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LEGAL RHETORIC UNDER STRESS: THE EXAMPLE OF VICHY

Richard Weisberg*

INTRODUCTION

Most of us have a tendency to think of the European disaster of 1933-45 in terms of physical violence of the worst, previously unimaginable kind. We have, in our mind's eye, masses of bodies. We think of the depersonalization of victimized groups, of the refusal to see certain people as real, specific individuals, and of the resulting

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Beginning in 1982, I have made periodic trips to France to ascertain something of the reality of that legal community during the War years. I have since amassed, there and at Yad Vashem in Jerusalem, some 2,500 documents, and I have interviewed a score of lawyers and functionaries who lived the period as adults, some flourishing, others chased from their profession and in hiding.

Most researchers into Vichy history will concur with me as to the invaluability of the documentary services of the Centre de Documentation Juive Contemporaine in Paris (CDJC). The CDJC, since the war itself when its founders had already courageously begun to document the period, has been graciously receptive to researchers. The gates at other documentary centers, such as the Archives Nationales (AN) have swung a bit wider in the past few years, their rich fund of materials gradually seeing the light of day. Other collections remain, sadly, closed off.

Meanwhile, lawyers and functionaries with memories of the Vichy years have become more responsive recently. If, in 1982 and 1983, I was universally greeted with the twofold answer: "Well, we were all in the Resistance—at least after 1944" and "Are you sure, young man, that you want to pursue this research?"—I now am granted lengthy interviews in which information of a more substantive nature emerges. Some of these individuals have helped with the documentary work. For example, Jean Barthelemy, a practicing Parisian lawyer, and the grandson of one of the Vichy Justice Ministers, granted me a two-hour interview and then allowed me to see almost all of his grandfather's private papers. While some of these are available at the AN, photocopying is not permitted there, and he graciously granted me photocopying privileges. Furthermore, while Jean Barthelemy has recently published an important book of memoirs by his grandfather, annotated with very helpful notes, he allowed me to see a variety of documents not included there.

I would like to thank the archivists at the following research centers: at Yad Vashem in Jerusalem, Cynthia Haft; at the CDJC in Paris, Monsieur Jacobson; at the AN in Paris, Mme. Bonazzi. For their generous support of my project, I thank Yeshiva University; the American Council of Learned Societies; and the Sassoon International Center for the Study of Anti-Semitism at the Hebrew University in Jerusalem. Finally, For their help in gaining access to various Parisian archives, I express my gratitude to Laurence Craig, Eric Friedman, and Serge Klarsfeld.

Where I have used archival documents, I have noted their locations followed by their particular identifying marks. Also, in a number of instances, I have included more information than called for by conventional law review citation forms (e.g. original date of publication, publisher, etc.). Translations of documents are my own.

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elimination of "anonymous, despised hordes." We do not think of language as playing much of a role in this horror, with one exception. We tend to believe that the German people, on whom, almost exclusively, we lay the blame for the Holocaust, were seduced into the violence by the brilliantly crazed rhetoric of their leader. From Hitler's hysterical words to the death camps sometimes appears to have been one horrifying step.

The purpose of this article is to show that a very different kind of rhetoric, in a very different kind of country, also led to death on a massive scale during the War years. The rhetoric was generated in France by men and women sitting at their desks; it arose, remarkably enough, with substantial independence from German interference or influence. It was the rhetoric of the law. This was a rhetoric of individual cases, not of mass depersonalization. It isolated out for individual analysis, rather than herded together, the subjects of its discourse. It used reason, not emotion, to identify these subjects.

For several years, I have been examining the way in which lawyers spoke during the stressful period of French history known as "Vichy," 1940-44. In this article I present a variety of empirical data and make a claim arising from the data. The claim is that a loose system of institutionally acceptable professional rhetoric caused—as much as did the terror or influence of German occupation—the definition, identification, and eventual destruction of tens of thousands of Jews, for the majority (but not the entirety) of such legal rhetoric was unchecked by an interpretive model that would have permitted recourse to certain foundational beliefs to evaluate and constrain itself.

There are at least three corollaries of my claim, the first two of which are fully developed here and the third of which is merely introduced in these pages: first, that the French legal community outdid the demands of the German occupiers and the examples of the German precedents; second, that "interpretive communities" need more than their situational sense of things to avoid catastrophe both to themselves and those their decisions affect; and third, that the Vichy lawyers' ingrained ability to avoid the conflict between the racial laws and the foundational egalitarianism of traditional French constitutional law shows there may well be a cause-and-effect link between an interpretive theory (here, anti-textualism) and the behavior of the group of interpreters it purports to describe.

The first corollary flows from the claim itself: German power and coercion cannot alone account for the ills that befell Jews on French soil during 1940-44, some 90,000 of whom were deported from
France to their extermination abroad.\(^1\) By analyzing the sophisticated jurisprudential debate in Vichy France on the issue of "Who is a Jew?," and then by providing an example of an autonomous body of French legal doctrine connected to that definitional discourse (landlord-tenant law), I demonstrate that unconstrained professional discourse more than German political pressure led to an excess of French zeal and thus a needless amount of Jewish suffering. My treatment of the first corollary expresses a central risk of professionalism, perhaps most notably legal professionalism—that lawyers seek relief from considering the basic premises of their actions by recourse to eloquence, formalism and the situational realities of the "job." It stands as a lesson to contemporary American lawyers, whatever the constitutional, egalitarian or procedural principles that appear to protect us from such behavior. For those "foundational" premises also existed in wartime France; yet they were trumped by the community's tolerance for narrower lines of discourse that studiously avoided (for the most part) the challenge of first principles.

The second and third corollaries relate both to the specifics of French legal history and the seemingly far-removed topical phenomenon of "Law and Literature" theory. In the second corollary, I seek to demonstrate that the popular notion of a protective professional or

\(^1\) Estimates of the number of Jews deported from France between 1940 and 1944 vary greatly. Robert Paxton's original research placed the number between 60,000 and 65,000. R. PAXTON, VICHY FRANCE: OLD GUARD AND NEW ORDER 1940-1944 at 183 (1972). This statistic, he speculated, included 6,000 French citizens. Id. Later, when working with Michael Marrus, Paxton modified his figure, placing it closer to 75,000. M. MARRUS & R. PAXTON, VICHY FRANCE AND THE JEWS 343 (1981). This latter figure coincides with Serge Karlssfeld's estimate. S. KLARSFELD, VICHY AUSCHWITZ 7 (1983). Klarsfeld estimated a pre-War population of 360,000. Id. at 344. Joseph Billig, however, concluded that as many as 120,000 Jews were deported from France during that time. 1 J. BILLIG, LE COMMISSARIAT GENERAL AUX QUESTIONS JUIVES 253 (1955). My number, 90,000, is not based on new research, but rather is an attempt at a consensus of the varying authorities.

Xavier Vallat, the first head of the infamous agency in charge of Jewish questions, the Commissariat général aux questions juives (CGQJ), writing from prison just after the War, said this:

France counted 330,000 Jews in 1939, of whom 50% were foreigners. In 1946, the number was 180,000, of whom 160,000 were of French nationality.

Vallat, Affaires juives, in 2 LA VIE DE FRANCE SOUS L'OCCUPATION 672 (Hoover Institute, Stanford University, 1947).

Vallat's figures, even factoring in some pre-armistice migration or post-armistice flight, are quite different from the currently accepted ones. Vallat ostensibly had no reason to lie, since he was already in prison and would not distort the figures. Other comments made by Vallat about wartime racial policy, however, cast everything he says into some doubt; thus in this same document he interposes one of the more amazing bits of rhetoric about the Vichy years: "One decidedly cannot reproach French officials for not having known of the abominations that even those who were the victims did not suspect ...." Id. at 677. For more Vallat rhetoric on related issues, see infra discussion at note 25.
situation discourse—typified by the phrase “interpretive community”\(^2\)—bends and breaks in the wake of Vichy France’s example. By answering Richard Posner’s critique of my earlier use of Vichy law in *The Failure of the Word*,\(^3\) I first show that many of Posner’s normative assumptions about professional rhetoric and behavior in fact unwittingly demonstrate the force of the second corollary—that interpretive communities need more than a merely situational sense of things. And by engaging the somewhat related discourse of Stanley Fish (who has not as yet addressed the implications of his theory for periods of holocaustic professional conduct), I assert that lawyers need recourse to textual standards of conduct and cannot rely on the practices of their profession alone to avoid future catastrophes. Here I willingly concede the difficulty of establishing norms apart from the interpretive practices surrounding them;\(^4\) but my point, embodied in the third corollary, is that the lesson of Vichy demands of our generation a *theoretical* posture in search of such norms. Hence I argue that the prevalent “post-modernist” hermeneutics, itself in radical disarray for reasons connected to my subject,\(^5\) directly risks producing modes

\(^2\) See, e.g., S. Fish, *Is There a Text in This Class?: The Authority of Interpretive Communities* (1980).

Fish maintains that every person speaks “from within a set of interests and concerns” and it is “in relation to those interests and concerns” that a person’s words are understood. If communication or understanding occurs, it will not be because the two people speaking “share a language, in the sense of knowing the meanings of individual words and the rules for combining them, but because a way of thinking, a form of life, shares [them] and implicates [them] in a world of already-in-place objects, purposes, goals, procedures, values, and so on; and it is to the features of that world that any words [they] utter will be heard as necessarily referring.” *Id.* at 303-04.

Fish insists that “communication occurs only within such a system (or context, or situation, or interpretive community) and that the understanding achieved by two or more persons is specific to that system and determinate only within its confines.” *Id.* at 304. *See also infra* text accompanying note 96 (summary of the Fish - Fiss debate.)


\(^5\) This school of thought, often labelled “deconstructionist,” has been discombobulated by revelations about the wartime activities in Belgium of one of its outstanding figures, literary critic Paul de Man. De Man is strongly identified with this school, and his writings highly influential within it. No less a figure than Jacques Derrida said, in eulogy: “As we know already but as we shall also come to realize more and more, he transformed the field of literary theory, revitalizing all the channels that irrigate it both inside and outside the university, in the United States and Europe.” *See* Lehman, *The Fall of Paul de Man*, New York Forward, Jan. 11, 1991, at 1, col. 1.

In 1987, four years after de Man’s death, details surfaced about his wartime activities. He had written facially collaborationist pieces for the pro-Nazi newspaper *Le Soir*. This revelation tarred de Man, his later critical works, and by association the deconstructionist school.
of practice that replicate Vichy’s text-avoidance, relativism, and ethnic debasement.

The historical subject of this article thus serves both as an example and as a first cause of our contemporary, situational duty to explore the risks of professional discourse. Post-Holocaust (a term I prefer to post-modern) theories that appear to liberate legal rhetoric from ethical norms are at best untimely and at worst perverse. No matter how difficult the quest for a “text” that will stand on its own to influence lawyers and others on the meaning of Vichy France, I argue here that the quest should proceed, sanctioned—rather than contradicted—by mainstream interpretive theory.

It is well worth recalling, 200 years after the French Revolution, how little allegiance there was to eighteenth-century revolutionary norms once the rhetorical floodgates were opened by articulate Vichy collaborators. Thus in 1940, only 80 of almost 600 French legislators refused on constitutional grounds to grant the Vichy leader, Pétain, virtually total monarchical powers.6 One of those 80, the young lawyer Philippe Serre, was to be hounded into exile for his courageous allegiance to text; others in his camp were to be executed by the Vichy regime for their vote. Serre, whom I recently interviewed, recognized at the time that the breach of constitutional norms represented, in his words, “the end of democracy in France.”7

This same Philippe Serre, a non-Jew and still proud Frenchman, remarked to me of the Vichy-authored anti-Jewish laws of 1940-44: “The Germans would not have insisted on a racial policy if the French had refused.”8 By the time of our conversation, in late 1988, my research had led me to a similar conclusion, but for different reasons. Serre saw the extensive Vichy racism as the twin result of Pétain’s “dictatorship” and the elevation of mediocre and often anti-Semitic ideologues to power under the Maréchal; he excepted his fel-

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6 R. Paxton, supra note 1, at 32.
7 Interview with Philippe Serre, in Paris (Dec. 21, 1988).
low private lawyers, who "se sont bien tenus" (i.e. who "conducted themselves properly"), criticizing instead the magistrates. But I felt, by then, that there were mixed results in all areas of legal practice, and that it was that practice and its discursive elasticity (and not the anti-Semitism of any one leader or group) that brought about the extent of the horror.

I focus here on merely two of literally hundreds of areas of Vichy legislation and caselaw. The first considers the disputes as to burden of proof and admissability of evidence on the basic question "Who Is a Jew?" The second exemplifies a discrete body of caselaw—here landlord and tenant—arising from the new legislation.

I.

Any analysis of Vichy rhetoric must begin with the law of 2 June, 1941, promulgated by the Vichy justice minister, Joseph Barthélemy and other government officials, and known as the "Statut des juifs." A sequel to a Vichy law of 3 October, 1940, this "2 June statute," as I shall call it, was designed to eliminate Jewish property ownership and to restrict or even eliminate Jewish participation in many professions and trades. Eventually it would be supplemented by almost 200 laws, ordinances, decrees, and rulings authored by French lawyers

9 Marrus and Paxton, in their necessarily brief section on Vichy law, list another half-dozen, one of their list tangential to the landlord-tenant problem discussed here. See M. Marrus & R. Paxton, supra note 1, at 143.

10 Loi portant statut des juifs, 3 Oct. 1940, Journal Officiel de la République Française [J.O.] (Oct. 18, 1940), D.P. IV at 312, reprinted in CENTRE DE DOCUMENTATION JUIVE CONTEMPORAINE, LES JUIFS SOUS L'OCCUPATION: RECUEIL DES TEXTES OFFICIELS FRANÇAIS ET ALLEMANDS 1940/1944 at 19 (Paris: CDJC 1982) [hereinafter LES JUIFS SOUS L'OCCUPATION]. This statute, the first to define who is a Jew under Vichy law, was reputedly written by Joseph Barthélemy's predecessor as Justice Minister, Raphaël Alibert, a known anti-Semite. Although it differed in certain ways from the 2 June, 1941 statute, which replaced it, both have been considered "Vichy" statutes by most authoritative French sources (and certainly by wartime German sources): "Le 3 octobre [1940], le gouvernement de Vichy promulgua la loi des Juifs en y introduisant la notion de race." ("On October 3, the Vichy government promulgated the Jewish laws by introducing to them the notion of race."). Inventaire: File AJ 38," at the Archives nationales, Paris, [hereinafter, AN] 1st cahier; see also, Michèle Cointet, Le Conseil national de Vichy 135 (1984) (doctoral thesis presented to the faculty of the University of Paris X for a doctorat d'état) (on file with author). The Germans always split their analysis of racial legislation into clear categories: their own, and Vichy's. (As I explore infra note 28, they wound up frequently adopting the Vichy racial laws for the occupied zone as well.) Vichy justice minister Joseph Barthélemy offered a self-interested minority view, from his perspective as one who, after all, signed the 2 June, 1941 law: "Cette législation n'est pas d'initiative française; elle est toute entière d'origine allemande." ("These laws are not a French creation, but entirely originated by the Germans."). J. Barthélemy, Ministre de la Justice: Mémoires 311 (Paris: Pygmalion, 1989). See also infra notes 51 and accompanying text (describing independent statutory activity by Vichy).
and officials. The 2 June statute begins, quite logically, with a definition of the word “Jew”:

1. A Jew is: He or she, of whatever faith, who is an issue of at least three grandparents of the Jewish race, or of simply two if his/her spouse is an issue herself/himself of two grandparents of the Jewish race.

   A grandparent having belonged to the Jewish religion is considered to be of the Jewish race;

2. He or she who belongs to the Jewish religion, or who belonged to it on June 25, 1940, and who is the issue of two grandparents of the Jewish race.

   Non-affiliation with the Jewish religion is established by proof of belonging to one of the other faiths recognized by the State before the law of 9 December 1905.

   The disavowal or annulment of recognition of a child considered to be Jewish is without effect as regards the preceding sections.

   [There follows the prohibitions for such people on property ownership and some employment; sanctions—including imprisonment—are then declared for engaging in proscribed activities.]

When I read the statute for the first time, I asked myself and others these questions: was this written by the French, with their long history of at least theoretical and constitutional equality before the law and freedom of religion—or was this imposed by the German conqueror? Was this degree of precision and legalistic verbiage really at work in the arrests of Jews on French soil that eventually led to large-scale deportations? Did not the German occupier (rather than the French) simply round up masses of indistinguishable people who lived in Jewish neighborhoods, herding them into trucks or buses, then onto trains to the death camps? Was not depersonalization, rather than specific definition, the method of the terrorizers, as Hannah Arendt seemed to argue? Were Jews even in Vichy itself—the so-called non-occupied zone administered exclusively by the French—defined and victimized by this law? And did the 2 June, 1941 statute become the linchpin for decisions, taken by courts before whom learned counsel would argue, that would then decide the fate of thousands of individuals in both zones?

11 LES JUIFS SOUS L'OCCUPATION, supra note 10, at 185-92 (giving a full list of these laws).

12 Loi du 2 juin 1941 remplaçant la loi du 3 octobre 1940 portant statut les juifs, J.O. (June 14, 1941), D.A.L. at 300, reprinted in LES JUIFS SOUS L'OCCUPATION, supra note 10, at 49; see also Appendix one.

As I learned more, I came to ask two additional questions: In what ways did the racial policy in France exceed that required by the German conquerors? Was there any rhetorical device or tactic, available situationally to the French lawyer who wrote, interpreted and applied that social policy, to reverse the fatal flow of events? My research into these basic questions was structured by analyzing the three major domains in which lawyers wrote and spoke: in the government,\(^{14}\) in the courts,\(^{15}\) and in the private sector.\(^{16}\) For each domain, I examined primarily, but by no means exclusively, the means of interpretation and implementation of the Jewish laws; their relationship to legal rhetoric and practice within the domains (e.g., the \textit{numerus clausus} on Jewish lawyers and law students; the prohibition against Jewish magistrates) and without (e.g., the application of the laws to specific situations).

I quickly found, however, a kind of seamless web of legislation and policy, in which the racial laws became connected, for example, with broader constitutional issues,\(^{17}\) with problems of conflict of laws

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\(^{14}\) The French government under Martial Pétain had its seat of operations in Vichy and was part of the "zone non-occupée" that enjoyed at least nominal independence from the German authorities. But the Germans increasingly allowed Vichy law and Vichy policy to extend to the "zone occupée" as well. \textit{See infra} note 28.

\(^{15}\) The court system remained, structurally, substantially unchanged, although there was at least one major new court created—the "Cour suprême"—and there were new, summary jurisdictions of existing courts, e.g., the infamous "sections spéciales" which tried and executed political prisoners, agitators, randomly selected hostages, etc., without right of appeal and in complete secrecy and undue haste. But the Jewish laws were worked out largely by the traditional dual system of French adjudication: the civil courts, with their appeals courts culminating in the Cour de cassation, and the administrative courts, commencing here often with decrees of the Minister of Justice or, later, decisions of the Commissariat général aux questions juives (created by the law of 29 March, 1941, J.O. (Mar. 31, 1941), \textit{reprinted in} \textit{LES JUIFS SOUS L'OCCUPATION}, supra note 10, at 39), reviewable by the chief administrative court, the Conseil d'État. The Conseil d'État received increased power under Vichy, and had within it specific sections and committees charged with examining all racial legislation. For example, the Conseil's "Section du statut des juifs," consisting of members from each of its major standing sections, issued the opinion on "What Means of Proof . . ." that Joseph Haennig commented on in his 1943 article, cited \textit{infra} text accompanying note 39. \textit{See} \textit{Commission du statut des juifs, Avis du Conseil d'État du Decembre 1942}, Législation de l'Occupation, Jan.-Mar., 1943, at 29, \textit{reprinted in} \textit{LES JUIFS SOUS L'OCCUPATION}, supra note 10, at 172.

\(^{16}\) These include avocats and avoués (the former pleading before courts and agencies; the latter, with their cousins, the notaires, handling land transfers and other transactions), and formal groupings of private lawyers such as the Paris Bar Association under the leadership of Jacques Charpentier, of whom more later, \textit{infra} notes 77, 87-88 and accompanying text. Law professors in France, unlike here, are better considered government functionaries than private attorneys. They too played a significant role in furthering the racial rhetoric innovated by Vichy. Joseph Barthélémy himself was drawn from the academy to the seat of ministerial power. For the participation of other law professors, \textit{see}, e.g., Lochak, \textit{La Doctrine Sous Vichy ou les Mésaventures du Positivisme}, in \textit{LES USAGES SOCIAUX DU DROIT} 252, 252-53 (Paris: P.U.F., 1989); and \textit{infra} notes 43, 76.

\(^{17}\) Constitutional issues were raised most publicly in the prolonged and much discussed
or rules of evidence;\textsuperscript{18} with traditional values such as the right to counsel and to an attorney-client privilege;\textsuperscript{19} with jurisdictional disputes as between administrative courts or agencies, and civil courts; and with internal issues such as: the salaries of lawyers, the explosion of litigation under Vichy,\textsuperscript{20} and the way entrance examinations and

“Riom Trial.” See generally Henri Michel, Le Procès de Riom 107-13 (Paris: Albin Michel, 1979). At Riom, the Vichy government brought criminal charges against various officials of Third Republic governments deemed responsible for the French defeat. Defense counsel for some of these accused consistently raised “foundational,” constitutional arguments against the appropriateness of the proceedings, and in the case against Léon Blum the defendant’s Jewishness itself emerged as an issue. See also infra notes 41, 82; Appendix seven (discussing the trial of Léon Blum).

As another example here, Vichy undertook a major constitutional reform project which envisioned, but never achieved, basic changes unrelated to the racial laws. See, e.g., Barthélemy, Ministre de la Justice, supra note 10, at 123, discussing Jacques Bardoux, a leading member of the Vichy-originated Constitutional Commission. Nonetheless, the regime’s racial policy affected both the makeup of the committee charged with that reform (no Jews were allowed), and its specific proposed provisions about freedom of religion, ex-post facto laws, foreign treaties, property ownership, denaturalization, et cetera. I will treat this slice of Vichy legal life at greater length in my book.

Questions of burden of proof arose in a variety of legal areas not necessarily racial in nature. One notable official, Camboulives, the Directeur des affaires civiles et du sceau (Ministry of Justice, 1941), effectively protested against a proposed law that would require all French to “justify their means of existence and the source of their property since 1 September, 1939.” Camboulives felt that such a law would unjustly shift the burden of proof, traditionally on the State, to the individual. Letter from Camboulives to Barthélemy (October 15, 1941), AN: 72AJ-412, dossier 6. No such argument as to principle was ever raised, in or out of government, on the shifting of the burden to the purported Jew under the racial laws. Instead, as we shall see, that debate had to develop gradually, through the subtle rhetoric of judicial decisions and learned articles. Legal discourse took a similar tack on matters of penalties of internment or even deportation, and on the relationship of the new racial legislation to preceding or concurrent French laws that did not on their terms apply to race. See infra Section II.

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The explosion of statutory material during the Vichy years is noted often and from many perspectives. Some of the increase, of course, derived from the several hundred or so new racial statutes, ordinances, decrees and major cases. Dalloz “Jurisprudence générale” for 1937-41, and then 1942-46, gives six full pages of statutes and cases under “Juifs.” In a memo of March 15, 1942 to the CGQJ, Darlan rejects the latter’s call for yet another change in racial definition by citing some 80,000 specific matters that had already been filed under the existing statute by that date. See CDJC: CXIV-24. But this litigious aspect of Vichy culture was more generalized. Thus, on Feb. 17, 1943, a Vichy memo argued for the hiring of many new judges on all levels:

The complexity of recent legislation, the increase in the small number of crimes and misdemeanors, have considerably raised the number of matters brought before various jurisdictions. For example, the criminal court of Montpellier, which decided 966 matters in 1938, took on 2,980 in 1942; the Limoges court saw its caseload increase from 696 to 2,502; Bordeaux’s from 2,557 to 4,601; Quimper’s from 398 to 990.

AN: BB30 1715 (Internal Vichy memorandum suggesting, to remedy this, not the calling up of Jewish judges who had been fired, but instead the immediate repatriation of French judges still held as prisoners-of-war in Germany).
even law-school courses should be conducted. From the earth-shattering to the banal, there was an expansion of legalistic issues connected to that law of 2 June, 1941 and its predecessors and progeny.

The 2 June statute indeed gave rise to what was easily the richest and most protracted legal debate of the period: who bears the burden of proof on the question of what the Vichy writers called “belonging to the Jewish race.” The 2 June statute is not explicit on the point, although the language (“is established by proof of belonging to one of the other faiths . . .”) might imply that the individual has the burden. The procedural issue, vital (as lawyers know) to the outcome of any piece of litigation, divided lawyers for four long years.

Upon this burden of proof question hung careers, fortunes, lives. For the 2 June statute left another gaping loophole when attempting to deal with the pervasive case of an individual with only two Jewish grandparents. It was here that the law coerced litigation and legal rhetoric. Anyone with three or more Jewish grandparents was irrefutably Jewish, as a matter of “race”; anyone with one or no Jewish grandparents was an “aryan” under this race-based approach, even if Jewish under Jewish law (by having a Jewish maternal grandmother) and even if (secretly) a Jew. Unless married to another Jew, however, the person with exactly two Jewish grandparents provided an ambiguous case.

This is the kind of question that lawyers love to attack. American as well as French lawyers might find here the tempting kind of statutory void that volumes of verbiage will soon fill. How can an interpretive community that thrives on such problems resist? What choices do members of that community have? Before returning to these questions, which are central to a discussion of my claim, let me continue empirically by revealing what French lawyers actually did. First, they drew pictures to explain to themselves the various perambulations.21 Then they began to debate the ambiguous statutory point; within a matter of weeks, they were divided, as an observer put it (making it sound more like a young wine than a legal matter of the gravest consequence), on “cette matiere fort delicate et nouvelle” (“this new and delicate matter”).22

Of no small interest was the obvious mistake in the statute, declaring Jewish any individual with only two Jewish grandparents but married to someone “of two Jewish grandparents of the Jewish race.” This, on its terms, would exclude from Jewishness half-Jews marrying

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21 For representative diagrams, see Appendix two. CDJC: XVIIa-38 (166 and 167).
someone with more than two Jewish grandparents or himself/herself a practicing Jew. While no private lawyer, to my knowledge, dared that argument in favor of a half-Jewish client, the lawyers in government agencies quickly saw the mistake. As the French administrative agency charged with Jewish questions—the Commissariat Général aux Questions Juives (CGQJ)—put it, in December, 1941:

We are faced with a defect in the drafting of the law that will soon be corrected. [It never was; it never needed to be.] But good sense requires that it be interpreted as though it said: "if his/her spouse is Jewish," and not "if his/her spouse is an issue of two grandparents of the Jewish race."23

Government lawyers, judges, and private attorneys all had much to say about the "delicate" debate. As early as the end of 1940 (construing a similar provision in the law of 3 October of that year), a justice department lawyer wrote to the Minister of the Interior of

... a yet more delicate case, although admittedly unusual and manageable, that of an individual, presumably of Jewish origins, but the issue of grandparents who practiced no religion or who were married civilly. How can we find the key to this problem? Arduous genealogical research might have to be on an international scale.24

For Xavier Vallat, the first Commissioner of the CGQJ, there was no doubt that the 2 June statute placed this occasionally overwhelming burden on the individual; writing just after the War of this problem, he says:

But how could we know if the grandparents were of the Jewish religion, since Jewish communities in France did not have records like those of the parish churches? It was only possible to determine this by forcing their descendants to furnish the contrary proof, that is evidence establishing that their grandparents had belonged to other recognized religions then in France: Catholic, Protestant, Orthodox or Islam.

And what about atheists, some will ask us? The answer is

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23 Letter from CGQJ to its regional director in Toulouse, CDJC: XVIIa-38 (156). The context of the correspondence is interesting, too. The Toulouse director was inquiring about the case of two first cousins who marry, having common Jewish grandparents, the Leboucher case. See Appendix three, CDJC: XVII-38 (157). He felt that the common grandparents "should not be counted twice to conclude that the grandchildren become Jewish because they have married." After all, absent the first-cousin relationship, a discrete total of four separate Jewish grandparents (not two!) would be necessary to consider the couple Jewish. The central CGQJ bureaucrat was willing to agree, because, as we just saw, he felt the 2 June statute should be read to insist on the Jewishness of the spouse; thus, each cousin had to be treated individually to determine his/her Jewishness, and the marriage one to the other would be irrelevant.

24 AN: BB-30-1714.
simple. We were dealing with people born in the first half of the
19th century and, in that period, atheism practically did not
exist.\textsuperscript{25}

As quickly as 21 November, 1941, Vallat's CGQJ was busy slap­
ping the wrists of such magistrates as the Procureur in Toulouse who
dared to reverse the burden. Declaring itself the best judge of the 2
June statute, "because of the minute study of the texts . . . our posi­
ton is unattackable. It consists of this affirmation: that the burden of
proof, in all contests relating to the quality of Jewishness, must be
carried by the individual and not by our Commission."\textsuperscript{26}

Not everyone connected with the Vichy government reveled in
placing this almost insurmountable burden on the individual rather
than the state. But it may be significant that the strongest statement
from Vichy against such an interpretation came from a writer, not a
lawyer.\textsuperscript{27} An essayist who briefly served in Pétain's cabinet, René
Gillouin complained directly to the Marechal on this point:

\begin{quote}
Il est regrettable . . . que ce soit désormais au présumé juif de faire
la preuve de son innocence [sic], et non plus à la justice.
L'innovation juridique est inquiétante pour tous. La dispersion des
biens par dissolution de la communauté sapera la famille. La loi
française est plus sévère que la loi allemande.
\end{quote}

(It is regrettable . . . that from now on the putative Jew will have to
prove her/his innocence [sic], and the State no longer needs to
prove her/his guilt. This judicial innovation is disquieting for
everyone. The dispersion of property by dissolution of the com­
nunity will sap the family. French law is more severe than German

\textsuperscript{25} Vallat, supra note 1, at 659-60. Vallat goes on to assert, among other things, that the
Vichy racial laws helped to save "95% of French Jews," while admitting that, of the 330,000
Jews he counted on French soil before the war, only 180,000 remained in 1946. \textit{Id.} at 672. He
blames only a few "sordid" individuals or groups for the spoliation of Jewish property,
amounting to many millions of francs, without reimbursement or eventual return of the prop­
erty in most cases. \textit{Id.} at 659. Vallat, whose legislative abilities and anti-Semitic attack on
Léon Blum while both were in the National Assembly commended him to the Germans for
this post, was charged with developing the Jewish legislation, \textit{see, e.g.,} 1 \textit{JOSEPH BILLIG, LE
COMMISSARIAT GÉNÉRAL AUX QUESTIONS JUIVES} 59 (Paris: Éditions du centre, 1955) [here­
inafter J. BILLIG, LE COMMISSARIAT GÉNÉRAL]. As to spoliation, Vallat himself described
one of his main tasks at the CGQJ to be "de pourschasser la fortune anonyme et vagabonde
d'Israel [to pursue the anonymous and roving fortune of Israel]." 1 J. BILLIG, \textit{LE COMMISSA­
RIAT GÉNÉRAL, supra, at 7.}

\textsuperscript{26} Letter from CGQJ to the Regional prefect of Toulouse, complaining of the prosecutor's
approach to the burden-of-proof question in the \textit{Dorfmann} case, CDJC: XVIIa-45 (2501).

\textsuperscript{27} Not that the story of the French literary community is altogether a happy one, as re­
gards the new racial situation. \textit{See, e.g., HERBERT LOTTMAN, THE LEFT BANK} (1982); \textit{see
also WELSBERG, AVOIDING CENTRAL REALITIES: NARRATIVE TERROR UNDER VICHY AND THE OCCUPATION, 5
HUM. RTS. Q. 151, 166 (1983) (discussing Sartre and Simone de Beauvoir, and others whose
careers flourished during this period).
As Robert Aron put it a decade after the war, somewhat modestly, the French statutory scheme was "plus sévère que celle de quelques pays satellites du troisième Reich" ("harsher than those of a few countries attached to the Third Reich"); Aron cites specifically the Vichy imposition of the burden of proof on the individual instead of the state. See R. ARON, HISTOIRE DE VICHY 227 (Paris: Fayard, 1954); see also M. MARRUS & R. PAXTON, supra note 1, at 205, 232, 263, 241-45, 334.

Certainly Jewish observers concurred as they analyzed the effects of the 2 June statute. The newsletter "Informations juives" of November 7, 1941, for example, observed that the statute exceeded even earlier German ordinances for occupied France by adding two substantive factors: the limit of June 25, 1940 for any attempts to convert or otherwise show nonobservance of Judaism; and the stipulation that, with only two Jewish grandparents, one married to a Jew would irrebuttably be deemed a Jew. (The Germans were far less fixed in their approach to this common situation.)

The Germans themselves, on several occasions, had to slap the wrists of French lawyers and bureaucrats whose legalistic zeal carried them beyond the strictness of German legal precedents. Hence, the chief of the Parisian Judenamt, Röthke, felt constrained to write CGQJ to advise them that the testimony of Catholic priests affirming the baptism of an alleged Jew with two aryan grandparents (or otherwise needing to sustain the burden of proof) was definitive from the perspective of German law. He wanted the French, who tended to disallow or devalue such evidence, to follow the more liberal German evidentiary model. CDJC: CXV-83; see also infra note 38 and accompanying text (discussing the Weiller case). On baptism, see infra notes 30, 43, and accompanying text.

As to the overbreadth of the French racial definition, the case of ethnic Georgians living in France is instructive. Here, the French themselves recognized they were breaking new ground, in terms of comparative law with the Nazi courts, yet proceeded anyway. The head of CGQJ's section on these laws thus writes, as late as 10 March, 1944, to his subordinate in Toulouse, that Georgians of Mosaic belief on French soil should be considered Jews under Vichy law:

For the moment, under French law, Georgians of Jewish belief must be regarded as having issued from three grandparents of Jewish religion and thus covered by the Statut des Juifs....

The German authorities exempt from the wearing of the Star such Georgians, because they consider them not to be of pure Jewish race.

Still, it does not appear that this exemption must ipso-facto bring about the removal of the aryan trustees that you have deemed it necessary to place in control of Georgian property. On the contrary, I have decided that, in every case, these Georgians must be made the object of aryisation measures.

Letter from the "Directeur du Statut des Personnes" to CGQJ Regional Director in Toulouse, (dated "Paris, le 10 Mars 1944"), archival reference missing: see Appendix six for the full document.

In every regard, including the "Final Solution" itself, the French could be fully counted on to provide the legalistic basis and the means to rid France of Jews. The lawyer Laval begged the Germans to deport Jewish children not previously demanded. See Appendix ten (correspondence between Paris and Berlin advising Adolph Eichmann that Laval was insisting that Jewish children 16-years-old and under be deported with their parents; it took Eichmann...
If the government debated the point, soon deciding that the individual
several weeks to condone Laval's innovation); see also M. MARRUS & R. PAXTON, supra note 1, at 263; a top police official, René Bousquet, begged them to allow deportations from the Unoccupied Zone. Id. at 241. (Bousquet, now in his eighties, was recently ordered to stand trial for crimes against humanity, based in part on information uncovered by Parisian lawyer Serge Klarsfeld. See Eytan, Mitterand Accused of Hiding Vichy Ties, The Jewish Week, Inc., December 28, 1990, at 10, col 1.) No wonder that, in late 1942, Dannecker's office could confidently write the following:

It is desirable that, regarding the Final Solution of Jewish questions, purely French organisations handle this in France. Still, this solution cannot yet be realised 100% with the present structure.

CDJC: XXVI, 80.

The Germans soon after this learned that there was still less need for German manpower in the French “final solution.” By mid-1943 The Paris Standartenführer and head of Paris Police (Dr. Knochen) was asking Berlin for 250 SS to help in French-originated round-ups of newly denaturalized Jews, and Berlin gently but firmly denied the need even for such modest numbers. “I recognize how hard your work is without sufficient personnel, but one SS-Führer and 3 subordinates will suffice.” Telegram from the head of the French gestapo in Paris to Dr. Knochen, marked “Endlösung der Judenfrage in Frankreich,” (July 2, 1943), CDJC: XXVII-23. Bousquet's police provided all that was needed for the massive roundups of 1942 and 1943.

Vichy law, and not German demands, created the need for Vichy police enforcement. In May, 1942, the Chief of Police on Jewish Questions of the CGQJ observed:

The rapidity with which Jewish legislation has been established and with which these measures have been applied makes us fear that, from what we see everyday with our own eyes, there may be huge deficiencies in vital personnel [to implement the policies].

CDJC: CXI-17. Thousands of police, guards, bus drivers, railway workers, even construction people, had to be re-positioned or newly hired; all of this was accomplished with an absolute minimum—even in the occupied zone—of German personnel or guidance. See infra notes 53 & 54.

On the broadest scale, a preliminary review of the documents makes clear that detention and even deportation (e.g. of children) were largely initiated by French lawyers, with the reactive support (and only later the active insistence) of the Germans. Although my conclusion on this point goes somewhat beyond that of earlier historians such as Marrus and Paxton, they state emphatically that “Any simple [explanation] of German Diktat can be dismissed summarily.” M. MARRUS AND R. PAXTON, supra note 1, at 5.

The following communication illustrates that Vichy legislation originated the policy of detention long before the Germans insisted upon it. In January, 1941, Dr. Knochen wrote to the German Military:

Foreign Jews on French soil number 1/2 of all Jews. The anti-Semitic developments of the past few months indicate that anti-Jewish feelings among the French are mainly directed to these foreign elements. This perspective is indicated by the French regime's legislation, for example the law of 4 October, 1940 about French stateless persons of the Jewish race, that gathers them together in Concentration Camps [Konzentrationslager], as well as makes possible the enforcement of special places of residence.

Note from Dr. Knochen to the German Military High Command in Paris (Jan. 28, 1941), Yad Vashem 0-9-4-1, CDJC: V-64. For further discussion of this infamous law of 4 October, 1940, see infra note 52. See also, e.g., 3 J. BILLIG, LE COMMISSARIAT GÉNÉRAL, supra note 25, at 314. As Vichy schemes to extend denaturalization to persons receiving citizenship after 1932 (and even 1928) progressed, the Germans permitted the French to go their own way, planning again to capitalize on the Vichy legal initiative for their late-War deportation drive. See, e.g., Memorandum to all police precincts in Paris from the Parisian Obersturmbannführer (July 16,
would have to prove his non-Jewishness ("innocence" as even the sympathetic Gillouin put it), a second domain of legalistic rhetoric—the courts—all the more extensively and controversially entered the fray. In the case of Michel Benaim, for example, a court in Rabat stated that:

an individual, issued from two Jewish grandparents and two non-Jewish grandparents, who is both baptized according to the Catholic faith and circumcised according to the rites of the Hebraic law, but who has never really belonged to the Catholic religion [must], by reference to Article One, Section Two [of the 2 June statute], be declared Jewish as not having proved his non-adherence to the Jewish religion by an actual membership in one of the other religions recognized by the French state before the law of December 9, 1905.29

Elsewhere, the Tribunal correctionnel of Brive decided that two small children had not sufficiently shown their "innocence." Aged two and three, these children had two Jewish and two non-Jewish grandparents; they were both baptized. But the court decided that truly to "belong" to another religion required "une volonté réfléchie et nettement exprimée que ne sauraient posséder des enfants de 2 et 3 ans" ("a considered and clearly expressed will that no child of 2 or 3 can possess"). Their father was thus convicted of not having declared the children to be Jewish.30

1943) (referring to this statute as basis for the Parisian roundups of July 23-24, 1943, CDJC: XXVI-76).


30 Reported in J. LUBETZKI, LA CONDITION DES JUIFS EN FRANCE SOUS L'OCCUPATION ALLEMANDE 1940-44 (Paris: Editions du Centre, 1945). But, in an expert opinion rendered on a similar matter in 1944, law professor Jacques Maury indicates that this case was ultimately reversed by the Court of Appeals of Limoges; see Opinion of Jacques Maury (March 6, 1944) CDJC: XVIIa-44 (240).

In contrast to the principal case is the long-standing view by such legal analysts as Dr. Mosse of Perpignan that, at least as regards proof of Jewish ancestry, the personal feelings of the ancestor are irrelevant. Hence: "From the point of view of the Law of 2 June, 1941, it is irrelevant to argue the lack of religion or the impurity of race of the Jewish ancestors. The law inquires neither into the religious beliefs nor the greater or lesser racial purity of the ancestors . . . ." Extract attributed to Dr. Mosse, CDJC: XVIIa-38 (165).

Dr. Mosse's view renders irrelevant the personal beliefs of the grandparents, as long as they were nominally Jewish; the principal case renders highly relevant the personal beliefs of infants being baptized. The only way to harmonize the opinions is to see that both made life more difficult for individuals trying to show their non-Jewishness.

Ironically, the notorious CGQJ took a more "liberal" approach to baptized babies. In an advisory opinion, the Agency declared thatwar babies born of mixed parentage, although not in fact belonging to a recognized faith "before June 25, 1940," would be viewed (if baptized immediately) as non-Jewish. Why? "Obviously it could not have been baptized before June 25, 1940, because it was not yet born." Letter from the CGJC to its Regional Director in Toulouse (Vichy, Aug. 18, 1942), CDJC: XVIIA-38 (158).
Meanwhile, civil courts in such jurisdictions as Bergerac, Aix, and Nice, were placing this difficult burden of proof on the State. Such insubordination caught the attention both of the CGQJ and its reviewing administrative court, the immensely powerful Conseil d’État; throughout the Vichy period, the Conseil d’État agreed with the CGQJ that the civil courts simply had no jurisdiction over Jewish definitional questions. While, as we shall see, the Conseil d’État gradually broadened the kinds of evidence of non-Jewishness it might permit the individual to submit, it rigorously stuck to the view both of its own exclusive jurisdiction and of the burden being upon the individual.

The Conseil d’État finally seized upon a case called Maxudian in April, 1943, both to illustrate its approach and to declare its sole jurisdiction over this issue. Mme. Maxudian had apparently petitioned her local police precinct to remove her name from its list of Jews. When the police failed to respond, and the CGQJ also failed to grant her request, she appealed to the Conseil d’État. That court held as follows, declaring its jurisdiction as an explicit part of its decision:

Whereas it is stipulated that the petitioner is an issue of two Jewish grandparents in the maternal line; that, if she produces a document originating from the consistory church of Verdun of the reformed faith from which it appears that her paternal grandparents, Moses and Sarah Lang, received the nuptial benediction in said church, on March 14, 1843, this evidence is not of the sort to establish that neither one nor the other of those people belonged to the Jewish religion, in contrast to the presumption that arises from the entirety of the evidence in the dossier which, apart from such proof, disallows Mme. Maxudian from justifying the claim that she cannot be considered a Jewess under the meaning of the law of 2 June, 1941.32

To cement the point about administrative control over matters of racial definition, the CGQJ several months later insisted that a couple seeking a declaration of their non-Jewishness in order to have removed the aryan trustee who had been assigned to run their toy store in Beziers be prohibited from petitioning the civil tribunal of that town. “It is beyond doubt,” said the Agency, “that civil judicial tribunals have no competence to declare the aryan nature of individuals. Only the CGQJ can do that, because only it can issue certificates

of non-adherence to the Jewish race. . . . If the CGQJ should refuse to deliver such a certificate, that person can appeal to the Conseil d'État."\footnote{33}

The "Certificat de non-appartenance à la race juive" referred to here was the passport to relief from the life-threatening strictures of the racial laws. For hundreds of cases similar to the ones we have noted, the "inside," "delicate" debate on the meaning of the 2 June statute decided whether the individual would receive such a certificate, exemplified by the one appended here.\footnote{34} Such certificates would have a magical effect, allowing the bearer to avoid special curfews and travel restrictions imposed on Jews, to fend off aryran administrators all too eager to take over businesses and real property, to engage in various professions and trades otherwise prohibited to Jews, to avoid, finally, deportation—sometimes at the last minute as lawyers rushed to the internment camp at Drancy with the certificate, thus plucking their clients from the line heading for the bus, heading for the train "to the East."

The CGQJ treasured its monopoly on this jurisdiction, but the civil courts kept finding ways to compete. Throughout 1943, opinions such as the following appear, which at one and the same time claim civil court jurisdiction over the 2 June statute (infuriating the CGQJ and the Conseil d'État) and take a more liberal interpretive approach (confusing the jurisprudence, and broadening the debate):

\footnote{33 Communication from the CGQJ to the police chief in Montpellier, (dated "Vichy, Sept. 9, 1943), CDJC: XVIIa-38 (163). Indeed, on occasion the Conseil d'État did overturn a decision of the CGQJ. For an example, consider the case of one Brigitte See to whose shoe store on the Boulevard Malesherbes in Paris the CGQJ assigned an aryran administrator ("Administrateur provisoire"); although insisting that Mme. See had the burden of proof, the Conseil found she satisfied it by showing two non-Jewish grandparents and a third of uncertain religion (the fourth being Jewish), and that she had been baptized at birth. Decision of April 30, 1943, Conseil d'État, CDJC: XVIIa-45 (252).}

\footnote{34 See Appendix four (CDJC: XXXII-123).}
[It]t appears from the [2 June] statute that definition as a Jew is a function of the number and the race of the individual's grandparents.

Whereas Charles Touati . . . was born on 22 December, 1898 in Algiers of Israel and Eugenie Temime, themselves born of unknown fathers and mothers who never acknowledged them;

That there are neither maternal nor paternal grandparents on which his race can be determined;

That thus the law of 2 June, 1941 is not applicable to him.

Therefore, it is held that Charles Touati is not Jewish under the meaning of the law of 2 June, 1941.35

As the War was ending, and even the Conseil d'État could see the handwriting on the wall, it too began opposing the CGQJ. In mid-1944, the latter bitterly attacked its former surest ally for declaring as an aryan a woman with two Jewish grandparents who had "spontaneously declared herself to be Jewish."36

Around the same time, in a CGQJ document called by a contemporary observer, "une perle de la jurisprudence vichyssoise," the lawyer for a certain M. Elina was advised as follows:

My dear colleague: In order finally to dispose of this case, which has been pending since 4 February, 1943, I would be in your debt if you could have sent to me by a member of the Medical Association a declaration as to whether or not your client benefits from his entire preputial integrity [que votre client jouit de toute son intégrité préputiale].37

Sadly, the use of such circumcision data was pervasive, particularly where the state was deemed to have the burden of proof. Civil prosecutors used such data in their rigorous efforts to detect Jews even toward the end of the war. In a case decided as late as 17 May, 1944, a Marcel Joseph Weiller narrowly escaped losing his liberty, although he had been hitherto untouched—unlike tens of thousands of other Jews on French soil who had by then been deported. Before the Tribunal civil de première instance of Ceret, Weiller was accused of failing to register himself as a Jew, even though the state could not prove that he had at least three Jewish grandparents. Weiller's "crime"? I quote from the opinion of the court:

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35 Session of February 12, 1943, Tribunal civil de la Seine (Iere Chambre), Paris (Report of court decision in this case on file with the author).
36 See A CGQJ internal memorandum (undated) reporting the incident as it progressed through June 22, 1944 and describing the Feb. 9, 1944 decision of the Conseil d'État as "surprising" and "contrary to the law of 2 June 1941." CDJC: XVII-36 (154a).
37 See Appendix five, Letter to M. Arnold Crochez, Avocat à la Cour, from CGQJ. CDJC: XXIII-19.
[B]eing born of at least two grandparents of that race, he would be Jewish if found to belong himself to the Jewish religion. Weiller's belonging to the Jewish race is apparent from the discovery, in his house, of the Tablets of the Law, and of Hebrew prayers; from the fact that he was circumcised at birth, and, contrary to his allegations, never baptized, the certificate of baptism delivered by the vicar Berges of Toulouse being just an accommodation to him.

Weiller's production of a baptismal certificate, always (as we have seen) less convincing to French courts than to German, availed him little. The court thought it not quite a forgery, but almost so, and they had the evidence of the Jewish sacred objects in Weiller's home, and of a Dr. Cortade that Weiller was indeed circumcised. On the other hand, a maid testified that she had seen Weiller perform certain Catholic rites. Because the state (in this tribunal) had the burden, and because the evidence was equally balanced, Weiller escaped retribution and deportation. On such thin reeds, wisper than the words themselves of which they are made, were fates decided, over and over again, in Vichy France.

The evidence presented in this very late case fulfilled the plea of Joseph Haennig, in 1943, that the broadest inquiry be allowed into the Jewishness of the individual. The state should present evidence, and so should the individual. Not only the individual's belonging to a recognized religion should satisfy the courts, Haennig argued, but also any other proof he might mount. This, Haennig advised, using the gentle rhetoric he felt comfortable with at the time, was the approach of the Nazi courts in Germany itself, whose "largeness and objectivity of spirit" he hoped the French would emulate.

Haennig's analysis, published in the authoritative reporter of French law, reads as follows:

"What Means of Proof Can the Jew of Mixed Blood Offer to Establish His Nonaffiliation with the Jewish Race?"

The Commission on the Jewish Laws has been established by the head of State to give its view on the interpretation of Article I of the Law of 2 June 1941 concerning the subject of nonaffiliation with the Jewish race.

The Commission believes that the statute writers allowed more proof than merely that of belonging to another religion recognized by the State prior to the law of 9 December 1905. It has noted that "in each case, the adjudicator may ascertain that the claimant either has never belonged or has ceased to belong in fact, to the Jewish community" (Gazette du Palais 1943, 1st sem., Doctrine, p. 14). . . .

38 See supra note 28. The Weiller case is to be found at CDJC: XVIIa-45 (254).
We believe that neither good sense nor the law could lead to the view that the statute writers required of an individual having only two Jewish grandparents proof of his belonging to the Catholic or Protestant denominations in order to avoid being included on the lists of Jews.

Since the courts must now decide each case on its own merits, we would do well to cite as an example German law, and thus to see how it overcomes any difficulty relating to proof of nonaffiliation with the Jewish race. This exercise reveals a largeness and objectivity of spirit.

A recent case of particular note dealt with the female descendant of two Jewish grandparents, baptized as a Protestant, who, under the Article stipulating the definition of a citizen of the Reich, only would become Jewish if she adhered to the Jewish religion, the same solution incidentally as is reached under the law of 2 June 1941.

This woman of mixed Protestant and Jewish heritage had, for a period of six months, at the express request of her Jewish father and against the wishes of her Protestant mother, attended classes at religious school to learn about the Jewish faith. Once each year until her father's death in 1931, she accompanied him to synagogue on the New Year.

On the other hand, she never contributed to the synagogue, while still retaining her name on the list kept there.

Under these circumstances and facts, the Supreme Court of Leipzig was called on to consider her case. It first noted that, as soon as she learned of the presence of her name on the Jewish lists, she requested its removal, in the spring of 1938.

The Court affirmed the lower court judge's view that she had only attended New Year's services in order to preserve family peace. The view that there was no sufficient tie to the Jewish community in this case was thus deemed correct.

[However, the defendant had called herself a Jew in order to obtain employment from a Jewish agency.] Theoretically, the Court of Leipzig refused to consider the motives leading an individual to certain specific acts apparently linking him to the Jewish community. However, where these links have been merely for pretense, the court instructed lower courts not to take them into account if it has been established, as in the instant case, that the defendant was merely using the Jewish religion as a means to acquire an advantage by the intermediary.

This analysis of the German law furnishes an interesting contribution to the study of a subject still little understood by the French courts. The analysis indicates a possible route, without
risk of distorting the statute writers' intention, and in conformity
with the principles which underlie the racial statutes and cases.

Joseph Haennig,
Member of the Appellate Bar
Paris39

Haennig's 1943 essay raises dreadful questions, despite its benign
aura of liberal, legalistic eloquence. Superficially read, it looks like a
well-meaning attempt to limit somewhat the extent of racial oppres­
sion. Placed in the context of Vichy rhetoric on Jewish definitional
questions, it stands as a paradigm for the French legal profession's
willingness to abandon allegiance to its textual traditions and to
"think the unthinkable, write the unwritable." As I have prelimina­
rily discussed in The Failure of the Word40 and shall discuss more
fully in Part III of this article, Haennig's statement typifies the im­
mersion in discourse that all too often screens lawyers from the cor­
rupt atmosphere lurking above the surface of their words.

At the turning point of Vichy power, with the Axis armies
largely in retreat and the Normandy landing about a year off, Haen­
nig and most of his colleagues were just warming to the jurisprudence
of Jewish identity. Gone for the majority of French lawyers were
thoughts of the still-existing constitutional guarantees of equal protec­
tion, safeguarding of property, and avoidance of ex post facto laws.41

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39 This material originally appeared as an article by Joseph Haennig, a Parisian lawyer, in
the edition of the Gazette du Palais (the traditional reporter of French statutes and cases)
covering the first semester of 1943, at 31. The translation is my own.
40 R. WEISBERG, supra note 3.
41 Thoughts of the still-existing constitutional guarantees were not gone for everyone.
Léon Blum, in his opening speech to the court at Riom (see supra note 17), called the trial
itself a "legal monstrosity," since he and others were appearing as men already condemned, at
least by the head-of-state. The audience listened "with growing interest to this legal discussion
which little by little was transformed into an appeal for true justice and then reached the
heights of a protest in defense of the French republican ideal." J. COLTON, LEON BLUM:

Blum's defense counsel at the Riom trial, André Le Troquer, demonstrated a similar be­
 lief in constitutional protection when he "moved to have the court declare itself illegal on the
ground that the constitutional act establishing it had not been ratified by the nation." Id. at
408. Le Troquer also "launched a diatribe against the Vichy regime—its supression of repre­
sentative institutions, its curbing of free speech, its arbitrary arrest, and imprisonment prac­
tices." Id.

Daladier's attorney—Daladier had been head of state during 1940, and was on trial with
Blum—vociferously protested the Vichy court's use of ex post facto laws, invoking the Decla­
ration of the Rights of Man as his authority, and remarking "Our children will read the juris­
prudence of the year 1942 and will not understand it." Id. at 411. Altogether, an
understanding was exhibited that norms of French law continued during this period. Even
some Vichy functionaries expressed their uneasiness in the face of what they considered very
persuasive foundational arguments.

Had no lawyers voiced foundational, principled objections, the vast professional major-
Instead, considering himself only bound by the internal discourse of the "Jewish question," and not by any external norm, Haennig neatly debated issues that shortly before he would have considered inadmissably grotesque.

Haennig's apparent lack of viciousness thus makes his case compelling for us today. Scores of lawyers like Haennig, even more than those few who relished the infliction of suffering upon the Jews, made that suffering possible. Once the Nazi state and its courts could be cited by a mainstream lawyer as providing any kind of a model on race issues, French law became unanchored—dashing towards its own doom with no one at the helm but the most recently published rhetorician.42

For any lawyer in 1943 who might still have wavered on the professional propriety of debating racial laws in Vichy as well as occupied France, Haennig's seeming benevolence must surely have been persuasive. If such evenhanded analysts, trying to narrow the already overly broad French definition of Jew, could discourse freely on such a subject, surely all whose practice touched on racial matters might find solace. And, indeed, the French bar (always remarkably autonomous from governmental control) had by then taken the statute to its bosom, nurtured it, discovered its defects and its strengths, and—like the parents of a still youthful upstart—discussed its future with a combination of wariness and optimism.43

Marrus and Paxton have accurately described Joseph Haennig's article as a suggestion to French Courts to refer to German law "objectively and broadmindedly." They opine that "this suggestion was not, to our knowledge, taken seriously by any French jurisdiction." M. MARRUS & R. PAXTON, supra note 1, at 143. In fact, Haennig was trying to convince French courts that had already exceeded German jurisprudence on the burden of proof/evidentiary standard issue discussed in this Section. Indeed, Haennig's superficially bizarre rhetoric continued to be necessary throughout the War to French lawyers urging more benign interpretations on their courts and colleagues. For example, note the expert analysis of law professor Jacques Maury, who was asked, as late as March 6, 1944—three months before the Normandy invasion—to argue the same issues. Called upon to advise on the Jewishness of three young children of mixed parentage, two baptized before 25 June, 1940 and one afterwards, Maury cites Haennig on the still problematic case of the youngest child, who could not necessarily prove his non-Jewishness solely through the baptism:

One can take it today as certain [despite conflicting earlier cases in the civil courts as well as the Conseil d'État] that an individual can demonstrate by any means, even by presumptions, that he did not belong to the Jewish race on 25 June, 1940. This is, indeed, the German solution, whether by ordinances of the occupying authorities of 1940, 1941 et 1942, or by application of the laws of the Reich of 15
Another broad body of caselaw, perhaps less well known to the bar, and apparently of less interest to government lawyers, exemplifies the seamless web of litigation I indicated earlier. In its interweaving of various strands of French legislation, it further indicates how agonizing and unstable Vichy law became once it substituted—Haennig-like—the freedom of the discursive moment for the constraint of constitutional ideals. By a decree of 26 September, 1939—predating by a year all racial laws—any tenant who had been mobilized for the War could benefit from a seventy-five percent reduction in rent during the period of his military service. Furthermore, the decree permitted tenants the right to reductions, even after mobilization, if debilitated, economically or otherwise, by a "Circumstance of War" (un fait de guerre).

The question to which dozens of lawyers and judges had to turn was whether Jews disadvantaged by the 2 June 1941 statute could benefit from the rent reduction prescribed by the 26 September, 1939 decree. The latter, of course, was silent as to Jews. Lawyers for landlords who might never have seen the racial statutes, and lawyers for Jews who had been living with them on a daily basis, now had to use their skills to harmonize two unrelated statutes and to use them for their clients.

We have no documents indicating any interest by the German occupiers in this jurisprudence, even though most of the cases arose in occupied Paris. Here was a purely internal matter of law, subject even more so than in the rhetoric we have just examined only to the usual discourse among lawyers and judges. Many landlords, faced with Jewish tenants unable to pay their rent, went to court to evict. From mid-1941 until the end of the war, before justices of the peace in many of Paris’s twenty arrondissements, before other civil courts of original jurisdiction, and before various courts of appeal, lawyers argued the legal niceties of the 26 September, 1939 decree on rent reductions.

As developed regarding the 2 June statute, so here (so everywhere that the interpretive community of French lawyers focussed its

September, 1935 (see articles by M. Haennig, Gaz. Pal. 7-9 October, 1942, and 27-30 March, 1943).
Opinion of Jacques Maury (March 6, 1944), CDJC: XVIIa-44 (240); see also Appendix eight (a reference on official stationery to Haennig as an authority).
44 Gazette des Tribunaux, 20 October, 1939.
attention) the debate was confined narrowly to several issues. The main question was whether unemployment, detention, or deportation constituted a Circumstance of War, so that victims might claim the rent reduction; or whether the French government had acted quite apart from the War, actions that might constitute a fait du prince ("act of state"). In the latter case, the tenants or their survivors would not be granted rent reductions. The vicissitudes of legal argument further created a minidebate on whether the results of the anti-Jewish climate might not have been a Circumstance of War prior to 2 June 1941 and an act of state afterwards. Because it was a Vichy statute, now applicable to the occupied zone as well, the 2 June, 1941 law marked a reasonable date to infer purely French activity of a racially restrictive nature, arguably unconnected with the War.

Further squabbles arose as to whether detention might be seen as a Circumstance of War (whenever arising), while "mere" loss of job an act of state. Also, in the resolution stage of the trials, courts had to decide whether the rent reduction (set by the decree at seventy-five percent for any period of actual mobilization) should be the same or less when the Circumstance of War was forced unemployment, detention, or deportation.

What developed is unique in the jurisprudence of the Vichy years. Courts of first jurisdiction overwhelmingly allowed some rent reduction to the Jewish tenants. Yet the manner in which even favorable decisions were rendered served to promote uncertainty and confusion among similarly situated tenants who could not, chose not to, or would only later litigate the question of their monthly rent. The case law here, like Joseph Haennig's "benign" approach to the 2 June 1941 statute, forces on the analyst an inquiry as to the effect of seemingly benign legal discourse that chooses to work with—rather than challenge centrally—a grotesque superstructure of law.

I will emphasize two courts of original jurisdiction, because they decided more cases than any other on this point. These are the justices of the peace of the 20th and 11th arrondissements of Paris itself. We will see that each—again quite independently of the Germans, of the French administrative structure, and of much appellate jurisprudence—chose to define the questions before it in fascinating and troubling ways. While each, although arguably contradicted by a Paris appeals court decision we will analyze, favored the tenants' claims, they did so in conflicting ways. Their case law finally failed to give heart or even certainty to a Jewish community desperate for anchoring, for solace, and for some sign of protest by the French legal establishment.
I begin with the 20th arrondissement. In a typical case, the Justice of the Peace there found for a M. Bankhelter, who received the full seventy-five percent reduction for his army period (four months) and thirty-five percent for his period in detention, which the court formulaically asserted to be “by order of the Occupying authorities.” This court viewed forced detention as a Circumstance of War, and it relieved Bankhelter of that much of his rent from the date of his internment until the date of the decision, 12 December, 1942, a period of nineteen months.46

The 20th arrondissement had already developed a small body of case law on this issue. On 19 June, 1941, in the Lerman case, the court allowed a nonveteran a seventy percent reduction for having been fired the year before, leaving him since then without resources.47 While there is no discussion of the cause of Lerman’s unemployment, it seems probable that he demonstrated its link to the racial laws. And in Baraban, decided 30 July, 1942, a detainee at the camp at Beaunes la Rolande was relieved of seventy-five percent of his rent obligation during his mobilization and fifty percent since his internment some fourteen months prior to the decision.

Baraban begins to demonstrate some of the effect of rhetorical maneuvering on the development of these laws. It is thus worth quoting in part:

Whereas his incarceration . . . by the Occupying authorities could not flow from the Law of 2 June, 1941, since the arrest was prior to that date (14 May, 1941) but is in fact a Circumstance of War;

Whereas this arrest has resulted in depriving him of all resources that he might have had as an artisan-tailor, although Jewish,48 as long as he conformed to the laws concerning Jewish work . . . .

[Thus, the court orders the reduction in rent.]49

The first quoted paragraph is disingenuous. There was already a Vichy-authored racial law of 3 October, 1940 in effect when Baraban was arrested and detained;50 neither it nor the 2 June statute authorized the random arrest and special incarceration inflicted on people like Baraban. On the other hand, other Vichy statutes specifically

48 The 2 June statute did not, on its terms, forbid Jews from being tailors.
50 See supra note 10.
condoning the detention of Jews, and their placement into special camps, had also long been on the books prior to Baraban's arrest. One of these, the Law of 4 October, 1940, stated:

Foreigners of the Jewish race can, as of the promulgation of this law, be interned in special camps by the decision of the prefecture of the Department in which they live.

The Baraban court fails to mention any of these statutes, preferring to situate its rhetoric as a legalistic argument distinguishing pre-2 June, 1941 arrests as clear Circumstances of War from later ones, which might be acts of state. This is not the only time we will see lawyers and judges feeling comfortable when they establish narrow and quite artificial zones within which to structure their discussions. The Baraban judges, like many Vichy lawyers, chose a low level of discursive generalization: by focusing on the 2 June statute, they avoided dealing with the earlier 4 October 1940 detention statute that would be more difficult to rationalize. Furthermore, the term "Occupying authorities" begs the question—often begged in these cases—of who actually did the arresting of Jews during the Vichy years. We know by now, at least, that the French police did almost all the actual

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51 That there was such French-authored statutory activity prior to 2 June 1941 was irrefutable. See especially, infra note 52, for further discussion of the incarceration law of 4 October, 1940, on which see also supra note 28; additionally, legal analysts should have been aware of denaturalization laws of September and October, 1940 that permitted the summary rounding up and detention of denaturalized or foreign residents. The legal profession itself was stigmatized; lawyers falling into the "foreign" category numbered in the hundreds and they, under the Law of 11 September, 1940, were barred from practice and then, by the law of 1 October, 1940, subject to detention, "s'ils sont en surnombre dans l'économie française et si, ayant cherché refuge en France, ils se trouvent dans l'impossibilité de regagner leur pays d'origine" ("if they are too numerous in the French economy and if, having sought refuge in France, they now cannot get back to their native country").

Each magistrate undoubtedly knew, by late 1942, of dozens of former lawyers either arrested or thrown out of work. My analysis of the reaction of non-Jewish lawyers to these events must await another forum—although part of my present subject—but there surely was a long history of French arrests prior to 2 June, 1941, and these would have been known to these magistrates.

52 Loi sur les ressortissants étrangers de race juive, 4 octobre 1940, J.O., (Oct. 18, 1940), reprinted in LES JUIFS SOUS L'OCCUPATION, supra note 10, at 22. By all accounts, first justice minister Alibert not only signed the law, but also authored it. See, e.g., my personal interview with a Vichy functionary close to the authorship of the law, Gilbert LeSage in Paris (Dec. 13, 1988). Obersturmführer Dannecker consistently described it as a Vichy law: "Ich bemerke noch, dass im unbesetzten Gebiet bereits 3 Konzentrationslager [3 concentration camps] für fremdstaatliche Juden bestehen, die unter Zugrundelegung des Vichyer Gesetzes vom 3.10.40 [sic] errichtet wurden." Note from Obersturmführer Dannecker to Sturmbannführer Zeitschel (Paris, February 28, 1941) (emphasis added), Yad Vashem: V-63. Although Dannecker wrote "3.10.40 [3 October 1940]," he must have been referring to the law of 4 October, 1940. The Germans relied on this law throughout the war, as I will discuss in the wider manuscript of which this article is a part. Without doubt, the concentration camp reality in France originated as one of Vichy law's earliest innovations. See supra note 28.
detaining of Jews until mid-1944. The Germans devoted almost no manpower to the process. Indeed, during the month of the Baraban decision, judges and other citizens of Paris had observed with their own eyes, or at least heard about, the infamous roundups (or “raflses”) of thousands of Parisian Jews by hundreds of Parisian police on 16-17 July, 1942. The police, with little or no German backing, herded the terrified Jews into crowded houses in the various neighborhoods, and from there to the Velodrome d’Hiver. It was, for most of them, a matter of days until transfer to Drancy and, ultimately, Auschwitz.

Why did the Baraban court, together with most of its colleagues in the other arrondissements, come to use the formula “arretés par les autorités de l’Occupation”? A simple answer would be that it was employing what I have elsewhere called “considerate communication;” it was hiding from its various audiences the troubling truth that, from the earliest days of Vichy, the French (without German help) were arresting Jews both in the occupied and nonoccupied zones, by force of their own statutes.

Whatever the motive, it is worth reflecting for a moment on the legal effect of the three 20th arrondissement cases so far described, Bankhelter, Lerman, and Baraban. What might the family of a de-

53 M. Marrus & R. Paxton, supra note 1, at 241-42, 263-64, 271; see also supra note 28.
54 See sources cited supra note 53. Maurice Rajsfus tells of his own experiences during this two-day grand rafle, referred to by Vichy with the sinister euphemism Vent printanier (spring wind). He and his family were among the almost thirteen thousand Jews arrested in the grand rafle. Rajsfus stresses the centrality of Parisian police, whom he describes as almost entirely without sympathy for those they were rounding up. When it was announced by the police some hours after the arrests that children under sixteen would not be further detained, parents were forced to decide whether to send their children back into the street alone, or to keep their family together. The parents of the fourteen-year-old Maurice and his sixteen-year-old sister reluctantly decided to let them go. The two children thus escaped deportation and death, but thousands did not, including an eleven-year-old cousin to whom he dedicates the book. See Maurice Rajsfus, Jeudi Noir, 16 Juillet 1942: L’honneur perdu de la France profonde (Paris: L’Harmattan, 1988).
55 The formula frustrated a stingy landlord in the late 1942 case of Neyman. Sometime in July, 1942, probably during the grand rafle (described supra note 54 and accompanying text), Neyman was arrested. His arrest left his wife unsupported; earlier, their business had been snatched and, ever since May 1941, run by an “administrateur provisoire.” Nonetheless, Neyman had been able to pay the rent until his arrest. Even before they lost their business, an earlier decision of 6 April, 1940 had reduced their rent in response to Neyman’s military service. But the landlord now argued that “the new diminution in resources resulted not from a Circumstance of War but instead from rules and decrees currently in force against the Jews.” The court would not (rather than could not) accept that reasoning, choosing to fall back upon the established formula that Neyman “a été arrêté par les Autorités d’Occupation” (“was arrested by the Occupying Authorities”). Again, the court ignored the fact that the French police acting under Vichy law had arrested Neyman in July, 1942. Although the court ignored Vichy involvement, it did allow a fifty-percent reduction, retroactive to the July arrest. Judgment of December 8, 1942, Tribunal civil de la Seine, CDJC: CDXXIX-2.
56 See R. Weisberg, supra note 3, chs. 8, 9.
tained Jew, arrested after 2 June, 1941 (eventually the vast majority) argue to that apparently sympathetic court in an effort to gain a rent reduction? Nothing in the jurisprudence so far would allow the argument that post-2 June, 1941 arrests constituted Circumstances of War, because the jurisprudence universally involved arrests prior to that date. The court might have taken a stance from the beginning forthrightly recognizing that most of the victimization of Jews was a Vichy Law phenomenon but bearing a cause-and-effect relationship to the War and hence covered by the 26 September, 1939 decree. This approach would have empowered all suffering Jewish tenants to acquire rent reductions. Instead the court consistently left open the central questions that a lawyer more constrained by constitutional text should have asked.

As we saw with the rhetorical approach taken to the 2 June 1941 definitions themselves, the piecemeal, tunnel vision resolution of specific contests—even if producing a benign outcome in the individual case—had the effect of disempowering vast categories of people who came later. And rarely, even in these unique landlord-tenant cases, did any lawyer or court attempt at the beginning to ask different sets of questions that might more broadly have challenged the legislative scheme altogether.

Indeed, the legalistic distinction drawn in Baraban, itself based on a fiction, between arrests made prior to the 2 June statute and those subsequent to it, gained authoritative legalistic acceptance. The fiction both ignored Vichy detention and race legislation from at least 3 and 4 October, 1940 until 2 June, 1941 and left open whether the latter was an Act of War or of State. Analogous to the swift tide of rhetoric that made the 2 June statute unchallengeable at its rotten core, this argument deflected attention from the pervasiveness of French anti-Semitic statutory activity long before 2 June, 1941.

57 For such an approach, see the Krouck case, infra text accompanying note 61.

58 A minority of lawyers did raise publicly foundational concerns about the development of wartime French law. See supra note 41 (discussion of the Riom trial, with its defense lawyers’ jugular, foundational attacks on the Vichy legal system); infra notes 85-88 and accompanying text (further accounts of Riom and other public arguments by lawyers against the Vichy laws); see also infra note 89 (noting a letter from Belgian lawyers expressing outrage at racial laws there). But most lawyers felt more comfortable avoiding such higher levels of generalization when discussing race related issues. The fact that a spectrum of rhetorical choice existed in Vichy casts into a shadowy corner even the seemingly benign jurisprudence of the landlord-tenant cases.

59 See, e.g., 3 LES LOYERS DE GUERRE 56 (Paris: 1943) (CDJC: CDXXIX-2), a treatise accepting the distinction.

60 See supra notes 51 & 52 and accompanying text.
disabled the families of most Jews, arrested after 2 June, 1941, from arguing with any probability of success in that arrondissement.

The 11th arrondissement, on the other hand, took the bull by the horns in a February, 1943 decision that faces more squarely the long history of Jewish incarceration by Vichy law. It adopted, in the Krouck case,°¹ the rhetorical variation I mentioned earlier. Krouck held that, since the first such Vichy law (dated 3 September, 1940)°² stated explicitly that "the effects of this measure, circumscribing individual rights, will end with the war," all subsequent detention laws must—a fortiori—also be connected with the hostilities, as a Circum­stance of War. The 11th, unlike the 20th, thus admitted the Vichy origins of laws detaining Jews—laws that predate the 2 June statute by nine months—but used statutory interpretation to connect those French laws with the War. Thus Krouck, detained for the simple reason of being a stateless Jew,°³ received a rent reduction of fifty percent.°⁴

The same court would use this reasoning a month later to help another detainee. In the March, 1943 case of Eisenberg, again in the 11th arrondissement, the landlord was forced, by the Krouck case, to become even more explicit about French influence on anti-Jewish legislation and punishment. He argued, frankly but unsuccessfully, as follows:

Eisenberg, who was interned for being Jewish, cannot claim a rent reduction [under the Decree of 26 September, 1939, etc.]. As an act of state [fait du prince], the legislation imposed in occupied and non-occupied France cannot be causally connected with an Act of War . . . It applies to all of France and is of unlimited duration; it will remain in effect until the Legislator rescinds it . . .

Using its earlier reasoning from Krouck, the court was now able to admit both the French origins of internment laws and their causal connection to the war. It rejected the landlord's argument and ordered a forty percent rent reduction.

Thus, while the 11th and 20th arrondissements found ways to

°² This law, overtaken by the one cited centrally at supra note 52, stated that "certain individuals may be interned in specially designated camps."
°³ See supra note 29; supra notes 51-52 and accompanying text (discussing the detention laws, especially that of October 4, 1940 and the 1942 roundups in Paris of almost 13,000 Jews in a two-day period).
°⁴ A few months earlier, the 11th arrondissement had followed basically the same logic in the Chmoulovs'ki case. Judgment of November 2, 1942, J.P., Paris-11th Arrondissements, CDJC: CDXXIX-2. The court there gave a thirty-percent rent reduction to an unemployed, stateless Jewish war veteran.
grant relief to some Jewish tenants, their differing rhetoric created confusion among the families of many other Jews potentially seeking such relief later. The 11th, by freely admitting French authorship and activity in anti-Jewish legislation of all kinds, produced a more realistic rhetoric but nonetheless used statutory interpretation to grant rent reductions; the 20th, on the other hand, used a formulaic approach to create less forthright distinctions that kept similarly situated Jews in the dark about their rights. No wonder that the Jewish legal service of the Union générale des Israélites français (UGIF), in advising hundreds of tenants and even their landlords' lawyers, could not rely on this jurisprudence to make legalistic distinctions with any confidence.

In countless such situations, disequilibrated by the jurisprudence, Jews were first advised to ask their landlords to decide the matter "à l’amiable"—without recourse to litigation. Thus for example, in October 1942, the UGIF offered its help to the Topolanski family, whose breadwinner had been arrested and deported after the enactment of the 2 June, 1941 statute. The UGIF, despite the tenant-favorable cases already on the books, had to write prayerfully to the landlord's lawyer as follows:

May we not try to arrive at a friendly agreement here . . . ?
Mr. Topolanski, employed before the war in the Commercial Pharmaceutical Office, volunteered at the beginning of hostilities. He always paid his rent fully and on time.

On 20 August, 1941, he was interned at the camp in Drancy, on the order of the Occupation authorities. He was freed on 5 November for reasons of health; but on 16 July, 1942, he was again arrested and on the 22d of the same month deported to an unknown place. His wife has had no news of him since then.

Mrs. Topolanski has remained behind with three young children of 7, 5 1/2 and 20 months, and without any source of funds. She has been described to us as particularly worthy of note.

Could you not, under these conditions, ask your client . . . if he could grant these pitiful tenants a reduction of 50% . . . .

We ourselves will guarantee that M. Poisson receives the balance of the rents due from these tenants.

Other cases at the level of original jurisdiction might have afforded some consolation, as the horrors of the Jewish experience in

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66 Letter to M. Remy from the UGIF (October 30, 1942), CDJC: CDXXIX-1.
both zones increased, to the UGIF and to potential Jewish tenants or their survivors. But they provided no doctrinal anchoring, no sense of predictability. On the contrary, their rhetoric and even their disposition of cases, showed more variation than we have seen as between the courts in the 11th and 20th arrondissements.67

Just as troublesome and disequilibrating was the only authoritative appeals court case that seems to have come down on this point of landlord-tenant law. In the case, decided 29 September, 1941, the Chambre des référés of the Cour de Paris unfortunately decided to construe each of the two doctrines I ascribed to the 11th and 20th arrondissement in a manner detrimental to the Jewish tenant, a doctor. First, the court held (unlike the 20th arrondissement) that even very early legislation was of Vichy origin: the August and September, 1940 decrees restricting the practice of medicine by Jews were deemed pure acts of Vichy administrative law. Second (unlike the 11th arrondissement), this court specifically declined to associate that legislation with the necessities of war:

As to that last order of administrative law [the decree of 16 August, 1940 prohibiting such practice68], it cannot be said that it bears a cause-and-effect relationship to the War; rather it derives

67 In a suburban case, the Justice of the Peace reduced the rent of M. Buch, who had volunteered for the War, returned and then found himself arrested. There are two interesting aspects of this case. First, the court, unlike most others even in this area, does not hesitate to characterize vividly the plight of Buch's wife and children since his arrest:

His wife and three children are in a state of total deprivation [dans le plus grand complet de dénument], their subsistence available only through charities.

Second, the court allows, as a remedy, the full seventy-five percent reduction, "until the end of the duration of hostilities," a strange but wonderful formulation in view of the cease-fire of 22 June, 1940! Judgment of July 23, 1942, J.P., Boulogne-Billancourt, CDJC: CDXXIX-2.

Even Jewish landladies gained assistance of a legalistic sort from this body of cases. Thus, the Justice of the Peace of the 3d arrondissement, in Dreyfuss-Pignon, allowed a sixty-percent reduction in the rent of a woman whose own real property no longer brought her rentals because it had been aryenized and was now under the control of an administrator. Judgment of February 25, 1943, J.P., Paris-3d Arrondissement, CDJC: CDXXIX-2.

The related case of hostages—those Jews taken randomly and specially as reprisals for attacks on Germans—was unproblematic, particularly in view of the doctrine that had developed. By May 1942, a Justice of the Peace of the 13th arrondissement could observe that the case of the hostage was already part of the "Doctrine et de la jurisprudence" of the Decree of 26 September, 1939. Judgment of May 5, 1942, J.P., Paris-13th Arrondissement, CDJC: CDXXIX-2. Hostage-taking was, indeed, a German activity, although the Vichy justice ministry under Barthélemy collaborated in the creation of the infamous sections spéciales that came to try and often execute such hostages. See J. BARThÉLEMY, supra note 10, at 245 (noting his anguish and blaming the "courts" on Pucheu).

68 For the basic Vichy text creating a numerus clausus and other restrictions on the practice of medicine by Jews, see the Decree of 11 August, 1941, J.O. (Sept. 6, 1941), D.A.L. at 450, reprinted in Les Juifs Sous L'OCCUPATION, supra note 10, at 69.
from measures adopted by the Legislator\textsuperscript{69} that might have been taken in circumstances having nothing to do with the War.\textsuperscript{70}

Thus, the doctor was allowed his seventy-five percent reduction dating from his mobilization until 10 September, 1940, the exact date when he was informed by the French police that he could no longer practice medicine because of the racial laws. But he was not permitted any other reduction in rent under the 29 September, 1939 decree.

The appeals court's frank admission that the racial policy of France was unconnected with the War not only again confirms this article's first corollary, but seems to run counter to the earlier cases discussed.\textsuperscript{71} It stood as an authoritative roadblock to any sense of understanding, even under this uniquely benign set of cases, that impoverished and terrified Jewish tenants might bring to the laws that controlled their fate.

Synthesizing these cases, in an official memorandum from its legal department in late 1943 or early 1944, the UGIF parsed the law with combined rhetorical considerateness and legalistic opportunism. First, the UGIF deemed it prudent to avoid the central reality of the Vichy years, and the implied holding of the Paris appeals court: that French lawyers and policemen consistently outperformed in their anti-Semitism the fondest wishes—much less demands—of the conqueror.\textsuperscript{72} The UGIF construed the cases as follows, drawing an interesting distinction between detention and loss of work:

\begin{quote}
In fact, if it cannot be denied that the head of the French state has promulgated a number of laws and decrees about Jews; these texts limit the activity of Jews, either by restricting them in their trades or certain professions, or in creating for them a special Law, but none of these texts involve deprivation of liberty \textsuperscript{73}, none orders the placement in an internment camp of Jews \textsuperscript{74} because of their Jewish origin [sic].

On the other hand, the occupation authorities have rendered a number of ordinances regarding Jews in the Occupied zone (nine to this date\textsuperscript{75}), not only measures analogous to those taken by the
\end{quote}

\textsuperscript{69} Also a fiction, although frequently used: The only "legislator" in Vichy was Pétain, assisted by his ministers and their legal staff.

\textsuperscript{70} Judgment of September 29, 1941, Cour de Paris (Chambre des Référés), CDJC: CDX-XIX-2.

\textsuperscript{71} See the discussion, supra text accompanying notes 45-67.

\textsuperscript{72} See supra note 28.

\textsuperscript{73} See supra note 51, regarding the Vichy detention law of 4 October, 1940, whose origin the writer of this memo, like so many of his profession, disregards. Furthermore, by the time of the UGIF analysis, the mass roundups in Paris had already taken place, making obvious even to a nonlawyer that detention was a Vichy policy, implemented with no or little German urging or assistance. See supra note 54 and accompanying text.

\textsuperscript{74} The number of these German ordinances was not to grow much larger, whereas the
Head of the French state, but also a certain number of restrictions on their liberty.\(^7^5\)

Finally, at different times, and for the first time in May, 1941

... Jewish males were arrested, sometimes with the assistance of lists compiled by the Occupying authorities, sometimes just on the mention of the word "Juif" on identity cards.\(^7^6\) Soon, Jewish females were made the object of identical measures ... 

Some categories of Jews have been specially targeted, for example on 21 August, 1941: arrests of all [sic] Jewish Lawyers.\(^7^7\)

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French law regarding Jews was to number almost 200 statutes, decrees, rulings, etc. See Les Juifs Sous l'OCCUPATION, supra note 10, at 185-92; supra note 20.

\(^{75}\) There is very little in the German ordinances about detention. See supra notes 10, 28, 51. The Sixth Ordinance, it is true, imposed a curfew on Jews from 8 p.m. to 6 a.m., and forbade them from moving their residence, see the Sixth Ordinance of February 7, 1942 (published Feb. 11, 1942), reprinted in Les Juifs Sous l'OCCUPATION, supra note 10, at 139, and the Ninth (July 8, 1942, published July 15, 1942, reprinted in Les Juifs Sous l'OCCUPATION, supra note 10, at 161) forbade them entry into certain movie houses and restricted their shopping in department stores and smaller establishments to one hour a day (3-4 p.m.), the hour during which, as one writer put it, "most shops were closed." See H. AMOREUX, LA FRANCE ET LES FRANÇAIS DE 1939 À 1943 at 67 (Paris: Colin, 1970). The Germans first capitalized on the (4 October 1940) statute that Vichy promulgated long before the Germans were even prepared to address detention issues in France, and then permitted Vichy to write and implement the additional legislation dealing with detention.

\(^{76}\) It was not until the eighth German ordinance, 29 May, 1942, that Jews in the occupied zone were forced to wear the yellow Star of David. See J. LUBETZKI, supra note 30, at 155. The Vichy debates about the Star were colorful and complex; Vichy's legalistic debates about Jews, including learned treatises by law professors suggesting special insignia and other means of isolating Jews, make up an unfortunate part of this history. See, e.g., A. BROC, LA QUALITÉ DE JUIF: UNE NOTION JURIDIQUE NOUVELLE 14-20 (Paris: Pr. Univ. de France, 1943), beginning his legal treatise on the Jewish laws with a "learned analysis" of the religious history of the Jews, one that sets them apart from all other religions and is deserving of being segregated; see also H. BAUDRY & J. AMBRE, LA CONDITION PUBLIQUE ET PRIVÉE DU JUIF EN FRANCE (Lyon: Desvigne, 1942), a treatise promising practitioners a better understanding of the vital part of "la France nouvelle." The authors state, "For those in whom some liberalism brings out a distaste for what they think of as [these laws'] show of sectarianism, we will respond that anti-Semitism has never been inspired by anything except the non-sociability and non-assimilability of the Jew." Id. at 11-12. The authors' analysis commences with the traditional anti-Semitic history of "the wandering Jew."

\(^{77}\) Part of my larger study, as I indicated earlier, will be the treatment of lawyers specially, both by the legislation and by their non-Jewish colleagues. The UGIF text refers to the beginning of the focus on arrests of lawyers, which continued throughout the war, and eventually touched hundreds of private lawyers and magistrates alike. See, e.g., Appendix nine, Paris-Soir article of 12 September, 1941. The number of lawyers specially arrested was not "all," of course, but forty. Among the forty lawyers arrested and interned in Drancy on 21 August, 1941, many of whom were deported thereafter and never returned, was the distinguished Pari-
These are measures taken by the Occupation authority, which have struck all categories of Jews, both French and naturalized... If it cannot be denied that such measures, imposed by the Head of State, restraining or suppressing activity, may not, according to the cases, permit a rent reduction by application of the Decree of 26 September, 1939—since "such measures would have been passed in circumstances other than of War (Paris Appeals Court decision of 29/9/41)," the situation is different for internment measures taken by the occupation authorities solely for reasons of War... It is clear that under these conditions, internment in the camp at Drancy must be considered a consequence of the state of War...

We have no subsequent decisions confirming the UGIF's analysis. We are left with a body of legal rhetoric, facially favorable to a class of Jewish litigants but finally also contributing to the terror as it further legitimated racial jurisprudence. The case law's ambiguities


On Charpentier's equivocal rhetoric in his book about Jewish lawyers at the bar generally, see infra text accompanying note 88.

The Nazis themselves took an interest in the arrests of Jewish lawyers, although they do not appear to have originated them. See Memorandum of von Bose (himself a lawyer), the Legal Counsel to the German Ambassador in Paris (October 5, 1941), CDJC: VI (138). In that memo, von Bose reports to the Gestapo that he had been visited by three Parisian lawyers (Aulois, Vallier, and Mettetal) asking that some of the more prominent of the 40 arrested lawyers be released from Drancy, "in the interests of anti-Semitism." The French lawyers' reasoning appears to have been that, with so many mediocre, "undesirable" Jewish lawyers still free, the average French lawyer might be disgusted to see these prominent ones imprisoned, and the arrests might "inspire pity in a segment of their anti-Semitic colleagues." (Pierre Masse's name was apparently not raised by the group.) In fact, of the "prominent" group, Ulmo, Frank and Kahn were temporarily released. On these points, see Memorandum from von Bose (November 4, 1941), CDJC: VI (138). All three lawyers, however, eventually perished during the Occupation. See Poignard, supra, at 6-7; the case of Jacques Frank is movingly told by Maurice Alléhaut after the war (Document in the Bibliotheque des Avocats, Palais de Justice, Paris, pp. 229-34). Frank, released from Drancy on 2 November (according to Alléhaut, however, less due to pressure than to horrible health), never regained his former spirit and, several months later, committed suicide by throwing himself out a window. Id. at 234.

The writer continues to disregard Vichy's independent statutory and detention activity. See supra notes 10, 51 & 52.

The UGIF confusion, real or feigned, about certain grim realities of war, must be understood in the context of sheer terror pervading that organization, which tried to help Jews but was officially beholden to German and French overlords. As just an example—relating to landlord-tenant law—of the Kafka-esque nature of the UGIF's tasks, consider that they were instructed by the Germans and the Parisian police, in mid-1944, to reimburse out of the UGIF's limited treasury those aryän landlords whose apartment doors had been forced open by the police and damaged in the search for Jews. See UGIF document, "Extrait du Registre des Délibérations: Délibération du 30 Mai 1944" (May 30, 1944), YV: 09/27.
certainly afforded relief to those Jewish tenants—or their families—who might eventually fall within the developing doctrine. But to the many Jews in the 20th arrondissement who were arrested after 2 June, 1941; to those advised by lawyers of the appeals court’s decision that only job-related loss, and not loss of liberty, could be ascribed to the French state; and to those in the 11th who saw the contrary confirmed by the court, which recognized that their countrymen—and not the Germans—were responsible for the incarceration of men, women, and children—these cases created only further confusion and terror.

Landlord-tenant law in the France of 1940-44 again indicates that professional rhetoric that disregards long traditions of professional behavior is unacceptable even as it appears to be “doing good.” My final section analyzes the theoretical implications of this empirical observation.

III.

Having perused two bodies of French wartime legal doctrine, we are ready to return to my claim about the insufficiency of fluid, situational discourse in moments of crisis. Where, as in Vichy France, legal rhetoric is permitted to float free, it contributes to—perhaps even creates—the most dire consequences. We have seen demonstrated the corollary claim that Vichy legal discourse resulted in an outperformance of the racial demands of France’s German conquerors.80

80 See, e.g., supra note 28. Of this claim, Richard Posner has imprudently written: There was indeed much anti-Semitism in France before and during World War II, but the proposition that France would have tried on its own, as it were, to exterminate the Jews, or that it embraced genocide more enthusiastically than Germany did, cannot be taken seriously. R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 172 (1988).

We have not yet reached the point in our own discourse that merely assertive rhetoric such as this will block the clear-eyed analysis, by interested audiences, of historical realities. I have shown that Philippe Serre, a hero of the Vichy years and a man who is very moderate otherwise in his critique of French lawyers, blames on the French the racial policy that brought death to 90,000 Jews from French soil. See supra text accompanying note 8. Contrary to Posner’s blithe assertion, the most comprehensive historians of the period agree with at least the part of my conclusion that Vichy racism, in many key respects, outdid that of the Germans. See supra note 10. And the legal documentation gathered for the present article considerably expands upon earlier findings in this regard. See especially supra notes 28, 51, 52, 54.

Posner’s statement, typical of authoritative attempts to affect interpretive communities by rhetoric rather than reality, will not permit the possibility, which I would now call the probability, that the French were more zealous than their German conquerors in pursuing a deadly racial policy through French law. Posner’s only support for his incredulous attitude is that “three-fourths of the Jews in France (many of them refugees from Nazism rather than
This Section begins by responding to Richard Posner's critique of my earlier approach to what by now might be called "Haennig's Choice." I observe centrally that an allegiance to French constitu-

French nationals) survived the war and that the Vichy government tried to protect at least French Jews from the Nazis, and, more generally, to dissociate itself from the 'Final Solution'." R. POSNER, supra, at 172. This is a curious piece of rhetoric. First, Posner's fractional estimates do not square with those of, say Xavier Vallat himself, see supra note 1. Still, Posner's view that three-fourths of the Jews "survived the war" is generally held to be true. See, e.g., M. MARRUS & R. PAXTON, supra note 1, at 344. But no inference of admirable governmental conduct flows from any such fraction. In countries with far less autonomy, far fewer Jews (proportionately) were lost. Then there is Posner's parenthetical, which (like Vichy itself) seems to distinguish between French and foreign Jews. Yet, finally, the French regime proved ready even to sacrifice "its own." See, e.g., M. MARRUS & R. PAXTON, supra note 1, at 365-75 ("[T]he Vichy regime set out to reduce the Jews—all Jews, not merely immigrants or refugees—to a subservient role, ... and to subject them to humiliating restrictions."). As for deportations, "the first convoy consisting of French Jews only left on 13 February 1943." J. ADLER, THE JEWS OF PARIS AND THE FINAL SOLUTION 45 (N.Y.: Oxford 1985). Posner also misrepresents French behavior insofar as he claims it even tried to dissociate itself from the "Final Solution." See id. French law brought about, and French lawyers actively bargained for, deportations "to the East." See supra notes 51 & 52. It can no longer credibly be maintained that the government, at least Laval and the CGQJ, did not suspect the fate of those deported. See, e.g., 1 J. BILLIG, LE COMMISSARIAT GÉNÉRAL, supra note 25, at 229. Marrus and Paxton hedge, in the general diplomatic spirit of their fine book, but seem to conclude that, at least once deportations began from Vichy itself, Laval at least knew the horrid outcome. M. MARRUS & R. PAXTON, supra note 1, at 354-56. Contemporary diaries indicate that many average observers could foresee the plight of Jews they saw deported from Vichy soil. See, e.g., PIERRE-ANDRÉ GUASTALLA, JOURNAL (1940-44) at 178 (Paris: Plon 1951) (entry for 2 September, 1942):

Horrible things are happening at the camp called Milles near Aix and also in all the camps in France. Jews of German, Austrian, and Czech nationality are being herded together there, whether they're 20 or 60 years old, then crammed into cattle cars and sent to Poland in sealed trains.

Even if lawyers—unlike their lay countymen—remained blissfully ignorant of these departures and their probable destiny, even if they did not deliberately contribute to the genocide, we might still seek an explanation for their merely abiding the anti-Semitic innovations of 1940-44. The constitutional and egalitarian assumptions of 150 years would as little point to "neutral" tolerance, see MARRUS & PAXTON, supra note 1, at 145, as to zealous advocacy for such grotesque laws and policies. As Marrus and Paxton put it, on their more modest claim: "It is hard today not to be surprised at the routine fashion with which this new legal order was explained and applied." Id. at 144. (Marrus and Paxton recognize, of course, that in areas they studied more closely (government behavior, such as that of Laval's), the French outperformed their conquerors' wishes and even desires. See id. at 232, 263, 364.) Posner will be too anxious to be "taken seriously" himself to disregard the issues raised by French wartime legalism.

tional text and tradition was possible even under the eyes of the oc­
cupiers,® and that Haennig could have mounted a “jugular” attack
on the system if he had so desired without risking life or limb. I fur­
ther suggest that French lawyers, as a minimal position, always re­
tained the option of remaining silent, and that Haennig’s very
decision to publish equivocal words seems careerist at best, immoral
at worst.

Through a challenge to the now influential claims of Stanley
Fish, I proceed in this Section to suggest that it may be possible to
abstract from the everyday practice of law a series of norms that
might constrain French (or American) lawyers from again violating
egalitarian traditions as the Vichy lawyers clearly did. By making a
modest move in the direction of Owen Fiss® and his “disciplining
rules,” I thus confirm that constitutional norms deserved to be used as
a standard by French lawyers apart from the situational discourse
that led them to accept, debate, and further the anti-constitutional
racial laws.

More strongly, perhaps, I then move to my second corollary;
that interpretive theory must at least allow for the positing of such
norms as absolute constraints upon the day-to-day practice of law.
However difficult the distinction may be between disciplining rules
and everyday rhetoric, the example of Vichy mandates a theoretical
posture recognizing the difference. For theory does affect practice;
the disappearance of textual standards behind the momentary needs
of the Vichy legal interpretive community resulted from a long-stand­
ing theoretical posture of text-avoidance or even text-denial within
that community. If post-modern theories such as Fish’s prevail, they
will create an atmosphere in the practice that risks replication of the
Vichy experience.

A. Richard Posner on “Haennig’s Choice”

Richard Posner has come to the defense of Joseph Haennig. As
to my finding grotesque Haennig’s reasoning, his benign view of Nazi
authorities, and his basic acceptance of the racial scheme adopted by
Vichy lawyers, Posner says:

I am unwilling to accept Weisberg’s verdict. Although Haen­
nig's article contains no hint of disapproval of the racial laws, it would not have been published if it had. It does not praise the laws. The only thing praised is a German decision that saved a woman who was half-Jewish from the gas chamber. The article may have saved some French half-Jews. Indeed, it may have saved more lives than if Haennig had thrown up his law practice and joined the Resistance . . . . Maybe he thought the racial laws grotesque but knew it would not help to let his feelings show in the article. What would Weisberg have Haennig do?

It is true that if most Frenchmen had refused to collaborate with the Nazis, the Jews of France would have been better off than they were by receiving small crumbs of assistance from the likes of Haennig. But the problem with mass defiance . . . is, who shall step forward first?®

Posner observes, speculatively, that the Haennig piece "would not have been published" if it were overtly resistant to the racial laws. The statement ignores far more explosive public declarations already known to the Bar, by such eminent lawyers as Léon Blum and his own attorneys during the political trials at Riom.® True, Blum was already imprisoned when he made his subversive remarks (although they could not have endeared him to the court or to the Vichy and German leaders who were in attendance), but his lawyers challenged the constitutionality of the Vichy regime, of its legislation, of the trial, etc., and went totally unpunished. Indeed, the Minister of Justice, Joseph Barthélemy later dined and drank with the defense counsel, and felt powerless to stop the antigovernment rhetoric of Blum, the "Jew" to whom the formally "liberal" Justice Minister refers in the handwritten contemporaneous scribbling I append here.®

Blum and his lawyers were not unique in "publishing" far more controversial language than Haennig might have risked for his article. The head of the Paris Bar Association, Jacques Charpentier, twice petitioned Pétain directly and unambiguously, at some risk to himself and to his organization.® He was demanding, first of all, that separa-
tion of powers and right to counsel be observed in the very trial of
Blum I have just mentioned; second, he protested with vigor the gov-
ernment’s attempt to pass upon membership applications for the Bar.
The outcome he sought was achieved in both cases.

These protesting lawyers, whose views constituted direct attacks
on the government and were publicly known, suffered no losses.
Haennig, writing analytically about a body of laws already strongly
disputed, might well have had “published” at least some language im-
plicitly attacking the very soundness—the “Frenchness,” so to
speak—of the racial laws. But he chose not to. Here we must seek
explanation not in a simplistic and anachronistic view of the Nazis in
France as an all-terrorizing or all-censoring authority. Everything
was in flux in Vichy France, always. Haennig’s refusal to challenge
the laws at their corrupt heart was typical and collegial, but it was not
absolutely mandated.

If he did not go that route, we need to find out why. Perhaps the
answer lies somewhere in the following remarkable passage from Jac-
ques Charpentier. The head of the Paris Bar, so courageous when his
vital interests were attacked, said this—after the war—about the ra-
cial statutes’ ostracism of newly admitted Jewish lawyers:

At the Paris Bar, there had always been a Jewish problem. A
number of refugees had a conception of justice very different from
our own. . . . Since 1940, a law excluded the sons of such refugees
from the profession of law. For several prior years, this type of
measure was strongly desired by the Paris Bar. . . . Before the War,
we were invaded by those recently naturalized, almost all of eastern
origin, whose language was ridiculed by the Press, thus cover-
ing us with shame. They brought to the conduct of their practice
the customs of their bazaars. In this respect, the Vichy policies
comported with our own professional interests, but I only envi-
sioned their application after the fact.88

Charpentier and his Bar association, unlike their colleagues in
Belgium who uniformly protested to a far less independent govern-
ment the ostracism of their Jewish colleagues,89 went along with the

and the right of the Bar to administer itself without governmental interference). However,
Charpentier’s record in other areas implicating foundational French beliefs, including the ra-
cial laws, is far more spotty.

On all these points, see J. CHARPENTIER, supra note 77. See also infra text accompanying
note 88 (discussion of Charpentier’s actions and rhetoric on the “Jewish problem” at the Paris
bar); 72 AJ file, supra note 85.

88 J. CHARPENTIER, supra note 77, at 127.

89 See a four-page handwritten letter from three leading Brussels lawyers to General von
Folkenhausen, Military Commander for Belgium (November 19, 1940) (Yad Vashem: IV-
203), expressing outrage at the racial legislation there.
The example of Charpentier indicates that French lawyers felt empowered to challenge directly some Vichy laws and procedures, but that they almost always fell short of focusing their discourse on the jugular of the corrupt new legislation. Yet the example of Blum and his lawyers at Riom demonstrates the availability—without sanction—of jugular protest. Thus Posner is naive in asserting that Haennig “would not have been published” if he had protested the laws themselves. More troublingly still, Posner reveals his beliefs about professionalism by implying—without reflection—that publication should have been a goal of Haennig’s in any event. The phrase endorses axiomatically the drive to get published, whatever the context and the other rhetorical or ethical options available to a lawyer acting within it. Posner thus slips in as an assumption what is in fact most controversial in Haennig’s choice.

Suppose, against the evidence but in line with Posner’s declaration, that Haennig indeed could not have been published if he chose to attack the jugular? Then why did he choose to publish at all? There are only four possible answers. First, Haennig may have been delighted with, or indifferent to, the racist aspects of Vichy law. Second, even if discomfited by the latter, he may have decided to enhance his career by whatever pragmatic means were available. (Indeed, Haennig’s views became authoritative in magisterial circles.)

Yet if these were Haennig’s positions, we surely cannot condone his drive to see his name in print, however benign his analysis seems on first blush. But his decision seems no more edifying if we assume the third possibility: that he strongly opposed the laws but decided to

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90 See Appendix nine (headline reporting the arrests); see also supra note 77 (discussing these arrests).
91 Vichy Landlord-Tenant law, even in decisions most favorable to Jewish litigants, illustrates this failure. See supra Part II.
92 To be distinguished, however, is the Philippe Serre version of attack; see supra text accompanying notes 6-7. Those who challenged the authority of the regime ab initio, as opposed to the constitutionality of its eventual laws and procedures, were often harshly victimized.
93 See Appendix eight, an anonymous reference to Haennig on the official government stationery of a public prosecutor.
publish a conciliatory analysis that largely accepted their premises. If this were true, he appears to have either lacked some of his colleagues' courage in denying the validity itself of the racial legislation, or (less likely) to have been unaware of such collegial precedents. But even here, Haennig had a better option, the one assumed away by Posner's sense of professionalism.

Surely Haennig, faced with these latter feelings, might have adopted what I would call the "rhetoric of silence"—the eloquent refusal to pour additional verbal fuel onto a flamingly corrupt discursive mass. Posner fails even to consider silence as a professional option in Vichy-type situations. I will forgo the urge to see here a careerist program unmindful of ethical considerations, or to elaborate at this time on the risks for lawyers of needing constantly to talk. Instead, I will come to the fourth and most edifying explanation for Haennig's choice: he detested the legislation but thought that his specific analysis might do some good to some unfortunates already subject to it.

This proves at least as problematic as the earlier explanations for Haennig's choice. For what Posner himself calls the article's mere "crumbs," thrown by Haennig to a starving community of oppressed people, turn out to be poisoned. Like all legalistic rhetoric situating itself at the then-prevalent discursive center (such as the landlord-tenant cases discussed in Part II supra), Haennig's seemingly benign rhetoric immediately implicated if not condemned thousands of similarly situated individuals who could not carry the new burden of proof proposed by his analysis.

Each legalistic piece of line-drawing, in other words, tightened the noose around the majority of oppressed people, for such rhetoric further legitimated the overall scheme of victimization. One person can prove that going to the synagogue did not imply real Jewish faith; the next dozen cannot. If the line had not been drawn to protect the first, some other line might have been drawn to protect the dozen. Or lawyers might have resisted the temptation to draw any lines, thus bringing the system to a complete halt. Analogously, one tenant, in the 20th arrondissement, can show that her husband was arrested prior to 2 June, 1941; she gains a rent reduction and is not thrown out on the street. But the next tenant, like most Jews, was arrested after that date. No relief is afforded, indeed no defense is available and the courts are not used at all. But if the first piece of legal rhetoric had drawn the line more favorably to all potential claimants of rent reductions, or if magistrates had quickly begun to express disapproval of the racial scheme altogether, the "crumbs" would have immediately gathered into a full meal for Vichy's famished Jews.
B. Stanley Fish and the Denial of “Text”

Stanley Fish has not as yet commented on the nexus between his well-known interpretive theories and the events described generally as the Holocaust and discussed in their French legalistic guise throughout this Article. But his powerful endorsement of the view that professional norms cannot exist apart from the practices of the community allegedly bound by those norms must eventually run up against Holocaustic barriers. For Fish, only the situation constrains the professional, and never any set of beliefs “objectively” available to that person or his colleagues. There is simply no recourse to anything but the situation:

[Communication occurs within situations. . . . To be in a situation is already to be in possession of (or possessed by) a structure of assumptions, or practices understood to be relevant in relation to purposes and goals that are already in place; and it is within the assumption of these purposes and goals that any utterance is immediately heard.]

This passage, which might serve as an ex post facto apology for Joseph Haennig’s essay, establishes on a theoretical level the notion that ideals, norms, beliefs, can never constrain professional behavior. In a sense, for Fish, these latter simply have no independent existence, for they are nought but a function of the practice—at any given moment—of the community ostensibly bound by them. This community is always free to incorporate into its practice—or to eject from it—earlier understandings of normative conduct.

Nor can any text ever bind a practitioner, because no text exists apart from that practitioner and the community to which he belongs:

Strictly speaking, getting “back to the text” is not a move one can perform, because the text one gets back to will be the text demanded by some other interpretation and that interpretation will be presiding over its production.

The text, like the norm or foundational belief, exists not separately from the community employing it but instead within that community. For Fish, it never stands apart from us—rather, it is us. Our very sense of what the text is arises from the latest interpretation of the text rather than from anything “within it”; nothing is “within it” except that interpretation.

In a well-known debate with Fish, Owen Fiss argues for the existence of texts and beliefs apart from the interpretive community.

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94 S. FISH, IS THERE A TEXT IN THIS CLASS? 149 (1980).
95 Id.
96 See Fiss, supra note 4; Fish, supra note 4.
A judge, for example, deciding a case under our Constitution, is bound by norms of interpretive conduct that discipline behavior at the time of decision-making. And the Constitution, for Fiss, yields meanings, i.e., constrains the reader or interpretive community from purely self-generated or subjective conduct. For Fish, there is no such extrinsic discipline, no way to etch into stone either an interpretive strategy or a set of professional ethics. Instead the standards of professional conduct are determined at any moment by solely internal, situational factors, not by any "objective" or foundational definitions. Most recently, and most portentously, Fish puts it this way:

[It] is the conditions currently obtaining in the profession rather than any set of independent and abiding criteria that determine what is significant and meritorious.97

Were it not for the example of Vichy law, I might find myself in substantial theoretical agreement with Fish.98 It is very difficult to "prove" the existence of any entity sufficiently outside a practice to constrain (objectively) those situated within it. The constraints, as Fish argues, are inside the practice. But, however difficult the task, I am inclined to move toward Fiss' position, because I am convinced that Vichy constrains us, so to speak, to seek the constraint of disciplining rules. Were French lawyers culturally attuned to reverence for text instead of textual manipulation (another point I will consider at greater length in my book), I am convinced they would have sought in larger numbers to reject as outside the bounds of constitutional and procedural French norms these strange racial laws.99

Thus, although Fish always consoles his audiences by saying that there is no causal connection between his theory and anyone's practice (he must, of course, because to say otherwise would be to contradict the theoretical premise that there are no norms apart from practice, including his norms), I contend that such a connection al-

97 S. Fish, Doing What Comes Naturally 177 (1989)
99 Vichy lawyers were content to avoid constitutional norms not because they conceived of no reality apart from their practice; instead, they avoided them because their cultural and professional environment condoned text-avoidance and encouraged pragmatic interpretive flexibility as a professional, hermeneutic norm. For French lawyers, the avoidance of central realities, see Weisberg, Avoiding Central Realities, supra note 27, at 168-70 and 168 n.49, was part of their professional and cultural training. In other words, (most) Vichy lawyers felt unconstrained by the constitutive texts of their tradition because their professional culture fully empowered them to avoid textualism when other concerns had been brought into competition. This assertion will require an analysis in my forthcoming book of traditional French anti-Talmudism and of the relationship of legal to Catholic interpretive theory that the Vichy years expressly brought forth through learned legalistic discussions of the anti-Jewish racial laws. For present purposes, this observation may serve to alert the reader that preponderant cultural (and theoretical) beliefs do affect professional practice.
ways exists. If practitioners have been trained to see text as nothing but themselves, they will so act in times of crisis. If they are trained to see texts as apart, they will more likely insist on the primacy of such texts above their own contextual needs and impulses. And since the constitutive French texts would have yielded principled opposition to the jugular vein of Vichy racism, the dreadful results of 1940-44 might have been avoided.¹⁰⁰

So the example of Vichy rhetoric knocks out Fish's contention that the "significant and meritorious" can ever be exclusively determined by "conditions currently obtaining in the profession."¹⁰¹ For there is little of the "meritorious" in the practice of Vichy law, and the only "significant" aspect of it was its demonstration that we must seek—however difficult the task—"independent and abiding criteria" to guide us as legal professionals. Vichy lawyers, as we have seen, were themselves capable of applying their foundational ethics to a critique of the new regime; so it is not merely our analysis that rejects Vichy behavior as nonmeritorious. But most Vichy lawyers, like most Fish-ian professionals, rested easy with the theoretical assumption that their legal rhetoric was situationally, and in no other way, constrained. This is what we now have to avoid.

Vichy teaches that practice normatively unconstrained from the notion of "text" is only as good as the values of its most articulate practitioner. Liberated from the smallest allegiance to textual concepts held dear for 150 years until the moment of Vichy's association with the victorious Germans, Vichy lawyers were able to foster radical change, not the incremental type with which Fish consoles us. The radical move once made—that racial legislation was interpretively acceptable—lawyers went about their business splitting hairs, or, to shift to Posner's metaphor about Haennig, throwing crumbs.

The lesson of Vichy is that professional communities cannot accept theories denying the objective existence of texts. They must resist such theories, fight to understand what is meant by textuality as something apart from any reader or group of readers, and then substantively evaluate the motives and subjective biases from which all texts are generated. The battleground for us in the 1990s is the battleground of texts, not of situationalist theory.

CONCLUSION

Vichy lawyers generated rhetoric that directly led to the concen-
tration camps "in the East." Their willingness to draft laws in a manner often exceeding the German conqueror's demands set precedents even the Nuremberg laws and Nazi courts had not imagined; their subsequent zeal in interpreting that legislation unconstrained by traditional (textual) French notions of egalitarianism and personal freedom exemplifies the risks to professional communities of theories privileging situation over standards.

1. A Jew is: He or she, of whatever faith, who is an issue of at least three grandparents of the Jewish race, or of simply two if his/her spouse is an issue herself/himself of two grandparents of the Jewish race.

A grandparent having belonged to the Jewish religion is considered to be of the Jewish race;

2. He or she who belongs to the Jewish religion, or who belonged to it on June 25, 1940, and who is the issue of two grandparents of the Jewish race.

Non-affiliation with the Jewish religion is established by proof of belonging to one of the other faiths recognized by the State before the law of 9 December 1905. The disavowal or annulment of recognition of a child considered to be Jewish is without effect as regards the preceding sections. [There follows the prohibitions for such people on property ownership and some employment; sanctions—including imprisonment—are then declared for engaging in proscribed activities.]
Toulouse, 18 November, 1941

[CDJC, XVII-38 (157)]

MEMORANDUM

For the Director of the (CGQJ) Service on the Racial Laws

S. P. 447
JL/LC

The LEBOUCHER case, with which you are familiar, has drawn my interest on the following question:

Each of these spouses has two grandparents of the Jewish race, but those are identical.

It strikes me as logical to avoid counting these identical grand-parents twice to reach the conclusion that these grandchildren are both Jewish just because they decided to marry each other.

Please advise if this conclusion is a sound interpretation.

[Facsimile translated by author]
CERTIFICATE
OF NON-AFFILIATION TO THE JEWISH RACE

On presentation by the party to the CGQJ of various documents, we have decided that ___________________________, born __________________________ at __________________________ should not be considered a Jew(ess) on the terms of the law of 2 June 1941.

Paris, __________________________

Darquier de Pellepoix
APPENDIX FIVE

L'AFFAIRE DE M. CLÉMENCEAU

Madame Clara Augereau
55, Avenue de Suffren
PARIS

H.E.

Affaire: M. CLÉMENCEAU, 55, Avenue de Suffren
PARIS.

Mon cher Maitre,

Afin de régler définitivement la situation de l'intéressé qui est en instance depuis le 4 Février 1945, je vous serais obligé de bien vouloir me faire parvenir un certificat établi par membre du conseil de l'Ordre des Médecins attestant que votre client jetait de toute son intégrité psychique.

Veuillez agréer, M. mon cher Maitre, l'expression de mes sentiments distingués.

S. V. E. B.
Objet: Statut racial des Géorgiens de confession mosquée

J'ai l'honneur de vous informer que le Statut des Géorgiens de confession mosquée a fait l'objet d'une demande spéciale auprès des autorités occupantes.

Pourtant, je crois devoir attirer votre attention sur le fait de la décision qui fut prise en Janvier 1943 par le Statut des Personnes à Vichy, décision qui conférait la qualité de non-juifs à tous ressortissants géorgiens de confession mosquée, doit être considérée comme nulle et non avenu.

A l'heure actuelle, il est apparu qu'au sens de la loi française, les ressortissants géorgiens de confession mosquée doivent être regardés comme étant issus de trois grands-parents de religion juive, et soumis au Statut des Juifs. Cette décision résulte du fait que le loi précitée est fondée essentiellement pour déterminer la race des intéressés, sur la religion profondément par leurs grands-parents.

Les autorités allemandes exemptent du port de l'étoile les géorgiens de confession mosquée, parce qu'elles les considèrent comme n'étant pas de pure race juive.

Il n'apparaît pas que cette exemption du port de l'étoile doit entraîner ipso-facto la levée des administrateurs provisoires que vous auriez cru devoir faire placer aux biens des Géorgiens de confession mosquée. Bien mieux, je crois devoir décider que, dans tous les cas, les Géorgiens de confession mosquée doivent faire l'objet d'une mesure d'aryanisation.

Le Directeur du Statut des Personnes
signé: ILLISIBLE

Toulouse, N° 2533
The Germans are shocked to see a Jew hold forth against the Martial.

No Jew could raise his voice against Hitler where they came from.
Office of the Public Prosecutor

On the competence of German military tribunals and the collateral effect of their decisions for French courts, see J. Haennig.

Gaz Palais 10-12 February, 1943
APPENDIX NINE

Headline: I have seen them, these Jewish Millionaires: Former Celebrities of the Paris Bar, Interned in a Camp near our Capital
JE LES AI VUS, CES JUIFS

millionnaires...

INTERNÉS PRÈS DE PARIS

(SUITE DE LA PREMIÈRE PAGE)

Pour l'instant, seuls impor
tent le décès de la vue relè
te, nous nous laissons subjuc
ter, émouvus le sympathetic
capitaine de gardiens qui veille
car la mort a du monde, et de
dans quelques jours, probable
tement qu'il se passe, de son com
de.

C'est à qui nous avons la

courtoisie de présenter les

caractéristiques de ces

cargos internes, d'où pour

court, que nous avons le

...
An das
Reichssicherheitshauptamt
– IV B 4 –
Berlin

Betreff: Judenabschub aus Frankreich.


Die Verhandlungen mit der französischen Regierung haben inzwischen zu folgendem Ergebnis geführt:

Sämtliche staatenlose Juden der besetzten und unbesetzten Zone werden für den Abschub bereit gestellt.


Betr. I. Judensperrung.

1.) Vermerk:

Am 20.7.1942 rief 6-Obersturmbannführer EICHMANN und 6-Obersturmbannführer NOWAK von SS-HA IV B 4 hier an.

Mit 6-Obersturmbannführer Eichmann wurde die Frage
des Kinderabwanderung besprochen. Er entschied, daß, sobald
der Abtransport in das Generalgouvernement wieder möglich
ist, Kindertransporte beginnen können. 6-Obersturmbannführer Nowak
sicherte zu, Ende August/Anfang September etwa 5 Transporte
nach dem Generalgouvernement zu ermöglichen, die Juden aller
Art (auch arbeitsunfähige und alte Juden) enthalten können.

Es wurde 6-Obersturmbannführer Eichmann ferner mitgeteilt,
dß verläßlich lediglich noch 10 Transporte möglich
würden und daß wegen der Festnahme weiterer Juden Verhandlungen
mit der französischen Regierung schwieriger
waren. 

Wegen der eingefallenen Transporte aus Bordeaux wurde
erklärt, daß infolge der durch 6-Standartenführer Dr. Knochen
den Französischen Polizeichef Bousquet gemachten Erklärung, vor-
läufig nur staatenlose Juden zu nehmen, ohne hiesig in Zukunft
eine völlig neue Lage entschieden sei, die das ganze Konzept
umgeworfen hatte.

2.) 6-Standartenführer Knochen war der Kommissar vor den
Verhandlungen.

3.) 6-Standartenführer wesentlich, aus Ressorts und an die
nachgeschickt.