bush ordered that, at minimum, the commissions must provide “a full and fair trial.”<sup>5</sup>

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

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<sup>1</sup> 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, 107<sup>th</sup> Congress, September 18, 2001, *Congressional Record* 147.

<sup>2</sup> 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>.

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

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

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

<sup>6</sup> “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.<sup>7</sup> 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*,<sup>8</sup> 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.<sup>9</sup> The Court also determined that habeas rights do not depend on citizenship status, and the detainees' challenge could therefore proceed.<sup>10</sup>
- Also in 2004, in *Hamdi v. Rumsfeld*,<sup>11</sup> 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."<sup>12</sup> 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.<sup>13</sup> 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*,<sup>14</sup> the Supreme Court declared unlawful the military commission convened to try one of the first Guantanamo defendants, Salim Hamdan,<sup>15</sup> "because its structure and procedures violate both the [Uniform Code of Military Justice] and the Geneva Conventions."<sup>16</sup> Four justices also concluded that the offense with which Hamdan was charged—"conspiracy to

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<sup>7</sup> 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>.

<sup>8</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>9</sup> *Rasul v. Bush*, 484.

<sup>10</sup> *Rasul v. Bush*, 484.

<sup>11</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>12</sup> *Hamdi v. Rumsfeld*, 509-10.

<sup>13</sup> *Hamdi v. Rumsfeld*, 518.

<sup>14</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

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

<sup>16</sup> *Hamdan v. Rumsfeld*, 567.

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

- In 2008, in *Boumediene v. Bush*,<sup>19</sup> the Supreme Court invalidated Congress’s attempt in the Military Commissions Act (MCA) of 2006<sup>20</sup> 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 Constitution<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup> In October, Congress passed the Military Commissions Act of 2009,<sup>25</sup> 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-

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<sup>17</sup> *Hamdan v. Rumsfeld*, 566 (internal quotation marks omitted).

<sup>18</sup> *Hamdan v. Rumsfeld*, 567.

<sup>19</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

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

<sup>21</sup> U.S. Constitution, art. I, sec. 9, cl. 2.

<sup>22</sup> “Military Commissions History,” *Office of the Military Commissions*.

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

<sup>24</sup> 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>.

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

martial and civilian federal courts.<sup>26</sup> For example, the 2009 revision mandated exclusion of “statements elicited through torture as well as cruel, inhuman, or degrading treatment,”<sup>27</sup> heightened evidence admissibility standards,<sup>28</sup> 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.”<sup>29</sup>

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.<sup>30</sup> A total of 40 detainees remain at Guantanamo.<sup>31</sup>

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.<sup>32</sup> 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

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<sup>26</sup> 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>.

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

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

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

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

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

<sup>32</sup> 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.”<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

Baker’s decision set off a chain reaction which would ultimately result in the indefinite abatement of pre-trial proceedings in February 2018.<sup>36</sup>

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.<sup>37</sup> 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

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

<sup>34</sup> 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>.

<sup>35</sup> 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.

<sup>36</sup> 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>.

<sup>37</sup> 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.<sup>38</sup>

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,<sup>39</sup> and in October 2018 the Court of Military Commission Review reversed the abatement and ordered the proceedings to resume.<sup>40</sup> 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

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<sup>38</sup> 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>.

<sup>39</sup> 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>.

<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup> Pohl decided that exclusion of the statements, which played a key role in the

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<sup>41</sup> 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>.

<sup>42</sup> 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>.

<sup>43</sup> 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>.

<sup>44</sup> 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>.

<sup>45</sup> 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

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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.<sup>1</sup> 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.”<sup>2</sup> 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

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

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

decisions regarding the goals of representation.<sup>3</sup> 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."<sup>4</sup> Is the lawyer advocating for the client's individual interests or for the cause the client represents?<sup>5</sup> 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."<sup>6</sup>

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."<sup>7</sup>

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."<sup>8</sup> In this way, lawyers' responsibilities do not end with zealous advocacy of a client's

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

<sup>4</sup> 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.

<sup>5</sup> 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.

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

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

<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

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?

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<sup>9</sup> Loewy, "Lawyering for Social Change," 1871-72.

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

<sup>11</sup> 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."<sup>12</sup> 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.

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<sup>12</sup> 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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