LAWYERS, UNPOPULAR CAUSES, UNPOPULAR CLIENTS, AND THE CONCEPT OF JUSTICE

Bar Association of the U.S. Fifth Circuit CLE
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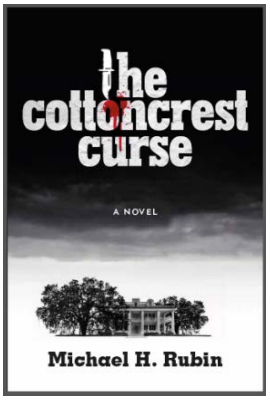
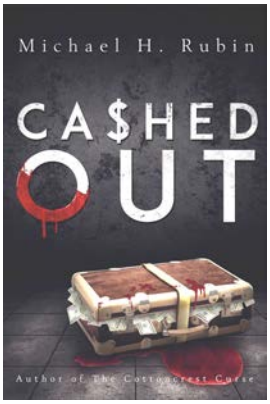
By:
Michael H. Rubin[1]
MCGLINCHEY STAFFORD, PLLC
301 Main Street, Suite 1400
Baton Rouge, LA 70808
225.383.9000
mrubin@mcglinchey.com
with offices in
▪ New Orleans ▪ Houston ▪ Dallas ▪ Cleveland, OH ▪ New York, NY ▪ Washington, D.C. ▪ Albany, NY ▪
▪ Jackson, MS ▪ Monroe, LA ▪ Jacksonville, FL ▪ Fort Lauderdale, FL ▪ Irvine, CA ▪ Birmingham, AL ▪

[1] Mike Rubin is one of the leaders of the multi-state law firm of McGlinchey Stafford PLLC and handles commercial litigation and transactions as well as real estate, finance, and banking matters. He heads his firm's appellate practice team and is a member of the ABA Standing Committee on Ethics and Professional Responsibility. He has presented over 400 major papers in the U.S., Canada, and England on ethics, professionalism, finance, appellate law, real estate, and legal writing. He is a past-President of the Bar Association of the Fifth Federal Circuit, American College of Real Estate Lawyers, the Louisiana State Bar Association, and the Southern Conference of Bar Presidents. He serves as a Life Member of the American Law Institute and is a Commissioner on the Uniform Law Institute (the organization that writes the UCC and other uniform laws). For four decades, he also served as an Adjunct Professor teaching courses in finance, real estate, and advanced legal ethics at the law schools at LSU, Tulane, and Southern University. He is an author of, co-author of, and contributing writer to more than a dozen legal books and over forty articles; his works are used in law schools and have been cited as authoritative by state and federal trial and appellate courts, including the U.S. First and Fifth Circuits. He has been honored as the Distinguished Alumnus by the LSU Law School and as the Distinguished Attorney of Louisiana by the Louisiana State Bar Foundation. His latest legal book, on Louisiana finance and real estate, now in its second edition, is THE LOUISIANA LAW OF SECURITY DEVICES, A PRÉCIS (Carolina Academic Press). He also is a novelist. At the American Library Association's annual meeting in San Francisco in 2015, his debut novel, a legal thriller entitled THE COTTONCREST CURSE, received the IndieFab Gold Award Winner as the best thriller/suspense novel published by a university or independent press. Publishers Weekly calls it a "gripping debut mystery," and 225 Magazine writes that it is "not just a thrilling murder mystery, but also a compelling look at life in south Louisiana during its most tumultuous decades." The novel is available in your local bookstores and as a hardcover, e-book, and audio book on the websites of Amazon and Barnes & Noble, and a German edition has been released in Europe. His second novel, a contemporary legal thriller entitled "CASHED OUT," was released nationally by Fiery Seas Press in August of this year and, like THE COTTONCREST CURSE, is available in your local bookstores and as a paperback and e-book on the websites of Amazon and Barnes & Noble. Award-winning thriller writer R.B. Belsky says: "If you like John Grisham and Michael Connelly's Lincoln Lawyer, you're gonna love" CASHED OUT.





THE COTTONCREST CURSE
Book Details

In this heart-racing thriller, a series of gruesome deaths ignite feuds that burn a path from the cotton fields to the courthouse steps, from the moss-draped bayous of Cajun country to the bordellos of 19th century New Orleans, from the Civil War era to the Civil Rights era and across the Jim Crow decades to the Freedom Marches of the 1960s and into the present.

At the heart of the story is the apparent suicide of an elderly Confederate Colonel who, two decades after the end of the Civil War, viciously slit the throat of his beautiful young wife and then fatally shot himself. Sheriff Raifer Jackson, however, believes that this may be a double homicide, and suspicion falls upon Jake Gold, an itinerant peddler who trades razor-sharp knives for fur and who has many deep secrets to conceal.

Jake must stay one step ahead of the law, as well as the racist Knights of the White Camellia, as he interacts with landed gentry, former slaves, crusty white field hands, crafty Cajuns, and free men of color all the while trying to keep one final promise before more lives are lost and he loses the opportunity to clear his name.

CASHED OUT
Book Details

Holding $4 million in cash, given to you by your murdered client, makes you everyone's target.

One failed marriage. Two jobs lost. Three maxed out credit cards. "Schex" Schexnaydre was a failure as a lawyer. Until three weeks ago, he had no clients and no cash. Well, no clients except for infamous toxic waste entrepreneur G.G. Guidry, who's just been murdered. And no cash, except for the $4,452,737 Guidry had stashed with him for safekeeping.

When Schex's estranged ex-wife, Taylor, is accused of Guidry's murder, she pleads with Schex to defend her. He refuses, but the more he says no to Taylor, the deeper Schex gets dragged into the fall-out from Guidry's nefarious schemes, ending up as the target of all those vying to claim Guidry's millions for themselves.

Schex careens from the swamps and marshes of Louisiana's chemical corridor to the deep water oil rigs in the Gulf of Mexico, from the river industries that pollute minority neighborhoods to the privileged playgrounds of New Orleans' crime syndicate bosses, and from a notorious alligator processing plant to the halls of political power, all in an attempt to clear his name and claim Guidry's cash for himself.

Praise for
THE COTTONCREST CURSE

"**Gripping**."
Publishers Weekly

"Literary fiction" taking "readers on **an epic journey**."
Southern Literary Review

"Michael Rubin proves himself to be an **exceptional storyteller**. **I highly recommend picking up this book**."
James Carville, Political strategist and commentator

"**Impeccably researched, deftly plotted, and flawlessly executed.** Highly recommended."
Sheldon Siegel, New York Times best-selling author of the Mike Daley/Rosie Fernandez novels

The "**story is gripping, the writing is masterful**."
Chicago CBA Record

"A **page-turner** likely to keep you up all night."
LSBA Journal

Praise for
CASHED OUT

If you like John Grisham and Michael Connelly's Lincoln Lawyer, you're gonna love "Schex" Schexnaydre – a down-and-out-attorney who breaks all the rules looking for some kind of justice. Fast, funny, and filled with twists and edge-of-your-seat suspense. Michael H. Rubin really nails it!
R.G. Belsky, author of the Gil Malloy mystery series

Cash in on this **thrilling read**. Set in the sweltering heat of the Louisiana bayou, **Cashed Out is enthralling**. Fast-paced plot. Page turning. The whodunit aspect adds to the intensity.
Foreword Reviews

The tension never lets up. Chilling suspense until the surprising conclusion.
Steven W. Kohlhagen, author of "Where They Bury You"

"**Plenty of action** at breakneck speed. **Five Stars**!"
Manning Wolf, author of "Dollar Signs."

Michael H. Rubin @MichaelHRubin Michael H. Rubin Michael H. Rubin

www.mrubinbooks.com

LAWYERS, UNPOPULAR CAUSES, UNPOPULAR CLIENTS, AND THE CONCEPT OF JUSTICE

1. AN OVERVIEW OF THE PROFESSIONALISM AND ETHICAL ISSUES CONCERNING JUSTICE

The ABA Model Rules of Professional Conduct and the corresponding Louisiana, Texas, and Mississippi RPCs set forth two distinct responsibilities that are separate and apart from an attorney's duties to the client. One deals with a lawyer's duties as a professional and as an officer of the court. The other deals with a lawyer's obligation to uphold the law.

First and foremost, lawyers are officers of the court. Attorneys cannot "make a false statement of law or fact" to a tribunal or fail to correct previous misstatements to the court.[2] Litigators owe a higher duty to a court than they do to opposing counsel in out-of-court negotiations.[3]

Lawyers cannot impugn the integrity of a judge.[4] Federal courts have the inherent powers to punish lawyers for behavior that does not violate state or federal statutes or court rules.[5] Courts have sanctioned and disbarred lawyers for improperly accusing a judge of incompetence and bias.[6]

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[2] LA RPC 3.3(a)(1), MS RPC 3.3(a)(1), TX RPC 3.03(a)(1).

[3] Compare ABA Model Rule 4.1 with 3.1. *Also see* Rubin, "The Ethics of Negotiation: Are There Any?" 56 La. Law Review 446 (1995).

[4] LA RPC 8.2, MS RPC 8.2, TX RPC 8.02.

[5] *Chambers v. Nasco, Inc*., 501 U.S. 32 (1991).

[6] See: *In re Evans*, 801 F.2d 703 (4th Cir.1986), where a lawyer was disbarred for criticizing a judge without investigating the basis of the charge. *Evans* stated that the "failure to investigate, coupled with his unrelenting reassertion of the charges ... convincingly demonstrates his lack of integrity and fitness to practice law." *Evans* also stated: (emphasis supplied):

> A court has the inherent authority to disbar or suspend lawyers from practice. *In re Snyder*, 472 U.S. 634, 105 S.Ct. 2874, 2880, 86 L.Ed.2d 504 (1985). This authority is derived from the lawyer's role as an officer of the court. Id. Moreover, as an appellate court, we owe substantial deference to the district court in such matters:
>
> On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 529-30, 6 L.Ed. 152 (1824). See also, *In re: G.L.*S., 745 F.2d 856 (4th Cir.1984). In this case, we can only

[Footnote continued on the next page]

There is always a tension between the "robust debate" that the First Amendment allows and improper criticism of the court by an officer of the court.[7] Lawyers have a duty under RPC 8.2 not to make false or reckless statements about a judge,[8] and courts have tended to enforce Rule 8.2 sanctions even when lawyers have claimed that their words or activities were protected by the First Amendment.[9] As a number of courts have noted, because an attorney is an officer of the court, a lawyer's First Amendment rights may be more limited than those of the public,[10] and the U.S. Supreme Court has stated that lawyers' First Amendment rights may be "extremely circumscribed" in certain instances.[11]

> conclude that the district court's disbarment of Evans, based on his violation of the rules of professional conduct, is amply supported by the record and did not exceed the limits of the court's discretion.
>
> Evans' letter, accusing Magistrate Smalkin of incompetence and/or religious and racial bias, was unquestionably undignified, discourteous, and degrading. Moreover, it was written while the Brown case was on appeal to this Court and was thus properly viewed by the district court as an attempt to prejudice the administration of justice in the course of the litigation.

[7] See, for example, the statement in *Fieger v. Thomas*, 872 F.Supp. 377, 385 (E.D. Mich. 1994), quoting with approval from another opinion:

> It is a rare and unfortunate day when the judges of this district must sanction an attorney for conduct involving criticism of the bench. Robust debate regarding judicial performance is essential to a vital judiciary. If an attorney, after reasonable inquiry, has comments about a judicial officer's fitness for service, he or she may and should express them publicly. Conversely, baseless factual allegations contribute nothing to judicial accountability and undermine public trust in the courts.

[8] ABA RPC 8.2(a):

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

[9] *See, e.g., Board of Professional Responsibility, Wyoming State Bar v. Davidson*, 205 P.3d 1008 (Wyo.,2009); and *Notopoulos v. Statewide Grievance Committee*, 277 Conn. 218, 890 A.2d 509 (Conn.,2006).

[10] *See, e.g. In re Pyle*, 283 Kan. 807, 821, 156 P.3d 1231 (Kan. 2007). Also see *In re Johnson*, 240 Kan. 334, 729 P.2d 1175 (1986), was a contested case in which this court found that Johnson should be disciplined for false, unsupported criticisms and misleading statements about his opponent in a county attorney election campaign. In its discussion of the First Amendment and lawyer speech, this court said:

> "A lawyer, as a citizen, has a right to criticize a judge or other adjudicatory officer publicly. To exercise this right, the lawyer must be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms. Unrestrained and intemperate statements against a judge or adjudicatory officer lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified." *Johnson*, 240 Kan. at 336, 729 P.2d 1175.
>
> Our *Johnson* case also stands for the proposition that a lawyer cannot insulate himself or herself from discipline by characterizing questionable statements as opinions.

[11] *See: In re Cobb*, 445 Mass. 452, 838 N.E.2d 1197, 1210 (Mass. 2005):

[Footnote continued on the next page]

For example, lawyers have been sanctioned for language used in their court filings, including unfounded allegations of *ex parte* contacts,[12] for statements accusing courts of ignoring the law to achieve a result,[13] for statements in a letter that a judge is "an embarrassment to this community,"[14] and for Internet postings containing unfounded accusations against a judge.[15]

> The Supreme Court has said that "[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed.... Even outside the courtroom, a majority of the Court in two separate opinions in the case of *In re Sawyer*, [360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959),] observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be." *Gentile v. State Bar of Nev*., 501 U.S. 1030, 1071, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). The Court went on to say that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of" other kinds of speech protected by the First Amendment.

[12] *See, e.g., Board of Professional Responsibility, Wyoming State Bar v. Davidson*, 205 P.3d 1008, 2009 WY 48 (Wyo. 4/7/09, where a lawyer was sanctioned for, among other things, putting the following language into a court filing:

> "How can an attorney have gotten a trial date from a judge who was not assigned to the case? That could only be done by having engaged in improper ex parte communications with the court. * * * It is obvious enough that Respondent filed his reassignment motion to achieve a procedural and tactical advantage. Yet no one notified the Petitioner of opposing counsel's communications with [the] Judges . . . at the time those communications occurred much less took any action to determine whether Petitioner would stipulate to the reassignment of the case or to the trial date. * * * It has been rumored that if one is affiliated with [opposing counsel's law firm], favoritism may be accorded her by [the] or those in his office. Because opposing counsel is with the law firm [ ], Petitioner believes that favoritism was at play here."

[13] See: *In re Wilkins*, 777 N.E.2d 714, 715-716 (Ind. 10/29/02), where an appellate lawyer stated in a brief (and received a sanction, which was reduced on rehearing, 782 N.E.2d 985 (Ind. 2003)):

> The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.
>
> Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).

[14] *Notopoulos v. Statewide Grievance Committee*, 277 Conn. 218, 890 A.2d 509 (Conn. 2006).

[15] See: *Office of Disciplinary Counsel v. Wrona*, 589 Pa. 337, 908 A.2d 1281 (Pa. 2006).

The second responsibility deals with how lawyers should represent their clients. The Rules state that a lawyer may not "counsel a client to engage" in conduct that a lawyer "knows is criminal or fraudulent" or "assist a client" in such actions.[16]

Both sets of responsibilities—the responsibility to the court and the responsibility to upholding the law—rest on two unstated assumptions: that laws are "just" and that there is an appropriate mechanism to challenge unjust laws. In a famous opinion about actual justice versus the appearance of justice, a court wrote:[17]

> However elusive the concept may be, there is a universal human feeling, not confined to philosophers, lawyers, or judges, that there is a quality known as justice, and that it is the aim of legal institutions to achieve it. . . . This feeling that justice is a supreme goal, this sense that it is a predicate to organized society, is no mere yearning, for it is only in a fair proceeding, one that comports with our sense of justice, that we can with any legitimacy call another human being to account.
>
> Justice must not only be done; it must be seen to be done. The interest of justice requires more than a proceeding that reaches an objectively accurate result; trial by ordeal might by sheer chance accomplish that. It requires a proceeding that, by its obvious fairness, helps to justify itself.

For example, while a lawyer who counsels a client to violate the law may lose the right to practice, Rule 1.2 permits a lawyer to discuss the consequences of such actions with the client and to "make a good faith effort to determine the validity, scope, meaning, or application of the law." The permission Rule 1.2 gives to attorneys presupposes the existence of an impartial judiciary that will properly determine whether a law is "valid," as well as a legal basis (such as the Constitution) to launch a challenge and claim that the law is invalid.

But what if one lives in a society where laws are unjust, where the judiciary is not impartial, and where there is no legal mechanism to challenge a law's validity? What is a lawyer to do?

The issue arose in Germany prior to and during WWII, and it arose in Louisiana before the Civil War as well as during portions of the post-Reconstruction era.

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[16] Model Rule 1.2(d) and its identical Louisiana counterpart.

[17] *U.S. v. McDaniel*, 379 F.Supp. 1243, 1249 (E.D. La. 1974). This language occurs in an opinion granting a motion for a new trial in a criminal where the prosecution used its peremptory challenges in a manner that led to the suspicion that the challenges were racially motivated.

2. LAWYERS IN NAZI GERMANY[18]

a. NAZI ANTI-SEMITIC LAWS

Laws passed in Germany in 1870 permitted Jews to become lawyers. That abruptly changed following the Reichstag fire in February, 1933 and the Nazi "Decree for the Protection of People and the State."[19] The Decree, passed ostensibly to restore order and to protect Germany from Communists, suspended civil liberties indefinitely, superseded the Weimar Constitution, and permitted the unchallenged "right" of the Nazis to pass whatever laws they wanted.

In April, 1933, the Nazis promulgated two additional laws designed to undermine lawyers and the judicial system. The "Law of the Restoration of the Professional Civil Service" applied to judges and excluded all Jews (and other Nazi opponents) from all

[18] The majority of the information in this section of the paper is derived from a book edited by Alan E. Steinweis and Robert D. Rachlin, *THE LAW IN NAZI GERMANY: IDEOLOGY, OPPORTUNISM, AND THE PERVASION OF JUSTICE*, Berghahn Press (2013).

[19] The formal name of this document was the "Order of the Reich President for the Protection of People and State." Its text read, in part (for the full text, see http://www.worldfuturefund.org/Reports2013/reichfire/reichfire.html (last visited 4/10/17)):

> § 1. Articles 114, 115, 117, 118, 123, 124, and 153 of the Constitution of the German Reich are suspended until further notice. Thus, restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press, on the right of assembly and the right of association, and violations of the privacy of postal, telegraphic, and telephonic communications, and warrants for house searches, orders for confiscations as well as restrictions on property are permissible beyond the legal limits otherwise prescribed.
>
> § 2. If any state fails to take the necessary measures to restore public safety and order, the Reich government may temporarily take over the powers of the highest state authority.
>
> § 3. State and local authorities must obey the orders decreed by the Reich government on the basis of § 2.
>
> § 4. Whoever provokes, appeals for, or incites the disobedience of the orders given out by the supreme state authorities or the authorities subject to them for the execution of this decree, or the orders given by the Reich government according to § 2, can be punished – insofar as the deed is not covered by other decrees with more severe punishments – with imprisonment of not less than one month, or with a fine from 150 to 15,000 Reichsmarks.
>
> Whoever endangers human life by violating § 1 is to be punished by sentence to a penitentiary, under mitigating circumstances with imprisonment of not less than six months and, when the violation causes the death of a person, with death, under mitigating circumstances with a penitentiary sentence of not less than two years. In addition, the sentence may include the confiscation of property.
>
> Whoever provokes or incites an act contrary to the public welfare is to be punished with a penitentiary sentence, under mitigating circumstances, with imprisonment of not less than three months.
>
> § 5. The crimes which under the Criminal Code are punishable with life in a penitentiary are to be punished with death: i.e., in Sections 81 (high treason), 229 (poisoning), 306 (arson), 311 (explosion), 312 (flooding), 315, paragraph 2 (damage to railways), 324 (general public endangerment through poison).
>
> ***
>
> § 6. This decree enters into force on the day of its promulgation.

civil service positions.[20] The "Law of the Admission to the Legal Profession" prohibited all non-Aryans the right to practice law.[21] Each of these two "laws" contained a few

[20] The formal name of this statute was the "Law for the Restoration of the Professional Civil Service. Its text read, in part (see http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1520, last visited 4/10/17):

> § 1
> 1.1 For the restoration of a national professional civil service and for the simplification of administration, civil servants may be discharged from office in accordance with the following regulations, even when there are no grounds for such action under existing law.
>
> 1.2. For the purposes of this law, the term "civil servant" means immediate and mediate officials of the Reich, immediate and mediate officials of the federal states, officials of local governments and local government associations, officials of public corporations and of institutions and enterprises with the same status. The stipulations apply also to social insurance agency employees who have the rights and duties of civil servants.
>
> 1.3. "Civil servants," for the purposes of this law, also includes officials in temporary retirement.
>
> 1.4. The Reichsbank and the German State Railway Co. are empowered to make corresponding regulations.
>
> § 2
> 2.1. Civil servants who attained their status after November 9, 1918, without possessing the required or customary training or other qualifications are to be dismissed from service. Their former salaries will be accorded to them for a period of 3 months after their dismissal.
>
> 2.2. They possess no right to allowances, pensions, or survivors' pensions, nor to continued use of the official designation, the title, the official uniform, and the official insignia.
>
> 2.3. In cases of need, a pension, revocable at any time, equivalent to a third of the normal base pay for the last position held by them may be granted to them, especially when they are caring for dependent relatives; reinsurance according to the provisions of the Reich's social insurance law will not occur.
>
> 2.4. The stipulations of Section 2 and 3 will be applied in the case of persons who come under the provisions of Section 1 and who had already been retired before this law became effective.
>
> § 3.
> 3.1. Civil servants of non-Aryan descent are to be retired; honorary officials are to be removed from official status.
>
> 2. Section 1 does not apply to civil servants who were already employed on August 1, 1914, or who fought during the World War at the front for the German Reich or who fought for its allies or whose fathers or sons were killed in the World War. With the agreement of the appropriate special minister or of the highest authorities of the federal states, the Reich Minister of the Interior can permit further exceptions in the case of officials who are abroad.
>
> § 4.
> Civil servants whose former political activity affords no guarantee that they will act in the interest of the national state at all times and without reservation can be dismissed from service. They are to be accorded their former salary for a period of 3 months after their dismissal. Thereafter, they will receive ¾ of their pension and corresponding survivor's benefits.

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exceptions for those admitted prior to 1914 and those "fought during the World War [WWI] at the front, but not only were no Jews likely to have fought for the German armed forces "at the front," but the laws also were written in such a way as to make the exemptions not applicable to Jews.

The rules involving judges were designed to remove all Jews from the judiciary; Jewish judges were mandated to "retire"; in other words, they were forced out of their jobs with no chance to contest their exclusion from the court. While lawyers theoretically had to have a "formal" disbarment proceeding, this was a ruse and effectively deprived lawyers of a living, for who would hire a lawyer subject to immediate disbarment?

Nonetheless, after the passage of "Law of the Admission to the Legal Profession," some Jewish lawyers continued to practice, although their number was cut in half. Moreover, this law had the additional effect of creating a distinction between classes of lawyers. Aryans ranked ahead of all Jews, Jewish war veteran lawyers who had "fought at the front" (assuming any existed) ranked ahead of other Jews, and every other remaining Jewish lawyer was at the bottom of the heap.

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§ 5.
5.1. Every civil servant must acquiesce to being transferred to another office in the same or equivalent sector, even into one carrying a lesser rank or regular salary – reimbursement of the approved relocation expenses will occur if the transfer is made on account of service-related needs. If a civil servant is transferred to an office carrying a lesser rank and regular salary, he retains his previous official title and the official income of his former position.

5.2 In place of a transfer to an office of lesser rank and regular income (Section 11), the civil servant can demand to be retired.

§ 6.
For the purpose of simplifying the administration, civil servants can be retired, even if they are not yet unfit for service. If civil servants are retired for this reason, their places may not be filled again.

§ 7.
71.. Dismissal from office, transfer to another office, and retirement will be ordered by the highest Reich or federal state agency, which will render a decision that is final and not subject to appeal.
7.2 The dispositions according to Articles 2-6 must be made known to those affected by September 30, 1933 at the latest. [. . .]

§ 8.
A pension will not be granted to the civil servants dismissed or retired in accordance with Articles 3 and 4 if they have not completed a term of service of at least 10 years. [. . .]

[21] This law, "Law No. 36 of 1933), provided, in part: "The admission of lawyers who are of non-Aryan descent can be cancelled . . . ." and "Admission to legal practice can be refused to persons . . . of non-Aryan descent." See: Malcolm D. Evans, Religious Liberty and International Law in Europe, Cambridge Univ. Press (1997), p. 168.

The extent to which the "law" was perverted is demonstrated by the fact that Hans Frank, head of the National Socialist Lawyer's Association, "called for an end to German-Jewish jurisprudence," because "creative, interpretive, or instructive work or commentary by Jews on German law . . . is impossible."[22]

The Nazis passed a myriad of other laws expressly designed to discriminate against Jews. There were laws depriving Jews the right to practice numerous professions, including being auctioneers or midwives. There were laws prohibiting Jews from being jurors, revoking the licenses of Jewish tax consultants, and severely restricting the number of Jewish students in universities and professional schools.[23]

There were even laws prohibiting Jews from owning carrier pigeons or buying lottery tickets.[24]

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[22] "The Law in Nazi Germany," *supra*, p. 121.

[23] For more on this, see the following site (last visited 4/5/17):
https://www.ushmm.org/wlc/en/article.php?ModuleId=10007901

[24] A partial list of such laws can be found at
https://www.ushmm.org/wlc/en/article.php?ModuleId=10007901 (last visited 4/10/17) and these statutes include (the following is a quote from this site) :

1933

March 31. Decree of the Berlin City Commissioner for Health suspends Jewish doctors from the city's social welfare services.

April 7. (a) The Law for the Restoration of the Professional Civil Service removes Jews from government service. and (b) The Law on the Admission to the Legal Profession forbids the admission of Jews to the bar.

April 25. The Law against Overcrowding in Schools and Universities limits the number of Jewish students in public schools.

July 14. The Denaturalization Law revokes the citizenship of naturalized Jews and "undesirables."

October 4. The Law on Editors bans Jews from editorial posts.

1935

May 21. The Army Law expels Jewish officers from the army.

September 15. The Nuremberg Race Laws exclude German Jews from Reich citizenship and prohibit them from marrying or having sexual relations with persons of "German or German-related blood."

1936

January 11. The Executive Order on the Reich Tax Law forbids Jews to serve as tax consultants.

[Footnote continued on the next page]

April 3. The Reich Veterinarians Law expels Jews from the profession.

October 15. The Reich Ministry of Education bans Jewish teachers from public schools.

1937

April 9. The Mayor of Berlin orders public schools not to admit Jewish children until further notice.

1938

January 5. The Law on the Alteration of Family and Personal Names forbids Jews from changing their names.

February 5. The Law on the Profession of Auctioneer excludes Jews from the profession.

March 18. The Gun Law bans Jewish gun merchants.

April 22. The Decree against the Camouflage of Jewish Firms forbids changing the names of Jewish-owned businesses.

April 26. The Order for the Disclosure of Jewish Assets requires Jews to report all property in excess of 5,000 Reichsmarks.

July 11. The Reich Ministry of the Interior bans Jews from health spas.

August 17. The Executive Order on the Law on the Alteration of Family and Personal Names requires Jews bearing first names of "non-Jewish" origin to adopt an additional name: "Israel" for men and "Sara" for women.

October 3. The Decree on the Confiscation of Jewish Property regulates the transfer of assets from Jews to non-Jews in Germany.

October 5. The Reich Ministry of the Interior invalidates all German passports held by Jews. Jews must surrender their old passports, which will become valid only after the letter "J" has been stamped on them.

November 12. The Decree on the Exclusion of Jews from German Economic Life closes all Jewish-owned businesses.

November 15. The Reich Ministry of Education expels all Jewish children from public schools.

November 28. The Reich Ministry of the Interior restricts the freedom of movement of Jews.

November 29. The Reich Ministry of the Interior forbids Jews to keep carrier pigeons.

December 14. The Executive Order on the Law on the Organization of National Work cancels all state contracts held with Jewish-owned firms.

December 21. The Law on Midwives bans all Jews from the profession.

[Footnote continued on the next page]

In addition to Nazi officials who were anti-Semitic, Henrich Himmler (a high-ranking SS officer and the chief builder and overseer of concentration camps) was also vehemently anti-Christian. He gave a speech at the funeral of Reinhard Heydrich (an SS leader and a primary architect of the Holocaust), stating: "We will have to deal with Christianity in a tougher way than hitherto. We must settle accounts with this Christianity, this greatest of plagues that could have happened to us in our history, which has weakened us in every conflict. . . . If we do not secure this moral foundation which is the deepest and best because the most natural, we will not be able to overcome Christianity on this planet and create the Germanic Reich which will be a blessing for the earth. That is our mission as a nation on this earth. For thousands of years it has been the mission of this blond race to rule the earth and again and again to bring it happiness and culture."[25]

b. THE EFFECT OF THE ANTI-SEMITIC LAWS ON LAWYERS AND JUDGES

In response to these anti-Semitic proclamations, some Jewish lawyers argued for resistance, including fighting unjust laws, although there was no legal way to challenge them. Lawyer Ernst Fraenkel wrote an article, "The Point of Illegal Work," arguing that illegal work was both justifiable and crucial.[26]

Eventually, however, the axe came down on Jewish lawyers, both *de jure* and *de facto*. Nazis barred Jews from some courtrooms; Nazis "recommended" to businesses that they not use Jewish lawyers, and Christian lawyers refused to have Jewish partners.

Five years after the passage of the "Law of the Admission to the Legal Profession," Hitler "signed a decree that disbarred all Jewish lawyers as of 30 November, 1938. Between the time the decree was signed in September 1938 and its November 30th effective date, *Kristallnacht* (night of the broken glass) occurred, in which Jewish businesses were ransacked, synagogues burned, and tens of thousands of Jews arrested.

While a handful of Jewish "advisors" (former lawyers who could no longer practice law) were permitted to "represent" Jews, that too was a farce, for: (a) the

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February 21. The Decree concerning the Surrender of Precious Metals and Stones in Jewish Ownership requires Jews to turn in gold, silver, diamonds, and other valuables to the state without compensation.

August 1. The President of the German Lottery forbids the sale of lottery tickets to Jews.

[25] English translation by Jeremy Noakes and Geoffrey Pridham, eds., Nazism, 1919-1945, Vol. 2: State, Economy and Society 1933-1939. Exeter: University of Exeter Press, 2000, p. 304, quoted at http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1573 (last visited 4/0/17).

[26] "The Law in Nazi Germany," *supra*, at 124, 125.

"advisors" were required to "swear to upholding Nazism," (b) "may not under any circumstances be addressed as guardian or even as a lawyer-like actor," and could not "protect justice as officers of the court."[27]

In that type of society, the conduct espoused by today's Rules of Professional Conduct seems both irrelevant and counter to any abstract notion of justice.

3. THE INTERRELATIONSHIP OF RACE, RELIGION, AND ANTISEMITISM IN LOUISIANA[28]

Louisiana has an unsavory history of combining racial discrimination with religious discrimination. In 1862, Robert Cavalier, Sieur de la Salle, took possession of a huge swath of North American territory in the name of France—this is what later became the Louisiana Purchase. In 1699, Bienville established a fort in Biloxi (then spelled "Bilocxy") and, along with Iberville, obtained a charter for the colony.

In 1724, the French Code Noir was published. One would think that a codified set of laws called the "Black Code" and regulating slavery would begin with provisions dealing with slavery. but that was not the case. Article I of the Code Noir had nothing to do with slavery but everything to do with religion; it decreed the "expulsion of Jews from the colony."

One might imagine that, by Article III, the Code Noir would address slavery, but it did not. Instead, Article III permitted the exercise of only the "Roman Catholic creed." Every other of mode of worship was prohibited.

It is not until Article IV of the Code Noir that slavery is dealt with, but it does so in a curious mixture of religious and racial discrimination. Article IV stated that Negroes were "subject to confiscation" unless they were placed "under the direction or supervision" of someone of the Catholic faith.

From 1724 to 1803 The Code Noir controlled what we now know as Louisiana (except for the eastern-most parishes that were governed by the Spanish), even though in France itself slavery was abolished in 1794 in a law passed by the Assembly of the First Republic. Yet, that abolition did not last for long, for in 1802 Napoleon reestablished slavery and prohibited blacks, "mulattoes, and other mixed race people" from intermarrying with whites. Napoleon abolished the slave trade in 1815; that abolition, however, did not end slavery or free any slaves. It merely forbade the transport of new

[27] *Id*. at 130.

[28] The majority of the information in this section comes from my independent historical research while working on my novel, *THE COTTONCREST CURSE* (LSU Press, 2014).

slaves to French colonies. Slavery was not formally abolished France or its colonies until 1848.[29]

After the Louisiana Purchase in 1803, slavery continued unabated in Louisiana. Even though many northern states had outlawed slavery, the federal Fugitive Slave Act of 1793 gave federal imprimatur to the validity of slavery nationwide by requiring the return of runaway slaves, no matter where they were found. The 1793 Fugitive Slave Act was later augmented and superseded by the 1850 Fugitive Slave Act; both acts were designed to give teeth to Article IV, Section 2, Clause 3 of the Constitution.[30]

The 1850 Fugitive Slave Act was designed, in part, to overturn *Prigg v. Pennsylvania*,[31] in which the Supreme Court held that state officials in free states did not have to assist in the hunting or recapture of slaves under either the 1793 Act or the Constitution. *Prigg*, however, was a decision that merely refused to impose a duty on free states. The majority opinion of the *Prigg* Court came out strongly in favor of slavery, stating that not only may a slave owner retrieve his slave "in every State of the Union" but that the federal government is required, "through its own proper departments, legislative, executive, or judiciary,"[32] to enforce these rights.

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[29] A French lawyer, Adolphe Crémieux was instrumental in this effort. For more about him, see the text at footnote 54, below.

[30] The U.S. Constitution, Art. 4, Section 2, Clause 3 states: "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

[31] *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

[32] A more extensive quote from Prigg follows (41 U.S. at 540 et seq.) (emphasis supplied)::

> *The owner of a fugitive slave has the same right to seize and take him in a State to which he has escaped or fled that he had in the State from which he escaped, and it is well known that this right to seizure or recapture is universally acknowledged in all the slaveholding States. The Court have not the slightest hesitation in holding that, under and in virtue of the Constitution, the owner of the slave is clothed with the authority in every State of the Union to seize and recapture his slave wherever he can do it without any breach of the peace or illegal violence.* In this sense and to this extent, this clause in the Constitution may properly be said to execute itself, and to require no aid from legislation, state or national.
>
> The Constitution does not stop at a mere annunciation of the rights of the owner to seize his absconding or fugitive slave in the State to which he may have fled. If it had done so, it would have left the owner of the slave, in many cases, utterly without any adequate redress.
>
> The Constitution declares that the fugitive slave shall be delivered up on claim of the party to whom service or labor may be due. It is exceedingly difficult, if not impracticable, to read this language and not to feel that it contemplated some further remedial redress than that which might be administered at the hand of the owner himself. * * *
>
> I*t cannot well be doubted that the Constitution requires the delivery of the fugitive on the claim of the master, and the natural inference certainly is that the National Government is clothed with the appropriate authority and functions to enforce it*. The fundamental principle applicable to all cases of this sort would seem to be that, where the end is required, the means are given, and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted.

[Footnote continued on the next page]

Under the Fugitive Slave Act of 1850, state officials who did not arrest a runaway slave were liable for a substantial monetary fine, and those who aided a runaway could be subject to both a fine and up to six months in prison. On the other hand, officials who captured a runaway could get a bonus and a promotion.

The 1850 Act also contained a distinct lack of due process, for a purported owner need only submit an application to the court claiming that a person was a runaway slave; this declaration was "full and conclusive evidence of the fact or escape" and provided the only evidence needed to arrest the supposed runaway.[33] In fact, the law expressly provided for arrest or seizure "without process."[34]

So, how were those accused of being runaways to defend themselves? The 1850 Act prohibited alleged runaway slaves from demanding a jury trial[35] or testifying on their

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> The clause relating to fugitive slaves is found in the national Constitution, and not in that of any State. It might well be deemed an unconstitutional exercise of the power of interpretation to insist that the States are bound to provide means to carry into effect the duties of the National Government nowhere delegated or entrusted to them by the Constitution. *On the contrary, the natural, if not the necessary, conclusion is that the National Government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, executive, or judiciary, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution.*

[33] See http://www.nationalcenter.org/FugitiveSlaveAct.html (last visited 4/11/17). Section 10 of the 1850 Fugitive Slave Act provided (emphasis supplied):

> SEC. 10. And be it further enacted, That when any person held to service or labor in any State or Territory, or in the District of Columbia, shall escape therefrom, the party to whom such service or labor shall be due, his, her, or their agent or attorney, may apply to any court of record therein, or judge thereof in vacation, and make satisfactory proof to such court, or judge in vacation, of the escape aforesaid, and that the person escaping owed service or labor to such party. Whereupon the court shall cause a record to be made of the matters so proved, and also a general description of the person so escaping, with such convenient certainty as may be; and a transcript of such record, authenticated by the attestation of the clerk and of the seal of the said court, being produced in any other State, Territory, or district in which the person so escaping may be found, and being exhibited to any judge, commissioner, or other officer authorized by the law of the United States to cause persons escaping from service or labor to be delivered up, ***shall be held and taken to be full and conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party in such record mentioned***. And upon the production by the said party of other and further evidence if necessary, either oral or by affidavit, in addition to what is contained in the said record of the identity of the person escaping, he or she shall be delivered up to the claimant. And the said court, commissioner, judge, or other person authorized by this act to grant certificates to claimants or fugitives, shall, upon the production of the record and other evidences aforesaid, grant to such claimant a certificate of his right to take any such person identified and proved to be owing service or labor as aforesaid, which certificate shall authorize such claimant to seize or arrest and transport such person to the State or Territory from which he escaped: Provided, That nothing herein contained shall be construed as requiring the production of a transcript of such record as evidence as aforesaid. But in its absence the claim shall be heard and determined upon other satisfactory proofs, competent in law.

[34] Fugitive Slave Act of 1850, Section 6.

[35] This jury trial prohibition was designed to overturn the laws of some northern states that sought to aid runaways by requiring a jury trial before they were returned. These were called "Personal Liberty Laws," and a number of them were passed after the Supreme Court's 1842 decision in the *Prigg* case prevented the federal government from forcing state and local officials to enforce the 1793 Fugitive Slave Act.
[Footnote continued on the next page]

own behalf.[36] Further, the written statement of their former owner was "conclusive";[37] no oral testimony was required and thus there was no cross examination. In other words, the legal system was rigged so that the result of any accusation against an alleged runaway was almost impossible to overturn in a court of law.[38]

Even though there was no DNA testing in the 1800s, Louisiana focused on skin color, skin variations, and "blood relations" in an obsessive way, creating a myriad of classifications justifying discrimination. One might be called a "griffe" – the child of a black parent and a mulatto parent. Or one might be classified as a "dark socatra," the child of a black parent and a griffe parent. The degrees of consanguinity became so fine that a child of a black parent and a quadroon parent had a separate classification as a

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See http://www.history.com/topics/black-history/fugitive-slave-acts (last visited 4/11/17) and http://www.econlib.org/library/YPDBooks/Lalor/llCy820.html (last visited 4/11/17).

[36] See Section 6 of the 1850 Act, whose text can be found at the same location as that cited in footnote 33, above (emphasis supplied).

> SEC. 6. And be it further enacted, That when a person held to service or labor in any State or Territory of the United States, heretofore or shall hereafter escape into another State or Territory of the United States, the person or persons to whom such service 01 labor may be due, or his, her, or their agent or attorney, duly authorized, by power of attorney, in writing, acknowledged and certified under the seal of some legal officer or court of the State or Territory in which the same may be executed, may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the courts, judges, or commissioners aforesaid, of the proper circuit, district, or county, for the apprehension of such fugitive from service or labor, or by seizing and arresting such fugitive, where the same can be done ***without process***, and by taking, or causing such person to be taken, forthwith before such ***court, judge, or commissioner, whose duty it shall be to hear and determine the case of such claimant in a summary manner***; and upon satisfactory proof being made, by deposition or affidavit, in writing, to be taken and certified by such court, judge, or commissioner, or by other satisfactory testimony, duly taken and certified by some court, magistrate, justice of the peace, or other legal officer authorized to administer an oath and take depositions under the laws of the State or Territory from which such person owing service or labor may have escaped, with a certificate of such magistracy or other authority, as aforesaid, with the seal of the proper court or officer thereto attached, which seal shall be sufficient to establish the competency of the proof, and with proof, also by affidavit, of the identity of the person whose service or labor is claimed to be due as aforesaid, that the person so arrested does in fact owe service or labor to the person or persons claiming him or her, in the State or Territory from which such fugitive may have escaped as aforesaid, and that said person escaped, to make out and deliver to such claimant, his or her agent or attorney, a certificate setting forth the substantial facts as to the service or labor due from such fugitive to the claimant, and of his or her escape from the State or Territory in which he or she was arrested, with authority to such claimant, or his or her agent or attorney, to use such reasonable force and restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive person back to the State or Territory whence he or she may have escaped as aforesaid. ***In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence***; and the certificates in this and the first [fourth] section mentioned, shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever.

[37] *Id*.

[38] Solomon Northrup's book, *12 YEARS A SLAVE*, involved the forerunner to the 1850 Fugitive Slave Act. The book was published in 1853. Northrup was kidnapped in 1841, and the law in effect at that time was the 1793 Fugitive Slave Act, the statute interpreted in the *Prigg* case.

"marabou." The law at the time made distinctions down to the 1/64 degree. If a child was one 1/64 "black," then that child could be treated as a slave. That was a harsher measure of "race" than the Nazi purity laws, which were treated one as Jewish if there was a 1/16 relationship in family.

One should not be too quick to think that this kind of classification was a result of a bygone era. In the 1910 case of *State v. Treadway*,[39] the Louisiana Supreme Court found no difficulty in determining a person's race solely by skin color.[40] Even today, certain birth certificates must list the "race" of the child,[41] and as late as 1983, the race of the parent had to be listed as well, down to the 1/32 degree.[42]

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[39] *State v. Treadway*, 126 La. 300, 52 So. 500 (La. 1910)

[40] The Court in *Treadway* held that a quadroon was not a "negro," and in so holding stated, 52 So. at 508 (emphasis supplied):

> ***We do not think there could be any serious denial of the fact that in Louisiana the words 'mulatto,' 'quadroon,' and 'octoroon' are of as definite meaning as the word 'man' or 'child,' and that, among educated people at least, they are as well and widely known.*** There is also the less widely known word 'griff,' which, in this state, has a definite meaning, indicating the issue of a negro and a mulatto. ***The person too black to be a mulatto and too pale in color to be a negro is a griff. The person too dark to be a white, and too bright to be a griff, is a mulatto. The quadroon is distinctly whiter than the mulatto. Between these different shades, we do not believe there is much, if any, difficulty in distinguishing.*** Nor can there be, we think, any serious denial of the fact that in Louisiana, and, indeed, throughout the United States (except on the Pacific slope), the word 'colored,' when applied to race, has the definite and well-known meaning of a person having negro blood in his veins. ***We think, also, that any candid mind must admit that the word 'negro' of itself, unqualified, does not necessarily include within its meaning persons possessed of only an admixture of negro blood; notably those whose admixture is so slight that in their case even an expert cannot be positive***. * * * Well, then, if there are well-known words in the language by which persons of negro blood whether pure or mixed may be unmistakably referred to or designated, and, in fact, since that meaning could be unmistakably conveyed by the use of a phrase instead of by a single word, and since the word 'negro' of itself and unqualified has to be admitted to be to say the least of equivocal meaning as including persons ***not having the appearance of negroes***, though having in their veins some admixture of negro blood, can anyone say why the Legislature should have said 'negro,' plain 'negro,' or 'negro race,' unqualified, if its intention was to include these persons of such slight admixture of blood? The Legislature must be supposed to know the words of the language and to use them according to their ordinary signification. ***When, therefore, it used the word 'negro,' plain 'negro,' or 'negro race,' and not these other words or forms of speech including within their meaning persons who, though apparently white, yet had in their veins a perceptible admixture of negro blood, the inevitable inference is that it did so because it meant negro, plain negro, or persons black as negroes and having the characteristics of the negro, and not these other persons not coming within that description.*** It might be different if there were something in the context to enlarge the ordinary meaning of the word; but there is nothing. The word stands isolated, and has to speak for itself.

[41] *See* La. R.S. 40:46.3, concerning certificates required to be obtained by one who "assumes custody of a live born infant of unknown parentage."

[42] *See* Raymond T. Diamond and Robert J. Cottrol, "Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment," 29 Loyola Law Review 255, 257 (1983), quoting the then-current Louisiana statute (enacted in 1970) as stating:

> In signifying race, a person having one-thirty-second or less of Negro blood shall not be deemed, described, or designated by any public official in Louisiana as "colored," a "mulatto," a "black," a "negro," a "griffe," and "Afro-American," a "quadroon," a "mestizo," a "colored person," or a "person of color."

The statute was repealed by Acts 1983, No. 441.

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But African Americans were not the only people who were discriminated against in Louisiana. Before, during, and after the Civil War, anti-Semitism was rampant. Even Judah P. Benjamin, who became Attorney General and Secretary of War of the Confederacy, was subjected to vehement attacks because of his religion. The northern press tagged him "Judas Iscariot Benjamin" and called him a "little Jew" who showed the same mercy to the Union "as his ancestors showed to Jesus Christ." On the other hand, the Southern press blamed him for battle losses and said he was an "Israelite in Egyptian clothing."

Trying to vindicate legal rights in such an environment was dangerous indeed, but the Fourteenth Amendment gave hope. New Orleans attorney Louis Martinet orchestrated the test case of *Plessy v. Ferguson*, in which Homer Plessy, a light-skinned man who could "pass for white," boarded a train bound from New Orleans to Covington. Plessy took a seat in the "whites only" car, and when the conductor came for the ticket, instead of "passing for white," Plessy revealed himself as a Negro, leading to his arrest. The briefs that Martinet and others filed on his behalf made all the right arguments,[43] but they were rejected by the Louisiana Supreme Court, which recoiled from the notion that to apply the 14th Amendment in a way that would outlaw "separate but equal" railroad accommodations would require the nullity of statutes affecting not only education but also "intermarriage between the races."[44] The Louisiana Supreme Court also applauded the statute in question as promoting racial harmony.[45] On appeal to the U.S. Supreme Court,[46] Justice Henry R. Brown set forth the notorious "separate-but-equal" test that lasted until 1954, until it was finally overturned in *Brown v. Board of Education*.

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[43] Plessy's case in the U.S. Supreme Court was argued by A.W. Tourgee and Samuel Field Phillips. Tourgee wrote in this brief: "Justice is pictured as blind and her daughter the Law, ought at least to be color-blind."

[44] *Plessy*, 45 La. Ann. 80, 87, 11 So. 948, 950 (1892):

> To hold that the requirement of separate, though equal, accommodations in public conveyances, violated the fourteenth amendment, would, on the same principles, necessarily entail the nullity of statutes establishing separate schools, and of others, existing in many states, prohibiting intermarriage between the races.

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[45] *Id* (emphasis supplied):

> We have been at pains to expound this statute because the dissatisfaction felt with it by a portion of the people seems to us so unreasonable that we can account for it only on the ground of some misconception. Even were it true that the statute is prompted by a prejudice on the part of one race to be thrown in such contact with the other, one would suppose that to be a sufficient reason why the pride and self-respect of the other race should equally prompt it to avoid such contact, if it could be done without the sacrifice of equal accommodations. ***It is very certain that such unreasonable insistence upon thrusting the company of one race upon the other, with no adequate motive, is calculated, as suggested by Chief Justice Shaw, to foster and intensify repulsion between them, rather than to extinguish it.***

[46] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[Footnote continued on the next page]

4. A SAMPLING OF TEXAS AND MISSISSIPPI RACE CASES

Louisiana courts were not unique in their focus on the race of parties and witnesses in the late 19th and early 20th Centuries.

In 1856, the Texas Supreme Court held that if a girl, an alleged fugitive slave, was "only one-eighth African blood," she could be prohibited from giving evidence in court, even though "two medical gentlemen . . . testified that they had examined her and could not detect any of the indicia of the existence of African blood in her."[47]

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[47] *Gaines v. Ann*, 17 Tex. 211, 214 (Tex. 1856):

> The most important question arises on the decision of the court below refusing a new trial to the plaintiff on the ground that the verdict was not supported by the evidence. The question was not merely whether she was entitled to her freedom, because, if of the African race, she might still be entitled to her freedom, from having been born of a free mother, if so proven; but it was, whether she was of the pure white race, or mixed with African blood and born of a slave mother. On the question of her condition of slavery, the doctrine is too well settled to require a reference to authority, that the offspring follows the condition of the mother. If the mother was a slave, so also would be the child, with this qualification, that the mother was in lawful slavery. If the mother was of the pure white race, unmixed with African blood, her being de facto held in slavery would not be lawful and could not entail her own illegal slavery upon her child. So if she was of Indian and not of African blood, she could not be held in slavery de jure. Lawful slavery is confined to the African race. The evidence in this case was clear and unequivocal, that the mother and grandmother of Ann were both slaves and of the African race; that the grandmother was a mulatto, or half-breed; that the mother of Ann was a quarteroon, and slave at the birth of Ann; that the reputed father of Ann was a white man, and she consequently was one-eighth of the African blood. The evidence of her being pure white blood was that of two medical gentlemen, who testified that they had examined her and could not detect any of the indicia of the existence of African blood in her, but that a person who was only one-eighth of the African blood might not show any signs of the existence of that blood, though in general that degree of the blood would show itself; and that the appearance of the child, in cases of mixed blood, were much more likely to be in conformity with the father than the mother. *215 Does this evidence contradict the positive fact of the mother being a slave and of the African race? We think not. The facts sworn to by the medical gentlemen may be true, and yet not in any way contrary to the fact proven, of the status of the mother. And the evidence of the witnesses who proved the facts of the mother being of the African race and a slave, is not impeached. We are therefore bound to conclude that the verdict of the jury, finding Ann to be of the pure white race, is not supported by the evidence; and it is not a case of conflicting evidence, where the verdict should not be disturbed.
>
> This cannot fail to give rise to some grave reflections on the law as it now is, on this subject. The girl Ann is proved to be only one-eighth of African blood, and the third generation, one of each being white, and is the last degree prohibited by law from giving evidence against a white person. Her child, if by a white man, would be a competent witness against a white person, but following the status of its mother, it would be a slave, and it would so descend, ad infinitum, so long as the descent from a slave mother could be traced, though the blood be of the smallest possible amount. Whether it is sound policy to permit the law to remain in its present state is a question to be

[Footnote continued on the next page]

In 1911, the Texas Court of Criminal Appeals held that there was no reversible error in a criminal case when the prosecutor made a direct racial appeal, calling the defendant "a black negro, the exact image of Jack Johnson, and thinks he can fool this jury into turning him loose, on the grounds that he was protecting his mulatto stepdaughter, who came on the stand and tried to talk like a yankee."[48]

In 1856, the Mississippi Supreme Court reversed a conviction because the trial court refused to give the jury an instruction that if the defendant was "a mulatto slave, and not a negro man slave, as charged in the indictment," then he could not be convicted.[49]

Yet, in 1906, during the height of the Jim Crow era, the Mississippi Supreme Court reversed a conviction of "a mulatto" because of the district attorney's blatant appeal to racial prejudice in his address to the jury,[50] including such statements as "mulattoes should be kicked out by the white race and spurned by the negroes." The Mississippi Supreme Court stated: "Mulattoes, negroes, Malays, whites, millionaires, paupers, princes, and kings, in the courts of Mississippi, are on precisely the same exactly equal footing. All must be tried on facts, and not on abuse."

> answered by the wisdom of the legislature, and not by us. Believing that the verdict in this case is not supported by the evidence, the judgment is reversed and the cause remanded for a new trial.

[48] *Jordan v. State*, 137 S.W. 133, 62 Tex. Crim. 380, 385 (Tex. Court Crim. Appeals 1911).

[49] *Dick v. State*, 1 George 631, 30 Miss. 631 (MS 1856).

[50] *Hampton v. State*, 88 Miss. 257, 40 So. 545 (MS 1906). The opinion reads, in its entirety:

> It appears that the district attorney was permitted by the court to use the following language over objection: "The shirt was cut and fixed in the jail with Charley Stuart's knife." This is without support in the evidence. The district attorney further said to the jury these words: "Not a negro in that great concourse of negroes who threatened to be respectable has dared to come here and testify in behalf of this mulatto" (at the same time pointing to *546 the defendant). He further said to the jury that: "In any other commonwealth in this Union (pointing to the defendant) he would be hung without benefit of clergy." He further said to the jury, referring to the evils of miscegeneration, the defendant being a mulatto, that "mulattoes should be kicked out by the white race and spurned by the negroes; that the defendant was whiter than himself, the counsel of defendant, or the judge, or any of the jury, but that they were negroes, and that as long as one drop of the accursed blood was in their veins they have to bear it; that these negroes (referring to the defendant and his brother) thought they were better than other negroes, but in fact they were worse than negroes; that they were negritoes (pointing at the defendant), a race hated by the white race and despised by the negroes, accursed by every white man who loves his race, and despised by every negro who respects his race."
>
> Mulattoes, negroes, Malays, whites, millionaires, paupers, princes, and kings, in the courts of Mississippi, are on precisely the same exactly equal footing. All must be tried on facts, and not on abuse. Only impartial trials can pass the Red Sea of this court without drowning. Trials are to vindicate innocence or ascertain guilt, and are not to be vehicles for denunciation.

On the other hand, in 1925, the Mississippi Supreme Court upheld segregated schools, held that a person of Chinese descent was not "white," and engaged in a discussion of what constitutes "racial integrity and purity" as well as whether the word "colored" had a different meaning that "negro."[51]

[51] *Rice v. Gong Lum*, 139 Miss. 760, 104 So. 105, 107-08 (MS 1925):

> In order to determine the meaning of the terms used in the above section of the Constitution, it will be necessary to consider other expressions in the same Constitution, and also legislation of the state bearing on the segregation of the races. In section 263 of the Constitution it is provided that marriage of a person of the white race with a negro or mulatto or with a person having one–eighth or more of negro blood shall be unlawful and void. It will be noted in this section that the terms "negro" and "mulatto," "or person who shall have one–eighth or more of negro blood," were used, and the constitutional prohibition against marriages between the races is confined to negroes and those having one–eighth or more of negro blood. In Moreau v. Grandich, supra, we held that one–eighth of negro blood provided in the section relating to intermarriages was not controlled in fixing the status of the races for school purposes under section 207 of the Constitution. It will also be noted that section 207 of the Constitution, instead of using the word "negro" or having a specific quantity of negro blood, uses the word "colored" in describing the opposite races from the white race.
>
> In section 2859, Code of 1892, just two years after the Constitution of 1890 was adopted, the Legislature prohibited marriages between the white and Mongolian races, and between persons of the white race and persons having one–eighth or more of Mongolian blood. The same section also prohibited intermarriages between persons of the white race with those of negro blood or one–eighth negro blood, the prohibition with reference to marriages being identical in each case as to the negro and Mongolian races.
>
> It will be noted further that neither section 263 of the Constitution nor section 2859 of the Code of 1892, which statute has been constantly in force since that date, prohibits any marriage or social relations between the negro and Mongolian races, and they are left free to maintain such social, including marriage, relations as they see proper to enter into.
>
> Why did the Constitution use the term "negro" in one section and the term "colored" in the other section?
>
> To all persons acquainted with the social conditions of this state and of the Southern states generally it is well known that it is the earnest desire of the white race to preserve its racial integrity and purity, and to maintain the purity of the social relations as far as it can be done by law. It is known that the dominant purpose of the two sections of the Constitution of our state was to preserve the integrity and purity of the white race. When the public school system was being created it was intended that the white race should be separated from all other races. It is true that the negro race was the only race of consequence so far as numbers were concerned. There were then some other races living within the state, of course. So far as we have been able to find, the word "white," when used in describing the race, is limited strictly to the Caucasian race, while the word "colored" is not strictly limited to negroes or persons having negro blood.
>
> One of the definitions given to the word "colored," as applied to race, is "of a dark skin or non–Caucasian race." Standard Dictionary. The same definition is practically given by Mr. Webster in his dictionary. The word "white," as applied to race, where not affected by statutory definition, is universally limited to the Caucasian race.
>
> The United States courts have often dealt with the term "white race" when passing on questions of naturalization; it being provided by federal statutes originally that only persons of the white race

[Footnote continued on the next page]

These cases indicate that, in the years before Watson and Crick discovered the structure of DNA[52] and before DNA testing became a possibility,[53] courts were intimately focused on ascertaining a person's racial identity based upon both their skin color and their "blood lines."

5. JEWISH LAWYERS IN THE CIVIL RIGHTS MOVEMENT AND RELATED FIELDS

While the focus of this paper is about discrimination against Jews, it should be noted briefly that many Jewish lawyers have been at the forefront of fighting both slavery and segregation.

For example, in France in the 1830s, at a time when slavery was a roaring business in America, French Jewish lawyer Adolphe Crémieux (born "Isaac Moise" in 1796) was instrumental in ending slavery in the French colonies, leading some to call him the "French Abraham Lincoln."[54]

In the 20th century, Jewish lawyers were heavily involved in defending the rights of African Americans. New York criminal attorney Samuel Leibowitz came to Alabama in the 1930s to defend the Scottsboro boys[55] and was attacked as a "northern Jew working to undermine Southern values."[56]

Nathan Margold, a protégé of Felix Frankfurter, wrote an in-depth report that became the NAACP's blueprint for a legal strategy culminating in *Brown v. Board of Education*. His concept was not to attack *Plessy* head-on, but rather to bring suits arguing

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> could be naturalized. But, after the Civil War, the statute was amended so as to provide for the naturalization of aliens of African nativity and to persons of African descent. In the decisions of the Supreme Court of the United States it is expressly held that Mongolians do not come within the term "white" as used in reference to race. See the Case of Ah Yup, 5 Sawy. 155, Fed. Cas. No. 104, which has subsequently been followed by that court. See, also, Ozawa v. United States, 260 U. S. 178, 43 S. Ct. 65, 67 L. Ed. 199, and Yamashita v. Hinkle, 260 U. S. 199, 43 S. Ct. 69, 67 L. Ed. 209.

[52] See *THE DOUBLE HELIX* by James Watson, Athenaeum Press (1968).

[53] DNA testing was first used in a criminal case in England in 1986. See http://www2.le.ac.uk/departments/emfpu/to-be-deleted/explained/profiling-history (last visited 9/20/17).

[54] See: Posener, *ADOLPHE CRÉMIEUX: A BIOGRAPHY*, available at (last visited 4/5/17) https://www.abebooks.com/ADOLPHE-CREMIEUX-BIOGRAPHY-Posener-Eugene-Golob/10093616804/bd.

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[55] See Southern Jewish Life Magazine, "Scottsboro: A Southern Tragedy, a Jewish Controversy," found at (last visited 4/5/17): http://www.sjlmag.com/2011/03/remembering-scottsboro-boys-case-its.html

[56] *Id*., quoting Leonard Dimensteins' "Anti-Semitism in America."

that the separate facilities were not equal, thereby undermining factually the separate-but-equal doctrine.

Jack Greenberg argued *Brown v. Board of Education* in the Supreme Court as co-counsel with Thurgood Marshall[57] and succeeded Marshall as Director-Counsel of the NAACP Legal Defense Fund.

The list of all those involved in battling discrimination and segregation are too numerous to include in this paper, but there are many books on the subject that provide detailed information about the lawyers and their efforts.[58]

6. CONCLUSION

Attorneys in the United States should not smugly assume that our state's Rules of Professional Conduct set forth "ethical" truisms that are applicable anywhere and anytime. In fact, the word "ethics" and "ethical" do not even appear in the "black letter" provisions of the ABA Model Rules and are found only in the Preamble and in comments.

Without a strong, independent judiciary and a mechanism to challenge unjust laws, our Rules of Professional Conduct would be hollow. Our Rules are appropriate only so long as there is a system in place that can help achieve and further the cause of justice.

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[57] For more on Greenberg, see his book, "Crusaders in the Court: Legal Battles of the Civil Rights Movement," available at (last visited 4/5/17): https://www.amazon.com/Crusaders-Courts-Battles-Movement-Anniversary/dp/0974728608/?tag=thefor03-20

Also see Benjamin Ivry, Forward Magazine, "Jack Greenberg, the Lawyer Who Used Law as a Weapon to Desegregate America's Schools," found at (last visited 4/5/17): http://forward.com/culture/looking-back/351856/jack-greenberg-the-lawyer-who-used-law-as-a-weapon-to-desegregate-americas/

[58] See, for example:

V.P. Franklin, AFRICAN AMERICANS AND JEWS IN THE TWENTIETH CENTURY: STUDIES IN CONVERGENCE AND CONFLICT, Univ. of Missouri Press (1998);
Stuart Svonkin, JEWS AGAINST PREJUDICE: AMERICAN JEWS AND THE FIGHT FOR CIVIL LIBERTIES, Columbia Univ. Press, 1997; and
Howard Sachar, "Jews in the Civil Rights Movement," http://www.myjewishlearning.com/article/jews-in-the-civil-rights-movement/ (last visited 4/11/17)