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Brady Justice:
How The Brady Bunch Taught Jurisprudence to Generations

Russ VerSteeg*

Introduction

For five seasons from 1969 to 1974 The Brady Bunch television series aired across America. The familiar theme song – “Here’s the story of a lovely lady who was bringing up three very lovely girls...” – has become iconic. In the years that followed, The Brady Bunch continued in reruns, and generations of young Americans watched the exploits of the parents, Mike and Carol, the housekeeper, Alice, and the six children, Greg, Peter, Bobby, Marcia, Jan, and Cindy in reruns in the afternoons after school.2 “The Brady Bunch was only a minor hit during its prime-time run from 1969 to 1974. It found a loyal niche audience of kids and

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* Professor, New England Law | Boston. I would like to thank two research assistants, who both did a great deal of work on this project, Jayme Yarow and Valenina Baldieri. Thanks also to New England Law | Boston Research Librarians Brian Flaherty and Barry Stearns, and special thanks to Tiffany Knapp for making the footnotes look presentable. Lastly I am thankful to my wife, Nina Barclay, who listened to me talk about The Brady Bunch for about a dozen years!

1 See e.g., ANDREW J. EDELSSTEIN & FRANK LOVECE, THE BRADY BUNCH BOOK 7 (1990) (“[T]he series premiered on September 26, 1969 – the start of a five-year, Friday night network institution, and eternal life in reruns...[and] spinoffs...”).

2 Although statistics are hard to come by, there is a wealth of anecdotal evidence regarding the impact of the television series. For example, see SHERWOOD SCHWARTZ & LLOYD J. SCHWARTZ, BRADY BRADY BRADY: THE COMPLETE STORY OF THE BRADY BUNCH 48 (2010) (“During its 5-year run, The Brady Bunch knocked 11 different competing TV shows on NBC and CBS off the air.... As of 2010, The Brady Bunch has had all kinds of sequels and spin-offs, it has been running in syndication for 35 years, and it is still running in 43 countries.”); Id. at 89 (“In 2007, The Brady Bunch was still so popular, it received TV Land’s Pop Culture Award.”); Id. at 131 (“We only achieved real popularity when the series went to syndication.”); EDELSSTEIN & LOVECE, supra note 1, at xi (In the book’s Forward, Florence Henderson, who played the role of Carol Brady, notes that The Brady Bunch television show “touched millions of lives all over the world”); BARRY WILLIAMS, GROWING UP BRADY: I WAS A TEENAGE GREG 2 (1992) (Writing in 1991, Williams said: “[F]or over twenty years our fantasy family has been beamed into living rooms all over the world. Through four successive decades, on all three major networks, in six separate reunions and in countless thousands of reruns, the Bradys have woven themselves into the fabric of Americana. Generations have grown up watching our harmless, pleasant, moralistic tales.”); Id. at 147 (1992) (“‘The Brady Bunch’ continued to thrive as a living, breathing, somehow current entity in the minds of tens of millions of Americans.... ‘The Brady Bunch’ ruled (and in a lot of markets still rules) syndication, consistently clobbering whatever sacrificial competition was lain in its path.”); LAUREN JOHNSON, THE BRADY BUNCH FILES 16 (2000) (“For some bizarre reason, these details have been implanted in the collective consciousness of those who were weaned on it. But why? How is it that most of us can’t remember our own phone numbers or a person’s name two minutes after we’ve been introduced, but we can remember the Bradys live at 4222 Clinton Way and that Alice’s sisters’ names are Emily and Myrtle?”).
Teens, but it earned mediocre ratings. Following syndication in 1976, it began airing every afternoon nationwide. The show was arguably more popular in syndication than it ever was in prime time, as evidenced by its 1986 rise to the number one slot on the TBS Network. In short, the series has had a tremendous impact on the minds of a substantial number of Americans.

Television affects its viewers in powerful ways. Viewers absorb lessons, presumably positive, negative, and neutral, from the television shows that they watch. There is little doubt that *The Brady Bunch* producers desired to teach morals and values. The producers wanted to impart lessons about rules of law, right and wrong. It is likely that *The Brady Bunch* has influenced the thinking of a large number of Americans, many of whom eventually have attended law school and become lawyers.

And as life imitates art, even *The Brady Bunch* characters acknowledged that television has the capacity to teach us about law. In the episode *The Fender*...
Benders, housekeeper Alice advises little Cindy about how a courtroom operates. Alice happily tells Cindy that she has learned a great deal about law from watching television; she's an amateur expert on law because of watching TV, although she's never been in court herself:

Alice: “I’ve learned a lot from The Bold Ones, and Owen Marshall, and I expect to pass the bar on the Perry Mason reruns.”
Cindy: "You mean court's just like on TV?"  
Alice: "Pretty much. The judge walks in and you stand up. When he stands, you stand, when he sits, you sit."
Cindy: "Sounds like "Follow the Leader.""

This Article examines jurisprudence in The Brady Bunch. Specifically, the Article considers how the things that the characters say and do reflect law in a general sense; therefore it examines issues such as truth and honesty, fairness, equality, right, wrong, and justice. Grant Gilmore has noted that those involved in the

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8 The Brady Bunch: The Fender Benders (ABC television broadcast Mar. 10, 1972). As an interesting aside, it is worth noting that the actor who played Mike Brady, Robert Reed, had previously portrayed a young lawyer in the TV series, The Defenders. See Edelstein & Lovece, supra note 1, at 11 (Robert Reed, who played Mike Brady, had gained insight into law in the television series that he had previously been in, The Defenders); see also id. at 56 (explaining that Reed’s “break came in a 1959 episode of Father Knows Best, “The Imposter,” where he played a young lawyer, and describing The Defenders as a “law drama” that “was a tough, justly acclaimed show that took on subjects that are still controversial today, such as abortion and euthanasia.”); Id. at 97 (The Defenders aired on CBS from “September 16, 1961 – September 9, 1965”); Schwartz & Schwartz, supra note 2, at 63. Given his previous experience, Reed was especially sensitive to legal issues and attention to detail. See id. at 69 (“Bob [Reed] insisted on picayune accuracy on everything and anything. He checked every minute detail in the script with his Encyclopedia Britannica, which was his bible. I wasn’t striving for accuracy, but comedy is based on the willing suspension of disbelief to make it funny, and Bob Reed wouldn’t bend at all.”); Id. at 72 (“Bob checked every word in the script against a variety of legal sources. He wanted to make sure the writers weren’t deviating from actual case procedure, word for word.”); Id. at 73 (“Robert Reed brought qualities of integrity and honesty to the role.”); see also Edelstein & Lovece, supra note 1, at 5 (“The creator of The Brady Bunch, Sherwood Schwartz, was no stranger to litigation. In 1971 he sued United Artists, arguing that he had not received proper compensation for his earlier hit TV series, Gilligan’s Island. The case settled out of court.”).

9 See Hall, supra note 5, at 148 (“For Weber, social action was the prime datum of sociology and he drew a hard line between the professional or doctrinal study of law and the sociology of law; the legal sociologist studies social action ‘oriented to law.’”) (referring to the scholarship of Max Weber); see also Schwartz & Schwartz, supra note 2, at 140 (explaining some of the goals of the series, Lloyd Schwartz states that they “wanted our shows to be universal not about what was happening currently in the world. That may well be one of the reasons that the shows hold up in syndication.” “In doing so, we did episodes about peer pressure, acceptance, honesty, etc.”); Edelstein & Lovece, supra note 1, at 20 (1990) (explaining the appeal of The Brady Bunch, Sherwood Schwartz said “Human, family stories. I don't care what the generation is, it's the same: the problems of communicating, of honesty, of being the middle child, of little things like wearing braces or glasses.”).
legal profession like to consider themselves as philosophers,\(^\text{10}\) and it is not difficult to imagine that *The Brady Bunch* writers, producers, and staff appreciated their educational role. Although it would also be possible to consider substantive areas of law such as Torts, Contracts, Property, Criminal Law, and Civil Procedure, this Article does not directly address those kinds of topics. To be sure, the five television seasons are packed with legal issues and lessons that relate to these and other specific legal subjects. But this Article addresses law in a more general, foundational, sense.

Words and conduct often reflect values and core principles relating to justice.\(^\text{11}\) There is little doubt that justice was important to the Brady’s. Several core values that we associate with justice appear frequently and prominently. In particular, a number of episodes emphasize the importance of truth and honesty. Fairness and equality also occasionally take center stage. The characters also strive to make decisions with impartiality. Several episodes that address impartiality actually use courtroom settings. Sometimes the courtrooms are real and in other instances the characters engage in mock trials. The Brady’s also routinely refer to “the law” and refer to it and “rules” with a certain reverence. In addition, the characters now and then refer to lawyers; they occasionally poke fun at the law or the legal system.\(^\text{12}\)

Even casual viewers probably recall the frequency with which Mike Brady moralized. Mike, in his role as father, often told the children either one-on-one or as a group about the importance of truth, the importance of rules, the importance of fairness, and the importance of equality.\(^\text{13}\) It becomes crystal clear

\(^{10}\) *Grant Gilmore, The Ages of American Law* 3 (1977) (“By the end of the [eighteenth] century, lawyers had put aside their plumbers’ image and become philosophers – an upgrading of status which the legal mind naturally found irresistible. Indeed, we became students not merely of law but, much more grandly, of jurisprudence – an old word wrenched in new meaning.”).  

\(^{11}\) *See e.g., Hall, supra note 5, at 1 (“Savigny said, ‘The law, as well as the language, exists in the consciousness of the people,’ and he stressed the ‘organic connection of the law with [their] being and character….’ It ‘is first developed by custom and popular faith, next by jurisprudence [i.e. case law] - everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a lawgiver.’” (quoting F. Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* 25, 27, 30 (A. Howard trans., 1831))).

\(^{12}\) *See e.g., The Brady Bunch: Grand Canyon Or Bust* (ABC television broadcast Sept. 24, 1971) (the prospector Zachariah Brown hands the Brady’s a piece of paper and says: “Sure, sure here it is all legal-like now, signed and everything; all you’ve got to do is fill in the details, that’s all.”); *The Brady Bunch: Adios, Johnny Bravo* (ABC television broadcast Sept. 14, 1973) (the shady record producer casually remarks about a recording contract: ”You know, it’s gotta be like legal, like you dig.”).  

\(^{13}\) *See Hall, supra note 5, at 2 (“Thus, either mediately or directly, knowledge of jurisprudence permeates the entire enterprise of the study and practice of law even if that influence is not always consciously perceived.”).
in Season Four why Mike is so adept at discussing legal issues. Although the audience had never heard Mike mention it previously, in March 1973 we learned that Mike’s paternal grandfather was a judge. Presumably little Mike spent hours as a child listening to his grandfather wax eloquently about the virtues of law and its importance in society. In his only appearance on the show, Grandpa Brady makes clear that his life in the law was important and rewarding. With Judge Grandpa Brady as patriarch, it is unsurprising that truth and justice served as cornerstones of the Brady tradition.

Part I considers Brady viewpoints and lessons relating to Truth and Honesty. Part II examines episodes and interactions that concern Fairness and Equality. Part III focuses on the big-picture of Right & Wrong – Justice in a general sense, as we zoom-in on incidents, which gave the Brady’s an opportunity to reflect on and express views regarding rules and Justice. Because of its focus on “Justice,” Part III also examines Brady viewpoints relating to the role of law and the judiciary in society. The Article concludes with thoughts about how the Brady Bunch may have helped a generation of American citizens and lawyers maintain and advance a number of positive social values by providing weekly – and daily during reruns - role models relating to the role of law and justice. The Brady household displayed an abiding reverence for the rule of law. The family valued law and legal institutions. Jurisprudence scholar Jerome Hall writes: “[R]ules of law supply the rational factor that serves as a practical guide to officials and laymen, and…they provide the distinctive features of certain actions that otherwise dissolve in an amorphous ocean of behavior…” Mike Brady would have agreed wholeheartedly, and if we close our eyes and use our imaginations, we can certainly visualize and hear him offering Professor Hall’s words of wisdom to the assembled Brady children.

I. Truth & Honesty
A. General

An essential element of jurisprudence is the value of truth. The Brady’s both express the importance of truth and also put it into action. Several episodes are entirely devoted to truth, or have truth operating as an underlying theme.

14 See infra Part III for additional discussion regarding Judge Brady. Interestingly, Sherwood Schwartz’s older brother, Albert, “attended...Brooklyn Law School – only to chuck it all and become a comedy writer and producer.” EDELSTEIN & LOVECE, supra note 1, at 94.
15 See GILMORE, supra note 10, at 105 (“What is meant by the Rule of Law is rarely explained with any particularity, but the message is clear: we have the Rule of Law; our enemies do not have the Rule of Law; our possession of the Rule of Law is what makes our society a better society than their society.”).
16 HALL, supra note 5, at 161 (footnote omitted).
Occasionally characters soberly articulate the importance of truth, frequently struggling with the difficulty of acknowledging that being truthful is the right thing to do. For example, in *Mail Order Hero*, Bobby lies to his friends and tells them that he knows the famous New York Jets quarterback, Joe Namath. He tells them that Joe comes over to their house to eat whenever he comes to town. So when the Jets come to play a game and his friends want to come over to meet Broadway Joe, Bobby realizes that he has been caught in a lie. Brother Greg counsels Bobby to tell the truth about his lie: "So I think I'd tell the truth before it gets any worse." Peter chimes in with a light-hearted spin on the topic: "Right, honesty is the best policy. Especially when nothing else works." A number of episodes treat truth and honesty as a matter of central importance. In *The Great Earring Caper*, Marcia insists that Cindy confess to Carol the truth about losing an earring. When Peter breaks a lamp, in *Confessions, Confessions*, while playing with a basketball in the house, the children collude to keep the incident a secret. Peter plans to go on a camping trip, and he worries that he’ll lose the privilege of camping as punishment. In another episode, an errantly thrown Frisbee breaks another lamp. When Carol directly asks Alice what happened, Alice reluctantly tells the truth and explains to Carol how the lamp got damaged. These and other episodes will be discussed in greater detail below. But first, it will be useful to consider one episode in particular that actually uses a courtroom trial scene as a reality-play to emphasize the importance of truth. Because the majority of this episode deals with legal issues throughout the entire half hour and a courtroom scene, it merits detailed treatment. The episode also provides a social

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17 “Broadway Joe” Namath played his college football at the University of Alabama and was MVP of Super Bowl III, when the NY Jets upset the Baltimore Colts 16-7. Namath was inducted into the NFL Hall of Fame on August 3, 1985. See Mark Kriegel, *Namath: A Biography* 405 (2004).
19 *Id.; see also Schwartz & Schwartz, supra* note 2, at 195 (commenting about this episode, the Schwartz’s write: “Of course the Brady kids learn a valuable lesson about lying and what happens.”).
22 Punishment is a common consequence for breaking rules in the Brady household. The children seem to accept punishment as a matter of course. *See Hall, supra* note 5, at 115 (“In the early history of jurisprudence many legal philosophers wrote about law without mentioning the sanction; this can be traced back to many pithy statements by Plato and Aristotle, to the Stoic Chrysippus, and to Cicero who defined law as ‘right reason, commanding what should be done and forbidding what should not be done.’”); *Id. at 119* (“Thus, Austin and Kelsen are in substantial agreement that the sanction is an essential part of positive law.”) (citation omitted).
commentary on unethical courtroom tactics. The Fender Benders involves a minor supermarket parking lot collision.\textsuperscript{24}

\textbf{B. The Fender Benders (March 10, 1972)}

As Carol was pulling out of a parking space, she collided with a car driven by a man named Harry Duggan. The accident damaged the right rear fender of the family station wagon. Carol says it "wasn't even my fault." The story emerges that Carol looked back when backing up from her parking space at the supermarket. Duggan also backed up (according to Carol, without looking) and they collided. Carol explains to Mike that both cars sustained about the same amount of damage, and there were no injuries. She says that she and the other driver exchanged names and addresses and "decided to fix our own cars instead of making a big thing out of it." Mike says that he thinks that it would have been better to have "reported it...but as long as you both agreed."

Marcia tells Greg that the accident wasn't Carol's fault but instead "that dumb man-driver's fault." But soon the man with whom Carol had the accident, Harry Duggan, arrives for a visit at the Brady House. He turns out to be a classic sleazeball and now is changing his story, accusing Carol of being at fault. He suggests that the real problem is "women drivers."

Harry now says that his "car had to be towed from the scene of the accident to a shop." And he adds, "As a matter of fact, she banged up my car pretty bad." He then presents an itemized list of the damage, and he says that Carol is going to have to pay. He claims that he didn't agree to have each fix their own car, because "it certainly wasn't my fault." He wants to tell his side of the story, and says that he looked out of his rear window and "saw it was clear" and then "started to back out slowly." "When all of a sudden, she came screaming out of her parking place and banged right into me. Obviously, she just didn't look back."

Carol protests that he "couldn't have looked back because I was moving first." Duggan disputes Carol's statement and says that \textit{he} was moving first. He says that the muffler needs replacing, along with several other things, for a grand total of $295.11.\textsuperscript{25} Mike tells Duggan to leave before he tosses him out. Duggan asks: "Sir, are you threatening me with bodily harm?" Mike replies: "Yes! Out!" And Duggan responds that he's going to sue: "I'll see you in court."

\textsuperscript{24} The Brady Bunch: The Fender Benders (ABC television broadcast Mar. 10, 1972).
\textsuperscript{25} $295 in 1972 is roughly equivalent to $1600 in 2014.
Mike’s interpretation is that Duggan is "obviously trying to use the accident to get a whole lot of other repairs done on his car." And when Bobby and Cindy ask if they will have to go to court too, Mike says yes they might because they were witnesses, and "it's perfectly legal." Carol assures them that "it's nothing to be afraid of. All you have to do is tell the truth." Mike explains that they definitely have to tell the truth. "Of course, especially in court."

Cindy asks if she has to tell "The exact truth?" Bobby tells Mike and Carol that "maybe the accident was Mom's fault." And Cindy adds that they didn't see her look back. When Mike pursues the issue, asking "Are you sure?" Bobby answers yes they are sure. Mike then presses the matter with Carol but she says that she's "positive" that she looked back. Carol becomes exasperated and laments: "Mr. Duggan's going to take me to court and my own kids are going to have to testify against me." Mike and Carol discuss it and reluctantly agree that they don't want to make Bobby and Cindy testify against Carol; so they decide just have to pay Duggan the $295.11.

At this point Marcia steps in, however, and says that she guesses that she'll "have to be a witness too." In her view, it was not Carol's fault. She exclaims to Cindy: "Mom's fault?" To which Cindy replies: "What am I gonna do?" Marcia’s sarcastic response to her little sister is quite blunt: "Well for one thing, get glasses!" Marcia then goes to tell Mike and Carol that she "saw Mom look back."

It is at this juncture that Alice has her discussion about courtroom procedures with Cindy. Cindy tells Alice that she’s scared because "The judge swears at you." Of course Alice sets her straight: "No Sweetie, the Judge swears you in." The conversation continues:

Alice: "And when he calls your name, you become the witness and you sit

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26 Under the CAL. EVID. CODE, specifically § 701, “a person is disqualified to be a witness if he/she is: 1) incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or 2) incapable of understanding the duty of a witness to tell the truth. In any proceeding held outside the presence of a jury, the court may reserve challenges to the competency of a witness until the conclusion of the direct examination of that witness…” CAL. EVID. CODE § 701. In Bradburn v. Peacock, a California Court of Appeals held that “in order to be a competent witness a child under 10 years of age must be capable of receiving just impressions of the facts and relating them truly,” Bradburn v. Peacock, 286 P.2d 972, 973 (Cal. Dist. Ct. App. 1955) (citing CODE CIV. P. § 1880(2)). “Their competency is to be determined, not by their age, but by the degree of their understanding and knowledge.” Id. (quoting People v. Bernal, 10 Cal. 66, 66 (1858)). “[A] child's extreme youthfulness [is] not, per se, sufficient to exclude him from the witness stand. There is no arbitrary age limit under which the testimony of a child is automatically rejected.” Id. (quoting People v. Delaney, 52 Cal. Ct. App. 765, 768 (1921)).

27 See supra text accompanying note 8.
in the witness chair."
Cindy: "Is that where I have to tell the truth?"
Alice: "Yep, the truth, the whole truth, and nothing but the truth."

Cindy then wonders if she does not sit in the chair, if she might be able to "fib a little."
Alice tells her that her mother wouldn't want that. Cindy, however, persists, and expresses her concern.
Cindy: "But if Bobby and I tell the truth, she'll lose, and go to jail for years and years."
Alice: "Honey, this is just small claims court. There's no jury. Your mother's not going to have to go to jail no matter what you say. The judge just listens to both sides, and then he decides...."

Mike formulates a plan to gather evidence. He proposes that the family "restage the scene of the crime" in order to figure out "why four people in the same car didn't see the same thing the same way." So, they all go to the car in their driveway and sit where they were sitting when the accident occurred, in order to try to see what they could see. They are trying to do "exactly" what they did in the supermarket parking lot. Carol says that they first fastened their seat belts, and Marcia agrees. Carol says that she looked back. Then Marcia recalls that Bobby and Cindy were "fighting about something" and Cindy says "Oh yeah!" and that Bobby had spilled ice cream all over her. So, facing one another, Bobby and Cindy re-enact their argument. Greg, meanwhile, is behind the wheel of the other car, playing the role of Mr. Duggan in the parking lot. Mike points out to Bobby and Cindy that, if they were indeed arguing the whole time, perhaps they didn't see whether Carol looked back. And in fact Cindy concedes "Maybe we missed it."

The scene then shifts to the courthouse. Duggan arrives late wearing a neck brace and feigning a limp. He says that he is late because he's suffered whiplash and was at the doctor. He says that Mrs. Brady hit him after he carefully looked back. He uses toy cars on a magnetic board to illustrate his version of the

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28 For comic relief, when Greg almost fails to stop the car, Jan says: "We almost had another court case." Alice chimes in "Yeah, Brady versus Brady."
29 A close-up shot of a relief sculpture (presumably the relief is on the exterior of the courthouse building) reads: "Justice for all." There are figures of three men. The one in the center has two swords with fasces and a caduceus and a scale. Another may be Moses with the Ten Commandments.

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accident. The judge tells him that he'll "hear both sides, and then the court will render a decision." Duggan complains that he can hardly turn his head. He remarks that his wife is "bedridden," apparently trying to elicit sympathy from the judge. The Judge admonishes him: "Just stick to what happened in the parking lot, Mr. Duggan." Duggan claims he looked out of the rear window "and saw it was clear." And that he "started to back up very slowly...." And he accuses Carol of barreling out of the parking space and hitting him. "Of course, you know how woman drivers are, your honor." Throughout the episode Duggan has cast aspersions on women and women drivers. This provides an opportunity for the judge to emphasize that gender "is not pertinent." And he asks if Duggan has any witnesses. When Duggan admits that he does not, the Judge asks Carol to tell her side of the story.

Carol agrees that they were both parked but says that she "was the one who sure everything was clear." Duggan tries to interrupt, but the Judge says that he has had his turn. The Judge then asks Marcia, Bobby, and Cindy if they were witnesses. When Duggan protests ("I object, Your Honor") that Carol has "probably told them what to say," the judge tells Duggan that he doesn't need his advice. Marcia corroborates Carol's story, agreeing that she looked back.

Judge: "Now children, the story that your mother told about the accident in the parking lot; is that true, did she turn around and carefully look before she backed up?

Marcia: "Yes, Your Honor, I saw her look back."

Judge: "Are you sure?"

Marcia: Yes Sir, I'm sure."

Bobby and Cindy then explain that they were arguing and can't be certain about what they saw. The judge thus acknowledges that he has to deal with two conflicting accounts. "This leaves the Court to settle the decision entirely on the testimony of both litigants." Unfortunately, at this point in the episode, the writers resort to an unnecessary, sophomoric reuse. Mike purposely drops his briefcase, making a loud noise. Duggan, startled by the sound of the briefcase hitting the floor, turns around quickly to see what made the noise. The judge, along with everybody else, realizes that Duggan's ability to turn his neck impeaches his testimony, because it severely erodes his credibility. To be sure, the Judge just as easily could have rendered his decision based on credibility and witness testimony alone, without the additional briefcase-head-turning incident. Nevertheless, the Judge finds for the Carol, the defendant, and a disappointed Duggan rips up his itemized list of damages.

The tag scene to this episode features Peter and Jan arguing – actually having a
tug-of-war – over ownership of a candy bar. They each grab a candy bar and argue "it's mine!" Cindy, playing the role of the judge, sits down and says "Let me settle this." "I was just in court so I know all about settling things, really legal." Jan and Peter agree to allow Cindy to act as Judge. Each claims to have bought the candy bar (Peter..."yesterday" and Jan..."today"). Cindy says: "It's a very tough case, there's only one thing to do." She takes a big bite and runs away; Jan and Peter give chase.

C. Episodes & Incidents Focusing on Truth and Honesty
1. The Slumber Caper (October 9, 1970)

In The Slumber Caper, the characters wrestle with an interesting problem about truth. The problem also concerns circumstantial evidence and at least one difficulty inherent in drawing inferences from circumstantial evidence. Humans are fully capable of drawing false conclusions based on circumstantial evidence. In Mrs. Denton’s English class, Marcia drew a picture of George Washington, which she says she copied from a picture on the wall in the classroom. Unfortunately, it is not a very flattering representation of the Father of our Country. In fact, it is not readily identifiable as the first President. A classmate, Paula Tardy, found Marcia’s drawing and added a caption, which read: “Mrs. Denton? Or a hippopotamus?” Mrs. Denton found the picture and, apparently, turned it over to Mr. J.P. Randolph, the school principal. The monkey wrench in the plot, however, is that for most of the episode neither Mr. Randolph, Marcia, nor anyone (including the audience) except Paula knows that Paula was the person who added the derogatory remark. Mr. Randolph calls Marcia to his office and tells her that he has concluded that she is responsible for both the drawing and the caption. Consequently he punishes her with staying after school for one hour for a week. Marcia, however, is adamant. She admits that she drew the picture but denies that she wrote the comment, “Mrs. Denton? Or a hippopotamus?”

At home Mike and Carol tell Marcia that, because of this incident, they are canceling the slumber party that had been planned. In tears, Marcia appears heartbroken that Mike and Carol refuse to believe that she is telling the truth. Devastated, she tells them: “You don’t believe me either! And if you don’t, I don’t want a party or anything ever from you!” In the following scene, Mike, perplexed, says, “It’s not like her honey. I’ve never seen Marcia so adamant.” Carol replies, “That’s one thing about Marcia, when she’s wrong, she admits it.” Thinking that Mr. Randolph might be mistaken, Mike pays him a visit, and they discuss the incident. But Mike respects Mr. Randolph’s position and does not
argue with him. They add a bit of comic relief, however, when Mr. Randolph admits, in response to Mike’s question, that Mrs. Denton does “unfortunately” look like the drawing. After Mike and Carol discuss the matter further at home, they determine that Mr. Randolph’s conclusion may be incorrect. Thus they decide that they are willing to trust Marcia, and they revoke the slumber party cancellation.

Marcia, in the meantime, however, jumps to her own conclusion. She remembers that her best friend, Jenny Wilton, sits in the same desk in the class that meets after she (Marcia) has English with Mrs. Denton. Therefore, Marcia infers that it was Jenny who must have added the caption to Marcia’s drawing. Marcia telephones Jenny and, without explaining why, un-invites Jenny to the slumber party, telling her that the party is only for her friends! 30

At the party (fourteen girls including the three Bradys), Paula, innocently tells Marcia that she was the one who had written the caption on the paper, and that she intended it merely as a joke. Paula then apologizes upon learning that Marcia was punished for it, and Paula then offers to tell Mr. Randolph the truth. Marcia now realizes that she also had falsely accused Jenny Wilton (the same sin of false accusation as Randolph – convicting without proper evidence) and she confesses to her parents and telephones Jenny to re-invite her to the slumber party. Mike admonishes Marcia: "You were blamed for something because somebody didn't have all of the facts. You turned around and did the same thing to Jenny." 31

In the tag scene at the end, Mr. Randolph telephones to apologize because of Paula’s confession.

30 Perhaps this is the 1972 equivalent of “un-friending” someone on Facebook today?
31 When a witness’s credibility is in question in a California court, that witness’s credibility “may be attacked or supported by any party, even the party who called the witness.” CAL. EVID. CODE § 785. Under CAL. EVID. CODE § 786, “evidence of traits of his character other than honesty and veracity, or their opposites, is inadmissible to attach or support the credibility of a witness.” Id. When Mike and Carol agree that when Marcia is wrong she admits it they are evaluating facts that go to Marcia’s veracity. This type of evidence would be admissible in a California court of law and support Marcia’s credibility. Unfortunately, Marcia didn’t do the same evaluation before she accused Jenny of the wrong doing; had she done so maybe she wouldn’t have found herself scorning a friend and later having to apologize for it. This theme occasionally appears in the show. See e.g., The Brady Bunch: Top Secret (ABC television broadcast Feb. 15, 1974) (Bobby and Cousin Oliver have misinterpreted evidence, and Mike lectures about "what can happen when you jump to conclusions without getting all the facts.")
2. *Quarterback Sneak* (Nov. 9, 1973)

In *Quarterback Sneak*, Greg suspects that Fairview High’s (a football rival of Greg’s school, Westdale High) quarterback, Jerry Rogers is feigning romantic interest in Marcia for the sole purpose of gaining access to and stealing Greg’s team playbook. And Greg’s suspicion is correct; Bobby actually witnesses Jerry attempting to take the playbook when he was visiting Marcia one afternoon following school. Consequently, Greg, who’s playing halfback for Westdale, manufactures a substitute, fake playbook with phony plays. Jerry indeed takes the bait and pilfers the fake playbook that Greg has planted in the house. Mike learns about Greg’s deception and lectures Greg, telling him that Westdale could win dishonestly because the playbook is a fake, and the Fairview team, relying on false information, will misinterpret Westdale's signals. “A victory’s only going to mean something if Westdale beats Fairview in an honest game” So Greg calls Jerry on the phone to tell him that the plays are fake, but Jerry doesn't believe him. In fact, Jerry lies and denies that he stole the book in the first place. Later Fairview’s coach takes Jerry out of the game in the first quarter when he learns about the playbook incident, and Westdale wins the big game 20-7. Back at home post-game, Greg proudly tells Alice “We won fair and square.” In this episode, honesty is rewarded while dishonesty, theft, and deception are punished.

3. *Eenie, Meenie, Mommy, Daddy* (October 10, 1969)

The episode *Eenie Meenie, Mommy, Daddy* presents a problem for Cindy. She is participating in a school play – the lead role of the fairy princess – but, because the size of the auditorium is limited, students will be allowed to invite only one parent to the performance. In an effort to avoid making a decision about which parent to invite, she fakes an injury and lies about hurting her left ankle in an effort to have an excuse not to be in the performance. But within a matter of seconds, she forgets and begins limping on her right ankle. The look on her teacher’s face, Mrs. Engstrom, tells the audience that she knows that Cindy is lying about her injury. Yet Mrs. Engstrom doesn’t challenge Cindy’s lie. Instead she telephones Carol and explains the incident to her.

Mike, nevertheless, rather than communicating openly and honestly about the issue, decides to employ his own form of deception. Although he does not directly lie to Cindy, he presents a hypothetical. He begins his lie with "Suppose": "Suppose that I had a business meeting that night, out of town…?" Cindy’s response is joyous, and she exits to telephone Mrs. Engstrom, presumably to reclaim her lead role as the fairy princess in the play.
But at the episode’s end, we learn that, after his discussion with Cindy regarding his hypothetical business meeting, Mike contacted Mrs. Engstrom, explained the special circumstances surrounding Cindy’s dilemma, and, as a result, the cast (and apparently all involved) stage an additional performance just for the Brady’s. At the end of this episode, Mrs. Engstrom makes an interesting statement about jurisprudence. Following the "special performance for the Brady's," she says "I guess children don't understand sometimes it's possible to bend the rules a bit." This turn of events shows that there can be a positive outcome when people are honest and explain special circumstances fully to others. Mike’s honesty is rewarded. As the closing camera shot zooms away from Mike, Carol, Greg, Marcia, Peter, Jan, Bobby, and Alice who are seated alone in an otherwise empty school auditorium, the TV audience, however, is left to wonder why the parents, family, and friends of the other children who also were limited to only one ticket for the regular performance were not invited to this additional show.

4. Everyone Can't Be George Washington (December 22, 1972)

Curiously, Peter uses the exact same reuse for the same reason in Everyone Can't Be George Washington. Peter has the role of Benedict Arnold in the school play but several classmates tease him about being a traitor (like the historical Benedict Arnold), so he tries to think of excuses to get out of playing the part. He, like Cindy in Eenie, Meenie, Mommy, Daddy, pretends to twist his ankle. But his lie backfires when Mrs. Bailey tells Peter that the real Benedict Arnold was wounded at the Battle of Saratoga and also limped. She even tells him that it was the same leg – “Isn’t that lucky!” she adds. Not deterred, Peter next pretends to have laryngitis. Mike and Carol clearly know that Peter’s lying about the laryngitis; Mike remarks to Carol “His laryngitis seems to have cured his ankle.” “Yeah I noticed that too.” Carol replies. Moments later Mrs. Bailey telephones Jan to tell her to stop working on making scenery. Throughout most of the episode Jan, who was put in charge of making scenery for the play, has enlisted the help of Mike, an architect, and the rest of the family to create elaborate sets. But, because of Peter’s apparent inability to speak and the inability to find a substitute on short notice, Mrs. Bailey has canceled the play. Jan is crestfallen, presumably reflecting on how much effort she and the others have put into creating scenery. Mike and Carol then confront Peter with his lies about the ankle and laryngitis, and remind him about letting down Jan and the many others who have worked on the play. Staring truth in the eye and feeling guilty, Peter changes his mind and participates in the play.

32 In fact Mrs. Bailey’s assertion was correct. Arnold was wounded (for a second time) in his left leg in that battle in 1777. BRIAN RICHARD BOYLAN, BENEDICT ARNOLD THE DARK EAGLE 32 (WW Norton & Co. Inc., 1973).
5. *Alice Doesn’t Live Here Anymore* (October 17, 1969)

Even housekeeper, Alice, lies on occasion. In the opening scene of *Alice Doesn’t Live Here Anymore*, Bobby runs into the house to ask Alice to help him because he fell off his bike and has a bloody knee. Alice begins triage but then Carol, the new mother, enters the kitchen to see if she can help. She looks at Bobby’s knee and says: “Come on let’s hobble upstairs and I’ll get you bandaged up.” To which Bobby replies, “Alice can do it.” It becomes apparent that Carol’s feelings are bruised, and Alice tries to encourage him to go with Carol. Feeling rejected, Carol exits the kitchen. Alice, having perceived Carol’s reaction, then lies to Bobby and tells him to go upstairs to have Carol attend to his injury. “I’m too busy right now; I don’t have time to fool around with scraped knees.” Alice lies in order to manipulate Bobby to interact with Carol. Alice wants Carol to feel needed.

Moments later, Mike asks Alice to sew a button on a dress shirt. She initially promises to do so but then, apparently thinking that this situation presents another opportunity for Carol to be more involved, quickly changes her tune and says, “On second thought, Mr. Brady, I just won’t have time to do it right now.” Taken aback, Mike replies, “It’ll only take you a minute.” “I’m sorry I just can’t do it; I’m way behind schedule,” Alice counters, “Say I’ve got an idea. Why don’t you ask Mrs. Brady.”

Alice does much the same in the next scene when she tells Peter and Greg that she doesn’t have time to referee their argument about the whereabouts of Peter’s baseball glove. She instructs them to go inside to ask Carol to arbitrate instead.³³

³³ Every now and then we find discrepancies in the world of the Brady’s. This might be such an instance but then again it might not be. In this scene, Peter has apparently taken Greg’s baseball glove, and the two of them are literally tugging at the glove, two-fisted, trying to wrestle it away from one another. Peter says that he took Greg’s glove because he couldn’t find his glove, and accuses Greg of having taken his (*i.e.*, Peter’s). That’s the basis of their argument. Greg sounds furious and exclaims, “Now look what you did, you got the pocket in the wrong place!” “Look at this, Alice, he took my glove and now the whole pocket’s messed up.” Moments later Carol solves the boys’ problem when she explains that it was *she* who moved Peter’s glove from the top of his desk to a drawer. She says that she thought that baseball season was over. The potential discrepancy is this. In the episode which aired just one week earlier, *The Brady Bunch: Eenie, Moenie, Mommy, Daddy* (ABC television broadcast Oct. 10, 1969), when Peter and Bobby were in the backyard throwing a baseball, Peter was throwing left-handed and Greg was throwing right-handed. Thus, it seems illogical that Peter would have taken Greg’s glove, since Greg’s glove would fit the left hand and Peter’s would fit the right. But perhaps there is no discrepancy. Young baseball players know that, in a pinch, a lefty can use a righty glove and vice-versa, although it’s not ideal because of the finger positions and location of the pocket. But this would explain why Greg says that “the pocket’s in the wrong place” and that “the whole pocket’s messed up.”
And Alice’s tactics begin to have the desired effect; Carol happily reports to Mike that the boys are starting to come to her with their problems. Alice overhears Carol and is pleased. But in the next two scenes all three boys encounter problems and they take them to Carol instead of Alice. Now it’s Alice who begins to feel rejected. She feels even more left out when a new telescope arrives in the mail and the boys immediately run upstairs to show it to Carol. The girls then begin to feel rejected also. They bring Carol into their room to ask her why she’s spending so much time with the boys and ignoring them. So Alice’s lies have had at least two negative consequences: her own feelings are hurt and the girls’ feelings are hurt.

At this point, matters escalate. Alice now thinks that the family dynamics would be better if she were to leave for good. She’s not sure that she’s really needed now that the boys and Mike have begun to rely on Carol for the kinds of things that she used to do. So Alice invents another lie. Rather than being direct with Mike and Carol about the situation, Alice concocts a yarn that her aunt in Seattle has a liver (or kidney…Alice says “it’s one of those things in there”) ailment, and claims that her aunt wants Alice to come to Seattle to be with her during her sickness. So she tells Mike and Carol that she plans to leave.

Now it appears that Alice’s lies and efforts to direct the males in the household towards Carol have not only worked but have also backfired with serious consequences. That night, Carol says to Mike: “Mike, you don’t believe that story about her aunt any more than I do! We’ve got to find out the truth!” To which Mike responds: “Honey, what do you want to do, put her under a bright light or drip water on her forehead?” Mike then gets the idea that perhaps he needs to give Alice a raise. He tells Carol that he hasn’t increased her pay but that he has, as a result of marriage, doubled Alice’s workload. The following morning Alice, says ironically: “Nothing could be farther from the truth.” “Mr. Brady it’s not the money.” But when Mike directly asks, “What is it?” she repeats the lie again: “It’s like I said, it’s my aunt in Sacramento.” As is the case with many a liar who’s been caught because of inconsistency, Mike’s suspicions have now been confirmed: “Sacramento?” he asks himself after she has left the kitchen.

Further confirmation of her lies arrives in the next scene when Marcia and Jan overhear Alice’s telephone conversation wherein she confides in her friend

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left-hander using a right-hander’s glove certainly could alter the pocket formation. And, in fact, when Carol takes Peter’s glove out of the drawer, it does appear to be a left-handers glove (perhaps a left-hander’s first baseman’s mitt). Christopher Knight, the actor who played Peter, is left-handed. See Christopher Knight, WIKIPEDIA, http://en.wikipedia.org/wiki/Christopher_Knight_(actor) (last visited June 7, 2015).

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Myrtle: “Now that Mr. Brady’s married, I’m just not necessary any more.” The family then decides to fabricate reasons to ask for Alice’s help to show her how much they need her. Of course they’re all guilty of lying in an attempt to convince her that she’s needed. Their ploy works but Alice catches on. In the end she decides to stay, remarking that they must care about her a great deal to have gone to the trouble of staging such elaborate escapades.

6. Peter And The Wolf (Oct. 12, 1973)

The episode Peter And The Wolf illustrates truth as an important value. Greg has a date with Sandra Martin scheduled for Saturday night. At school she tells Greg that she needs to cancel because her 18 year old cousin, Linda, is coming to visit from out of town “right out of the blue” and that she needs to be with her. Greg suggests that they double date, and he tells Sandra that he’ll find a date for her. After one friend at school rejects Greg’s proposal, back at home he begins calling other friends on the phone, looking for a date for Linda.34

After striking out with his friends, Greg cooks up a plan to have Peter come on the double date. Greg creates a false identity for Peter, Phil Packer, from another high school. Sporting a false mustache, Peter goes on the double date to a drive-in movie with Greg, Sandra, and Linda. The girls are not fooled, and after the date they hatch a plan of their own. The next day Sandra telephones Greg and asks to go on another double date that night. Sandra and cousin Linda have decided to fawn over “Phil” just to play mind games with Greg. At the Pizza restaurant both girls flirt with “Phil.” As coincidence would have it, Mike and Carol wind up going to the same restaurant with one of Mike’s Mexican business clients, Mr. Calderon, and his wife. Mr. Calderon sees the girls throwing themselves at “Phil” and takes offense at their public display of affection. He says it’s embarrassing. Of course Mike and Carol share an awkward moment when they realize that Peter and Greg are causing the embarrassing situation. Greg and Peter then realize that their parents have caught them. Following this moment of crisis, however, the four teens decide that honesty is the best policy.

34 In his first phone call to Fred, we learn that in the first scene Sandra made a mistake. Although in the previous scene Sandra referred to their date on Saturday night, Greg asks Fred if he’s busy on Friday night. Subsequent dialogue and action reveal that the actress, Cindi Crosby, who played Sandra, mistakenly said “Saturday.” At the house, Mike tells Carol that he hopes to take her to dinner on Saturday night, and later it turns out that they bump into Greg, Peter, Sandra, and Linda. But that incident is the night after Greg, Peter (“Phil”), Sandra, and Linda go to the drive-in movie on Friday night. In a later scene, Peter and Greg are discussing their double date planned for that night. Peter remarks that it will be difficult to concentrate in class during the day. Presumably, this is additional evidence that Peter and Greg have their date scheduled for Friday (a weekday) not Saturday. Interestingly, Cindi Crosby is the sister of actress Cathy Lee Crosby.
and they explain everything to Mike, Carol, and the Calderons. Back at home, Carol tells Greg and Peter that the Calderon’s “didn’t exactly approve of your X-rated behavior, but they did admire the way you and the girls told the truth.” Peter chimes in with his own moralistic summary, saying what he learned from the experience. “One, you act your age. And two, you don’t try to be something you’re not.” To be sure, this episode once again teaches that deceit and falsehood lead to negative consequences while addressing difficult situations openly and truthfulness bring about positive results.

7. The Tattle-Tale (December 4, 1970)

The Tattle-Tale presents difficult issues relating to truth. This episode is all about Cindy tattling. Cindy freely tells just about everything to anyone. When Bobby accuses her of being “a snitcher,” she replies: “I’m not a snitcher, I just tell it like it is!” Both Mike and Carol quickly tell Cindy that she mustn’t tattle. They emphasize the need to stay out of other people’s business. This story illustrates an interesting problem with truth. Although we tend to prize truth and hold it up as a shining star in legal matters, humans also prize privacy and confidentiality. This is one reason why special rules of evidence and civil and criminal procedure govern spousal immunity and trade secrecy.

After a series of relatively minor incidents involving tattling on her brothers and sisters, Cindy and Alice are in the kitchen when the doorbell rings. Alice meets the postman at the door who tells her that she has a registered letter. Alice opens the letter to discover that she has won a contest. Happy about her contest win, she hugs the postman. Meanwhile, Sam Franklin, Alice’s beau, telephones and Cindy answers. Cindy innocently tells Sam that she saw Alice hugging the postman. Gripped by jealousy, Sam fails to show up that evening to take Alice on their date. When Alice calls Sam to ask where he is, he tells her to let the postman take her to the dance. Alice doesn’t understand Sam’s passive-aggressive behavior until Cindy explains that she told Sam that she had seen Alice hugging the postman.

35 For comic relief, Peter adds: “And three, you find out in advance what restaurant your Mom and Dad are going to…and go someplace else!”

36 Under CAL. EVID. CODE, “[a] spouse, whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.” CAL. EVID. CODE § 980. “Communication between husband and wife is presumed to be confidential and burden is on opponent of privilege to prove otherwise.” (citing People v. Carter, 110 Cal. Rptr. 324, 327 (Cal. Ct. App. 1973)). This rule applies in both civil and criminal cases. GEORGE FISHER, EVIDENCE 1057 (Robert C. Clark et al. eds., Foundation Press, 3rd ed. 2013).
In one of his classic lectures, Mike sits down to explain the problem to Cindy. He perceptively explains that it’s not always easy to determine what information about one person ought and ought not be passed along to another. Telling the truth, indeed, is often a more nuanced matter than some would have us believe. “I know it’s difficult for a little girl to know what to say and what not to say. Grownups have that same problem. But you have to learn when to keep quiet.” Of course in the ensuing scenes Cindy, too young to use judgment, simply refuses to disclose any information to anyone about anything. But perhaps that’s really the point. Although truth may be an important value in life and law, it is necessary to balance the need for truth with other, competing values and interests such as privacy, confidentiality, and personal interests.  

8. Career Fever (November 17, 1972)

In Career Fever, several characters have difficulty with honesty. The plot revolves around Greg and Mike. Greg has been thinking about careers, and he, like many boys, considers his father’s profession, architecture. In the opening scene, Mike tells Carol, “I don’t know, it may be corny, but I’m so proud Greg wants to following my footsteps.” The audience quickly learns, however, that Greg has changed his mind and does not want to pursue architecture. He has confided in Marcia, and she counsels Greg: “You’ve got to let him know.” But when she asks Greg if he has told Mike about his change of heart, Greg tells her that he plans “to show him” instead, in order to avoid disappointing him. Greg’s idea is to draw terrible mock architectural plans. He shows Marcia a house plan that he has drawn. It is so bad that she has to ask him what it is. “When Dad sees that, he’s got to say I don’t belong in the architect business.” Uncharacteristically, Marcia encourages Greg’s deceit, telling him “That’s a terrific idea.” Thus the basis of the subsequent plot rests on Greg’s unwillingness to communicate directly and honestly with Mike. In essence he attempts to manipulate Mike by dishonest conduct.

When Greg shows his drawing to Mike, Mike holds his tongue, trying not to discourage Greg. Mike then shows Greg’s drawing to Carol. He tells her: “I couldn’t tell him the truth; he’s so excited about being an architect.” As we might assume, the problems escalate. Mike gets the idea to give Greg architectural tools and a book to “help him with his perspective.” Meanwhile, Greg tells Marcia that he’s decided to face the music and tell Mike the truth. “Marcia, I’ve made up my mind. I’m going to have to do something drastic.” “Like what?” she asks. “Tell

him the truth! I’m just going to have to walk right up to Dad and say, ‘Dad, I
don’t like it, I’m no good at it, and just don’t want to be an architect.’” But Greg
loses his resolve when Mike returns home and presents Greg with his old
drafting kit: “Because the correct equipment can make all the difference in the
work you do.” So once again Greg decides to draw something terrible. Marcia
asks if he thinks he can draw something worse than his last, and Greg tells her,
“If you think that was bad, wait til you see this!” Ironically, in the very next
scene, when Peter comes to talk with Mike and Carol about a problem of his
own, Mike insists that Peter not beat around the bush: “Alright, Peter, what’s this
all about? The truth now!”38

Finally, after Mike and Carol have looked over Greg’s latest visual disaster (Mike
remarks “What we have here is Frank Lloyd Wrong.”), the episode concludes
with Greg finally admitting to Mike that he does not want to be an architect.
Both he and Mike acknowledge that it would have been better to have dealt with
one another honestly from the start. “Dad, I should have leveled with you in the
first place.” “Well I guess I should have leveled with you too, son.” Mike
responds. The message is clear. This episode tells us that we’re better off
communicating truthfully with others rather than trying to protect them by
second-guessing their feelings and reactions to the truth ex ante.

9. Cindy Brady, Lady (February 18, 1972)

The basic plot of Cindy Brady, Lady is that Cindy feels jealous of Marcia and Jan,
because she wants to go on dates and do things that older girls do. So Bobby
decides to be her “secret admirer.” His first move is to leave a note with a candy
bar in the mailbox for her. Next he leaves flowers and a note on the front steps.
And the pattern continues for several days with assorted small gifts and notes.
Mike and Carol learn that Bobby is Cindy’s secret admirer, and they make him
promise to tell her the truth. Mike advises Bobby: “Sure, she had to find out the

38 In this episode, all of the other Brady children, except Marcia, have begun emulating Greg; they
are exploring career ideas. Cindy wants to be a model. Bobby wants to be an astronaut. And Peter
and Jan have checked out books about medicine and diseases from the library in hopes of
learning to be a doctor and nurse respectively. Peter, in the manner of many a first-year medical
student, has convinced himself that he has the symptoms of a fatal disease. Thus he has come to
speak with Mike and Carol to break the sad news to them. For criticism of the sexist message in
this episode, see Marinucci, supra note 3, at 517 (“In ‘Career Fever,’ Peter decides that he will
become a doctor, and Jan decides that she will assist him as the nurse. At no time does any
member of the Brady Family acknowledge that Jan could choose to become a doctor instead of a
nurse. In each of these examples, male members of the Brady Family are portrayed as more
active, more productive, or more intelligent than their female counterparts.”).
truth sometime.” And Carol admonishes him, “You are going to tell Cindy the truth, first thing in the morning.”

But when Bobby sees her in the morning, he beats around the bush, unable to directly tell her. Later at school Bobby bribes a friend, Tommy Jamison, to come to the Brady house to pretend to be her secret admirer. Cindy tries to act older and more mature, and Tommy tells her that she’s too grown up for him. Cindy then tells him that she was “just pretending.” At that point Cindy and Tommy discover that they actually have a lot of interests in common, such as climbing trees, playing on the backyard teeter-totter, and collecting lizards. They start having fun, playing in the yard. And Tommy’s enjoying Cindy’s company so much that he tells Bobby that he wants to return the Kennedy half dollar (the bribe).

Mike and Carol confront Bobby. But this turns out to be one episode where a rather serious lie goes unpunished – on screen at least. Mike tells Bobby, “Well hang on because this incident isn’t quite closed yet, ya know.” Bobby replies, “Well, before you say anything, just remember it’s a happy ending.” To which Carol adds: “For him (i.e., Tommy) maybe, but for you, we’re not so sure.” Mike and Carol certainly imply that, although no doled out on screen, there will be a punishment of some sort for Bobby.39

D. White Lies

Not surprisingly, there are a number of instances where characters make light of dishonesty. For example, in Cindy Brady, Lady, Alice looks in her mirror before bedtime and sighs: “Oh wow. Gotta get a new mirror…one that lies a little!” In addition, there are a number of episodes in which one or more characters lie without any appreciable consequence. Perhaps the writers considered these “white lies.” For example, very uncharacteristically, in Today, I’m a Freshman,40 Marcia lies about being sick on the first day of her freshman year in high school (because of her insecurity and fears). The doctor who has made a house call refers to it as “New-schoolitis.” And in Pass the Tabu,41 Greg tells the girls to "cover" for the boys and to lie about where they are going. Greg says, “If they ask tell Mom and Dad we went sight-seeing; and that’s all ya know. Okay?” Marcia agrees, “Okay,” Actually they are planning to take a “tabu” (a small wooden sculpture that has a reputation for bringing bad luck) back to its “burial

39 For more regarding punishment, see supra note 22 and infra note 103.
ground of ancient kings” in hopes of ridding themselves of bad luck. Mike and Carol had told the boys to ignore the superstitions.

Many of these “white” lying incidents occur in contexts where the person to whom the lie is being told appears to be aware of the lie but, nevertheless, decides not to confront the person who has told the lie. In these instances, the audience understands both that there has been a lie and that the individual being lied to knows it. For example, in Dear Libby the children lie a great deal to their parents. Marcia has read a newspaper column, “Dear Libby,” in which a reader (“Harried and Hopeless”) has written to Libby asking advice about how to deal with the difficult situation created in a family where both newlyweds have three children from a previous marriage. Harried and Hopeless says “I had no idea three new children could cause so much trouble” and asks “Should I continue pretending to love these new children and wait until they wreck my marriage or should I get out now?” Marcia incorrectly jumps to the conclusion that either Mike or Carol is Harried and Hopeless. She, therefore first removes that page (section B page 5) from the newspaper, apparently hoping to prevent Mike and Carol from reading the letter.43

Both Mike and Carol, however, notice that a page is missing. When Mike says that he'll go out to get another paper, Marcia volunteers to go buy another. Because of the late hour and darkness, Mike insists that Greg accompany Marcia. Greg, not thrilled about the prospect of missing the end of the TV show that he was watching to go on an errand with his step-sister, acquiesces. In response to Greg’s complaint about missing his TV show, Marcia tries to appease him with a lie: “It’s a rerun, I'll tell you all about it.” Within a matter of seconds it becomes clear that she was lying in an effort to prevent Mike from going to purchase the substitute paper.44 As soon as they close the front door, Marcia explains the quandary and gives Greg the column to read. After buying the new paper, Marcia and Greg apparently obscured the “Dear Libby” column in the new copy with a rather large smear of black ink, because upon their return home, Carol opens it and, in surprise, says “Well this page has a big black ink spot on it!” As she utters these words, she opens the page and the camera has a good view of the entire right-hand side of the page, blackened as if a bottle of ink had been spilled on it. Greg offers a potential explanation: “The printing press must have gone

43 See infra note 31 regarding other problems that arise in situations where characters jump to conclusions without sufficient facts.
44 Interestingly, although Marcia has essentially “stolen” that page of the newspaper, when she tells Greg that she took that section from the paper, he says "You're really weird." But he doesn't say "That's stealing."
haywire.” And Marcia adds: “That’s the trouble with machines; you can’t depend on them.” Greg then digs the hole deeper: “I heard about this one newspaper that printed a million copies of page nine right on top of page eight, and left page nine blank.” Marcia is quick to corroborate Greg’s lie and says “I heard about that too.” Both Mike and Carol’s faces look skeptical, and Mike presses the issue, asking “Really, what paper was that?” Their lies become manifest when they answer simultaneously, giving the names of different newspapers. Greg says “The Boston Times” and Marcia says “The Chicago Post.” And a fraction of a second later they each try to cover themselves by immediately changing their response to the name of the paper that the other had initially said. Mike and Carol roll their eyes and look at one another, and Marcia and Greg do the same. Although Mike and Carol (along with the audience) seem to know that Marcia and Greg are lying, they choose not to challenge or confront the children.

Later in the same episode, while Jan is watching TV, Peter enters and changes the channel. “Hey! I was watching that!” Jan exclaims. And the two step-siblings raise their voices and continue to argue. Greg comes in and tries to settle them down. But when Carol enters the room, alarmed by the sound of the children arguing, Greg intervenes and he lies to Carol about the argument, saying that the argument she heard “was on TV” and that “they’re telecasting a peace conference.”

But the episode ends happily. The “Dear Libby” writer visits the Bradys and reassures them that neither Mike nor Carol was “Harried and Hopeless.” The script writers, however, apparently decided not to comment either directly nor indirectly about the children’s white lies. Perhaps the lesson had more to do with the problems associated with drawing inferences from circumstantial evidence than lessons relating to honesty.

Children aren’t the only ones who lie in the world of the Brady’s. In the episode Getting Greg’s Goat, Greg and his friends have stolen Raquel, the goat who is Coolidge High School’s mascot. The Westdale students stole Raquel as revenge for Coolidge students having stolen Westdale’s mascot, a bear cub. Greg has hidden Raquel in his attic bedroom but Peter and Bobby accidentally allowed her to escape, and she eludes the children who try to catch her. Meanwhile Carol winds up hosting an emergency PTA meeting. Ironically, the PTA members want to discuss the problem of mascot-swiping, which has gotten “out of hand.” Carol is leading a house tour of the three PTA members and the Westdale Boys’ Vice-Principal, Mr. Binkley, while Greg frantically tries to stay one step ahead of them.

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45 See supra Part I.C.1.
and nab Raquel without being found out. When Carol opens the linen closet door to discover Raquel hidden there in Greg’s grasp, Carol shuts the door immediately and dissembles, pretending not to have seen Greg and the goat. “You’ve seen one linen closet, you’ve seen them all, right?” Complicit in the cover up, Carol hides the truth.47

E. Negligence, Lies, & Property Damage
1. Goodbye, Alice, Hello (November 24, 1972)

Negligence that causes property damage is a recurrent theme in the series. In conjunction with that theme, characters also dishonestly attempt to cover up the damage and conspire to hide it as well. The characters, especially the children, seem to fear the consequences of their negligence so much that they are willing to risk later being caught in a lie – which typically is precisely what happens. This is especially true in cases like Goodbye, Alice, Hello. In this episode, Peter and Greg first break the family rule that prohibits throwing objects inside the house. Here it’s a Frisbee. Bobby has left his Frisbee in the kitchen and Alice asks Peter to take it upstairs. As Peter and Greg are on their way, Peter tries to toss it to Greg but it caroms off the brick surface of the interior chimney and the post of the door to Mike’s study, before hitting and knocking over an antique lamp. The lamp smashes into several pieces. Greg remarks, “Mom’s gonna kill us!” Looking on, Alice weighs in, “Personally, I don’t think you’re gonna get off that easy.”

But Greg and Peter decide to try to glue the lamp back together, and they ask Alice not to tell Carol about the incident. Alice agrees. Carol returns from shopping and asks Alice if anything new has happened. Alice, a little nervously answers very quickly, “Nope.” Sensing an unusual nervousness in Alice’s voice, Carol says, “Well, that’s a pretty fast ‘Nope.’” A moment later, Carol notices that the lamp is broken. She immediately asks Alice what happened. Alice, because she had promised Greg and Peter that she wouldn’t say anything, begins by denying knowledge of what happened: “Oh my! How in the world do you suppose that happened?” But quickly Carol pursues the issue: “Look Alice, this is very important. Please, now you’ve always told me the truth before, now haven’t you?” Alice admits that she has always told Carol the truth.

And in the next scene, we learn that Alice did, in fact, spill the beans to Carol about how the lamp got broken. Greg and Peter are displeased that Alice failed

47 Greg does his share of lying in this episode too. For example, Greg lies about wanting to eat all of the breakfast food, so that he can take it up to his room for Raquel. And even Marcia, generally known for her integrity and truthfulness, participates in Greg’s lie. Marcia "covers" for Greg, running interference with Alice.
to keep their secret. Both boys lose their allowance for a week as punishment. Alice comes to their room to apologize to the boys. She states the matter simply: “I couldn’t lie to your mother.” To which Greg asks, “Couldn’t you have just said nothing?” Alice explains, “I tried. Honest, I did. I really tried.” The boys, nevertheless, harshly don’t appear willing to forgive her. In his book, Foundations of Jurisprudence, Professor Jerome Hall remarks: “It is doubtful that people usually think that they are making a sacrifice when they do what they ought to do; indeed, there is often much gratification in obeying ‘the voice of conscience,’ and some philosophers have thought virtue is the only road to happiness.” At this juncture, however, it is clear that Alice is experiencing little happiness as a result of doing that which she felt morally obligated to do.

Before long, Marcia gets in trouble with Carol because she accidentally left the record player running overnight. In addition to wasting electricity and overheating the motor, Marcia’s negligence results in unnecessary wear and tear on the phonograph needle. As punishment, Marcia can’t use the stereo for a week. Marcia, in turn, blames Alice because, when Carol asked her, Alice told Carol that it was Marcia who had been playing the stereo. When Marcia expresses her displeasure to Alice, Alice explains: “Oh Honey, I had no idea when she asked me who’d been using it why she wanted to know.” “Sure you didn’t!” Marcia sarcastically replies. Alice, feeling genuinely remorseful, says, “Honest, she just asked me a question and I answered it. I’m sorry, Honey.”

This episode illustrates the tension between honesty and consequences. Although the children react bitterly to the consequences that they suffer as a result of their transgressions being revealed to Carol, Alice has merely responded truthfully to questions that Carol asked. Now Alice feels the interpersonal stress caused by this tension. The children perceive Alice’s honest responses as a breach of trust. Moved to tears, Alice decides that she must leave. So she lies to explain why she plans to leave. Carol listens but doesn’t question the veracity of her explanation. Alice does, in fact, leave, and her friend, Kay, takes her place. Eventually, the children feel remorseful and Alice returns, as the Brady’s housekeeper. Interestingly, however, before her return, she winds up lying to the children! Kay tells Peter and Jan that Alice is working as a waitress at a local restaurant, so all

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48 HALL, supra note 5, at 132.

49 She makes up a story about an uncle who has offered her a job to manage a dress shop. There is another inconsistency here. Alice mentions that she needs to hurry in order not to miss her plane. But in the next scene, Kay, Alice’s friend who takes over as housekeeper when she leaves, tells Greg and Marcia that she has gone “back home.” However, in an episode the previous year, The Brady Bunch: The Winner (ABC television broadcast Feb. 26, 1971), we learned that Alice won a trophy for a modern dance contest at Westdale High School. It is inconsistent that she would need a take a plane to get home if she attended Westdale High.
six children go to pay her a visit. She tells them that she’s just gotten back into town and that the other job “didn’t work out.” And the children, in turn, lie to her when she asks them why they are there. They say that they were just passing by, returning from school.\(^5^0\)

The lesson learned in this episode seems to be that, although the truth may occasionally produce painful results (e.g., loss of allowance and stereo privileges), facing up to the truth is an important adult obligation that, in many instances, supersedes the confidence of keeping secrets among friends.\(^5^1\) Ironically, in the tag scene, Carol tells Alice that she believed the false excuse that Alice told her about why she had to leave. Alice replies: “Well I may not be the greatest housekeeper in the world but I’m a pretty good liar.”

2. The Great Earring Caper (March 2, 1973)

*The Great Earring Caper* features Cindy struggling with honesty. Carol has lent a pair of earrings to Marcia. Marcia tells Cindy that their Grandmother (presumably Carol’s mother) gave them to Carol. She emphatically tells Cindy not to touch them. So, of course, a moment later, after Marcia and Jan have left the bedroom, Cindy opens Marcia’s dresser and tries on the earrings. She then begins looking at herself in the bathroom mirror. Carol calls from the bedroom, interrupting Cindy’s mirror-gazing. Rushing to avoid being caught with the earrings, Cindy hurriedly hides them under a towel next to the bathroom sink. Approximately 30 seconds later, after a very brief discussion with Carol about a new clothing purchase, Cindy returns to the bathroom but cannot find the earrings. “They’re gone!” Cindy says aloud in disbelief.

Cindy enlists Peter’s help. Peter is experimenting with being a detective in this episode. He surmises that the earrings fell down the sink, so while he’s dismantling the pipes to look for them, Cindy busies herself trying to keep her siblings out of the bathroom. She over-does it; she lies, in a very obvious way,

\(^5^0\) It is interesting how often characters tell lies in circumstances such as these, where the person(s) to whom the lie is being told seems to be aware of the lie but yet decides not to confront the liar.

\(^5^1\) The importance of this lesson is memorialized in the laws that govern the conduct of lawyers and judges. Under Rule 8.3(a) of the ABA Model Rules of Professional Conduct, “a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” [*Model Rules of Prof’l Conduct* r. 8.3(a) (Am. Bar Ass’n 2014)]. The same rule also applies if a lawyer knows a judge who has committed a violation. See [*Model Rules of Prof’l Conduct* r. 8.3(b) (Am. Bar Ass’n 2014)].
telling the others that Jan or Greg (presumably anyone other than Peter!) is in the bathroom. Unfortunately for Cindy, Peter does not find them. To make matters worse, Carol plans to wear the earrings at an upcoming costume party. Cindy confesses to Marcia that she lost the earrings, and then, at Marcia’s insistence, Cindy finally confesses to Carol.

To make a long story short, the earrings wound up first in the laundry bag and then in the washing machine. Unfortunately, one of them sustained severe damage in the machine. So the problem began with Cindy taking something that she wasn’t suppose to take. And then because she failed to communicate promptly with either Marcia or Carol about her transgression, Carol’s earrings were damaged. Timely truthfulness could have avoided the property damage. Perhaps the lesson is that others are more understanding and forgiving of a mistake (e.g., taking the earrings without permission) than they are understanding and forgiving of dishonesty.

3. Confessions, Confessions (December 18, 1970)

In Confessions, Confessions, Peter tosses a basketball in the boys’ room upstairs. The ball flies out of the room and bounces down the staircase where it hits Carol’s “favorite vase.” Of course, throwing a ball in the house violates a family rule. Peter predicts that his parents will ground him as a consequence. Thus, he’s certain that he’ll have to miss a much-anticipated over-night camping trip. Greg, however, suggests that they glue the vase back together, and then wait to tell Mike and Carol what happened after Peter has returned from his camping trip. All six children agree to keep the incident a secret. So although this begins as an accident caused, in part, by negligence, it then escalates into a conspiracy to hide and cover up the truth.

Maintaining secrecy turns out to be difficult. First Mike comes home with flowers for Carol. The girls, concerned that he might look for the broken vase, head him off and take the flowers, promising to put them in a vase. Meanwhile, the boys have gone to the hardware store in search of glue with which to repair the vase. Coincidentally, Carol bumps into them in the hardware store. She asks them what they are doing there, and they lie, telling her that they are buying a corn popper. But when the clerk hands them a small brown paper bag with the glue inside, Carol sarcastically remarks that it appears to be a very small corn popper. “Come on fellas, what’s up?” she asks. All three lie to her saying that it’s “nothing.” She decides not to press the issue at that point.
Later, at dinnertime and after the children have glued the vase back together, Carol says that she wants to move the new flowers to that vase. Greg and Peter offer to help; Carol insists that they put water in the vase. Unfortunately for the conspiratorial kids, the glue has not set sufficiently, and, with the entire family in the midst of eating dinner, the vase begins to leak on the dining room table. Mike and Carol surmise correctly that it’s been broken and glued, and want to know who broke it and who glued it. The children at first try to ignore the situation. Mike tells them that he expects an answer after dinner. After dinner, each child individually, except Peter, goes privately to tell a parent that they broke the vase. The siblings are lying in an attempt to cover for Peter. Then to top it all off, Alice, who is not even in on the secret, also falsely confesses to Mike and Carol. Mike and Carol, however, see through her and bluntly tell her that it was kind of her to try to protect the children.

Quickly Mike and Carol correctly deduce that Peter – the only one who has not falsely confessed – is probably the guilty party. Mike notes, however, that the others are also guilty of wrongdoing, since they have been “accessories to the crime.” Mike tells them that the ones who didn’t break the vase “are just as guilty for hiding the truth.” Interestingly, rather than communicating their conclusion directly about Peter’s guilt to the children, Mike and Carol decide to manipulate the situation. They tell the children that Peter must be the only obviously innocent person, since he alone did not confess. So they grant Peter the authority to decide the punishments for his siblings. Apparently they hope that Peter’s guilty conscience will push him to own up.

His siblings, nevertheless, encourage him to go ahead and dole out punishments so that he can still go camping. They conspire again. This time Peter asks the others to think up their own punishments. Once he’s talked with them, he proposes exceptionally lenient punishments to Mike and Carol. But Carol points out the deterrent function of law: “Peter, you’re brothers and sisters have done something wrong. We’re trying to discourage them from doing it again.” And although it takes him some time to come around, Peter himself finally breaks, and on Saturday morning just before his scheduled departure for camping, he admits that it was he who threw the ball that broke the vase. His friends have arrived to pick him up. Peter acknowledges that he’ll need to tell his friend’s father that he can’t go, and he asks his parents what reason he should give as an excuse. Mike counsels him just to tell the truth: “The truth. Peter. Just tell him the truth.”

52 For example, Jan has to help Carol bake cookies, Marcia must take Bobby to an amusement park, and Greg will be forced to accompany Cindy to a movie matinee.

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F. Honesty as Exemplary Conduct

There are a number of episodes in which the children themselves act honestly in difficult circumstances. For example, in *The Winner*,

53 Bobby is jealous of his siblings who have all won trophies for winning at sports and other activities. He tries a number of things and decides to enter a contest to sell the most magazine subscriptions. Mike and Carol then try to help by selling subscriptions for Bobby to their friends. But he rejects the subscriptions sold to Mike and Carol’s friends, because he didn’t really sell them, they did. He wants to win the contest on his own or not at all.  

54 Similarly, in *Her Sister’s Shadow*,

55 Jan exhibits honesty in the face of adversity. In a plot that bears similarities to *The Winner*, this time it is Jan who feels low because she perceives that Marcia wins at everything she tries. Early in the episode, Jan is so frustrated by her lack of comparative success that she stoops to hiding Marcia’s trophies and ribbons on the floor of the closet. After failing to succeed at pom-pom girl tryouts, Mike, Carol, and Marcia assume that Jan will return home despondent. But instead she comes home feeling happy because she won the "Americanism" essay contest, by scoring 98% — "First in the whole school." Then Jan realizes that the person who graded her history essay added up the points incorrectly, and that her essay should have totaled 93 points not the 98 points for which she had been given credit. She realizes that someone else should have won the prize. She struggles with her conscience. But finally Jan comes clean in dramatic fashion on stage in front of the whole school. Mrs. Watson profusely praises Jan for her honesty.

*The Wheeler-Dealer* is an episode that contains an incredible amount of dishonesty, but, in the end, Greg sets a positive example with his honesty. Greg looks into buying his friend Eddie’s used (very used) car. Eddie behaves like a prototypical used car salesman. The car has dents, chrome missing, a hole in the back seat, the door sticks, and the engine sounds like a tank. But Eddie tells Greg: “I’ve got five or six guys just waiting to buy this baby.” He suggests to Greg that the auto body shop at school can straighten out the dents. He explains that, although the door sticks, it is possible to just hop over the door to get into

54 This episode contains a production mistake. In an effort to win at something, Bobby enters an ice cream eating contest sponsored by a local TV station. When they pull out of the driveway, Mike, Carol, and Bobby are in a blue convertible. But when they return at dusk, they are in the older, brown station wagon. I’m not certain why they didn’t correct that glitch. Perhaps they assumed that no one would notice?
55 (ABC television broadcast Nov. 19, 1971).
56 (ABC television broadcast Oct. 8, 1971).
the car because it is a convertible. “So it sticks a little!” “What hole? A little rip. Just sew it up. Only a dime for needle and thread.” When asked about the engine, Eddie says: “Purrs like a kitten.” In truth, it is loud and noisy, belching cannon-like explosions. But Eddie explains: “Runs a little rough until she warms up, then she’s great.” “The idle just needs to be adjusted.” Amidst the cacophony, he encourages Greg: “All this baby needs is a little bit of work.” “Greg, for a hundred bucks and a little bit of work, you’ve got yourself a car that’s worth maybe five hundred.”

So, Greg buys the car from Eddie and drives home. But Mike reminds Greg that he had promised to allow him look at it before buying. Mike and Greg discuss selling and buying.

Mike: “You made a business deal, he got the best of you, that’s all.”
Mike: “You take sellers….Naturally they’re going to make it sound as attractive as possible even if they have to exaggerate to do it.”
Greg: “You mean lie?”
Mike: “Yes, quite often they do, though they might call it ‘gilding the lily.’”
Mike: “But the important thing is that you are the buyer; you have to keep your guard up, see? It’s the old principle of caveat emptor.”
Greg: “Caveat emptor?”
Mike: “It’s Latin for ‘Let the buyer beware.’ Or to put it in the vernacular, ‘Them who don’t look, sometimes gets took.’”

So, then Greg decides to turn the tables and sell the car to somebody else. He uses a lot of the same jargon and schtick that Eddie had used when trying to sell the car to him. He tells Ronnie that he’s got five or six guys looking to buy “the classic.” Thinking that Greg has sold the car to Ronnie, Carol asks: “You didn’t lie to him, did you Greg?” Greg replies “Well I gilded the lily pretty good.” But he could not bring himself to sell it to Ronnie. He sighs and tells Mike and Carol. “I guess I’m a pretty crummy businessman.” But Mike reassures him. “No, no. You’re an honest one.” Instead, he sold it to the junkyard for $50.

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57 Under California law, specifically CAL. CIV. CODE § 1770, “any person who uses unfair and deceptive acts, such as representing a good as a particular standard or quality if they are not, in a transaction which results in the sale of a good or service to any consumer is unlawful.” CAL. CIV. CODE § 1770. Thus, “gilding the lily,” might not always be the best tactic for a salesperson.
III. Equality
A. General

One principle that we often associate with Justice is the notion of “equality.” In his last dialogue, the Laws, the ancient Greek philosopher Plato stressed the importance of need for law to apply equally to all.\(^{58}\) And the great Roman statesman and jurist Cicero embraced equality as one of the central tenets of Stoic philosophy.\(^{59}\) It is also common to refer to this principle as “fairness.” The foundation of equality is that law must treat people the same, as equals. This sounds appealing but is very difficult to put into practice. It is difficult because the concept is subject to an important proviso. Law does not treat people as equals in circumstances where their characteristics are different in a way that materially alters their capacity to participate in the activity in question. To take a relatively non-controversial example, law treats a 5 year old very differently from a 21 year old. Generally speaking, 21 year olds can vote in state and federal elections, drive motor vehicles, join the military, marry, and make a will. Five year olds cannot because we, as a society, generally agree that 5 year olds lack certain characteristics—the cognitive and/or physical capacities to participate in those activities responsibly and safely. Thus, as a rule, law treats two persons differently only if we can identify characteristics of the two that are different in ways that materially alter their ability to perform the activity in question. The ancient Greek philosopher Aristotle referred to this nuance of equality as “distributive justice.”\(^{60}\)

One way to remove bias from decision making is to base a given selection on a random method such as a coin flip or another, neutral means of sortition such as a lottery or drawing names from a hat. This is fairness in one sense because it is unbiased. But it is not fair in the sense that it does not take into account differences based on logical or rational criteria. For example, an employer could make decisions about raises, promotions, or layoffs by flipping a coin. But in an employment setting human beings typically consider that such decisions ought to be based on job performance and/or productivity rather than random selection. Nor do we typically think that it would be “fair” to decide guilt or innocence in criminal trials by flipping a coin. Similarly, most high school, college, and professional sports use a merit-based system to determine which teams will participate in playoffs. For example, NCAA basketball has a committee that selects teams based on a variety of statistics. The NHL uses a point system and


\(^{59}\) See id. at 110, 113-118.

\(^{60}\) See id. at 13 (“Distributive justice operates to reward individuals for the benefits that they confer upon society. In simple terms, those who are equals receive equal rewards while those who are non-equals receive unequal shares.”).
conferences to select the teams that play in the Stanley Cup playoffs. In part merit-based decision making is normative. NCAA basketball teams and NHL hockey teams make concerted efforts to try to achieve the statistics and points necessary to receive a playoff berth. If the NCAA and NHL used a lottery to select playoff teams, the incentive for teams to try hard during the regular season would be diminished. In part, human beings believe that some decisions often ought to take into account factors such as effort, prior achievements, and truth.

What is sometimes difficult is to determine when fairness requires that selection be merit-based (i.e., based on some criterion or criteria that have a meaningful relationship to the decision) versus when it is preferable to permit a neutral, random means of decision making (i.e., based on a method designed to produce a decision based on chance not materially related to the decision). There were, indeed, some occasions when the Brady’s did decide that a random means of decision making was appropriate without considering any specific factors as material. For example, in Snow White and the Seven Bradys, they draw names out of a hat to see who's going to get to play the role of Dopey (everyone, it seems, covets the role of Dopey). Presumably, they could have considered factors such as acting experience or a tryout. But instead they chose a random means of selection.

In a blended family of six children, it is not surprising that issues of fairness and equality arose frequently. Occasionally characters treat the topic in a light-hearted manner. For example, in A Clubhouse Is Not a Home, when Mike and Carol are discussing fairness in the allocation of their bedroom closet space, Mike reads from the dictionary: "To share: To divide into fair and equal portions." Carol moves the "shoe-divider" in their closet in such a manner to give her about 2/3 of the space and remarks: "Well, I think that's fair." Carol's remark insinuates that "fairness" is not necessarily always the same thing as "equality."

B. The Liberation of Marcia Brady (February 12, 1971)

The Liberation of Marcia Brady is an episode that addresses an equality concern that is global; namely, women’s liberation. At the episode’s beginning, a TV

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63 This episode is one of several in which the characters address an important social issue. See e.g., The Brady Bunch: Kelly's Kids (ABC television broadcast Jan. 4, 1974) (dealing with, among other things, racial bias. The neighbor, Mrs. Payne, comes over to complain about how destructive the Kelly boys might be and she suggests that "the minorities" might be special trouble. And Mrs. Kelly says: "She makes Archie Bunker look like a liberal."); The Brady Bunch: Today, I'm a Freshman (ABC television broadcast Oct. 13, 1972) (Marcia complains that all of her friends are going to
reporter, Ken Jones, interviews Marcia at school. The reporter asks: “Marcia, do you feel girls are the equal of boys?” She responds, “Well if we’re all supposed to be created equal, I guess that means girls as well as boys.” Jones then asks, “Do you think you can do everything they [i.e., your brothers] can do?” Marcia replies: “Well, I think I should have the chance to try.” The reporter then presses the issue and asks, “Tell me this, I mean, do they put you down sometimes just because you’re a girl?” Marcia quickly says: “They sure do! And it’s not fair.”

Back at home, after the other family members have seen Marcia’s interview on the evening news, the adults then briefly enter the fray. Carol asks: “Alice, what do you think about women’s lib? I mean, don’t you think that women are entitled to the same opportunities as men?” In order to prove her point, Marcia decides to join Greg’s scout troop (“Frontier Scouts”). At the Frontier Scout meeting, Mike and the other scout leader, Stan Jacobson, check the rule book, and Mike says that he sees no rule stating that girls can’t join. Nor does, Stan: “I’m afraid there’s nothing in the regulations that says that a Frontier Scout has to be a boy. I’m afraid we’ve just always assumed it was for boys.”

In an effort to spar with Marcia, Greg decides to join the “Sunflower Girls,” an organization that appears to be similar to the Brownies or Girl Scouts. “I wonder how she’d like some of her own medicine?” he asks rhetorically. But upon checking the regulations of the Sunflower Girls, Greg discovers that he is too old. A Sunflower Girl must be between 10-14. So Peter gets “drafted” by Greg and Bobby to join. Interestingly, they readily accept—and never pause to question—that the organization has the authority to differentiate on the basis of age but not gender. Marcia, nevertheless, rather matter-of-factly, tells Peter that she appreciates the fact that he understands her point that: “There isn’t any reason why we all can’t join whatever group we want to.” Later when Bobby suggests to Greg that he (Greg) might be able to sabotage Marcia’s Frontier Scouts initiation test (“Can’t you goof up her test some way?”), Greg acknowledges, “That wouldn’t be fair.” He, nevertheless, resolves to try to “make her stick to every single rule.”

Even though Greg tries to make things difficult, Marcia does manage to pass her test. But when all is said and done, she decides not to join. As far as she is concerned, simply proving to herself (and others) that Tower High but she’s going to Westdale because of “this dumb street that we live on.” Busing—also a racial issue—was an extremely important topic of concern in the 1970’s.

64 A rule book of this kind actually represents internal or microcosmic law of the organization. See HALL, supra note 5, at 116. (“[Lon Fuller] finds no differences among the rules of the state and those of ‘clubs, churches, schools, labor unions, trade associations, agricultural fairs, and a hundred and one other forms of human association.”).  

65 For additional discussion regarding adherence to rules, see infra Part III.
she could do it is what mattered most.\textsuperscript{66}

C. \textit{The Treasure of Sierra Avenue} (November 6, 1970)

In \textit{The Treasure of Sierra Avenue}, the three boys are playing with a football in a vacant lot when Bobby finds a wallet on the ground. When they return home, Greg counts out the money on the kitchen table as Peter, Bobby, Carol, and Alice look on. The wallet has $1,100.00. But the wallet has no identification card (e.g., driver’s license or credit card). Soon Jan is doing the math. She calculates that each child is entitled to $183.333…. The girls (Jan and Marcia) explain to Alice that Mike is always preaching about the need for everyone to share. So surely the girls should get equal shares. Meanwhile, Greg is in the boys' room doing the math to calculate the money, divided by three: $366.66. Just then the girls enter the boys' room (of course having knocked first), and begin discussing the division of their shares. They refer to themselves as the boys' "loving sisters." Peter disputes the girls’ claim: "None of you where even there when we found it." And Greg challenges the girls, saying that that they wouldn’t expect the girls to share it with them if it had been the girls who had found it.\textsuperscript{67} Mike steps in (literally) and takes the wallet, and then he says he's going to turn it over to the police department "because that's where people usually go when they lose something, hoping somebody honest is going to turn it in." Greg inquires: "What if nobody claims it, then it's ours isn't it?" Mike agrees: "If nobody claims it."

Carol points out that they (Mike and Carol, and implicitly the girls) shouldn't be unfair to the boys, because "after all, they are the ones who found the money." Carol tells Mike that "the money doesn't belong to us." Mike is convinced that somebody's going to claim it. Greg discovers a "lost" advertisement in the newspaper, stating that someone lost a brown wallet with a large sum of money in it. Greg and Peter realize that they should call telephone the number in the advertisement in the paper. They do but it turns out that it wasn't the right person. Meanwhile Mike has placed his own "found" ad in the paper. And Carol

\textsuperscript{66} The “cop-out” of the ending of this episode may reflect the subtle sexism that persisted at the time. \textit{See} Marinucci, \textit{supra} note 3, at 511-512 (“Other members of Generation X understand what it means to love \textit{The Brady Bunch}. It does not mean that we buy (or bought) into the values it fosters. More often than not, it means that \textit{The Brady Bunch} strikes us, in the words of \textit{South Park} character Stan Marsh, as ‘cheesy and lame, yet eerily soothing at the same time’ (Episode 106, “Death”). By dismissing \textit{The Brady Bunch} as presenting as harmless kitsch, we deemed the messages we believed the show to be presenting as unworthy of our attention. Because the sexist messages of \textit{The Brady Bunch} were often hidden beneath an egalitarian façade, however, our dismissive attitude left us vulnerable to the show’s subtly sexist subtext.”); \textit{Id.} 512-514 (criticizing the “sexist subtext” in this episode).

\textsuperscript{67} Greg: "We wouldn't expect you to [share money with us if you found money]."
is keeping track of the number of phone calls that they have received about the "found" ad (16) so far. Alice takes another phone call and soon it's up to 18 calls.

At this point, the characters tell us some incidental details regarding the California statutes relating to lost property in the early 1970's. Mike tells Peter and Bobby that the police can hold onto the wallet "for a long time." Peter chimes in: "The law says six months." "Unless of course you assume liability." Peter continues: "Well, if you sign for it, we can ask the police to give us the wallet right now; and hold it ourselves six months in the bank, and collect the interest." Bobby adds: "That's how it works." Carol is nonplussed and asks: "Where in the world did you get all this information?" Peter explains that he asked Joey's Dad, who is a lawyer.

Soon the girls, in retaliation for the boys' unwillingness to share the wallet money, decide to quit sharing other things (paper, hairbrush, licorice). Mike reads the children the riot act. The boys decide to acquiesce and share the money with the girls. Then the person who lost the wallet, Mr. Stoner, surfaces. He picks it up at the police station.  

Mr. Stoner then arrives at the Brady house to thank them. He says that he and his wife had been saving for a cross-country trip "for years." He gives the boys $100 as a reward. Mike protests, saying that he thinks that that's too much. When Mr. Stoner insists, the boys agree to take $20.  

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So each child keeps $3.33 and Mike keeps the extra 2 cents. Carol says that she doesn't think that it's fair for Mike to keep the extra two pennies. Mike contends that he was the one who took the wallet to the police station. Carol notes that she was the one who gave the boys permission to play in the vacant lot in the first place. So Mike gives her one cent (to split his 2-cent share), plus "an extra reward" (a kiss). Carol says that Mike can have the penny back because she'd rather have some more "reward"

68 Here we learn that persons have to pay tax on money that they find. Marcia: "Well at least there's one good thing about our not getting the money...No income tax." The Internal Revenue Code states, "[g]ross income means all income from whatever source derived." I.R.C. § 61. Treasure trove items are considered taxable income under § 61. See Cesarini v. U.S., 428 F.2d 812 (6th Cir. 1970).

69 Under California law, specifically California Civil Code § 2080, "any person that finds and takes possession of any money, goods...or other personal property...shall, within a reasonable time, inform the owner, if known, and make restitution without compensation, except a reasonable charge for saving and taking care of the property." It appears that the Brady’s directly abided by California law in this situation, they returned the wallet to the rightful owner and Mike saw to it that the compensation for saving and taking care of the wallet was reasonable (by denying the originally proposed $100 compensation). One must wonder, however, whether $20 was reasonable compensation for saving and taking care of Mr. Stoner's wallet that had $1,100.00 in it! See CAL. CIV. CODE § 2080.
D. Father of the Year (January 2, 1969)

*Father of the Year* is a complex episode. In essence, Marcia nominates Mike for a newspaper’s "father of the year" essay contest. In the process of writing her essay, Marcia lands in hot water when she gets caught in Mike’s work Den without permission and then fails to do chores that she was given (i.e., her punishment for being in the Den without permission). Mike grounds her for a week. However, in order to mail her nomination on time, she sneaks out of her bedroom window at night. This, however, is a transgression of her grounding punishment. And Mike and Carol actually catch her as she’s climbing back in the bedroom window. Mike and Carol tell her that she will not be allowed to go with the rest of the family on an impromptu family ski vacation for the upcoming weekend.

Mike and Carol then discuss the matter further at the kitchen table over coffee. Mike says that he wishes he could see Marcia on skis. Carol reminds him: “Darling, we've been over that several times now, rules are rules.” Mike wonders if perhaps they “ought to bend them just this once.” But Carol remains firm: "I want Marcia to go just as badly as you do, but she broke the rules. And it wouldn't be fair to the other children who didn't break the rules." Carol’s comment reflects an important element of fairness. Fundamentally, because Marcia violated a family rule, she is not entitled to be treated the same as the others. As a rule-breaker, it is fair to treat her differently by not allowing her to participate in the family ski trip. This episode will receive additional treatment in Part III.

E. 54-40 and Fight (January 9, 1970)

*54-40 and Fight* is a first-season episode that deals directly and extensively with fairness. In the introductory scene we learn that the girls have been saving

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70 See Hall, supra note 5, at 46 (“[T]he themes that rules of law [and congruent actions) having ethical significance, are intelligible and must be distinguished from desires and emotions, that (sound) rules of law and actions are intrinsically valuable and, also, useful, and that their validity can be objectively tested….”). For additional discussion on this episode and the importance of rules, see infra Part III.
71 See supra note 60 regarding Aristotole’s concept of distributive justice.
72 Greg appeals to a similar sense of fairness when he protests his punishment in *The Brady Bunch: Greg Gets Grounded* (ABC television broadcast Jan. 19, 1973), because he believes that he did not, in fact, break the family rules: "I think it's unfair for you to ground me when I didn't disobey you."
“Checker Trading Stamps,” planning to use them to “purchase” a sewing machine. The boys, on the other hand, have also been saving “Checker Trading Stamps,” planning to “purchase” a rowboat. Apparently, the grocery store gives a certain number of Checker Trading Stamps to consumers, based on the dollar-amount of their purchase (like the now-defunct S & H Green Stamps). So when Alice returns from the store, the children (boys vs. girls) disagree about the appropriate allocation of stamps. Interestingly, the children begin the debate by attempting to identify meaningful criteria for decision making. Greg says to Marcia: “Go ahead give one good, logical, intelligent reason why you should have all those stamps.” She replies, “Well cuz they come from groceries, and taking care of groceries is a woman’s job.” Greg answers, “Yeah well eatin’ ‘em is a man’s job.” Carol and Mike intervene; Mike proposes his “simple answer to this that’ll make everybody happy,” like King Solomon and says, “Split ‘em up.” At this point Greg and Marcia agree to work together, presumably to divide the stamps that Alice has accumulated 50-50.

After some additional squabbling, Carol brings all six children together and proposes that they combine their books of stamps in order to pool their resources and get something for the entire family rather than something intended only for the girls (i.e., sewing machine) or boys (i.e., rowboat). The girls say that they have 40 books and the boys say that they have 54. Initially, the children respond favorably to the prospect of buying something worth 94 books of stamps. When Marcia and Greg approach Carol and Mike with stamp catalogues in hand, Mike uses judicial terminology, asking “Well has the jury reached a decision?” They report, however, that they were unable to agree on what to buy. But what they did agree on was to ask Carol to make the decision for them. In

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73 The Wikipedia article, *S&H Green Stamps*, WIKIPEDIA, http://en.wikipedia.org/wiki/S%26H_Green_Stamps (last visited June 7, 2015), states: “Sperry & Hutchinson began offering stamps to U.S. retailers in 1896. The retail organizations that distributed the stamps (primarily supermarkets, gasoline filling stations, and shops) bought the stamps from S&H and gave them away at a rate determined by the merchant. Some shoppers would choose one merchant over another because they gave out more stamps per dollar spent.” (footnotes omitted).

74 One might well ask why the girls and boys didn’t simply keep the stamps that they had prior to the marriage, and then only divide equally any stamps acquired subsequent to the marriage?
terms of procedure, the children have been unable to agree and, therefore, have agreed instead to appoint an arbitrator to make the decision for them. And Carol quickly informs Mike that she expects him to help her so they can make the decision jointly.

To make matters more complicated, the following day’s newspaper reports that the Checker Trading Stamp Company is going out of business. Consequently, according to the newspaper article, the company “has requested that all premiums, exchangeable for the stamps, be redeemed within the next 30 days. If such stamps are not redeemed...they will be of no value.” In the scenes that follow, without explanation, however, Mike and Carol seem to have handed the reins of decision making back to the children. “I sure wish they’d hurry up and agree on something.” Carol sighs.

At this juncture, Greg proposes — and Marcia agrees to his proposal — to use a different means of decision making: a contest: “Boys against the girls, winner-take-all.” This is something akin to trial by combat or trial by ordeal. Interestingly, this type of decision making is something of a hybrid. It does not use logical factors that relate to the subject matter or disputants. Nor does it use a totally random, chance method such as a coin flip or spin of a wheel. Instead, trial by combat requires that both parties agree to the type of contest and circumstances of the combat in order to reach a decision. Mike says, “As long as both sides are willing to take the risk, I guess it’s okay.” But the children cannot decide on what kind of contest would be “fair” for both boys and girls. They consider several suggestions that clearly would give an advantage to one side or the other. A bit exasperated, Carol remarks, “Well I guess there’s just no such thing as fair competition between boys and girls.”

But Alice, who we presume is neutral, suggests building a house of playing cards. All agree that neither the girls nor boys have special strength or skills that would provide an advantage over the other with that activity.

Each child takes turns, alternating boy-girl-boy-girl, placing a card on the house. If a boy causes the house to fall, the girls win, and vice-versa. Mike and Carol act as “the umpires.” When the house of cards is on its tenth story, Mike and Carol think that the contest has gotten too stressful for the children, and they decide to change the decision-making mechanism; Mike suggests “tossing a coin or something.” So here he suggests a decision making device that is completely

75 See e.g., Duel, The Judicial Combat, 7 ENCYCLOPEDIA BRITANNICA 711-715 (1959).
76 See Marinucci, supra note 3, at 518 (“[T]he episode takes for granted that, with very few exceptions, girls and boys are simply too different to enjoy the same prizes or to compete in the same activities.”)
random – not even trial by ordeal or combat. The children protest, and decide to continue with the house of cards. But the family dog, Tiger, the “wild card,” enters the room and inexplicably jumps up on Greg from behind, knocking him into the cards as he is attempting to place another card on the house. The house topples. Peter protests: “That was an accident!” Jan rejoins: “Everything counts, you said so yourself.” Mike says: “Yeah, I’m sorry fellows, those were the rules.” We might legitimately ask why the judges don’t excuse the act of an outside force, like Tiger. But when the girls go to the Checker Trading Stamp redemption store, they decide to get a color TV set, something that the entire family can use (rather than a sewing machine or rowboat that would be used primarily by either the boys or girls).

F. Additional, Miscellaneous Incidents Involving Fairness

To be sure, many episodes contain dialogue in which characters occasionally refer to fairness in a rather casual and general manner. These instances are distinct from those where fairness and/or equality form the centerpiece of an episode. For example, in an episode that is extremely important because of its relationship to law, You’re Never Too Old, 78 Marcia has the following conversation with her great-grandfather, Judge Brady.

Marcia: "Grandpa, as a Judge, you always have to be fair and reasonable, don't you?"
Judge: "I have always been fair and reasonable." 79
Marcia: "Then, last night didn't you kind of convict Grandma Hutchins on circumstantial evidence?"
Judge: "My dear, that opinion is open to question."
Jan: "But Marcia and I are willing to swear that Grandma had nothing to do with arranging that dinner for two."
Judge: "Well, Jan, if you say so, then I must accept that fact."

77 And he had, in fact, said just that a short while earlier in the dialogue.
78 (ABC television broadcast Mar. 9, 1973). For more about this episode, see infra Part III.
79 The ABA Model Rules of Judicial Conduct specifically state under Rule 2.2 that, “a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” MODEL CODE OF JUDICIAL CONDUCT r. 2.2 (AM. BAR ASS’N 2014). To make certain this standard of behavior a judge must handle his duties objectively and with an open mind. MODEL CODE OF JUDICIAL CONDUCT r. 2.2 cmt. 1 (AM. BAR ASS’N 2014). Additionally, “a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.” Id. During a proceeding, should a judge's impartiality be questioned, a judge shall disqualify him or herself. MODEL CODE OF JUDICIAL CONDUCT r. 2.3 cmt. 1 (AM. BAR ASS’N 2014).
In *Dough Re Mi*, Marcia points out that the initial idea for the children to establish a musical group was Peter's, and, therefore, she doesn't think that it would be fair to Peter to remove him from the group (even though with his adolescent voice changing, he simply can't carry a tune). Here the idea of fairness hinges on the notion of reciprocity. Humans tend to believe that people ought to be rewarded proportionately for their contributions to most endeavors. Thus, here Marcia expresses her belief that Peter's contribution (i.e., the initial idea) deserves a proportionate reward (i.e., he ought to be permitted to participate in the activity even though his changing voice is damaging the overall quality of the activity). In *The Drummer Boy*, Mike points out that Bobby’s drumming isn’t fair to the other 8 people in the house. In this instance, Mike is using the word “fair” in a wholly different sense. Here fair means that Bobby’s noisemaking is unnecessarily disturbing the tranquility of the household.

**IV. Justice, Rules & the Role of Law**

**A. Overview**

Throughout history cultures have struggled to define “justice” in the abstract. And even though it is rarely simple to define it clearly and succinctly, it is common for us to acknowledge that justice and the role of law in society are critically important. A theme that we often see in *Brady* episodes is the tension between adherence to rules and individual freedom. The Brady characters routinely acknowledged the importance of following rules. For example, in *The Liberation of Marcia Brady*, Greg reminds Peter to strictly go by the rules of the Sunflower Girls with respect to what he’s supposed to say when he goes door-to-door to sell cookies. And again Mike admonishes the children by invoking the family rules in *The Big Sprain*: “You violated a strict family rule about leaving

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82 Regarding the interplay between strict adherence to rules and the frequent need for adaptation, see GILMORE, supra note 10, at 96 (“However, the focus of litigation has a way of shifting unexpectedly and unpredictably. New issues, which no one ever dreamed of, present themselves for decision. With luck, the statute will turn out to have nothing to say that is relevant to the new issues, which can then be decided on their own merits. In this way any statute gradually becomes irrelevant and will finally be reabsorbed within the mainstream of the common law. But that takes a long time.”) (footnote omitted); HALL, supra note 5, at 42 (“Freedom, for Kant, is the basic value from which other values flow and on which they depend; conformity to external duties is the sine qua non of ‘the kingdom of ends,’ where each individual has the maximum freedom compatible with the like for all other persons.”) (quoting and citing KANT, THE PHILOSOPHY OF LAW 45 (Hastie ed. 1887)).
83 (ABC television broadcast Feb. 12, 1971).
84 See supra Part III.B.
85 (ABC television broadcast Feb. 6, 1970).
your toys spread all over for people to trip over.” There are occasions when the strict adherence to rules strike most of us as pedantic. For example, as was discussed, in 54-40 and Fight, the dog Tiger interferes with Greg’s attempt to place another playing card on the house of cards, and the house of cards collapses. When the boys begin to complain about losing the contest in this way, Mike says: “Yeah, I’m sorry fellows, those were the rules.” But there are also situations in which we see Mike giving serious consideration to leniency. In Father of the Year, recall that it is Carol who holds the line, reminding Mike that they must strictly enforce their rules.

Carol: “Darling, we've been over that several times now, rules are rules."

Mike: “Maybe we ought to bend them just this once."

Carol: "I want Marcia to go just as badly as you do, but she broke the rules. And it wouldn't be fair to the other children who didn't break the rules."

In the episode Law And Disorder, Mike explains an important theme about justice and rules to Bobby, “we always have to have rules and laws but we also have to use them with reason, and justice.” Examples from seven episodes in particular shed light on The Brady Bunch perspective of justice and the role of law:

1) You're Never Too Old;
2) Greg's Triangle;
3) Kitty Carry-All Is Missing;
4) Greg Gets Grounded;
5) Sorry Right Number;
6) Law And Disorder; and, 7) A Fistful of Reasons.

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86 See GILMORE, supra note 10, at 10-11 (“I think it is also true that the American formulation of a legal rule has always tended to be more rigid, more abstract, more universal, than the English formulation. The result has been that, particularly during periods when we have taken our precedents and our theories seriously, we have had much more trouble than the English have ever had in adjusting to changing conditions.”).

87 See supra Part III.E.

88 See SCHWARTZ & SCHWARTZ, supra note 2, at 165 (“The series always followed that rule, so if one of the kids gets a big head or tries to find a way around a rule, he or she pays the consequences.”); see also HALL, supra note 5, at 135 (“The difficulty results from the fact that what seems to be a simple question turns out to be a very large array of problems that involve whole philosophies of law and an inevitable degree of subjectivity.”).

89 See supra Part III.D.


91 See HALL, supra note 5, at 6 (“For some, the most important question to ask concerns the justice of enactments and decisions; this is the perspective of the citizen vis-à-vis his government. It first found critical expression in Plato’s dialogues and it continues to this day to inspire natural law philosophies.”); id. at 26 (“Aquinas, too, held that law is imperative and, therefore involves the will, but he insisted that ‘in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason.’”) (citation omitted); Id. at 1 (“What matters here is that Aquinas’ stand on the primacy of reason places him with Plato and Aristotle as the principal representatives of the realist, classical theory of natural law.”).
B. Episodes
1. You’re Never Too Old (March 9, 1973)

As was mentioned, You’re Never Too Old is especially important because it establishes the foundation for Mike’s reverence for law and his deep commitment to justice and the significant role that law plays in society. Although portrayed as something of a caricature, Mike’s grandfather, a retired judge, presents himself as both conservative and caring. He appears to take himself very seriously, at one point proudly remarking: "Madam, I like to think that I dispensed justice fairly in the forty years I sat on the bench." He quotes Pliny the Elder, a famous Roman author in Latin, and paraphrases Homer, the ancient Greek epic poet. He is offended when Carol’s great-grandmother tries to make light of the legal profession, and does not want to hear suggestions that the judiciary is anything but dignified. For example, she asks whether, perhaps, on hot days Judges don’t wear trousers under their robes. Judge Brady is offended at the question, and tells her that he always wore his trousers under his robe.

Nevertheless, after he begins to feel more comfortable with Great-Grandma Hutchins, Judge Brady begins to laugh and lighten up a little. It is abundantly clear, however, that Judge Brady established the foundation and lit the torch of justice that Mike passes forward to his children.

2. Greg’s Triangle (December 8, 1972)

In the opening scene of Greg’s Triangle, Marcia practices her cheerleading, hoping to be selected as head cheerleader. Her sisters tell her not to worry because Greg is the chairman of the judging committee, and Jan and Cindy seem to think that Greg will base his decision solely on familial relationship without regard, necessarily, to merit. Meanwhile, it turns out that Jennifer Nichols, whom later in the episode we learn is also vying to be head cheerleader, has (not so coincidentally) started dating Greg. And Greg is very smitten with Jennifer. Practicing her cheer moves at home again, Marcia asks Greg for his opinion. But he tells her “Just because you’re my sister, don’t expect any favors.” Marcia is indignant and replies, “Who’s asking for any?” Greg smugly asserts, “When I vote, Marcia, it doesn’t matter who the contestant is. I’m going to be fair and impartial.”

92 See supra text accompanying note 78.
93 In one scene, Greg, dreamy-eyed, returns home from school and is so caught up in his thoughts about Jennifer that he puts his schoolbooks in the refrigerator.
But as those words leave his lips, the telephone rings. It’s Jennifer. Now she tells him that she will be trying out for head cheerleader, and “That’s the dream I’ve always had – to be the head cheerleader.” As he hangs up the phone, his statement to Marcia about judging with impartiality echoes in his head. At school Jennifer turns up the heat. She shows Greg the blue outfit she has chosen for tryouts, telling him that she’s picked blue because it’s his favorite color. Marcia overhears and expresses her concern about his bias towards his girlfriend. Later at home Jan asks Marcia: “Do you think that Greg would vote for his girlfriend against his own sister?” To which Marcia answers, “Jan, you don’t know anything about life.”

At the tryouts, the three judges split their votes: one for Marcia; one for Jennifer; and, one for Pat Conway. Greg breaks the three-way tie by voting for Pat, because he “really thought she was the best.” He’s now worried that both Marcia and Jennifer will hate him. Marcia, however, returns home and seems happy. She tells Greg: “I take back what I said. You’ve got a lot more character than I gave you credit for.” And she adds: “You know, I would have liked to have won but Pat was the best; she deserved to win.” But as we might have guessed, Jennifer is not so forgiving; she hangs up on Greg when he telephones her. The lesson in jurisprudence here is that judges must decide on the merits, putting aside personal and familial bias.

3. **Kitty Karry-All Is Missing (November 7, 1969)**

*Kitty Karry-All Is Missing* is an episode that provides commentary about the role of law and the judicial system in general. Cindy’s favorite doll, Kitty Karry-All, has disappeared. She set her down in the TV room, walked to the kitchen to get the doll’s bottle, and then when she returned, the doll was no longer there. Cindy jumps to the conclusion that Bobby has “kidnapped” Kitty. In the previous scene, Bobby had said a number of disrespectful things about Kitty, and even said to Cindy “I wish she’d move out and never come back.” Now Bobby insists that he’s innocent. When his brothers question him, Bobby denies having taken Kitty, and is even willing to swear “the sacred oath.” Peter remarks: “Boy that proves he didn’t take it, no sir!” Mike tells Carol that he believes Bobby’s truthfulness: “Honey, I know Bobby, if he says he didn’t take the doll, I believe him.” To which Carol says, “Well Cindy always tells the truth too.” Mike replies, “I believe she thinks he took the doll but maybe she dropped it somewhere….”

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94 Rita Wilson played the role of Pat Conway. She has been married to the actor Tom Hanks since 1988.

95 Of course both Bobby and Cindy lied occasionally. See e.g., *supra* Part I.C.3. and I.C.9.
The episode – like several others\textsuperscript{96} – gives us an opportunity to appreciate the potential weaknesses of drawing too many inferences from circumstantial evidence. Bobby has openly admitted that he dislikes Kitty. Cindy tells Marcia and Jan that Bobby had said that he "hated Kitty." And Bobby frankly tells Greg and Peter, “I'm glad she's gone; I hated that doll!” His siblings infer that his dislike must have created a motive for him to have taken her. The other children begin to exclude him. Carol remarks, "They're treating Bobby as if he were a criminal."

Mike, seizes this moment to teach the children a lesson in legal procedure. He pulls Greg and Marcia aside, because they are the oldest:

\begin{quote}
Mike: "You see, in this country, we're very proud to have a process known as the law. And under the law, a man is presumed innocent until he's \textit{proven} guilty."
Marcia: "Right, Dad."
Mike: "In other words, we don't hang anybody without a fair trial."
Greg: "Everybody knows that."
Mike: "Sure, but sometimes we tend to forget."\textsuperscript{97}
\end{quote}

Mike excuses himself, saying that he and Carol are about to go shopping. Greg and Marcia then continue the conversation.

\begin{quote}
Greg: "You know someth'n, Dad's right. We don't know for sure Bobby's guilty. Nobody saw him take that doll."
Marcia: "Right. Let's give him a fair trial."
Greg: "Good."
Marcia: "Then we'll hang him."
\end{quote}

Marcia and Greg try to convince Alice to be the judge for a trial, because, as Marcia says, "Mom and Dad aren't home." Alice finally agrees, but warns: "Okay, okay, but no loopholes, no habeus corpusse, I've got a pot roast in the oven." The children then stage a courtroom scene in the living room. Alice begins: "Oyez, Oyez, Oyez, Court is now in session. Judge Alice, presiding."

Marcia: "I'll be the D.A. cuz everybody knows he's guilty."
Greg: "I object, there's something illegal about that."
Alice: "Come on, come on. let's get this case on the road."

\textsuperscript{96} See e.g., supra Part I.C.1. and I.D.

\textsuperscript{97} Mike's explanation comports with modern perspectives of jurisprudence. See e.g., GILMORE, supra note 10, at 109-110 ("The function of law, in a society like our own...is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us.").
Marcia calls her first witness, Cindy. She sits her down in a chair and says: “Now tell the jury what happened, in your own words.”

Cindy: ”Well, Kitty's gone and Bobby took her, 'cuz nobody else was there, and those are my own words.”

Jan: ”Does that mean that we vote 'guilty' now?”

Bobby: ”Hey, I want a chance to say someth'n.”

Alice: ”Barrister, you may proceed.”

Greg: ”Okay, Defendant, what's your name?”

Bobby: ”You know my name.”

Greg: ”I know but I want the jury to hear it.”

Bobby: ”They know my name too. Everybody here knows my name.”

Marcia: ”Let me at 'em! Where were you on the night of March 9th?”

Bobby: »Before or after 9 o'clock?»

Marcia: »What's difference does it make?”

Bobby: »I'm not allowed up past 9 o'clock.”

Marcia: »He's guilty alright!”

Bobby: ”I'm not guilty. I didn't take that doll no matter what she says. I wouldn't do a thing like that. Maybe we fight sometimes but Cindy's my sister. Well, well, I just wouldn't do a thing like that.”

Alice: ”Well, jury, you've heard both sides, now it's deliberat'n time. And make it snappy, I can smell that pot roast from here.”

Then Greg and Marcia discuss the biases of the jurors. But each predicts wrongly. Marcia: “I know Jan'll vote 'guilty.” Greg: ”Peter and Bobby are just like that (crossing his fingers to illustrate their closeness), he won't vote against him.” Jan votes »not guilty,” and when Marcia questions her vote, Jan says: ”I changed my mind after his speech.” Greg and Bobby begin shaking hands, thinking that they have prevailed, but Peter interjects and says that he's voting "guilty.” Greg blurts out: ”That's immaterial! A while ago you said he was innocent!” Peter: ”So what? I did a lot of deliberat'n, and he's guilty. Alice: ”Well, looks like we've got a hung jury.”

Then Bobby's kazoo goes missing just moments after he put it down. So he accuses Cindy of having taken it. When Mike has Bobby empty his pocket to search for the kazoo, he tells both Bobby and Cindy that he believes that Cindy is telling the truth about not being a kazoo snatcher just as he had believed

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98 This exchange is really a subtle criticism of the hyper-technical formality of courtroom procedure isn't it? Everybody has to adhere to the rituals, even when we often know that these formalities are completely unnecessary.
Bobby when he said that he didn't take Kitty.

Then Mike says to both: "Sometimes we can be deceived by circumstantial evidence."

Bobby says: "Circum-special?"

Mike explains: "No, circumstantial. That's when things look different than they really are."

Cindy: Like when a lady puts on false eyelashes?"

Mike: "Well, something like that."

Mike: "You see, now each one of you knows that he's innocent, but the way things look, they think that the other one is guilty."

Bobby: "And that's not right?"

Mike: "No, no far from it. Do you know sometimes innocent men go to jail because of circumstantial evidence?"

Bobby: "Okay, then I believe Cindy's innocent."

Cindy: "And I believe Bobby's innocent."

Mike: "Good."

Cindy: "Even if he's guilty."

Bobby is experiencing a moral dilemma. He decides to go into his piggy bank to buy a new Kitty Karry-All doll for Cindy: "My whole life savings!" He takes his piggy bank to the toy store and purchases another Kitty Karry-All for Cindy. The episode concludes with the discovery that it was the dog Tiger who absconded with both Kitty and the kazoo. He had taken them to his doghouse. All's forgiven, and apparently all involved have learned lessons about the judiciary and some of the difficulties that our legal system incurs when trying to resolve disputes.


Greg Gets Grounded highlights the importance of paying attention to the intent of those who make laws. Intent, on occasion, may be more important than a literal reading of the language used.99 While driving the family car with Bobby as a

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99 “To interpret statutes, ‘intent of the legislature’ is by far the most common such criterion.” In fact, the U.S. Constitution’s separation of powers principle makes this approach mandatory, and courts are required to carry out the will of the lawmaking branch of the government. Courts use various strategies to determine legislature’s intentions. “Judicial opinions overwhelmingly emphasize the legislature’s words as the most reliable source of legislative intent, particularly when a statute is ‘unambiguous.’ Courts have invoked ‘concepts of reasonableness’ and, when necessary, disregard statutory language to follow legislative intention. Courts may consider the history of the subject matter involved, the end to be attained, the mischief to be remedied, and the purpose to be accomplished. Still others rely on extrinsic evidence from an act’s legislative history, or sequential drafts of legislation, or look to administrative interpretations, to determine
passenger, Greg becomes distracted when he looks at the back cover of a newly-purchased record album. As a result of being distracted, Greg fails to maintain control of the car, and he skids between two other cars, nearly causing an accident. Fortunately it's a near-miss, and no harm occurs. But Bobby tells Mike and Carol about the incident, and they decide to punish Greg, by taking away his driving privileges for a week. Mike imposes the consequence, directly stating: "You cannot drive the car for one week. Period."

Later in the episode, however, Greg admits that he drove his friend, George's, car. Mike is nonplussed.

Mike: "After you'd been told not to drive?"
Greg: "You didn't tell me not to drive."
Mike: "Yes I did."
Greg: "You said not to drive our car."
Carol: "Greg, we told you not to drive..."
Greg: (finishes her sentence) "...our car." "You didn't say I couldn't drive any car."
Mike: "Yes, but you knew what we meant; now you were grounded, right?"
Greg: "Dad, you said not to use our car for a week, and I haven't used it."
Carol: "Ahh come on Greg, that's walking a pretty fine line." "Are you trying to say you didn't understand what we meant?" "No driving?"
Greg: "I just know what you told me." "And that was not to drive our car."

So Mike decides to increase the penalty. "Okay, Greg, okay. But let's make no mistake about this. Except to school, you are not to leave this house for the next ten days." Greg appeals the sentence: "I think it's unfair for you to ground me when I didn't disobey you." Greg asks for them to recognize that he was simply going by their "exact words." Mike then asks Greg if he is prepared to live by legislative intent. Courts may consider the title of a statute to determine legislative intent, as the title is a legislative declaration of the tenor and object of the act. A subsequent statutory amendment may be an appropriate source to determine legislative intent. Courts even may locate legislative intent through the omission of language."

However, courts must refrain from any approach that results in an attribution of false or doubtful legislative intent. "In the end, probably no single canon of interpretation can absolutely provide an answer to the question about what a legislature intended. The question of meaning lies deeper than the law. It involves subtle questions of judgment and issues about transferring knowledge not fully understood by lawyers, scientists, or psychologists, inter alia." 2A NORMAN J. SINGER & SHAMMIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:5 (7th ed. 2007).
that precept too. Mike and Carol, therefore reconsider, and decide to allow Greg not to be grounded in return for his agreement to abide by his "exact words." As we might anticipate, throughout the remainder of the episode, Greg encounters hardships as he tries to follow through with strict interpretations of things that he has promised (i.e., his “exact words”). Presumably, the lesson Greg learns is that justice is sometimes best served if we place primary importance on a person’s intent rather than merely a literal reading of the “exact words” that have been expressed.

5. *Sorry Right Number* (November 21, 1969)

As is clear by now, several episodes emphasize the importance of rules, and Mike routinely chastises the children when they have broken rules. He and Carol typically impose punishment as a consequence for violating rules. Mike finds Greg talking on the telephone in Mike's home office (“the Den”), and nearly explodes: "What happened to the rules?" Greg's not supposed to be "in the Den." Rather, he's supposed to use the other phone "unless it's an emergency." Greg tries to plead that it is an emergency. Peter uses the phone in the Den next, and, like Greg, Peter claims that his call is an emergency, because his friend will fail math if he doesn't talk with him. This episode may also illustrate a rather common theme in the study of jurisprudence; namely, that advances in technology – in this case the expanded role of telephones to communicate – often require legal adaptations. Here Mike responds to the increased usage of his telephone by changing the family rule regarding under what circumstances others have permission to use his Den telephone.

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100 See *Hall,* supra note 5, at 78 (“So far as any generalization may be ventured, it may be said that their [i.e., examples of linguistic jurisprudence] salient feature is concentration on the use of words.”) (citations omitted).

101 For example, Greg promised to wash Carol's car “today.” So as night falls, Mike insists that Greg go outside in the dark to comply with his exact words. And then the dagger-to-the-heart ensues when Greg realizes that he promised to drive Peter and Bobby to a frog jumping contest, yet he has also promised to take Rachel on a date – on the same night!!

102 See e.g., supra Part III.G. and IV.A.

103 See *Hall,* supra note 5, at 104 (“[Bentham] concluded that punishment is the only sound way to regulate 'the conduct of people in general: reward ought to be reserved for directing the actions of particular individuals.’”) (citing *Bentham, The Rationale of Reward* 25 (1825)).

104 The title of this episode is a humorous reference to the 1948 movie, *Sorry, Wrong Number* (which was based on a 1943 radio play). See *Sorry, Wrong Number*, WIKIPEDIA, http://en.wikipedia.org/wiki/Sorry,_Wrong_Number (last visited June 7, 2015).

105 He says something about a rabbit about to have babies!

106 See e.g., *Gilmore,* supra note 10, at 14 (“But even during periods when no one challenges the basic rules, the society we live in continues to evolve and change – in response to technological developments, to shifts in patterns of moral or religious belief, to the growth or decline of population, and so on. The process by which a society accommodates to change without
concludes that he's going to have to issue an "ultimatum" and establish a new rule about using the Den phone because he can't call out or in. No more "emergency" exception. This rule change, however, is especially interesting because, in the episode Law And Disorder, the principal life-lesson turns out to be just the opposite; namely, that emergency situations sometimes justify conduct that would otherwise be considered a rule violation.

6. Law And Disorder (January 12, 1973)

Law And Disorder presents several nuances relating to the role of law in society. Bobby takes his job as a school safety monitor seriously. As a safety monitor, Bobby experiences, first-hand, difficulties when trying to exert authority and police power. Mike explains to Bobby one of the difficulties associated with having authority: "Well, take the police for instance, you know it isn't part of their job to like arresting people. They share a responsibility to enforce the rules." Carol adds, "And rules are very important, Bobby. They're made to protect people." And she explains, "If the kids at school break a rule, it's the safety monitor's job to report them." Armed with their advice, Bobby sets about strictly enforcing rules. He writes up one boy for chewing gum in the hall. He writes up a girl who inadvertently missed the trash can, trying to throw away a piece of paper without looking. Then he writes up several students who are throwing books in the halls, for "disorderly conduct."

Bobby continues wielding his authority by citing Cindy and two of her friends for running in the hallway. Cindy protests that he can't turn in his own sister! But Bobby defends his actions, saying "She was running in the hall. When you break a rule, you have to get punished." When Cindy complains to Carol about it, Carol tells her that the same rules apply to her as to everyone else. Feelings bruised, Cindy replies: "I don't see why they should." Carol, sensing the need to explain further, tells Cindy that, if her son were a police officer and she accidentally ran a red light, she'd still expect him to give her a ticket. Cindy humorously responds, "Boy if I ever had a son who was a policeman, and he gave me a ticket, I'd give him a spanking."

abandoning its fundamental structure is what we mean by law."); Id. at 65 ("Rapid technological change unsettles the law quite as much as it unsettles people.").

107 See infra Part III.6.

108 In many respects this concept is like the Tort concept of necessity. Necessity is commonly considered a justifiable excuse for rule breaking. See DAN B DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 82-87 (West Acad. Publ’g, 7th ed. 2013).
As the episode develops, Bobby begins to expand his authority beyond the school grounds, by reporting his siblings' transgressions at home. He wants to report Greg for coming in at 11:55 p.m., when he was supposed to be home by 11:30. After Greg tells him that he's got a very good reason for being late, Bobby replies, "That's what they all say." Marcia then informs Greg that she too will be in Bobby's "Report" because she borrowed a bracelet of Carol's without permission. And Bobby even plans to report Alice for throwing away spray bottles without separating them from the other trash. Undaunted, Bobby tells Jan that he's going to report her for failing to set the table. Bobby has decided that "rules are rules" and refuses to listen to Jan when she tries to explain why Alice was setting the table instead of her: "I've got a very good reason for not setting the table."

Now the stage is set for Bobby to learn a lesson about the role of affirmative defenses and justifications in the dispensing of justice. Jill, Bobby's friend, approaches him saying that her cat, Pandora, has run away and darted into an abandoned building that is slated for demolition. Jill is crying and asks Bobby to get Pandora out of the building to save her. Bobby protests, saying that there is a "No Trespassing" sign in front of the house. Nevertheless, Bobby reluctantly decides to go into the house to retrieve Pandora. He goes in, rescues the cat, and gets his good clothes very dirty in the process.

Afterwards, Mike and Carol discuss the matter with him. In this instance, an emergency situation necessitated his actions. They point out to him that you don't always have to get punished for breaking rules. "Well, you did break a rule, but you saved the little girl's cat, and that's a good reason for breaking a rule," Carol explains. The parents decide not to punish Bobby under these circumstances. Now Bobby gets a lecture about the legitimate excuses that the other members of the household had for having broken other rules. For example, Greg returned home after his curfew because he waited for his date's

109 Presumably this is a reference to Environmental law and state and/or municipal regulations regarding recycling plastics. While there is not mandatory law requiring consumers/citizens to recycle, California has established a comprehensive program for the recycling of beverage containers. This comprehensive program is called The California Beverage Container Recycling and Litter Reduction Act. “The purpose of the Act is to create and maintain a marketplace where it is profitable to establish sufficient recycling centers and locations to provide consumers with convenient recycling opportunities through the establishment of minimum refund values and processing fees and, through the proper application of these elements, to enhance the profitability of recycling centers, recycling locations, and other beverage container recycling programs.” 50 CAL. JUR. 3D POLLUTION AND CONSERVATION LAWS § 550 (2002). California has various regulations regarding how these recycling centers are supposed to be operated. See CAL. CODE. REGS. tit. 14, §§ 2500-2550 (West 2014).

110 Alice was setting the table instead of Jan.
parents to come home (she had forgotten her house key), and Alice set the table for Jan so that she could read a book to prepare for a test.

It may not merely be coincidence that this episode contains a brief, humorous exchange about the role of necessity as it relates to Admiralty law. Mike has some sort of book about boating, and he asks Peter: "When two boats meet, who has the right of way?" Peter hazards a guess: "The biggest boat." But Mike says: "No, no, no. The boat that's on the right. It's the same as the rules of the road." Jan interjects: "Yeah. But what if they're coming straight at each other?" To which Mike: replies with a smile "Then we're back to the biggest boat."

7. A Fistful of Reasons (November 13, 1970)

*A Fistful of Reasons* explores the role of law in conflict resolution. Buddy Hinton and other bully-types have been teasing Cindy at school because of her lisp. So Cindy begins addressing the problem (with encouragement of course from Mike and Carol) by practicing tongue twisters in a book to improve the pronunciation of her letters' sounds. Back at school, Buddy Hinton persists teasing and tormenting her again, and when Peter tries to defend Cindy (being a chivalrous older step-brother), Buddy challenges Peter and calls him "chicken."

Mike explains to his boys that fighting isn't the appropriate way to resolve problems and conflicts. He asks whether Peter has ever tried reasoning with Buddy. "Reasoning, calm, cool reasoning; that's a lot better than violence. And it's the only sensible way to settle differences," Mike counsels. Grant Gilmore, quoting Justice Oliver Wendell Holmes, expresses much the same sentiment: "In this bleak and terrifying universe, the function of law, as Holmes saw it, is simply to channel private aggressions in an orderly, perhaps in a dignified, fashion." But even with Mike Brady, Grant Gilmore, and Oliver Wendell Holmes cheering him on, Peter, nevertheless, comes home with a bruised left eye after the next Buddy Hinton encounter at school.

So Mike then decides to talk with Hinton's father. "Too bad your kid don't know how to fight," Ralph Hinton tells Mike when Mike confronts him with the issue. Ralph then tells Mike to get off of his property, and asks "or would you like to be helped off?" They stand toe-to-toe, face-to-face, but then Mike leaves. At this

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111 Interestingly, before the show was canceled after five seasons, Barry Williams, the actor who portrayed Greg, had suggested to the producers that the subsequent season ought to include an episode wherein "Mike and Greg get into an argument which would ultimately lead to Greg getting slugged." See WILLIAMS, *supra* note 2, at 140. Of course a sixth season never happened.

112 GILMORE, *supra* note 10, at 49.
point Mike realizes that this situation may be one of those situations where reasoning is not a practical solution. He therefore gives Peter permission "to defend himself."

Then comes the next Buddy Hinton encounter at school, with an audience of students looking on. Hinton starts teasing Cindy again "Baby-talk, Baby-talk." Peter confronts Buddy and Buddy swings a fist at Peter and misses. Then as he begins to throw another punch, Peter closes his eyes and literally beats Buddy to the punch—landing his fist on Buddy's mouth. Peter's blow has knocked out one of Buddy's teeth. And in a nearly ironic, Hammurabi-like manner of justice, Buddy begins to speak with a lisp as a result of the missing tooth. Then Peter apologizes to Buddy, and chastises the students who witnessed the confrontation, because they had begun laughing at Buddy. Peter tells Cindy that it's not right to tease Buddy for the same reason that it wasn't right for Buddy to tease her. In this instance, physical force as a means of self defense was justified.\textsuperscript{113} And Peter's compassion after the fact provides a positive role model for those who must administer justice in this manner.

**Conclusion**

*The Brady Bunch* characters did far more than pay lip service to the importance of truth and honesty. They routinely demonstrated that a lack of honesty has the potential not only to hurt others but to yield unfortunate consequences for ourselves. And even though there are occasions when being truthful is difficult and even painful, more often than not, it is a wise course. In the quest to uncover truth, numerous Brady situations illustrated the importance of verifying facts and the potential pitfalls associated with jumping to conclusions on the basis of circumstantial evidence.

The world of the Brady's also prized equality and fairness. They did recognize, nevertheless, that those values were flexible—occasionally necessitating that some individuals receive unequal treatment when circumstances demanded it. And although the show's position may not have been a particularly strong one by today's standards, the willingness to take a stand for social justice on issues such as gender and racial equality deserve our respect, and presumably helped to shape the attitudes of millions of viewers for the better.

Although they occasionally poked fun at law and its formalistic procedures, the Brady's also taught us to respect judges, the judicial system, and the rule of law.

\textsuperscript{113} See HALL, supra note 5, at 108 ("We shall assume that the use of physical force is regarded by some as an essential characteristic of the legal sanction.").
But as much as the Brady’s revered rules, they also came to understand that there were occasions when changed circumstances, such as advances in technology and emergencies, provided a counter-weight that allowed for exceptions and rational adjustments to what would have otherwise been a blind, irrational adherence to rules.

*The Brady Bunch* is a television series that has enjoyed remarkable success over the course of the past nearly half century. In today’s increasingly diverse multimedia world – with hundreds of television channels available via cable and satellite services, the emergence of the Internet and its attendant media potential, including YouTube, Netflix, Hulu, and many other means by which people are able to view entertainment content – it is likely that we may never again witness one solitary television show reach and affect such a significant percentage of the viewing audience. Chances are that Sherwood Schwartz, the writers, cast, staff, and sponsors of the original show never dreamt that they would influence so many people. Fortunately, Schwartz and all involved during the five-year run of *The Brady Bunch* possessed a sound moral compass and a sophisticated understanding of many of the nuances of jurisprudence that have helped to guide us into the twenty-first century.
Tenure of Employment v. Industrial Peace*

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The principal figures are in the foreground; the crowd is in the background. Woe to the details! Posterity neglects them all; they are a kind of vermin that undermine large works.

Voltaire 1694-1778, Age of Louis XIV

Abstract

This paper amounts to a discussion about justice: it is about whether just outcomes for the individual vis-à-vis ‘lines of jurisprudence’ and case law should matter within the democratic framework of Canada’s governing institutions. In the case of Alberta Union of Public Employees v. Lethbridge Community College, [2004] 1 S.C.R. 727, 2004 SCC 28 the Supreme Court of Canada overturned the highest Court in Alberta in the latter’s ruling that an employee deprived of both her employment and right to tenure without cause must receive the justice of reinstatement. Even at the close of the original appeal before a split arbitration board, one arbitrator of three, like the Alberta Court of Appeal later ruled, decided that reinstatement was the only option the employer had under the law. In this paper I will argue that the Supreme Court erred in its decision in this instance because it chose to support its own dictum of preserving “industrial peace” over and against what the Alberta Court of Appeal, labour arbitrator Bartee, and I see as the most important issue: the upholding of an employee’s rights as spelled out in the collective agreement. This was not a case where industrial peace should have been the underlying concern primarily because a Canadian employee was robbed by her employer of contractual and statutory rights under the collective agreement and the law respectively.

The Court, more concerned with what this decision might mean in future for “industrial peace,” felt they could justify their decision by employing the tactic of a long discussion on the jurisprudence relating to the broad remedial powers given to arbitration boards to settle disputes arising from their own dicta but yet in conflict with the collective agreement and statute law. Notwithstanding how

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1 Hereinafter Lethbridge.  
one wishes to order the nexus of factors which need to be considered in a case such as this, for instance the rights of the employee/employer, power of the board, right to an appeal, etc., I argue the court erred by not choosing the breach of a Canadian citizen’s legal and contractual rights as the single most important factor in this case. Cases involving dismissal really turn on whether the employee was fired for cause or without cause, and if the latter, then, as the Alberta Court of Appeal saw clearly, reinstatement is the only option. The Supreme Court, though, had something else at the front of their minds and front and centre in their decision: their own mantra of “industrial peace” pre-empted by a long, philosophically dislocated, discussion about the broad remedial powers of arbitration boards. I will argue that this decision needs overturning because it extinguishes a fundamental principle of justice in Canada: citizens cannot be deprived of their tenure of employment without just cause under a collective agreement.

Introduction

This paper is as much a work in jurisprudence as it is one concerning labour law. This paper assumes the famous Lockean calculation on which democratic projects have long – since the eighteenth century – based themselves on in some kind of written constitutional instrument that people join or intend to join in a united society for the mutual preservation of their lives, liberty, and property upon which they are able to subsist. Necessary to this basic proposition is the assumption that those agreeing to unite will lay down their power to punish or take vengeance and that this power will go to one among them according to rules the community agrees on together. Locke writes that “…in this we have the original right and rise of both the legislative and executive power as well as of the governments and societies themselves.” So by entering this compact which moves a people from a state of nature to a united society, keeping in mind the aforementioned intentions, these people agree then that:

…whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such laws, or abroad to prevent or redress foreign

5 Ibid., 9.127, 181.
injuries and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people.⁶

There is no need to emphasize in italics what Locke already has done so succinctly here. His emphasis that those in power govern and decide cases by standing laws only, not on “extemporary decrees” – and the latter referring to decrees which appear to be laws, but come suddenly and without due process or notice to the community – guards against illegitimate laws appealing to powerful interests in the commonwealth of citizens. I argue in this paper that in the case of Alberta Union of Public Employees v. Lethbridge Community College, [2004] 1 S.C.R. 727, 2004 SCC 28 the Supreme Court erred by not relying on the plain wording of standing laws and instead employed their own version of an extemporary decree, known to them as a “line of jurisprudence,” which was bereft of any instrument of due process overseen and approved by an elected official. By the Court so doing, a Canadian employee was unable to rely on the standing laws and plain wording of a contract she had entered, and she was subsequently robbed of a potential lifetime of gainful employment.

Besides claiming that the Court erred in their decision, in this research I also employ an interdisciplinary approach to convince the reader of my suggestion that the Court could have made Lethbridge an important decision for the protection of employee rights, instead of merely padding the idea of preserving industrial peace. I hope to be able employ the areas of jurisprudence, history, and the law⁷ to suggest that there are important issues at stake in the Lethbridge decision which are better understood by examining the Supreme Court’s Judgment in this way. The main question I examine is, quite simply, whether the employee received justice in the successful appeal of “industry” against her in which her guaranteed rights were quashed at the behest of more important “underlying contextual considerations.”⁸ I argue that the evidence presented shows she did not received justice. Further, I argue that the court made a crucial error of historical significance because their decision’s tendency is to move Canada backwards towards a Master and Servant model and away from an employee’s right to protection under collective agreements and statute law. Questions which I think will help the reader understand my claim, and should be kept at the front of their minds while reading this paper are: who exactly are the

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⁶ Ibid., 9.131, 182.
⁸ Vide infra.
masters in this nexus of events involving a real person deprived of her rights?; should it be lawful for “industry” to fire employees without cause and refuse to reinstate them with the support of arbitration boards and the courts? Further, a more philosophically layered question, should one pretend that the Supreme Court – a court that by definition will regularly present society with split decisions (5-4, etc.) – will always come down on the side of justice and never err in its decisions, even if honestly?

This research will be presented in two major sections, the first dealing with some of the history of arbitration boards and the courts to bear out the contention that “tenure of employment” does exist for employed Canadian citizens, especially those under collective agreements. The second section will focus on the Lethbridge case and here I argue one can reasonably see how the Supreme Court erred in its choice of primary objective and thereby missed what should have been the central point of the case, which was to uphold a principle of justice protecting Canadian employees from unjust dismissal. Had the Supreme Court chose to focus their attention on this latter consideration, I think the judgement would have been far different. In my analysis, I will be employing an analytical tool pursuant to the importance of historical events suggested by noted historian, John Lukacs.9

Lukacs, in his well-known treatise Historical Consciousness,10 divides historical events into two distinct categories, important and significant. He writes:

For historical importance and historical significance are not the same things: while the opening of the transisthmian canal or the first automobile assembly line in 1914 are important rather than significant events, Mussolini’s turn from international socialism toward a nationalist ideology, or the sudden jump in the American divorce rate – “minor” events, these – are significant rather than important. They are significant because they mark the appearance of tendencies that were to become eventually important.11

Using this heuristic tool, I here conclude that the Supreme Court’s judgements in labour cases involving dismissal without cause – and leading up to Lethbridge – were indeed historically significant, because they signified a tendency of the Court to protect “industrial peace,” expand the powers of the arbitration boards

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10 Ibid.
11 Ibid., 130.
against the plain wording of statutes and collective agreements, and leave aside the rights of employees in cases which are near the borderline separating what constitutes ‘dismissal with cause’ and ‘dismissal without cause’. I argue this border is absolutely fundamental and ought to be guarded by the high Court with deference to the exactitude with which the employee rights appear in the collective agreement and legislation, versus their chosen tactic of supporting, instead, industry and its unwritten right to be at peace, apparently. This latter contrast is real rather than rhetorical.

That this case is actually about one Canadian woman who lost a potential lifetime of employment security as against “industry” owned mostly by fabulously wealthy people – mostly men – is a prima facie factor which ought to be considered by all of us, especially the nine well paid Canadians who decided on the side of industry. Of course, to write this involves understanding the real and living persons and interests who are affected by this, and not merely the labyrinthine and oftentimes confounding, cross- purposed, and mis-applied world of ‘precedent’ or ‘lines of jurisprudence.’ Nothing clears the minds of legal functionaries on this point like recalling Jeremy Bentham’s words on one of the tools of ‘lines of jurisprudence:’ the actual court records:

…if a fit of curiosity happens to take the judge, such an [sic] one as shall not take him thrice perhaps in a twelvemonth, they are handed down: if not they are let alone: one out of a thousand becomes a law: the nine hundred and ninety nine others remain waste paper.12

Bentham is just as scathing on another source of law which lawyers and judges are still wrestling with, Holmes’ “oracles of the law,” the reports. Bentham writes that as the records are largely useless, another smaller collection of documents is assembled, in which, as he notes: one third, tenth, twentieth, or hundredth part of various cases are shown to the public, which if equally known would be just as likely to become law.13 He writes:

12 Jeremy Bentham, Of Laws in General, ed. H.L.A. Hart, The Collected Works of Jeremy Bentham: Principles of Legislation, ed. J.H. Burns (London: The Athlone Press, 1970), 15.3, 186: 185-188. To put Bentham’s purpose into a breath, he wanted to take laws out of the maze of records, reports, and treatises and have them all put into one “pure body of statutory law” (19.1, 232). For instance, Bentham ridiculed the fact that court records were stowed away in some dark cavernous place which was totally inaccessible to those whose fate depended on them. He noted that the trouble of finding these records, their scanty information and indecisiveness, meant that it was not more than once in a hundred that the judges employing the decisions could endure even looking at them.

13 Ibid., see generally 185-188.
Sometimes by commission from that high authority, a judge who had been dead and forgotten for half a century or for half a dozen centuries, starts up on a sudden out of his tomb, and takes his seat on the throne of legislation, overturning the establishments of the intervening periods....

I see the Court in *Lethbridge* moving dangerously close to overturning establishments from intervening periods – such as the advance of employee rights in Canada, discussed below. I argue that if the Court had of just altered their goal from the protection of industry to the protection of employees rights, they could have produced a case which would have inhered to positive tendencies in future decisions which both respected the border of rights over which an arbitration board or court may not transgress, except at their peril, as well as stayed within the bounds of precedent and statute law in Canada.

**A Legacy of Tenure of Employment**

Imbedded in the evolving Canadian legacy of protecting the rights of workers in collective bargaining agreements is an immutable and inalienable principle which protects the employee from arbitrary and unjustified dismissal. Inherent in this principle is a right to “tenure of employment.” Under the erstwhile common law rules of ‘master and servant’, in our Canadian past, an employee could be terminated at will with mere “bare notice” as a recompense for their time and effort, whether it had been months of service or even many years of the same. Employers could be sued for damages under breach of contract, but even in the result a suit was successful, the reward could not be imagined to replace the lost remuneration and human contentment of a life’s work, and the average hard-working Canadian employee continued on with no protection from dismissal for, basically, any reason the employer wished to concoct. Quite clearly, collective agreements and statute law have changed all that.

The impetus behind, and hence the purpose for, the changes to the law in this area are succinctly put forward in the case of *B.C. Central Credit Union v. Office and Technical Employees’ Union, Local No. 15* (1980) L.R.B.C. Decision No. 7/80. In this case, the board drew on the observations of George Adams in his article “Grievance Arbitration of Discharge Case.” In his piece Adams laid out several aspects of master and servant law which gave rise to general dissatisfaction.

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14 Ibid., 15.4, 187.
15 Hereinafter *B.C. Credit Union*.
17 Ibid.
1. *The law of master and servant*, as it developed, took a narrow contractual approach to employee misconduct. The court allowed dismissal for a broad spectrum of employee misconduct and the intermediate step of suspension and reprimand, not fitting within this contractual approach, [was] simply not relevant. Thus the only practical legal remedy available to the employer came to be the most severe form of disciplinary action -- dismissal.

2. *The single minded pursuit of the employer’s interest.* ...as the law of master and servant developed, significant qualitative distinctions were not made between different types of misconduct. Lateness, excessive absences, [etc]... were all treated the same. Similarly, all employees who misconduct themselves, regardless of their personal attributes or circumstances, met the same end.

3. A third shortcoming was and remains *the law’s retrospective approach to employee misconduct*. Contract law does not concern itself with whether a breach is likely to happen again. The innocent party is “entitled” to his remedy whether or not the particular breaching party is likely to violate his obligations again. [This arose out of temporary contractual relationships and, unfortunately, the employer could repudiate an on-going employment contract on the same basis.]

4. *Absence of judicial control over the way in which a dismissal is effected.* [no reasons need be provided. There is little attention to procedural fairness]

5. A final shortcoming, and one that is most visible today, is *the lack of protection master and servant law offers an employee against arbitrary dismissal*. While the employer’s interest in reacting to employee misconduct is overprotected by the remedy of dismissal, the remedies provided to the employee who has his contract terminated without cause are quite inadequate.

These conditions led naturally to the formation of trade-unions and the rise of collective bargaining.\(^{18}\)

All this in aid of the fact that the employer’s rights under the master servant model far outweighed those of the employee, and it was no surprise that in the environment of advancing human rights in the twentieth century, for which Canada was a vanguard state, these conditions simply could not endure. The absence of an employee’s right to tenure was soon replaced by an era of strong collective agreements and complimentary provincial labour codes in the middle of the twentieth century.

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\(^{18}\) Ibid. 36-38. Emphasis added.
Further, the board in *BC Credit Union* looked to another arbitration board’s view of an analogous matter in *Hiram Walker & Sons Ltd. et al.* (1976) BCLRB Decision No. 38/76. Here the board used the word “tenure” to describe the new rights that were emerging under collective agreements.

Thus it should be clear now that the historical and common law position has been altered radically. We are no longer talking in terms of traditional master-servant laws and relationships, where an employee has no expectation of tenure, let alone fringe benefits of employment such as health and welfare plans, seniority, grievance and arbitration procedures available, etc. The reasoning of Mr. Justice Laskin in the Court of Appeal decision in the *Port Arthur Shipbuilding* case has now been translated into statute law under the B.C. Labour Code. *Now, an employee does have tenure, and rights, and in the event of discharge, each case must be looked at in relation to the particular collective agreement in existence between the parties, and all the other factors having to do with that person’s employment.*

Under collective agreements today, a different environment exists; there is a continuing relationship, where an employee has an expectation of continued employment. The old common law position no longer applies to situations where collective agreements are in existence.\(^{19}\)

Other decisions,\(^ {20}\) such as this one did, recognized the need to steer clear of any jurisprudence which thwarted the progress of the employees’ right to tenure. Yet the case of *Port Arthur Shipbuilding Co. v. Arthurs et al.* (1969), 70 D.L.R. (2d) 693 (S.C.C.),\(^ {21}\) however ironically, did just that. That is to say the Supreme Court decision in this case\(^ {22}\) ultimately moved the employees’ relationship back closer to the master-servant model: but originally, when brought before the Labour Arbitration Board,\(^ {23}\) the employee’s tenure prevailed and was subsequently

\(^{19}\) *Hiram Walker & Sons Ltd. et al.* (1976) BCLRB Decision No. 38/76 p. 38,39. [Emphasis added].

\(^{20}\) *Wm. Scott & Co. Ltd. And Canadian Food & Allied Workers Union, Local P-162*, [1977] 1 Can. L.R.B.R. Following the legislative backlash to *Port Arthur Shipbuilding Co. v. Arthurs et al.* (1969), 70 D.L.R. (2d) 693 (S.C.C.); [1969] S.C.R. 85, a case which took the employer-employee relationship back dangerously close to a master servant model (*Wm. Scott & Co.,* 5) which allowed the harshest punishments for the most minor infractions, the provinces rallied against the court’s decision and legislated that the boards were now to be given supreme deference in deciding not only whether the employers had just cause, but also in fashioning a remedy which would be final and reasonable in the circumstances.

\(^{21}\) Hereinafter *Port Arthur*.


upheld up by a judge on the Ontario Appeal Court, in much the same fashion as the Lethbridge case under discussion where right to tenure was again supported by the Alberta Appeal Court. In the former case, the appeal court judge responsible for upholding the board’s decision was to be the future Chief Justice of Canada and one of the foremost authorities in the area of Canadian labour law, former Chief Justice Bora Laskin. He agreed that “…the collective agreement does create an entirely new dimension in the employment relationship: it is the immunity of an employee from discharge except for just cause, rather than the former common law rule of virtually unlimited exposure to termination.”

Further, “…an employee who has served the probation period secures a form of tenure, a legal expectation of continued employment as long as he gives no specific reason for dismissal.” In the Port Arthur board decision, these comments were placed alongside the co-existent and relatively new rights of an employer to discipline their employees, something that did not exist under the common law: unless one takes the untenable position that termination is a constructive form of discipline. This bifurcation of rights struck a balance between the employee’s right to tenure alongside the “broad management right” to discipline in a variety of ways. The correlation shows how the collective agreement changed the nature of both sides of the employment relationship. So while discipline is recognized by the collective agreement, so to the right to tenure of employment is also guaranteed unless the employer can show just cause.

The right to tenure is an absolutely central principle in the construction of the collective agreement and to commit a fraud on the purpose of the agreement, the protection of an employee’s tenure, by allowing an employee to be stripped of their living without cause is to allow a patently unreasonable and irrational result. Judge Laskin, then sitting with the Ontario Court of Appeal, in his Port Arthur decision, supported the Labour Board’s conclusion by stating that:

… it is sometimes forgotten that collective bargaining and the collective agreement have given the individual worker security of continuing employment, depending by and large only on his seniority in relation to the employer’s production needs (in terms of numbers of workers and their skills) and on his good behaviour which avoids giving just or proper grounds for discharge. What are generally called seniority and discharge clauses represent the employees’ charter of employment security; and it is reinforced by removing from the employer, not his initiative in acting against an employee, but his previously unreviewable right to rid himself of

25 Ibid. p. 40.
employees, even if it cost money damages to do so.  

In Port Arthur, involving discipline for cause, unlike Lethbridge, Laskin still emphasizes the ideal of security in the employees’ tenure or “continuing employment” and yet he goes on to back up the Board’s ‘decision making power’, regardless of their decision. He affirms the purpose of the collective agreements but also says he would have defended the board’s decision if it went the other way as well, which was a prescient, if regrettable, indication of which side of the question the Supreme Court would ultimately tend to fall on. In other words, the Supreme Court does their best to leave board decisions alone unless “patent unreasonableness” can be shown. Yet here arises the seminal question: if a board decision meets the Supreme Court’s “standard of reasonableness” test, how is it that the latter’s support is enough to void a Canadian’s right to tenure in a job they already possessed when they are dismissed without cause? I maintain this state of affairs amounts to an affront to the principle of justice since it revokes the employees “right to reinstatement” in cases where there is no cause. The ‘standard of reasonableness’ dicta of the Supreme Court should not trump the plain reading of the laws themselves because, otherwise, we are slipping, however imperceptibly, backwards towards dark days in common law history when judges could create their own rules.  

According to Lukacs taxonomy, Port Arthur is historically significant because it marked a tendency that would be repeated, ultimately leading to the historically important transaction of Lethbridge, the case in which a line of jurisprudence made up of a number of decisions significant to the outcome resulted in guaranteed rights being ignored in favour of judge-made principles. Judges are not elected lawmaking officials in the Canadian system of democracy. They are theoretically constrained to both the laws of an elected parliament and the laws of the many legislatures across Canada.

How can high Court dictum replace guarantees in the collective agreement and statute law? Of course, they should not. Let us remind ourselves continually that

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27 Ibid., 363. Emphasis added.
28 Vide infra.
29 Vide supra on Bentham. Also, one might point to the history of the the Star Chamber: a secret English Court from which there were no appeals, no juries, and which ultimately fell due to politically charged abuses. It was finally closed in the seventeenth century. The Star Chamber is an extreme example of the abuse of power and is only meant as an illustration of how far wrong things went in the history of common law courts wherein the ideas and opinions of judges were the true canon. It also serves as an fine example of Lukacs point that even though once created to deal with certain matters to assist other courts, the significant mutations of lack of public accountability, no juries, and its accessibility to the Monarchy led to an ultimately important series of abuses which had such a negative impact that it was permanently closed.
the Supreme Court is not any kind of elected assembly of lawmakers; they are interpreters of law in situations where legal instruments can reasonably bear more than one meaning, and thus lead to a dispute. Yet, in such plain language circumstances specifying either just cause or no cause, there is no need to create a line of jurisprudence to alter the meaning of collective agreement rights and labour code provisions to protect a barely veiled industrial peace by giving arbitration boards the unwieldy power of fait accompli-decision-making where they merely ‘avoid’ patent unreasonableness. And yet, in Canada that is exactly what has happened, as I discuss briefly here below.

It may also be countered that the above statement by Laskin was informative on the subject of the purposive intent behind the collective bargaining agreement rather than starkly conclusive on an employee’s right to reinstatement in cases where there was an absence of cause. Yet Laskin’s characterization of the employee’s rights was anything but indecisive or indeterminate. Rather, he stated the existence of an “employees’ charter of employment security” in such a way that future arbitration boards used his preliminary and significant declarations as a basis to further unearth this key concept of a right to tenure.

A compelling example of this reasoning is found in Tenant Hotline and Peters and Gittens (1983), 10 L.A.C. (3d) 130 where Arbitrator R.O. MacDowell unequivocally re-states Laskin’s earlier position.

Discharge can have devastating consequences for the individual and his family, and is no neutral event for the general community which must frequently absorb related unemployment or welfare costs. Employees invest a part of themselves in their jobs, and, as a matter of fairness, this investment should not be arbitrarily or unjustly extinguished.

From these hundreds of individual cases, there has now developed a coherent and generally accepted body of principles which differ significantly from those of the common law - that is, from those legal principles so aptly named the law of “master and servant”. At the core of this arbitral jurisprudence, is the notion that employees are no longer “servants” who can be disposed of at will on the giving of notice or the payment of some sum of money. They have a legitimate expectation and a legal right to tenure of employment, unless there are justifiable grounds for termination… Tenure in employment unless there is cause for termination is one of the twin pillars (the other is seniority) of what Mr. Justice Laskin has described as “the employees’ charter of employment
security.”  

Here again, the stark contrast is painted between master and servant law and the current “legitimate expectation and a legal right to tenure of employment, unless there are justifiable grounds for termination….” We also see here Laskin’s twin Pillars of Hercules for the worker, tenure and seniority, beyond which the employer and courts may only cross at their peril. This is an important aspect of the greater debate on the rights of the employee: the fact is that when there are justifiable grounds for dismissal, best known as “just cause,” the employee, according to the collective agreement, cedes his right to tenure. Yet this is not allowed in cases where employers dismiss employees without cause, because as MacDowell wrote, in these cases “they have a legitimate expectation and a legal right to tenure of employment.” Yet currently, in cases where there may be grounds for discipline inhering no just cause for dismissal, the arbitration board has now been accorded the power to offer “some lesser penalty” which may include discharge. What is going on here?

**Damages Indeed**

How is it that in the absence of just cause for dismissal, and even where there may be non-culpable behaviour justifying disciplinary action, that employees under the jurisdiction of arbitration boards are now losing their right to tenure and sent packing with damages amounting to four months wages against a prospective career wage total? We must take a moment to consider that a four month “reward” of damages on, let’s say, an annual salary of 25,000 dollars equals a paltry $8332 versus the $750,000 represented by a thirty year career at the same rate. These are “damages” in the true sense of the word. The sum of $8332 represents an infinitesimal percentage of the whole, coming in at a shocking 0.01110% - a.k.a. one tenth of one percent. How does one tenth of one percent suffice to make up for the loss of employment where that employee was protected by a right of reinstatement under the collective agreement? Like MacDowell poignantly noted above, discharge can be a devastating experience for the individual and the community and there should be no way an employer can hope to rely on arbitration boards and the courts to victimize Canadian workers as was the status quo under the grotesque master-servant law of former

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31 Ibid.
32 Ibid.
33 A heuristic turn-of-phrase made popular by the eminent historian Dr. John Toews: emeritus professor and former Dean of the Department of History at the University of Calgary; emeritus professor at Regent College Graduate School, Vancouver, BC.
Notwithstanding the semantic gymnastics used with phrases like ‘reasonableness of the decision’ and ‘poisoning the work environment’ – which are wide open to criticism on the grounds of malfeasance on the part of arbitration boards who hold in their hands the public trust but yet are allowed to legislate outside the scope of the collective agreement and have courts simply rubber stamp their so-called “reasonable” decisions.

In light of Lethbridge, it seems very likely that the Supreme Court of Canada has let the law slip backwards towards a master and servant context by not forcing the arbitration boards to rule within their mandate – at least not their contractual or legislated mandate because the Court argued that according to their own version of the mandate, the arbitration board was within some kind of allowable jurisdiction. Arbitration boards are not supposed to be acting as judges who alter the law or, even worse, set aside the laws before them: they are merely there as functionaries ensuring the collective agreement is applied as they receive it. Perhaps the judicial setting and appealable nature of their decisions has partly confounded many judicial actors into thinking that this mini-court is not only part of the legal system, but that their “judgments” should be protected in some kind of fraternal and partisan way, neither of which states of affairs is either correct or defensible.

While an arbitrator does have a broad remedial power to fashion remedies, she or he does not have the power or right to award damages in lieu of reinstatement where there is no just cause for discharge. This is a fact because the relevant statute law cannot be interpreted to infer such an authority and, indeed, because such a power would be inconsistent with the statute's recognition that there must be cause for discharge of an employee under a collective agreement. Additionally, such an award would not be "remedial" in the sense that it would not attempt to put the person back in the position they were in before the breach. Simply awarding damages for dismissal without cause permits a return to the old system of master and servant where the rule was dismissal with notice: only in the context of Lethbridge the employer was forced to pay a fee/damages for dispossessing the employee of her statutory rights.

As the board in BC Credit Union points out, “[w]hereas the common law relies upon monetary damages to compensate the victim of most such breaches, the evolution of collective bargaining law has included a much greater reliance upon remedies in kind or in specie.” This statement builds on a previous board decision by the highly esteemed arbitrator Paul Weiler in Re: International Chemical

34 Public Service Labour Relations Act, (S.C. 2003, ch. 22, s. 2).
35 BC Credit Union Ibid., 41. Emphasis in original.
Workers, Local 346 and Canadian Johns Manville Co. Ltd. (1971) 22, L.A.C. 396 in which Weiler pointed out that “[i]f there is no other and better way of restoring the employee to his proper situation, then damages are a proper way of approximating the law’s objective, even though the defendant may be penalized somewhat. In theory, though, the better remedy would be to compensate the grievor in kind, rather than money.”

It is acknowledged that in some cases where the employer goes out of business or where the reinstatement becomes practically impossible that, even though damages may be a poor substitute for the lost right, they may be the only reasonable solution. I would argue, though, as alluded to above, that if “damages” are the only option due to a supervening impossibility on the part of the employer, then the compensation should reflect a greater percentage of a potential lifetime of employment that was lost.

On this point there remains a very important constraining principle which imbues all agreements, not just collective agreements, in case of a fundamental breach. This is the aforementioned principle of contract law which directs that remedies for breach should be aimed at putting the aggrieved person back in the position he was before the breach. That position, in the case of an employee who is dismissed without cause, would be back at work since the common law right to dismiss with notice (or damages) doesn’t exist under a collective agreement. In an earlier arbitration decision decided by Laskin himself, which was ultimately affirmed by the Supreme Court of Canada, he states that “the board’s remedial authority, if it has any, must be addressed to the vindication of violated rights by putting the innocent party, so far as can be reasonably done, in the position in which he or it would be if the particular rights had not been violated.” Even at this early date – 1959 – Laskin is talking in the language of rights and how the board’s remedial authority needs to be addressed only to the violation of those rights. Again, in cases where there has been discharge without cause, regardless of any other considerations such as discipline, etc., it is patently unreasonable and stands in direct contravention to the collective agreement, the statute law, and the principle of justice to disenfranchise an employee of their guarantee to tenure of employment and make a mere award of damages.

No Discharge Without Cause - Right to Tenure

The board’s decision making power must always give a result which the collective agreement and statutes can reasonably bear. Dickson J., as he then was, in *Heustis v. New Brunswick Electric Power Commission* (1979), 98 D.L.R. (3d) 622 (S.C.C.)\(^{38}\) states that “there being nothing in either the agreement, or the Act, which expressly precludes the adjudicators exercise of remedial authority, I am of the opinion that an adjudicator under the *Public Service Labour Relations Act of New Brunswick* has the power to substitute some lesser penalty for discharge where he has found just and sufficient cause for some disciplinary action, *but not for discharge.*”\(^{39}\) Again, and from perhaps one of the most senior minds who ever sat on the Canadian Supreme Court bench, Dickson clearly states that the adjudicator has the power to substitute some lesser penalty in cases involving remedial disciplinary action, but not for discharge. The logical corollary of this common sense assertion by Dickson is that a board would not have the power to substitute damages where there is no just cause for dismissal. This must logically follow if we are to rely on the former statement of Dickson from *Heustis*. There was nothing in the agreement to preclude the arbitrator’s authority in the *Heustis* case where cause for discipline was determined, but his authority ended there because he had also found that there was no just cause for dismissal. Dickson, J. as he then was, writes:

> “[t]he language of the [arbitrator’s] decision, for example the sentence "Had I the authority to do so I would have substituted one month's suspension without pay", leads to the conclusion that the adjudication found just cause for discipline only. Impliedly he found an absence of just and sufficient cause for discharge.”\(^{40}\)

Similar to the *Lethbridge* case, and in agreement with what Dickson maintained, in situations of dismissal without just cause, the adjudicator must be re-tasked with the decision so that they can correct their finding according to the law rather than the predilection of the employer.\(^{41}\) In fact, both the agreement and the legislation which ensures that employees will not be dismissed save for cause precludes any other order but reinstatement, unless it be an impossibility. In *Heustis* the Court is saying that the right to award a lesser penalty could be

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\(^{38}\) Hereinafter *Heustis*.

\(^{39}\) *Heustis* at p. 632-633. Emphasis added.


\(^{41}\) Ibid., Dickson: “I would allow the appeal, set aside the judgment of the Appeal Division of the Supreme Court of New Brunswick, and restore the order of Stratton J. quashing the decision of the adjudicator and directing the adjudicator to proceed with the adjudication according to law.” 783.
inferred from the power to review dismissal but that is a long way from saying that an arbitration board who has found no cause for discharge can divest an employee of their rights of being entitled to job tenure under the collective agreement. This appears patently unreasonable.

Discharge Without Cause is Patently Unreasonable

The Doctrine of “Patently Unreasonable” has been spelled most clearly in the case of Canada (A.G.) v. P.S.A.C. [1993] 1 S.C.R. 941[hereinafter PSAC]. The Supreme Court of Canada has broken down the development, in regards to the court’s treatment of administrative tribunals, into three stages based on the case of Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227 [hereinafter CUPE]. In the PSAC case, Justice Cory, for the majority, makes reference to the categories of pre-CUPE cases, CUPE itself, and post-CUPE cases. The pre-CUPE cases were ones where the courts expanded their understanding of judicial review and “in each case this Court substituted its own opinion of the correct interpretation of the statute for that of the administrative tribunal.”

The CUPE case itself was written by Dickson J (as he then was). Speaking on the Public Service Labour Relations Act in CUPE, Dickson says “the Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of the Board members is all the more required if the twin purposes of the legislation are to be met.” Further, the question the court should ask itself is:

“did the Board so misinterpret the provisions of the Act as to embark on an inquiry or answer a question no remitted to it? Put another way, was the Board’s interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?”

These passages reveal two important aspects of the CUPE decision. The respect for the purposes behind the statute and a recognition that sometimes the Board’s “construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review.” This is the question the courts must answer before interfering with the Board’s decision, and it is a high standard indeed: it has even been further translated to mean “irrational” as the

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42 PSAC at 953.
43 PSAC at 954 quoting Dickson J. in CUPE at p. 235-36.
44 PSAC at 954 quoting Dickson J. in CUPE at p. 237. Emphasis added.
45 Ibid.
Supreme Court relied on dictionary definitions to aid itself in defining the concept. While dictionary definitions expanding what Dickson meant by patently unreasonable may help in a single case, it surely cannot be something that replaces the former dictum since variations in definitions of words meaning similar things may lead quickly off the map of what was intended (i.e. Fresh = New = Unused = Useless = Worthless = Garbage = Rotten). While the example is exaggerated to make a point, it is rather an observation that words which merely help define other words have different definitions, by definition. While PSAC moves patently unreasonable into the realm of the “clearly irrational”, other courts may want to exercise caution in taking the meaning away from the original standard in CUPE.

Along this theoretical tack, Justice Cory states in PSAC that, among other things, “it is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.” Hence the warning about moving too far afield. And this is part of what has come out of the post-CUPE cases, the expansion of Dickson’s original dictum. Another change Cory points to is what Beetz J. had delineated in U.E.S., Local 298 v. Bibeault [1998] 2 S.C.R. 1048.

1. If the question of law at issue is within the tribunal’s jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;

2. If however the question at issue concerns a legislative provision limiting the tribunal’s powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.46

An argument could be made that since dismissal without cause and with damages goes against the privative clause of the collective agreement and the Canada Labour Code, and that it is in a very real sense a limiting clause; then, as in these provisions set out by the Supreme Court, a mere error will cause it to lose jurisdiction. In Lethbridge, dismissal without cause is much more than a mere error. Even if the breach of the collective agreement falls under the first stipulation, which it would seem to on a prima facie view of the purpose of arbitration boards, then it cannot be understood that discharge without cause is a mere error or wrong. It is a flagrant bypass of the principles protecting an employee’s right of tenure under the collective agreement and statutory provisions, and thus clearly “irrational” in the circumstances. Not to intervene

46 PSAC at 956-57.
would contravene and offend the statute, the collective agreement, and the purposes behind them, as well as the hundreds of cases of employees who have had their tenure of employment protected. Again, it would mean a moving closer to master and servant law if the employer could discharge without cause on even the smallest expectation that the arbitration Board would order an award of damages instead of reinstatement.

Justice Cory ends his discussion in PSAC of by pointing to the importance of judicial review with labour arbitration, which is something that, regardless of the trend to unfetter the hands of boards in these kinds of disputes, is uncontested by all. The courts are a guarantor of correctness and, at the very least, natural justice.

In summary, the courts have an important role to play in reviewing the decision of specialized administrative tribunals. Indeed, judicial review has a constitutional foundation. See Crevier v. Attorney General of Quebec [1981] 2 S.C.R. 220. In undertaking the review courts must ensure first that the board has acted within its jurisdiction by following the rules of procedural fairness, second, that it acted within the bounds of the jurisdiction conferred on it by its empowering statute, and third, that the decision it reached when acting within its jurisdiction was not patently unreasonable. On this last issue, courts should accord substantial deference to administrative tribunals, particularly when composed of experts operating in a sensitive area.

That the board act within the bounds of the jurisdiction set out for it is a key element of the equation and cannot be understated when determining the principle of ‘tenure of employment’. The ‘no dismissal without just cause’ has a logical corollary, that being ‘dismissal without just cause means reinstatement’. The only exceptions must be a supervening inability on the part of the employee, or impossibility on the part of the employer.

Another separation of the doctrine is in the treatment of error of fact and error of law by the court Toronto Board of Education v. O.S.S.T.F. [1997] 1 S.C.R. 487. In this case the Supreme Court sets out the questions to be asked with an error in law. Where a tribunal is interpreting a legislative provision, the test is:

...was the Board’s interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation

47 Ibid. at 962. Emphasis added.
48 Professor Jim MacIntyre, UBC Law, Labour Arbitration Specialist, Labour Arbitrator.

A slight variation of this test applies to arbitrators interpreting a collective agreement. In those circumstances, a court will not intervene “so long as the words of that agreement have not been given an interpretation which those words cannot reasonably bear”: Bradco, supra, at p. 341

‘No dismissal without cause’ is clear as to its meaning, and any decision by a board which is the exact opposite, i.e. dismissal without cause and damages in lieu of reinstatement, is giving an interpretation which the words of the agreement cannot bear; nor the statute for that matter as this is read into all agreements in any event.

Further in this jurisprudence of the Supreme Court of Canada is the separation between patently unreasonable and simply unreasonable. The case of Canada Safeway Ltd. v. RWDSU, Local 454 [1998] 1 S.C.R. 1079 deals with this bifurcation. Justices Cory and MacLachlin rely on an earlier case, Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748 at para. 57, to delineate between merely unreasonable and patently unreasonable. Iacobucci J. for the court stated that:

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\text{[t]he difference...lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.}^{50}
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This would further strengthen the contention that dismissal without cause in light of a ‘no dismissal without cause’ clause is something which requires judicial intervention. Dismissal without cause in the face of the statute and collective agreement which require the opposite is clearly a decision defective on its surface. Any other construction of an alternate view would, in my opinion, be subterfuge in the process of obfuscation of the real issue.

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\[50\] Canada Safeway Ltd. v. RWDSU, Local 454 [1998] 1 S.C.R. 1079 at 1109.
The Supreme Court’s syntactical delivery in the Lethbridge case is very telling pursuant to what I argue was the main semantic import of their judgment, protecting “industrial peace.” In the following pages I will briefly look at some of this content and structure to show just how concerned the court was to set aside the respondent in her plight while focusing almost exclusively on a split arbitration board decision which supported the Court’s bi-furcated goal of allowing the board wide remedial powers which would in turn protect the industrial peace.

All actors sitting in judgement on this case were compelled to deal with the Alberta Labour Relations Code, R.S.A. 2000, c. L-1 (Hereinafter Code). Specifically in this case, Section 142 (2) became germane as it was this part of the Code which apparently gave the board these wide remedial powers to fashion another decision apart from the guarantee of reinstatement found in the Collective Agreement. The controversial section reads:

142(2) If an arbitrator, arbitration board or other body determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject matter of the arbitration, the arbitrator, arbitration board or other body may substitute some other penalty for the discharge or discipline that to the arbitrator, arbitration board, or other body seems just and reasonable in all the circumstances.

How narrowly this reads: “in all the circumstances.” Perhaps an arbitration board member’s “opinion” of an employee would therefore figure in to the overly broad category of “all.” One would hope and assume not, based on a reasonable reading of the statute, but certainly if the two members of the board who decided that the dismissal without cause “seemed” just to them, “reasonable” to them, and inclusive of all circumstances, it seems perhaps they were acting within the arbitrarily broad wording of the statute.

Yet, there is another historically situated jurisprudential problem at work here, because we know that the wording of 142(2) was in part taken right from Dickson’s own words in Heustis:

There being nothing in either the agreement or the Act to preclude the adjudicator’s exercise of remedial authority, an adjudicator under the

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Public Service Labour Relations Act of New Brunswick has the power to substitute some lesser penalty for discharge where he has found just and sufficient cause for some disciplinary action but not for discharge.\textsuperscript{52}

But Dickson was not, as the jumbled wording of 142(2) leaves us wondering, thinking or writing about “cause” for discharge in \textit{Heustis}, he was clearly writing about grounds for discipline “but not for discharge.” Even the statute itself approaches logical coherence when it states “…the arbitrator, arbitration board or other body may substitute some other penalty for the discharge or discipline that to the arbitrator, arbitration board, or other body seems just….\textsuperscript{53}” Are we to believe that this statute can be interpreted to mean that when the board is considering an alternate penalty for either discharge or discipline that it would be free to read the terms backwards and substitute discharge for discipline? How would that make any logical sense at all? The statute is empowering the boards, in one instance, to choose something besides discharge, something by definition lesser in degree such as discipline, and in the other instance, it is doing the same for the prospect of discipline, opening the door for something less than the discipline sought, a lesser discipline.

Further, to include the mantra of ‘industrial peace’ from \textit{Heustis} as the Supreme Court did in \textit{Lethbridge}, is a pure category mistake. While both are cases involving collective agreements and arbitrator’s decisions, in my opinion the factual similarities ground to a halt at this point. In \textit{Heustis}, the facts involve, first, employee A driving through picket lines and hitting a striking employee with his vehicle. In the near future, fifteen to twenty men ambushed six other employees including A, for revenge, and A was violently struck on the back, knocked to the ground, and then violently kicked in the face by employee B, causing a triple fracture of the nose to A.\textsuperscript{54} In stark contrast, \textit{Lethbridge} only concerned a woman whose productivity was being challenged, at that not even in the correct manner as she was given no warning before discharge by her employer. The facts of \textit{Lethbridge} involve no violence whatsoever, no “triple fractures,” no kicking, no knocking people over, with vehicles or otherwise, and yet we are supposed to believe that maintaining the “industrial peace”\textsuperscript{55} in the case of \textit{Heustis}, a laudable goal given the facts, should be brought to bear in the former, a case with no factual relationship at all to the protecting principle in question. “Industrial peace” seems strangely out of place in the \textit{Lethbridge} decision.

\textsuperscript{52} \textit{Heustis}, 770.
\textsuperscript{53} \textit{Alberta Labour Relations Code}, R.S.A. 2000, c. L-1, ss. 142.
\textsuperscript{54} \textit{Heustis}, 768.
\textsuperscript{55} Ibid., 781.
What is also curious about Heustis, in contrast with Lethbridge, is the Court’s diverse treatment of the appellants. In Heustis, employee B, who kicked A in the face causing the triple fracture to the nose, had his discharge order overturned by Dickson and the Court, since in that case the arbitrator felt there was just cause for discipline but not for discharge, and claimed he felt that suspension without pay was in order, but the arbitrator also felt he was compelled to adhere to the employer’s decision since they were permitted to discipline in some manner.\textsuperscript{56} In Lethbridge, as with Heustis, the arbitrators, all three, admitted there was cause for discipline but not discharge, and further, in both cases, the arbitration board decided to go against their own judgment pursuant to cause and support the employer’s discharge order as if the employer’s rights to discipline engaged an open door to whatever discipline the employer thought was appropriate. In Heustis, the Supreme Court a la Dickson saw clearly that if the arbitrator decided there was no cause for discharge but for discipline, and if this was evident in his decision, then discipline should have been ordered, not merely the rubber-stamping of the employer’s wish to discharge which took place. In Lethbridge, curiously enough, notwithstanding the culpability issues which make this employee’s case look like a cake walk in comparison with the criminally laced behaviour at issue in Heustis, the arbitrators’ admissions about no cause for discharge are nearly identical,\textsuperscript{57} but yet radically different conclusions by the two different Supreme Court line-ups were reached.

In Lethbridge the employee was summarily dismissed in a situation where her only fault was that she was not performing her duties in an efficient enough manner, and instead of getting any remedial training which would alleviate this, she was fired, we know for a fact, without just cause.\textsuperscript{58} The employee and the Alberta Union of Provincial Employees alleged dismissal without just cause and in contravention of the collective agreement. Let me now point directly to the Supreme Court’s opening structural move in their written decision: they opened with a review of all “relevant” instruments, statutory or otherwise, yet displayed only selections which supported the wide powers of the arbitration board. From the collective agreement, on the other hand, clearly the most important document before the court as far as the employee was concerned, the court cited only and lastly from section 12.16:

\textbf{12.16} The decision of the Arbitration Board shall be final and binding on the employee and the Parties.

\textsuperscript{56} Ibid., 773-774.
\textsuperscript{57} Lethbridge, 3.5.
\textsuperscript{58} Ibid. See also: Re. Edith Cavell Private Hospital and Hospital Employees’ Union, Local 180 (1982), 6 L.A.C. (3d) 229.
Here is the first indication of an unbalanced approach in this decision. There was no mention of the pertinent section from the Collective Agreement which guaranteed no discharge without just cause.\(^5^9\)

But ‘without just cause’ is *sin qua non* for this case. Even the members of the arbitration board who voted for damages, admitted that mere performance deficiency does not amount to just cause, it was simply not shown by the employer.\(^6^0\) The board found that employee was never made aware of the seriousness of the situation and no effort on the employer’s part had been made to train or find her a new position more suitable.\(^6^1\) Yet even in light of this, two of the board members imagined they could substitute an award of damages. The Appeal Court of Alberta in *Lethbridge* ruled that the only way such an award could stand is if there were proven “exceptional circumstances.” This Court described the arbitration board’s remedial power in regards to such circumstances by writing:

[47] Two important principles of Canadian labour law balance the scope of this remedial jurisdiction: security of tenure and confidence in dispute resolute mechanisms.

[48] An employer’s common law right to dismiss an employee without just cause, but on reasonable notice, does not exist under a collective bargaining regime. Consequently, where an employee is dismissed without just cause, the appropriate arbitral response is usually reinstatement.

[49] On the other hand, the ultimate goal of labour law is industrial harmony, a key to which is the expeditious, skilled, and final resolution of disputes. Arbitration boards seek to find a permanent and meaningful resolution of the issue for the parties. Where an employee has been dismissed or disciplined without just cause, the Board may be entitled to craft a different solution where reinstatement will not achieve that objective, *but only in very exceptional circumstances*.\(^6^2\)

\(^5^9\) For instance, the analogous sections of the current agreement, COLLECTIVE AGREEMENT BETWEEN THE BOARD OF GOVERNORS LETHBRIDGE COLLEGE AND THE ALBERTA UNION OF PROVINCIAL EMPLOYEES, LOCAL 071/001 (JULY 1, 2008 – JUNE 30, 2011), include management rights at Article 5.01 which give them authority to discharge, inter alia, only with with “just cause” (8). Article 13.01, on discipline, stipulates that “No Employee shall be disciplined without just cause” (14).

\(^6^0\) *Lethbridge*, 3.5.

\(^6^1\) *Vide supra* regarding the Edith Cavell “rules.”

The Court then stated:

[51] Exceptional circumstances cannot be categorized or limited, but have been described as those that “totally destroy” the viability of the employment relationship. These circumstances must be rare and truly exceptional….

[52] An examination of cases finding “extraordinary circumstances” shows that they usually involve an employee engaging in culpable behaviour, particularly theft or other deceit. There are very few cases of “extraordinary circumstances” where the conduct of the employee was nonculpable.

[53] While acknowledging that an Arbitration Board may have broad remedial jurisdiction to award damages rather than reinstatement where an employee has been unjustly dismissed for a non-culpable deficiency, this power is not unbridled, but is severely restricted in application. In this case, the Board did not rely on this power and did not consider and determine if extraordinary circumstances existed. On the record, it is doubtful that such a finding could have been justified or sustained.

Discharge without just cause, then, would be restricted to those cases involving circumstances which “totally destroy” the employment relationship due to theft, deceit, or other culpable behavior.

**Language Games**

One of the things which became clear to me as I poured over the Court’s decision is that the semantic import of many passages leaves the reader feeling like the Court was on the defensive, as if they had a vested interest of some kind. I do not argue the latter claim, but the former is clear on even a first read. Let me now point the reader to a number of excerpts in order to make my point clearer. In the opening statements of the judgment, we read:

While the provision [142(2)] can reasonably support an interpretation which limits its application to culpable dismissals, the board had ample reason to adopt a broader, but equally reasonable, interpretation and conclude that the provision applied to both culpable and non-culpable dismissals.\(^{63}\)

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\(^{63}\) *Lethbridge*, para. 2, opening statements.
Can 142(2) truly be read so that one concludes “reasonably” that the instructions are aimed at cases involving firing without just cause? The sub-section reads, “[i]f an arbitrator, arbitration board or other body determines that an employee has been discharged or otherwise disciplined by an employer for cause….” This looks at first as if it is only applicable to cases involving “just cause,” and everything that follows in the sub-section only comes in to force when the necessary clause of the statute has been borne out. Of course, in this case, the employee was fired without cause. But as we read above, the Supreme Court chose to follow a line of jurisprudence that would allow them to read this statute as if it applied to both cases, cause and no cause. What the statute seems to indicate is that boards are free to lower the penalty in cases of both discharge and discipline, but what is not clear is whether the cause is just cause. Obviously, if the board is lessening the punishment, the statute cannot be referring to “just cause,” otherwise the penalties should stand.

The language then begins to intensify from mere intention to outright rhetoric. Keeping in mind the Court’s stated intention of supporting the split board decision, we read that “[a]rming arbitrators with the means to carry out their mandate lies at the very core of resolving workplace disputes.” Is this really the case? The word “arming” means to be given weapons. Is that what the Supreme Court wants to give the arbitration boards, weapons? Who are they fighting? Should not the core of resolving these disputes come solely from the rights and authority given either side of the disagreement, including the board, which stems from the collective agreement and the Code? As alluded to, “Arming arbitrators” also reads unnecessarily in a military fashion – is not “equipping” the neutral choice – which shows the disposition of the authors, whether it was clerks or judges, who obviously felt that arbitrators must be allowed to impose their decisions with force, backed up, one could assume, by not only an arbitrator’s arsenal, but with the “arms” of the high Court’s decision.

We read in the next paragraph, “[g]iven the object of the legislation and its overall purpose, there is no practical reason why arbitrators ought to be stripped of remedial jurisdiction when confronted by labour disputes that turn on a distinction between culpable and non-culpable conduct….” Stripped? This word can produce quite violent possibilities as to its meaning given our cultural context, but what are they really saying here? It seems that while they want to

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64 Vide supra.
65 Vide supra.
66 The “necessary” as opposed to merely “sufficient” cause.
67 Ibid.
68 Lethbridge, para. 3, opening statements. Emphasis added.
ensure the arbitration board has arms or weapons sufficient enough to decide cases almost by fiat, given the Supreme Court interpreted herculean boundaries of their powers, they also wish to divest themselves of any responsibility by characterizing any challenge to the board’s decision as a “stripping,” and therefore the reader is semantically pulled towards believing what “eminent” sense it is to avoid “stripping” the humble arbitration board.

These examples show the purposed aim of the authors who chose to employ emotionally and physically charged language – armed and stripping – to attempt to convince the reader that, on at least some level, the Court was absolutely within its rights to allow the appeal, as it had stated at the very opening of the case. The proximity of their “held” decision in the first paragraph to the charged language of the second and third paragraphs are no mere coincidences. Woven together like this at the beginning, the Court attempts to sets the rest of its decision on some kind of high ground, wherefrom they can – using their own nomenclature – fire their arguments downwards at the reader.

The Court’s opening concludes by stating, inter alia, “[e]ommensurate with the notion of exceptional circumstances, as developed in arbitral jurisprudence, is the need for arbitrators to be liberally empowered to fashion remedies, taking into consideration the whole of the circumstances.”69 Again, this disturbingly wide language used in reference to public servants who are yet called upon to enforce the rights of employees as against the employer under specific instruments, the collective agreement and applicable statute law. While the court admits a few sentences later, the general rule is that when an employee’s collective agreement rights are violated, reinstatement is the normal order. I would suggest it should not only be the “general rule” and “normal order” but without an supervening impossibility the likes of a plant or school closure, reinstatement should be as fixed a rule as it reads in the collective agreement. The Court instead writes “[d]eparture from this position should only occur where the arbitration board’s findings reflect concerns that the employment relationship is no longer viable.”70 Is the Court allowed to re-write the plain wording of the collective agreement, relevant to reinstatement? Here they are saying that a majority arbitration board’s opinion that the employee would no longer be able to have a relationship with the employer – Ironically, and likely due to the dismissal – means that the arbitration board is actually allowed to legislate beyond the collective agreement and statute law in cases like these where there is no cause. In cases of cause, they are allowed by both statute and collective agreement, as shown above in s. 142(2), to do exactly that, fashion remedies which they think appropriate and

69 Ibid. para. 4.
70 Ibid.
reasonable in the circumstances. But, by the board’s own admission in this case, this was a distressing event in a woman’s life where there was no just cause for her dismissal. While the Court finished their introduction by maintaining that the board decision fell “well within the bounds of arbital jurisprudence” pursuant to finding exceptional circumstances before giving their own remedy, the facts of this case relating to the dismissal without cause show that rather than “arbital jurisprudence,” it should have been the plain wording of their primary instruments of consideration which led their decision, as in fact it did in the case of arbitrator Bartee, who maintained “…the board had made a jurisdictional error with respect to remedy”\(^\text{71}\) and insisted that reinstatement was the only just remedy.

**Concluding Observations and Suggestions**

The nub of the matter lies in the basic principle which is implicit in the statute and collective agreement. This principle is that employees have an entrenched right of tenure as against their employer when dismissed without cause. That there shall be ‘no dismissal without cause’ leads inexorably to the conclusion that where there has been dismissal without cause, there is a patently unreasonable breach of the legislation which is evident on the surface of the claim. Alongside this right of tenure implicit in dismissal without cause is the acknowledgement that there are two clearly marked instances where the arbitration board must fashion ‘some lesser penalty’ in these situations. The first is a supervening inability of the employee to engage in such an order, as articulated by Labour Arbitration Specialist and former Professor of Law at UBC, Jim MacIntyre. If the employee is moving out of province or cannot physically do the work, then the supervening event *dicta* comes into force and the arbitration board must fashion a remedy. The other exception is impossibility on the part of the employer. Bankruptcy or loss of an entire division of production would be cases where it is impossible to enforce the right of tenure and again it must be compensated in some other reasonable way such as a monetary settlement.

As for the Court’s current disposition regarding the jurisdiction of arbitration boards, Chief Justice MacLachlin in *Weber v. Ontario Hydro* (1995), 125 D.L.R. [Hereinafter *Weber*], reaffirmed the court’s support of arbitration boards to hear all matters coming within their jurisdiction, even though Charter and torts matters arise. The majority’s concern was not wanting to open the door to concurrent paths of litigation\(^\text{72}\) but keep disputes of this matter in the court of first instance,

\(^{71}\) Arbitrator Bartee. *Lethbridge*, chap. 3, para. 7.

\(^{72}\) The conclusion in Weber from MacLachlin C.J. was:To summarize, the exclusive jurisdiction model gives full credit to the language of s. 45(1) of the *Labour Relations Act*. It accords with this
wherever possible. Within the judgement are important statements for the law in this area in general.

…the appellant Weber argues that jurisdiction over torts and Charter claims should not be conferred on arbitrators because they lack expertise on the legal questions such claims raise. The answer to this concern is that arbitrators are subject to judicial review. Within the parameters of that review, their errors may be corrected by the courts. The procedural inconvenience of an occasional application for judicial review is outweighed by the advantages of having a single tribunal deciding all issues arising from the dispute in the first instance. This does not mean that the arbitrator will consider separate "cases" of tort, contract or Charter. Rather, in dealing with the dispute under the collective agreement and fashioning an appropriate remedy, the arbitrator will have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the Charter.73

As her ruling indicates, arbitration boards, notwithstanding the affirmation of their responsibilities in hearing cases which fall under their legislated jurisdiction and engage Charter and tort law, will be subject to judicial review. This review is circumscribed by Dickson’s threshold doctrine of patently unreasonableness found in CUPE. The Supreme Court has further explained what patently unreasonable means and where it does and doesn’t apply, yet all the judges who have put a further gloss on Dickson’s rule, such as Beetz J, Cory J, et al., have affirmed the basic premise of that original ruling and clearly support Dickson’s earlier ruling. As Cory J underscored in PSAC, Dickson’s question for the reviewing court is clear: “was the Board’s interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?”74 What Cory underscored in PSAC is what all courts have looked at subsequently. In the case considered here where there has been dismissal without cause, I respectfully suggest that the board’s interpretation so construed as to reverse a principle which is imbedded in the legislation, is, on the surface of the matter, patently unreasonable. My suggestion is that the court ought to uphold the implicit ‘right

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74 PSAC at 954 quoting Dickson J. in CUPE at p. 237. Emphasis added.
of tenure’ employees have in accordance with the wishes of Parliament and collective agreements between the parties: keeping in mind the two noted exceptions of supervening inability and impossibility. What is just and what is correct under lines of jurisprudence are not always the same thing, and it is my suggestion that wherever the court can uphold the former and put aside the latter while staying within the bounds of Constitutional instruments, so they should.

Postcript

‘Right of Reinstatement’ is still a live issue in Canadian courts, but it remains a very weak instrument of justice due to the fact that the Courts are allowed to overturn reinstatements made by Arbitration Board adjudicators in a variety of fashions. In a recent case the court stated that reinstatement is not a right: Payne v. Bank of Montreal, 2013 FCA 33.

[86] In Atomic Energy of Canada Ltd. v. Sheikholeslami, 1998 CanLII 9047 (FCA), [1998] 3 F.C. 349 (C.A.) at para. 12, leave to appeal denied S.C.C. Bulletin, 1998, p.1399, the Court noted that adjudicators have full discretion to choose among the remedies listed in subsection 242(4) of the Code, including compensation and reinstatement. While reinstatement is not a right, in practice it is the remedy favoured by adjudicators for unjust dismissal, save for exceptional circumstances.

[87] Even given the degree of deference due to an adjudicator’s exercise of the broad remedial discretion conferred by the Code, the reasons given in this case do not, with all respect, provide a cogent justification for the decision to order reinstatement.

So, here again, we see an adjudicator’s decision, using the right of reinstatement as a legal, permitted, and just remedy for a Canadian citizen, being trumped by a higher court. Philosophically, the Canadian courts are no closer to making the right of reinstatement a true right for employed Canadian citizens than they were in Lethbridge. Only the most extreme of circumstances ought to negate this right of employment given how important it is for a citizen to keep their gainful employment and be able to pay their bills and live in a society that continues to see a widening in the gap between the very rich and the very poor. While it may be true that adjudicators have full discretion to choose reinstatement, the appeal courts also continue to have full discretion to overturn such decisions, even in cases where there is nothing like an extreme circumstance to negate it.
THE ENABLER, THE TRUE BELIEVER, THE FANATIC:
GERMAN JUSTICE IN THE THIRD REICH

The Honorable Stephen J. Sfekas
Associate Judge of the Circuit Court for Baltimore City

*Lawyers are attached to public order beyond every other consideration, and the best security of public order is authority. It must not be forgotten, also, that if they prize freedom much, they generally value legality still more: they are less afraid of tyranny than of arbitrary power; and, provided the legislature undertakes of itself to deprive men of their independence, they are not dissatisfied.*

--ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA

I. Introduction

What would we have done?

When I was young, I often wondered whether I would have had the courage, discipline, and skill to have crossed Omaha Beach, to have held out at Pegasus Bridge or Arnhem, or to have braved the cold and isolation at Bastogne. It is of course impossible to know how any of us would have responded, but millions of ordinary Americans, British, French, Polish, Russian, and other soldiers were able to accomplish these things, in large part because they had received training, matériel, and moral support of their armies, and the approbation of their societies.

The far more difficult question is what any of us would have done had we been lawyers or judges in the German legal system between 1933 and 1945. Would we have resisted the Nazi corruption of the legal system? Could we have found a way to resist injustice from within the system? We would hope that we would not have collaborated with the system or worse to have enabled it. However, once again, we can never know.

What we do know is that there was resistance to Nazi rule from members of other political parties, such as the ninety-four Social Democrats who voted against the Enabling Act (see discussion, *infra*), and from the White Rose student groups, the Confessing Church, the Kreisau Circle, the July 20 Conspiracy, and

the German Army, and the traditional aristocracy. Yet there is virtually no history of resistance from the German legal profession or judiciary.

This paper will explore the conduct in the Nazi era of three prominent members of the German legal system, Franz Schlegelberger, Kurt Rothenberger, and Oswald Rothaug; the enabler, the true believer, and the fanatic of the title. Each of these men was a defendant in the Justice Trial, the third of the twelve Nuremberg Military Tribunals. During the course of the trial, there was extensive documentation of each of their acts, and each of them testified in his own behalf before a panel of disinterested American judges. Although their testimony was self-serving, it gives powerful insight into the inner workings of the legal system under the Nazis, and the attitudes of its participants.

Schlegelberger would argue that he cooperated with the Nazis in what would ultimately be a vain effort to mitigate Nazi tyranny and to preserve the vestiges of judicial independence. Rothenberger was a committed Nazi with what would prove to be a naïve belief that Nazism was compatible with a rational legal system. Rothaug was a fanatical Nazi who would willingly use the legal system to persecute the victims of Nazism.

In Section II, this paper will introduce the three jurists and will outline the development of the German legal system to the end of World War II. Part III will describe the evidence concerning each man and the defense to the charges offered by each during the trial. Part IV will be a discussion of the quest for order which drove the three to the disastrous choices they made. Part V will be a meditation on justice based on the experiences of these three men.

II. THE GERMAN LEGAL SYSTEM

*JUSTICE IS THE SET AND CONSTANT PURPOSE WHICH GIVES TO EVERY MAN HIS DUE... THE PRECEPTS OF THE LAW ARE THEN: TO LIVE HONESTLY, TO INJURE NO ONE, AND TO GIVE EVERY MAN HIS DUE." JUSTINIAN'S CODE, DIGEST, TITLE I, BOOK I.*

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a. The German Judiciary Before the Third Reich

Franz Schlegelberger was the highest-ranking judicial official in the Justice Trial. His career offers a microcosm of the development of the German judiciary to the time of the trial. In 1933, Schlegelberger was fifty-nine years old. He had had a distinguished career as a judge, scholar, and justice official. His books were read around the world, and he had lectured on legal matters in a number of countries. As a Ministry of Justice official, he had played an important role in taming the hyperinflation of the 1920s. Although he was quite conservative, he was not a Nazi and had no history of extreme anti-Semitism.\(^3\) Fourteen years later, he would be convicted of war crimes and crimes against humanity, and he would be sentenced to life imprisonment.\(^4\)

Schlegelberger was born in 1874. Just four years before his birth, Prussia had defeated France in the Franco-Prussian War, and Prussia under Bismarck had reorganized all of the German principalities into the new German Empire. A year after the formation of the Empire, Germany adopted a penal code which has remained the basis for German criminal law from 1871 to the present day.

In 1877, the German judiciary was reorganized. From 1877, each German state, or Land, would have three court levels. The lowest level would be the Amtsgericht, or Petty Court, with jurisdiction over crimes with a penalty of less than five years imprisonment and smaller civil claims. The next level would be the Landgericht, or County Court, a general jurisdiction trial court, which had original jurisdiction over more serious crimes and larger civil claims. The County Court also heard appeals from the Petty Court. Each Land also had an Oberlandesgericht, or Court of Appeals, which served as an intermediate appeals court. Finally, at the national level there was the Reichsgericht, or Supreme Court, which could hear appeals from the Courts of Appeal from around the country.\(^5\)

Bismarck also changed the method of recruitment of judges to assure that the judiciary would remain conservative with a strong commitment to preservation of the German state.\(^6\) German law students in the judicial track (as a civil law country, German law students could choose to be on a practice track or a judicial


\(^4\) J.T., supra note 3, at 1087; HEller, supra note 2, at Appendix A.


\(^6\) MÜLLER, supra note 5, at 6–9.
track) would begin their careers by serving after graduation an unpaid training period of four years, as a probationary judge. After completion of training a probationary judge would become an assistant judge. However, neither a judge in training nor an assistant judge had tenure, so he could be dismissed at any time. The result of this system was that a prospective judge had to have some independent means of support through law school and training. Additionally, politically unreliable judges could be dismissed at any time before becoming tenured, fully qualified judges. Judges therefore tended to be chosen from among more affluent families, and left-leaning judges and Jews had difficulty reaching tenure.

Schlegelberger was a typical product of this era. He attended law school at the University of Leipzig, and on December 1, 1899, was awarded a doctorate of law. He took and passed his bar exam and entered the judiciary as an Assessor, the lowest civil service rank as a judge. In 1902 he became an assistant judge, and in 1904 passed his probation period and became a permanent judge in Berlin. He continued to serve as a judge until 1919 when he joined the Reich Ministry of Justice, where he remained until his resignation in 1942. From 1922 on, he served as a member of the Adjunct Faculty of the University of Berlin.

The period from the end of World War I to the Nazi seizure of power in 1933 was a difficult and traumatic period for Germany as a whole and for the judiciary in particular. By recruitment and temperament, the judiciary had been a bulwark of the Imperial German state. Although Imperial Germany was an authoritarian state, with only limited legislative authority vested in the Reichstag, it viewed itself as a Staatsgericht, or “constitutional state.” It protected property rights, respected the law, and had orderly procedures.

However, the world of the German judiciary was upended by World War I. In late 1918, the German army suffered a series of major defeats, and by October 1918 was beginning to crumble. Strikes broke out in Berlin and spread throughout the country. A mutiny in the German fleet led to the abdication of the Kaiser and the declaration of a republic. The Social Democratic Party

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7 J.T., supra note 3, at 289; 1081–82 (Schlegelberger Testimony and Trial Opinion).
8 MÜLLER, supra note 5, at 1–3; H.W. KOCH, IN THE NAME OF THE VOLK: POLITICAL JUSTICE IN HITLER'S GERMANY 8 (St. Martin's Press, 1989). The German legal system, like that of many other European systems, was based on the civil law. That is, it derived from Roman law as codified in the Code of Justinian. A key characteristic of the judiciary was the prevalence of positivism as the dominant legal philosophy, i.e. the dissociation of morality and law. Positivism of course was a logical attitude of a judiciary committed to the stability of the state, and positivism would later serve as an excuse for collaborative judicial conduct in the Nazi era.
(“SDP”) formed a new government, which sued for peace. The armistice was signed on November 11, 1918.9

Because the surrender was arranged for by the left-wing government, and not the army, the legend developed that the army had been “stabbed in the back” by a disloyal SDP. The “stab in the back” became a common belief in conservative circles, including the judiciary.10 The SDP had additional problems after the armistice. A radical faction, known as the Spartakusbund, broke off from the mainstream SDP in an attempt to form a Soviet republic. As the army by this time had disintegrated, the SDP relied upon right-wing paramilitary groups, the Freikorps, to defeat the Spartacists.11

A new German republic was established in the town of Weimar in 1919. The Weimar Republic was forced to agree to the humiliating terms of the Treaty of Versailles, which among other things called for the by-now destitute Germany to pay massive war reparations to France and Belgium,12 to accept exclusive guilt for starting the war,13 and to try the Kaiser and his supporters for war crimes.14 The Leipzig War Crimes Trials which followed were a fiasco, with many acquittals and many light sentences.15

The problems of the Weimar Republic did not end there. After another abortive left-wing uprising, there were two right-wing uprisings, one by a veteran named Kapp, known as the Kapp Putsch, and one by the newly formed National Socialist German Workers’ Party (“NSDAP” or Nazi Party for short) in 1922. All three of these revolts were easily suppressed. However, the left-wing radicals received lengthy sentences and, in a pattern which would continue through the end of the Republic, the right-wing radicals got lenient sentences. As an example, Adolf Hitler served a short sentence in a minimum security prison, where he wrote Mein Kampf.16

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10 KOCH, supra note 8, at 19–20; EYCK, supra note 9, at 121-23.
11 EYCK, supra note 9, at 78-79; IAN KERSHAW, HITLER: 1889-1936, HUBRIS 111 (2000).
12 See Treaty of Versailles, Pt. 8, § 1, Art. 232 and Annex I.
13 Id. at Pt. 8, § 1, Art. 231 (the “War Guilt Clause”).
15 TUSA & TUSA, supra note 2, at 242–68.
16 MÜLLER, supra note 5, at 12–14.
In 1923, in a dispute over reparations, the French Army invaded the Ruhr River valley, and the German government adopted a policy of hyperinflation. The hyperinflation, which reached absurd levels, destroyed all savings and erased all debts denominated in Marks. Schlegelberger helped work out currency reform, which helped bring the inflation under control. However, by 1923, the new republic was associated with the “stab in the back” armistice, a military defeat, a humiliating peace treaty, abortive war crimes trials, revolts from the left and the right, and economic mismanagement which wiped out savings and the accumulated wealth of the middle class. There could hardly have been a less auspicious start to the new democracy.

After the onset of the Great Depression in 1929, Germany suffered from massive unemployment and deflation. The Nazi Party began to grow, and the German political system began to fragment. From 1931 on, Germany engaged in a series of inconclusive elections punctuated by increasing street violence between Nazi para-military units, the Sturmbteilung (the SA, sometimes referred to as the Storm Troopers), and Communist militias. On January 30, 1933, President Paul von Hindenberg, to break the political impasse, appointed Hitler to be the new Chancellor, i.e., chief of government, of Germany.

During the Weimar Republic, the German judiciary, long dedicated to the preservation of the German state, developed an adversarial relationship with the Republic. It was increasingly called upon to deal with political questions because of the political impasse, and had to adjudicate the fate of putative revolutionaries from the left and right. It also experienced a loss of wealth during the hyperinflation, and a loss of income after the beginning of the depression as the government imposed austerity measures.

b. The German Legal System under National Socialism 1933-1939

“I sit in one of the dives
On Fifty-second Street
Uncertain and afraid
As the clever hopes expire
Of a low dishonest decade;…”
September 1, 1939, W.H. Auden

17 J.T., supra note 3, at 286 (Schlegelberger Testimony).
19 KERSHAW, supra note 11, at 431.
20 KOCH, supra note 8, at 10–12; MÜLLER, supra note 5, at 14–24.
Very few German judges in 1933 were members of the Nazi Party. However, the judges clearly were primed to accept a nationalist alternative to the Weimar government, particularly if the nationalists came to power with some semblance of legality. As the Nazi takeover took place formally by legal means (although accompanied by massive street violence and intimidation by the SA) rather than by military coup or violent overthrow, the German judiciary was able to rationalize its acquiescence to the Nazi ascension to power.\(^{21}\)

After President von Hindenberg appointed Hitler to be Chancellor of Germany on January 30, 1933, Hitler formed a cabinet which mostly consisted of members of nationalist conservative parties. However, the Nazis took control of the interior ministry, which included the police and security services. Hitler then called for a new election to take place in March of 1933.\(^{22}\)

On February 28, 1933, after a fire broke out in the Reichstag building in Berlin, Hitler induced President von Hindenburg to invoke Article 48 of the Weimar Constitution,\(^{23}\) a provision which permitted the suppression of civil liberties in the event of a national crisis, alleging that the fire was an effort by the Communists to stage an uprising. Article I of the decree reads:

> Articles 114, 115, 117, 118, 123, 124 and 153 of the Constitution of the German Reich are suspended until further notice. Thus restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press, or the right of assembly and the right of association and interferences with the secrecy of postal telegraphs, and telephone communications, and warrants for house searches, orders for confiscations as well as restrictions on property, are also permissible beyond the legal limits otherwise prescribed.\(^{24}\)

Under this provision (repealed only in 1945 by Allied Control Council Law No.1)\(^{25}\) the Nazis commenced a reign of terror during the election campaign. The SA physically intimidated the opposing political parties and broke up

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\(^{21}\) MÜLLER, supra note 5, at 35-39.

\(^{22}\) KERSHAW, supra note 18, at 439.

\(^{23}\) Art. 48, § 2 reads: “Where public security and order are seriously disturbed or endangered within the Reich, the President of the Reich may take measures necessary for their restoration, in intervening in the case of need with help of armed forces. For this purpose he is permitted, for the time being, to abrogate either wholly or partially the fundamental rights laid down in Articles 114, 115, 117, 118, 123, 124 and 153.”

\(^{24}\) J.T., supra note 3, at 160 (Reichsgesetzblatt, pt. I, at 83, 28 February 1933).

campaign events with impunity. The police arrested all of the Communist members of parliament and suppressed all Communist party activities. The police also arrested or threatened with arrest members of the Social Democratic Party and the Center Party (the Catholic Party).26

Despite all of this the NSDAP received only 43% of the vote. However, with other Nationalist parties the Nationalist vote comprised over 50% of the total vote. The Nazis therefore had a working majority in the Reischtag.27

However, it was not Hitler's intention to serve as a conventional Chancellor, even with a working majority. The Nazis proposed an Enabling Act which would amend the Weimar Constitution to allow Hitler to rule by decree. However, a constitutional amendment required a two thirds majority of the Reichstag. Hitler got his two thirds majority by arresting all of the Communist members of the Reichstag so that they could not vote. Next he sought to intimidate and coerce the Center Party into voting for the Enabling Act. He secured their votes after his government signed a concordat with the German Catholic bishops guaranteeing them autonomy in clerical matters.28

On March 24, 1933, the Reichstag voted by 444 to 94 to pass the Enabling Act.29 The 94 opposing votes were cast by the remaining Social Democratic members of the Reichstag. Thus ended democracy in Germany until 1945.

The Enabling Act authorized Hitler to rule by decree and to depart from the provisions of the Weimar Constitution so long as he did not abolish the Reichstag or reduce the power of the President. (Hitler assumed the office of President himself shortly thereafter.)30 Although the Reichstag was never abolished, from March 24, 1934, it ceased to function as a legislative body.

26 See Kershaw, supra note 11, at 459-60.
27 Id.
28 Id.
29 Id.
30 The Enabling Act reads in part:
The Reichstag has decreed the following law, which is hereby promulgated in agreement with the Reich Council after it has been established that the prerequisite of legislation changing the constitution have been fulfilled.
Article 1. Laws of the Reich can be decreed, apart from the procedure provided by the constitution of the Reich, also by the government of the Reich. . . .
Article 2. The laws decreed by the government of the Reich may deviate from the constitution of the Reich as long as they do not concern the institution of the Reichstag and the Reich Council as such. The rights of the Reich President remain untouched. . . .
Article 5. This law comes into force on the day of its promulgation. It will become invalid on April 1, 1937; it will further become invalid if the present government of the Reich will be
Thus, between January 30 and March 24, all civil liberties had been suspended, the Constitution had been amended to let Hitler rule by decree, one of the major political parties had been suppressed, and the two remaining democratic parties were under enormous pressure.

Two weeks later, on April 7, two decrees were issued. One of them expelled "Non-Aryans" (i.e., Jews) and political undesirables from the professional civil service. The other provided that:

The admission [to the Bar] of attorneys who, according to the Law for the Restoration of the Professional Civil Services of 7 April 1933, are of non-Aryan descent, may be revoked before 30 September 1933.

The provision of paragraph 1 does not apply to attorneys who were already admitted on 1 August 1914, or who, during World War I, fought for the German Reich or her allies or whose fathers or sons were killed in action in World War I.31

At the time, Jews were permitted to become lawyers, although other professions were closed to Jews. Thus 22% of all of the lawyers in Germany were Jewish. Up to 60% of the attorneys in the Berlin Bar were Jewish. As a result of this law, 1,500 of the 4,400 Jewish lawyers were disbarred immediately.32 Over the next several years, no Jews were admitted to the Bar and because of forced emigration, discriminatory law, and political persecution, by the time of the outbreak of war, the legal profession and the judiciary had been purged of their Jewish members. There was no significant opposition to this purge from the organized bar or the judiciary.33

If Schlegelberger was a product of the pre-Nazi legal system, Kurt Rothenberger, the True Believer, was an agent for its Nazification. Rothenberger was born in 1896. After his service in the German Army during World War I, he studied law. By the late 1920s, he had begun a relationship with local Nazi leaders in the Hamburg region, although he did not join the Party until May of 1933. In 1929, he spent eight months in Great Britain studying the British legal system.34 Rothenberger was part of a coterie of Nazi lawyers who wished to transform the

31 J.T., supra note 3, at 164-65 (Berlin, 7 April 1933, Reichsgesetzblatt, pt. I, at 188). The translated text refers to “World War I.” The original German would likely have referred to the war by a different name, such as the “Great War.”
32 MÜLLER, supra note 5, at 59-62.
33 Id.
34 J.T., supra note 3, at 490, 493.
German legal system into an instrument of Nazi control. This group included Hans Frank, who would be convicted of war crimes and crimes against humanity in the International Military Tribunal, and the two most notorious jurists during the war, Roland Freisler and Otto Thierack. At the time of the Nazi seizure of power, Rothenberger was the President of the Hamburg Senate—that is, he was the equivalent of the Minister of Justice at the Land level.

Rothenberger actively participated in the purge of Jewish and Social Democratic lawyers and judges in the Hamburg area. After he joined the Party, he became the Gauleiter (political officer) for the National Socialist Jurists’ League. During the 1930s, he served both as a court administrator and as a judge in Hamburg.

In July 1933, less than 5 months from the emergency degree, all political parties other than the NSDAP were banned. Later that year, the Land governments were deprived of their authority, and power was centralized into the national government.

On February 16, 1934, the judiciary was reorganized by centralizing the judiciary on a national basis and eliminating the Land as a part of the judicial organization. All of the Courts were integrated into a national court system which would be under the Reich Ministry of Justice. All appeals would now bypass the former Land Appellate Courts and would go directly to the Reich Supreme Court. There was no resistance to any of these measures by the German judiciary.

One of the peculiar features of the Nazi regime was its frequent creation of parallel and competing organizations with similar functions to existing governmental institutions. Most frequently the parallel organization was a branch of the SS or of a new government agency controlled by the Nazi Party competing with a traditional governmental organization. Two such organizations were created in the judicial arena early in the regime, the Special Courts and the People's Courts. Indeed, many of the defendants in the trial were either judges of the People's Courts—e.g., defendants Rothaug, Barnickel, Nebelung, Lautz, Engert, and Petersen—or were judges of the Special Courts—e.g., defendants Oeschy and Rothaug. (Rothaug served on each of these courts at different times.)

36 J.T., supra note 3, at 1107.
37 J.T., supra note 3, at 988.
38 As examples, the Gestapo and the ordinary police, and the Waffen SS (that is, the military SS) and the Wehrmacht.
The Special Courts were created by decree on March 21, 1933, originally as a part of the judicial system of the Land before the centralization of the judiciary. These courts had jurisdiction over crimes arising under the Emergency Decree or against any decree involving internal subversion. This court ran parallel to the ordinary courts, however no appeal was allowed from a decision of the Court. As the Nazi era continued, more and more acts were defined as internal subversion so there was a migration of cases from the regular criminal courts to the Special Courts. The Special Courts each were to have three judges, but as newly created courts, the new regime was able to choose the judges for the Special Courts. Most of its judges were Nazis or Nazi sympathizers.

The People's Courts were established by a decree on April 24, 1934, with exclusive jurisdiction over cases of high treason and treason. However, the definitions of high treason and treason were regularly extended during the Nazi era so that a substantial number of ordinary criminal cases were transferred to the People's courts. The People's Court also acquired exclusive jurisdiction over cases involving plots against Hitler, and therefore was the court which tried the July 20 plotters. Obviously, there was substantial overlap in the jurisdiction of the People's Court, the Special Courts, and the ordinary criminal courts. A People's Court consisted at the beginning of five members, two of whom were professional judges and the other three typically Nazi Party officials, members of the SS and Army officers. Once again no appeal was permitted to a decision of the People's Court.

The legal profession was also reorganized in the early Nazi years. The German Federation of Judges was folded into the Federation of National Socialist Jurists. New judges had to swear a personal oath to Hitler: “I swear I will be loyal and obedient to the Fuehrer of the German Reich and people, Adolf Hitler, to adhere to the law, and to fulfill the duties of my office conscientiously so help me God.”

Similarly, lawyers were required to swear an oath of obedience to the Fuehrer as well. Indeed, in October 1933, at an open-air rally over 10,000 German lawyers

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39 J.T., supra note 3, at 222-25.
40 Id.
41 J.T., supra note 3, at 231-33.
42 On July 20, 1944, an attempt was made by a large group of Wehrmacht officers and prominent citizens, to assassinate Hitler and stage an anti-Nazi coup. Hitler survived the bomb, and the coup was suppressed.
43 J.T., supra note 3, at 232-33.
took an oath to Hitler. Law students henceforth would be trained in the “National Socialist Conception of Law” and upon graduation would swear an oath to Hitler. The new lawyer, before being admitted to practice, would also have to pass a character test mostly oriented towards the applicant’s commitment to National Socialism. This notion of a “National Socialist Conception of Laws” would prove to be a major theme during Rothenberger’s career, as we shall see.

One of the emerging National Socialist concepts of law was contained in a decree of June 28, 1935, authorizing judges to decide cases “by analogy”:

Article 2. Whoever commits an act which the law declares as permissible or which deserves punishment according to the fundamental idea of a penal law or the sound sentiment of the people, shall be punished. If no specific penal law can be directly applied to the act, it shall be punished according to the law whose underlying principle can be most readily applied to the act.

Article 170a: If an act deserves punishment according to the sound sentiment of the people, but is not declared punishable in the law, the prosecutor will examine whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by analogous application of that penal law.

Article 267a: If the trial shows that the defendant has committed an act which deserves punishment according to the sound sentiment of the people, but is not declared punishable by the law, the court will examine whether the underlying principle of a penal law applies to the act and whether justice can be helped to triumph by analogous application of that penal law.

This same law also authorized the Reich Supreme Court to ignore its own precedents, and it authorized the prosecution to enter a “nullity plea”—that is, a motion to set aside a lower court ruling or sentence for not being sufficiently harsh—and the extraordinary plea, which authorized a prosecutor to petition to set aside a verdict of acquittal in a criminal case within one year if he thought the acquittal was unjust.

By this law, the German judiciary, which had been committed to a judicial philosophy of positivism, became utterly untethered to the law. From this

45 Müller, supra note 5, at 38.
46 J.T., supra note 3, at 176.
47 J.T., supra note 3, at 405-06, 410-11.
moment on, the German prosecutors and judges in fact could find a person guilty of an offense which was not a crime, could sentence a Defendant to a term in prison derived from an analogous crime, and could retry a person already acquitted of a crime.

Oswald Rothaug, the Fanatic, would make regular and brutal use of law by analogy during his tenure as a judge. Rothaug was born in 1897. Although roughly the same age as Rothenberger, Rothaug was the culmination of the Nazification of German justice rather than its implementer. He studied law after his service in World War I, and passed the equivalent of the bar exam in 1925. From 1925-37, Rothaug served variously as a prosecutor and counsellor to various courts in Nuremberg. From 1937-43, he served as a judge of the People’s Court and Special Court in Nuremberg. He joined the Nazi Party in 1938, but had already been a member of the National Socialist Jurists League and the National Socialist Public Welfare Association. Throughout his tenure as a judge, he maintained a close relationship with the Sicherheitsdienst, or “SD,” the secret security and intelligence arm of the SS. Rothaug, unlike Schlegelberger or perhaps even Rothenberger, was a virulent racist who loathed Jews and Poles.48

Several months after the law by analogy decree, the so-called Nuremberg laws were promulgated, which changed the status of Jews in Germany. Rothaug would ultimately preside over the most famous trial under the Nuremberg race laws.49

The Law for the Protection of German Blood and Honor50 prohibited marriages and sexual relations between Jews and "German nationals of German or related blood." The law also forbade Jews from employing any German nationals in the home unless the German was at least 45 years old. A companion law limited German citizenship to persons of "German or German related blood," thereby denying Jews the rights or protection of citizens. The law contained detailed definitions of who would be considered a Jew for purposes of the law.51

After the Nuremberg race purity laws were passed, race, as defined in Germany, became a decisive factor in all legal dealings involving Jews. As an example, at Rothenberger’s insistence, race even became a defense in debt collection cases;

48 J.T., supra note 3, at 1143-45. See discussion infra.
49 See discussion infra.
50 J.T., supra note 3, at 180.
51 Id.
Jews were denied the right to proceed in forma pauperis in civil matters;\textsuperscript{52} race rather than conduct dominated criminal proceedings.\textsuperscript{53}

One of the most striking features of the judiciary between the Nazi takeover and the war was the degree to which the legal profession and judiciary embraced the Nazi Program. Returning once again to Schlegelberger, who it should be recalled was not a Nazi until involuntarily enrolled in the Party in 1938, Schlegelberger gave a speech at the University of Rostock on March 10, 1936, in which he stated,

In the sphere of criminal law the road to a creation of justice in harmony with the moral concepts of the new Reich has been opened up by a new wording of section 2 of the criminal code, whereby a person is also (to) be punished even if his deed is not punishable according to the law, but if he deserves punishment in accordance with the basic concepts of criminal law and the sound instincts of the people. This new definition became necessary because of the rigidity of the norm in force hitherto.\textsuperscript{54}

Rothenberger and Rothaug for their parts used their Nazi connections and their participation in Nazi activities to rise rapidly in government and Party leadership circles. Rothenberger became State Secretary for the Ministry of Justice after Thierack replaced Schlegelberger in that role in 1942, and Rothaug achieved prominence as a Judge in Nuremberg.

There are other examples of distinguished, non-Nazi judicial officials endorsing Nazi legal doctrines and principles.\textsuperscript{55} More to the point, however, was the general acquiescence of the judiciary to the Nazi legal revolution, and lack of any visible protest to any of the changes in the law.\textsuperscript{56}

\textsuperscript{52} J.T., supra note 3, at 642, 1113-14.
\textsuperscript{53} Race in the German conception distinguished among groups which Americans would not define in racial terms, e.g. Jews, Poles, Russians etc. were viewed as inferior "races." The American conception views race largely in terms of color. However, American race laws, like German ones, frequently forbade intermarriage, although not sexual relations, between races and often included race definitions. See Loving v. Virginia, 388 U.S. 1 (1967).
\textsuperscript{54} J.T., supra note 3, at 1082.
\textsuperscript{55} MÜLLER, supra note 5, at 39-45, 70-72.
\textsuperscript{56} Indeed, Ingo Müller argues that he has only found one instance of judicial resistance to Nazi law. Dr. Lothar Kreyssig, a judge in a Guardianship Court, was removed from his judgeship because of his active role in the Confessional Lutheran Church which had resisted Nazi rule, and because he would not give the Nazi salute. He later was reinstated, but got into trouble again when he learned that persons with disabilities under his jurisdiction were being euthanized. He launched an investigation and issued an injunction against the practice. He wrote letters to the Ministry of Justice protesting against the treatment of persons who were mentally ill and also objecting to the use of concentration camps for any purpose. When he was ordered to desist, he
Finally, and significantly, the one legal value which at least some in the judiciary were willing to fight for was judicial independence, and Hitler initially promised that the judiciary would remain independent. In fact, judicial independence would not finally disappear until August 1942.

All these changes in practice reflected a basic shift in German jurisprudence during the Nazi era. German law, like all civil law systems, had been based on legal principles derived from Roman law. As the purpose of the criminal law in particular was to modify the behavior of its citizens so that proscribed acts were punished or deterred and mandatory acts performed, Roman law, and hence German law, required that laws be published, that they be applied equally among people similarly situated, that they not be applied retroactively, that trials be fair and impartial, and that trials follow rational procedures.

The new German jurisprudence operated on wholly different presumptions. The actual conduct of the individual was of less importance than his or her status. Fair process would be subordinate to the needs of the state or to the racial needs of the German people. A clear expression of the new jurisprudence was given in a speech by Joseph Goebbels before the judges of the People’s Court in July 1942. In the summary of the speech prepared for the Ministry of Justice, Goebbels is quoted as saying:

The idea that the judge must be convinced of the defendant’s guilt must be discarded completely. The purpose of the administration of the law was not in the first place retaliation or even improvement, but maintenance of the state. One must not proceed from the law, but from the resolution that the man must be wiped out.57

This notion that one must no longer proceed from the law but the man must be wiped out was increasingly prevalent during the peacetime Nazi years, but became dominant after the outbreak of the war.

c. The German Legal System, 1939-1945

"Such decrees [unjust laws] are not so much laws as acts of violence, because as Augustine says, 'An unjust law does not seem to be a law at all.'

St. Thomas Aquinas

refused and instead resigned as judge. Thereafter, rather than being punished for his actions, he received his full pension and was allowed to live in peace. Id. at 193–95.

57 J.T., supra note 3, at 453 (Summary by Dr. Crohne of the Reich Ministry of Justice concerning Goebbels’s speech to the members of the People’s Court, 22 July 1942).
The Minister of Justice from 1933–1941 was Franz Gürtner. Had he not died in 1941, he would likely have been in the dock in 1947 rather than Schlegelberger. However, upon Gürtner’s death, Schlegelberger who was the deputy Minister for civil affairs, became the acting Minister of Justice. Schlegelberger’s tenure became a constant struggle between the judiciary, the Gestapo, the SS, and the Nazi Party for control of the legal process, a struggle which the judiciary would lose badly in 1942.

By Schlegelberger’s own account, much of his conduct as Minister of Justice was part of a strategy to maintain some semblance of judicial independence, and the Tribunal ultimately concluded that there was some substance to Schlegelberger’s position. However, Schlegelberger was intimately involved in two brutal developments in German law during the early war years, specifically the “Penal Law against Poles and Jews” and the “Night and Fog Decree.” These two laws would ultimately form the bases for the charges and convictions of Schlegelberger, Rothenberger, Rothaug, and others.

In addition to these two decrees, there was a third major development which became particularly important after Schlegelberger’s resignation in 1942. At the beginning of the war Germany adopted a series of wartime measures, which in some cases were comparable to the laws passed by other belligerent powers. As an example, Germany adopted laws to prohibit hoarding, to control the black market, to prohibit abuse of blackout restrictions as by nighttime burglaries, and to prevent the interference with military recruitment. However, there were additional laws to prohibit listening to foreign radio broadcasts, to make comments disparaging Hitler or the Nazi Party, or to damage the morale of soldiers.

During the course of the war, and particularly as Germany’s military situation deteriorated, violations of these laws increasingly became the province of the People’s Courts and the Special Courts which turned these laws into vehicles to terrorize and intimidate opponents of the regime. The administration of these laws became a third ground for the post-war prosecution.

58 J.T., supra note 3, at 292-99.
59 J.T., supra note 3, at 1083-1086 (Schlegelberger); 1110-1118 (Rothenberger); 1143-1156 (Rothaug).
60 J.T., supra note 3, at 182, 184-86, 187-89, 192-93.
1. The Law against Poles and Jews

“... a Pole is less sensitive to the imposition of an ordinary prison sentence.”

Franz Schlegelberger.

The war began on September 1, 1939 with the German invasion of Poland. Several weeks after the invasion, the Soviet Union by agreement with the Germans invaded Poland from the East. Despite a heroic defense, Poland was badly defeated by early October. Britain and France declared war on Germany on September 3, 1939, but offered no significant assistance to the Poles.

Poland was partitioned between the Germans and Soviets. Part of German-occupied Poland was organized into the “Government General,” where military law would apply. The parts of Poland contiguous to Germany were annexed to Germany and became known as the “Incorporated Eastern Territories.” The Law Against Poles and Jews was issued to provide the legal framework for the administration of the Incorporated Eastern Territories.61

This law was adopted at least in part because of Rothaug’s conviction that existing law was too lenient to Jews and had gaps in its application to Poles. Although, as we shall see, Rothaug would make creative use of law by analogy to enable persecution of Poles and Jews, he wanted to have clear authority to do so. Rothaug successfully urged his contacts in the Ministry of Justice to adopt a law addressing the new circumstances.62

The law had two major themes. First, in the new regime, Poles would be reduced to a docile permanent underclass who would support the spread of German settlement in Eastern Europe and over time be eliminated. Thus, the law as to Poles would be applied harshly to break the spirit and establish German domination, but would not seek to eliminate the Polish population in the short run.63 Second, the goal would be to eliminate the massive Jewish population of

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61 J.T., supra note 3, at 598-601.
62 J.T., supra note 3, at 373.
63 Richard J. Evans, The Third Reich in History and Memory 173, 370-72 (2015). The Poles were to be eliminated in the medium- to long-run to permit German colonization of Eastern Europe and to divert food production to Germany. Tooze notes that German policy was to starve Polish and other Eastern European urban areas to reduce the number of people to be fed by 20-30 million people. The Holocaust and the starvation of Russian POW’s was a first installment. See TOOZE, supra note 18, at ch. 14. The author’s great grandmother died of starvation in the Greek famine of 1942.
Poland. However, the law was not applied to Jews after 1943 because of the ghettoization and ultimate extermination of the Jewish community.\textsuperscript{64}

As the acting Minister of Justice, Schlegelberger was called upon to draft a law governing the administration of justice in Poland, and he in fact personally prepared the draft which ultimately became the law. In his cover letter transmitting the draft to the Reich Minister and Chief of the Reich Chancellery, Hans Heinrich Lammers (himself later tried and convicted of war crimes in NMT XII, the Ministries Case), Schlegelberger laid out the policy rationale for the law:

\textit{...a Pole is less sensitive to the imposition of an ordinary prison sentence. Therefore, I had taken administrative measures to ensure that Poles and Jews be separated from other prisoners and that their punishment be rendered more severe...} In my opinion, a special penal law against Poles and Jews in such a form would neither restrict the liberty of action of German officers and officials, nor allow Poles and Jews to profit from its administration insofar as they would be able to lodge unwarranted actions and complaints against German officials. Factual penal law provides for such an increase in severity in the penalties threatened that these will act as the strongest possible deterrent. Any hole in the law through which a Polish or Jewish criminal might slip is also closed. In the sphere of criminal proceedings, the draft clearly shows the difference in the political status of Germans on one side and Poles and Jews on the other.\textsuperscript{65}

In a portion of the letter, utterly without irony, Schlegelberger rejected the use of corporal punishment against Poles and Jews: “I cannot agree to this form of punishment as in my judgment it would not correspond to the level of civilization of the German people.”\textsuperscript{66}

The law itself provides substantively that Poles and Jews would be subject to the death penalty for any of the following activities:
1. Any act of violence against a German;
2. Manifesting any anti-German sentiment by making anti-German comments or defacing or removing official notices or lowering the prestige of the German people.

The sentence would be death or imprisonment for any of the following:

\textsuperscript{64} J.T., supra note 3, at 685-86.
\textsuperscript{65} J.T., supra note 3, at 611–13 (Letter, Schlegelberger to Lammers, 17 April 1941).
\textsuperscript{66} Id. at 615.
1. Any act of violence against any member of the German armed forces, police, or any agency of the Nazi Party whether the victim was German or not;
2. Causing damages to any installation of the German government or the Nazi Party;
3. Soliciting any person to disobey any decree or regulation;
4. Conspiring with or aiding or abetting anyone in the violation of this decree;
5. Possession of any weapon;
6. Committing any other act contrary to “fundamental principle of German law” or contrary to the interest of the German state.

The death penalty was made mandatory for any act for which death was the only penalty. A schedule of prison terms ranging from three months to ten years was prescribed where imprisonment was an option. However, “. . . in those cases where the law does not provide for the death penalty, it shall be imposed if the act shows a particularly base attribute or is particularly serious for other reasons . . .” The minimum penalties could not be reduced unless the crimes were committed against a fellow Pole or Jew. The law also changed the procedures available to a Polish or Jewish defendant:
1. The cases would be brought before the Special Courts in most cases.
2. All sentences, including the death penalty, would be carried out without delay.
3. The prosecutor could appeal a decision, but the defendant had no right to appeal.
4. Poles and Jews had no right to lodge a criminal complaint.
5. Poles and Jews had no right to ask for recusal for bias of a German judge.
6. Poles and Jews could not be sworn in as witnesses. However, even if unsworn, they could be prosecuted for perjury or false statements.
7. Although proceedings would be conducted in accordance with the German Law of Civil Procedure, the court was free to depart from the established rules when appropriate for the rapid and efficient conduct of proceedings.

The Law allowed the governor of the Incorporated Eastern Territories, to impose martial law and to try Poles and Jews before civilian court-martials, or to

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67 The provision of this law forbidding the swearing in of Poles or Jews as witnesses, while retaining penalties for perjury, would seem to be contradictory. However, the purpose of the provision was to discourage the calling of Poles or Jews in any case involving a German and to receive such testimony only with the utmost caution. J.T., supra note 3, at 668 (Letter from Reich Ministry of Justice to Presidents of District Courts of Appeal, August 7, 1942, signed by Freisler).
defer trial indefinitely and to refer the case directly to the Gestapo. Finally, Poles and Jews were forbidden to file civil cases. In January, 1942, a subsequent decree was issued over Schlegelberger’s signature making this law retroactive.

On July 1, 1943, a new decree was issued which deprived Jews of any right to a trial at all and turned any Jew accused of a crime over to the police for processing. The Jew’s property would be confiscated upon his death. Thus, the Law against Poles and Jews would no longer apply to Jews. This change in the law reflected the official adoption of the so-called Final Solution, that is, the systematic murder of the entire Jewish population in the occupied territories of Europe.

The Justice Tribunal estimated that 61,836 persons were convicted under the Law against Poles and Jews in the year 1942 alone.

**b. The Night and Fog Decree**

By 1941, resistance movements had sprung up in a number of occupied countries, and the German Army was struggling to find a solution to the growing problem of maintaining control of the occupied territories. Hitler instructed the German Army to implement a program whereby suspected resisters would disappear into the “Night and Fog.” (The German phrase used was “Nacht und Nebel” so that the program in the transcript was variously referred to as Night and Fog, Nacht und Nebel, or “NN.” This paper will use “Night and Fog.”)

The Night and Fog Decree was issued on December 7, 1941, at Hitler’s direction by Field Marshal Wilhelm Keitel, who was the Chief of the Supreme Council of the Armed Forces. (Keitel himself would be tried by the IMT and found guilty of war crimes, crimes against humanity, crimes against the peace, and conspiring to commit crimes against the peace. He would be executed in 1946.)

The decree provided that in circumstances in which the trial of a member of the resistance could not be dealt with within one week of arrest, the resistor would be transferred to Germany for trial. The defendant’s family and acquaintances would not be informed of his or her fate, would be allowed no contact or correspondence with the person, nor be informed of his or her location. If the person died, either of natural causes or execution, the family members would not

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70 See J.T., supra note 3, at 685-86 (1943 Reichsgesetzblatt, pt. I at 372).
71 J.T., supra note 3, at 683, 1079.
be informed. If the defendant wrote a will or a farewell letter, the document would not be delivered until the war’s end. As no foreign witnesses would be allowed to testify in court to preserve secrecy, the defendant essentially had no ability to call witnesses on his own behalf. The defendant would have the right to counsel in capital cases (the great majority of cases), but the choice of counsel would be made by the court with permission of the prosecutor. The proceedings would be conducted in German with no provision for interpreters.\footnote{See J.T., supra note 3, at 774–81 (Night and Fog Decree, December 7, 1941). See also id. at 794-97 (Secret Instructions of Reich Ministry of Justice to Prosecutors and Judges concerning measures to maintain secrecy in Night and Fog cases. March 6, 1943).}

The decree was made applicable in all cases involving:
1. Assault with intent to kill;
2. Espionage;
3. Sabotage;
4. Communist activity;
5. Crimes liable to create disorder;
6. Favoring of the enemy by smuggling people into a country, enlisting in an enemy army, or support of members of an enemy army such as by harboring parachutists; and
7. Illegal possession of weapons.\footnote{Id. at 778–79.}

Although the decree was applicable to all of the occupied territories, it in fact was primarily directed at the west European occupied countries with the exception of Denmark, i.e., France, Belgium, the Netherlands, Luxemburg, and Norway.\footnote{See J.T., supra note 3, at 788-89 (Memorandum of Defendant Von Ammon to Defendant Rothenberger 9 and 26 December 1942 concerning Night and Fog cases).}

Although Keitel was a Field Marshall of the Wehrmacht and overall commander of the German armed forces, the legal staff of the German Army was not enthusiastic about this decree or the program it created.\footnote{See, e.g., J.T., supra note 3, at 797 (File Note of Defendant Von Ammon, 7 October 1943); id. at 806 (Testimony of Rudolf Lehman).} The question arose as to whether the trials under the decree should be courts martial under the auspices of the army, or summary proceedings by the Gestapo, or trial by the judiciary.\footnote{See J.T., supra note 3, at 805-08 (Testimony of Rudolph Lehmann, Chief of the Legal Division of the German Armed Forces).} The army did not want the program itself and did not want to give it to the Gestapo.\footnote{See J.T., supra note 3, at 1040.} Accordingly, Rudolf Lehmann, the Chief of the Legal Division
of the Armed Service approached Roland Friesler, who at that time was deputy minister in charge of the criminal division of the Ministry of Justice (and who afterwards became the most notorious of the judges of the People’s Courts), and asked if the Justice Ministry would take on the responsibility for the Night and Fog cases. Friesler himself was not enthusiastic about the program and asked Schlegelberger, the acting Minister, whether the civilian judiciary should take on the cases.\textsuperscript{78}

Schlegelberger testified that he agreed to take the Night and Fog program in order to keep the prisoners out of the hands of the Gestapo where they would have been denied any possible legal process and would have been treated harshly. In his own words:

\begin{quote}
The provisions regarding secrecy had to be made so that the matter would not be taken out of the hands of Hitler. I was faced with the problem as to whether I should refuse to take over the NN [Night and Fog] cases altogether, and the Tribunal will recognize that would have been very simple for me. I could have held the position that as far as my department was concerned that I had nothing to do with the matter and therefore could reject it or have anything to do with it. But I could not take the responsibility to assist, to contribute, that the Hitler order he carried out and that the NN prisoners remain in the custody of the police.\textsuperscript{79}
\end{quote}

Freisler on behalf of the Ministry of Justice assigned the cases to the Special Courts, see discussion \textit{supra}. During the period during which Schlegelberger remained as acting Minister, the courts did in fact function within the minimal procedural guarantees of German law. However, after Schlegelberger’s resignation in 1942, Otto Thierack, a committed Nazi, became Minister of Justice, and the policy towards the Night and Fog defendants changed.

First, the People’s Courts acquired concurrent jurisdiction with the Special Courts over Night and Fog cases. The People’s Courts were even more ideological and harsher than the Special Courts.\textsuperscript{80} Second, Thierack developed a new practice with respect to defendants. If a defendant were executed or given a long sentence, he would be sent to a concentration camp in police custody to have the penalty carried out. However, if he or she were acquitted or nolle

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{See J.T., supra} note 3, at 871 (Schlegelberger Testimony). \textit{See also J.T., supra} note 3, at 808-15 (Schlegelberger Testimony).

\textsuperscript{80} \textit{See J.T., supra} note 3, at 818-19 (Testimony of Defendant Von Ammon).
prosequi, or if the defendant had been given a short sentence which had expired, the defendant would not be released, but would instead be turned over to the Gestapo to be held, presumably in a concentration camp, but under a lower security level, until the end of the war. Thus, regardless of the result of the trial, the defendant would likely end up in police custody in a concentration camp, albeit in a slightly less harsh confinement if the defendant were innocent or had served out his or her term.\textsuperscript{81}

To this day there are no accurate calculations of the total number of Night and Fog victims primarily because few records were kept. An internal report in 1944 concluded that there were 8,369 persons in custody at that time. However, that number is clearly an underestimate of the total number of victims. Very few survived the war.\textsuperscript{82}

One can get a flavor of the actual application of German law by looking at two cases which led in part to Rothaug’s conviction by the Tribunal.\textsuperscript{83}

The first of these was the trial of Leo Katzenberger and Irene Seiler, one of the most famous cases of the Nazi era.\textsuperscript{84} Leo Katzenberger was a wealthy Jewish businessman in the City of Nuremberg in the 1930’s. He later became the most prominent leader of the Jewish community of that city. In the early 1930’s, he had promised Irene Seiler's father, a non-Jewish German who was a close friend of Katzenberger, to help Irene Seiler, after she moved to Nuremberg and set up a photography shop. Katzenberger and Seiler became close friends and were observed by the neighbors to greet each other with embraces, and on at least one occasion she was seen to have been sitting on his lap. They denounced Katzenberger to police, and Katzenberger was charged under the race laws with having sex with a non-Jewish German woman. The case attracted the attention of the rabidly anti-Semitic newspaper Der Stürmer, which mounted a press campaign against Katzenberger.\textsuperscript{85}

\textsuperscript{81} Id. See id. at 1044-46 for a description of the brutal treatment of Night and Fog defendants in concentration camps.

\textsuperscript{82} See MÜLLER, supra note 4, at 170-173; JT at 1054.

\textsuperscript{83} It should be noted that Rothaug was found guilty of crimes against humanity, because of the consistent pattern of racial persecution rather than because of the results of a specific case. The cases were used as examples.

\textsuperscript{84} The Katzenberger-Seiler case was the basis for the “Feldenstein” case in the Academy Award-winning movie JUDGMENT AT NUREMBERG (Roxlom Films 1961). Judy Garland played the character based on Irene Seiler. See also CHRISTINE KOHL, THE MAIDEN AND THE JEW: THE STORY OF A FATAL FRIENDSHIP IN NAZI GERMANY (John S. Barrett trans., Steerforth Press 2004) (1997) (a good general account of this case).

\textsuperscript{85} See KOHL, supra note 81, at 5; J.T., supra note 3, at 652.
Rothaug, who by that time was sitting as a judge of a Special Court, took jurisdiction away from the ordinary courts and tried the case before a panel he headed. As Katzenberger and Seiler denied any sexual involvement, Rothaug charged Sieler with perjury and consolidated her trial with that of Katzenberger, thereby barring her testimony.

The trial itself was conducted in a circus-like atmosphere. Spectators bought tickets, and the gallery was full of uniformed Nazi Party and SS leaders.\(^\text{86}\) \textit{Der Stürmer} gave the trial front-page treatment, and Rothaug berated the two defendants from the bench. At one point, Rothaug stated that “the Jews are our misfortune,” and blamed the Jews for starting the war. This statement was a common catchphrase in \textit{Der Stürmer} and many Nuremberg Nazi Party circles.\(^\text{87}\) Rothaug would not permit Seiler’s husband, who was present at many of the meetings between Katzenberger and Seiler, to testify on Katzenberger’s behalf. Despite the lack of any evidence of sexual impropriety, Rothaug concluded that it was against all “practical experience” that the relationship could be innocent. He therefore concluded that there must have been intercourse, for which the law prescribed two-and-one-half years of imprisonment.\(^\text{88}\)

Rothaug went on to conclude that a sexual relationship between a Jewish man and a non-Jewish German woman was an attack on “the purity of German blood” and that Katzenberger had taken advantage of blackout conditions to facilitate his visits to Seiler’s apartment. Thus, Rothaug found Katzenberger to have violated the law against public enemies which imposed the death penalty on anyone who made use of wartime conditions to facilitate a crime. Katzenberger was sentenced to death, and Seiler was sentenced to two years of hard labor.\(^\text{89}\)

A second case was that of two Polish girls, Durka and Struss, who were working in an armaments factory near Nuremberg. One of the girls was seventeen years old, and the other slightly older. A fire broke out in the factory, and the girls were accused of setting it. The girls were arrested and charged with sabotage. The trial was scheduled for the same day as the arrest. The court-appointed attorney was notified of the trial two hours before its start, but Rothaug denied the attorney’s request for postponement. The case was tried under the Law against Poles and Jews. The girls were convicted and sentenced to death and

\(^{86}\) J.T., supra note 3, at 749.  
\(^{87}\) KOHL, supra note 81, at 133-34; J.T., supra note 3, at 750-51. Kohl puts the phrase in the mouth of the prosecutor; however, Rothaug in this account made numerous anti-Semitic comments of his own. KOHL, at 139.  
\(^{88}\) J.T., supra note 3, at 661.  
\(^{89}\) J.T., supra note 3, at 663-64.
were executed four days after the fire. It should be noted that under German law, the seventeen-year-old was entitled to treatment under juvenile law.  

Ironically, the Katzenberger case actually damaged Rothaug’s career, because Hitler assumed that Seiler was convicted of racial pollution. Hitler apparently felt that the man was always the sexual aggressor and the woman always the victim, even when the sex was consensual.  

3. The Loss of Judicial Independence and the Administration of Thierack  

One of the most important themes of the German legal system in the war years was the gradual surrender of judicial independence by the judiciary itself followed by the seizure of complete control by Hitler and the Nazi Party. The key figures in the gradual surrender were Schlegelberger and Rothenberger. Rothenberger, unlike Schlegelberger, was in fact a committed National Socialist. However, both of them were also committed to the independence of the judiciary. Their defense of judicial independence laid the groundwork for its ultimate loss.

Shortly after Schlegelberger’s appointment, he learned of Hitler’s displeasure with a specific sentence in a criminal case which he felt was too lenient, and a general unhappiness with the performance of the judiciary. Schlegelberger’s response was an extraordinarily obsequious letter to Hitler:

In continuing the work of the deceased Reich Minister, Dr. Gürtner, I will do my utmost to instill the administration of justice with all of its broad branches more and more firmly within the National Socialist State. In the course of the large number of verdicts pronounced daily there are still judgments which do not comply with the necessary steps. In order that such judgments be dealt with rapidly you, my Fuehrer, have created the nullity plea and the extraordinary objection for criminal cases. For civil proceedings, the right of application for the Chief Reich Prosecutor at the Reich Supreme Court for the resumption of the procedure could serve the same purpose in an ordinance drafted by myself. So as to avoid all such wrong verdicts, the public prosecutor’s office is called on, in this draft, to participate in civil proceedings, and should stress the right of the national community against the individual interests of the opposing parties.

90 J.T., supra note 3, at 1146-47. 

91 There was also discomfort in legal circles at the coupling of the sexual purity laws with the blackout laws with the result of the imposition of the death penalty. KOHL, supra note 81, at 143-44.
Apart from this it is desirable to educate the judges more and more in a
correct way of thinking, conscious of the national destiny. For this
purpose it could be invaluable if you, my Fuehrer, could let me know if a
verdict does not meet with your approval. The judges are responsible to
you, my Fuehrer; they are conscious of this responsibility and are firmly
resolved to discharge their duties accordingly.
I feel it is my duty to you, my Fuehrer, to bring it to the attention of the
judges if a decision does not conform to the opinion of the state
leadership.

Heil, my Fuehrer! Dr. Schlegelberger. 92

In this remarkable letter, Schlegelberger, the acting Minister of Justice, and the
leader of the legal apparatus of the state: (1) endorsed the nullity plea, by which a
prosecutor could ask an appellate court to set aside a sentence he felt to be too
lenient; (2) endorsed the extraordinary objection by which a prosecutor could
have a verdict, including a verdict of acquittal, set aside and the case retried; (3)
on his own initiative, proposed that the prosecutor have the right to intervene in
private civil cases; (4) agreed to reeducate the judiciary on its national
responsibilities; (5) invited Hitler to make known any objection he may have to
any verdict, (6) declared that judges are responsible to Hitler personally; (7)
declared his personal duty to Hitler, to call to the attention of any judge if his
opinion in a case failed to conform to the opinion of the state leadership.

The record is replete with instances during Schlegelberger’s tenure, of Hitler, or
the Party’s interventions in criminal cases, to increase sentences to the death
penalty whenever leniency was shown to any defendant, particularly if the
defendant were Jewish or Polish. As an example, two weeks after this letter was
written, Schlegelberger was told that Hitler was displeased that a Polish farm
hand who had committed a sex crime was not sentenced to death because of
extenuating circumstances, by a three-judge court. Schlegelberger demoted the
judges involved. 93 On another occasion, a Jewish man had been accused of
hoarding 60,000 eggs, presumably for sale on the black market. He was convicted
of violating anti-hoarding laws and was sentenced to two and a half years in
prison. Upon Hitler’s complaint, Schlegelberger arranged to have him turned
over to the Gestapo for execution. 94

92 J.T., supra note 3, at 417-18 (Letter, Schlegelberger to Hitler, March 10, 1941).
93 J.T., supra note 3, at 424 (Letter, Schlegelberger to Reich Minister April 3, 1941).
94 J.T., supra note 3, at 431 (Letter, Schlegelberger to Reich Minister Lammers, October 29, 1941).
Cases like this continued throughout Schlegelberger’s tenure as acting Minister of Justice with Schlegelberger by his own account fighting a continuous rearguard fight to maintain the integrity of the judiciary. The crisis in the judiciary came in a speech Hitler made to the Reichstag on April 22, 1942. In his speech he asked that he be given the authority to remove from office regardless of rights of tenure any person, including judges, whom he felt was not doing his duty. Hitler went on to say:

Furthermore, I expect the German legal profession to understand that the nation is not here for them, that they are here for the nation, that is, the world which includes Germany must not decline in order that formal law may live, but Germany must live irrespective of the contradictions of formal justice.

From now on, I shall intervene in these cases and remove from office those judges who evidently do not understand the demand of the hour.95

Schlegelberger and Rothenberger immediately understood this speech as a formidable assault on the remnants of judicial independence, and both scrambled to mitigate the impact of the speech. Schlegelberger proposed a decree to Hitler which while recognizing Hitler’s new authority, would have delegated his authority to remove judges and to intervene in cases to the Ministry of Justice. This idea was rejected.96

Rothenberger proposed in a memo to Hitler a radical reorganization of the entire German legal system along National Socialist lines, including the reeducation of existing judges and a new system of legal education to train new judges with a proper National Socialist frame of mind.97 He also argued that a strong judiciary and the rule of law were ultimately compatible with a strong authoritarian state even though a great leader establishing a new order should not be bound by traditional constraints of law. Thus, even the National Socialist state would ultimately need a functioning judicial system.

95 J.T., supra note 3, at 437–38. The Reichstag vested the power to remove judges notwithstanding the law by unanimous vote that day. Id. at 437.
96 J.T., supra note 3, at 438-44.
97 Rothenberger’s reforms borrowed heavily from his experiences in Great Britain. He argued that German legal education should move away from lectures on abstract legal propositions and instead move toward discussion of the use of legal principles in actual cases. He also suggested that there no longer be a Judge’s track in recruitment, but that judges be chosen from among attorneys with extensive practical and legal experiences, and in no event should anyone become a judge until he was at least thirty-five years old. J.T., supra note 3, at 479.
The memo suggests then that Hitler would take on the role of the Supreme Judge of the German people, and that all judges would have a direct relationship with the Supreme Judge who would lead and instruct the others. No other agency, including the Gestapo, the SS, or the Party would be allowed to stand between the Supreme Judge and the judiciary. As he put it: “Because a judge who is in direct relation of fealty to the Fuehrer must judge ‘like the Fuehrer.”

Rothenberger would testify that this memo was his effort to persuade Hitler not to end judicial independence, but rather to enhance it by insulating the judiciary from the SS, Gestapo, and the Party. He acknowledged, however, that Hitler took the notion of being the Supreme Judge more seriously that he might have wished.

With the change in the status of the judiciary, Schlegelberger apparently had reached his limit. He resigned as acting Minister, and Otto Thierack was appointed Minister of Justice in August 1942. Upon his retirement, Hitler awarded Schlegelberger a bonus of 100,000 Reichsmarks, a considerable sum of money.

The period from August 1942 to the German surrender on May 8, 1945, marked the final triumph of Nazism over any semblance of pre-Nazi legal justice. This final period is dominated by two figures, Otto Thierack and Roland Freisler. Otto Georg Thierack served in the German army in World War I and was wounded. After the war he completed his legal studies and became a judge. He joined the Nazi Party in 1932 and became a leader of the National Socialist Jurists Association. After the formation of the People’s Courts, he became a judge of the People’s Court where he served with several breaks, until his appointment as Reich Minister of Justice replacing Schlegelberger in August 1942.

Roland Freisler was a lawyer who joined the Nazi Party in 1925. He served in the Ministry of Justice under Schlegelberger as State Secretary. With Thierack’s appointment as Minister of Justice, a vacancy was created in the position of

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98 Id. at 474.
99 Id. at 499–502.
100 J.T., supra note 3, at 1082. See discussion infra, page 41.
101 Müller, supra note 5, at 39, 143-144.
102 Although this would not play a role in the subsequent prosecution, Schlegelberger was invited to the Wannsee Conference in January 1942 where the Final Solution was decided upon and organized. Freisler attended the conference as Schlegelberger’s designee. It is likely that Schlegelberger knew of the Final Solution, but he resigned within six months of the conference so he may have played a minimal role. Freisler, a committed Nazi, would play an important role.
Chief Judge of the People’s Court, and Freisler was appointed to take Thierack’s place.\textsuperscript{103}

Rothenberger was appointed to be State Secretary of the Ministry of Justice with the intent that he would implement some of the reforms in his memo. However, not surprisingly, Hitler, the Party apparatus, and Thierack proved to be less interested in a National Socialist conception of Justice than Rothenberger had supposed. However, Hitler did accept Rothenberger’s suggestion that he was the supreme judge and legal authority. Rothenberger proved to be a nuisance to his superiors who had very little interest in or patience with his proposed reforms, Rothenberger served as State Secretary until 1943 when he was demoted to notary, a low-level judicial position, where he served until his arrest. (Rothenberger’s experience is consistent with a saying variously attributed to Mark Twain, Robert A. Heinlein, or folklore, that “you should not try to teach a pig how to sing, it’s a waste of your time and it annoys the pig.”)

Thierack and Freisler ended all pretense of legality in Germany. Under Thierack, the few procedural protections defendants had were substantially reduced and in many cases trials were dispensed with as persons were turned over to the Gestapo with no trials at all. In early 1943, Jews were excluded from the Law Against Poles and Jews so that they were completely excluded from the courts. \textit{See discussion supra.} In November 1944, because of a backlog of Night and Fog cases, Thierack directed that all Night and Fog defendants be turned over to the Gestapo without trial.\textsuperscript{104} Additionally, Thierack directly intervened in criminal proceedings to make sentencing harsher. As an example, he introduced regular “Judge’s Letters” to the judges in which he would review recent cases and would praise the harsh sentences and criticize lenient ones that had taken place.\textsuperscript{105}

Freisler, as head of the People’s Court assigned himself many of the political cases which arose in this period. As an example, he tried the cases of the White Rose, a non-violent, anti-Nazi group made up of Christian university students and their professor. The leaders of the group including the sister and brother, Sophie and Hans Scholl, were convicted and sentenced to death by Freisler in a trial marked by Freisler’s denunciations of the students. The Scholls and one other student were arrested on February 18, 1943, and were tried, convicted, and executed on February 22, 1943. The rest of the White Rose was arrested later and also received perfunctory trials under Freisler.\textsuperscript{106}

\textsuperscript{103}\textit{Id.} at 144.
\textsuperscript{104} Secret Directive of the Reich Ministry of Justice, January 21, 1944. (Tr. at 799).
\textsuperscript{105} JT at 523-530.
\textsuperscript{106} KOCH, \textit{supra} note 7, at 136-138.
Freisler also presided over the trials of the July 20 conspirators. On July 20, 1944, Colonel Klaus von Stauffenberg, a wounded veteran of the Eastern Front and a staff officer in the German army, set off a bomb in a bunker during a meeting with Hitler. Upon Hitler’s death, the plan called for a military coup led by anti-Nazi senior officers who would negotiate an end to the war. However, Hitler survived the blast and the coup was easily defeated. The conspirators, including many prominent officers and civilians, were arrested and tried before Freisler. These trials were conducted in a brutal fashion with Freisler berating and bullying witnesses and the accused. Most of the alleged conspirators were found guilty and either received death sentences or harsh prison sentences.107

Among the changes to the legal system were the following: (1) Thierack issued a decree in accordance with Hitler’s speech, removing all civil service or tenure protections for judges on March 3, 1943; (2) he invited the SS and the Gestapo to participate more closely in judicial proceedings; (3) he issued a directive that defendants would be allowed to have counsel only at the discretion of the judge; (4) when they had developed a backlog of executions because of pending clemency appeals, Thierack on September 8, 1943 at Hitler’s request disallowed all clemency appeals without review to allow the executions to proceed.108

Under Thierack and Freisler’s lead, the number of executions skyrocketed. In the People’s Courts alone, the number of executions rose as follows:109

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Accused</th>
<th>Number Sentenced to Death</th>
</tr>
</thead>
<tbody>
<tr>
<td>1937</td>
<td>618</td>
<td>32</td>
</tr>
<tr>
<td>1938</td>
<td>614</td>
<td>17</td>
</tr>
<tr>
<td>1939</td>
<td>470</td>
<td>36</td>
</tr>
<tr>
<td>1940</td>
<td>1096</td>
<td>53</td>
</tr>
<tr>
<td>1941</td>
<td>1237</td>
<td>102</td>
</tr>
<tr>
<td>1942</td>
<td>2572</td>
<td>1192</td>
</tr>
<tr>
<td>1943</td>
<td>3338</td>
<td>1662</td>
</tr>
<tr>
<td>1944</td>
<td>4379</td>
<td>2079</td>
</tr>
</tbody>
</table>

Thus, the number of executions went from 102 in 1941 to 1,192 in 1942 during the first half of which Thierack was chief of the People’s Court, and during the

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107 Id. at 198-215.
108 KOCH, supra note 7, at 161.
109 KOCH, supra note 7, at 132.
second half of which Freisler was head. The percentage of total cases resulting in the death penalty was: 110

<table>
<thead>
<tr>
<th>Year</th>
<th>Death Penalty</th>
<th>Acquittal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1940</td>
<td>4.8%</td>
<td>7.3%</td>
</tr>
<tr>
<td>1941</td>
<td>8.2%</td>
<td>5.9%</td>
</tr>
<tr>
<td>1942</td>
<td>46.3%</td>
<td>4.7%</td>
</tr>
<tr>
<td>1943</td>
<td>49.8%</td>
<td>5.4%</td>
</tr>
<tr>
<td>1944</td>
<td>47.9%</td>
<td>11.7%</td>
</tr>
</tbody>
</table>

The increases in the death penalty after 1942 were largely due to the Night and Fog cases, and in 1944 to the July 20th conspiracy trials. 111 The remaining defendants were generally given substantial prison terms. There are no good figures for the number of executions ordered by the German judiciary during the Nazi era, but all the numbers are astonishing. The Ministry of Justice of the Federal Republic of Germany estimated that there were 32,000 judicial executions. 112 Koch gives a competing figure of 16,560. 113 Muller notes that the Italian judiciary under Mussolini issued 29 death sentences in 5,319 trials from 1926 on, and Japanese civilian courts condemned two persons to death for crimes against the state from 1928 on. Fascist Italy and Imperial Japan like Nazi Germany had mass arrests, harsh imprisonment, and extrajudicial killings, but the German judiciary was an outlier even among Fascist states. 114

Freisler did not stand trial at Nuremberg because he was killed in February 1945 during an air raid. Thierack would have stood trial, probably as the primary defendant in the Justice Trial, but he committed suicide after his arrest. Germany surrendered on May 8, 1945, and civil administration of the country was turned over to the Allied Control Council, which consisted of the commanding officers of the American, British, French, and Soviet armies in Germany. Allied Control Council Law No. 1, issued on September 20, 1945, repealed all political or discriminatory laws during the Nazi era, including all the restrictions on Jews or other subject populations, as well as the Reichstag Decree, the Enabling Act, and all laws giving privileged status to the NSDAP. 115

110 Koch, supra note 7, at 234.
111 Id. at 234.
112 Müller, supra note 4, at 196.
113 Koch, supra note 7, at 232.
114 Müller, supra note 4, at 196–97.
115 Allied Control Council Law No. 1.
III. The Justice Trial

By 1943, all three of our subjects had been demoted or transferred from their positions. Schlegelberger had resigned in 1942 during the crisis over judicial independence. Rothenberger was demoted to notary in 1943 because his reform ideas had become a nuisance, and Rothaug would be reassigned to be a prosecutor rather than rise in the judicial hierarchy.

Their fates would become intertwined after the war when all three were arrested and charged with war crimes, crimes against humanity, and conspiracy to commit war crimes and crimes against humanity. They were tried before Nuremberg Military Tribunal III, in what became known as the Justice Trial.

The case against Schegelberger focused on his role in drafting the Law against Poles and Jews and his participation in the Night and Fog program. The case against Rothenberger rested on his role in the Night and Fog program and his role in barring Jews from any access to the civil courts. The case against Rothaug was based on the large number of cases in which he had denied justice to persons on the basis of race.

The defenses raised by the three were self-serving, as would be expected, but were remarkably revealing about the mind-set of key members of the German judiciary. The most striking feature of the defense is that none showed any particular sympathy for the victims, nor any shame or remorse for their conduct. All three—indeed, all of the Justice defendants—lacked insight into their actions.

Schlegelberger was the target defendant for the prosecution because of his pre-Nazi prominence, and because of his role in crafting the laws which formed much of the basis of the horrors inflicted by the Nazi judiciary. Schegelberger noted that he had never been a Nazi until he was involuntarily enrolled in the Party in 1938. He testified that he bore no ill will against Jews and felt that God had created all people as equals. He further claimed that his personal physician was half-Jewish, and that his best friend was a Jew.

Schlegelberger explained his conduct as essentially a rear-guard action to prevent worse things from happening. His rhetorical support for National Socialism,

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116 J.T., supra note 3, at 288, 291.

117 J.T., supra note 3, at 717.

118 Id. at 718. Non-American readers may miss the irony of this testimony. In American culture, persons often disclaim bigoted remarks or conduct by claiming that “I am not an anti-Semite; some of my best friends are Jews (or black, or Hispanic, or gay, etc.)”
such as his 1936 speech, supra, or his personal letters to Hitler, supra, were merely intended to establish his good faith with the regime. His demotion of the notary who bought postcards from the Jewish merchant similarly was done to preserve his position.119

Schlegelberger agreed to take the Night and Fog program from the military courts because he knew that if the program were not in the judiciary or the military courts, it would go straight to the Gestapo. He defended the specific provisions of the program, such as forbidding the use of foreign witnesses, as a matter of military necessity, although this feature deprived the defendant of the ability to defend himself.120

Schlegelberger defended the Law against Poles and Jews on the grounds that it preserved some minimum level of procedure and rules to govern court proceedings against Poles and Jews. By doing so, he headed off the possible denial of all legal rights to those groups.121 In actual fact, after 1943 under Thierack, Jews were deprived even of the vestigial rights accorded them under the Law against Poles and Jews.

Schlegelberger finally testified that he conducted an ongoing bureaucratic struggle against three elements, the SS under Himmler, the Party Chancellery under Martin Bormann, and the Propaganda Ministry under Goebbels, to preserve what he could of the integrity and independence of the judiciary. When Hitler crossed the line in his Reichstag speech in April 1942,122 Schlegelberger finally resigned from his position, and was rewarded by Hitler with 100,000 Reichsmarks and a number of special privileges in retirement.123 Things did get worse after his retirement with the appointment of Thierack.124

In his final statement to the Tribunal, Schlegelberger says:

These words of Pope Gregory VII are world-famous: "I loved justice and hated arbitrariness; therefore, I die in exile."

I feel confident that your judgment will save me from that fate. But I, too, in imprisonment, could not overcome the bitterness of being

119 J.T., supra note 3, at 289.
120 J.T., supra note 3, at 807-11.
121 J.T., supra note 3, at 725-730.
122 J.T., supra note 3, at 303-306.
123 J.T., supra note 3, at 305.
124 J.T., supra note 3, at 302-303.
rewarded for my hard struggle for justice by this period of shame and misery.\footnote{125}{J.T., supra note 3, at 941.}

It seems absolutely clear that Schlegelberger to the end felt that he was a just man, and that his prosecution was unjust.

It is also clear that Schegelberger had a narrow conception of justice. He did not view it as “giving every man his due” or as conducting trials fairly or protecting rights. Instead justice concerned the preservation of the independence and prerogatives of the judiciary. Thus, he easily acquiesced to Hitler’s criticism of judicial leniency, and his offer to correct any sentence that Hitler disagreed with, apparently so long as the judiciary was in charge of the correction. However, when Hitler proposed to dismiss judges himself if he felt that they were not doing their duty, Schlegelberger felt compelled to resign.

The Tribunal’s final judgment against Schlegelberger reads:

The evidence conclusively shows that in order to maintain the Ministry of Justice in the good graces of Hitler and to prevent its utter defeat by Himmler’s policies, Schegelberger and the other defendants who joined in this claim of justification took over the dirty work which the leaders of the state demanded, and employed the Ministry of Justice as a means for exterminating the Jewish and Polish populations, terrorizing the inhabitants of occupied countries, and wiping out political opposition at home. … The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the state which is not found in frank atrocities which do not sully judicial robes…..

Schlegelberger is a tragic character. He loved the life of the intellect, the work of the scholar. We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security…..\footnote{126}{J.T., supra note 3, at 1086-87.}

Schlegelberger was found guilty of war crimes and crimes against humanity and was sentenced to life imprisonment.

Rothenberger testified extensively about his memo. He had favored the ideas behind the memo for many years, but he actually submitted the memo just before Hitler’s April 26, 1942, speech ending judicial independence.
Rothenberger testified that he felt he would be able to persuade Hitler to adopt his ideas.\textsuperscript{127} However, after thirteen months as assistant secretary, he realized that Hitler could not be convinced of anything and that his memo had provided an additional rationale for the end of judicial independence. Furthermore, he had made powerful enemies in Himmler, the Party, and Thierack, who forced him to resign.

The other testimony against Rothenberger was not as clear-cut as against the rest of the defendants. As an example, he strongly objected to the Gestapo's practice of taking into “protective custody” persons who had been acquitted of crimes by the judiciary. He went so far as to inspect the notorious Mauthausen concentration camp.\textsuperscript{128} However, although he found that there were persons being held in protective custody there, he did nothing about it. (He also seems to have missed the other horrors of the camp.) Rothenberger also was instrumental in another comparatively minor, yet cruel, injustice. After the Kristallnacht attack on the Jewish community in 1938, the Nazis imposed a massive fine on the Jewish community which led to the impoverishment of many Jewish families. Rothenberger created a policy in Hamburg to deny Jewish litigants of any right to proceed \textit{in forma pauperis}, thereby denying them any access to the civil courts. He also told judges to disregard all settlement of claims. Thus, Jews had no recourse when non-Jews cheated them or failed to pay rents, debts, or salaries to Jews.\textsuperscript{129}

The Tribunal concluded that:

\begin{quote}
the evidence discloses a personality full of complexities, contradictions, and inner conflict. He was kind to many half-Jews, and occasionally publicly aided them, yet he was instrumental in denying them the rights to which every litigant is entitled. He fulminated publicly against the \textit{"Schwarze Korps"} [SS newspaper] for attacking the courts, yet he reproached judges for administering justice against Party officials and unquestionably used his influence toward achieving discriminatory action favorable to high Party officials and unfavorable to Poles and Jews …
\end{quote}

Rothenberger was not happy with his work in Berlin. … Soon he learned of the utter brutality of the Nazi system and the cynical wickedness of Thierack and Himmler, whom he considered his personal enemies. He could not stomach what he saw, and they could not stomach him. The

\textsuperscript{127} J.T., \textit{supra} note 3, at 499.
\textsuperscript{128} J.T., \textit{supra} note 3, at 1114.
\textsuperscript{129} J.T., \textit{supra} note 3, at 642-46.
evidence satisfies us that Rothenberger was deceived and abused by his superiors; that evidence was “fraud” against him; and that he was ultimately removed, in part at least, because he was not sufficiently brutal to satisfy the demands of the hour.  

Rothenberger was found guilty of war crimes and crimes against humanity and was given the relatively light sentence of seven years with credit for time served.

The evidence against Rothaug consisted of numerous examples of cases similar to that of Katzenberger and Durka and Struss, the two young Polish girls, see discussion, supra. His defense was that as a German judge he was obligated to follow the letter of the law and had little discretion in its application.

However, there was unarguable testimony in the record that Rothaug was a fanatic Nazi who loathed Jews, Poles, and other foreigners.

The Tribunal concluded as to Rothaug:

Despite protestations that his judgments were based solely upon evidence introduced in court, we are firmly convinced that in numberless cases Rothaug’s opinions were formed and decisions made, and in many instances publicly and privately announced before the trial had even commenced and certainly before it concluded. By his manner and methods he made his court an instrumentality of terror and won the fear and hatred of the population. ... [W]e find that Oswald Rothaug represented in Germany the personification of the secret Nazi intrigue and cruelty. He was and is a sadistic and evil man. Under any civilized judicial system he could have been impeached and removed from office or convicted of malfeasance in office on account of the scheming malevolence with which he administered injustice.

Rothaug was found guilty of crimes against humanity and was the first person in history to have been found guilty of genocide. He was sentenced to life imprisonment.

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130 J.T., supra note 3, at 1117-18. 
131 J.T., supra note 3, at 1118, 1200. 
132 J.T., supra note 3, at 1166. 
133 J.T., supra note 3, at 1156.
In the aftermath of the trials, the fate of the convicted war criminals became a sore point in the relationship between the United States and the new Federal Republic of Germany. The trials also became controversial domestically within the United States. During the 1950’s a process was initiated by John McCloy, the High Commissioner for Germany which led to the commutation of virtually all of the sentences of the Nuremberg defendants in all of the trials. Schlegelberger was released in 1951 and died in 1961, the year of the release of the movie Judgement at Nuremberg, in which Burt Lancaster played a character who was a composite of Schlegelberger and Rothaug. Rothenberger was released in 1950. He committed suicide in 1959. Rothaug was the last of the Justice Trial defendants released in 1956. All three received their full pensions with credit for their time served under the Nazi regime.

IV. The Quest for Order

From 1933 to 1945, the German legal system, once a well-respected, constitutionally-based institution, degenerated into an instrument of Nazi despotism. Yet the judges and lawyers of Germany, with few exceptions, acquiesced or participated actively in this development. Why did this happen?

The key is contained in the de Tocqueville quotation at the beginning of this article and in part of the testimony of Professor Hermann Jahrreiss, an expert witness for the defense in the Justice Trial.

De Tocqueville’s insight, derived from his observation of lawyers in Britain and the United States, the two most democratic countries of his era, is that lawyers by instinct and training value stability, logical thought processes and orderly procedures. Even when confronted by injustice, they may acquiesce if the law has been followed. This insight has often been true in American history, particularly in the period between Reconstruction and the New Deal, but has been profoundly wrong in other eras, such as the aftermath of World War II and the Warren Court.

It does explain much of what went on in the Nazi era.

This tendency within the legal profession was reinforced by another phenomenon peculiar to Germany in the interwar period. As Prof. Jahrreiss noted:

134 JUDGMENT, supra note 85.
135 HELLER, supra note 2, at 331-69 has an excellent account of the aftermath of the trials.
It is easy to forget that the German people for 33 years have never had really normal conditions... For all these people, life—and that was the normal thing for them—was a continuous change from open to latent crisis. One was always exposed to danger and always with a longing for stable conditions. The consequence is that for most Germans, order, which deserves that name, is something hard to imagine. To the German people order has become to mean something transitory, something unstable, something upon which one cannot depend...\(^{136}\)

[S]mall wonder that a state, to see to it that laws once decreed have to be carried out by the authorities, demanded particular emphasis because otherwise not even the minimum of order could be guaranteed.... *The essence that “an order is an order” had to become the last refuge of those actually in power.*\(^{137}\)

For all three of these men, the quest for order within the parameters of the legal system would largely govern their conduct.

Schlegelberger, born in 1874, was forty years old and established in his profession in 1914 when the world he grew up with crumbled. He was fifty-nine in 1933 at the time of the Nazi accession to power, and he would spend the next twelve years accommodating himself to the Nazi revolution while trying to preserve something of the legal tradition he had grown up with.

In his case this meant a steady capitulation to Nazi demands with largely ineffective efforts to mitigate the worst of Nazi excesses. The Tribunal correctly noted that Schlegelberger’s strategy facilitated and legitimized Nazi excesses.\(^{138}\)

Thus, Schlegelberger actually drafted the vile Law against Poles and Jews, but could rationalize his role because it did provide for small residual rights for Poles and Jews caught up in it.\(^{139}\)

One of the most striking parts of his effort, however, was that he would write: “… a Pole is less sensitive to the imposition of an ordinary prison sentence,” in the same memorandum in which he wrote, with respect to corporal punishment,

\(^{136}\) J.T., *supra* note 3, at 258.

\(^{137}\) J.T., *supra* note 3, at 259 (emphasis added).

\(^{138}\) J.T., *supra* note 3, at 286-87.

\(^{139}\) J.T., *supra* note 3, at 725-30.
“I cannot agree to this form of punishment—as in my judgment it would not correspond to the level of civilization of the German people.”

Similarly, Schlegelberger would attempt to modify the decree ordering Jews to be deported to the east and certain death, by permitting half-Jews to remain if they agreed to be sterilized.

It should be remembered that Schlegelberger was not just another lawyer. He was an internationally-known legal scholar, well respected within the German legal community, and serving as the Acting Minister of Justice. His acquiescence and apparent embrace of laws such as Night and Fog and the Law against Poles and Jews provided powerful legitimacy to the Nazi revolution, while his attempt to take the edge off of the rank injustice of the measures had little effect. When Schlegelberger did finally resign, his successor, Thierack, making use of the precedents he had set, ran rough shod.

The search for order goes to the heart of Schlegelberger’s dilemma. Before 1933, he had voted for the German National People’s Party, an extremely conservative and nationalist party, which had avoided the extreme anti-Semitism of the Nazis. This party, however, was nostalgic for the pre-war Wilhelmine period.

Schlegelberger had been content with the Nazification of the legal sector, or at least not objected to it until he was elevated to be Acting Minister. He did not resign or retire, despite his age, even after Jews were expelled from the judiciary or legal profession, or after the Nuremberg laws, or the adoption of law by analogy, or the abrogation of civil liberties under the Reichstag decree or the Enabling Act, or the dramatic expansion of the use of the death penalty. He not only acquiesced in the Night and Fog Decree and the Law against Poles and Jews, he actually helped draft both.

The issue that prompted his resignation was the passage by the Reichstag of the decree that Hitler could remove any judges that he was dissatisfied with, with no limitation. Schlegelberger did not object to the impact of Nazi laws on individuals, but rather objected to the attack on the institutional integrity of the judiciary. Thus, he recognized that the judiciary had lost its battle with the SS, the Party, and Goebbels, to maintain some minimal level of legal order.

140 J.T., supra note 3, at 611-13.
141 J.T., supra note 3, at 649.
142 J.T., supra note 3, at 287.
Rothenberger was only eighteen years old in 1914, and thirty-seven years old in 1933. Thus, he had spent his entire adult life during the turmoil and unrest of World War I and the Weimar Republic. He was a committed National Socialist and saw it as a political movement which could restore order and bring renewal to Germany. He enthusiastically set about creating a Nazi legal system in Hamburg and clearly viewed himself as a legal reformer.

Rothenberger’s memorandum to Hitler, on the creation of a National Socialist legal system, represented an idealistic and utterly naïve misreading of the regime he was serving. His memorandum was intended to eliminate the chaotic struggle among the judiciary, the SS, and the Party, which had so consumed Schlegelberger. However, Rothenberger, the true believer, concluded that the best way to do that was directly to subordinate the judiciary to Hitler with no intervening forces. The judiciary would then rule like the Führer. Even a Nazi state would be more stable and successful with a properly functioning judiciary, thereby reaffirming de Tocqueville’s insight about the legal profession. Rothenberger got his chance to implement his program with his appointment as Deputy Minister of Justice after Schlegelberger’s resignation in 1942.

Rothenberger soon learned that Hitler liked his idea of the direct subordination of the judges to him, but was otherwise uninterested in reform. Rothenberger, the idealist, wore out his welcome with the circle of fanatics surrounding Hitler and, in 1943, he suffered a drastic demotion to notary.

Rothaug, Rothenberger’s contemporary, was cut from different cloth. Rothaug was a committed Nazi and a passionate anti-Semite and hater of all things Jewish and Polish. His notion of stability consisted of a ruthless suppression of the Jews and Poles within his grasp. Katzenberger, and Durka and Struss, were just two of many cases demonstrating Rothaug’s attitude. Rothaug viewed himself, however, as being an instrument of the law and in many ways fit perfectly with Jahrreiss’s analysis of a desperate need to comply precisely with orders. However, Rothaug was less concerned with order in the sense of institutional integrity as was Schlegelberger, or as a stable and flourishing Nazi legal system as was Rothenberger, but rather order in the sense of the control and elimination of alien and “polluting” elements in German society, that is, Jews, Poles, and other foreigners.

Sadly, the quest for order of these three legal officials was to accelerate the degeneration of German law into irrationality and barbarism.
V. A Meditation on Justice: What Would We Have Done?

At the beginning of this paper, the question was posed, “What would we have done?” The “we” of course means any judge, lawyer or legal official who would read this paper.

In a sense the question rightfully could be answered only by someone who had been a lawyer or judge in Germany in 1933, or by someone who had survived living as a legal professional in a dictatorship. We know that the participants in the German legal system failed the German people, the people of Europe, their profession, and themselves by their failure to resist or to alter the new system. Clearly all three protagonists, but especially Schlegelberger lacked the courage, the integrity, or even the decency to have met the challenge of Nazism. Of course, just as we cannot ever know whether we would have been able to storm Omaha Beach, we cannot be sure whether we could have maintained integrity in the face of Nazi oppression.

However, all legal systems have flaws and all will from time to time inflict injustice or make errors, sometimes systematically. What is the proper response? There is no easy answer.

The United States at the time of the Nazi era in Germany still recognized “separate but equal” as the law of the land and the Supreme Court itself approved the internment of loyal Japanese Americans during the course of the war. See United States v. Korematsu, 323 U.S. 214 (1944) (Other democratic common law countries would have their own injustices with respect to aboriginal and indigenous peoples and colonial populations.)

However, after World War II, the American legal system, led by courageous lawyers and judges, helped lay the groundwork for the ultimate success of the Civil Rights movement by removing the legal basis for racial discrimination, see e.g. Brown v. Board of Education, 349 U.S. 294 (1955), Loving v. Virginia, 388 US 1 (1967). The legal system has not yet resolved the crisis in police-community relations, which persists in many American cities (including the city in which the author presides), and perhaps in cities around the world.

Perhaps the lesson of the German judges is the necessity of acting with courage, integrity, and professionalism in the face of injustice.
THE HYPOCRISY OF “EQUAL BUT SEPARATE” IN THE COURTROOM: A LENS FOR THE CIVIL RIGHTS ERA

JAIMIE K. MCFARLIN

This article serves to examine the role of the courthouse during the Jim Crow Era and the early stages of the Civil Rights Movement, as courthouses fulfilled their dual function of minstreling Plessy’s call for “equality under the law” and orchestrating overt segregation.

A. INTRODUCTION: THE RACIST COURTHOUSE AS THE UNHERALDED BATTLEGROUNDS OF THE CIVIL RIGHTS MOVEMENT

The year is 1961. You’ve been called into this southern state court as a witness. Originally, the subpoena was a surprise, but you knew no other witness would likely testify in this defendant’s case. You walk up the courthouse steps and fidget with the buttons of your “Sunday’s best” suit. Your eyes sink towards the ground as you let the White women pass by first. You enter and glimpse back at the courthouse lawn, recently fertilized with the blood of Herbert Lee. You quickly say part of the Lord’s Prayer to yourself, mourning internally. You are almost to the courtroom doors, but realizing you should relieve yourself before the trial begins, you head to the basement of the courthouse for the Black bathroom, a tiny converted janitor’s closet with corroded plumbing. Sauntering back upstairs, you then find the courtroom for the trial.

The pews are sparsely filled, and you nod towards the other Black spectators mouthing a “Good Morning” and slide in next to them, hoping not to get caught

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1 This article focuses on state courts because “[e]ven before Brown, federal courtrooms were not segregated.” Hon. Constance Baker Motley, Reflections on Justice Before and After Brown, 32 FORDHAM URB. L.J. 101, 104 (2004).


on a splinter on the unkempt “Black pews.”5 Looking up towards the judge’s bench, you see the Confederate flag in the front of the room.6 You also take a glimpse at the defendant, a shackled, fourteen-year-old Black boy, and his White defense attorney.7 Shaking your head in anguish, you realize taking this morning off from work was pointless. The White prosecutor stands behind his table and waves at the defense counsel, who smiles and winks back in earnest.8 The White bailiff carries a Bible in each hand,9 and sits them on the counter with his paperwork. He passes by the door near your seat and you glimpse at the names on the witness list. Not surprisingly, the “Dr.” from in front of your name is missing.10 The jury enters, and you recognize a few of the all-White faces.11 You rise to your feet as the Judge enters,12 and the day’s proceedings begin, immersed in the contradiction that Plessy13 bestowed upon the courts.

6 See Coleman v. Miller, 117 F.3d 527, 528 (11th Cir. 1997) (quoting Governor Marvin Griffin’s 1956 state address that expressed his state’s activist opposition to civil rights while denying an action to enjoin the flying of the Georgia state flag over Georgia's state office buildings).
7 See Benno C. Schmidt, Jr., Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1407 (1983) (“From the end of Reconstruction to the New Deal, virtually every embodiment of the legal process in the South, from the sheriffs and police to the prosecutors, to the courtroom functionaries, to defense counsel, to the judges, was white."

8 See Michael J. Klarman, Scottsboro, 93 MARQ. L. REV. 379 (2009) (explaining the risks that White lawyers took for defending black clients too vigorously).
10 See MARTIN LUTHER KING, JR., LETTER FROM THE BIRMINGHAM JAIL (1963) available at http://www.uscrossoier.org/pullias/wp-content/uploads/2012/06/king.pdf (describing segregation in the South “when your first name becomes ‘nigger’ and your middle name becomes ‘boy’ (however old you are) and your last name becomes ‘John,’ and when your wife and mother are never given the respected title ‘Mrs.’

12 See Steven Michael Selzer, Civility Rules, MD. B.J., SEPTEMBER/OCTOBER 2003, at 30 (discussing rising for the judge as a demonstration of respect for the judicial system). See also In re Dellinger,
This article serves as both a descriptive and somewhat persuasive discussion of the southern courthouse during the Jim Crow era and the early stages of the Civil Rights Movement, as judges were challenged by the dual function of minstreling Plessy's call for “equality under the law” and orchestrating overt segregation. This hypocrisy plagued the courts until the reversal of Plessy v. Ferguson in the 1954 ruling of Brown v. Board of Education.14 Put simply, the courthouses from Plessy to Brown exemplified Gunner Myrdal's conflict paradigm: “a conflict between liberty, equality, and the American idea of fair play on the one side, and prejudice, self-interest, and habit on the other.”15 Using the conflict paradigm to articulate the hypocrisy, the article examines wide-ranging practices of southern state courts during the Jim Crow era and the early Civil Rights movement. My analysis concludes with explaining the southern state courthouse as playing a tripartite role in American apartheid as a symptom, signal, and symbol of societal norms. An understanding of the court's role as such incorporates facets of overt discrimination and the battleground of the Civil Rights movement that, at times, was not captured within written case law.

B. THE CONFLICT PARADIGM

Before the Civil War, courts were instruments of the slaveholders, enforcing the Fugitive Slave Laws and, in Dred Scott,16 holding unconstitutional the Missouri Compromise, one of the abolitionists’ legislative victories.17 In the Reconstruction era, Black people were a political force to be reckoned with, as Black men infiltrated both voting booths and state and federal legislatures18 via the executed demands of the Fourteenth and Fifteenth Amendments of the U.S.

461 F.2d 389, 401 (7th Cir. 1972) (articulating that while court “may require such rising” at the beginning of a session and end of a recess, some symbolic acts of defiance may not amount to obstructions punishable as criminal contempt); Ex parte Krupps, 712 S.W.2d 144, 150-51 (Tex. Crim. App. 1986) (holding that refusal of pro se defendant and six spectators to rise upon entrance of judge, after being warned to do so, is proper ground for contempt).
13 Plessy v. Ferguson, 163 U.S. 537 (1896).
16 Dred Scott v. Sandford, 60 U.S. 393 (1856).
17 Id. at 450. (1856) (declaring the Missouri Compromise void because it deprived slaveowners of property in the free territories).
Constitution. Courts again became tools of segregationists to combat these progressive reforms before and immediately following the Civil War and passage of the Thirteenth Amendment. Reunion was destroyed in the aftermath of 1877 and with the election of Rutherford B. Hayes, which led to the federal government pullback of its federal forces, allowing White supremacy to blossom in the South. Perhaps not surprisingly, anti-segregationists, up until the NAACP's work in 1910, saw the ballot box and not litigation as a much more efficient weapon in the struggle for African-American freedoms.

The legal hallmark of this post-Reconstruction system of racial segregation was Plessy v. Ferguson, enumerating the mantra of "equal but separate." Plessy was decided "on the edge of one of the most terrorist seasons in American history, the Post-Reconstruction era." Plessy survived as the backdrop to explain the sentiments of the judiciary who used Plessy's holding of "separate but equal before the law" to construct a fictional neutrality of racial segregation's effects. Plessy deferred to the state to "established usages, customs, and traditions of the people." With deference to social jurisprudence as its choice of judgment,

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22 Plessy, 163 U.S. at 540. The role of Plessy as a factor is debated amongst historians. See e.g., Stephen J. Riegel, The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate but Equal" Doctrine, 1865-1896, 28 AM. J. LEGAL HIST. 17, 20 (1984) (arguing that historians have overemphasized Plessy and have "largely ignored the development of judicial law legitimizing segregation in the latter third of the nineteenth century"); Otto H. Olsen, The Thin Disguise: Turning Point in Negro History, PLESSY V. FERGUSON at 27-28 (1967) (discussing the context of Plessy and invoking Justice Harlan's phrase in his Plessy dissent observing that the law's promise of equality in segregation was but a "thin disguise" for discrimination). Regardless of the importance of this individual case, the Plessy framework of "equal but separate" certainly illustrates the ethos of social norms in the Jim Crow era even if the case law's role as a causal factor is undetermined. Oberst, The Strange Career of Plessy v. Ferguson, 15 ARIZ. L. REV. 389, 396-97 (1973) (noting that Plessy is considered now "one of the pivotal decisions of the Supreme Court").
23 Id. at 540 (upholding a statute requiring "that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races.") (emphasis added).
25 Plessy, 163 U.S. at 544 (citing Roberts v. City of Boston, 59 Mass. 198, 206 (1849)).
26 Id. at 550.
courtrooms were confines for both covert\textsuperscript{28} and overt anti-Black sentiments throughout the post-Reconstruction era,\textsuperscript{29} creating a convoluted battleground for the Civil Rights Movement.

From 1877 through the mid-1960s, during a period termed the “Jim Crow Era,”\textsuperscript{30} a racial-caste system shaped the lives of United States citizens, discriminating against Black Americans. This system was legally enforced through the codification of “Jim Crow laws” and grounded in the holding of \textit{Plessy}, which had the effect of legitimizing anti-black racism.\textsuperscript{31} Jim Crow laws included segregation statutes for hospitals, prisons, schools, churches, cemeteries, public restrooms, and public accommodations.\textsuperscript{32} Statutes also severely regulated social interactions between the races, making “Jim Crow etiquette” the social norm.\textsuperscript{33}

Before the Civil Rights Movement, the court faced the conflict paradigm through one of its major functions in segregation: racial identity case law.\textsuperscript{34} In the nineteenth century, southern state supreme courts showed that “race” was often

\begin{footnotesize}
\begin{enumerate}
\item Smith, \textit{supra} note 24, at 4 (finding that “Justice Brown's framework for 'exact justice,' while flawed, established elements allowing courts to bend to an exclusionary social legal framework rather than an inclusive one under the Equal Protection Clause of the Fourteenth Amendment. In \textit{Plessy}, the Court stamped its approval on social jurisprudence as the choice of judgment, thereby sealing race distinction in the fabric of American law as 'exact justice.'
\item See Surell Brady, \textit{A Failure of Judicial Review of Racial Discrimination Claims in Criminal Cases}, 52 \textit{SYRACUSE L. REV.} 735, 766 (2002) (“Brown has not proven as useful in combating forms of discrimination that are far less public, such as may be practiced during enforcement of criminal laws. That distinct kind of discrimination needs new judicial sensitivities.”)
\item See \textit{supra} notes 56 to 121 and accompanying text.
\item Benno C. Schmidt, Jr., \textit{Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow}, 82 \textit{COLUM. L. REV.} 444, 445 (1982) (“Blacks in the South remained segregated and stigmatized by Jim Crow laws; disenfranchised by invidiously administered literacy tests, white primaries, and poll taxes; and victimized by a criminal process from whose juries and other positions of power they were routinely exclude”).
\item David Pilgrim, \textit{What Was Jim Crow}, \textsc{Ferris State University}, http://www.ferris.edu/Jimcrow/what.htm (last visited Dec. 11, 2014).
\item \textit{Id.}
\item See generally, \textsc{Randall Kennedy} \textit{Interracial Intimacies: Sex, Marriage, Identity, and Adoption} (2003); Ariela J. Gross, \textit{Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South}, 108 \textit{YALE L.J.} 109, 120, 181-85 (1998) (documenting the racial identity case law); Laura Miller, \textit{Are You White Enough? From Jim Crow Laws to Workplace Discrimination, the History of Race and the American Courtroom Is Incendiary}, \textsc{Mont. Law.}, November 2008, at 22, 23 (explaining the role of the courts in the antebellum South and the characteristics that the court took into account when litigating race).
\end{enumerate}
\end{footnotesize}
determined as much by individuals’ reputation and conduct as by appearance, “blood,” or other presumably scientific evidence.\(^{35}\) In each case, the “racial identity” of a person was disputed, and a determination of whether the person was White or Black was relevant to the outcome of the litigation.\(^{36}\) Then later, two critical cases in the height of the Jim Crow-era, \(Ozawa\) (1922)\(^{37}\) and \(Thind\) (1923),\(^{38}\) forced the Supreme Court to specify the judiciary’s criterion to determine race.\(^{39}\) The racial identity cases confirmed the courts role as the arbiter of segregation as \(Plessy\) allowed the courts to be the fact-finder as deciding who and what was separate under the law.\(^{40}\) The Supreme Court furthered that enforcement role in \(Gong Lung v. Rice\),\(^{41}\) as it held that states possess the right to define a Chinese student as non-white for the purpose of segregating public schools.\(^{42}\)

A prolific example of the role of state courts as race referees was \(Green v. City of New Orleans\).\(^{43}\) \(Green\) is the story of Jacqueline Henley, a mixed-race child whose racial classification foiled her adoption due to a Louisiana law prohibited adoption across racial lines.\(^{44}\) In \(Green\), the court and authorities refused to change the child’s race on her birth certificate,\(^{45}\) as reclassifying her race required

\(^{35}\) Gross, supra note 34 at 181-85.

\(^{36}\) Id.


\(^{39}\) Prior to 1922, two competing doctrines characterized the racial-prerequisite cases: the common-knowledge test and the scientific-evidence inquiry. The common-knowledge standard relied upon “popular, widely held conceptions of race and racial divisions” based entirely on perceptions that might or might not be grounded in physical appearance. This methodology contrasted sharply with the scientific-evidence test, previously in vogue, which had relied upon “supposedly objective, technical and specialized knowledge for racial determination.” Sharona Hoffman, \(Is There A Place for "Race" As A Legal Concept?\), 36 ARIZ. ST. L.J. 1093, 1131 (2004). When viewed in isolation, the common law standard arose victorious. However, when applied, racial determination became a “system of white performance interpreted through the eyes of judges.” For a closer dissection of these two cases, see also John Tehranian, \(Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America\), 109 YALE L.J. 817, 821-22 (2000).

\(^{40}\) Most remarkable was the role of the courts in interracial intimacy cases. See generally, KENNEDY, supra note 34; Randall Kennedy, \(Interracial Intimacies: Sex, Marriage, Identity, Adoption\), 17 HARV. BLACKLETTER L.J. 57-83 (2001).

\(^{41}\) Gong Lum v. Rice, 275 U.S. 78 (1927).

\(^{42}\) Id. at 83.


\(^{44}\) Id. See also Kennedy, \(Interracial Intimacies\), supra note 40, at 57 (explaining back story and facts of the case).

proof beyond a reasonable doubt.\textsuperscript{46} In racial identity case law, “[f]ew cases illustrate more vividly the cruel lunacy of American pigmentocracy.”\textsuperscript{47} Not only was “equal but separate” the applicable standard, but it was the role of the courts to referee the minutiae of “separate.”

When faced with the conflict paradigm, notions of fact-based equality were far from the conscious of the judiciary until education-based cases such as \textit{Pearson v. Murray}\textsuperscript{48} and its progeny\textsuperscript{49} laid the framework for inequality as the rhetoric that debates surfaced around. Instead, case law and the physical logistics of the courtroom revolved around maintaining segregation and the “separate” requirement of \textit{Plessy}. The conflict paradigm was infused into the court’s DNA, and Civil Rights-era litigation unveiled both apparent and clandestine effects of the conflict paradigm in the courtroom.

The African-American Civil Rights Movement\textsuperscript{50} encapsulates the major campaigns of civil resistance from the 1950’s to the early 1970’s to secure legal recognition and federal protection of the citizenship rights enumerated in the constitutional amendments adopted after the Civil War.\textsuperscript{51} In addition to boycotts, marches, and civil disobedience of the Movement, litigation attacked a wide spectrum of practices of the segregation regime.\textsuperscript{52} Civil Rights litigation, predominantly led by the National Association of Colored People (“NAACP”), had its first major victory in 1910.\textsuperscript{53} In 1954 the litigation reached its capstone in

\textsuperscript{46} See \textit{Green}, 88 So. 2d at 77.
\textsuperscript{48} 182 A. 590 (Md. 1936) (notably argued by Thurgood Marshall and Charles Hamilton Houston).
\textsuperscript{50} I also refer to this period as the Civil Rights Era throughout this paper.
\textsuperscript{52} Randall Kennedy, \textit{Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott}, 98 \textit{YALE L.J.} 999, 1012 (1989).
\textsuperscript{53} Guinn v. United States, 238 U.S. 347 (1915) (upholding the trial courts ruling by striking down an Ohio grandfather clause voting restriction and helping establish the NAACP’s importance as a legal advocate).
Brown v. Board of Education,\textsuperscript{54} the most famous Supreme Court decision of the twentieth century. Landmark impact litigation, as an engine in the Civil Rights Movement, is well-documented, debated, and interpreted by legal historiographies.\textsuperscript{55} Regardless of the chosen narrative surrounding that litigation, the debates still reiterate the broader impact of constitutional law through litigation and legislation in bringing drastic social change for Blacks across the country. However, the courthouse itself is an unheralded battleground and critical forum of the Civil Rights Movement, as the development of the Jim Crow courthouse and the courthouses’ place in the Civil Rights Movement provides a means for depicting various structures of segregation and its demise.

C. EXAMPLES OF RACISM IN THE COURTROOM: RACIAL SEGREGATION AND OVERT DISCRIMINATION

The courtroom was one of the rare forums forced to directly face the conflicting values of segregation and equality. The courts were theoretically supposed to treat Black Americans explicitly as “equals” before the law. But at the same time, the courts created their own Jim Crow-era tactics of overt discrimination through all-White juries,\textsuperscript{56} segregated physical accessories of the courtroom (such as the Bible used for oath-taking),\textsuperscript{57} and spatial segregation, including segregated bathrooms and pews.\textsuperscript{58} Other forms of racism similarly mimicked anti-Black cultural sentiments through disrespectful verbal cues\textsuperscript{59} and the belittlement of Black attorneys.\textsuperscript{60}

\textsuperscript{56} See supra note 11.
\textsuperscript{57} See supra note 9.
\textsuperscript{58} See supra note 5.
\textsuperscript{59} For examples of verbal disrespect, see the repeated use of ‘nigger’ to refer to the defendant revealed in the record in Franklin v. South Carolina, 218 U.S. 161 (1910). See also R. BAKER, FOLLOWING THE COLOR LINE 47, 97 (1906).
\textsuperscript{60} See infra, notes 107-121 and accompanying text.
1. All-White Juries

Arguably, one of the first segregated mechanisms in the courthouse to fall was the jury box.\(^{61}\) In a series of cases from 1879 to 1942 starting with *Strauder*,\(^{62}\) the Supreme Court “declared unequivocally that defendants in criminal cases are entitled to non-discriminatory selection of the grand jurors... and petit jurors... at trial.”\(^{63}\) Blacks could no longer be totally excluded from jury lists by statute.\(^{64}\) Instead, in the early 1900’s, states would use the processes of the jury selection itself to shield its process from Equal Protection’s pre-*Shelley v. Kramer*\(^{65}\) requirement of state action.\(^{66}\) The exclusion of Blacks from southern juries was virtually absolute.\(^{67}\)

During the Jim Crow era, juries served as one of the simplest demise of criminal justice for Black Americans.\(^{68}\) Not only were Blacks facing criminal sanctions,

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\(^{63}\) See Brady, supra note 61.


\(^{65}\) State action doctrine was extremely limited in civil rights litigation until *Shelley v. Kraemer* in 1948. 334 U.S. 1 (1948). In *Shelley*, the Court held that judicial enforcement of a private racially-based restrictive covenant constituted state action under the Equal Protection Clause because it had been judicially enforced. See John Dorsett Niles et. al., *Making Sense of State Action*, 51 SANTA CLARA L. REV. 885, 891 (2011).

\(^{66}\) In five cases, the Court held the Fourteenth Amendment’s Equal Protection Clause (as understood at that time) was only authorized only for actions challenging state laws. Therefore, federal courts lacked jurisdiction over the jury selection cases because the alleged discrimination occurred through the actions of state officers and not by operation of state law. See Brady, supra note 61, at 802 (citing Franklin v. South Carolina, 218 U.S. 161 (1910) (upholding state law requirements that electors--from whom grand jurors were selected--must meet literacy, residence and poll tax requirements)).


\(^{68}\) See Brady, supra note 61, at 765 (2002) (“State criminal justice systems became a primary tool...
but White plaintiffs were acquitted charges for crimes against Blacks.\(^69\) Judges around the South were able to place themselves a single iteration away from inequitable criminal remedies by relying on all-White juries within the \textit{Plessy} framework of “equality under the law.”\(^{70}\) As Blacks were kept out of jury service, the democratic safeguard of the jury system was turned into a means of minority subjugation.\(^{71}\)

The intersection of jury formation and responsibilities of the juries in creating unjust trial outcomes is only one prong of the effects of this racist practice. The formation of the all-White jury box also fit into the larger pattern of deficiency of legal protections for Blacks.\(^72\) This injustice in the jury selection process furthered the general feeling of uncertainty, arbitrariness and inequality.\(^73\) Jury duty, as a prong of civil service, was a sign of sound judgment and upright citizenry. The uniform exclusion of Blacks from jury service perpetuated the...

\(^69\) Describing discriminatory acquittals, a historian notes, “[f]rom the Emmett Till trial to that of Rodney King, there is a long history of juries acquitting white defendants charged with violence against black victims.” Tania Tetlow, \textit{Discriminatory Acquittal}, 18 WM. & MARY BILL RTS. J. 75 (2009). \textit{See e.g.}, Jeffrey S. Adler, "The Killer Behind the Badge": \textit{Race and Police Homicide in New Orleans, 1925-1945}, 30 LAW & HIST. REV. 495, 503-04 (2012) (noting a 1931 newspaper clipping that documented “as far as some white juries are concerned, the killing of innocent Negroes by policemen is no graver an offense than killing a rat or an insect”) (citations omitted); Douglas O. Linder, \textit{The Emmett Till Murder Trial: An Account}, http://law2.umkc.edu/faculty/projects/ftrials/till/tillaccount.htm (last visited Dec. 11, 2014) (detailing the trial in which an all-White jury returned a "Not Guilty" verdict after just an hour of deliberation despite clear evidence that two white men murdered a Black child). The author describes the jury selection process in the Emmett Till murder trial of two White men:

In 1955, none of the black residents of Tallahatchie County were registered voters and thus, under the jury selection rules then in place, no black was eligible to serve as a juror. During the six hours of jury selection, the county’s sheriff-elect assisted the defense team, advising the lawyers as to which jurors were “doubtful” and which were “safe.” All of the twelve white men seated for the jury seemed safe. One of the defense attorneys said later, “After the jury was chosen, any first-year law student could have won the case.”

\(^70\) Kelly Miller, a prominent Black mathematician and sociologist during the early 1900’s, noted: “The Negro feels that he cannot expect justice from Southern courts where white and black are involved. In his mind accusation is equivalent to condemnation. For this suspicion the jury rather than the judge is responsible.” Benno C. Schmidt, Jr., \textit{Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1410 (1983} (citing K. MILLER, \textit{RACE ADJUSTMENT: ESSAYS ON THE NEGRO IN AMERICA 79 (1908)).

\(^71\) \textit{Id.} at 1409.

\(^72\) \textit{Id.}

\(^73\) \textit{GUNNER MYRDAL, AMERICAN DILEMMA 524 (1944)} (emphasis added).
belief that “the black race . . . were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries.”

As more diverse jury lists were compiled, the jury selection process signified one of the first shifts in the courthouse towards even further coded discrimination. The fall of the all-White jury list propelled a move towards covert discrimination through tactics such as racially-based preemptory challenges. By removing the all-White jury from the courthouse’s playbook, equality under the law thus faced another covert hurdle.

2. The “Colored” Bible

The hypocrisy of the Plessy mandate is perhaps clearest as reflected in an anecdote from a North Carolina Court. In 1947, a Black doctor was summoned to the New Hanover County Court House in Wilmington, North Carolina to testify regarding a patient involved in an insurance liability case. As he took the witness stand, the bailiff asked him to swear the customary oath on a Bible — a battered Book wrapped with a strip of dirty adhesive tape and labeled “Colored.” Describing that incident as “unconscionable,” the doctor later explained his feelings when he walked out of the courthouse:

74 See Hill v. Texas, 316 U.S. 400, 405 (1942) (quoting Neal v. Delaware, 103 U.S. 370, 397 (1880)).
76 Healing a Nation, MEDICINE AT MICHIGAN, Summer 2000, 38-41. See also DIANE MCWHORTER, CARRY ME HOME 202 (2001); Garrett Epps, The Other Sullivan Case, 1 N.Y.U. J.L. & LIBERTY 783, 787 (2005) (noting that even the Bibles were segregated).
77 Healing a Nation, 38-41.
I was stunned. My eyes fogged, my ears hummed and a quiver ran down
my spine. I almost gasped . . . The charge built up in me by years of racial
prejudice had finally exploded . . . There were measly black schools,
segregated hospitals, segregated tennis courts, all-[W]hite government,
segregated libraries, and segregated Bibles.78

The separate Bibles for Black and White witnesses to swear their oaths captures
the racial protocol of the Jim Crow South and demonstrates not only the banality
of its evils but also the absurdity of its tactics.79 The segregated Bible reflects the
depths at which discrimination was engraved in the courthouse -- as if the oath
taken while swearing on different bibles created a Black truth and a White truth.
As a purely figurative tactic of segregation this again encapsulates the hypocrisy
of Plessy’s “equal but separate,” insisting that the judiciary ignore the power of
symbolism.

3. Spatial Segregation of Facilities

Spatial desegregation was a major battlefront in the Civil Rights Era as physical
“segregation emphasized such presumed differences by relegating Blacks to
unmistakably inferior facilities. . . [S]igns were not the only physical reminders of
separation . . . The physical inequality [became] a symbol of the essential racial
status and [was] defended with great determination.80 Courthouses were no
different than other public spaces plagued with Jim Crow apartheid as
courthouse pews, bathrooms, and water fountains81 were segregated. In some
courts, witnesses even testified from segregated witness boxes.82

The classic fiction novel To Kill a Mockingbird accurately portrayed the segregation
of the southern state courthouse facilities:

78 Id.
79 Michael Patrick Brady, The Warmth of Other Suns: A Time When the Bible Itself Was Segregated,
(reviewing ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S
GREAT MIGRATION (2010)).
80 Mary Ellen Maatman, Speaking Truth to Memory: Lawyers and Resistance to the End of White
81 Segregated drinking fountains labeled "white" and "colored" in the Dougherty County Courthouse of Albany,
Georgia (photograph), in TWENTY-FIVE PHOTOGRAPHS FROM THE SOUTHERN CIVIL RIGHTS
82 Benno C. Schmidt, Jr., Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strader v.
There, [the three White children] went up a covered staircase and waited at the door. Reverend Sykes came puffing behind [them], and steered [them] gently through the [B]lack people in the balcony. Four Negroes rose and gave [the three White children] their front-row seats. The Colored balcony ran along three walls of the courtroom like a second-story veranda, and from it [they] could see everything.83

From an architectural standpoint, courthouses and their layout of restrooms often represent the last physical vestiges of segregation.84 In Hernandez v. Texas, the Supreme Court agreed the segregation of courthouse bathrooms was evidence as “Mexican” as a class of persons distinct from Whites,85 detailing “two men’s toilets, one unmarked, and the other marked ‘Colored Men’ and ‘Hombres Aqui’ (‘Men Here’).”86 Notably in Green v. New Orleans,87 there was no bathroom in the courthouse (located in the all-White French Quarter of New Orleans) for the Black witness, Herbert Stanton, the alleged father of the mixed-race child.88 Because segregation was a functioning tool of discriminatory practices, “the marking of racially-separate restroom facilities was an official public statement that those in power thought [B]lack people were inferior.”89

In 1948, the Mississippi Supreme Court addressed segregated seating in the death penalty appeal of Murray v. State.90 The court considered whether to reverse the murder conviction of a Black man tried in a courtroom that segregated Black spectators, allowing them to sit only in the balcony. The court’s language reveals the long tradition of courthouse segregation: “It is asserted that the seating arrangement, suggested pursuant to a custom whose immemorial usage and

85 Hernandez v. State of Tex., 347 U.S. 475 (1954) (“Substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from ‘whites’ . . . by showing the attitude of the community.”) (Footnote omitted). See also, Juan Francisco Perea, Mi Profundo Azul: Why Latinos Have a Right to Sing the Blues, in Colored Men And Hombres Aquí: Hernandez v. Texas and the Emergence of Mexican American Lawyering 100, (Michael A. Olivas ed., 2006).
87 88 So. 2d at 76.
88 Kennedy, Interracial Intimacies, supra note 42, at 61 (2001) (“Unable to find toilets other than those reserved for whites, [Stanton and Green] were forced to leave the courthouse and wander through the surrounding French Quarter in search of relief.”)
89 Higginbotham, supra note 7, at 526.
90 Murray v. State, 202 Miss. 849, 33 So. 2d 291 (1948) (en banc).
sanction has made routine, resulted in a concentration in the balcony of those of the same race as the defendant.”

In affirming the conviction, the court implicitly approved of that “routine” tradition, and its decision permitted its continuance: “Assuming that this seating arrangement was insisted upon and deemed prejudicial to such as were piqued thereby-as to which there is no showing—such reactions may not be magnified into a fancied denial of constitutional rights and thereupon made assignable to the defendant.”

After a plethora of Civil Rights Movement litigation sensitized the judiciary to the derogatory use of segregation and its hindrance of equal protection, the Supreme Court addressed segregated courthouse seating in *Johnson v. State of Va.* In traffic court in Richmond, Virginia, the bailiff and judge had instructed a Black gentleman to move from the section reserved for Whites. The Supreme Court held that the practice of segregating spectators by race in a courtroom was a “manifest violation of the State's duty to deny no one the equal protection of its laws,” following the Equal Protection mandate of *Brown*. The courthouse seating remains at issue in present day as the Court has refused to conclude that the racist seating of a courtroom could, in any possible manner, affect the administration of justice.

4. Overt Discrimination in the Courtroom

While practices of social segregation are addressed in case law, in many instances, overt discrimination in the courtroom was not necessarily captured by litigation and the paper trail that followed. Racism in the courts was also reflected in the court’s treatment of participants, particularly Black witnesses and lawyers.

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91 *Id.* at 857, 33 So. 2d at 292.
92 *Id.*
93 373 U.S. 61, 62 (1963)
95 *See* State v. Cox, 244 La. 1087, 1108 (1963) (The Louisiana Supreme Court, in considering appellants' claim that racial segregation in the courtroom had denied him a fair trial in violation of his due process and equal protection rights, acknowledged that the courtroom in question had been segregated for many years but affirmed the conviction). Later, the United States Supreme Court reversed Cox's conviction on first amendment grounds but did not discuss the question of the segregation of the courtroom. State v. Cox, 379 U.S. 536 (1965).
Black defendants and witnesses were routinely addressed by their first names, called “boy” or “nigger,” or other terms of condescension, and derided as untrustworthy and simple-minded. One example of the repeated use of ‘nigger’ to refer to the defendant is the trial record in Franklin v. South Carolina. Similarly, in a major 1904 peonage prosecution, United States v. McClellan, the Attorney General-elect of Georgia represented the defendants. The federal district Judge Emory Speer made a rare admonishment of counsel:

Don’t you think the future Attorney-General of the state of Georgia can spare us this ‘nigger, nigger, nigger’? It sounds so unworthy of a great court of justice, and so unworthy of your own position at the bar to be alluding to these poor unfortunate creatures constantly in the lowest terms of degradation.

This unusual moment captured the common practice amongst White attorneys, the perpetual berating of Black victims, witnesses, and courtroom participants, with the goal of bringing the social stratification and norms of the Jim Crow era to the forefront of the courtroom conscience.

The southern courts also failed to accord to Black witnesses the formal civilities accorded to White witnesses. The case of Miss Mary Hamilton squarely addresses one such form of disrespect through the lack of titles used by questioning attorneys. After the Brown decision, a young Black woman named Mary Hamilton challenged such customs. Hamilton was on the witness stand in a Birmingham state court for an offense stemming from participation in a civil rights demonstration. The state’s attorney continued to address her as “Mary” even as she insisted on being addressed as Miss Hamilton, so she refused to answer any of the state attorney’s questions. The judge held her in contempt of court on in the courtroom that the written record can never reveal.”

98 218 U.S. 161 (1910). See also R. Baker, Following the Color Line 47, 97 (1906).
100 A Recent Georgia Peonage Case: Throwing a Sidelight on Legal and Social Conditions in the South, 23 The Green Bag 525, 528 (1911).
101 Higginbotham, supra note 7, at 543 (“Appellate courts have upheld convictions despite prosecutors’ references to black defendants and witnesses in such racist terms as ‘black rascal,’ ‘burr-headed nigger,’ ‘mean negro,’ ‘big nigger,’ ‘pickaninny,’ ‘mean nigger,’ ‘three nigger men,’ ‘niggers,’ and ‘nothing but just a common Negro, a black whore.’”)
102 See Ex parte Hamilton, 275 Ala. 574, 574 (1963), rev’d, 376 U.S. 650 (1964). For an acknowledgement that the use of first names for black persons was part of the Southern caste system, see also King, supra note 10.
103 Id.
The Supreme Court reversed with no oral argument, citing Brown and Johnson v. State of Virginia. Miss Mary Hamilton’s request was simple: treatment with the same dignity accorded to White witnesses in the court.

Discrimination against lawyers came in two forms in Jim Crow courts: exclusion and ill-treatment. First, Blacks were generally excluded from the occupation of the practice of law. African-Americans were completely underrepresented in the legal profession, particularly in the South:

In 1930 less than 1 per cent of all lawyers were Negroes. Almost two-thirds of the 1,200 Negro lawyers resided outside the South. Most Negro lawyers are the products of [W]hite law schools in the North. In Mississippi there were but 6 Negro lawyers, as against more than 1,200 [W]hite lawyers. The corresponding figures for Alabama were 4 and 1,600, respectively. Of all those in the South only a minority are believed to devote themselves to their law practice, and rarely do they appear in court to defend Negro clients against [W]hite parties. Their main legal work concerns internal Negro affairs, such as those connected with churches, fraternal associations, domestic relations and criminal matters.

Not only was the Black defendant pleading for understanding from White judges, White prosecutors, White police officials, and White juries, but the defendant was also unable to secure Black counsel as they largely did not exist in the Jim Crow South. Not until Gideon v. Wainwright in 1963 did the Supreme Court begin requiring the states to provide counsel for indigent defendants in criminal cases. Right to court-appointed counsel in state courts was dependent

104 Id.
105 Id.
106 Higginbotham, supra note 7, at 527.
107 MYRDAL, supra note 73, at 326.
108 The exception to the rule of White supremacy in the judicial administration during the Jim Crow-era and early Civil Rights Movement is Miami’s “Negro Municipal Court,” established in 1950 as the United States’ first, and perhaps only, court ever set up on purely racial lines. See Ernesto Longa, Lawson Edward Thomas and Miami’s Negro Municipal Court, 18 ST. THOMAS L. REV. 125 (2005) (detailing the history and arguing for the significance of this court).
109 Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth and Fourteenth Amendments require the states to provide counsel to all indigent defendants). The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI.
110 For assistance in civil cases, indigent persons must turn to three sources of counsel: the private bar, organized private legal aid, and public legal assistance. Alan J. Stein, The Indigent's Right to Counsel in Civil Cases, 76 YALE L.J. 545, 546 (1967).
on a laundry list of manipulable factors.\textsuperscript{111} Black defendants were left to fend for themselves.

The few lawyers that appeared before Jim Crow and early Civil Rights-era southern courts faced a myriad of discriminatory tactics.\textsuperscript{112} Anecdotes from Federal District Court Judge Constance Baker Motley’s distinguished career as a trial attorney exposed courtroom inequities: “Often a southern judge would refer to the men attorneys as Mister, but would make a point of calling me ‘Connie,’ since traditionally Black women in the South were called only by their first name.”\textsuperscript{113}

In Miami, Florida in the mid-1930’s, Black attorneys were limited to work that did not require court appearances.\textsuperscript{114} When a young Black attorney, Lawson Edward Thomas, attempted to appear on Thanksgiving Day in 1937 and sat in at the front of the courtroom, the bailiff order him to take a seat “with the rest of the niggers” or be thrown from the sixth floor window.\textsuperscript{115} In partially an act of defiance and in part to distinguish himself as an attorney, Thomas went into the hallway and waited for the judge to take the bench.\textsuperscript{116} Later that day, Thomas reentered the courtroom, and became Miami’s first Black attorney to present his case at trial.\textsuperscript{117}

In the epic study in 1944, \textit{The American Dilemma} by Gunnar Myrdal, Myrdal contemplates the plight of Black lawyers. Myrdal simply states, “the Negro attorney often has little chance before a Southern court.” Not even “respectable” Black attorneys could procure the justice of the court, but instead, Myrdal comments that it would take a “respectable” White attorney to garner the respect

\textsuperscript{111} To limit the right of appointment, the Court manipulated two factors: the complexity of the trial situation, and the defendant's stake in the proceedings (in right to counsel cases between Betts v. Brady, 316 U.S. 455 (1942), and Gideon v. Wainwright, 372 U.S. 335 (1963)). “Against the complexity of each case it set off the defendant's abilities to master it—his intelligence, youth, experience, etc.” Stein, \textit{supra} note 110, at 549. For exhaustive review of these cases, see \textit{Beaney, The Right to Counsel in American Courts} 160-91 (1955).


\textsuperscript{113} K.B. Morello, \textit{The Invisible Bar: The Woman Lawyer in America, 1683 to the Present} 161 (1986).


\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.}
of the court on behalf of a Black client.\textsuperscript{118} The limited availability of Black lawyers further undermined due process for the majority of Black criminal defendants.\textsuperscript{119}

With that backdrop in mind, a critical Civil Rights Era benefit was the confrontation of Black attorneys in the face of justice – where they previously rarely appeared. Moreover, “[t]he mere presence of [B]lack attorneys contradicted the prevalent racist notions about black inferiority.”\textsuperscript{120} As entities such as the NAACP shifted from White attorneys to Black attorneys in the 1930s, trials presented one of the few arenas in the South where Black professionals could meet their White counterparts in open competition.\textsuperscript{121}

Overall, the Black courtroom experience in the South during the Jim Crow Era and early portion of the Civil Rights Movement indicates the courts’ discrimination within the hypocritical notions of “equal but separate.” Blacks were far from equal in their treatment in the courthouse – from entry through the courthouse doors to the adjudication of the legal issue at hand.

**D. Courthouse Racism as a Symptom, Signal, and Symbol of Racism in Broader Society**

From the previous exploration of the segregation and racism in the courts, segregation in the courtroom augmented, confirmed, and approved those dominant social norms of White supremacy outside the courtroom walls. In similar tertiary analysis, the racism in the courthouse preceding the Civil Rights era stood as a symbol, signal, and symptom of racism in broad society.\textsuperscript{122} Racism in the courts can be symptomatic of societal racism: reflecting the ideologies, attitudes, myths, and assumptions of anti-Black social norms.\textsuperscript{123} Segregation can also signal to the courtroom participants to partake in racism, triggering and mobilizing racist attitudes and stereotypes in the judgment and actions of the judge, jury, and attorneys.\textsuperscript{124} Lastly, discrimination and segregation in the courts

\textsuperscript{118} **MYRDAL, supra note 73, at 326.**


\textsuperscript{120} *Id.*

\textsuperscript{121} *Id.* at 545-551.

\textsuperscript{122} *Higginbotham, supra note 7, at 545-551.*

\textsuperscript{123} *Id.* at 545-46.

\textsuperscript{124} *Id.* at 546.
are “powerful symbols, acting to reinforce, legitimate, and perpetuate racism in the broader society.”\textsuperscript{125}

1. Courthouse Racism as a Symptom

Courthouse racism was a symptom of societal norms as the judiciary participated in racism in a manner plagued with the distinguishing features of Jim Crow social conditions. The characteristics of the 1950’s era courtroom mirrored the micronorms of segregated America as “the law articulate[d] and the institutional structures embod[ied] the formal racial dogmas.”\textsuperscript{126} As Randall Kennedy termed the “etiquette of segregation,” the Jim Crow micropolitics of day-to-day living highlighted the infiltration of segregation into all aspects of life.\textsuperscript{127} Segregation was not just in the classrooms, buses, and dining rooms, but imposing an abundance of taboos and etiquettes in personal contacts.\textsuperscript{128} Segregation was a national phenomenon, albeit in less virulent forms in Northern states.\textsuperscript{129} Myrdal noted that the rules of segregation were often enforced beyond statutory obligations, pointing out that courts were active in enforcing not just law, but also customs far outside those set down in legal statutes.\textsuperscript{130} The segregation and discrimination of the courthouse rose beyond mere symbolic participation in Jim Crow-era tactics; but rather, the underlying racist ideology (with symptoms previously examined in this article) was a disease engulfing the judiciary.

2. Courthouse Racism as a Signal

Courthouse racism acted as signals for those participants in the courtroom, triggering reactions from judges, juries, attorneys, and witnesses. The courtroom

\textsuperscript{125} Id.
\textsuperscript{126} E. B. Reuter, Address, \textit{Why the Presence of the Negro Constitutes a Problem in the American Social Order}, 8 J. NEGRO EDUC. 291, 297 (1939).
\textsuperscript{127} Kennedy, \textit{supra} note 52 at 1010. \textit{See also} Robert J. Cottrol & Raymond T. Diamond, \textit{The Second Amendment: Toward an Afro-Americanist Reconsideration}, 80 GEO. L.J. 309, 349-50 (1991) (“Jim Crow was established both by the operation of law, including the black codes and other legislation, and by an elaborate etiquette of racially restrictive social practices.”)
\textsuperscript{128} Samad, \textit{supra} note 15, at 11-12.
\textsuperscript{129} RICHARD WORMSER, \textit{THE RISE AND FALL OF JIM CROW} page xii. \textit{See e.g.}, Davison M. Douglas, \textit{The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North}, 44 UCLA L. REV. 677 (1996-1997); C. VANN WOODWARD, \textit{THE STRANGE CAREER OF JIM CROW} (both noting the history little violence in the North as compared to the South after Brown, and noting the diversion of national attention from the South following episodes of violence in Northern cities); P. FIELD, \textit{THE POLITICS OF RACE IN NEW YORK: THE STRUGGLE FOR BLACK SUFFRAGE IN THE CIVIL WAR ERA} (1982) (examining black struggles for civil rights in a northern state during the Civil War).
\textsuperscript{130} Samad, \textit{supra} note 15, at 13.
is filled with customs, traditions, time-honored practices, and rules of etiquette. As one judge explained, the courtroom is a “uniquely contrived atmosphere where the ultimate human drama unfolds.” Both judges and jurors are impacted by impressions of attorneys in their appearance and conduct. Furthermore, the appearance of justice intertwines with integrity of the courtroom that the Court has sought to preserve in its due process jurisprudence. Leon Higginbotham explained succinctly:

Instances of racism in the courtroom tap into the ideology of societal racism. A racist remark or insinuation by a judge or prosecutor acts as a signal, triggering and mobilizing a host of attitudes and assumptions which may be consciously held, or unconsciously harbored, by the judge, jury, and lawyers in the courtroom. The effect of the racist act or statement permeated beyond its immediate context by tripping other racist assumptions at other junctures in the proceeding.

A significant example of signaling through courthouse racism was the use of segregated Bibles for witness oaths. The use of an inferior “Black Bible” served as an incessant reminder to all courtroom participants that Blacks were fundamentally different and inferior to Whites and did not enjoy the benefit and protection of the laws for White citizens. Segregated Bibles augmented the overt attacks by counsel on the credibility of Blacks as witnesses and defendants using references to stereotypical notions of Blacks as either fools, liars, or violent. In a similar manner, addressing Black witnesses in informal terms and requiring Black attorneys to litigate from a different area triggered further

132 Procaccini, supra note 131, at 15.
133 Id.
134 See Cecelia Trenticosta & William C. Collins, Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana, 27 Harv. J. Racial & Ethnic Just. 125, 152 (2011) citing Estes v. Texas, 381 U.S. 532, 561 (1965) (“[T]he courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to “the integrity of the trial” process.)
135 Higginbotham, supra note 7, at 548-49.
136 Id. at 549 (1990) (using similar analysis to separate counsel table in South Africa).
137 Due to sheer volume, I have not included the plethora of case law with mere references to the race of a defendant or witness. Another large group of cases includes racially derogatory prosecutorial appeals. See id. at 529 (documenting racially derogatory prosecutorial statements).
stereotypes about Blacks that ushered into the conscious and unconscious minds of courtroom participants.

3. Courthouse Racism as a Symbol

During the Civil Rights Movement, the symbolic importance of the courtroom was no different than it is today. The stigmatization of blacks that resulted from overt and covert racist treatment in the courtroom was a particularly powerful symbol, legitimizing and reinforcing the general societal perceptions of blacks as inferior.”

Segregation was an unrelenting means of “performing” the tenets of White supremacy.

In the 1963 law review article, *Racial Discrimination and the Federal Law: A Problem in Nullification*, Louis Lusky categorizes two separate mechanisms of oppression. Lusky deems discrimination linked to some particular relationship, such as student, voter, neighbor, passenger, customer, as narrow-spectrum devices. This discrimination is limited to when a Black American would seek to utilize the relevant forum such as voting booth, school, or mode of transportation. The second mechanism is broad-spectrum devices of discrimination. Broad-spectrum discriminatory tactics remind and convince Blacks that they are an “intrinsically inferior order of being[s] who cannot justly claim equal treatment.” Systematic inequalities in the administration of the law squarely fall in that category through “exclusion of Negroes from jury panels and juries, courtroom segregation, unduly light punishment of Negroes convicted of crimes against other Negroes, and cruel and unusual punishment of Negroes convicted of crimes against [W]hites, and of convicted [W]hites who have aided Negro protests.”

The best example of courthouse racism as a symbol tool is the treatment of lawyers in the courtroom. Case law recognizes the importance of the legal occupation. In a more recent case, *Friedman v. District Court*, the court plainly observed the power of the legal profession:

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138 *Id.* at 572.
139 GRACE ELIZABETH HALE, MAKING WHITENESS 284 (1999).
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.* (citations omitted).
Attorneys occupy a different position in relation to the courts than do ordinary citizens. Attorneys are officers of the court. The privilege of practicing law is subject to certain conditions among which is that an attorney must observe reasonable rules of courtroom behavior and decorum.\textsuperscript{146}

Although the Friedman court was referring to attorney conduct, the pedestal that attorneys sit on as professionals is crucial in their role as community leaders. The void of Black attorneys in the list of great leaders of the Civil Rights Movement\textsuperscript{147} is a result of anti-Black policies in both law schools\textsuperscript{148} and bar associations.\textsuperscript{149} But the rarity of the Black lawyer makes him even more symbolically important in the courthouse, drawing crowds with their courtroom appearances.\textsuperscript{150} Similar with respect to public accommodations and Title 2 of the 1964 Civil Rights Act, the ostracization of Blacks even in merely symbolic places of public accommodation had a concrete effect on the texture of Black lives.\textsuperscript{151} The courtrooms provided one of the first forums in American history in which a cadre of Blacks—the Civil Rights Movement’s Black lawyers—consistently and publically bested Whites in an intellectual-professional setting.\textsuperscript{152} Similarly,

\begin{quote}
\textsuperscript{146} Friedman v. District Court, 611 P.2d 77, 78 (Alaska 1980).
\end{quote}

\begin{quote}
\textsuperscript{147} “Although black lawyers have served the black community as role models, providers of legal services, and protectors of property and civil rights, many of the best-known and most influential black leaders have not been lawyers. . . . [In fact,] there are very few lawyers who can be considered among the greatest leaders in African-American history.” Paul Finkelman, Not Only the Judges’ Robes Were Black: African-American Lawyers As Social Engineers, 47 STAN. L. REV. 161, 189-90 (1994). Notably, Malcolm X recalls a childhood story from grade school when he told his eighth-grade English teacher, Mr. Ostrowski, that he wanted to become a lawyer when he grew up. ALEX HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 36 (1965). His teacher responded, “Malcolm, one of life's first needs is for us to be realistic. Don't misunderstand me, now. We all here like you, you know that. But you've got to be realistic about being a nigger. A lawyer—that's no realistic goal for a nigger. You need to think about something you can be. You're good with your hands--making things. Everybody admires your carpentry shop work. Why don't you plan on carpentry? People like you as a person—you'd get all kind of work.” Id. After the career of Malcolm X as a civil rights leader, we should perhaps thank Mr. Ostrowski.
\end{quote}

\begin{quote}
\textsuperscript{148} See Finkelman, supra note 147, at 167 (noting that thirty-four of the eighty-eight accredited law schools in 1939 had anti-Black admissions policies).
\end{quote}

\begin{quote}
\textsuperscript{149} See Charles H. Houston, The Need for Negro Lawyers, 4 J. NEGRO EDUCATION 49, 51 (1935) (noting that southern Black lawyers are uniformly excluded from the benefits of membership in bar associations).
\end{quote}

\begin{quote}
\textsuperscript{150} See Finkelman, supra note 147, at 187-190 (describing packed courtrooms witnessing Black attorneys at trial in both the antebellum North and Jim Crow-era South).
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\textsuperscript{152} Kennedy, supra note 52 at 1064 (citing GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983); GILBERT WARE, WILLIAM
\end{quote}
litigation victories forced segregationists to go outside the law to maintain their power. The Civil Rights Movement’s litigators “helped to erode the façade of inevitability that surrounded the segregation regime and to create the perception of a gap between right and reality, authority and force.”

Civil Rights Movement litigation also acted as symbolic impetus for societal change. Commenting on the effects of Brown and other legal reforms, Judge Robert Carter noted:

> [T]he psychological dimensions of America's race relations problem were completely recast. Blacks were no longer supplicants seeking, pleading, begging to be treated as full-fledged members of the human race. . . . They were entitled to equal treatment as a right under the law; when such treatment was denied, they were being deprived—in fact robbed—of what was legally theirs. As a result, the Negro was propelled into a stance of insistent militancy.

Through racist tactics, the illegitimacy of Blacks was reinforced within every tangible and intangible part of the judiciary. Some argue that the litigation during the Civil Rights Movement was merely a formality and detracted from the Civil Rights Movement by deradicalizing that movement. But even if the litigation composed “mere formalities,” symbolism in the courtroom was integral to the Civil Rights Movement.


153 Kennedy, supra note 52, at 1065.


155 See, e.g., K. BUMILLER, THE CIVIL RIGHTS SOCIETY (1988); Moore, Brown v. Board of Education: The Court's Relationship to Black Liberation, in LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER, AND THE COURTS 62-64 (R. Lefcort ed. 1971) (“The needs of Blacks are fundamentally incompatible with the central role and function of the judicial system. . . . When Blacks look closely at American jurisprudence on questions of race, they find that little progress, if any, has been made after generations of litigation.”); Steel, Nine Men in Black Who Think White, N.Y. TIMES MAG. (Oct. 1968).

156 I personally believe the legal apparatus during the Civil Rights Movement was more than “mere formalities. Kennedy, supra note 52, at 1062 (“Formal rights matter [and] . . . are now sometimes referred to as ‘mere’ formalities were anything but ‘mere’ in the context that King confronted.”)

157 Mary Ellen Maatman, Justice Formation from Generation to Generation: Atticus Finch and the Stories Lawyers Tell Their Children, 14 LEGAL WRITING: J. LEGAL WRITING INST. 207, 225 (2008) (“The ways in which physical spaces were divided and maintained told a story: ‘For whites . . . African Americans were . . . most publicly inferior because they sat in inferior waiting rooms, used
E. CONCLUSION

As the discriminatory practices evolved, including those previously explored in this paper, racial issues still influenced the judiciary, but in more covert ways. Mimicking the rhetoric of discrimination after the legislation and litigation of the Civil Rights Movement, courthouse injustice shifted from overt to covert bias. To understand the depths at which injustice pervades the courthouse requires inspecting the overt discriminatory practices of recent American history in the Jim Crow and Civil Rights eras. Courthouse racism, including tactics not visible in case law, captures some of the origins of that overt bias as a symptom, signal, and symbol of Jim Crow-era societal norms.

The hypocrisy of Plessy and conflict paradigm is apparent when applied to the courthouse, as public officials segregate this formal public facility while allegedly dispensing the American notion of “equality.” This open-segregation also reveals the overall trend of evolving into a more complex social issue following the Civil Rights Movement. In the Jim Crow courthouse, interactions between Whites and Blacks were inevitably framed by the racial issues made chronically salient by laws, openly-held prejudicial attitudes, and discriminatory practices.\(^\text{158}\) Furthermore, “the explicit, pervasive nature of racial prejudice rendered race a salient issue whenever Whites made judgments about Blacks.” Accordingly, race was viewed as a relevant issue in almost all trials of Black defendants.\(^\text{159}\) The discriminatory and racist practices within the courthouse affirmed that social ideology in one of the most formal forums. The courts defied the impossible “equal but separate” mandate of Plessy not just in the holdings of case law, but also in the actual treatment of Black Americans within their walls.

inferior restrooms, sat in inferior cars or seats, or just stood.”) (citing Grace Elizabeth Hale, Making Whiteness 284 (1999)).


\(^\text{159}\) See Randall Kennedy, Race, Crime, and the Law 90 (1997) (using Dorsey v. State, 108 Ga. 477 (1899) to highlight the pervasiveness of racism in society and its influence on the legal system through the tendency of trial judges to allow differential treatment of White and Black defendants without violating the letter of the law).