In Defense of Flexiphobia: How Training in Intractability Can Help Lawyers in Moments of Perceived Emergency

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IN DEFENSE OF FLEXIPHOBIA:
HOW TRAINING IN INTRACTABILITY CAN HELP LAWYERS IN MOMENTS OF PERCEIVED EMERGENCY

Richard H. Weisberg*

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* Walter Floersheimer Professor of Constitutional Law, Benjamin N. Cardozo School of Law. I gratefully acknowledge the legal theory workshops in Fall 2011 at Georgetown and Columbia Law Schools, where probing questions about “flexophobia” helped me, without becoming overly flexible, to refine my analysis and especially to clarify points that were misunderstood by those excellent audiences. I am also indebted to the students of law and literature who took the “Guernsey exercise” (Appendix A) through the years, most recently at Princeton University (August, 2010, co-organized by Peter Brooks) and in my seminar at the Georgetown Law School (2011); and to the lawyers at the New York City Bar Association Inns of Court session, co-directed in September 2010 by Professors Carol Ziegler of Columbia and Professor Eric Freedman of Cardozo, where the “Guernsey Scenario” (Appendix B) was first presented. The author is just completing a book-length manuscript on this subject.
INTRODUCTION

For some time now I have been thinking about a series of legal events that provoke a challenge to the generally positive norm of flexibility. Flexibility of thought is a good thing, we believe. However, these events, all of which in one way or another have been thought of as “emergencies” make us revalue negatively our predilection to be open-minded and, conversely, situate more affirmatively words like “intransigent,” “rigid,” “intractable.” These harsher versions of the more polite word “steadfast” cause us, as I wish to do throughout this Article, to challenge our liberal predilections, our blue-state and John Stuart Mill–ian allegiance to tolerance, tolerance especially for the positions we detest. I am no red-stater myself, but my own work (including as a litigator) about the way lawyers behaved during the World War II French regime called Vichy and my subsequent interest in liberal academic equivocation about the post-9/11 practice of torture, have led me to think in a broader way about flexibility, and especially, that sub-category called hermeneutic or interpretive flexibility.

The baseline enlightenment position is, of course, that of flexibility. There are many upsides to heeding constant challenges to our views, especially as coupled with a programmatic willingness to veer toward views diametrically opposed to our own. They are set out brilliantly but not with complete convincingness in a tradition epitomized by the second chapter of John Stuart Mill’s *On Liberty* (1859). I am not the first to ask us to consider the downside of constant openness.\(^1\) I emphasize three inter-related strengths of the seemingly naughty words inflexibility and intractability: First, denying normatively the merits of flexibility removes the easy out of attacking opposed positions *just because they are inflexible*. We are compelled to skip over the self-congratulatory comparison of our liberal open-ness to *their* fundamentalist intransigence. Flowing from this and second, we enter more quickly into the domain of substantive judgment of contrasting positions. Judgments emerge directly from the perceived rightness or wrongness of the opposed, inflexible position. Flexophobia not only entails but also facilitates making such judgments. The very judgmental closure that we enlightened ones normatively avoid permits us to reflect on the substantive, as opposed to the methodological defects both in our own

\(^1\) See, e.g., Frederick Schauer, *The Argument from Truth, in FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982). Kent Greenawalt allows for what I am calling a flexophobic response to the views we abhor: “Even if the state should tolerate expressions of racial bigotry, individuals may be warranted in greeting bigots with disapproval and minimizing contacts with them.” KENT GREENWALT, CONFLICTS OF LAW AND MORALITY 30 (1987). Much of this Article has to do with choices that we make as Greenawalt’s “individuals.”
and in others’ positions. Third, and of greatest importance to this Article, a normative privileging of intransigent positions assists us—in times of crisis especially—to safeguard positions we hold dear but which—as in Vichy or the recent post 9/11 American debate on “torture”\(^2\)—have been rendered equivocal by flexible analyses.

As with the Vichy project itself, which led to an empirical study of French legal reasoning during World War II,\(^3\) my inspiration for flexiphobia as I now call it came from powerful fictional stories. Just as my curiosity about World War II France was provoked by Camus’ The Stranger and The Fall,\(^4\) so a counter-flow I saw in Faulkner’s Intruder in the Dust stimulated my first allegiance to intractability. For it is that word, used seven times (and “inflexible” used thrice) by the narrator about the wrongly accused Lucas Beauchamp, a man of color about to be lynched in Faulkner’s imaginary Yoknapotawpha County, that created over the course of the narrative one key lesson: to stick to the good when the world is falling apart, you need to be inflexible. Furthermore, just as I teach all three of those stories every year in my “Law and Literature” class, so I developed a classroom exercise connected to my work on Vichy, and it is here that I am going to exemplify in some detail for this Article how the risks of flexibility have unfolded when American lawyers or law students are tasked with role-playing as wartime lawyers. I then move on to a brief appraisal of flexibility versus flexiphobia within otherwise allied camps, my example being the Dreyfus Affair in France, with a very brief footnoted account of how the legal team that successfully helped Holocaust survivors in U.S. federal court eventually broke apart and an even quicker but up to the moment glimpse of the debate among American lawyers on executive branch targeting of U.S. citizens. In notes 32 and 33, I introduce a wider project’s taking up of the theological implications of flexiphobia.

I. FLEXIPHOBIA ENTAILS CHOICE, BUT DISCRETION IS CONSTRAINED BY LONG HABITS OF MIND AND PRACTICE

A. Elaine Scarry and the Importance of Habit

At the outset, it is important to distinguish flexiphobia from an antipathy to choice. To the contrary, the impulse toward intractability means the actor understands that there are choices, that he or she in fact has a form of discretion available at all times. The question then be-
comes which choice to make, typically as between a new variable and an old, ensconced principle of thought and action.

In a recent small masterpiece, Thinking in an Emergency, Elaine Scarry describes in great detail patterns of thought that permit people trained in crisis management to respond with habituated actions and words that assist others to survive emergencies. One such training is CPR, a life-saving technique that requires the practitioner to repeat (sometimes for as long as thirty minutes and often knowing that a human life is in her hands) long practiced, intractable patterns of behavior. As Scarry, who has been part of a fledgling project with Peter Brooks and myself connected to my theme today,⁵ puts it,

The procedures for CPR confirm a feature of habit that is often cited in critiques of habit, its rigidity, while at the same time vividly illustrating a mistake those critiques make when they attribute to rigidity a robotic (or automaton-like) lack of thought. . . . The procedures are so well internalized that mental space is left over for addressing additional complicating patterns.⁶

Ensconced habits of mind arise, rather than disappear, during moments of professional stress or even long periods of perceived “emergency.” One habit might be to forget all prior training and shift ground completely, once so challenged. But the more effective actors, like the first responders in Scarry’s study, call upon long standing traditions of thought and action. As Scarry puts it about another set of life-saving habits she studied, those of mutual aid contracts across communities in Canada and Japan, “the question is not whether habit will surface in an emergency (it surely will) but instead which habit will emerge, and whether it will be serviceable or unserviceable.”⁷

B. The Guernsey Exercise

An exercise I devised based on an actual situation in the occupied British channel island of Guernsey asks what kinds of habits might help lawyers to retain ingrained habits of thinking that are as meritorious as those of the CPR practitioners, without losing the capacity to think with sufficient creativity at the margins of those habits and without losing those excellent habits of thought altogether due to a real or perceived emergency. The outcome of almost twenty years of assigning the

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⁶ ELAINE SCARRY, THINKING IN AN EMERGENCY 20 (2011).
⁷ Id. at 43.
Guernsey exercise to lawyers is that, overwhelmingly, they compromise their finest traditional patterns of thought. Flexibility has become engrained as a norm, and the training these lawyers have received in high-level generalizations about equality, fairness, due process, tends to disappear. The results faithfully parallel the historical disaster wrought by otherwise fine and equality-trained lawyers, judges, and academicians during Vichy and also our own recent experience with incursions on foundational, pre-9/11 habits of thought shared by American lawyers about torture or wiretapping or special prisons.

The “Guernsey Scenario,” a dramatization recently offered at the New York City Bar Association Inns of Court, and the exercise itself are appended. I found the actual file in the French archives in the course of researching Vichy. The obvious chance it gave me was to present English-language wartime documents that mirrored a central problem of French law during World War II: defining the Jew for purposes of eventual isolation, expropriation, and imprisonment. The file concerns an innkeeper, Mrs. V.B. Woolnaugh, who is at risk under the French-modeled Guernsey orders of being defined as a Jew. She falls into the category of “mixed heritage individuals”—those whose grandparental heritage made of them the ambiguous case lawyers love so much. Under French law, more or less imported into the nearby channel islands such as Guernsey, and to some extent like the Nazi Nuremberg laws of 1935, the individual with exactly two Jewish and two non-Jewish grandparents fell into a gray area. Mrs. Woolnaugh was apparently just such a person. Under the gun of Guernsey law, as interpreted by British-trained lawyers and bureaucrats, she might now lose her inn and her life depending on the interpretive strategies adopted by the Guernsey lawyer my audiences are now asked to become for purposes of the exercise.

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8 For then-preliminary findings that have been borne out in many subsequent experiments, see Richard Weisberg, *The Hermeneutic of Acceptance and the Discourse of the Grotesque, with a Classroom Exercise on Vichy Law*, 17 CARDOZO L. REV. 1875 (1996). A graph at the end of the article indicates that about eighty percent of those taking the exercise avoid altogether their legal training in higher level arguments available to them and instead embrace the exercise on low levels that seem to them appropriate for the “new” material. This tracks empirically the response of French lawyers and judges during World War II to the anti-Jewish laws promulgated by the Vichy regime. For the exercise itself, see infra app. A (“WRITING ASSIGNMENT”).

9 See the “Guernsey Scenario,” infra app. B. That screenplay was delivered before eighty or so lawyers at the Inns of Court in New York City on September 16, 2010. The lawyers then were divided into six groups of about thirteen each to discuss how to respond. Although their internal debate, which was monitored in each group, usually began with a range of options including formal rejection of the anti-Jewish laws on legal (not only moral) grounds connected to the law’s violation of many foundational safeguards, the work product in the end tracked the usual statistic: eighty percent or so opted into foregrounding the lower level question: Is Mrs. Woolnaugh a Jew under the Order of April 26, 1941? All went through arguments on both sides, with most groups concluding she probably was not a Jew, and hence, could keep her inn. Id.

10 See WEISBERG, supra note 3, at 37–81.
How would American lawyers respond, from the safety of their classrooms or bar association events, to the dilemma apparently imposed on the Guernsey innkeeper by laws at least equally as inimical to Anglo-American professional habits as they were to their French confreres? Overwhelmingly, they set aside their trained patterns of traditional thought and responded on fatally attractive levels of generality. “The key issue,” as almost eighty percent conclude in one way or another, “is whether Mrs. Woolnaugh is a Jew.” Gone in the face of the new situation is almost every trace of their higher level training. A small minority enter the issue with questions such as “Who has the burden of proof, and if it is the government, can ‘Jewishness’ by grandparental heritage be proven at all during wartime?” Or “Do these laws violate traditional constraints on _ex post facto_ criminal sanctions?” or “Does not the Order violate principles of due process?” or, more pragmatically: “Before proceeding at all against Mrs. Woolnaugh or any other suspected Jew, should we not interrogate that fellow Gill, who may have falsely accused her of marrying in a Jewish temple?”

Lawyers exhibit under the stress of a troubling new professional challenge a deliberate tunnel vision, which makes them somehow feel better than if they were to apply fundamental and longer held patterns of thought. As Scarry observed, some habits always emerge in such situations; it is a question of _which_ habits. So the very novelty of the factual context eventually trumps the trained intuition, here of a hypothetical Anglo-American trained lawyer. “Is she a Jew?,” despite the obvious grotesqueness of the question, replaces “Now that I have been put in charge, do I enforce such a law or do I work to make it a nullity or at the very least to minimize its effect not only on this targeted individual but on all such individuals who may not be able to make her protective arguments convincingly?”

An engrained proclivity to see all sides of an issue and then to relish the potential creative arguments spring boarding from that complexity also kicks in. It might be called “compromise” but it is better understood as a kind of professional _excitement during which old habits of thought yield fairly quickly to new opportunities_.

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11 The problem with “incrementalism,” or working within the system to try to do a little good, is not only that the arguments for one individual may be unconvincing to supervising authorities, but much more so that for every one person protected, hundreds or thousands similarly situated who cannot make the winning argument are placed at greater risk because the basic structure has been accepted—this time by the role playing “Guernsey lawyer”. See Symposium, _Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges Under the Law of the Third Reich and Vichy, France_, 61 BROOK. L. REV. 1121 (1995); see also Robert Burt, _Wrong Tomorrow, Wrong Yesterday, but Not Today: On Sliding into Evil with Zeal but Without Understanding_, 5 ROGER WILLIAMS U. L. REV. 19 (1999); Symposium, _Lawyer Collaboration with Systems of Evil_, 5 ROGER WILLIAMS U. L. REV. 19 (1999).

C. A Flexiphobic Legal Response in Vichy

In the real world of Hitler’s Europe, lawyers and judges overwhelmingly accepted lawful anti-Semitism with a flexibility often necessary to overcome their engrained habits of egalitarianism or due process. The Vichy regime, jumping the gun on any Nazi pressure to do so, proudly and with a keen and articulated sense of autonomy promulgated and implemented almost 200 laws and regulations against Jews on wartime French soil. Eventually, 75,000 people were sent “to the East” under color of Vichy law while 3000 more died in Vichy-administered camps like Gurs and Beaumes-la-Rolande.

Shortly after these strange laws’ appearance and whatever their original habituated response to them might have been—Vichy lawyers were calling their regime’s new laws “cette matière fort délicate et nouvelle,” this new and fragile material. As to a titillating young wine, they might now bring their interpretive skills and individual tastes to legalized anti-Semitism, previously so antipathetic to their professional experience. Vichy quickly placed at risk of severe legal sanction tens of thousands of full Jews (or those with three Jewish grandparents) and thousands more who, like Mrs. Woolnaugh, might be so defined despite thinking of themselves as Catholic, Protestant, Muslim, or atheist. Four years of ink were spilled by French legal actors and analysts on the statutory definition of “Jew” and in particular the mixed heritage individual. The key factor, heuristically on exhibit in the Guernsey exercise, was the entry-level choice of issues raised by the analyzing legal authority. After some hesitation because the “new material” and its anti-egalitarianism was so foreign to their tastes, French lawyers overwhelmingly rejected high levels of generalization in favor of savoring the narrow issue: who is a Jew?

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13 See WEISBERG, supra note 3, at 37–81.
14 Id. at 342.
15 Id. at 244.
16 Id. at 68.
17 Camus’s novels aside, I was first drawn into a study of Vichy law while perusing French journals in the Columbia Law Library early in 1981. While for most other wartime countries, official law reports were missing, between 1940 and 1944, the French Gazette du Palais continued to publish. Everything in the reporters looked like pre-war and post-war doctrine and analysis except for the new category I found in the index for each year: “Juifs.” Both in the occupied and unoccupied zones, French draftsmen, and then French lawyers and judges, made much of a racial category that would have seemed bizarre to them before and was immediately expunged after. This process developed without much Nazi intervention; the Germans were delighted to import the expansive Vichy laws into the Occupied Zone, WEISBERG, supra note 3, at 46, and even had to slap Vichy’s wrists for attacking too many categories of potential victims left untouched by Nazi law. See WEISBERG, supra note 3, at 196–240.
However, flexiphobia manifested itself early, distinctly, and admirably.

In Vichy, one early responder relied on the engrained habits of mind later exemplified in Scarry’s work as a safeguard to overly malleable professional responses during emergencies: Professor Jacques Maury opined in the central law reporter, the *Journal officiel*, that no French lawyer or judge would accept the then brand new basic Vichy definitional laws *at all*.18 Almost before the regime’s ink was dry on the dreadful laws of October 3–4, 1940, Maury protested frontally against the very legitimacy of his own new government’s anti-Semitic statutes. Professor Maury might have feared reprisals for his protest not only from Vichy but also from the Nazis. He wrote in Occupied Paris, and he was taking on the first set of laws against the Jews, not by parsing them in detail but instead by tossing them as a whole into the garbage pail marked “not French.” The young law professor was positive his colleagues would see the same disconnect between these new laws and every pattern of French egalitarian thought to which they were professionally habituated. At the time, many French lawyers felt, but did not write, as Maury did: if the Germans insist on anti-Semitic policies, maybe they will succeed, but French law simply will not go down that path.19 Maury placed these traditional thoughts centrally before his colleagues:

> There is an increasing abandonment of our long-held rule safeguarding equality in their rights as well as in their responsibilities to all French people. . . . [O]n the specific characteristic thus emphasized, the great majority of nationals are safeguarded rights that all the others, unless excepted, definitively and even retroactively lose.20

Maury’s protest went to the jugular: laws discriminating among French citizens and residents on the basis of racial and religious qualities simply were *not French*: they violated long traditions of equality and would not be enforced, he believed, by French judges. If the Germans insisted (as they had not yet had time to do!) on persecuting Jews, well so be it; but the French would reach up to principles long held dear and would see their own regime’s acts as aberrational; as though in a CPR or community aid reflex, they would call upon their trained intuitions as French lawyers.

Maury entered the debate with a high-level –of-generality attack on the laws, and he did so in the face of two authoritarian and potentially brutal regimes. He was not taken out and shot or even detained. Eventu-

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18 WEISBERG, supra note 3, at 54–55.
19 As the lawyer Philippe Serre, a renegade from the Vichy regime who had courageously voted in Parliament against granting Marshal Petain full powers, told me in 1982: “There would have been no racial policy in France if the French had refused.” *Id.* at 3.
20 *Id.* at 54–55 & n.60.
ally, seeing his colleagues abandon old habits fairly quickly, he began writing and testifying about Jews on lower levels of legal generality. He “got tenure.”

The problem resided in those colleagues, not in the oppressive governments that his early flexiphobia directly challenged.

II. IN THE BELLY OF THE BEAST: HITLER CRAVES FLEXIBILITY

A. Positivism Was Rarely the Chief Offender

The immediate postwar debate on whom to blame for Nazi legalistic wrongdoing assumed that inflexibility was the villain. Not yet mindful of the volumes of empirical data and academic discussion of Hitler’s courts that eventually emerged later in the twentieth century, the scholarship pitted—both in Germany and the U.S.—distinguished natural lawyers against equally distinguished positivists, who doubted the validity of any conflation of law and morality.21 It turns out that the positivists had no need to defend their seemingly rigid approach to law, because Nazi jurisprudence from the onset of the regime fought to create flexible judges. Carl Schmitt, whose controversial writings paved the way for the odd form of “legality” present in the Third Reich, declared that “the era of legal positivism has come to an end.”22 He recognized “the paralyzing effect” on a revolutionary movement such as National Socialism “of legal-positivist jurisprudence.”23 Nazi judges consistently ruled against Schmitt-ian “others,” i.e., enemies of the state such as Jews, even when there were no laws on the books to justify such rulings.24

Once a statute was promulgated, hermeneutic manipulation from the bench became even more obvious: An example is the parsing of the words “sexual intercourse,” after such activity between Jew and non-Jew had been prohibited by the “Law for the Protection of German Blood and Honor” of September 15, 1935. Courts had to figure out whether defendants (usually the Jew in the situation) could be severely


22 MÜLLER, supra note 21, at 219; Lippman, supra note 21, at 219; see also MICHAEL STOLLEIS, THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY (Thomas Dunlop trans., 1998).


24 One example among scores is the tolerance for pre-statutory judicial dissolution of many marriages between Jews and non-Jews, MÜLLER, supra note 21, at 93; such dissolutions were “what the Führer wanted,” after all. Id.
punished for such acts as mutual touching, flirting, or even becoming aroused by an Aryan woman. A panel of the High Criminal Court stated a new rule of habitual flexibility: “The courts to which the Third Reich has assigned responsibility for administering justice, can carry out this task . . . only if they do not remain glued to the letter of the law . . . .”

Postwar Nuremberg trial documentation sets out just as plainly the flexible program: “[The] elastic nature of National Socialist legislation required the interpretative ability of an enlightened and energetic judiciary.”

B. One Flexiphobic Nazi Judge Summons Up the Best Habits of Mind and Protests Euthanasia from the Bench

Flexibility, however—which entails an openness to the new and the untested—is not the only cast of thought available to trained lawyers and judges. Even in the worst times, as we saw with the young French law professor Maury, flexiphobic responses can emerge, summoning the finest in professionally habituated behavior even as—or precisely when—all around are submitting to chaos. But was there an historical German analogue to Maury, who attempted to do CPR on France’s flagging legal life-stream?

Yes.

Ingo Mueller reports on the “one documented case of resistance in which a judge opposed the system in the course of carrying out his professional duties.” Dr. Lothar Kreyssig, a committed Lutheran, was not a novice like Maury, and neither did his protest come early on. In fact, Judge Kreyssig had been on the Brandenburg Court of Guardianship since the waning Weimar years. Hitler’s rise to power in 1933 did not diminish his proclivity to “numerous minor acts of insubordination.”

In 1938, he had publicly protested the arrest of the prominent theologian Martin Niemoeller. But that and some relatively minor prior incidents of curmudgeonly behavior had not implicated his judicial function. All this changed in the early 1940s, when he began issuing injunctions to sever al hospitals to prevent them from pursuing the Nazi’s euthanasia policies; he followed this by bringing criminal charges against a Nazi party leader who had been identified as “responsible for the euthanasia program.” Kreyssig—the habituated positivist? the deeply feeling member of the Lutheran Confessional Church?—wrote to the president of the Prussian Supreme Court:

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25 See id. at 101.
26 Lippman, supra note 22, at 237–38.
27 MULLER, supra note 21, at 193.
28 Id. at 194.
“Whatever benefits the people is lawful;” in the name of this terrible doctrine, which has yet to be contradicted by those whom it behooves to protect the law in Germany, entire areas of communal life have been placed beyond the reach of the law—the concentration camps, for example, and now institutions for the mentally ill as well.\(^{29}\)

Lothar Kreyssig, no more than Jacques Maury, suffered the imminent execution we flexible ones might be all too eager to deduce from such behavior. Kreyssig did have to face the wrath of the fanatical People’s Court judge and Reich Ministry official Roland Freisler. But even that hysterically flexible figure sent him off with a slap on the wrist: in 1942, Judge Kreyssig was retired from the bench at full pension.

Maury and Kreyssig prove that stability, steadfastness, and intractability are habits equally available even and especially in times of emergency and complete collegial collapse and compromise. In Hitler’s Europe, this flexiphobic response was that of a tiny minority compared to the seize-the-day zeal or at least “okay, let’s go along” opportunism of their colleagues.\(^{30}\)

There are many explanations for flexible adjustment in times of crisis. I do not discount the element of fear, although Kreyssig and Maury teach us that lawyers and judges—members of a powerful institution not easily crushed by even an Adolf Hitler—can articulate fine traditions without being punished. Nor do I under-estimate anti-Semitism itself, although that factor is exaggerated and falls apart in France because there were several doctrinal areas in which judicial results were pervasively pro-Jewish.\(^{31}\) A highly relevant and still under-examined factor behind the majoritarian impulse to flexible distortion of received texts, traditions, and norms, is that some pervasive doctrine seems to support departures from received habits of thought. This doctrine does not have to be legal; it can be moral in nature. Thus I have written about an exchange between Vichy and the Roman Catholic Church in 1941, which seemed to lend Rome’s approbation to Vichy’s racial policies while at the same time affirming strongly the Church’s complete antipathy to racism. During this exchange, briefly reported in note 32 here, the Church apparently made hermeneutic flexibility explicit and normative. This seems to have comforted the Vichy head of state and perhaps also some lawyers and judges professionally tasked

\(^{29}\) Id.

\(^{30}\) Kreyssig was unique, but there were as late as the 1942 incident reported above other members of the judiciary who were capable of expressing opposition not so much to genocidal policy as to Hitler’s direct incursions on judicial authority. See, e.g., Lippman, supra note 21, at 238–40.

\(^{31}\) See WEISBERG, supra note 3, at 241–85 (on landlord-tenant suspected of being Jews); id. (on out-of-wedlock children suspected of being Jews).
with implementing anti-Semitic laws. Some of my ongoing work will engage the whole idea of sourcing flexible interpretive strategies to the early Christian readings of the Hebrew Bible.

In a letter, from Leon Berard, a lawyer and Vichy’s emissary to the Roman Catholic Church, to his head of state, Berard apparently consoled Petain about his regime’s aberrational racist laws:

2 September 1941. M. le Maréchal: By your letter of 7 August 1941, you honored me by requesting information touching questions and problems that might be raised, from the Roman Catholic perspective, by the measures your government has taken regarding the Jews. I have had the honor of sending you a preliminary response where I observed that nothing has ever been said to me at the Vatican that would imply, on the part of the Holy See, a critique or disapproval of those legislative and regulatory acts.


[Nonetheless], one must admit, there is a contradiction between French law and Church doctrine, which is explicitly opposed to racism.

E. Practical Result of the Contradiction. Conclusion. I just mentioned the sole point at which the law of 2 June 1941 contradicts a principle held by the Roman Church. But it does not follow from this doctrinal divergence that the French state is threatened with . . . even a censure or disapproval that the Holy See might express in one form or another about the Jewish laws. . . . As an authorized person at the Vatican told me, they mean no quarrel with the Jewish laws.

[There is] an essential distinction that the Church has never ceased to admit and to practice, for it is full of wisdom and reason: the distinction between thesis and hypothesis, the thesis in which the principle is invariably affirmed and maintained and the hypothesis, where practical arrangements are organized.

*Id.* at 421–22 (third and fourth omissions in original) (internal quotation marks omitted).

For a groundbreaking work in this area, see Harold Bloom, *Jesus and Yahweh: The Names Divine* (2005), and an earlier masterpiece to which Bloom is often responsive, Frank Kermode, *The Genesis of Secrecy* (1979). Both writers engage with early Christian exegeses, for example, of the Hebrew prophetic text of Isaiah: Bloom calls John “a strong misreader” of that and other Hebrew texts, *Bloom, supra*, at 76, and sees the long-received Hebrew scholars’ way of understanding their own texts as “captive” to the eventual Christian triumph over received Jewish habits of interpretation, *id.* at 51. He hints that the long history of this “textual slavery” is not necessarily definitive: “Yahweh may not yet have spoken his final word upon this matter.” *Id.* at 37. I am working through the notion of flexiphobia as a way of describing a continuing resistance to the triumphalism of some Christian readings of the Hebrew Bible. I start from the proposition that the ultimate “emergency”—the expected end of days—coupled with some real skepticism toward strict law, led such writers as Paul and later John to distort the sacred Hebrew texts on which they relied and ultimately—when (flexiphobically) nothing came to pass that those texts prophesied about the Messiah, including the end of days—flexible distortion of texts became a kind of fighting faith. As Nietzsche the careful philologist observed, retaining a sacred text while fundamentally altering its meanings took some work. In a remarkably flexiphobic passage about interpretive distortion, Nietzsche put it this way:

However much the Jewish scholars protested, everywhere in the Old Testament there were supposed to be references to Christ and only to Christ, and particularly to his cross. Wherever any piece of wood, a switch, a ladder, a twig, a tree, a willow, or a staff is mentioned, this was supposed to indicate a prophecy of the wood of the cross; even the erection of the one-horned beast and the brazen serpent, even Moses spreading his arms in prayer, even the spits on which the Passover lamb was roasted—all are allusions to the cross and as it were preludes to it! Has anyone who asserted this ever believed it? . . . [But] they were conducting a war and paid more heed to their opponents than to the need to stay honest.
III. FLEXIPHOBIA AND INTERNECINE STRIFE: THE DREYFUS CASE AND A FOOTNOTE (#50) ON RECENT AMERICAN STRUGGLES WITHIN LIKE-MINDED LEGAL GROUPS

This Article has asked us to consider reversing our valuation of certain words and to experiment with a 180-degree shift from the privileging of “flexibility,” “open-ness,” or “permeability” toward their opposite numbers: “inflexibility,” “intractability,” and “stubborn-ness.” In this final section, similarly based on an important historical dilemma faced by lawyers, I add that even brothers and sisters in arms often develop through a crisis by breaking into the opposed camps of flexibility and flexiphobia. To do this, I briefly reference the guidance of recent historians of the Dreyfus case, who have complicated prior received oppositions of the “Affair” such as “Dreyfusard/anti-Dreyfusard,” “Republican/Military,” and “Individual/State.” Instead, the key dialectic turns out to be flexible vs. intractable within both camps: how strongly did key players on each side insist on their positions versus how malleable were others who seemed to be taking similar positions on Dreyfus’s guilt or innocence, on allegiance to Republican values versus those of the Army, on the demands of the individual or the state, etc. I argue that—with hindsight that extends across the history of twentieth century France at least through Vichy—the “best” players on both sides were the intractable and the inflexible, and the least effective and ultimately the most harmful in hindsight, were the flexible, the malleable, the most open to nuanced shifts in position. The re-valuation—inflexible, often good vs. flexible, usually bad—permits us to imagine a challenge to our customary endorsement of permeable perspectives.

The Dreyfus Affair entailed a twelve-year struggle to redeem the innocence of a wrongly accused French soldier, Alfred Dreyfus. Convicted of treason for turning over military data to the Germans, he was then humiliated by the formal stripping of his rank and the ceremonial breaking of his sword. Captain Dreyfus was sent to Devil’s Island, where he languished in complete isolation for four years. Meanwhile, his supporters in France gradually took up his case, realizing that the conviction was based on weak evidence, that the judges acted with im-

1 FRIEDRICH NIETZSCHE, THE DAWN OF DAY, aphorism 84 (1881), as quoted in WEISBERG, supra note 3, at 428–29.
35 This is a brief section of a paper first given in Paris at the Senate Building on July 7, 2011.
proper secrecy, and that another identifiable man was in fact the guilty party. These “Dreyfusards” agitated for the convicted man’s return to France to face a new military trial in the town of Rennes, where he, however, was again convicted. The uproar at that stage of the Affair led to an offer of a pardon, a key moment in testing the flexiphobic mettle of Dreyfus’s supporters, coupled with a grant of amnesty to many anti-Dreyfusards, who otherwise were facing investigation and trial for falsifying documents, lying under oath and many other transgressions that produced and sustained Dreyfus’s unjust punishment.

Many lawyers, as well as politicians, Protestant religious thinkers, and writers such as Emile Zola had lined up passionately on the side of the innocent man. Others, supporters of the Army, anti-Republicans, and overt anti-Semites, lined up just as intractably against Dreyfus. However, as strategic and substantive decisions needed to be made several years into the Affair, sub-groups developed that placed at loggerheads even former allies within the opposed groups. For the Dreyfusards, lawyers who were flexible compromised key opportunities to attack those who remained incurably anti-Dreyfusard and often added to Dreyfus’s suffering. Dreyfus may well have lost at his second trial because the more open and amiable strategies of the defense lawyer Edgar Demange prevailed over the hardheaded inflexibility of fellow litigator Fernand Labori. The intractable Labori, self-described as “excessively devoted to the idea of justice” in his post-trial letter to Dreyfus’s brother,36 lost ground to his far more flexible colleague Demange, whose closing argument before the Rennes tribunal displayed altogether too much tolerance for the government’s witnesses and basic positions. Demange was a classic flexiphile.

Meanwhile such non-lawyers as the Protestant teacher Abbe Pecaud displayed a consistently intolerant attitude toward the strategies of his flexible fellow Dreyfusards, particularly regarding the pardon and the amnesty. As reported in a fine recent article on the Affair by Serge Audier,37 Pecaud would have none of the perfectly reasonable sounding approach of a belated Dreyfusard, Leon Bourgeois, who counseled compromise:

In your position and that of other republican leaders in this Dreyfus Affair, there is a fundamental moral error: You have sacrificed the individual to the community. You have clouded over and diminished the face of the individual and thus also the Law.38

36 BREDIN, supra note 34, at 446.
37 Serge Audier, La République, l’affaire Dreyfus et la Raison d’état, 130 REVUE DE SYNTHESE 289–322 (2009) (Fr.).
38 Id. at 295.
The Pecaud who would chastise the Dreyfusard leader Joseph Reinach in a letter after the second judicial defeat, who would say that the Rennes outcome was predictable, blamed to some extent his more flexible Dreyfusard colleagues, who in the face of later developments displayed a predilection for pardon and amnesty because they feared strict law and judicial process. Pecaud stood out as perhaps the most flexiphobic of the Dreyfusards, especially since, as Audier well shows, there was so much late in the game blurring elsewhere of their divisions even against the anti-Dreyfusard camp. At these final moments in the Affair, even for some Dreyfusards, support for the individual by no means entailed a rejection of the State or the Army; while for certain flexible anti-Dreyfusards, the idea of the individual remained alive throughout the Affair. Nonetheless, like Pecaud on the other side of the aisle, the less amiable, and more flexiphobic anti-Dreyfusard’s were staunchly suspicious of any show among Dreyfusard’s of patriotism or support for the army. The diehards on both sides were deeply skeptical of the flexible crossings over between the two camps; they perceived, probably correctly, that these border crossings into seeming semi-agreement only papered over lasting intractable differences.

Perhaps it was his righteous Protestantism, but in Pecaud inflexible habits of thought trumped tactical ambiguities, and the pardon and amnesty were intolerable. Pecaud and other flexiphobics found strength in facing head on the actual, rather than the rhetorically softened, views of their enemies, and he felt too many of his colleagues were being tricked by their occasional displays of compromise.

Pecaut’s righteous attitude, matched by his rhetoric, makes him sound like a Protestant Talmudist. I do not use the fraught phrase lightly, but one thing we know is that Talmudism, seen (largely without legitimate proof) as a kind of literalist legalism, fares very poorly in most of Europe (even Reformation Europe), from St. Paul on and certainly from the French anti-Semitic perspective of the late 19th century through Vichy. In most enlightened as in most anti-Dreyfusard Catholic circles, “talmudism” is not a term of approbation. But the problem for Jews and often for those supporting them passionately was that it was the association of Talmudism with an unattractively stubborn allegiance to law and ethics that prevailed, certainly during the Affair and Vichy.

39 See the flexible Dreyfusard senator Scheurer-Kestner’s remark during the Affair’s late stages about “dubious tribunals, for juries are always dubious,” BREDIN, supra note 34, at 252, 435–37. Eventually, Dreyfus received full judicial exoneration, but this took until 1906, a full twelve years after his arrest. See, e.g., HARRIS, supra note 34, at 368.

40 Audier, supra note 37, at 300ff.

41 HARRIS, supra note 34, at 150.

42 Id. at 293–97.

43 Id. at 173–74. See the many Vichy doctrinal justifications for anti-Jewish laws as a response to stubborn Jewish allegiance to the Talmud, WEISBERG, supra note 3, chs. 2, 10.
Indeed, the distaste of so many French for Dreyfus himself, and to some extent for the religion to which he adhered, derived largely from their perception of a kind of Jewish inflexibility, an insistence on sticking to a position against all odds, a kind of legalism that understands law very differently from the way the Republic sees it. “Talmudism,” as a pejorative signifying an inflexible code foreign to French law links Leon Blum as Dreyfusard to the Leon Blum placed on trial by Vichy’s second justice minister, the pre-war liberal Joseph Barthelemy, at Riom. There was something vaguely “unFrench” about it—too little French soil in the sandals, as some said of Blum in the 1930s.

Immensely to his credit, Pecaut applied inflexibly to the Dreyfus case an agenda intractably in line with his commitment to “a lay vision of moral improvement based on ‘liberty, solidarity, human dignity, sincerity, uprightness, justice, respect for the rights and duties of the moral life,’” Pecaud’s enduringly inflexible allies displayed such characteristics as Colonel Picquart’s “persistence” and his insistence on “moral reparation” rather than a pardon or amnesty; as the lawyer Labori’s self-described “excessively devoted to the idea of justice,” as Georges Clemenceau’s “austere moral high mindedness,” which always bothered the more pragmatic in the Dreyfusard camp, and as the neo-Kantian categorical imperative sometimes adopted by Jean Jaures and Emile Durkheim. These deontological positions exhibit an almost stiff-necked aversion to what Duclert’s fine chapter (thirteen) calls everyone else’s “manipulation of justice.” But many other allies began, under the influence of new developments and increased pressures, to split from their intractable colleagues. Flexiphobia, in other words, is also subject to flexible variation.

44 See WEISBERG, supra note 3, at 6–36.
45 HARRIS, supra note 34, at 197 (citing Phyllis Stock-Morton).
46 BREDIN, supra note 34, at 440.
47 Id. at 445.
48 Id. at 435.
49 Id. at 445; HARRIS, supra note 34, at 339.
CONCLUSION

I have argued that the opposition flexible/inflexible stands as a marker not only for historical legal crises but also for later—indeed current—events. Flexiphobic moral fervor is often linked, as we have seen, to an idea of law as the best ultimate barometer of truth and the best pathway – if faithfully followed – to right actions and policies. But distortions of law through overly flexible interpretive strategies, or even outright skepticism about law’s place in the realm of decisive action, have prevailed in the arenas this Article has foregrounded. Flexiphobia must be more empathetically taught and fashioned into a more habitual state of mind than its currently successful rival, which displays constantly its infinite malleability.
APPENDIX A

WRITING ASSIGNMENT

You are a lawyer on the occupied (British) channel island of Guernsey in early 1944. You have a prewar law degree from the University of Kent (Canterbury) and an LL.M. from Georgetown Law School and have a thriving practice on Guernsey since 1936. You have been asked by the Bailiff of Guernsey (who has been delegated full administrative power by the occupying powers for this matter) to commence proceedings against a Mrs. V.B. Woolnaugh of Vauvert Manor, Vauvert Road, to prohibit her from owning and operating a small inn on Vauvert Road. She has been the proprietress of that inn for some twenty-five years.

“Distasteful business,” mumbled the Bailiff as he handed you the attached file. “But she lied to us on December 2, 1940 [see infra p. 2128]. Apparently she was secretly married to this fellow Auguste Spitz the month before, you know, the one who got deported last year. And the ceremony, we’re told by this fellow Gill, took place in a Jewish temple!”

“Sorry about the print quality of this file,” The Bailiff continues, “but it’s all in there.”

As a preliminary measure, the Bailiff asks you to draft a memo stating the issues arising under the law of April 26, 1941 that might apply to this situation. He attaches the recent law review article by a certain Joseph Haennig, a French lawyer. “My good friend, the Gau-leiter of Paris, tells me that lawyers discuss this stuff a lot over there. It’s basically the same regime, and the law’s no different.”

Respond to this situation in four pages or less.

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51 For relevant statutory sections, see infra p. 2115.
52 See infra pp. 2130–31 for a reproduction of the article.
RELEVANT SECTIONS, ORDER OF APRIL 26, 1941 FOR GUERNSEY

Jews.53

Any person having at least three grandparents of pure Jewish blood shall be deemed to be a Jew. A Jewish grandparent having belonged to the Jewish religion shall be deemed to be of pure Jewish blood.

Any person having two Jewish grandparents of pure Jewish blood who (a) at the time of the publication of this Order, belongs to the Jewish religious community or who subsequently joins it; or (b) at the time of the publication of this Order is married to a Jew shall be deemed a Jew.

In doubtful cases, any person who belongs or has belonged to this Jewish religious community shall be deemed a Jew.

Prohibition of Certain Economic Activities.54

(1) On or after May 20, 1941, Jews and Jewish undertakings for whom or for which a managing administrator has not been appointed shall be prohibited from carrying on the following economic activities: (a) wholesale or retail trade; (b) hotel and catering industry; (c) restaurants; [(d)–(s) not added here] . . . .

(2) In no undertaking shall a Jew be engaged as a higher official or as an employee who enters into contact with customers. Persons who . . . have right or signature or . . . who individually are designated as such by the Militaerbefehlshaber or the competent French authorities [!] shall be deemed to be higher officials.

53 See infra p. 2116 for the original text.
54 See infra p. 2117 for the original text.
IN DEFENSE OF FLEXIPHOBIA 2117
The Controlling Committee of the States of Guernsey

ORDER RESPECTING BULBS,
(of May 12th, 1941).

Mr. H. B. DUGEMIN, Resident Commissioner, hereby appointed to execute the same duty of the same subject by the following order, and to give effect thereto:

1. All Jewish economic enterprises, as well as all Jews and guests of Jews and all hostels which are not economic enterprises, shall be declared to be occupied territory for the purpose of the enterprise, and shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

2. The enterprise associated with the enterprise, on the one hand, and the Jewish economic enterprises, on the other hand, shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

3. All Jewish economic enterprises, as well as all Jews and guests of Jews and all hostels which are not economic enterprises, shall be declared to be occupied territory for the purpose of the enterprise, and shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

4. The enterprise associated with the enterprise, on the one hand, and the Jewish economic enterprises, on the other hand, shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

5. All Jewish economic enterprises, as well as all Jews and guests of Jews and all hostels which are not economic enterprises, shall be declared to be occupied territory for the purpose of the enterprise, and shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

6. The enterprise associated with the enterprise, on the one hand, and the Jewish economic enterprises, on the other hand, shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

7. All Jewish economic enterprises, as well as all Jews and guests of Jews and all hostels which are not economic enterprises, shall be declared to be occupied territory for the purpose of the enterprise, and shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

8. The enterprise associated with the enterprise, on the one hand, and the Jewish economic enterprises, on the other hand, shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

9. All Jewish economic enterprises, as well as all Jews and guests of Jews and all hostels which are not economic enterprises, shall be declared to be occupied territory for the purpose of the enterprise, and shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

10. The enterprise associated with the enterprise, on the one hand, and the Jewish economic enterprises, on the other hand, shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

11. All Jewish economic enterprises, as well as all Jews and guests of Jews and all hostels which are not economic enterprises, shall be declared to be occupied territory for the purpose of the enterprise, and shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

12. The enterprise associated with the enterprise, on the one hand, and the Jewish economic enterprises, on the other hand, shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

13. All Jewish economic enterprises, as well as all Jews and guests of Jews and all hostels which are not economic enterprises, shall be declared to be occupied territory for the purpose of the enterprise, and shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

14. The enterprise associated with the enterprise, on the one hand, and the Jewish economic enterprises, on the other hand, shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

15. All Jewish economic enterprises, as well as all Jews and guests of Jews and all hostels which are not economic enterprises, shall be declared to be occupied territory for the purpose of the enterprise, and shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

16. The enterprise associated with the enterprise, on the one hand, and the Jewish economic enterprises, on the other hand, shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

17. All Jewish economic enterprises, as well as all Jews and guests of Jews and all hostels which are not economic enterprises, shall be declared to be occupied territory for the purpose of the enterprise, and shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

18. The enterprise associated with the enterprise, on the one hand, and the Jewish economic enterprises, on the other hand, shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

19. All Jewish economic enterprises, as well as all Jews and guests of Jews and all hostels which are not economic enterprises, shall be declared to be occupied territory for the purpose of the enterprise, and shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

20. The enterprise associated with the enterprise, on the one hand, and the Jewish economic enterprises, on the other hand, shall be dealt with accordingly. Orders or notices thereof shall be made effective by order.

Dated this 12th day of June, 1941.

JOHN LEALE,
For and on behalf of the Controlling Committee of the States of Guernsey.
Sir,

- Julia HARRITA - Hungarian

I beg to report that I have seen the above named woman. She informs me that her mother died when she was a baby and her father died soon after. She states that she never knew anything of her grandparents. As far as she is aware her parents were not Jews and she is not related to Jews.

- Annie WRANSEY - German

Enquiries have been made by the Seneschal of Sark concerning the above named woman. She states that neither her parents nor grandparents were Jews and that she can trace back five generations in her family without encountering Jewish blood.

Her Passport, No. 556, issued in London on 13/2/39, is stamped with a T?

I am,

Sir,

Your obedient servant,

[Signature]

Inspector,

A. J. Sherwill Esq.,

Elizabeth College.
Montague Burton Ltd.
38 High Street, Guernsey, C. I.

The Inspector of Police, Guernsey.

26th Oct. 1940

Dear Sir,

I am, and I believe that my company is, not a Jewish company, nor does it employ any Jews. I am not, neither is any member of the staff employed at this address, of Jewish extraction or member of the Jewish religion.

This being only a branch of the company and myself manager of same, I have never had access to the list of shareholders, and therefore I am not in a position to state whether the shares owned by Jews comprise more than 50% or not. As far as I am aware the firm is English and a public company, the shares being widely held by the British public.

Yours truly,

P.P. Montague Ltd.

(signed) S. W. Gill

Manager.
Dear Sir,

Re - Relating to Measures against Jews.

I have to report that this office has taken charge of the stock of a small wholesale Ladies' underwear business which was abandoned at the time of the evacuation. I understand it was conducted by a Mrs. W. Middlewick at her private residence at 36, High Street, who, I believe, was of the Jewish faith. The business has not been carried on since the stock was taken over.

The stock consists of:

145 pairs Ladies' Art Silk stockings.
136 Ladies' Yests.
992 pairs Knickers.
40 Combinations.
278 Slips.
4 Coats (Summer weight).
12 " (Winter weight).
6 Costumes.
9 Cotton Frocks.
5 Wool Frocks.
64 Nightdresses.
21 Suits Pyjamas.

Yours faithfully,

[Signature]
STATES OF GUERNSEY.

COMMITTEE FOR
CONTROL OF ESSENTIAL COMMODITIES,

LADIES' COLLEGE,

GUERNSEY.

3rd May, 1941.

The Bailiff of Guernsey,
Court House,
Guernsey.

Sir,

With reference to your letter of 2nd inst., I have the honour to inform you that the goods left by Mrs. Middlewick have been sold as instructed.

I have the honour to be,

Sir,

Your obedient Servant,

P. DE PUTSON,

Custodian of Business and Industry.
The Royal Court,
Guernsey.

March 22nd, 1941.

Feldkommandantur 515,
Grange Lodge,
Guernsey.

Re: Card-indexing of Jews.
Ref: Order regarding measures against Jews, dated 27.9.40.

Sir,

I have the honour to acknowledge your communication of the 17th instant on the above subject, and in accordance with the instructions contained therein, I enclose copies of a letter which I have received from the Inspector of Police, together with the lists referred to in that letter, and which I hope will satisfy your requirements.

I have the honour to be,
Sir,
Your obedient Servant,

[Signature]

Bailiff.
With reference to your letter dated 19th March.

I have the honour to report that there are four known persons of the Jewish persuasion resident in the Balliwick of Guernsey, two by marriage of British nationality and two of German nationality. The latter are:

STEINER, Theresia, born Vienna, 29/4/18.

SPITZ, August, born Vienna, 29/4/18, both residing at the States Emergency Hospital, Castel, appear in the Foreigners Card Index and their cards have been marked with a capital "J" in red with a line across in accordance with the instructions contained in the letters.

There are no known persons without nationality resident within the Balliwick.

Attached please find a list containing the names and addresses of persons at present resident in the Balliwick who have emigrated from Germany and Austria since 1/1/33.

I have the honour to be,

Your obedient servant,
Ihre Ehre den Empfang
Briefes vom 24ten d. M. betreffend
ritte Verfassung der Massnahmen
den vom 26.4.41, zu bestätigen,
und Abschriften eines Briefes zu
mitteln, den ich vom Kgl. Gerejsier
bes der Angelegenheit erhalten habe
ie verlangten Auskünfte enthalt.
Ich habe die Ehre zu verbleiben
gez. V. Carey
Beiliff.
The Bailiff's Chambers,
Royal Court House,
Guernsey,
June 28th 1941.

Feldkommandantur 5½,
Grange Lodge.

Sir,

I have the honour to acknowledge the receipt of your letter of the 24th instant regarding the Third Order relating to measures against Jews dated 26.4.41, and, in reply, beg to enclose copies of a letter which I have received from His Majesty's Greffier to whom I referred the matter for the information required by you.

I have the honour to be,

Sir,

Your obedient Servant,

(Signed) VICTOR G. CARRY,

Bailiff.
-Copy-

Sir,

Re Third Order regarding measures against Jews, dated 29.4.41.

I beg to acknowledge receipt of the note of Dr. Reffler of the 29th instant in respect of the above.

Mrs. V.B. Woolnough of Vauvert Manor, Vauvert Road, saw me on the matter, but as on the instructions of the German Authorities contained in your letter addressed to me of the 2nd May, 1941, she was not to be considered a Jewess provided the information contained in her declaration of December 2nd 1940 is correct, and she confided that declaration by a letter addressed to me on the 5th May 1941. I told her that I did not think the Order affected her.

I do not know of any person considered as a Jew under the present provisions conducting the enterprises mentioned in Para. 1 and 2, or occupying the post of an official therein.

I have the honour to be, Sir,
Your obedient Servant,

(Signed) A.J. ROUSSEL,
H. M.'s Greffier.

Victor G. Carey, Esq.,
Sailiff of Guernsey,
Royal Court House.
The text of this letter reads as follows: "Sir, In accordance with the order relating to Jews in [the] Guernsey Evening Press of November 28th, 1940, I herewith attach a list of my securities. I would mention that my mother (now deceased) was a Jewess, but my father is a Gentile and I was baptized in the faith of the Church of England a few months after my birth at Holy Trinity Church [rest of line illegible] and further I married a Gentile. I am, Sir, Faithfully Yours, Violet [Blanche?] Woolnaugh."

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55 See also infra p. 2134.
Sir,

Registration of Jews.

Advertising to your letter dated 23rd October, I have the honour to report that a total of four persons have registered as being of the Jewish persuasion.

Mrs. Howard knows that her mother was a Jewess but she cannot say anything about her father, since she has not seen since she was a young girl and she is now said to be dead.

There are no others registered as Jewish businesses but the Managers of Messrs. H. W. Druce, 57 High Street, and Messrs. J. H. and J. S. Burton Ltd., 57 High Street, both grocery outlets have given information that they are not Jews but they are unable to say whether over 50' are. The first capital is in Jewish hands. Both are branches of firms carrying on business in England.

As the Managers are in a position to know, I have not directed them to send it letters as required for Jewish businesses.

Copies of letters are here attached.

I have the honour to be,

Sir,

Your obedient servant,

The Bailiff,
Royal Court,
Guernsey.
APPENDIX  "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 1 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). . . .

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, baptised 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

The material in this appendix originally appeared as an article by Joseph Harminy, 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, p. 31. The translation is my own.
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 that 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 Haenig,
Member of the Appellate Bar
Paris
APPENDIX B: GUERNSEY SCENARIO, SEPTEMBER 16, 2010

I. NARRATOR. In late June 1940, the Nazis seized the British Channel Islands. These territories, including the Islands of Jersey, Sark, and Guernsey among others, became the longest occupied lands in all of Hitler’s Europe. Even the D-Day troops bound for Normandy were not instructed to liberate them. By the end of the War, it was reported that there were 230 offspring of German soldiers on Guernsey, and the U.S. press also noted that “1000 Jews and Russians may have been murdered on the Islands.” Considerably later it was learned that Jews such as Auguste Spitz, who plays a small role in our drama tonight, had been deported from the Islands by order of Law. On Guernsey, the scene of our drama, these unfortunates were defined as Jews under the law of April 26, 1941, one of the only English-language laws of this kind in all of Hitler’s Europe and modeled after Vichy racial law. [LAW PROJECTED ONTO SCREEN] The time is late in 1943. Much of the administrative work on the Island was done by British officials such as the Bailiff, whom you will meet later. Now to our drama:

II. Two ordinary Islanders, Mary Bull (“M”), carrying a basket with new potatoes, and Jenna Stalwart (“J”), carrying a newspaper. LOCATION SIGN SAYS “DOWNTOWN GUERNSEY”

M. Hello, J. How are you today? Is anything new?

J. Cabbage soup and potatoes yesterday, potato soup and cabbages today. I’m constipated, and we’re still occupied.

M. Tell me news, not history. What’s that you’re carrying, the “Guernsey Evening Press”? That’s German news in English.

J. A lot of the news is about cigarettes and rationing of food—same damned stuff. And most of the regulations they print seem to come more from Vichy France than either Berlin or our own administrators.

M. I heard our Bailiff and his staff were very keen on surveying everybody as to their ancestry. There are even questionnaires. And if you’re thought to be Jewish, you can only shop between 3 and 4 in the afternoon.

J. There’s less and less about Jews going ‘round these days.

M. Not surprising. That situation is being taken care of. Some order for a change.
J. Who would have thought there were so many on Guernsey? I didn’t know any, apart from Mr. Cohen. But he was Church of England. So was his father.

M. But if his grand-parents are Jewish—or at least three of them, any-ways—that makes him Jewish.

J. How do you know that?

M. I think I read it in the very paper you’re reading. I also heard that all non-Islanders —I mean not born here—are being sent to work in Ger-

J. For what crime? That’s not British justice.

M. We’re no longer in Britain. We’re part of the “new Europe”.

J. More like a European prison, where we’re left to starve.

M. Sssshhh. Be quiet. The walls have ears.

J. Only the wind can hear us.

M. And the new potatoes.

[End of scene.]

NARRATOR. Unknown to Mary Bull and Jenna Stalwart, all those previously defined as Channel Island Jews had been deported in Febru-

ary, 1943. . . . . Now our scene shifts to real time: November 1943 in a Guernsey courtroom. As you will see, this so-called Administrative Court does not exercise adjudicatory authority. Its function is to make a public record of information for use by the Bailiff of Guernsey.

III. Three judge panel interviewing Mr. Gill and Mrs. Woolnaugh;
LOCATION SIGN SAYS “ADMINISTRATIVE COURT”

Judge A (seated in the middle). This Court has been directed to in-
quire into and make a public record of information concerning the status of Mrs. Violet Woolnaugh and her ownership of an Inn at Vauvert Road in Guernsey pursuant to the law of April 26, 1941 as published in the Gazette Officielle. At the conclusion of this brief factual hearing, the Court will turn this distasteful matter over to the Bailiff of Guernsey for such disposition as she deems appropriate.

Judge A. The Court calls Mrs. Violet Woolnaugh. [PAUSE FOR HER TO APPEAR] Mrs. Woolnaugh, do you own the Bed & Breakfast on Vauvert Road?

Mrs. W. Yes. I have owned and managed it for 25 years.

Judge A. Do you have a statement at this time?
Mrs. W. Yes, your honor. I would simply repeat my written statement of 28 Nov., 1940 to the Bailiff: [READING HER STATEMENT] “In accordance with the order relating to Jews in the Guernsey Evening Press, I herewith attach a list of my securities. I would mention that my mother (now deceased) was a Jewess, but my father is a Gentile and I was baptized in the faith of the Church of England, a few months after my birth, at Holy Trinity Church and further I married a Gentile.”

Judge A. Thank you Mrs. Woolnaugh. You are free to leave the Court.

Judge B. The Court calls Mr. S.W. Gill to make his statement.

Gill. I am the owner of a business on High Street in Guernsey. I am aware of the provisions of the Guernsey law relating to the Jews of April 26, 1941, and I was aware of the prior version of that law dating to early September, 1940.

Judge B. Mr. Gill, I show you a letter to the Inspector of Police dated 26 October 1940 that bears your signature on your business letterhead and ask that you read it aloud.

Gill. READING FROM STATEMENT “I am not, neither is any member of the staff employed at this address, of the Jewish religion. I have never had access to the list of shareholders, so I am not in a position to say whether the shares owned by Jews comprise more than 50% or not. As far as I know, the firm is English and a public company of which this is only a branch, and the shares are widely held by the British public.”

Judge B. And you prepared and sent this letter pursuant to an official request?

Gill. Yes, and permit me to state on the record that I was happy to do my bit to cooperate with the authorities.

Judge B. Mr. Gill, do you have information relating to a Mrs. Violet Woolnaugh, who also maintains an enterprise here on Guernsey?

Gill. I do. She was secretly married in a temple to August Spitz soon after I wrote my letter.

Judge B. The court takes judicial notice that Mr. August Spitz, born 25 August 1901, was deported last year.

Judge B: Thank you, Mr. Gill. You are free to leave the court.

Judge C. At this time, this Court is adjourned.

IV. The Bailiff (“B”) and the Head of the Guernsey Bar (“GL”). LOCATION SIGN SAYS “BAILIFF’S OFFICE”

GL knocks
GL: Hello, Bailiff.

B: Distasteful business. The court has turned over to me the disposition of Mrs. Woolnaugh’s ownership and management of her Bed and Breakfast on Vauvert Road. Your private practice has brought you over to France, and you’re the only soul on this Island who knows anything about these racial laws and the way they work. The Court heard testimony. . ..You’ve got to help me.

GL. Well, I’ve never done anything in this area.

B. We’ll pay you well. As Head of the Guernsey Bar, you’re well liked here, and well educated – what with your fancy degrees from Kent and even from the Yanks!

GL. I’m still not sure. My practice is going well anyway. And I usually have my guests stay at Mrs. W’s B& B. I’ve got one there now, a lawyer from Paris.

B. Well, be that as it may, we need to deal with this, and maybe he can help. Interpretation of racial laws is influenced by Vichy readings.

GL. Perhaps. My guest has done some work in that area.56

B. All the better. Mrs. W seems to have lied to us about her marital status. What we surmise based on her own statements puts her at risk of being Jewish, and non-Aryans can’t deal with the public in enterprises such as Vauvert Road. If she married a Jew, as this fellow Gill says –

GL. Married a Jew? Her name is Mrs. Woolnaugh. . . .

B. Mr. Woolnaugh is in England if anywhere – blasted war – and Gill saw her marrying Spitz in a temple.

GL. Spitz?

B. You may not know him. Anyway, he’s been deported. . . .

[end of scene]

V. GL and Joseph Haennig (“H”) LOCATION SIGN SAYS “MRS. W’S INN”

GL. So that’s the story, Joseph. What should I do?

H. Did you speak to her – she’s right downstairs preparing my eggs and bacon.

GL. I’m not going to, and please don’t say anything to her about this. She was allowed to leave the courthouse the other day before this fellow

56 See supra p. 2130.
Gill testified against her. She probably knows nothing about any inquiry against her.

H. Well, for what it’s worth. Vichy lawyers and judges are in a quandary about what to do with people like her.

GL. Like her?

H. Yes, people who seem to have two Jewish and two non-Jewish grandparents. They are in a grey area under the statutes. In fact, I just published an article in a Paris law review. For mixed heritage folks like Mrs. W seems to be, folks with two Jewish and two non-Jewish grandparents, French courts are all over the map. I’m glad I’m not in your shoes. For what it’s worth, my article cites a Nazi court in Leipzig that let a girl go who had mixed grandparental heritage even though she listed herself in a synagogue as a Jew to try to get any kind of work still permitted from Jewish businesses.

GL. Let her go. Amazing. Was she married, though?

H. No. There’s a lot more I can tell you, but you should just read my article. Here comes Mrs. W

NARRATOR: Mr. Haennig’s article was sent to you earlier this month.

VI. The Head of the Guernsey Bar and the Bailiff. LOCATION SIGN SAYS “BAILIFF’S OFFICE.”

GL. I read Haennig’s article. Fascinating. But it’s very complicated. He says some Vichy courts let mixed heritage suspects offer evidence not only of being baptized but anything else that might take them out of the category Jew. Bailiff, I think we will need to enlist all the members of the Guernsey Bar to analyze this issue. They know better than to decline such an assignment.

B. You are right. I will commission the bar members.

VII. The Bailiff’s Instructions

B. (Putting on wig and addressing the audience) Upon consultation with the Head of the Guernsey Bar, I hereby direct that all Guernsey lawyers in attendance this evening assist me in addressing the problem of Mrs. Woolnaugh’s status under the Law of April 26, 1941. At his suggestion, I have further designated some of our most distinguished members of the Bar to serve as Team Leaders. I direct you to look at the colored sticker on your program to determine your team. I am now going to introduce each team leader. When I am through with the introductions, I direct each of you to join your team leader immediately and follow your team leader to the room where you will deliberate. You are
to report back to this room immediately upon the conclusion of your deliberations. Here are the team leaders and the meeting rooms:

Team 1 (Red): Tribeca front

Team 2 (Orange):

Team 3 (Black):

Team 4 (Green): NY (25th floor)

Team 5 (Blue): Chicago (25th floor)

Team 6 (Purple): Gramercy