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Eric L. Muller

*University of North Carolina School of Law*, [emuller@email.unc.edu](mailto:emuller@email.unc.edu)

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# The Fellowships at Auschwitz for the Study of Professional Ethics and the Moral Formation of Lawyers

Eric L. Muller

It is a brief digression in the film *Conspiracy*, a historical Holocaust drama.<sup>1</sup> Fifteen mid-level bureaucrats sit around a conference table in a well-appointed Berlin lakeside villa in January of 1942, gathered to coordinate a plan for murdering all of Europe's Jews. A representative of the Reich Interior Ministry proposes mass sterilization rather than mass murder—"we'll pinch off the race at this generation," as he puts it—because this, unlike outright genocide, could be done consistently with German law. A Nazi Party representative interrupts: "We make the law we need!" "Why am I telling *you* this?" he adds in exasperation. "How many lawyers are in this room?" he asks. "Raise your hands."

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

The conversation swiftly shifts back to genocide, and before long the focus is the grisly logistics and mechanics of killing. Shocking stuff. But for the law students screening *Conspiracy* as part of the law curriculum of the Fellowships at Auschwitz for the Study of Professional Ethics ("FASPE"),<sup>2</sup> the most shattering moment is that little digression, the nine raised hands.<sup>3</sup>

They realize: Lawyers murdered the Jews of Europe.

**Eric Muller** is Dan K. Moore Distinguished Professor in Jurisprudence and Ethics, UNC School of Law, and Director, Center for Faculty Excellence, UNC-Chapel Hill. Many thanks to my UNC colleagues Dana Remus and Molly Sutphen, my wife Leslie Branden-Muller, and my daughter Abby Muller for comments on a draft of this article.

1. CONSPIRACY (HBO Films 2001).
2. FASPE currently offers fellowship programs for students in four professional disciplines: law, medicine, journalism, and seminary. See <http://www.faspe.info> (last visited June 23, 2014). A fifth program for business school students is being developed.
3. While the meeting that *Conspiracy* depicts did take place, this particular dramatic moment undoubtedly did not. The film is a dramatization of the discussions at Wannsee that strays from the historical evidence—the minutes of the meeting that Adolf Eichmann prepared—in order to make the meeting's subject more intelligible and the characters of those in attendance more vivid. See Alan E. Steinweis, AM. HIST. REV., 107 (2002) (reviewing CONSPIRACY (2001)).

A few days later, the FASPE fellows walk through the gate and up the driveway of that lakeside villa in Berlin. The movie's exterior shots were filmed on location, and the grounds and façade of what is now called the House of the Wannsee Conference look the same today as they did seventy years ago. So as the fellows step through the front door, they feel as though they are crossing a threshold into history. They enter the meeting room and stand in the spot where that earlier group of lawyers ratified the terms of annihilation over cognac. They cannot help but see the chasm between the refined norms of their profession and the savagery of what that refinement produced, because they are standing where the chasm opened.

It gets harder. A day or two later, the FASPE fellows climb the concrete stairs of an Auschwitz barrack to file past a display case, easily seventy-five feet long, filled with two tons of human hair. The next day, at the Birkenau death camp, they stop at a meadow where bodies were burned in the open air when the crematoria were full. They listen to frogs croaking in ponds where human ashes were dumped.

Though they are in no shape to think about it at this particular moment, they surely will never be in a better position to appreciate Robert Cover's observation that "[l]egal interpretation takes place in a field of pain and death."<sup>4</sup>

\* \* \*

The FASPE fellowship includes more than visits to Holocaust-related sites. The program intersperses these visits with sessions on legal ethics and the formation of professional identity. In these seminars, they are talking not about how lawyers facilitated genocide, but how to manage duties of candor and confidentiality, which case decisions a lawyer may control, and whether junior associates are free to resist the commands of senior partners.<sup>5</sup> They are talking, in other words, about the ordinary sorts of problems they will encounter in their own lives as practicing lawyers. The aspiration of FASPE is that against the backdrop of the Holocaust and its lawyers, they will talk about those problems in extraordinary ways and will emerge from the fellowship with a deeper commitment to moral and ethical practice.

Surveys of the FASPE fellows tend to suggest that the fellowship realizes this aspiration. The fellows' sense of preparedness "to confront the ethical issues that will arise in [their] professional practice" typically rises significantly between pre- and post-trip assessments.<sup>6</sup> This marked increase in feelings of ethical preparedness suggest that FASPE is doing something effective—something that may not be happening in ethics instruction within the walls of

4. Robert Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986).

5. The program uses problems from LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* (3d ed. 2012) and RICHARD ZITRIN ET AL., *LEGAL ETHICS IN THE PRACTICE OF LAW* (3d ed. 2007).

6. For example, in 2013, only 2 of 13 fellows rated their sense of preparedness at 8 or higher on a 1-10-10 scale before the trip began, while 9 of 13 did so by the trip's end.

US law schools.<sup>7</sup> The FASPE program has not been rigorously evaluated to determine which of its components are most effective at increasing the fellows' sense of preparedness to meet the ethical challenges of law practice. However, several components of the FASPE experience distinguish it from the ethics and professionalism curricula common in American law schools:

- FASPE immerses students in history by taking them to the physical sites where lawyers worked and where the consequences of their work unfolded. In other words, it invokes the power of place as a pedagogical tool.
- FASPE focuses on lawyers' roles in a paradigmatically evil system. It does not seek to inspire fellows with stories of heroic lawyers fighting for justice. It unabashedly teaches by negative example.
- FASPE is a completely immersive, intensely personal, and often emotional experience. The fellows, two FASPE faculty members, and several FASPE staff members are together for twelve straight days, living and learning together in places that have known great human suffering. It presents an opportunity for group cohesion and for sustained (even unremitting) engagement that no American law school course could attain.

In this Essay, I explore these distinctive attributes of the FASPE law program.<sup>8</sup> The third of them—its full-immersion approach—makes clear that FASPE is a pedagogy that cannot easily be replicated as part of the program of legal education in an American law school. It is very expensive,<sup>9</sup> surely too expensive for an era in which most of the conversation about American legal education is about cutting costs.<sup>10</sup> And yet the success of the program calls out for examination, if only to see whether aspects of its approach might transfer to a U.S. law school setting.

The Fellowships at Auschwitz for the Study of Professional Ethics are twelve-day study experiences for professional school students in four disciplines: law, medicine, journalism, and religion.<sup>11</sup> They are administered by the Museum of Jewish Heritage in New York City on the strength of financial support from private donors. All four programs are grounded on the same idea: that students training in these professions can deepen their commitment to ethical

7. According to the 2010 Law School Survey of Student Engagement ("LSSSE"), only 57 percent of U.S. law students in their final year of study feel "very much" or "quite" prepared to "deal[ ] with ethical dilemmas that arise as part of law practice." See Law School Survey of Student Engagement, 2010 Annual Survey Results 8 (Table 1), [http://lssse.iub.edu/pdf/2010/2010\\_LSSSE\\_Annual\\_Survey\\_Results.pdf](http://lssse.iub.edu/pdf/2010/2010_LSSSE_Annual_Survey_Results.pdf) (last visited June 23, 2014).

8. I have been a FASPE law faculty member for four years and have had a significant hand in the development of its curriculum.

9. The fellowship covers the costs of air and ground transportation, accommodations, food, and educational materials for each fellow.

10. See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2013).

11. See *supra* note 3. An additional program for business school students is also contemplated.

practice by studying the roles that their professions played, in the places where they played them, in the Holocaust.

The law program's curriculum presents a mix of historical study and discussion of current problems in legal ethics, and proceeds (with modest annual variations) as follows.

### **Pre-trip Assignments**

The fellows<sup>12</sup> are given two assignments to complete before gathering in New York City in late May to begin the program. First, they are asked to read two books and an article: an excellent, very short history of the Holocaust by historian Doris Bergen,<sup>13</sup> Primo Levi's searing *Survival in Auschwitz*,<sup>14</sup> and an old but concise history of the German bar in the Third Reich from the *American Journal of Legal History*.<sup>15</sup>

Second, the fellows are asked to write and submit a legal memorandum in response to a problem based loosely on the one Richard Weisberg describes in his article "The Hermeneutic of Acceptance and the Discourse of the Grotesque, with a Classroom Exercise on Vichy Law."<sup>16</sup> The problem asks the fellows to put themselves in the shoes of an English-trained lawyer on the German-occupied Isle of Jersey in 1943 and advise a Jersey government official on whether, under the German-imposed racial laws in force on the island at that time, two described island residents should or should not be deemed "Jews." It comes as a shock to the fellows to see the German laws on Jews published in English and to learn that lawyers trained in England enforced them in a British Crown Dependency. The ways in which the fellows do (or do not) apply the laws to the facts in their memoranda become important touchstones for the discussion that lies ahead on the trip to Europe.

### **The Trip: New York**

The law fellows gather for their FASPE trip at the Museum of Jewish Heritage in lower Manhattan in late May.<sup>17</sup> The program's first two days are at the museum and include an ice-breaking activity, an historical overview of the Nazis' rise to power, a chance to explore the museum's exhibits and to hear the

12. The number of fellows varies slightly from year to year but averages thirteen, and includes students who have completed their first, second, and third years of law school as well as an occasional LL.M. student. They are selected in a highly competitive application process from a pool of applicants that regularly exceeds two hundred.

13. DORIS L. BERGEN, *WAR AND GENOCIDE* (2d ed. 2009).

14. PRIMO LEVI, *SURVIVAL IN AUSCHWITZ* (1947).

15. Kenneth Willig, *The Bar in the Third Reich*, 20 AM. J. LEGAL HIST. 1 (1976).

16. 17 CARDOZO L. REV. 1875 (1996).

17. Gathering at the same time and place were the fellows in the FASPE Journalism Program. The Law and Journalism programs travel and socialize together throughout the trip and visit many historical sites together but follow different curricula unique to their disciplines.

personal narrative of a Holocaust survivor, and a screening of the film *Conspiracy* mentioned at the beginning of this essay. Seminar discussions begin with an exploration of the validity of some of the most commonly voiced explanations for the behavior of German lawyer-perpetrators: an excessive commitment to legal positivism and obedience to authority. Conversation focuses on Gustav Radbruch's well-known formula for deviating from positivism<sup>18</sup> and on Stanley Milgram's notorious obedience experiments in New Haven in the early 1960s.<sup>19</sup> A discussion of the approaches the fellows took in responding to the Isle of Jersey problem allows them to consider the extent to which various professional and situational circumstances led them to consider applying, undermining, or rejecting the Nazi laws defining who was a Jew.

### Berlin

After two days at the museum in New York, they fly overnight to Berlin and immediately set out on a historical walking tour focusing on Jewish life in the city before and during the Nazi years. The capstone of the day is a visit to the somber steles of the Memorial to the Murdered Jews of Europe near the Brandenburg Gate and the powerful museum installed beneath the memorial.

After a good night's sleep, the fellows spend the morning touring the Topography of Terror, a museum at the site of the Third Reich's security nerve center that documents the Nazi bureaucracy of repression and genocide. The afternoon is devoted to the first of several sessions featuring group work based on hypothetical current-day problems in legal ethics. These problems range widely across the landscape of law practice. The fellows might discuss how to respond as a law firm associate to a partner's demand for an unsupportable opinion letter, or how and whether a criminal defense lawyer should cross-examine a truthful witness, or how to advise a corporate client about whether to take advantage of a costly contract drafting error by opposing counsel.

The next day in Berlin begins with a visit to the austere but haunting memorial at Track 17 of the Grönewald train station in an elegant residential district. This is the track where the majority of Berlin's Jews were put on trains and deported to the east; it goes unmentioned, but is surely on everyone's minds, that in a couple of days we will ourselves head east to see the depots at the other end of the line. The afternoon is spent at the House of the Wannsee Conference. After a sobering historical tour, the fellows work in small groups on short research projects about Nazi law and Nazi judges, and then gather for a full-group discussion of the career of Bernhard Lösener, the lawyer who manned the "Jewish Desk" at the Reich Interior Ministry from 1933 to early 1943.<sup>20</sup> Lösener was something of a complex figure who, on the one hand,

18. Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law*, in *LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY* 127-36 (David Dyzenhaus, et al. eds., 2007).

19. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974); Arthur G. Miller, *What Can the Milgram Obedience Experiments Tell Us about the Holocaust?*, in *THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL* (Arthur G. Miller ed., 2004).

20. *LEGISLATING THE HOLOCAUST: THE BERNHARD LOESENER MEMOIRS AND SUPPORTING*

helped draft many of the key laws and regulations that isolated and persecuted Germany's Jews, but, on the other hand, worked against Party pressure to expand the definition of who counted as a Jew and resigned his position when he could no longer avoid knowing that the Reich's program had shifted to outright genocide. Lösener's career provides rich fodder for consideration of the impact of professional ambition and of the merits and demerits of continuing or discontinuing representation.

A final day in Berlin includes additional seminar sessions working through difficult ethical scenarios in everyday law practice. The fellows also meet with a German lawyer who discusses the legacy of the German bar's complicity in the creation and maintenance of the Nazi legal regime for later generations of German lawyers and judges.<sup>21</sup>

### Poland

The fellows next fly to Krakow in southern Poland. A day and a half in this picturesque old city center includes an historical presentation about the complicated story of Poland and the Jews before and during World War II, additional ethical-problem-based seminar sessions, and a tour of Kazimierz, Krakow's erstwhile Jewish quarter.

The following two days are devoted to guided tours of the Auschwitz I and Birkenau camps in the town of Oswięcim. The two camp sites are strikingly different from each other. The smaller Auschwitz I, with its tall and well-preserved brick barracks and its infamous "Arbeit Macht Frei" metal gate, is home to a somewhat outdated but nonetheless traumatizing museum display featuring mountains of shoes, eyeglasses, prosthetics, clothing, suitcases, and other remains of the Nazis' victims. The vast Birkenau camp, where hundreds of thousands were gassed, was mostly destroyed at war's end and offers relatively little in the way of curatorial interpretation. It has more of the feel of a cemetery or memorial park than Auschwitz I, which is simply an onslaught of horrors. The fellowship's curriculum includes no seminar meetings or focused discussions of professional ethics on these days, though each day offers the fellows the opportunity to meet for open-ended discussion of what they have seen, learned, and felt.

For the final two days of the trip, the fellows return to Krakow for further seminar sessions. At this point in the trip, the themes that emerge have to do with the legacy of the tragic history they have studied. The fellows screen and discuss a powerful documentary film called "Inheritance,"<sup>22</sup> which narrates a painful meeting at the site of the Plaszow concentration camp in Krakow between the daughter of the camp's brutal commander Amon Goeth and a

DOCUMENTS (Karl Schleunes ed., 2001).

21. In the summer of 2014, the German lawyer was law professor Bernhard Schlink, author of, among other things, the bestselling novel *THE READER* (1997) and *GUILT ABOUT THE PAST* (2010), a penetrating collection of essays exploring the continued relevance of the Nazi era for Germans today.
22. *INHERITANCE* (Allentown Productions, 2006).

Jewish inmate of Plaszow who worked as a slave in Goeth's home. The film triggers thoughtful discussion of the relevance of the Holocaust story to successive generations and the challenges of judgment and reconciliation. Another session focuses on post-war efforts to bring Nazi perpetrators to justice. Using a chapter from David Fraser's provocative book *Law After Auschwitz*,<sup>23</sup> the fellows reflect on whether the Nazi legal system was fundamentally continuous or discontinuous with German legal systems that preceded and followed the Third Reich, and with the legal systems of other Western nations.<sup>24</sup> At this late point in the trip, this is a crucial question. The FASPE program assumes that what German lawyers did and didn't do between 1933 and 1945 can contribute to the professional formation of today's young lawyers, but the nature of that contribution varies for each FASPE fellow at least in part as a function of how relevant the Nazi example seems to his or her own life. This penultimate session enables the fellows to address this question directly, and with the knowledge they have gained over ten days of travel and study.

The trip's final seminar session looks ahead rather than to the past. Keying off of David Luban's thoughtful article *Integrity: Its Causes and Cures*,<sup>25</sup> the fellows are asked to discuss the strategies that might be available to them to keep from slipping (or plunging) into unethical or—what is not quite the same—immoral behavior. The discussion is personal and powerful, naturally spilling over into broader reflection about the meaning and impact of the FASPE experience and of the personal relationships the fellows have built during their time together.

### Post-trip Assignment

FASPE asks that upon returning from the trip, the fellows write a paper about legal ethics, on a topic of their choosing, to reflect their engagement with the themes and lessons of their fellowship experience. The range of topics is remarkable: papers submitted after the FASPE trip in 2013 explored the role of humility in *pro bono* work,<sup>26</sup> the propriety of a government lawyer's declining to defend an immoral law,<sup>27</sup> the geography of the Holocaust and ethics in environmental law,<sup>28</sup> and many other interesting themes.

FASPE does not purport to function as a residential law school curriculum in ethics or professionalism. It can only supplement, and not replace, a residential course or courses. It is instructive, however, to consider how FASPE

23. DAVID FRASER, *LAW AFTER AUSCHWITZ* (2006).

24. See Eric L. Muller, *Of Nazis, Americans, and Educating against Catastrophe*, 60 *BUFF. L. REV.* 323, 338-43 (2011).

25. David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279 (2003).

26. Kristen Bell, *Learning Humility* (2013) (unpublished manuscript) (on file with author).

27. Johnston Chen, *When Defenders of the Law Choose not to Defend: Attorney General Kane and Pennsylvania's Ban on Same-Sex Marriage*, 2013 *FASPE J.*, at 25.

28. Carson Thomas, *Stones Will Speak: Environmental Ethics and a Geography of the Holocaust*, 2013 *FASPE J.*, at 29.

fits into the evolving discourse on the pedagogy of ethics and professionalism in American law schools.

The question of how to teach ethics to aspiring lawyers has arisen episodically for decades. The Association of American Law Schools convened national conferences on the subject in Boulder, Colorado, in 1956 and 1968, and another in 1977 in Detroit.<sup>29</sup> The topic grew somewhat pressing by the time of the third of these AALS gatherings, because the American Bar Association had recently amended its accreditation standards for law schools to require instruction in professional responsibility.<sup>30</sup> The topic also shifted somewhat in focus over these two decades due to the rise of clinical legal education<sup>31</sup>: for the first time it became possible for students to study ethics experientially rather than through abstract lecture and dialogue in classrooms.

The next cycle of debate about legal ethics instruction occurred in the early 1990s, when the W.M. Keck Foundation invested nearly \$5 million in grants over a five-year period to study and improve the teaching of legal ethics in American law schools.<sup>32</sup> These grants supported considerable study of then-current approaches to teaching legal ethics<sup>33</sup> as well as experimentation with new methods. They led to the publication in 1996 of three symposium issues of American law reviews dedicated to canvassing and debating the results of the Keck-supported studies and curricular changes.<sup>34</sup>

The Keck-supported work continued the discussions that were already ongoing about whether the law school curriculum should situate instruction on legal ethics and professionalism in a single freestanding course taught in a conventional classroom, in an experiential course or courses in a law school's clinical program, or in modules and themes pervasively embedded across the curriculum in courses focused on other areas of substantive law. Faculty members who had piloted courses and programs designed along all three of these broad lines published articles singing and at least loosely documenting the praises of what the Keck funds had enabled them to build or sustain.<sup>35</sup> The

29. See Ian Johnstone & Mary Patricia Treuthart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEGAL EDUC. 75, 87 (1991).

30. See *id.* at 90.

31. See James Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83, 91 (1991)

32. Thomas B. Metzloff & David B. Wilkins, *Foreword*, 58 LAW AND CONTEMP. PROBLEMS 1, 1 (1995).

33. Writing in 1991, James Moliterno summarized the rival methods of instruction that were then common as "lecture, problem-based discussion, case-opinion based discussion, example (including lawyer case studies and faculty or supervisor role modeling), and role-sensitive representation activity (including both client and simulated client representation).", *supra* note 32, at 105.

34. One appeared in volume 58 of LAW AND CONTEMPORARY PROBLEMS, the other two in volumes 38 and 39 of the WM. & MARY L. REV.

35. See, e.g., Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409 (1998) (the problem method); Thomas L. Shaffer, *On Teaching Legal Ethics with Stories*

Keck-supported literature also saw interesting discussion about expanding the range of materials for teaching legal ethics and professionalism beyond the usual law school fare of rules and judicial opinions. Instructors using film clips, fiction, and oral histories of prominent lawyers claimed effectiveness in stimulating reflection on what it means to be an ethical professional in the law.

One emerging theme in this literature was that the prevailing pedagogy of ethics and professionalism was attending too much to the rules of ethics and not enough to the developing moral perception and other non-cognitive contributors to an ethical practice of law. Like the rest of the law school curriculum, this critique went, the standard approach to ethics instruction privileged rules and reason to the detriment or exclusion of feelings, “personal relationships, personal values, and personal morality.”<sup>36</sup> In its fixation on the formal rules constraining lawyer behavior, it avoided deeper and more personal questions about developing moral responsibility and moral perception<sup>37</sup> and about “engag[ing] clients in moral conversations about the lawyers’ and the clients’ moral responsibilities and the moral dimensions of a case.”<sup>38</sup>

The periodical literature did not return in a comprehensive way to the teaching of ethics and professionalism until the appearance of a symposium issue on “the formation of an ethical professional identity in the peer-review professions” in the *University of St. Thomas Law Review* in 2008. What had been the somewhat marginal theme of personal morality in the Keck-supported symposia of the mid-90s now moved front and center: virtually all of the work stipulated that “[w]ith respect to the elements of an ethical professional identity, ... a foundation ... is created by self-knowledge and growth of the moral self from narcissism toward responsibility to other people.”<sup>39</sup> The focus of this symposium’s intervention in the literature was on the notion that professional ethics education could support “the holistic formation” of “an ethical professional identity” connecting technical professional skills with a profession’s highest purposes.<sup>40</sup>

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*about Clients*, 39 WM. & MARY L. REV. 421 (1998) (clinic-based narrative method).

36. John Mixon and Robert P. Schuwerk, *The Personal Dimension of Professional Responsibility*, 58 LAW & CONTEMP. PROBS. 87, 91 (1996).
37. See Lisa Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue about Goals*, 39 WM. & MARY L. REV. 457, 460-69 (1998).
38. Christine Mary Vener, *Encouraging Personal Responsibility—An Alternative Approach to Teaching Legal Ethics*, 58 LAW & CONTEMP. PROBS. 287, 290 (1996).
39. Neil Hamilton, Foreword, *The Formation of an Ethical Professional Identity in the Peer-Review Professions*, 5 U. ST. THOMAS L.J. 361, 363 (2008).
40. *Id.* at 361. A follow-up symposium published in the *University of St. Thomas Law Journal* in 2011 continued the theme of considering ethics instruction in law schools as contributing to a process of moral and professional “formation” rather than simply instilling an understanding of ethical rules. See Robert K. Vischer, Foreword to Symposium on “*The Lawyer’s Role and Professional Formation*,” 9 U. ST. THOMAS L.J. 215 (2011) (summarizing symposium papers).

For legal education, the most important contribution to this symposium came from Ann Colby and William M. Sullivan,<sup>41</sup> both of whom had just wrapped up the multi-year “Preparation for the Professions” program of the Carnegie Foundation for the Advancement of Teaching.<sup>42</sup> That program carefully examined “the goals and practices of professional education in ... five fields,” including law, through site visits and data analysis in order to “understand their strengths and weaknesses, and to recommend strategies for improving professional preparation.”<sup>43</sup> The Carnegie project helpfully identified three common “apprenticeships” in all professional education: an apprenticeship of knowledge, an apprenticeship of practice, and an apprenticeship of professional roles and responsibilities.<sup>44</sup> In legal education, students acquire knowledge of the substance of the law and skill at analytical thinking in the first apprenticeship. In the second apprenticeship, law students learn the skills of law practice through clinical work, simulation exercises, writing courses, and the like. The third apprenticeship is where law students are acculturated to the “essential social purposes” of the practice of law and to the “ethical standards and practices, professional sensibilities, and ... sense of professional identity” that define the field.<sup>45</sup>

Colby and Sullivan were careful to note that in all of the professions, the third apprenticeship is not distinct from the first two; in some ways it arises from and integrates what students learn in those.<sup>46</sup> The third is, however, the apprenticeship that gets the least amount of attention and cultivation in legal education, to the point of being “marginalized.”<sup>47</sup> The Carnegie study uncovered a reason for this. The third apprenticeship is not about knowing the law or how to “think like a lawyer” or how to cross-examine a witness or how to negotiate a settlement. It is about developing the basis of a career-long purpose to live up to the ethical norms and highest public purposes of the profession itself. But the Carnegie team’s law school site visits revealed strong doubts among both faculty and students that “professional educators are ... responsible for shaping students’ ethical development, that this enterprise is ... legitimate, and that it is [any] longer feasible to influence the ethical development of students once they are young adults.”<sup>48</sup> That, Colby and

41. Ann Colby and William M. Sullivan, *Formation of Professionalism and Purpose: Perspectives from the Preparation for the Professions Program*, 5 U. ST. THOMAS L.J. 404 (2008).

42. This program produced a much-discussed report, known colloquially as “the Carnegie Report.” See WILLIAM M. SULLIVAN, ET AL, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

43. *Id.* at 409.

44. *See id.*

45. *See id.* at 410.

46. *See id.* at 411.

47. *See id.* at 419.

48. *Id.* at 420. Russell G. Pearce summarizes and criticizes the view that law school comes too late for moral instruction in *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law*

Sullivan plausibly argue, is a big part of why the apprenticeship of ethics and professional identity plays a marginal role in legal education.

The Carnegie study of the professions suggested another reason. Law schools emphasize the first apprenticeship (knowledge of the law and development of analytical thinking skills); their main pedagogical mode is that of what Colby and Sullivan call “the academy.”<sup>49</sup> By this they mean that most of the instruction takes place in a conventional classroom setting that privileges “skepticism, intellectual rigor, and objectivity.”<sup>50</sup> In such a setting, they point out, “it is not surprising that the third apprenticeship tends to be suspect, since it requires engagement rather than distance, and commitment rather than thoroughgoing skepticism.”<sup>51</sup> Colby and Sullivan note that fields such as medicine and nursing, which give priority to the second apprenticeship (where the focus is the acquisition of professional skills), tend to take the third apprenticeship more seriously.<sup>52</sup> Attention to professional identity and purpose is to be expected in a setting like a patient encounter, where the professional stakes are visceral and high.

The work of the Carnegie team significantly enriched our thinking about the pedagogy of legal ethics and professionalism by positioning the development of character at the center of a discussion that had formerly focused on conduct and the rules constraining it.<sup>53</sup> In one way, however, the Carnegie approach slighted an important piece of the third apprenticeship. At every point where Colby and Sullivan speak of the third apprenticeship, they invoke a morality that is internal to the profession. They say, for example, that the apprenticeship “is meant to capture students’ induction into *the field’s* ethical standards and practices, professional sensibilities, appreciation for and commitment to *the field’s* essential social purposes, and sense of professional identity in which those purposes and standards are experienced as core features of what it means to practice that profession.”<sup>54</sup> They argue that the third apprenticeship must help students develop “[h]abits of interpretation or salience through which complex situations are understood and framed at least in part in moral terms, *that is, in terms of the field’s purposes and standards.*”<sup>55</sup>

What this focus on role morality misses, of course, is the tension between role morality and ordinary morality. A lawyer exclusively focused on acting

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*School*, 29 LOY. U. CHI. L. J. 719, 732-35 (1998).

49. Colby & Sullivan, *supra* note 41, at 420.

50. *Id.*

51. *Id.*

52. *See id.* at 421.

53. It must be noted that the Carnegie Report was not without its critics. *See* W. Bradley Wendel, *Should Law Schools Teach Professional Duties, Professional Virtues, or Something Else? A Critique of the Carnegie Report on Educating Lawyers*, 9 U. ST. THOMAS L. REV. 497 (2011).

54. Colby & Sullivan, *supra* note 41, at 410 (emphasis added).

55. *Id.* at 415 (emphasis added).

in role might blind himself to contexts in which role morality deviates from other moral structures, including his own personal code. It is not enough for a professional to commit herself to “the field’s purposes and standards;” she must also learn to look for contexts in which commitment to “the field’s purposes and standards” might lead her astray. After all, those “purposes and standards” tend to reward zeal in an advocate and to celebrate lawyerly cleverness. These features are not deviations from what Colby and Sullivan call “the profession’s social ends and civic foundations”<sup>56</sup> or its “public purpose;”<sup>57</sup> they are among its basic methods. They are building blocks of its institutions. It is therefore practically inevitable that a single-minded focus on *the field’s* purposes and standards will risk endorsement of too much zeal<sup>58</sup> and too much cleverness,<sup>59</sup> or at least fail to train students to be on the lookout for an excess of those things, in themselves and in others. What is needed in the third apprenticeship is not just a focus on the role behaviors that are prized by legal institutions but also a challenge to what Parker Palmer calls “the myth that institutions are external to us and constrain us.”<sup>60</sup> It must remind students of “all of the ways in which [lawyers] co-create institutional pathologies”<sup>61</sup> that can lead the profession to condone or approve what is morally troubling or even unconscionable.<sup>62</sup>

The risk of relying too exclusively on the legal profession’s own account of itself in ethics education is revealed in a vignette from my home institution, the University of North Carolina School of Law. Some twenty years ago, the school offered a course designed to teach law students ethics and professionalism through the methods of oral history.<sup>63</sup> Students were trained in interviewing techniques and then sent out to interview local “lawyers and judges who [were] living lives dedicated to a higher purpose, who love[d] what they [were] doing,

56. *Id.* at 406.

57. *Id.* at 426.

58. Colby and Sullivan acknowledge this risk, though they too unreflectively characterize excessive zeal—“the attorney as hired gun”—as a “deviation[ ] from ethical practice” rather than as a byproduct of it. *See id.* at 418-19.

59. *Cf.* William Damon, et al., *Passion & Mastery in Balance: Toward Good Work in the Professions*, 134 DAEDALUS, no. 3, 27, 31 (2005) (noting “the sheer delight of intellectual virtuosity as an end in itself” that can develop among law students in the latter part of their professional education).

60. Parker J. Palmer, *A New Professional: The Aims of Education Revisited*, 29 CHANGE 6, 9 (Nov-Dec 2007).

61. *Id.*

62. *See generally* David Luban, *Stevens’s Professionalism and Ours*, 38 WM. & MARY L. REV. 297, 315 (1996).

63. *See* Walter H. Bennett, Jr., *The University of North Carolina Intergenerational Legal Ethics Project: Expanding the Contexts for Teaching Professional Ethics and Values*, 58 LAW AND CONTEMP. PROBS. 173 (1995).

and who [found] intellectual richness and creativity in lawyers' work."<sup>64</sup> In the words of the course's creator, these were lawyers who were "proud of being members of the profession, who [felt] that being a lawyer involves a deep moral commitment, that it is a position not only of prestige but of honor."<sup>65</sup> This creative approach to teaching ethics and professionalism had the virtue of engaging students in a far more personal kind of study than what goes on in the typical classroom. It sought to "reconnect[ ] issues of professional values to questions of personal and societal morality ... by encouraging students to view lawyers not only as professionals, but as individuals and members of their communities."<sup>66</sup>

The journal article introducing this innovative course to the larger community of legal educators opened with a quotation from one of the course's oral history subjects, the late Judge Frank W. Snapp of the Mecklenburg County Superior Court. This epigraph seemed to sum up the rationale for the course itself while also portraying Judge Snapp as just the sort of seasoned ethical expert to inspire law students to reach for a higher level:

I think the ethical tone of the Bar has dropped way below what's acceptable.... If a lawyer doesn't know an ethical problem when it confronts him, that's the problem. They don't know whether they've got an ethical problem. They just barge ahead. And if you haven't got that gut feeling, "wait a minute here, there's something here," and look into it, they can give you all the courses in the world. It's not going to give you that.<sup>67</sup>

The idea that students might begin to develop that "gut sense" through sustained personal contact with a luminary like Judge Snapp was novel and worthwhile.

On careful examination, though, Judge Snapp was a troubling role model. In the early 1970s, Snapp had presided over a notorious criminal trial that emblemized the lid of repression that southern whites tried to force over black political activism of the late 1960s and early 1970s. The case of "the Charlotte Three" was a prosecution of young black political activists for allegedly burning down a horse stable from which one of them had been barred on account of his race. Though the evidence was thin and the trial marred by prosecutorial misconduct, the nearly all-white jury that Judge Snapp empaneled convicted all three of them and the judge sentenced them to terms of as long as 25 years' imprisonment, by far the harshest sentences for arson in anyone's memory and longer even than those for fires that claimed human life.<sup>68</sup>

64. WALTER BENNETT, *THE LAWYER'S MYTH: REVIVING IDEALS IN THE LEGAL PROFESSION* 6 (2001).

65. *Id.*

66. Bennett, *supra* note 63, at 191.

67. *Id.* at 173 (quoting Frank W. Snapp).

68. See Heather Ann Thompson, *All Across the Nation: Urban Black Activism, North and South, 1965-1957*, in *AFRICAN AMERICAN URBAN HISTORY SINCE WORLD WAR II* 194-201 (Kenneth L. Kusmer & Joe W. Trotter eds., 2009). In the *NEW YORK TIMES*, Tom Wicker editorialized critically

The case of the Charlotte Three and the brutality of its outcome did not give a misleading impression of Judge Snapp's views on race or judicial demeanor. His UNC oral history—the oral history from which the epigraph was drawn—is full of bigoted and dismissive quips about minority groups.<sup>69</sup> In addition, it was also no secret that Judge Snapp comported himself bluntly, even brutally, from the bench. An Associated Press profile described him as what we might today call a bully, a judge “known for his quick wit, short fuse and sharp tongue” who “[f]or 22 years ... ha[d] scowled—sometimes red-faced—from behind the bench.”<sup>70</sup> Lawyers who had appeared before him called him “a high-pressure hose that gets loose” and a judge who “reduces lawyers to jelly.”<sup>71</sup> Even those lawyers who praised him described the judge as “too impatient, hot-tempered, abrasive and quick to make up his mind.”<sup>72</sup>

The purpose of this brief profile of Judge Snapp is not to demonize him. Although his courtroom manner was intemperate, his social views were surely shared by other white southern men of his socioeconomic class and generation. The point is rather to highlight that a law school program seeking to connect students in the 1990s with prominent exemplars of professionalism identified Judge Snapp as an appropriate candidate and his “gut feeling” as a fitting epigraph for the program itself.<sup>73</sup>

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about the case to a national readership, calling Judge Snapp's sentences “unusually harsh even by the standards of the law-and-order atmosphere of the Nixon years.” Tom Wicker, *Law and Vengeance*, N.Y. TIMES, Dec. 27, 1974, at 31.

69. Interview with Judge Frank Snapp, Law School Oral History Project, University of North Carolina at Chapel Hill (Feb. 25, 1993) (on file in the Southern Oral History Program Collection at the Southern Historical Collection, The Louis Round Wilson Special Collections Library, UNC-Chapel Hill). Snapp complained that the nation had become “polyglot,” *id.* at 17, full of “strangers, Hispanics, [and] Haitians” who no longer wanted to be “Americanized.” *Id.* at 21. He recalled an era in New York City when “[t]here were a lot of black people, but you never were afraid of being mugged,” *id.* at 23, and spoke of the “type of black” a lawyer might want on a jury. *Id.* at 67. He said it was a “dangerous thing” that the owner of a baseball team should have to go to a sensitivity training class because she said “nigger.” *Id.* at 26. He told the law student interviewing him that for fear of contracting AIDS, he would not assist a gay person who had been shot. *Id.* at 25. He called lawyers Jews in contexts where that was irrelevant, *id.* at 65, and caricatured Jews as quick with arbitrary assertions of anti-Semitism. *Id.* at 25. He contrasted the “Asians who ... will work” and learn to speak English with others who would not. *Id.* at 22. He blamed feminism for having left teenagers without a parent to look after them, leading them to murder people. *Id.* at 27. As for the 25-year sentence he imposed in the Charlotte Three case for the fire that killed horses but no humans, Judge Snapp was mystified by the critical public reaction: “You would have thought I had them flogged in the public square.” *Id.* at 65.
70. *Colorful Judge Steps Down after 22 Years*, WILMINGTON (NC) STAR-NEWS, Aug. 14, 1989, at 23.
71. *Id.*
72. *Id.*
73. It is worth noting that Judge Snapp's interviewer did not question him about any of the troubling aspects of his career or temperament, or about any of the disturbing views about race, ethnicity, and religion that he voiced during the interview.

The legal profession, like all professions, wants to lionize its luminaries and elders as wise and heroic. It wants to hold up an icon like John W. Davis as a “paragon of virtue and rectitude and [a] conscience of the community”<sup>74</sup> without accounting for the fact that Davis chose to devote his full energies to the defense of American racial apartheid, not just early in his career but at its end, when the moral horrors of that system were becoming apparent to lawyers all over the country.<sup>75</sup> The profession wants to venerate a powerful lawyer like John J. McCloy as a “lawyer-statesman”<sup>76</sup> without grappling with McCloy’s role as an architect of the wartime legal system that uprooted and imprisoned tens of thousands of American citizens without charges of wrongdoing, on the basis of nothing more than their parents’ country of origin.<sup>77</sup> To be sure, judges like Frank Sneed and lawyers like John Davis and John McCloy might serve as useful examples in the professional development of attorneys, but the example could be of something nuanced rather than noble—the power that lawyers have to do great harm in the name of, rather than in violation of, their professional ethos.

In summary, over several decades, the literature has suggested a number of strategies for supplementing and improving instruction in legal ethics and professionalism in American law schools—strategies that not every instructor embraces but that nonetheless enjoy broad acceptance. Students should have the chance to learn through experience rather than just through reading and Socratic dialogue. Students should engage with a wider range of learning materials than rules and cases, and these should include narratives—both fictional and real—about lawyers’ lives. Students should be encouraged, even expected, to raise their sights above the rules of professional conduct and examine deeper and more ambiguous issues of emotional and moral development. Students should learn to appreciate the lawyer’s role morality within a broader moral framework that will allow her to see when acting in role carries danger. Students should be offered an apprenticeship to carry them past the acquisition of substantive knowledge and practical skill toward a career-long appreciation of the tremendous responsibility lawyers have for the welfare of others.

The FASPE program presents one way of addressing some of these needs. By harnessing the power of place, the FASPE fellowship provides an immersive learning experience that compels each fellow to confront emotional

74. BENNETT, *supra* note 64, at 39.

75. *See id.* at 47-50. Walter Bennett allows that by the end of the twentieth century, Davis’s professional life might not serve as an inspiring example for “a young African-American lawyer.” *Id.* at 76. He does not suggest, though, that Davis’s defense of racial apartheid would impair Davis’s reputation in the eyes of lawyers today who are not young and black, and he argues that Davis’s career choices were proper in their historical context even if they look unpalatable today. *See id.* at 76-77.

76. ANTHONY KRONMAN, *THE LOST LAWYER II* (1993).

77. *See* Susan P. Koniak & Roger C. Cramton, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 196-97 (1996) (criticizing Kronman’s veneration of McCloy).

evidence of the degradation and violence in a system of law created and managed by legal professionals. This happens not only at a wild and barbaric site like Auschwitz, where the most extreme violence was practiced, but also at a refined and elegant site like the House of the Wannsee Conference, where, as noted at the outset, the perpetrators were mostly lawyers. These settings disrupt the fellows' understanding of legal ethics and professionalism, shifting it to a more emotional plane.

FASPE also supplies the fellows with a wider variety of learning materials than is common in a law school course on ethics and professionalism. Of course, the physical sites themselves become learning materials; this is another way of describing the impact of the power of place. But the curriculum also includes various narrative depictions of lawyers and others making decisions with grave ethical ramifications—films showing lawyers deciding upon the deaths of millions and experimental subjects deciding whether to administer electrical shocks to an innocent person. It includes a case study of Bernhard Lösener, the perplexing Nazi lawyer mentioned earlier,<sup>78</sup> who can plausibly be seen as both a builder of and a brake on the engine of the persecution of Jews through the 1930s and who abandoned his post when no longer able to claim ignorance of the reality of genocide. It includes a face-to-face meeting with a survivor of Auschwitz and Birkenau who narrates the tragedies that befell her and her family.

This last narrative reveals another unique aspect of FASPE's approach to ethics and professionalism: it gives a prominent place not just to lawyers but also to the people *harmed by* lawyers. This is the central reason for the visit to Auschwitz and Birkenau on the FASPE trip. The FASPE fellows spend time in Germany, walking in the footsteps of the Nazi lawyers and trying to imagine their mindsets and motivations, but then travel to the killing fields in Poland to confront the human impact of what those lawyers did. It is an opportunity for the fellows to imagine themselves into the lives of those touched (and destroyed) by lawyers' power. Including the experiences of victims distinguishes FASPE's approach to legal ethics from those common in law school curricula, which focus chiefly on lawyers and the rules constraining them.

Another distinction should be obvious but nonetheless bears mention. FASPE teaches chiefly by negative example. It abandons the heroic narrative of an Atticus Finch or a Thurgood Marshall (not to mention the falsely heroic narrative of a Frank Snapp) in favor of the tortured and torturing narrative of a Bernhard Lösener. The point of looking so unflinchingly into the face of evil is not to scare the fellows straight. FASPE does not cast all Nazi lawyers as unrecognizable moral monsters. Rather, it invites the fellows to find in a character like Bernhard Lösener traces of themselves: ambition, cleverness, competitiveness, patriotism, acceptance of the *status quo*. It rejects the trite and mistaken depiction of the Nazi legal system as a mere veneer of legality shielding a wholly corrupt and lawless interior, emphasizing instead the

78. See *supra* note 21 and accompanying text.

numerous points of connection between the Nazi legal system and the legal system of the Weimar Republic that preceded it—as well as the legal systems of other nations, including our own.<sup>79</sup> The FASPE fellow looks into the face of evil to see, in certain moments, her own resemblance. This is uncomfortable work, rather distinct from the cheerful hope that law students will be inspired to live and practice ethically through exposure to the stories of heroes, lawyer-statesmen, and pillars of the community.<sup>80</sup>

A final distinction between FASPE and the common legal ethics course in a law school classroom is that FASPE is completely immersive. From the moment the FASPE fellows arrive in New York, they are together (with each other, and, to a great extent, with faculty and staff) for twelve straight days. These are days not just of seminar study but of travel, meals, jet lag, entertainment, co-rooming, and sightseeing. Friendships form; at moments they also fray. People move from resilience to vulnerability and back again on their own timetables. There are tears, and there is laughter. FASPE is, in other words, something of a cocoon that forms around the fellows to permit them the intense reflection and personal engagement that stimulates personal and moral growth. It is safe to say that the program of legal education at no American law school could afford to create such an opportunity for its students, as a matter of either time or funding.

This is not to say, however, that FASPE's approach to ethics and professional formation has no place in American legal education. Americans need not travel overseas to confront sites of great human suffering designed and defended by lawyers. American law and American lawyers created and nourished the plantation economy and protected the slave trade.<sup>81</sup> Those sites of suffering remain. American law and American lawyers created and defended the legal structures that exiled and imprisoned American Indians and attacked and undermined their cultures.<sup>82</sup> Those sites of suffering remain. American law and American lawyers designed and defended the uprooting and incarceration of tens of thousands of Japanese Americans in camps during World War II.<sup>83</sup> Those sites of suffering remain. For every heroic lawyer defending a lunch

79. Though it is uncomfortable for Americans to acknowledge this, laws enforcing racial supremacy and separation and laws authorizing eugenic sterilization were common in the United States in the mid-1930s, much as they were in Germany. See DAVID FRASER, *LAW AFTER AUSCHWITZ* 95-97, 107-17 (2005).

80. I do not mean to suggest that FASPE is alone in the idea that students can profit from studying lawyers who do wrong. Richard Abel's excellent *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008) takes a similar approach, though the lawyer conduct catalogued in Abel's book does not approach the evil of the Nazi system.

81. See ROBERT COVER, *JUSTICE ACCUSED* (1975); *SLAVERY AND THE LAW* (Paul Finkelman ed., 1997); Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. 757 (2009).

82. See TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL, THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* (2009).

83. See PETER IRONS, *JUSTICE AT WAR* (1983); Eric L. Muller, *Hirabayashi and the Invasion Evasion*, 88 N.C. L. REV. 1333 (2010).

counter protester of Jim Crow, there was a network of laws and lawyers prosecuting and persecuting him.<sup>84</sup> Those sites of suffering remain.

At many American law schools, it is possible to visit such a site for the cost of a bus or a train ticket, and at others for the cost of a domestic plane ticket. Some such sites—plantation slave quarters, or a Woolworth lunch counter<sup>85</sup> that company lawyers fought to keep segregated—would speak with unmistakable clarity. Others—the grassland where once stood an internment camp or the halls of an historic courtroom—would require the assistance of an historical interpreter to make them speak, but such interpreters abound, sometimes as nearby as the halls of a campus history department. While FASPE supports twelve days of isolation and immersion, a powerful group dynamic could surely take hold in a shorter time, perhaps even a Spring Break trip or even a four-day weekend. FASPE is admittedly costly, but if the American bar is serious in its concern for the decline of professionalism, law firms might be persuaded to help fund a powerful program fostering moral and ethical reflection and formation.

The approach of FASPE should not and will not replace the more conventional methods of instruction in ethics and professionalism in American law school classrooms. It does, however, show how some of the holes in the standard curriculum might be filled, thereby helping the discipline renew its commitment not just to educating law students about conduct rules but launching them on a lifelong path of moral professional formation.

84. See ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* (2009); DAVID J. MAYS, *RACE REASON, AND MASSIVE RESISTANCE: THE DIARY OF DAVID J. MAYS, 1954-1959* (2008); CLIVE WHITE, *RABBLE ROUSERS: THE AMERICAN FAR RIGHT IN THE CIVIL RIGHTS ERA* (2011).

85. I refer to the lunch counter beautifully preserved and interpreted at the International Civil Rights Center and Museum in Greensboro, North Carolina.