Brooklyn Law Review

Volume 61 | Issue 4 Article 1

4-1-1995

SYMPOSIUM: Nazis in the Courtroom: Lessons rom the Conduct of Lawyers and Judges under the Laws of the Third Reich and Vichy, France

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BROOKLYN LAW REVIEW

Volume 61 1995 Number 4

SYMPOSIUM

NAZIS IN THE COURTROOM: LESSONS FROM THE CONDUCT OF LAWYERS AND JUDGES UNDER THE LAWS OF THE THIRD REICH AND VICHY, FRANCE

The Association of the Bar of the City of New York

Thursday, October 12, 1995

Introduction:	Norman L. Greene
Moderator:	Honorable Herbert S. Okun
Introduction & Commentary:	Professor Fritz Stern
Speakers:	Honorable Jack B. Weinstein Professor Richard H. Weisberg Professor David Luban Professor Ruti G. Teitel

A PERSPECTIVE ON "NAZIS IN THE COURTROOM"

NORMAN L. GREENE[1]

"Nazis in the Courtroom" draws on the Nazi experience to consider the problem of judges and lawyers who are complicit with evil law. These are judges or lawyers who knew or should have known better and therefore faced a moral choice: what should they have done when faced with laws that are evil in their letter or in their application?[2] As one of the panelists, David Luban, notes, the concern is not with the Nazi "monsters," but with the "good" judges.[3] The participants in the program explore the issues raised by the conflict between adherence to the form of law and adherence to substantive morality.

The relationship between law and morality has been the subject of ongoing debate.[4] The debate presupposes that a judge may find himself caught between the law and his own conscience. Should the judge park his conscience at the courthouse door in applying law?[5] Does a judge, applying the

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[1] Copyright 1996 Norman L. Greene. All Rights Reserved. Mr. Greene is a partner in the New York City law firm of Schoeman, Marsh & Updike, LLP and Chair of the Committee on Lectures and Continuing Education of The Association of the Bar of the City of New York.

[2] Although this program is limited to lawyers and judges, other professions, including physicians, also bore a measure of responsibility for the tragic success of the Nazi program. *See*, Edward Ernst, *A Leading Medical School Seriously Damaged: Vienna 1938*, 122 ANNALS OF INTERNAL MEDICINE 789, 792 (May 15, 1995) ("The historic role played by the [medical] profession in the Third Reich, however is indisputable: Had the profession taken a strong stand . . . it is conceivable that the entire idea . . . of genocide would not have taken place.") (internal quotations ommitted).

[3] *See also* Markus D. Dubber, *Judicial Positivism and Hitler's Injustice*, 93 COLUM. L. REV. 1807 (1993) (reviewing INGO MULLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (1991)). "Let us focus not on the Nazi 'monsters,' but on the 'good' judges, the best judges Germany had to offer at the time. . . ." *Id.* at 1824 (footnotes omitted). Dubber suggests that of these judges the following questions might have been asked:

> How could these judges year after year interpret laws that to us seem so patently inhumane and unjust? How could those law professors who were not fanatic Nazis continue to teach and develop inhumane and unjust legal doctrines that fueled the legal murder machine of Nazi Germany?

Id. at 1825.

[4] *See, e.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) *and* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

[5] *See, e.g.*, Norman L. Greene, *No Duty for Lawyers to Ignore Conscience*,

law as written, discharge his responsibilities?[6] H.L.A. Hart asked, "Is law open to moral criticism? Or does the admission that a rule is a valid legal rule preclude moral criticism or condemnation of it by reference to moral standards or principles?"[7]

The Nazi experience was a situation involving laws so monstrous, and the Nazi legal system was so flawed, that one might contend that it is not relevant to the American experience.[8] But the problem of enforcing unjust laws is not an alien experience to American judges. The crisis between judicial conscience and the law has had, and continues to have, grave implications for American judges faced with enforcing laws they believe to be unjust. The dilemma of the anti-slavery judge faced with the question of whether to enforce the fugitive slave laws presents the most poignant example.[9] Robert Cover argues that these judges were complicit with a system of law they thought immoral.[10]

As Judge Weinstein notes, the law versus conscience issue also arises in the context of the application of mandatory

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N.Y.L.J., September 25, 1995, at 2 (letter to the editor) ("[L]awyers and judges cannot simply lay aside their conscience when they do their work. They cannot ignore the implications of what they are doing on the basis that one law is like another, merely because it appears in a statute book.").

[6] Judge Weinstein has answered this question in the negative: "The Nazi judges' silence, acquiescence, and active participation in the gravest injustices serves as a reminder that the duty to decide cases in accordance with statutes or precedent is not absolute." Jack B. Weinstein, *Limits on Judges' Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1, 25 (1994) (footnote omitted).

[7] H.L.A. HART, LAW LIBERTY AND MORALITY 3 (1963). *Cf.* Dubber, *supra* note 3, at 1825-26 ("Legal positivism's strict and proud division between law and morality, its hostility to even the suggestion of assessing the extralegal validity of positive law, permitted lawyers to rationalize to themselves and others their interpretation and application of laws they might, upon reflection, have considered to be grotesquely unjust or immoral.").

[8] *E.g.*, Fuller, *supra* note 4, at 660 ("To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system.").

[9] ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975); William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 538-47 (1974). As Judge Weinstein has observed, similar issues were faced where a few segregationist judges resisted the United States Supreme Court's attempts at integration. Weinstein, *supra* note 6, at 28.

[10] COVER, *supra* note 9, at 6.

federal sentencing guidelines (which he specifically refers to as "immoral sentencing laws") in criminal cases by judges opposed to them. A recent controversy in New York illustrates this dilemma as well. A conflict arose between a District Attorney who had expressed reservations about capital punishment and the Governor who supports capital punishment. The issue was whether the prosecutor would seek the death penalty in a particular murder case involving the murder of a police officer. These modern examples, among others, underscore the continuing relevance of the debate.[11]

The gap between law and morality arises not only when the laws themselves are evil but when laws are the subject of overly rigid interpretation, leading to unjust results. As Richard Weisberg notes, this gap has been treated in literature as well as law. In *Billy Budd*, Herman Melville's Captain Vere stands on one side of the dilemma as he argues the imperative of following the law regardless of consequences: "For [ ] law and the rigor of it, we are not responsible. Our vowed responsibility is in this: That however pitilessly that law may operate, we nevertheless adhere to it and administer it . . . ."[12] In his study of the dilemma faced by antebellum judges, Cover writes that his study of judges concerns those, who thinking slavery immoral, "confronted Vere's dilemma, the choice between the demands of role and the voice of conscience. And it was he [i.e., the anti-slavery judge who enforced fugitive slave laws] who contributed so much to the force of legitimacy

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[11] *See, e.g.*, Rachel L. Swarns, *Governor Removes Bronx Prosecutor from Murder Case*, N.Y. TIMES, March 22, 1996, at A6. *See also*, Letter from Robert T. Johnson, Bronx County District Attorney, to George E. Pataki, Governor of New York (published in New York Daily News, March 21, 1996, at 4) (letter submitted in response to Governor's question regarding whether the District Attorney had a policy against the death penalty). The letter highlights the District Attorney's concerns about the death penalty, despite the Governor's threat to remove him from the case if he had such a policy. Inferring that the District Attorney had refused to confirm that he would seek the death penalty, the Governor superseded the District Attorney's authority and replaced him on the case.

[12] HERMAN MELVILLE, BILLY BUDD 68-69 (Signet Classics 1961) (1891). In his analysis of BILLY BUDD, Cover suggests that "In Vere's words we have a positivist's condensation of a legal system's formal character." COVER, *supra* note 9, at 2. Under this conception of law "the judge is not responsible for the content of the law but for its straightforward application." *Id.* at 3.

that law may provide, for he plainly acted out of impersonal duty."[13]

Another example appears in Alan Paton's *Cry, The Beloved Country*, where a South African judge absolves himself of the obligation to do anything other than administer the law, regardless of its justice, in sentencing Absalom Kumalo to death for murder.[14] Likewise, English judges in the nineteenth century handed out death sentences for a wide variety of crimes, despite discomfort with the harshness of the law. The severity of the criminal code, which the judges well recognized, sometimes provoked them to tears.[15]

Given the enormity of their misconduct, Nazi judges could have benefitted from an infusion of conscience, no matter how great. As for American judges, however, undue reliance on conscience may raise different problems. Mary Ann Glendon, who does not focus on the Nazi judicial system, refers to the American judges in the early part of the twentieth century who exhibited compassion toward big business at the expense of overworked women and children.[16] Glendon notes that "[t]he

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[13] COVER, *supra* note 9, at 6.

[14] *See* ALAN PATON, CRY, THE BELOVED COUNTRY 199-200 (Charles Scribner's Sons 1976) (1948), where the judge noted the following:

> [S]ociety . . . has made law, and has set judges to administer it, and has freed those judges from any obligation whatsoever but to administer the law. . . . If the law is the law of a society that some feel to be unjust, it is the law and the society that must be changed. In the meantime there is an existing law that must be administered, and it is the sacred duty of a Judge to administer it.

[15] ROBERT HUGHES, THE FATAL SHORE 30 (Vintage Books 1988) (1986) ("The judge simply surrendered to the imperative of the statutes, a course of action that absolved him of judicial murder, and that caused him to weep. . . .").

[16] MARY A. GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 163 (1994). Glendon notes:

> But are judicial compassion and responsiveness viable substitutes for the elusive ideal of impartiality? Few would dispute that judges should be able to empathize with the men and women who come before them. But in the early years of this century, adventurous judges were extremely tenderhearted toward big business, while showing little compassion for women and children working long hours in factories.

Id. Some examples include Adkins v. Children's Hospital of District of Columbia, 261 U.S. 525 (1923) (striking down minimum wage for female workers); Hammer v. Dagenhart, 247 U.S. 251 (1918) (ban on commerce in products of child labor unconstitutional); and Lochner v. New York, 198 U.S. 45 (1905) (maximum 60 work week for bakery employees struck down as a violation of freedom of contract). *See also* ROLF HOCHHUTH, THE DEPUTY 83 (Grove Press, Inc. 1964)

problem with subjective judging is that sooner or later, the tables are apt to be turned when ambitious judges with the 'wrong' ideas ascend to the bench."[17]

"Nazis in the Courtroom" begins with Professor Fritz Stern sketching the historical context of the administration of justice in twentieth century Germany. As David Luban notes, and Stern concurs, during the Weimar Republic, judges "brutally persecuted leftists and blatantly protected the violent right, including Hitler."

David Luban defines his topic as a "report on the legality of evil" and questions to what extent the rule of law can immunize and safeguard jurists from evil-doing. He explains the willingness or eagerness of Nazi judges to "advance the Nazi program by enforcing monstrous law." He catalogues a number of examples of judicial misconduct in the enforcement of Nazi laws, including jailing a Jewish man for looking across the street at a German woman; killing a Jewish man for having an affair with a German woman; and executing another Jewish man for possibly having such an affair. Nazi judges refused even to consider evidence that the Nazis had set the Reichstag fire during the Reichstag fire trial.

Did the Nazi judges fail because of their adherence to positivism—their belief that law and morality are separate? Was there an excessive devotion by German judges to the rule of law?[18] Was it because they treated the laws the way that a

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(1963) ("Conscience? Who could trust that! Conscience or God: men never have wreaked such havoc as when invoking God—or an idea. Conscience is a treacherous guide. I am convinced that Hitler acts according to his conscience. No, I need an answer from outside myself.")

[17] GLENDON, *supra* note 16, at 165. Once again, the bankruptcy of the Nazi legal system makes comparisons difficult. It is hard to imagine condemning Nazi judges charged with enforcing racially and religiously discriminatory law from engaging in *too much* subjectivity in order to avoid its harsh effects.

Furthermore, the panelists noted that the consequences of Nazi judges having resisted are debatable. Judge Weinstein commented that German judicial resistance might have prevented the Holocaust. David Luban suggested that had the Nazi judges refused to enforce the law and resigned, they would have been replaced by more willing Nazi judges. In the Vichy context, Richard Weisberg argued that Vichy lawyers had the skill and capacity to void the discriminatory French laws.

[18] *See*, Fuller, *supra* note 4, at 659. Fuller notes:

> German legal positivism not only banned from legal science any consideration of the moral ends of law, but it was also indifferent to what I have called the inner morality of law itself. The German lawyer

soldier treats an order, with the judge saying that a law is a law, like a soldier stating that an order is an order? Or did they fail because Nazi law directed judges not to interpret laws positivistically?[19]

Professor Luban points to a number of factors responsible for their behavior and concludes that the rule of law bore a degree of responsibility in immunizing Nazi judges from their conscience. The judges were obedient to the law at the expense of morality or even basic human decency. He adds that certain legal reasoning of the Nazi judges was all too recognizable by professional standards; and without arguing for the moral equivalence of American and Nazi judges, he even finds parallels in the decisions of American courts.

Richard Weisberg notes that despite having the capacity and skill to protest, judges in Vichy, France matched the Nazis in their willingness to enforce racial laws and, at times, exceeded it or developed their own form of anti-semitic laws.[20] It was their behavior, more than German pressure, that led to the implementation of anti-Jewish laws in Vichy. Among other things, Vichy lawyers would advise clients on whether they were Jewish under the definitions of racial laws; there were treatise and manual writers on the subject; and racial law became big business.

Professor Weisberg concludes that the story of Vichy lawyers is especially troublesome in light of the similar principles underlying American and French legal traditions, including equality under the law and due process. He notes that the Vichy experience, in which some defenders of individual rights brought up under noble legal lessons became co-opted into enforcing Vichy's racial laws, is a cautionary tale for Americans.

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was therefore peculiarly prepared to accept as "law" anything that called itself by that name, was printed at government expense, and seemed to come "von oben herab" [from on high].

[19] For example, Professor Luban cites a Nazi code which permitted punishment for an act "which deserves to be punished according to the spirit of a rule of criminal law and healthy folk-feeling" (a synonym for "whatever the Nazi party wanted").

[20] Richard Weisberg, *Legal Rhetoric Under Stress: The Example of Vichy*, 12 CARDOZO L. REV. 1371, 1415 (1991) (The "willingness of [the Vichy French] to draft laws in a manner often exceeding the German conqueror's demands set precedents even the Nuremberg laws and Nazi courts had not imagined . . . .").

Judge Weinstein discusses what judges can do when faced with immoral laws, noting that judges "can ignore neither monstrous nor routine injustices." According to Judge Weinstein, "[o]f the various options available to American judges when faced with an immoral law, only one is ruled out: silent acquiescence."[21] Although resignation is a principled option for some judges in certain cases, this might also result in the replacement of good judges with government puppets.[22] Other judicial techniques include distinguishing unjust precedent and deliberately risking reversal in order to ensure that the appellate courts and the public recognize the strong opposing moral views.[23]

Judge Weinstein wonders what would have happened if all judges refused to enforce a particular law. His view is that in the conflict between law and morality, morality would prevail. Indeed, he suggests that if substantially all German judges had resisted the Nazi laws, the Holocaust might have been brought to a halt. Based upon his experience with other judges in his court (the United States District Court for the Eastern District of New York), he predicts that the judges in the United States would stand up for morality and withstand assaults by injustice. He concludes that when "they individually think it necessary, judges have the responsibility to speak up and ask for justice."

Although not focusing exclusively on the Nazi era, Professor Teitel considers the effect totalitarian precedents should have been afforded in post-war German courts, in

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[21] *Id.*

[22] *Cf.* Dubber, *supra* note 3, at 1815 (one victim of Nazi persecution acknowledged that some Nazi judges "remained in office to soften the impact of unjust Nazi laws").

[23] The approaches Judge Weinstein would use differ from those of Cover. Weinstein cites Cover as suggesting that

> *In a static and simplistic model of law,* the judge caught between law and morality has only four choices. [1] He may apply the law against his conscience. [2] He may apply conscience and be faithless to the law. [3] He may resign. [4] Or he may cheat: He may state that the law is not what he believes it to be and, thus preserve an appearance (to others) of conformity of law and morality.

Weinstein, *supra* note 6, at 27 (quoting COVER, JUSTICE ACCUSED at 6 (emphasis added)). Weinstein argues that Cover's "second and fourth options ignore the great flexibility of the American common law and its historical forms of interpretation." *Id.*

developing her theme that there is more than one law and may be a split between formal law and justice. How did these judges handle the conflict between evil laws and their judicial role?

In particular, Professor Teitel focuses on post-Communist German courts, discussing the prosecution of border guards in post-Communist courts for shootings of people crossing the border during the Communist era in the former East Germany. The guards' defense was that they were just following the law prohibiting unlawful border crossings.

In one case, the court was required to decide whether the post-Communist judges would apply the previous (Communist) law and accept the defense that the guards were following the unjust law. Professor Teitel points out that despite the written law, there are circumstances in which defendants (such as the border guards) should have known that the border-crossing law—even though it was settled law—should not have been considered "law" in its true sense.[24] She concludes by noting that there are signs in the United States of a gap between law as written and the people's understanding of law—the "public perception of law as lawful and the law as written"—and these are troubling.

The Committee on Lectures and Continuing Education, in conjunction with the Committees on Civil Rights and International Human Rights, is pleased to present this important symposium and to have the opportunity to bring these issues to the attention of the bench and bar. We are grateful to our distinguished panelists and, in particular, our moderator, Ambassador Herbert S. Okun, for lending their talents and experience to this subject.

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[24] *See generally*, Ruti G. Teitel, *Paradoxes in the Revolution of the Rule of Law*, 19 YALE J. INT'L L. 239, 240 (1994). Professor Teitel noted that in the border guards' case, the German court rejected the border guards' defenses although they depended on prior law, relying on past decisions concerning the Nazi regime. According to Professor Teitel, the court relied on

> a doctrine established in a 1953 decision distinguishing positive law from justice, stating "The experience of the National Socialist regime in Germany, in particular, has taught that . . . it must be possible in extreme cases to value the principle of material justice more highly than the principle of the certainty of the law."

Id. at 243-44 (footnote omitted).

PROFESSOR FRITZ STERN[25]

Ladies and Gentleman, I trust you will believe me that when I got this invitation to talk before this particular audience I found it intimidating. I was reminded of the line from my favorite modern play, *A Man for All Seasons*, where Sir Thomas More is made to say, "The currents and eddies of rights, of right and wrong, which you will find such plain sailing, I can't navigate. But in the thickets of the law, oh there I am a forester."[26] In those very thickets, alas, I am a foreigner, far from being a forester, and therefore I appear here with a certain degree of trepidation. All I can do is suggest something of the historic context of the administration of justice and injustice in twentieth-century Germany, a country that at the beginning of this century prided itself on the high standards and the incorruptibility of what was called the *Rechtsstaat*.[27]

We must remember that in the first half of the nineteenth century, in the German states, the legal profession was on the liberal side. Above all, it demanded a written constitution that embodied liberal designs. The legal profession's importance can be measured by, for example, its presence at the Frankfurt Assembly in 1848. Subsequent history shows that liberal commitment diminished as the political culture of Germany changed. In the late 1870s, the practice of law became free, so that access to the practice of law was no longer entirely up to the state, yet at the same time a new conservative push from the government occurred in regard to judicial appointments. From the 1890s to 1918 (under the old imperial regime), German lawyers tended to be part of the establishment and, on the whole, a very conservative group. They were part of the upper class group, by status and by prestige. Most of them had a sense of calling, of entitlement, and were proud of their cultivation and their civic responsibility. Still, German lawyers—particularly judges—were historically picked for their political loyalty or correctness and were part of the

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[25] University Professor, Columbia University.

[26] ROBERT BOLT, A MAN FOR ALL SEASONS, 37 (1960)

[27] The Rechtsstaat may be thought of as "the state in which the rule of law bounds the exercise of political power." David Dyzenhaus, *The Legitimacy of Legality*, 46 U. TORONTO L.J. 129, 137 (1996).

monarchical establishment.

Let me make just one brief, but important, parenthetical remark on a subject to which we will have to return, and that is the question of Jews. Once the legal profession became a so-called free profession, Jews played a disproportionate role as attorneys, just as they did in the medical profession. Indeed, Jews occupied disproportionate positions throughout the upper echelons of German society, so much so that in 1905 half of the bar in Berlin consisted of Jews. Yet the opposite was true of the bench: Jews, until 1918, found it extremely difficult to become judges.

It would be impossible to overestimate the impact of the First World War, of defeat, and of the revolution, on Germany's society and on the German judiciary. It led to a general radicalization both to the left and to the right. Simply put, judges (and to a lesser extent lawyers), after the so-called revolution in November 1918, felt disinherited and resentful, even though the revolution had not touched them and they had retained their positions.

They felt disinherited because they believed that it was no longer their society, their country, their world. The Social Democrats established the Weimar Republic in November 1918, and then a democratic coalition wrote the constitution in the spring of 1919. The new constitution left the judges in the offices they occupied under the old constitution. Only later did the Social Democrats discover that the Weimar judiciary was in very large measure anti-republican. The judiciary was contemptuous of the very political system in which they were to administer justice. In the first three years of the Weimar Republic (roughly 1918-19 to 1923), infamous political murders and crimes occurred. There were also street crimes of a political nature. It became common for German judges to administer "political justice." Political justice meant that those who had committed murder but came from the right and claimed to be nationalists were often commended for their selflessness and idealism, while those on the left received much harsher treatment. To cite the words of Gustav Radbruch, the minister of justice (a Social Democrat at the time and a judicial scholar), there was a state of war between the people and the judiciary during the Weimar period.

Hitler's trial in November 1923 (after he had tried to

overthrow the Reich government) was a mockery of justice. His sentencing was also a mockery of justice, illustrated by the fact that he was not deported as an alien as the law required. Needless to say, if Hitler had been deported back to Austria in 1923, history would have been very different, and some of us might not be here tonight. After Hitler's violent putsch against the regime failed, he then undertook a so-called March of Legality. This march demonstrates one of the important things to remember about the Third Reich and its context: Throughout—and especially in the first two years after they came to power—the Nazis tried to maintain facades of normalcy and legality, facades that allowed judges and attorneys to make their compromises and become complicitous.

There were a couple of stages by which this was done. First, the Weimar Constitution was used perversely to subvert its own principles. The Reichstag fire in February 1933, a month after Hitler came to power, gave the Nazis the opportunity to create, by so-called constitutional means, emergency decrees that the octogenarian president signed, as he had to. For all practical purposes, these decrees abrogated all civil rights, never to be restored.

The Enabling Act of March 1933 gave the existing cabinet four years of decree power, an act consistent with the constitution. Also in March 1933, the first concentration camps were established. Next, in April 1933, the infamous decree on the "restoration" of the professional civil service removed political opponents (so-called non-aryans and others) from most civil-service positions. This decree obviously targeted judges; some lawyers were also disbarred. That the judges and other civil servants accepted this first violation of the principle of the constitution and allowed the exclusion of their Jewish colleagues without a collective protest or significant individual protest was a tremendous encouragement to the regime, which in the beginning was still uncertain of how far it could go.

During the weeks when the Nazi regime was establishing itself, there was a nearly total absence of protest against the revocation of what would be considered basic civil rights. Gradually there came into being—and this is why I mentioned the concentration camps—a kind of dual-state existence. There was a normalcy in judicial proceedings concerning what one might call normal criminal cases. Then there were the cases of

political justice and so-called political crimes, of which more and more were given into the hands of special courts over which the Gestapo and the SS had control. In this dual system, the most normal achievements of civilized life such as habeas corpus quickly became unknown. Once, of course, you were in the concentration camp or in prison for political reasons (or later for racial reasons), there was no recourse at all.

This is a fairly important point about the Nazi regime in general. Remember what I said about the judges and their behavior in the Weimar republic in a free democratic society, when they allowed the Nazis to throw their political opponents, among whom were communists and socialists and so-called aryans by the thousands, into concentration camps. If Germans, German lawyers and judges among them, had been willing to do this to each other—to other Germans—we should understand how this kind of violence and brutality led to the atrocities and horrors that came much later when Germans did it to non-Germans. Thank you.

PROFESSOR RICHARD H. WEISBERG[28]

The last few times that I had the honor of addressing an audience in this room concerned two literary texts, one *Billy Budd* and the other *The Merchant of Venice*, and I think that some of you may have been to one or the other of those

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[28] Richard Weisberg holds a Ph.D. in Comparative Literature from Cornell University (with his M.A. in French supervised by Paul de Man) and his J.D. from the Columbia University School of Law, where he was an editor of the Law Review. He currently holds the Walter Floersheimer Chair in Constitutional Law at the Benjamin N. Cardozo Law School of Yeshiva University. Professor Weisberg has been on the graduate faculty in French and Comparative Literature at the University of Chicago, and more recently has been a visiting professor of English at Brandeis University. He has visited as well at a half-dozen law faculties in the United States and in Australia, Israel and Canada.

The author of three pioneering books in the field of Law and Literature, Professor Weisberg will soon publish VICHY LAW AND THE HOLOCAUST IN FRANCE (Gordon & Breach Worldwide; the NYU Press for North America). He has recently been awarded a Rockefeller grant for a residence in Bellagio, where he and Professor Geoffrey Hartman will develop their project, *Towards a Post-Modernist Sense of Text and Culture*.

Professor Weisberg is general editor of CARDOZO STUDIES IN LAW AND LITERATURE, now in its seventh year of publication.

occasions. These are also texts that I think are important to keep in mind as we tie together some of the themes of tonight's discussions. *Billy Budd* is a text that tests the distinction between natural law and positive law, which most of us will be touching on, and I think David Luban in particular. The struggle between what lawyers think of as their professional duty and their personal conscience is a very subtle process, particularly in Vichy, but a very important aspect of the debate about the way Nazi judges acted under the Third Reich too. The *Merchant of Venice,* I think, is a text that teaches us how what might be called polite anti-semitism becomes caught up and made a part of legal discourse. People who would not otherwise previously speak in those kinds of ways become involved in a process that co-opts them until they find themselves speaking as lawyers or judges in ways that prior to the occasion in question they would have considered abhorrent.

This for me is the particular interest of Vichy, France: a system that was in many respects very similar to our own, precisely as regards the stories that most lawyers who practiced during 1940-44 in France were educated into. These stories were very similar to the constitutional stories that we learn in this country. Stories based on the same great principles of the 1790s: the rights of people, the rights of all mankind, egalitarianism under the law, due process, all this was part of the education and the practice of French lawyers prior to 1940. The conundrum is, how could they have behaved the way they did? At least as regards Jews, how could they come to violate the noble legal lessons that had been ingrained into them? The ancillary question for us as an American audience is perhaps more provocative in the case of Vichy than in the case of the Third Reich precisely because of the similar traditions Vichy shares with us. Can it happen here? Has it indeed happened here? Is it happening now in our own system? Vichy law forces us to personalize the issue, to take it beyond good and evil to a real question for us as American lawyers.

The behavior of French lawyers, judges, and bureaucrats—far more than German force or pressure—brought about the anti-Jewish laws and their implementation in Vichy, France. Furthermore, the extent of the damage to Jews on French soil was a function less of traditionally virulent anti-semitism or of

political pandering to fascist influence than of the desire by the professional legal community to take the new doctrinal area of racial laws to its logical conclusion without challenging the laws on any high level of legal—let alone moral— generalization. The French legal community's way of reading the racial laws, in effect, created those laws as they actually came to persecute Jews on French soil. Italian lawyers faced with a similar statutory scheme under Hitler's ally Mussolini largely ignored those laws. They were not implemented until the Germans rolled into their country. In Belgium, a week after the promulgation of laws against Jews (not by an indigenous regime, as happened in France, but by the Nazi authorities in Belgium), prominent lawyers and judges immediately wrote a letter to the German occupying authorities protesting this anti-semitic legislation and claiming that it was no part of Belgian tradition to ostracize Jewish lawyers and judges and that indeed it was against the law of war for an occupying authority to take a step of that kind. In Denmark, the general population stood up and said no; 7300 of some 7700 Danish Jews were saved. In France, there was virtually no protest by lawyers against these racial laws that their own countrymen had promulgated and that ran so against French legal tradition. Thus, often on a case-by-case basis, some 75,000 Jews on French soil were sent to their slaughter in the camps in the East; some 3000 Jews never made it that far, for they died in the French-run Vichy camps in the southern zone.

At every point, Vichy lawyers had the capacity and the skill to protest and even potentially render null and void the black ink of the statutes. Indeed, there was sporadic public protest against many legal changes brought under Vichy, yet no lawyer directly attacking the new regime and its laws suffered any sanction that we know of. There was even one such jugular attack on the Jewish laws themselves published by a law professor as early as November 1940, one month after the first Vichy racial statute was promulgated. (As Professor Stern has pointed out about Germany, so in Vichy there was an amazing swiftness and rapidity with which the regime promulgated these racial statutes.) This protest made by a law professor was published prominently in occupied France under the eyes both of the Nazis and the Vichy bureaucrats, demonstrating that it *was* possible to protest. Unfortunately,

no one else prominent in the legal community joined the bandwagon of that protest. The story of what happened to that particular professor is this: he suffered no penalties for protesting; rather his career advanced, he was promoted, and by the end of the Vichy period his own discourse had accommodated the racial statutes, and he was dealing with them not on the level of high protest of his original publication but on relatively low levels of generalization. In other words, he retreated to the hairsplitting lawyer-like questions that all of us in the profession love to deal with but that perhaps only avoid the most significant legal issues raised by laws of this kind.

Vichy lawyers' manner of reading Vichy's many anti-Jewish laws and regulations (there were over 200 of them published by the French) wound up extending the scope of the legislation to more groups and individuals than the German precedents demanded or sometimes even suggested. On crucial matters of racial identification particularly there were hundreds of cases involving individuals in the gray area of mixed grandparental heritage. Does a person with two Jewish and two non-Jewish grandparents count as a Jew? Ironically, the Nazis felt that Vichy was probing too deeply, too legalistically, into this question. To give just one example, in Nazi Germany in similar cases the production of a baptismal record by a lawyer on behalf of such a mixed-heritage person was dispositive of the issue of that person's aryan status. In France, because of its long tradition of anti-clericalism, baptismal records were looked at with great skepticism, so many individuals of mixed grandparental heritage could not prove their non-Jewish status by the mere production of a baptismal certificate. A second example: the French extended their inquiry into Jewishness to groups that the Germans had long before decided not to touch, like the Mosaic Georgians[29]

[29] The Mosaic Georgian sect, which honored and revered the Torah, were suspect as a religious matter. By German approximation early in 1941, there were some fifty Mosaic Georgians in France whose fate would have to be decided under Vichy laws. The occupiers quickly made clear their own sense that these individuals were not Jewish, both by the Nazis' race-oriented lights and by their view of the sect's religious practices, too, which approximated Jewish practice only in their reverence for the five books of Moses and in no other way. *See* WEISBERG, VICHY LAW AND THE HOLOCAUST IN FRANCE, ch. 6 (forthcoming 1996).

and the Karaites.[30]

On the other hand, it has to be pointed out that there are doctrinal areas in Vichy law which were often less persecutory than the German equivalents. For example, landlord-tenant law often went in favor of Jewish tenants who were seeking rent reductions after their breadwinner lost his job or was deported. Out-of-wedlock children of Jewish ancestry were treated generously and the Sephardim in France, (who early in the Vichy inquiry process were not necessarily considered Jews), enjoyed a certain cushion of opportunity to escape (for a while) the sanctions of the racial law. The indigenous legal community continued to argue at length the matters that counted to it, even where there was a firm German precedent that might have controlled one way or another. So the French often outdid the Germans at their own game or to put it better, they insisted on playing their own Gallic version of the game.

One explanation for Vichy anti-Jewish legal developments was ironically Vichy law's fierce anti-Germanism, a part of France's overall xenophobia, particularly at periods of crisis. Many of Vichy's fiercest anti-semites also detested the Germans. One of these was the first Vichy justice minister, Raphael Alibert. Men like Alibert wanted to carve out their own path in the direction of racial prejudice. The Nazis were largely willing to tolerate variations from their own racial program. They were delighted to reduce their own manpower needs by letting the French do it. And they quickly saw the political benefit of transporting Vichy law into the occupied zone as well, including of course Paris. Incidentally, French racial law also travelled into the Channel Islands, whose English-trained lawyers learned to split hairs with the best of their French colleagues and to deport a handful of their own meager Jewish population to the East.

Thus, the Vichy racial approach was progressively integrated into the wartime law of western Europe. Prominent Parisian lawyers advised clients on whether in fact they were Jewish under the regime's definitions. They also counseled

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[30] The Karaites also believe in the Pentateuch and their name itself derives from the Hebrew for "scriptures," but they reject the Talmud. There were some 270 of them in wartime France. And the Nazis quickly took the same position they had taken on the Mosaic Georgians. But in March 1942, Vichy officially took the position that they were Jewish. *See id.*

landlords who wondered how they could collect rent from deported Jewish tenants. Or they assisted clients to aryanize Jewish properties and "cleanse" major corporations (some of which prominently still do business today) of their Jewish shareholders and officers. Courts and bureaucrats argued right up to the liberation of their towns and cities about whether children of mixed marriages who were baptized could be considered non-Jewish under the mounting legal precedents. Law professors and manual writers numbering in the scores entered the fray. Vichy racial law was big business. It was a new area that, just as some might describe a new wine, lawyers thought of as delicate and ripe with possibilities. What legal community can resist, what even basically right-thinking lawyer can resist these complex questions, particularly when none but one has taken a stand in protest? Finally, all of this occurred under the rubric of a constitutional scheme similar to ours. The great pronouncements of the 1790s still lived in Vichy. The Constitution of 1875 embodying them was never repealed. In other areas Vichy law often intoned those great maxims. Here, however, French lawyers never got themselves together and never mobilized their community to argue the obvious: the egalitarian models of French constitutional law should not permit the weeding out of a group on the basis of factors that are innate or implicate only the belief of the individual. Question: Are we today weeding out individuals and groups in our system, which is premised on the same constitutional guidelines? Can we learn from Vichy—as our negative model—to read our law and our quite similar constitutional tradition better? Thank you.

A REPORT ON THE LEGALITY OF EVIL: THE CASE OF THE NAZI JUDGES

PROFESSOR DAVID LUBAN[31]

I have decided to title this talk on the Nazi judges "A Report on the Legality of Evil." Obviously, I've modeled this title on Hannah Arendt's famous and still controversial study of Adolf Eichmann, which she called "A Report on the Banality of Evil."[32] This notorious subtitle is usually misunderstood. Arendt did not mean that evil, or Eichmann's evil, were banal. Rather, she meant that Eichmann's motives were banal. She meant that anyone who wants to understand how an ordinarily ambitious and extraordinarily bland bureaucrat like Eichmann could perform monstrous evil has to explain something genuinely uncanny, what she once called "the grotesque disparity between cause and effect."[33] How is it, Arendt asked, that "an average, 'normal' person, neither feeble-minded nor indoctrinated nor cynical, could be perfectly incapable of telling right from wrong"?[34]

I have borrowed Arendt's subtitle because I think that parallel questions arise in connection with the German legal profession, particularly the Nazi judges. The questions are parallel, not identical. There is no reason to believe that the Nazi judges shared Eichmann's moral psychology, the blandness and thoughtlessness Arendt found in him. On the contrary, the most notorious of these judges—Roland Freisler, who presided over the trial of the July 20 Bomb Plotters—seemed closer to the psychotic and obscene Julius Streicher. Both were ranting, screaming Nazis from central casting. Some judges, perhaps, shared the banality of evil, but others surely did not.

On the other hand, the Nazi judges who participated eagerly in the Third Reich's atrocities did share with

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[31] Morton and Sophia Macht Professor Law, University of Maryland; Research Scholar, Institute for Philosophy and Public Policy. A talk prepared for the Association of the Bar of the City of New York panel on the Nazi judges, October 12, 1995.

[32] HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (rev. ed. 1963).

[33] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM viii (rev. ed. 1970).

[34] ARENDT, EICHMANN IN JERUSALEM, *supra* note 32, at 23.

Eichmann one unnerving feature. There was something about their position as mid-level officials in a bureaucratic hierarchy that made them—in Arendt's phrase—"perfectly incapable of telling right from wrong." What I want to ask tonight is whether that something has to do with the law itself. Instead of the banality of evil, therefore, my topic is the *legality* of evil. In what way, and to what extent, does the rule of law immunize and safeguard jurists from evil-doing—as we fondly hope? In what way, to what extent, does the rule of law instead immunize jurists from the still small voice of conscience? That is the central jurisprudential question that the case of the Nazi judges raises.

For jurists, one of the most troubling episodes of this horrible era was the willingness or even eagerness of the German legal profession and judiciary to advance the Nazi program by enforcing monstrous law. Let me say what I mean by the German judges being involved in enforcing monstrous law. I am talking, for example, about the German laws against sexual conduct or contact between Germans and Jews. I am talking, therefore, about the case of Max Israel Adler, who is jailed for looking across the street at Ilse S., a fifteen-year-old pure-blooded German woman.[35] I am talking about Werner Holländer, who is killed for conducting an affair with a German woman,[36] and Leo Katzenberger, the head of the Nuremberg Jewish community, executed for possibly having an affair with a German woman.[37] But not just these laws: I am also talking about cases such as a Catholic youth group in the early years of Nazism whose members are imprisoned for engaging in sports activities and outings that hadn't been approved by the Party, and therefore (according to the court that sentenced them), giving aid and comfort to communism by such public displays of lack of discipline.[38]

Shouldn't lawyers and judges be especially sensitive to the juristic monstrosity of Nazi legislation? After all, instead of the "rule of law, not of men," an ideal that dates back to Plato and Aristotle, the fundamental principle of Nazi rule was the so-

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[35] INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 111 (Deborah Lucas Schneider trans. 1991).

[36] *Id.* at 112-13.

[37] *Id.* at 113.

[38] *Id.* at 47-48.

called "Leadership Principle," summarized in the slogan "The Führer's words have the force of law."[39] Don't jurists above all others have a professional duty to maintain the rule of law? The capitulation of the German profession, and especially the German judges, led to a great deal of soul-searching by jurists at a loss for an explanation. Were the German judges cowards, or opportunists, or so fanatical that they were willing to sacrifice their professional ideals for the Nazi cause? That was the question.

Soon after the war, an unexpected and extremely unpleasant answer was proposed—an answer profoundly threatening to the legal profession's faith in the rule of law. It came from Gustav Radbruch, one of the most eminent jurists of the Weimar Republic. According to Radbruch, the problem was not that German judges had abandoned the rule of law but rather that they were enslaved by it. The real culprit, Radbruch argued, was the legal philosophy of *positivism*—the view that law and morality are separate, that a statute can be legal even if it is wicked, and thus that the question "is it legal?" is totally distinct from the question "is it moral?" Or, as Radbruch put it, positivism made the German judges treat law the way that German soldiers treated orders: Where the soldier says, "'An order is an order,'" the judges said, "'A law is a law.'"[40] Because they were positivists, the German judges thought it their duty to enforce even the most monstrous decrees. In the words of Hans Kelsen, greatest of the German positivists, "Even law that is bad in the opinion of the law-applying organ has to be applied. . . ."[41] In one notorious case, a judge imposed the death sentence on a tradesman simply for writing anti-Hitler graffiti on a men's room wall, in violation of a wartime edict.[42] The judges' capitulation to Nazism came from excessive devotion to the rule of law rather than a too-

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[39] *Führerworte haben Gesetzes Kraft* was a common Nazi slogan.

[40] Gustav Radbruch, *Five Minutes of Legal Philosophy*, *in* JOEL FEINBERG & HYMAN GROSS, PHILOSOPHY OF LAW 109 (3rd ed. 1991).

[41] HANS KELSEN, REINE RECHTSLEHRE: EINLEITUNG IN DIE RECHTSWISSENSCHAFLICHE PROBLEMATIK 101 (1st ed. 1934) (stating "Auch das —nach Ansicht des Rechtsanwenders—schlechte Gesetz ist anzuwenden. . . .").

[42] This case is discussed in Gustav Radbruch, *Gesetzliches Unrecht und Übergesetzliches Recht*, RECHTSPHILOSOPHIE 339 (Erik Wof & Hans Peter Schneider eds., 8th ed. 1973).

great readiness to abandon it. They loved the law not wisely but too well. As German law professor Arthur Kaufmann reads the case of the Nazi judges, "It appears, and this is fatal, that a career in jurisprudence renders one incapable of recognizing and opposing injustice."[43]

Part of the emotional power of Radbruch's explanation was that it involved painful self-criticism, because Radbruch had himself been one of the chief pre-war legal positivists. In one anguished essay after another, Radbruch recanted his own positivism for disarming the German judiciary in the face of the Nazis. This may have been an unfortunate move by Radbruch, because it provided a wonderful excuse for compromised Nazi judges. Now they could deflect blame from themselves to their positivist law teachers, who were by-and-large liberals, or Social Democrats like Radbruch himself, or Jews like Kelsen.[44] (All of them, needless to say, lost their jobs in 1933.) Judges who jumped on Radbruch's bandwagon carefully ignored the fact that Kelsen wrote his positivist masterpiece, *The Pure Theory of Law*, in 1934, explicitly with the anti-Nazi agenda of insisting that judges should separate law from politics.

As it happens, Radbruch's explanation became the conventional wisdom among American jurists as well as Germans. That is because Radbruch's diagnosis was repeated and endorsed by America's most influential jurisprudential thinker, Professor Lon Fuller of the Harvard Law School.[45] Fuller, who was a long-time critic of positivism, eagerly seized on Radbruch's *cri de coeur*. But as a matter of fact, even Fuller's chief philosophical adversary, the British positivist Herbert Hart, conceded that the German judges had been enforcing the positive laws of the Hitler regime.[46] With the two most eminent legal philosophers in the Anglo-American world in agreement, positivist and anti-positivist alike, it is

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[43] Arthur Kaufmann, *National Socialism and German Jurisprudence From 1933 to 1945*, 9 CARDOZO L. REV. 1629, 1633 (1988).

[44] MÜLLER, *supra* note 35, at 220-21.

[45] Lon L. Fuller, *supra* note 4, at 646-47.

[46] H. L. A. Hart, *supra* note 4, at 615-21. Hart's reply was that precisely if you are a positivist, you should realize that a law can be valid but also too wicked to obey. If the German judges refused to look past the question of legal validity, that was not the fault of positivism.

small wonder that Radbruch's thesis became the received wisdom.

I said earlier that Radbruch's diagnosis of the German judges is profoundly threatening to the legal profession's faith in the rule of law. The reason is simple. To those of us reared in the liberal-democratic legal tradition, the rule of law stands as a mighty bulwark against tyranny, murder, and the arbitrary decree. If it turns out that the rule of law can actually grease the wheels of tyranny—if, as the eminent contemporary positivist Joseph Raz has argued, the rule of law is simply a tool, like a knife, that can be used for purposes both good and evil[47]—then our trust in the bulwark gets shaken.

Furthermore, the fact is that most American lawyers are instinctive positivists. We are uncomfortable with natural law ideas, which seem too redolent of religion and too much like wishful thinking. Oliver Wendell Holmes enjoined us to bathe our legal concepts in cynical acid in order to get the tincture of moralism out of them, and by and large we have done what Holmes asked. To be told by Radbruch that "[t]his view . . . has rendered the jurist as well as the people defenseless against laws, however arbitrary, cruel, or criminal they may be"[48] is to be told that our unofficial national philosophy of law may make us patsies for fascism. This is not comforting news in the era of Timothy McVeigh and Mark Fuhrman.

The question, then, is whether Radbruch was right. In 1987, a German jurist, Ingo Müller, published a best-selling study of the Nazi judiciary. One of Müller's themes was that the Nazi judges quite literally got away with murder in the softness of postwar Germany. By publicizing this inconvenient fact, and by naming names, Müller became the juridical equivalent of the "Nasty Girl." Another theme, however, was that Gustav Radbruch quite simply got things backward. The real problem with the Nazi judges was not that they were dyed-in-the-wool positivists, but that they weren't positivistic enough.

The story Müller tells is simple. In 1871, Bismarck purged

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[47] Joseph Raz, *The Rule of Law and Its Virtue*, 93 LAW QUARTERLY REVIEW 195, 208 (1977).

[48] RADBRUCH, *supra* note 40, at 109.

liberals from the judiciary and replaced them with ultraconservatives. The Weimar Republic made the fatal mistake of leaving the Kaiser's judges in office, despite the fact that these men hated the republic. Throughout the Weimar period the judges brutally persecuted leftists and blatantly protected the violent right, including Hitler. There was barely a pretense of judicial impartiality, and in Brecht's witty slogan, Germany changed from the land of *Dichter und Denker*—poets and thinkers—to the land of *Richter und Henker*—judges and hangmen.

When Hitler came to power, it was no shift at all for the judiciary to become enthusiastically Nazified. Nor did the habit of lawless partiality change: the Nazi judges politicized their decisions shamelessly, as in the Reichstag fire trial, when the supreme court refused even to consider evidence that the Nazis had set the fire because—in the court's words—"The party's ethical principles of restraint preclude the very possibility of such crimes and actions. . . ."[49] Nazi jurisprudence made a point of rejecting legal positivism in favor of the so-called "teleological method" of "creative" interpretation, according to which judges must interpret a statute by determining its Nazi ideological intent.[50] In Müller's words, "National Socialist legal doctrines were the exact opposite of legal positivism"[51] and "the fairy tale of positivism whitewashed the entire profession."[52]

Despite Müller's impressive documentation, I'm not so sure he is right, however. Undoubtedly, the Nazi judges were shockingly partial and political: their opinions are filled with Nazi propaganda cloaked as fact. Thus, when the members of the Catholic youth group were convicted of the "crime" of going on outings and playing sports in violation of a Party decree, the court explained that "Such a public display . . . can all too easily become an encouragement to Communists. . . ."[53] Shocking dicta such as this, however, have nothing to do with positivism or its opposite. In the German civil law system, we must remember, judges are finders of fact as well as

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[49] Quoted in MÜLLER, *supra* note 35, at 33.
[50] MÜLLER, *supra* note 35, at 80-81.
[51] MÜLLER, *supra* note 35, at 220.
[52] MÜLLER, supra note 35, at 222.
[53] MÜLLER, *supra* note 35, at 47-48.

interpreters of law, and these parrotings of propaganda were presented as factual determinations, not legal interpretations.

When we turn from fact-finding to law interpretation, it is much less obvious that the Nazi judges weren't being good positivists. The reason is quite simple: Nazi positive law instructed judges to interpret statutes teleologically, not positivistically. The clearest example is the notorious Article 2 of the Criminal Code (1935): "Punishment is to be inflicted on persons who commit an act which has been declared punishable by the Criminal Code, or which deserves to be punished according to the spirit of a rule of criminal law and healthy folk-feeling."

Plainly, Article 2 is an abomination. How should a judge construe it? One way would be to reason that since it is a criminal statute, Article 2 should be construed narrowly, and in favor of the accused. But any such "liberal" principle of statutory construction would run contrary to the "Leadership Principle." Thus, a positivist would have to agree that Article 2 instructs judges to determine whether "healthy folk-feeling" would demand criminal punishment for an act—and the phrase "healthy folk-feeling" was a standard euphemism for whatever the Nazi Party wanted. Even if Nazi philosophy of law denounced positivism, it is likely that ordinary judges were doing exactly what positivism required of them.

This wouldn't be so if the kind of reasoning in Nazi decisions was completely beyond the pale of recognizable judicial rhetoric and reason. Unhappily, it isn't. The condemnation of the Catholic youth group for going on unauthorized outings and thereby aiding Communism is not much different in tenor from American district court decisions under the Espionage Act in World War I, where people were convicted "for criticizing the Red Cross and the Y.M.C.A." or "discourag[ing] women from knitting by the remark 'No soldier ever sees these socks.'"[54] In one American case a woman was convicted for saying, "I am for the people and the government is for the profiteers."[55] In his instructions to the jury, the judge denounced the Russian Revolution and used the defendant's "declared sympathy with that Revolution, an

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[54] ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 57 (1920).

[55] *Id.* at 58.

offense not punishable even under the Espionage Act, to show how dangerous it was for her to talk about profiteers."[56] A closer parallel to the Nazi style of judging would be hard to find.

Unfortunately, other examples come to mind. After the Reichstag fire, Hitler declared a state of emergency that suspended basic personal rights "to defend the state against Communist acts of violence. . . ."[57] Müller notes with outrage that the Prussian Supreme Court "forbade lower courts to determine whether the provisions of the decree were actually met in specific instances."[58] Yet judicial refusal to review official decisions in military situations has been standard American fare as well—most notably in the *Korematsu* decision upholding the internment of Japanese Americans,[59] but more recently in *Goldman v. Weinberger*,[60] where the Supreme Court declined to review an Air Force regulation forbidding an orthodox Jew from wearing a yarmulke. Even the outrageously savage sentences of the Third Reich have present-day American parallels in *Harmelin v. Michigan*,[61] where the Supreme Court sustained a sentence of life without parole for a first-offense drug possession, or *Rummel v. Estelle*,[62] which found the Court upholding a life sentence for $228 worth of petty frauds.

I am obviously not arguing for the moral equivalence of American and Nazi judges, and Americans recognize most of the decisions I have just canvassed as infamously bad law. The question isn't whether it is bad law, however. The question is whether the reasoning of the Nazi judges is simply unrecognizable by professional standards—and the answer is that it is all too recognizable.

What misleads Müller, I think, is that he identifies legal positivism with a narrow, rule-oriented textualism.[63] Positivism has no necessary connection with narrow

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[56] *Id.*
[57] Quoted in MÜLLER, *supra* note 35, at 47.
[58] MÜLLER, *supra* note 35, at 47.
[59] Korematsu v. United States, 323 U.S. 214 (1944).
[60] 475 U.S. 503 (1986).
[61] 501 U.S. 957 (1991).
[62] 445 U.S. 263 (1980).
[63] Here I am following Dubber, *supra* note 3, at 1820.

textualism. Positivists insist that every legal system has a "rule of recognition" specifying what counts as law and what doesn't. If the rule of recognition instructs jurists to consult "healthy folk-feeling" to determine the law, that doesn't make it any the less a positivist rule of recognition than if it instructs jurists to stick to the letter of the text, narrowly construed.[64] Müller doesn't recognize that in a legal system of broad, explicitly politicized statutes coupled with equally politicized canons of interpretation, positivism will invite jurists to engage in role-identification with the regime's aims, rather than rule-following.

The distinction between role-identification and rule-following is crucial. It takes us back to the question of how mid-level officials in a bureaucratic hierarchy could be perfectly incapable of telling right from wrong.

In 1971, shortly after the conviction of Lieutenant William Calley for the My Lai massacres, social psychologists Herbert C. Kelman and V. Lee Hamilton surveyed Americans' attitudes toward crimes of obedience. Kelman and Hamilton asked subjects whether they believed that most people would massacre innocent civilians if they received Lieutenant Calley's orders to shoot, and also whether the subjects would themselves follow the orders. Far and away the largest group (forty-seven percent) answered "yes" to both questions.[65] Virtually all of this group (ninety-four percent) also believed that a Calley not only would but should follow orders to shoot,[66] and a large majority of them believe that neither subordinates nor their superiors should be held responsible for criminal actions that the superiors condoned but did not explicitly order.[67] Two-thirds of this group believed it was wrong to convict German officers at Nuremberg for war crimes ordered by superiors.[68] As the psychologists summarize their findings, the large group of subjects who predict both that they

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[64] *See* Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982).

[65] HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE 173, Table 7.1 (1989) (453 out of 967 answered "yes" to both questions; the second most common response, answering "no" to both questions, was given by 161 subjects).

[66] *Id.* at 178, Table 7.2.

[67] *Id.* at 182, Table 7.3.

[68] *Id.*

would themselves follow orders to shoot civilians and that most other people would do so "essentially rejected accountability in the situation for *all* participants, not just for the subordinates. . . ."[69]

Equally important for our purposes is Kelman and Hamilton's finding that these compliant people fell into two very different groups, the rule-oriented and the role-oriented. Rule-oriented people follow rules to avoid trouble; they are socialized into compliance, but they comply minimally and passively; they think moral principles are irrelevant to rule-giving as well as rule-following; and they protest rules only if their own security is threatened.[70] By contrast, role-oriented people believe that they have an obligation to obey and support the government; they are socialized into identification, not mere compliance; they take an active role in carrying out policies; they believe that their moral obligation to government overrides personal morality, and that government operates by a special set of moral principles. They protest if their status, rather than their security, is threatened.[71]

Both Radbruch's and Müller's versions of positivism envision judges who are rule-oriented, but it seems clear from these descriptions that the Nazi judges by and large were role-oriented, rather than rule-oriented. Role-orientation fits seamlessly with "the odd notion, indeed very common in Germany, that to be law-abiding means not merely to obey the laws but to act as though one were the legislator of the laws that one obeys."[72]

And, as it happens, role-orientation—identifying with the orderer rather than simply acquiescing in the orders—corresponds with the broader version of positivism that I have been describing, a positivism that commands jurists to look beyond the letter of a statute to its spirit. *Yet both the rule-orientation and the role-orientation lead to the same result: obedience at the expense of morality or even basic human decency.*

We must also not forget the differences between the

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[69] *Id.* at 185.
[70] *Id.* at 269, Table 11.1.
[71] *Id.*
[72] ARENDT, THE ORIGINS OF TOTALITARIANISM, *supra* note 33, at 122.

German civil law system and our own common law system. These are not merely differences in procedure, or even differences internal to the law. Legal systems reflect their countries' larger systems of political authority, and Germany's larger system has historically been bureaucratic and hierarchical rather than decentralized.[73] German judges are neither political appointees nor elected officials: they are *Beamters*, civil servants, who do not belong to the bar, who begin their careers directly out of law school, and who are gradually promoted as they gain experience and please their superiors. As with other civil servants, bureaucratic conscientiousness all too readily takes the place of bureaucratic conscience.

I began with this question: does the rule of law immunize and safeguard jurists from evil-doing or from the voice of conscience? My answer, I fear, is "more the latter than the former." And this for three reasons, only one of which is specific to Germany. That is the point I just mentioned, that German judges work in a hierarchical rather than a decentralized system of authority. The other reasons, however, are the psychology of role-identification, and the broad form of legal positivism with which it corresponds entirely too well. Positivists understand quite well that legal validity is no talisman against evil; what they did not anticipate was how little evil might trouble the conscience of a judge.

PROFESSOR RUTI G. TEITEL[74]

I would like to build on what's been said. We have been looking largely at the role of judges during periods of persecution, and I would like to continue the story as to Germany by looking at three judges to see how post-Nazi judges and post-communist judges have interpreted the jurisprudence in the cases from the Nazi period. What do these decisions tell us about how these judges confronted the

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[73] *See generally* MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986).

[74] Professor of Law, New York Law School; Senior Schell Fellow, Yale Law School.

dilemma? How do they resolve the question of the conflict between evil laws and their role as judges? Are there any lessons?

Let us begin with the most recent (post-communist) decision, which begins at the Berlin Wall in 1989. Just before reunification, East German border guards shot two East Germans trying to escape across the border. These border guards were prosecuted in 1991, and the question confronted by the Berlin State Court was whether these defendants had a defense in former East German (GDR) law.[75] One might have thought the Unification Treaty bound these judges, because, in common with the rule of law in all democracies, the treaty stated that the law that applied to these cases should be the scene of the crime law.[76] Thus, the question for the judges was whether to apply GDR law and validate the defense that they were just following the law prohibiting unlawful border crossings.

The court posed the dilemma exactly as we are considering it here, saying the question was whether the written (i.e., former) law was rightful, and that the issue seemed to be a dilemma of law versus justice.[77] What is interesting about this decision is that it takes us back close to fifty years, to the post-World War II German judiciary, because the court looks back to other periods of persecution and post-persecution and declares that it is guided by the post-war German judiciary evaluating Nazi law, and so the cases that they look at are (again) cases of collaborators.[78] One in particular concerned a woman who evidently had a bad marriage, and, using the Nazi laws as an enabling opportunity for judicial murder, denounced her husband, who was incarcerated. She was prosecuted after the war for having done that. Now, her husband was arrested but not killed, and in her defense she relied on Nazi law, and said that this was the law she was following.[79] In confronting

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[75] *See* Ruti G. Teitel, *supra* note 24; Kif A. Adams, *What is just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 STAN. J. INT'L L. 271 (1993).

[76] Teitel, *supra* note 24, at 243.

[77] Teitel, *supra* note 24, at 241.

[78] Teitel, *supra* note 24, at 243. In rejecting the guards' defenses, it appears that the court did not follow the treaty. *Id.*

[79] *See* Note, *German Citizen who Pursuant to Nazi Statute Informed on*

those laws in the 1950s, the German judiciary said that there has to be a way of evaluating laws that are unjust; in "extreme cases" there must be a possibility to weigh justice more highly than legal certainty.[80] So again, we see the dilemma between formal law and justice; between the rule of law as security versus what is just.

To return to the post-communist court: it held itself guided by the postwar cases, and in a potentially controversial analogy said both involve "extreme cases."[81] Like the collaborator cases, the border guard action was an "extreme case," and in these "extreme cases," justice is more important than certainty.[82] Now, it is worthy to note, that unlike the other cases discussed on the panel that occurred during persecution, here the act of validating the evil law would imply an act of clemency, a defense: the border guards would go free. This then is the reverse of those other cases, where validating the law means a conviction. Coming up in the reverse, these cases invert the usual case, but consider the same problem of to what extent to validate evil laws.

Now, I would like to explore the reasoning of these two courts: how they came to these decisions and to see what we might draw from their reconciliation of the competing values that we are considering here. The first effort at reconciliation is the 1950 German judiciary's appeal to principles of natural law. This was previously discussed by David Luban. This appeal is illustrated by Gustav Radbruch's conversion. In his movement from positivism to natural law, Radbruch declared that law has to yield to justice. Following Radbruch, much of the reasoning in these cases relies on natural justice principles. In addition to this reasoning, in other reconciling determinations these principles are codified in international legal norms, adopting a concept which was very vivid at the time in the 1950s. Certainly Nuremberg plays a role here, along with the UN, the Geneva Convention, and the growth of international law in general, with its proposition that international law trumps national law, no matter how evil. So

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Husband for Expressing Anti-Nazi Sentiments Convicted under Another German Statute in Effect at Time of Act, 64 HARV. L. REV 1005 (1951).

[80] Teitel, *supra* note 24, at 243.

[81] Teitel, *supra* note 24, at 243.

[82] Teitel, *supra* note 24, at 243.

this already suggests an understanding that there is law and there is *law*: there is more than one law.

Let me pursue this thread. The post-communist court, considering the dilemma of the tension between morality versus justice, doesn't leave it at that, but instead introduces a very interesting way to think about the way judges might confront this dilemma. The court suggested reasons why the border guards should not have thought of the border protection law as law, even though it was settled law. In particular, the court discussed the lack of transparency: the fact of a news blackout whenever there were shootings; soldiers were warned not to speak; they were often transferred; the names were erased from the records of whom might have been shot; when foreign dignitaries came, there was an understanding that the shootings had to stop. Lastly and most intriguingly the court added to its decision a fact about one of the four defendants, who had shot one of the people crossing the border. The defendant had never worn his medal of merit for the shooting in public because he knew that there was a strong likelihood of insult and attacks, followed by recriminations by the GDR. The point that the court draws from all of this is that we are all aware of the difference between written law and law. Thus, the court says "Justice and humanity were portrayed as ideals also in the then GDR;"[83] and since these ideals as to justice were known, many of the inhabitants of the GDR would have considered these written laws unjust.

Here, there are several points. One is the idea of transparency. Part of the rule of law is the idea that for a law to be valid, it has to be written, it has to be published, and it has to be applied generally.[84] Certainly that was understood. But beyond that, the court points to the importance of public opinion and perceptions of law and legal culture. The court considers if there was a social consensus at the time and if there was a breakdown in consensus on whether these laws were just. The court suggests that the judges could draw upon these considerations in their interpretation of these laws. The court's reasoning is relevant because it suggests a way out of the positivism-natural law dilemma as it is ordinarily framed

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[83] Teitel, *supra* note 24, at 241.

[84] *See also* LON L. FULLER, THE MORALITY OF THE LAW 39 (1964).

because it suggests that the fact that the law is written is only one element of what makes law positive, and that there are others, such as a broader understanding of publication and public perception.

I think this decision helps to explain how law is considered in transitional periods, and relatedly, how we evaluate the uses of law in periods of totalitarian rule. In a totalitarian country, we might very well expect a gap between the law as it is written and the people's understanding of the law. Indeed, when we see the commencing of this divide, where contempt for written law or for lawyers begins, it may signal the onset of a new period. The danger sign is clear: lack of integration between the public perception of law as lawful and the law as written. That these attitudes are on the rise in our country is rather troubling.

I want to conclude by suggesting that we can enrich our debate about judgment on tyranny. The real question I suggest is not the issue of the competing claims of morality versus the duty to follow laws, nor the related question of the way we frame and question these claims, but what law do judges follow? What may well be most important about these decisions is that they remind us of law's multiplicity. In functioning democracies, as well as periods where totalitarian countries are in transition towards more liberal regimes, there begins to be a multiplicity of sources of the rule of law: natural law as well as international law, societal consensus, and constitutional law. These are all constraints on the judge's interpretation of statutory law, the law of the sovereign, the law we are considering here. I think this multiplicity helped to advance the breakdown in the last wave of transitions: In a period of technological change, we live more and more with interconnected legal systems, and there is an inherent multiplicity and coexistence of legal values and norms. This interconnectedness helped usher in the collapse of repressive regimes and the last wave of transition. Finally, recognizing multiple sources of law allows us to see the importance of the public sphere in shaping the understanding of the law, as well as what law judges follow.

JUDGE JACK B. WEINSTEIN[85]

I shall touch upon three points: first, a reminder of the failures and successes of our American judiciary on human rights; second, a discussion of options available to American judges when faced with pressures to act immorally; and third, predictions of American judges' future reactions.

German judges under the Nazis assisted in widespread murder. They lacked the individual and institutional, and perhaps jurisprudential, will to insist on justice. The reasons have been suggested here orally, and in my extensive paper.[86]

American judges, by contrast, have a constitutional obligation to protect life, liberty, due process and equality. There is an individual direct responsibility from constitution to judge—not one that runs through the state or the bureaucracy. Each American judge is individually beholden to the people and our conscience through the Constitution.

Our own legal system has sometimes failed to counter challenges to what we now consider basic rights. I remind you of the destruction of the Indians in colonial, revolutionary and subsequent times; the Alien and Sedition Acts; *Dred Scott* and other pro-slavery decisions; the sacrifice of former slaves' freedoms to the political compromises toward the end of the last century, culminating in *Plessy*; the frustration of legislative attempts to protect workers and others against the excesses of unconstrained capitalism; and the Japanese internment camps.

Our understanding of the horrors of what happened in Germany has critically affected post-World War II legal history in this country. In the main, the tendency of our legal system, particularly in the last fifty years, has been to protect the most vulnerable. We have opened the courthouse doors to those claiming abuse of their rights.

It would be both absurd and churlish in this great hall, in this citadel of justice, not to acknowledge the contrast between Nazi destruction of the rule of law aided by the connivance of the German judiciary and our own veneration and real life

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[85] Senior District Judge, United States District Court, Eastern District of New York.

[86] Unpublished manuscript, available on request from author.

implementation of that rule. In these very environs Thurgood Marshall mobilized the American bar for the legal struggle that culminated in *Brown*. And in this building of the Bar Association of the City of New York a critical fight to preserve legal aid for the indigent is even now being mounted.

Of the various options available to American judges when faced with an immoral law, only one is ruled out: silent acquiescence. Federal senior judges, of which I am now one, have the statutory option to refuse to take whole classes of cases in which unjust results are preordained.[87] I submit that every judge in this country, whether state or federal, has that choice by virtue of his or her office because of the supremacy of the federal Constitution which controls both state and federal judges.

What would happen if all judges shared the same moral revulsion to a particular law and refused to enforce it? There would be a profound constitutional conflict and the nation would have to look into its very soul. Morality and legal duty would come into conflict. I believe morality would win.

Had the German judges, or any substantial portion of them, resisted, they might have brought the Holocaust to a halt before it started. But members of the German judiciary did not think the Nuremburg laws unjust. Like many Germans, some judges may have disagreed, but not on deeply moral grounds.

Since the time of Bismarck, German judges were part of what I consider a subservient state bureaucracy, appointed in their youth. In sharp contrast, our judges are independent personalities who take office only after they have demonstrated their own strengths.

Resignation in the face of unjust laws is a principled option for our judges, but it can also be seen as acquiescence and defeat. I do not recommend it. In extreme cases, it will result in replacement of good judges with government puppets, eliminating the last vestiges of justice.

There are many techniques used by our courts to avoid and circumvent dubious and immoral precedents. In criminal cases, in which grave injustice is most likely to occur, the rule of lenity as well as the specific and general guarantees of the

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[87] *See* 28 U.S.C. § 294(b) (1984).

Bill of Rights establish a duty in each individual judge to follow the path that protects the accused against government abuse.

Stare decisis is not a barrier to justice; the rules laid down either by the highest court in the country or intermediate courts are not immutable. Stare decisis does not apply when constitutional or moral principals are challenged by its application. The lower court is bound only where first, the rule of the superior court is absolutely clear; second, changes in caselaw, statutes or conditions make it certain that the rule will remain unchanged in the higher court; and third, the rule applies unequivocally to the facts before the court. My position is, and I have discussed this point in my longer paper, that even when all three conditions are satisfied, a previously enunciated rule cannot, and should not, prevent an individual American judge from following the Constitution and what he or she considers its moral imperatives. Precedent can be distinguished on many grounds, as, for example, by characterizing the "rule" as dictum, and by finding parallel lines of authority.

The district judge, particularly, has a closeness to, and in general a superior appreciation of, the facts and thus a greater ability to apply them to the law. Those insights cannot be replicated at the appellate level.

Trial judges must be true to an inner core of responsibility. They must sometimes risk, or even court, reversal to make certain that the appellate courts, the bar, academia and the public are fully aware that there is a strong opposing moral view. Judges can ignore neither monstrous nor routine injustices.

The sentencing guidelines are a prime paradigm of judicial reaction to unjust laws. The federal guidelines relegate some of the least culpable participants to being caged in prison for excessive periods without the possibility of parole. Federal guidelines have been recognized as a major injustice of our time. Federal judges are almost unanimously opposed (I am talking about trial judges, who I consider the reservoir of morality in cases such as this) to mandatory minimums and to overly harsh and rigid guidelines.

How have the judges reacted to the federal guidelines which have proven so unjust in their application? First, many

of them declared the guidelines unconstitutional. Then they showed why the controlling statutory scheme under the guidelines did not control in cases in which they produced absurd and unjust results. When that tack failed, judges, constrained to work within the guideline system, tried to achieve maximum room to maneuver by expanding the power to depart. At the same time they criticized the guidelines and mandatory minimums in opinions, often following them with expressed regret, while sending a strong public message of protest. They made their objections known in a variety of other ways from op-ed pages and law reviews to congressional committee hearings. Finally, through such organizations as the United States Judicial Conference and bar associations, they urged legislative changes on the Congress and the Sentencing Commission. The judges' struggle against immoral sentencing laws has been effective to some extent because more and more people now have a clearer notion of the injustices that are taking place in our courts.

This awareness is beginning to have an ameliorating impact on all three branches of government. Federal intermediate appellate courts have reacted in a variety of ways. Some have tried to restrict the trial judges in exercising discretion. The Second Circuit Court of Appeals has recognized that trial judges have a great deal of freedom and has encouraged them to exercise judicial discretion, for example, to protect families which would be devastated by excessive sentences. Congress has acted explicitly to meet the demands of the judges by producing a safety valve to avoid absurdly long sentences. And the Attorney General of the United States has responded through sound studies and talk, but little action.

My own cohort of federal judges were steeled in the depression; they understood what was going on in Germany and Spain, and Italy and elsewhere in the thirties. We were victorious in a terrible war against the legions of Hitler and Hirohito. We were flushed in the post-war period with the United States' post-war technological and economic success. We were therefore not in a mood to knuckle under to what we concluded were inhuman violations of due process to the accused, and ethnic and racial injustices. That, I think, explains in part what has happened in the last fifty years in

the United States. Statutes, international treaties, and action by private nongovernmental agencies on behalf of human rights has also helped.

My cohort is rapidly moving offstage. There are current attempts to gut protections to consumers, to the criminally accused, to the elderly, to the poor, and to minorities of various kinds. They will not pass unnoticed through the courts.

A serious question is what will be the reaction and the theory and the role of the younger judges, lawyers and academics who are now coming into power. My own observation of the tough-minded, sensitive, superbly trained and dedicated judges and magistrate judges in my own court in the Eastern District of New York is that they can be depended upon to do their duty to protect justice under the Constitution. They will, I think, stand up for morality, for equality, and for due process for all. Our thin judicial black line will, I believe, hold against whatever assaults on justice we can foresee in the United States.

Between the poles of acquiescence to injustice and resignation from judicial office, many options are available to American judges faced with the ostensible duty of enforcing unjust laws. American judges can and must avail themselves of those choices to defend morality. Injustices that pale in comparison to the Holocaust are still sufficient cause for our American judges to question and resist. When they individually think it necessary, judges have responsibility to speak up and act for justice.

PROFESSOR RICHARD H. WEISBERG

Judge Weinstein was typically concise and also I think very inspiring in what he said. I would like to present a slightly darker picture as a member of a generation that came into intellectual and emotional fruition in the 1960s, a headstrong generation. A generation that felt that it was not necessarily bound or constrained by, for example, written laws, and which then experienced the Vietnam War and a series of assassinations, and (perhaps more to the point of this conference) the influence of such schools of legal reasoning as law and economics, legal pragmatism and other theoretical

approaches that perhaps are deleterious, when it comes to our subject tonight, to legal and judicial thinking. They run counter to the vision that Judge Weinstein's generation brought to law. And I am not at all optimistic that the experiences of the Holocaust that we are all trying to understand tonight are any longer alive to influence the judiciary or other legal actors. Put it this way: what *are* the lessons from the conduct of lawyers and judges under the laws of the Third Reich or in Vichy? What kind of arguments in opposition to unjust laws are we going to get from the current generation of lawyers? Will our legal community, trained as it currently is, take the courageous course or will they act like French lawyers who made a big business out of the racial laws and who learned to work with it at very low levels of generalization? And I have seen their files, I've worked in the archives, I've seen very distinguished lawyers incapable of articulating the higher-level legal issues, much less moral issues implicated. Or at least, I found them incapable of citing them even in the context of in-house memoranda. How is our current generation of advocates going to influence our current generation of judges "to do the right thing?" I think that we have an enormous amount of work, particularly as the memory of the Holocaust begins to be threatened not only by those who deny the Holocaust but just by the passage of time and the onslaught of pragmatism.

PROFESSOR FRITZ STERN

I found Judge Weinstein's remarks enormously inspiring and encouraging. I think one has to remember that for all the necessity to draw on lessons in the past—and I will come to that later—it is also terribly important not to make easy analogies and not to forget the immense differences between the United States and the traditions of this country and the history of Germany or for that matter France. The difference between Germany and France is also very, very great but what was done in Vichy, if I might just put this very quickly, was really a French anti-revolution: the part of France that never accepted 1789 was waiting for defeat at the hands of the Germans to bring about a counter-revolution, so to speak. I

think that this country, blessed by its Constitution and by the basic commitment to it, is therefore very, very different from the German theme. All of you know this probably much better than I do, so it's not for me to say too much about the relation of the judiciary to the political culture or to public opinion. But I would particularly like to turn to one thing in Professor Luban's remarks and simply supplement it, if I may: Yes, there are obviously examples in the American past of judges making immoral or amoral decisions; but the huge difference (it is almost unnecessary to say this, but we mustn't forget it) is that in this country liberal principles are still enshrined. They are enshrined in the Constitution and in a free press, which ought not to be underestimated, which does not exist in a totalitarian state. Therefore, frankly, if one wants to draw lessons from the German situation, one should be aware of attacks on liberal principles because those are the ones that are protecting us and have protected us. The Germans have had a long tradition of anti-liberalism on the left as well as on the right most especially. It would be unfortunate if we forgot how important the promotion of a political culture is; fortunately the formation of our political culture still enshrines the liberal principle.

PROFESSOR RUTI G. TEITEL

I wish to comment and pose a question, building on what Professor Stern suggested. Is the notion of Auschwitz as a "lesson" troubling? To what extent is Auschwitz a "lesson"-maker? To me, Auschwitz seems like an "extreme" case in the sense that the Berlin court spoke of "extreme cases." Would we equate the border guard with a Nazi collaborator? In a period of debate on "cultural relativism," what are extreme cases? This question—what are the extreme cases?—is one that more and more, judges and citizens and lawyers confront. I think there is a breakdown in that understanding.

PROFESSOR RICHARD H. WEISBERG

I think that we are learning more and more every day about the Vichy period, which was shrouded for fifty years in the myth of universal resistance and which the French only recently have begun to fess up to. We learn that Vichy is not an extreme case, but again a case closer to that of our own experience and therefore more threatening and important to learn about. The second Vichy justice minister, Joseph Barthelemy, was a professor of constitutional law who prior to the war—unlike his extremist predecessor Alibert—enjoyed a reputation not dissimilar to that of George Ball or Floyd Abrams. Yet he became a prominent member of the Vichy government promulgating the second Vichy racial statute of June 2, 1941, signing into law the special session courts that summarily tried and executed individual French defendants who were suspected of Gaullism or communism, and accomplishing a number of other complex and more obvious excesses during his stay in government. How do individuals like that become co-opted? This is, I think, a cautionary tale for us, and not an extreme case except that it provokes us to wonder how a lawyer with those beliefs (an outspoken anti-Nazi in the 1930s, a defender of individual rights throughout his life and in all of his writings) becomes during a period of crisis something very different from what he has always been. There were many such people in the government who were not vicious anti-Semites and who were fully in favor of traditional French egalitarian rights who changed, who were able to change. His case suggests that there is something about legal professionalism that we need to explore.

PROFESSOR DAVID LUBAN

I have a few stories that I think are cautionary stories. First of all, I think I am less sanguine than Judge Weinstein about what would have happened if all of the German judges had refused to enforce monstrous Nazi law, and resigned. They would have been replaced by Nazis, and if judges kept on refusing to enforce the law the Party would have done what it was doing anyway, which was simply shooting people regard-

less of the law. I think that that is a problem. First is a story which is meant to illustrate that a problem of conscience is recognizing when the crisis is on you. At the point at which Jews were being expelled from the profession, the Deutscher Anwaltverein, which is the German equivalent of the ABA, voted to expel all of its Jewish members. Now it happened that there was a majority of Jews on the governing committee of the Deutscher Anwaltverein; they all abstained from this vote because of their clear conflict of interest. They didn't realize that something extraordinary, not something ordinary, had come on them. And I think that part of the problem of saying what we have to do is to fight immorality is that it is very hard to recognize when the crisis is on us. Second is a story that I heard recently from a colleague. I haven't been able to verify it yet. It is about the practicing bar. So far we have been talking about judges, this story is about I.G. Farben Chemical Company, which ran its own concentration camp with slave labor. It signed contracts with the Nazi government saying that they would feed and house the slave labor. When the policy of the government changed to allowing the slave laborers to work themselves to death, the legal department of I.G. Farben was instructed, so the story goes, and carried out the instruction to try to break the contract and save the company money on food because after all, why should the company lose good money on people who were about to be killed anyway? From this the message that I would like to draw is that it is a mistake to focus simply on judges. It is the role of practicing lawyers that is extraordinarily important in the resistance to immorality. Third, I am worried about the possibility of appellate judges who reverse the good work of trial judges. Almost all of the cases that I was describing earlier were appellate reversals of trial judges who had acquitted. And in 1944, Otto von Thierack, who was then the Minister of Justice in Germany, began sending around letters to the German judiciary saying, "Of course I do not want to tell independent judges how to decide cases, but I do think that it is important to criticize some plainly erroneous decisions. For example, here we have a judge who has a piece of litigation over coffee rations between a Jew and a German, and who sides with the Jew. What kind of message is that sending?" Although it seems to be reading between the lines of

Thierack's letters, it must be that there were some courageous trial judges in German as late as 1944. The problem was that the trial judges were not the judges of the last instance.

Now for the last story. I think that it is no secret that I think the disease of overpunishment is creeping up on America. I came across the Nazi three strikes and you are out statute, the statute on habitual offenders. Of course, ours is three strikes and you are in jail for life. Ingo Müller is outraged at the Nazi statute three strikes and you get fifteen years maximum!

PROFESSOR FRITZ STERN

I will try to be very, very brief. I agree with Professor Luban that the important thing is to recognize the crisis and the challenge when it comes. But I want to register two dissents. First, I want to clarify the story which involved the society of lawyers and Jews voting and not voting. There was a committee meeting, the presidium of that society met, and it decided not to expel the Jews. This decision was later reversed. Although they changed their minds later, I think there has to be a certain amount of historical respect for this minor gesture of German lawyers, in that particular committee, refusing to expel the Jews. Thus it is perfectly true that Jews did not vote—but not on that occasion. Secondly, I powerfully disagree with the notion that if all German judges had collectively resigned it would have made no difference. It would have made a huge difference, and we probably would not even have had a Second World War.

PROFESSOR RICHARD H. WEISBERG

And that goes doubly for France. As I suggested, and we even have examples from elsewhere in Europe of organized protest at high levels having important results on the elaboration of systems that had identical statutory structures, it isn't the black ink of the statute that determines how a legal system runs. It is the way that the legal community understands and implements, or refuses to implement, the

dictates of the dead page that they see in front of them. You have to give life to anything to make it forceful within a community. It's perhaps the desire for legal professionalism more than anything else that motivates us, and which we need to be aware of. It motivates us to accept somewhat unquestioningly what we view to be the severe constraints or dictates of statutes or laws that we abhor. The Vichy example urges us to grasp, *in the situation*, the full legal and moral implication of what we are doing, and not to nitpick. But it is very difficult, in the heat of practice, to understand what the larger issues are, and I think we have to be alert and always able to step at least a half step back from where we are to try to figure out what we are doing. Is this really part of what we were trained to do? Is this consonant with our understanding of the ideals and the constitutional laws of this country? Am I a cog in the wheel or am I someone who can be reflective as a professional and either make some changes or fight to preserve what is best in the system when others have been pushed to change it?