
A WATERGATE LAWYER-HERO’S WORLD WAR II NAZI
CAMPS-RESPONSE: A CHESTERFIELD H. SMITH-
CENTENARY REAPPRECIATION

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If the Legend belies the facts, print the facts.

I. INTRODUCTION

A. *Chesterfield Harvey Smith, Senior: Watergate Lawyer-Hero*

On May 31, 2018, President Donald J. Trump re-sparked controversy by tweeting denial he had discharged Federal Bureau of Investigation Director James Comey over probes into, e.g., whether the 2016 Trump presidential campaign colluded with Russia.¹ Upon Comey's discharge, Congressional voices had hearkened to history. They bandied possible precedent: "Some equated the firing with events known as the 'Saturday Night Massacre' during the Watergate scandal that brought down President Richard Nixon."² Therefore, as America recalls the July 28, 2017, centenary birthday of Chesterfield Harvey Smith, Senior (1917-2003), re-appreciation of this widely-hailed, Saturday Night Massacre personage in perspective proves timely.

Mr. Smith in life was deemed to have "earned a countrywide reputation of being such a bold and visionary attorney that he was dubbed 'America's Lawyer' and 'the conscience of the legal profession.'"³ That celebratory "America's Lawyer" phrase endures as his epitaph.⁴ Upon Smith's death, Chief Justice of the Supreme Court of Florida Harry Lee Anstead

¹ On May 31, 2018, the President tweeted: "Not that it matters, but I never fired James Comey because of Russia! The Corrupt Mainstream Media loves to keep pushing that narrative, but they know it is not true!" Donald Trump (@realDonaldTrump), TWITTER (May 31, 2018, 5:11 AM), <https://twitter.com/realdonaldtrump/status/1002160516733853696?lang=en>. Many commentators believe that the firing of James Comey could eventually lead to President Trump's impeachment. See, e.g., Peter Nicholas, *President Defends His Firing of Comey*, WALL ST. J., June 1, 2018, at A4 ("A finding by [special counsel] [Robert] Mueller could become the basis for impeachment in Congress."). From the start, the media fiercely debated Comey's discharge. See, e.g., David Jackson et al., *Trump Fires FBI Director Comey*, USA TODAY, May 10, 2017, at 1A.

² Bartholomew D. Sullivan, *Lawmakers Call for Independent Investigation into Russia Ties*, USA TODAY, May 10, 2017, at 2A. For some Democrats, this was enough to justify impeaching the President:

In an echo of Richard Nixon's Saturday Night Massacre in 1973, President Trump abruptly fires FBI Director James Comey. Then, in a television interview, Trump fuels cover-up allegations by linking the ouster of Comey to a pending investigation into Russian interference in the 2016 presidential election. Trump then warns Comey not to leak because there may be White House "tapes" of their meetings. For excitable Democrats, it was enough to leap from Watergate to impeachment.

Paul M. Barrett, *How to Remove a President 101*, BLOOMBERG BUSINESSWEEK, May 19, 2017, at 26.

³ Jan Pudlow, *Chesterfield Smith: America's Lawyer*, FLA. BAR J. (Nov. 1, 2003), <https://www.floridabar.org/news/tfb-journal/?durl=/DIVCOM%2FJN%2FJNJournal01%2Ens%2Fc0d731e03de9828d852574580042ae7a%2F1e0d4588011d7f4685256dc90057cb2c%21OpenDocument%26Highlight%3D0%2C%2A>.

⁴ Erik Lander, *Chesterfield Smith*, FIND A GRAVE (last visited Apr. 5, 2019), <https://www.findagrave.com/memorial/7697458/chesterfield-smith>.

offered: “Chesterfield Smith was the quintessential American patriot and lawyer. He remains Florida’s version of Atticus Finch”⁵ Governor Lawton Chiles of Florida and the Florida Cabinet in 1997 had designated him “A Great Floridian”⁶ and American Bar Association President Dennis W. Archer offered of Smith: “His irrepressible faith in the law drove him to speak out in the struggle for all that is fair.”⁷ In Tom Brokaw’s widely-read book, *The Greatest Generation*,⁸ the author held of Smith: “His lifetime of good works and enterprise as a lawyer have earned him the nickname ‘Citizen Smith.’”⁹ Of the chapter on Smith in Brokaw’s book, Smith learned from his Army-buddy James I. Wendell, Jr., MD, that: “It could not have been more adulatory if you had written it yourself.”¹⁰

B. *Chesterfield Harvey Smith, Senior: Second World War Hero*

Mr. Smith’s own voice dominates the following pages. They conjure for twenty-first century generations the atmosphere of America during the times of Smith’s service in a serious role. Examined herein will be the scarcely-scrutinized report of his war’s-end confrontation with liberated Nazi camps during his Second World War military career.¹¹ That matter almost hints History tested his integrity and assertiveness early, preparing him for demands of his decades-subsequent performance on the national-stage. To date, various sources of his war’s close camp-connection preclude confident reconstruction of an accurate version, for multiple accounts entail multiple inconsistencies. Moreover, items such as, e.g., the name(s) of any relevant camp(s), the respective site(s) thereof, and the name of a mayor-figure salient in diverse versions of the story, are lacking from recountings readily at-hand.

Within Germany, as recalled by World War II’s Captain Smith, he faced the sordid backwash of Nazi camps’ evils on the scene of his own, local occupational reign.¹² He did so in a fashion vividly parallel (in some

⁵ Pudlow, *supra* note 3. Chief Justice Ansead’s Atticus Finch invocation won praise in 2003; following the publication of Harper Lee’s *GO SET A WATCHMAN* (2015), the public’s admiration of the character has perhaps fallen. *See also* JOSEPH CRESPINO, *ATTICUS FINCH: THE BIOGRAPHY* 96–99 (2018) (discussing Atticus Finch’s racist views in *Go Set a Watchman*).

⁶ Pudlow, *supra* note 3.

⁷ *Id.*

⁸ TOM BROKAW, *THE GREATEST GENERATION* (1998).

⁹ *Id.* at 317.

¹⁰ Letter from James Wendell, MD, to Chesterfield Smith, JD, at 1 (Jan. 23, 1999) (on file with University of Florida Library).

¹¹ *Infra* Section III.A.

¹² Pudlow, *supra* note 3.

elements) to, yet simultaneously obtrusively inconsistent (in other ways) with, the respective reactions to liberated Nazi camps of, e.g., General Dwight D. Eisenhower, General George S. Patton, Jr., and General James M. Gavin.¹³ Those generals executed high-profile responses to Nazi camps.¹⁴ They performed during the very period when, some say, Captain Smith¹⁵ wrestled with painfully comparable issues of his own unit's local occupation-governance.¹⁶

¹³ See, e.g., Pudlow, *supra* note 3 (describing how, while liberating the Nazi concentration camps, he ordered the burgomaster to “lock the townfolk in the Jewish slave labor camps, and [to] invite the slave laborers to trade places and live in the local homes.”).

¹⁴ See, e.g., Letter from Gen. Eisenhower to Gen. Marshall, NAT'L ARCHIVES & RECORDS ADMIN. (Apr. 19, 1945) (on file with National Archives and Records Administration), https://www.eisenhower.archives.gov/research/online_documents/holocaust/1945_04_19_DDE_to_Marshall.pdf (describing how his unit “continue[d] to uncover German concentration camps . . . in which indescribable horror prevail[ed].”); Letter from Gen. Patton to Gen. Eisenhower, NAT'L ARCHIVES & RECORDS ADMIN. (Apr. 15, 1945) (on file with National Archives and Records Administration), https://www.eisenhower.archives.gov/research/online_documents/holocaust/1945_04_15_Patton_to_DDE.pdf (describing additional camps his unit found and advocating for the continued documentation of “the brutality of the Germans.”). See also Interview with Manfred Steinfeld, U.S. HOLOCAUST MEM'L MUSEUM, at 1 (Dec. 1989), https://collections.ushmm.org/oh_findingaids/RG-50.031.0070_tcn_en.pdf (describing General Gavin's involvement during the final days of World War II).

¹⁵ Captain Smith ultimately to become Major Smith. MICHAEL L. JAMIESON, REMEMBRANCES: MY LIFE WITH CHESTERFIELD SMITH 7 (2d ed. 2004). According to Smith, he and his cousin Harold “joined the [Florida] National Guard [] about when the draft was enacted in 1940, and [they] each had high draft numbers.” Interview by Julian Pleasants with Chesterfield Smith, JD, UNIV. OF FLA., at 7, <http://ufdc.ufl.edu/UF00006389/00001/7j>. The national draft lottery ending on October 30, 1940, SUSAN DUNN, 1940: FDR, WILLKIE, LINDBERGH, HITLER—THE ELECTION AMID THE STORM 219 (2013), embrace of the state's National Guard came quickly. Jamieson seems hazy about wartime military accessions; speaking about his fellow Smith-employee, William H. McBride, Jr, he stated:

After his first year in law school, he interrupted his studies to volunteer as a United States Marine and enter service in Vietnam, telling a few close friends (only when they asked) that his conscience would not permit him to exploit his student exemption while brave men and boys were being killed. They typically responded with utter amazement to his answer.

JAMIESON, *supra* 15, at 53. Amazement proves appropriate: In August 1964, Congress passed the Tonkin Gulf Resolution. See Act of Aug. 10, 1964, Pub. L. 88-408, 78 Stat. 384, *repealed by* Act of Jan. 12, 1971, Pub. L. 91-672, § 12, 78 Stat. 384. One might wonder whether the 1967 B.A-McBride scrupled at five consecutive deferments between September 1963 and June 1968. Jamieson overlooks the following: On February 16, 1968, President Johnson abolished deferment for law students. 32 C.F.R. § 1622.26(b) (1969).

¹⁶ See, e.g., Katherine Walters & Carl Van Ness, *A Guide to the Chesterfield Smith Papers*, UNIV. OF FLA. SMATHERS LIBRARIES SPECIAL AND AREA STUDIES COLLECTIONS (June 2009), www.library.ufl.edu/spec/pkyonge/smith.htm (noting that Smith's unit “took part in the Battle of the Bulge . . . and occupied the Ruhr valley area until the war ended . . .”).

This plus other matters engender questions summoning subsequent resolution through in-depth, professional-level analyses. Evidence herein could empower experts' expansion of the instant groundbreaking inquiry. The eminence of so long-esteemed a Star of the Bar justifies cool-minded scholars' serious substantiation of the Smith legend. Clinically objective, professional reexaminations thereof should exceed in dependability journalistic judgements handed-down during (or influenced by) the emotionally inflamed moments of his coast-to-coast prominence. For it was during days of roiling passion that fame found Chesterfield H. Smith, Senior. As seen *supra* Section I.A., one juncture actually was dubbed the Saturday Night Massacre.¹⁷

II. THE SATURDAY NIGHT MASSACRE, AND ITS AFTERMATH

A. *The Fever in America: October 1973*

Mr. Brokaw approvingly relates: "Elliot Richardson, the [US] attorney general who resigned rather than fire [Watergate Special Prosecutor Archibald] Cox, said later, 'We, the people, at the end of the day had the final voice in what happened—we were given that voice by the leadership of the Bar, which itself was embodied in Chesterfield Smith'."¹⁸ (At Harvard, said Archibald Cox, Jr., had been a Professor of Law; Richardson there had been Cox's student.)¹⁹ The Watergate Special Prosecutor investigated matters emerging from President Richard M. Nixon's 1972 presidential campaign; hence, some parallel to the Trump-Comey drama.²⁰ Such praise as Richardson's suggests Smith suited to America's canon of heroes. Richardson's plaudit refers to the October 1973 Saturday Night Massacre. Therein, President Nixon obtained Cox's discharge by US Solicitor General Robert H. Bork after the resignations (protesting Nixon's demanded ouster of Cox) of Richardson and Deputy Attorney General William D. Ruckelshaus.²¹

¹⁷ Sullivan, *supra* note 2, at 2A.

¹⁸ BROKAW, *supra* note 8, at 316.

¹⁹ Archibald Cox, 92, *Is Dead; Helped Prosecute Watergate*, N.Y. TIMES (May 30, 2004), <https://www.nytimes.com/2004/05/30/nyregion/archibald-cox-92-is-dead-helped-prosecute-watergate.html>.

²⁰ *Id.*

²¹ *Id.*

Bork at once had been appointed as Solicitor General after the Nixon administration had extracted the resignation of Solicitor General Erwin Griswold (former Dean of Harvard Law School).²² Cox himself had enjoyed appointment to serve as Solicitor General beginning in 1961 under President John F. Kennedy's Attorney General: Robert F. Kennedy, his brother.²³ Bork explains of Cox's investiture in the Watergate Special Prosecutor post, which accession transpired inside the office of Griswold (Nixon's effective-dischargee) himself:

Cox was a man of integrity, but he was a protégé of Senator Edward Kennedy—Nixon's bitterest enemy—and closely allied with the entire Kennedy family. . . . Sure enough, Ted Kennedy and Ethel Kennedy, the widow of Robert Kennedy, were prominent members of the small audience invited to the investiture.²⁴

Brokaw's text elaborates with the contemporary American Bar Association President Chesterfield H. Smith's following-day reaction to the Saturday Night Massacre:

As Smith remembers that afternoon, "Lawyers—Republicans and Democrats—were calling me, saying, 'What are you going to do?' I started drafting a statement I still like. It began, 'No man is above the law.' The next day it was on the front page of *The New York Times* and about eleven other major papers. We were the first large voice of a substantial organization that called for Nixon's impeachment."²⁵

In his American Bar Foundation interview about six months subsequent to his 1974 departure from that presidency,²⁶ Mr. Smith reflected upon those same hours thus:

I had calls from Ralph Nader, I had calls from Senators Tunney and Hart and Kennedy who were in oppositions [sic]. I had a call from the administrative assistant to Senator Hruska. I talked to those other people but did not talk to Elliott Richardson who had just resigned the day before this—it was on a Sunday—and he called me and I was on another phone and I never did get him back.²⁷

²² *Id.*

²³ *Id.*

²⁴ ROBERT H. BORK, *SAVING JUSTICE: WATERGATE, THE SATURDAY NIGHT MASSACRE, AND OTHER ADVENTURES OF A SOLICITOR GENERAL* 32 (2013).

²⁵ BROKAW, *supra* note 8, at 315–16. Tom Brokaw openly believed the yarn years later, as implied by his unequivocal language thereafter: "In *The Greatest Generation* I wrote about Chesterfield Smith, a World War II veteran who later became president of the American Bar Association and took a courageous stand against Richard Nixon during Watergate." BROKAW, *THE GREATEST GENERATION SPEAKS: LETTERS AND REFLECTIONS* 183 (1999).

²⁶ Interview by American Bar Found. with Chesterfield Smith, at 60 (1970s), http://ufdc.ufl.edu/aa00005955/00001/print?options=1JJ* [hereinafter ABF Interview].

²⁷ *Id.* at 68.

Among oral histories in the University of Florida Digital Collections rest the transcripts of Mr. Smith's January 14, 2000, and March 9, 2000, interviews with the University of Florida's 1996–2007 Director of the Samuel Proctor Oral History Program, Julian Pleasants.²⁸ These transcripts further enable accurate perception of the Smith-manifesto's gestation: "I drafted a statement finally. We would read it to people who called us, like Teddy Kennedy or Ralph Nader or somebody else. We would then make additions and edit it when they would suggest something"²⁹ After being helped by, e.g., US Senator Edward M. Kennedy and Kennedy's University roommate US Senator John Tunney³⁰, the short-term outcome would be: "I felt like I was somebody much more than I had ever been."³¹

Smith, the 1973 President of the American Bar Association, proved willing to take counsel concerning the law and President Nixon from a figure (Senator Kennedy) whose own brother (Robert F. Kennedy) managed the campaign of the candidate opposing Nixon in 1960's presidential election, and another of whose brothers (John F. Kennedy) *was* Nixon's 1960 opponent.³² *Conscience of the legal profession*. Perhaps it failed to cross his mind whether his sudden homage hinged heavily upon his American Bar Association chieftainship, e.g., Smith's perch persuaded Americans to trust him to apply impartially the rule of law to the Kennedy family's foe. *Given voice by the leadership of the Bar*. On the other hand, perhaps both (1) his position as President of the American Bar Association as reinforcement for his perceived impartiality concerning President Nixon; and (2) his behind closed-doors conjunction with Senator Kennedy, did cross his mind. As just seen, Smith acknowledged the Kennedy-Smith connection in 1974 and 2000 interviews.³³ Ambassador Joseph P.

²⁸ See Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15.

²⁹ *Id.* at 97.

³⁰ Jacques Leslie, *John Tunney, Kennedy's Friend*, in *Muskie's Corner*, N.Y. TIMES (Dec. 26, 1971), <https://www.nytimes.com/1971/12/26/archives/john-tunney-kennedys-friend-in-muskies-corner.html>.

³¹ Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 97.

³² See generally News Services, *Chesterfield Smith; ABA Head During Watergate*, WASH. POST (July 18, 2003), https://www.washingtonpost.com/politics/chesterfield-smith-aba-head-during-watergate/2012/05/31/gJQANb9TGV_story.html?utm_term=.50447a500271 (discussing Chesterfield Smith as the President of the American Bar Association during Watergate); see generally Peter Carlson, *Another Race To the Finish*, WASH. POST (Nov. 17, 2000), https://www.washingtonpost.com/archive/politics/2000/11/17/another-race-to-the-finish/c810a41c-7da9-461a-927b-9da6d36a65dc/?utm_term=.df52cee01bed (discussing the presidential election of 1960, including Robert F. Kennedy's role as a campaign manager).

³³ See ABF Interview, *supra* note 26.

Kennedy, Sr., sired four sons and the Index of Brokaw's *The Greatest Generation* lists the names of three.³⁴ But absent therefrom is Edward M. Kennedy's name.³⁵ Brokaw's book evolved as if Smith forgot mention of Senator Edward Kennedy for newsman Brokaw.

Nor seemed Mr. Smith to admit misgivings during 1973 about whether Watergate weekend-colleague Kennedy conspicuously profited in public, personally, as *himself* above the law.³⁶ To the contrary, such contacts as Edward Kennedy exhilarated him: Smith felt events unwound as though thereby he metamorphosed into a personage far above his status beforehand. Mr. Smith was correct.

That Wednesday: "I went to Harvard, and, so help me God, I could not believe . . . the students cried when I spoke. They were so frightened about the Saturday Night Massacre that the president was taking over, that he thought he was above the law, that he could lock the doors on the courthouse if they were investigating him."³⁷ *Harvard students so scared they wept*. Emotional energies, fueling controversies consequent to that week, thus emerged from fear of the President embodying a law unto himself.³⁸ The fear was of a President self-servingly eluding law enforcement as incarnated in, e.g., a Watergate Special Prosecutor.³⁹ This was the 1973 atmosphere of America.⁴⁰

Any country's spirit shifts through the decades.

B. *The Climate in America: 1995-2003*

Introducing his 1999 book, *The Holocaust in American Life*,⁴¹ the late University of Chicago Professor of History Peter Novick explained: "My aim in writing this book—at once modest and grandiose—is to provide discussion about the questions it raises: how we got to where we are concerning the memory of the Holocaust, and whether where we are is

³⁴ BROKAW, *supra* note 8, at 402.

³⁵ *Id.*

³⁶ Text of Kennedy's Television Address (July 25, 1969), in CHAPPAQUIDDICK: THE REAL STORY, 1993, at 171–75. *See generally* Appendix (discussing Edward Kennedy's personal account of the events in Chappaquiddick).

³⁷ Jan Pudlow, *Chesterfield Smith – 1917–2003*, 77 FLA. B.J. 8 (2003).

³⁸ RICK PERLSTEIN, THE INVISIBLE BRIDGE: THE FALL OF NIXON AND THE RISE OF REAGAN 97–99 (2014).

³⁹ *Id.*

⁴⁰ *Id.* at xiv.

⁴¹ PETER NOVICK, THE HOLOCAUST IN AMERICAN LIFE (2000).

where we want to be.”⁴² Speaking of recent years (i.e., pre-1999), Novick reported: “The promoters of many causes sought enhanced legitimacy and visibility by association with the Holocaust.”⁴³ Thus, to tightly tie himself to the Holocaust offered means whereby a man self-consciously could feel much more than he ever before had been. To be sure, during the twenty-first century this final fact falls upon some ears like gross overstatement. *Quaere*, whether demonstrable association with the Holocaust did pay-off bountifully.

Benjamin Wilkomirski’s book, *Fragments: From a Childhood, 1939-1948*,⁴⁴ was published in 1995 as the Holocaust memoir of a Jewish orphan; it drew extensive endorsement, netted many prizes, was translated into a minimum of nine foreign languages,⁴⁵ and attained acclaim internationally.⁴⁶ Gentile,⁴⁷ actually, tragic “Wilkomirski” proved a native Swiss: Bruno Doessekker.⁴⁸ He passed every day of the Second World War inside Switzerland⁴⁹ (a nation neutral, warlong). *Enhanced by association with the Holocaust.*

Inside the United States of 1995-2003, some still could hope to seize “enhanced legitimacy and visibility” through such an “association” as Novick’s, via at least one precise method.⁵⁰ Novick recognized: “The liberation of the camps had for some time been made emblematic of America’s face-to-face encounter with the Holocaust.”⁵¹ So such specific, self-enhancing linkage endured as exploitable for self-promoters plausibly proclaiming themselves some sort of American liberator of Nazi camps. Or as Vanderbilt’s Professor of Modern Jewish Culture Jay Geller concluded of that sad, Swiss precedent: “[A]llow me to adopt a theatrical metaphor.

⁴² *Id.* at 15.

⁴³ *Id.* at 231.

⁴⁴ BENJAMIN WILKOMIRSKI, *FRAGMENTS: MEMORIES OF A WARTIME CHILDHOOD* (Carol Brown Janeway trans., 1996).

⁴⁵ Jay Geller, *The Wilkomirski Case: Fragments or Figments?*, 59 *AMERICAN IMAGO* 343 (2002).

⁴⁶ STEFAN MAEHLER, *THE WILKOMIRSKI AFFAIR: A STUDY IN BIOGRAPHICAL TRUTH* 114–15 (2001); DANIEL L. SCHACTER, *THE SEVEN SINS OF MEMORY: HOW THE MIND FORGETS AND REMEMBERS* 2 (2002).

⁴⁷ Geller, *supra* note 45, at 355.

⁴⁸ *Id.* at 344; BLAKE ESKIN, *A LIFE IN PIECES: THE MAKING AND UNMAKING OF BENJAMIN WILKOMIRSKI* 16–18 (2003).

⁴⁹ SCHACTER, *supra* note 46, at 3.

⁵⁰ NOVICK, *supra* note 41, at 231.

⁵¹ *Id.* at 63.

Wilkomirski-Doessekker was a character in search of a drama that would make him a star.”⁵²

Quaere, whether these realities rightly inform reconsideration (responsive to his personal centenary) of the American Bar Association’s lauded President in the Watergate-Era.

III. FIVE LIBERATED NAZI CAMP WARSTORIES

A. *The Smith Papers Version: 2009*

Thanks to the University of Florida, researching Mr. Smith can begin with “A Guide to the Chesterfield H. Smith Papers.”⁵³ In paragraph two of the Guide’s Biographical/Historical Note by Katherine Walters and Carl Van Ness one finds:

In Germany and later Czechoslovakia, Smith served in the occupation forces. When he heard of conditions in a concentration camp, Smith ordered the camp’s commanders to vacate their homes and move into the camps, while the camp prisoners moved into the commanders’ houses. He was discharged in 1945 with the rank of major and a Bronze Star. On his way back home he won \$4,000 playing craps.⁵⁴

In this Smith Papers summarization appears “a concentration camp” (singular).⁵⁵ Too, “the camp’s commanders” are consigned to the “camps” (plural) while the seized houses are those of “the camp commanders” themselves.⁵⁶ Those camp commanders, along with their camps, all are unidentified.⁵⁷ Walters and Van Ness naturally never purport to have witnessed then 64-year-old episodes.⁵⁸

B. *The Florida Bar Version: 2003, Regarding 1995*

i. 1995

Before his son, Mr. Smith during 1995 in effect ratified a tale of himself as revisited by James I. Wendell, Jr., MD:

⁵² Geller, *supra* note 45, at 361.

⁵³ Walters & Van Ness, *supra* note 16.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

The most poignant war story Smith never told his son was delivered in a memoir written by a war buddy in the 94th [Infantry Division, encompassing the 390th Field Artillery Battalion] Dr. Jim Wendell. Smith shared that wartime account with his son, Chesterfield Smith, Jr., in 1995, detailing how he had summoned the burgomaster and ordered him to lock the townsfolk in the Jewish slave labor camps, and invite the slave laborers to trade places and live in the local homes.

In a letter to his father, Chet Smith wrote: "You never mentioned this to me, nor have I ever heard it before. I have been proud of you many, many times, but never more so than when I read about the above-referenced incident. I am sure that someday, when Taylor and Chetty (his daughter and son) are older and understand the dark but important part of their Jewish heritage, they, too, will be exceedingly proud of their grandfather."⁵⁹

Someone delivered the drama wherein Smith was cast as star.

In this Florida Bar version, there are "slave labor camps" (plural).⁶⁰ Here it is "the townsfolk" who become locked into the tragically de-nominated "Jewish slave labor camps."⁶¹ Meanwhile the seized habitations become the townsfolk's "local homes."⁶² The date is unidentified.⁶³ The "burgomeister" is unidentified.⁶⁴ All the camps and the burgomeister's town are unidentified.⁶⁵ (This is Wendell's "detailing how.") Attend to this detail: Attorney Smith as a father fails firsthand attestation of the emotion-laden "Jewish slave labor camps" episode.⁶⁶ For this "most poignant" episode arrives "delivered in a memoir" by third-party Wendell.⁶⁷

ii. 1993–1995

The Wendell-Smith "Jewish slave labor camps" inclusion, however topical to the Smith household ("their Jewish heritage"), rings false overtly.⁶⁸ Historian Novick cautioned: "The best estimates are that Jews accounted for about one fifth of those liberated from concentration camps in Germany by American troops."⁶⁹ Furthermore, one must distinguish

⁵⁹ Pudlow, *supra* note 3, at 15. Burgomaster is the title "corresponding to our 'mayor.'" BLACK'S LAW DICTIONARY 247 (4th ed. 1968).

⁶⁰ Pudlow, *supra* note 3, at 15.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ NOVICK, *supra* note 41, at 65.

Nazi concentration camps (calculatedly tormenting the innocent) from the victorious Allies' own Displaced Persons camps (supposed to succor the homeless).⁷⁰ For Novick instructs: "In the immediate aftermath of V-E Day [May 8, 1945] there were more than ten million displaced persons in Germany and Austria, of whom only a tiny fraction were Jewish camp survivors."⁷¹

Skeptics would wonder why any Americans became inspired (in the run-up to 1995) to associate themselves with liberation of the German camps. In 2017, *Jewish Chronicle* literary editor Gerald Jacobs explained:

For four decades or more after the end of the Second World War, publishers tended to shy away from Holocaust material. But when, in 1993, Steven Spielberg released the film *Schindler's List*—based on Thomas Keneally's novel *Schindler's Ark*—the climate changed. Since then, Holocaust literature has become a genre in its own right.⁷²

Climate.

Film director Spielberg appeared on the cover of Newsweek Magazine's issue of December 20, 1993.⁷³ That cover read: "Movie of the Year Schindler's List Spielberg Takes on the Holocaust."⁷⁴ Sara R. Horowitz would acknowledge: "Is *Schindler's List* an important film? Yes, by virtue of its popularity. Spielberg's film may well be the one vehicle by which many Americans come to learn of the Holocaust."⁷⁵ Critics in Germany deem Spielberg, himself, Holocaust-Hollywoodizing in the flesh.⁷⁶ A Guide to the Chesterfield H. Smith Papers attests it was while in-the-flesh Holocaust-Hollywoodizing could be characterized as Steven Spielberg and when there were those Americans feeling the urge to self-connect with the German camps-liberations, i.e., during the run-up to 1995, that the 390th Field Artillery Reunion occurred: September 22–25, 1994.⁷⁷

⁷⁰ See *id.* at 65–68.

⁷¹ *Id.* at 67. "A month after the Rheims surrender the displaced persons division of the Allied Military Government at Frankfurt issued a statement that the number then registered exceeded five million." OSMAR WHITE, CONQUERORS' ROAD: AN EYEWITNESS REPORT OF GERMANY 1945 192–93 (2003).

⁷² Gerald Jacobs, *But is it any good?*, TIMES LITERARY SUPP., July 14, 2017, at 23.

⁷³ NEWSWEEK, Dec. 20, 1993 (see magazine cover).

⁷⁴ *Id.*

⁷⁵ Sara R. Horowitz, *But is it Good for the Jews? Spielberg's Schindler and the Aesthetics of Atrocity*, in SPIELBERG'S HOLOCAUST: CRITICAL PERSPECTIVES ON *SCHINDLER'S LIST* 119, 138 (Yosefa Loshitzky ed., 1997).

⁷⁶ Geller, *supra* note 45, at 354.

⁷⁷ See *Walters & Van Ness*, *supra* note 16.

C. *The Museum of Florida History Version: 1997*

The Museum of Florida History produced a video, “Chesterfield Smith: Great Floridian,” in 1997.⁷⁸ A draft script thereof by Sidney L. Matthew utilizes Smith’s Army-pal Jim Wendell.⁷⁹ Reposing in the Smith Papers:

[VIDEO: SGT. WENDELL]

[Wendell tells the account of Chesterfield H. Smith ordering the burgermeister of the German town to place former allied prisoners of war into homes. When asked why, Chesterfield H. Smith replied, “because we won the war and you lost.”]⁸⁰

In this Museum of Florida History draft-script version, the parties to be residentially-hosted are identified neither as “slave laborers,” nor as emerging from a “concentration camp.”⁸¹ Smith’s immediate motivation is neither “conditions in a concentration camp” nor those dark days of the “Jewish heritage,” but victors’ triumphalism.⁸² *Because you lost.* Unexplained is why “former allied prisoners of war” lingered on-site.⁸³ Herein, the (assuredly sparse) script introduces Sergeant Wendell, who “tells the account.”⁸⁴ However, exactly whose account this is seems unacknowledged. In the draft script surviving, Wendell need not be assumed actually to attest as firsthand witness to the tale told video viewers.

The script might prove a source suspect on its face. It presents Wendell as a sergeant.⁸⁵ But Wendell was a Doctor of Medicine and “a unit medical officer.”⁸⁶ Surely should Wendell have remembered his own rank

⁷⁸ E-mail from Michele Wilbanks, Pub. Servs.’ Coordinator, Special & Area Studies Collections, Univ. of Fla., to author (July 14, 2015) (on file with author).

⁷⁹ Sidney L. Matthew, Working Script Great Floridian Chesterfield Harvey Smith 15–16 (Apr. 7, 1997) (unpublished manuscript) (on file with University of Florida George A. Smathers Libraries).

⁸⁰ *Id.* at 16.

⁸¹ *See id.* at 15–16.

⁸² *Id.* at 16.

⁸³ *See id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Wendell, *supra* note 10.

and role. Whether or not the Museum of Florida History judged Wendell's story suspicious, the entire Wendell element of the draft script is absent from its video.⁸⁷

D. The Oral History Version: 2000

Well post-1995, Mr. Smith was still citing that Wendell story about Chesterfield.⁸⁸ For Dr. Pleasants, Smith recollects his local occupation-command in Germany during April 1945:

One thing, a friend of mine who was our medical doctor and a captain [not sergeant] from Pottstown, Pennsylvania, named Jim (I will think of his name in a minute) wrote about how I ordered all the Germans to move into the prison camp, or a bunch of them by designation, out of the big houses, and I sent the prisoners to live in the big houses.⁸⁹

Pleasants declined probing Mr. Smith's allegation.

In Pleasants' oral history version, the "concentration camp" or "slave labor camps" become a "prison camp" (singular).⁹⁰ The "prisoners" to be re-accommodated are neither identified as "slave laborers" nor as "Allied Prisoners of War."⁹¹ Those who are consigned to the "camp" (singular) become "all the Germans."⁹² Or: "a bunch of them by designation."⁹³ Its date is unidentified.⁹⁴ The lone camp is unidentified.⁹⁵ The location of "the big houses" goes unidentified.⁹⁶ Take heed: Attorney Smith literally refers to a third-party who "wrote about how I ordered all the Germans."⁹⁷ But interviewee Smith fails, firsthand, to confirm the episode.

E. The Dr. Jim Wendell Version: 1999

⁸⁷ Wilbanks, *supra* note 78, at 2.

⁸⁸ See Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 12–13.

⁸⁹ *Id.* at 13. Well before this University of Florida interview, parties had raised in excess of a quarter-million dollars funding University of Florida Chesterfield Smith Professorships of Law. *America's Lawyer: One of UFLaw's greatest...1917–2003*, 40 U. OF FLA. LEVIN C. OF L., no. 1, 2003, at 20, 21. Interviewer Pleasants' politesse proved politic.

⁹⁰ Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

i. Dr. Wendell as Reliable Reporter

Jim Wendell, M.D., entitled his Second World War memoir *Huck Finn and Tom Sawyer in World War II: Life with Orlin Runde in the 390th*.⁹⁸ It recalls the 1944–1945 experiences of 94th Infantry Division⁹⁹ medical officer Wendell¹⁰⁰ in his 390th Field Artillery¹⁰¹ Battalion (155mm Howitzer)¹⁰² with his reconnaissance officer, Captain Orlin Runde: “We [his unit] landed at Utah Beach on D-94¹⁰³ [i.e., in September, the third month after the famous amphibious invasion of Normandy through, e.g., Utah Beach] and had an enthusiastic welcome from the French—throwing flowers, bringing out wine, and cheering.”¹⁰⁴ Wendell’s date is confirmed by 1948’s *History of the 94th Infantry Division in World War II*.¹⁰⁵ However, if Wendell’s Norman citizenry ninety-four (or more) days after D-Day and two weeks (or more) after the August 25 liberation of Paris retained surplus wine to give strangers, then the four year-German military occupation looks more lenient than wartime propaganda implied. For by July 31 (not August 31) Normandy already contained 800,000 Americans, not to speak of additional thirsty Allied troops.¹⁰⁶

In less cheery reality, arrival of the 390th coincided with what the JAG office acknowledged as a wave of rape in the European Theater of Operations.¹⁰⁷ *800,000*. Captain Chesterfield H. Smith played his part in Huck and Tom’s tour of duty: “Capt. Harvey Smith once bitterly remarked that he had the dubious distinction of commanding the highest battery in

⁹⁸ Jim Wendell, *Huck Finn and Tom Sawyer in World War II: Life with Orlin Runde in the 390th*, in *THE TOM BROKAW COLLECTION, 1941–97* (Robert Rubero & Kimberly York eds., 2001).

⁹⁹ *Id.* at 1.

¹⁰⁰ *Id.* at 4, 17.

¹⁰¹ *Id.* at 16.

¹⁰² *Id.* at 9 (The U.S. Army denominated the unit under study (among the “94th Division Artillery”) as “390th Field Artillery Battalion (155 Howitzer)”; OFFICE OF THE THEATER OF OPERATIONS, ORDER OF BATTLE OF THE UNITED STATES ARMY, WORLD WAR II: EUROPEAN THEATER OF OPERATIONS, DIVISIONS 346 (1945).

¹⁰³ Wendell, *supra* note 98, at 9.

¹⁰⁴ *Id.*

¹⁰⁵ LAURENCE G. BYRNES, *HISTORY OF THE 94TH INFANTRY DIVISION IN WORLD WAR II I* (1948).

¹⁰⁶ STEPHEN E. AMBROSE, *CITIZEN SOLDIERS: THE U.S. ARMY FROM THE NORMANDY BEACHES TO THE BULGE TO THE SURRENDER OF GERMANY JUNE 7, 1944–MAY 7, 1945* 68 (1998). To be sure, Ambrose thinks wine was “present in almost every cellar in France and Belgium.” *Id.* at 333.

¹⁰⁷ MARY L. ROBERTS, *WHAT SOLDIERS DO: SEX AND THE AMERICAN GI IN WORLD WAR II FRANCE* 198 (2013).

the highest battalion in the highest division in the highest army in the ETO, measured by its rate of VD.”¹⁰⁸ Wendell’s typewritten manuscript closes: “This memoir is being prepared for Orlin’s son, [sic] (and my namesake), Jim Runde in the hope that it may help to perpetuate the memory of an important period in the life of Orlin Runde . . . and the start of our lifelong friendship.”¹⁰⁹

Wendell records that “After reaching the Rhine, the 94th Division was pulled back and to the north . . . to Krefeld, Germany . . .”¹¹⁰ Thereafter: “[W]e moved into occupation duties on April 20th, with 94th Division HQ in Dusseldorf, and 390th FA in Langenfeld.”¹¹¹ Both Krefeld and Dusseldorf are situated in the Rhineland.¹¹² Wendell’s siting of the 390th Field Artillery Battalion occupation duty in Langenfeld on April 20 is facially plausible. The American media of April 19 trumpeted that on April 18: “The 87th Infantry cleared Langenfeld.”¹¹³ Still, that History of the 94th Infantry Division in World War II locates Division Command Post at Krefeld from April 1 (Easter Sunday¹¹⁴) until April 25, and at Dusseldorf between April 25 and June 7, 1945.¹¹⁵ Wendell adds: “About this time the battalion first encountered the atrocities of the Nazi regime. Prominent German citizens were forced to exhume the corpses who proved to be German political prisoners, executed on April 13th.”¹¹⁶ And that History of the 94th Infantry Division in World War II substantiates Wendell’s words.¹¹⁷

The foregoing tends to confirm credibility of witness Wendell’s story. In fact, his documentary package carries credentials, e.g., photographs of the uniformed Wendell, Runde and Smith in Mississippi during 1944 and from the 390th Battalion’s 1975 reunion.¹¹⁸ The latter presents an agreeable-couple photo of Smith with Vivian Lee Smith (his wife). The more poignant proves this photograph upon recalling Mrs. Vivian Lee

¹⁰⁸ Wendell, *supra* note 98, at 19–20.

¹⁰⁹ *Id.* at 25.

¹¹⁰ *Id.* at 16.

¹¹¹ *Id.*

¹¹² OFFICE OF THE THEATER OF OPERATIONS, *supra* note 102, at 350.

¹¹³ Hal Foust, *Reds Break Berlin Lines! Yanks Drive into Czechoslovakia; Fall of Leipzig Near*, CHI. DAILY TRIB. Apr. 19, 1945, at 1.

¹¹⁴ BYRNES, *supra* note 105, at 451.

¹¹⁵ *Id.* at 515.

¹¹⁶ Wendell, *supra* note 98, at 16 (referring to the Wenzelberg Massacre).

¹¹⁷ BYRNES, *supra* note 105, at 473–75.

¹¹⁸ See Wendell, *supra* note 98.

Smith's death from "carcinoma of the lung (both)" at 5:00 a.m. on February 25, 1987.¹¹⁹ In 1975, neither could know how upon July 25, 1987, at the age of sixty-nine years and 362 days, Smith would acquire a bride twenty-six years his junior. Her bridegroom had mourned as widower 150 days.¹²⁰

ii. Wendell-Smith as Suspect Source

a. *The Wendell-Smith Warstory*

Dr. Wendell at once continues concerning "Capt[.] Harvey Smith of A Battery (later President of the American Bar Association)."¹²¹ Unfortunately, this anecdote contrasts with Wendell's preceding passage (lines less questionable). For this anecdote seems sharply less susceptible of proof:

Even more harrowing was the discovery of the slave-labor camps in our area. These were set up to man the industries of the Ruhr. With minimal food and housing, without any medical care or sanitation, they were literally worked to death. Capt. *Harvey Smith* [sic], B Battery Commander, was so revolted by the camp in his area that he summoned the burgomeister of the adjacent town. He gave him two hours to evacuate all of the citizens and move them into the camp. The slave laborers were moved into the houses, to stay there until the Germans had the slave labor camp cleared up to Harvey's satisfaction. . .

The responsibilities of occupation troops are those of military governors. As medical officer of the 390th, I was handed the job of arranging care for the approximately 8[,]000 slave laborers¹²²

To be sure, in Dr. Wendell's 1999 story the Captain's kingly promulgation is not facially impossible.

Quaere, whether that Captain constituted a man above the law. For in 2017 Miriam Gebhardt reminded the world:

In the first years of the occupation, a German policeman would not have been able to report anything even if he had burst in on an American gang rape. He could not have intervened, let alone arrested the soldiers, because the military

¹¹⁹ Death Certificate for Vivian Smith, 25 February 1987, File No. 003055, Florida Office of Vital Statistics. Record on file locally at Miami-Dade County Clerk of Court.

¹²⁰ The "amazing wife," Michael S. Mullin, Letter to the Editor, *Chesterfield Smith*, FLA. B. NEWS, July 15, 2017, Mrs. Vivian Lee Smith lives through the various pages of Jamieson's study of her husband. JAMIESON, *supra* note 15, at 28–29, 30 ("the charming First Lady of The Florida Bar and the ABA"), 51, 52, 67, 69. The young successor likewise variously appears. *Id.* at 93–95, 105. Her hurried succession goes unnoticed.

¹²¹ Wendell, *supra* note 98, at 11.

¹²² *Id.* at 17.

police were responsible for crimes against the German population. Nor, incidentally, would German civilians have been entitled to come to the aid of the victims, as the Germans were forbidden from attacking members of the occupying forces or proceeding against them in any other form. The occupying power had sole responsibility for the charges and investigations involving the soldiers, with the result that in most cases no charges were ever brought in the first place. The perpetrators could also not be arraigned before a German court. Here, too, the military courts had jurisdiction.¹²³

Any civilian girl's tears over her rape by military occupiers did not flow within a "he said-she said" court confrontation. History Professor Mary Louise Roberts of the University of Wisconsin confirms the converse: "The standard of proof for rape in the military court system consisted of two types of evidence: first, that sexual penetration had occurred, and second, that the accuser/victim had tried, to the full extent of which she was able, to resist the assault."¹²⁴ *Full extent.* According to the U.S. Army Center of Military History, an impediment to convictions in Judge Advocate prosecution of soldiers for rape was "The legal requirement, a manifest lack of consent by the victim . . ."¹²⁵ *Manifest non-consent.*

The *United States Army in World War II* series cited a manuscript in the Office of the Chief of Military History (then, Brigadier General James L. Collins, Jr.) which contains the reassuring assertion: "Although many Americans suspected that crying rape was a German woman's way of getting back at the conqueror and although some soldiers undoubtedly interpreted lack of resistance as seduction, the military courts generally held that even where physical force was not proved, the victim had submitted through fear."¹²⁶ Unfortunately, if the standard for conviction was resistance to the fullest extent of which the victim was capable (a manifested lack of consent), then any court's conclusion of submission from fear facially appears consistent with her rapist's acquittal.

¹²³ MIRIAM GEBHARDT, *CRIMES UNSPOKEN: THE RAPE OF GERMAN WOMEN AT THE END OF THE SECOND WORLD WAR* 15 (Nick Somers trans., 2017) (2015). American-style free elections at the *Kreis* level would not take place until April 1946. FREDERICK TAYLOR, *EXORCISING HITLER: THE OCCUPATION AND DENAZIFICATION OF GERMANY* 280–81 (2011). Compare counsel provided the Red Army: "On the eve of the crossing into East Prussia, the army's Main Political Administration told the troops: 'On German soil there is only one master—the Soviet soldier . . . he is both the judge and the punisher for the torments of his fathers and mothers, for the destroyed cities and villages . . .'" *Id.* at 51.

¹²⁴ ROBERTS, *supra* note 107, at 213.

¹²⁵ EARL F. ZIEMKE, *THE U.S. ARMY IN THE OCCUPATION OF GERMANY 1944–1946* 219 (U.S. Army Ctr. of Military History, ed., 1975), <https://history.army.mil/books/wwii/OCC-GY/index.htm>.

¹²⁶ CHARLES B. MACDONALD, *THE LAST OFFENSIVE* 333 (Office of the Chief of Military History, U.S. Army, ed. 1973).

Professor Roberts found: “The JAG office reported two significant ‘rape waves’ in the ETO: the first in the late summer of 1944, and the second in the spring of 1945.”¹²⁷ In Britain and in the liberated nations, approximately 200 US troops were put to death for rape; whereas within Germany, zero American military rapists were punished capitally, notwithstanding the convictions of 284.¹²⁸ Judge whether the violated victims of those 284 convicts’ outrages were *mere German* women. In all events, during the spring of 1945 nestled the moment of Captain Smith’s *Kreis-overlordship* and his avowed Nazi camp-stewardship, whether or not above the law.

Dr. Wendell’s next paragraph records: “Food was arranged by other members of the battalion, but our medics had the task of spraying the displaced persons (DP’s) [sic: DPs] with DDT.”¹²⁹ DPs could have been captives in a real Nazi slave labor camp, if they essentially had been kidnapped to Germany from their respective homeland countries to be worked to death. In Dr. Wendell’s version, the adjacent town’s dislodged German civilians conscripted “into the Camp” (singular) become “all of the citizens,” i.e., neither the “camp’s commanders” only, nor (in Smith’s words) “a bunch of them by designation.”¹³⁰ The “slave laborers” (not particularly “Jewish”) relocated into “the houses” (not just, in Smith’s words, the “big houses”) of “all the citizens” (not, in the words of the Smith Papers’ Biographical/Historical Note, “the commanders’ houses”).¹³¹ The date is unidentified, instead of seared into each soldier’s soul. The “slave-labor” camp, “adjacent town,” and its burgomeister each passes unidentified.¹³²

¹²⁷ ROBERTS, *supra* note 107, at 198. “There were thousands of ordinary criminals in ETO. Hundreds of them were caught, tried by court-martial, and sentenced . . . in the case of rape or murder, to death by firing squad. Sixty-five men were ordered shot.” AMBROSE, *supra* note 106, at 342. If sixty-five men in the entire European Theatre of Operations were sentenced to die for either murder *or* rape, but there were approximately 800,000 healthy, heterosexual, armed American males just in Normandy on July 31, 1944, *id.* at 68, then approximately how many troops licensed themselves to *rape* for free?

¹²⁸ TAYLOR, *supra* note 123, at 147, citing J. ROBERT LILLY, TAKEN BY FORCE: RAPE AND AMERICAN GIS IN EUROPE DURING WORLD WAR II 117, 161 (2007).

¹²⁹ Wendell, *supra* note 98, at 17.

¹³⁰ Compare Wendell, *supra* note 98 at 17, with Walters & Van Ness, *supra* note 16, at Biographical/Historical Note, and Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13.

¹³¹ Compare Wendell, *supra* note 98 at 17, with Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13, and Walters & Van Ness, *supra* note 16, at Biographical/Historical Note.

¹³² Wendell, *supra* note 98, at 17.

Ascertain whether the burgomeister's town lay "adjacent" to: (1) the slave-labor camp; (2) Langenfeld; or (3) wherever Smith found himself when he summoned the burgomeister¹³³ (whatever ill-starred burgomeister proved readily rounded-up at the moment). In any case, the Captain Smith of A Battery on Wendell's page 11 transmutes into B Battery commander on page 17.¹³⁴ Herein, following the "slave labor camps" paragraph, Wendell inserts himself into his tale.¹³⁵ But in the camps-houses residential-switch paragraph about Captain Smith, Wendell avoids insertion of himself as witness.¹³⁶

b. *The Wendell-Smith War-Yarn's Questionability*

Captain Smith regally permitted a burgomeister "two hours to evacuate all of the citizens and move them into the camp."¹³⁷ Picture how these civilians must evacuate and relocate in fewer than 120 minutes notice. Estimate the proportion of townspeople enjoying access, on their brace of hours-notice, to a motor vehicle with gasoline and four tires in the land that lost the war. Decide how these civilians abruptly could be posted of their instantaneous homelessness. After all, guess how many Germans owned a functional telephone. Guess whether the town's telephone exchange still operated. Guess whether it was the burgomeister, or any Germans, who controlled that telephone exchange. Guess how many Germans owned radios in the land that lost the war. Guess whether the nearest radio station still operated. Guess whether it was the burgomeister, or any Germans, who controlled that radio station.

Mr. Smith acknowledges: "I was told under instructions from above that we wanted to stabilize everything. We wanted electricity to continue to be generated. We wanted the trains to run [and] the telephones to run."¹³⁸ None of these versions of the Nazi camps story explains how the dishoused-relocated civilian populace was mobilized by telephone or otherwise. None suggests the Smith tactic served to stabilize his community.

¹³³ Where a portable monarch happened to be afforded serious interpretation of "adjacent." See for example, Smith's theory and practice of leadership in his law firm, Holland and Knight: "When a reporter pressed then-Managing Partner Bill McBride about our lack of a home office, he answered, 'Our home office is where Chesterfield Smith is sitting on any day.'" Michael T. Moore, *Remembering Chesterfield Smith 'America's Lawyer'*, FLA. B. NEWS, July 1, 2017.

¹³⁴ Wendell, *supra* note 98, at 11, 17.

¹³⁵ *Id.* at 17.

¹³⁶ *Id.*

¹³⁷ *Id.* at 17.

¹³⁸ Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13 (bracketed word in original).

It seems a sub-two hours notification-basis whereby assigned-residence addresses were ascertained while (Wendell's) 8,000 "slave laborers were moved into the houses."¹³⁹ Such assigned new addresses were imperative, if simply to vacate room in the camp for transplanting "all of the citizens" of a town.¹⁴⁰ Wendell was burdened with caring for 8,000 slave laborers.¹⁴¹ Determine whether Captain Smith correspondingly "mother-henned" an entire town's semi-invalid elderly, preschool infants, newborn babies, nursing mothers, etc., impressed into the camp under the Captain's responsibility.

For the nearly simultaneous experience of the future Pope Benedict XVI evidences the odds a majority of a Rhineland town's able-bodied, adult males conveniently clustered around their households' hearths, thence "to move into the prison camp."¹⁴² Joseph A. Ratzinger (Pope Benedict) was drafted into the Wehrmacht at age seventeen during December 1944; May 1945 found him a wartime deserter.¹⁴³ Arriving at his family's village, the Americans found him an eighteen-year-old living as a civilian; yet they carried-off Joseph from his parents' home.¹⁴⁴ Until June 19, he was held as a Prisoner of War.¹⁴⁵ So, some would wager that any realistic city-manager must at least limit his muster of the dis-housed to the conveniently most-mobile remainder of any town's populace, e.g., its eighteen to forty-five-year-olds, or at any rate nobody beneath ten years of age. Otherwise, the city-manager must risk shepherding along the roadways his flock of, e.g., the lame, the halt, and the pregnant. For Germany's able-bodied Joe Ratzingers resided unwillingly elsewhere.¹⁴⁶

F. *The Uneasy Upshot of Five Texts*

In short, five liberated Nazi camp war stories prove mutually contradictory. Sometimes the rehoused are inhabitants of "Jewish slave labor camps" (the story for Chesterfield's son, sensitive to "Jewish heritage").¹⁴⁷ Whereas sometimes they are "former allied prisoners of war," the version prepared for the Museum of Florida History's video (toward storytelling

¹³⁹ Wendell, *supra* note 98, at 17.

¹⁴⁰ See Wendell, *supra* note 98, at 11.

¹⁴¹ *Id.* at 17.

¹⁴² PETER SEEWALD ET AL., *BENEDICT XVI: AN INTIMATE PORTRAIT* 167–79 (2008).

¹⁴³ *Id.* at 177–78.

¹⁴⁴ *Id.* at 178.

¹⁴⁵ *Id.* at 179.

¹⁴⁶ *Id.*

¹⁴⁷ Jan Pudlow, *Chesterfield Smith: America's Lawyer*, 10, *FLA. L.J.* 1, 8 (2003).

to a consumer body brimming with descendants of Second World War GIs).¹⁴⁸ Thereby, identity of camp-inhabitants fluctuates with the sympathies of each postwar target-audience.

Arrestingly absent seems any 1945 audience for Captain Smith's Army tour of duty's *tour de force*. Specifically, Smith communicates the story to his son through third-party Wendell's memoir, and five years thereafter spotlights third-party Wendell's document during Smith's oral history interview.¹⁴⁹ In Wendell's turn, the Smith camp-story unfolds devoid of declaration of Wendell's personal knowledge thereof.¹⁵⁰ Nonetheless, among them, these 1995, 1997, 1999, 2000, 2003 and 2009 mini-melodramas somehow do interconnect: a burgomeister, a camp, and houses. This pastiche, plausibly, conflates a minimum of two or three distinct, genuine episodes. Those sister-incidents are nonfiction.

IV. TRUE, LIBERATED CAMP/GERMAN-CIVILIANS STORIES

A. *The Supreme Allied Commander Dwight D. Eisenhower History*

Australian war correspondent Osmar White was attached to Patton's Third Army.¹⁵¹ White recorded:

The first reaction of American officers to the "I did not know" attitude was cold disgust and rage.¹⁵²

After the discovery of the Ohrdruff camp on 6 April, Colonel Hayden Sears, of Boston, ordered every able-bodied male German in the nearby village to parade. He took them in trucks to the camp and on Sunday morning, 8 April, ejected three women who had come because they had mistaken the terms of the order, and forced the others to inspect the rotting remains of thirty men clubbed and stabbed to death in a final orgy of murder before the guards fled. "Come near and look at the nature of these wounds," Sears ordered them.¹⁵³

On April 12, 1945, Supreme Allied Commander Dwight D. Eisenhower and Generals Omar Bradley and George S. "Old Blood and Guts" Patton, Jr., together visited the Nazis' Ohrdruf-Nord Labor Camp (a Buchenwald subcamp) in the Gotha area near the village of Ohrdruf¹⁵⁴ in the

¹⁴⁸ Matthew, *supra* note 79, at 16.

¹⁴⁹ Wendell, *supra* note 98, at 17.

¹⁵⁰ *Id.*

¹⁵¹ WHITE, *supra* note 71, at 2.

¹⁵² *Id.* at 91–92.

¹⁵³ *Id.* at 90.

¹⁵⁴ DAVID EISENHOWER, EISENHOWER: AT WAR 1943–1945, at 761 (1986); MICHAEL KORDA, IKE: AN AMERICAN HERO 574 (2007).

Third Army sector.¹⁵⁵ In General Bradley's words: "A guard showed us how the blood had congealed in coarse black scabs where the starving prisoners had torn out the entrails of the dead for food.¹⁵⁶ Eisenhower's face whitened into a mask.¹⁵⁷ Patton walked over to a corner and was sickened."¹⁵⁸ Bradley paints his less-dignified (deceased) subordinate as outright nauseated.¹⁵⁹ Whereas the face of Bradley's more dignified (yet-surviving) superior (seriously speculated, at Bradley's writing, as potential President) merely whitened into a mask. Within that SS concentration camp¹⁶⁰ both Ike and Old Blood and Guts vomited. Therein, Old Blood and Guts declined ingress to a toolshed holding corpses.¹⁶¹

Regurgitation recurs as a motif of 1945 liberators' entry into repulsive Nazi installations. During 1947, Holocaust survivor Leah Weis-Neuman gave testimony to Holocaust research institute Moreshet.¹⁶² She could recall the victorious troops' April 15 entry into Bergen-Belsen: "British soldiers entered the blocks. Their faces were pale from the sights they had seen [in Bergen-Belsen], and on every second step they stopped to vomit."¹⁶³ Queasy British soldiers' undignified demeanor defines behavior absent from victorious Chesterfield Smith's reminiscences about himself, tactically served solely secondhand.

In the words of General Eisenhower's grandson David Eisenhower: "According to Third Army reports, citizens of Gotha denied any knowledge of what had gone on at Ohrdruf, and so Eisenhower issued orders that all men, women and children be turned out at bayonet point to parade through the camp and form work parties to bury the dead."¹⁶⁴ On April 13, General Eisenhower mentioned to Bradley "that Patton had told him the mayor of Gotha and his wife, after seeing Ohrdruf, had gone home and hanged themselves."¹⁶⁵

¹⁵⁵ EISENHOWER, *supra* note 154, at 761.

¹⁵⁶ OMAR N. BRADLEY, A SOLDIER'S STORY 539 (1978).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ KORDA, *supra* note 154.

¹⁶¹ EISENHOWER, *supra* note 154, at 762.

¹⁶² YEHOUSHU'A AIBESHITS & ANNA EILENBERG-EIBESHITZ, WOMEN IN THE HOLOCAUST: A COLLECTION OF TESTIMONIES 197 (1993).

¹⁶³ *Id.* at 763.

¹⁶⁴ EISENHOWER, *supra* note 154, at 763. The grandson's source proved empty of authority for David Eisenhower's lurid all children roused "at bayonet point." *Id.*

¹⁶⁵ *Id.* at 765.

Herein one finds a named camp, a named town, and a named date.

B. The General George S. Patton, Jr., History

i. Patton Shoulders Command

The Third Army's overlord General S. Patton, Jr., relates firsthand how on April 15 he "flew over to Weimar and visited what I then thought was going to be my next Command Post. It was the home of a *Gauleiter* [regional Nazi Party leader], who had been responsible for the slave labor and all the general nastiness in that vicinity."¹⁶⁶ Interestingly, Smith recalled that in approximately November 1944, the 94th Infantry Division had been "moved up into Patton's 3rd Army,"¹⁶⁷ although the famed Patton between July 9, 1943, and January 26, 1944, was Commanding Officer of the 7th Army, and only between January 26 and October 7, 1945, the Commanding Officer of the 3rd Army.¹⁶⁸ (On August 1, 1944, the Third Army officially had been activated in France.¹⁶⁹) That General and Captain Smith were connected by the Museum of Florida History's draft script thus: "He travelled across France and Germany as an artillery captain on the battlefields occupied by even General George S. Patton."¹⁷⁰

On April 15, 1945, Patton issued an order to Weimar's mayor providing that:

. . . at least 1,000 inhabitants of the city, half of whom are to be women, are to view the camp at camp before they are altered. Those who are required to make the trip include: men and women from 18 to 45, particularly those who belonged to the NSDAP [National Socialist German Workers' Party, i.e., Nazi Party]. Two-thirds of those are to be of the more prosperous classes and one [-] third the less. They must be strong enough to endure the march and the inspection will last about 6 hours; the distance is 25 kilometers. Food is to be brought and it is to be consumed before viewing the camp.¹⁷¹

Herein, one finds a named camp, a named town, and a named date. Thereby, one could find a namable mayor.

¹⁶⁶ GEORGE S. PATTON & PAUL D. HARKINS, WAR AS I KNEW IT 299 (1995).

¹⁶⁷ ABF Interview, *supra* note 26, at 11.

¹⁶⁸ Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 11.

¹⁶⁹ IAN DEAR & M.R.D. FOOT, THE OXFORD COMPANION TO WORLD WAR II 868 (Ian Dear ed., 1995).

¹⁷⁰ MATTHEW, *supra* note 79, at 16.

¹⁷¹ HAROLD MARCUSE, LEGACIES OF DACHAU: USES AND ABUSES OF A CONCENTRATION CAMP 55-56 (2001).

ii. The Psychology of a Military Genius

If it truly were the *Gauleiter* “who had been responsible for the slave labor and all the general nastiness in that vicinity,” then posterity might marvel that Patton coerced civilian subjects of his guilty *Gauleiter* “to endure the march.”¹⁷² For General Patton marked the manner of man secretly to reassure himself his Anglo-Saxon conscience debars him from inflicting punishment sans due process of law. Furthermore, Patton’s twenty-five-kilometer distance¹⁷³ stretches beyond fifteen miles, i.e., beyond a thirty-mile-roundtrip hike. But his forced-marchers were fed nothing beforehand to fuel their ordeal.¹⁷⁴ Patton’s option, instead ordaining comestibles-consumption expressly *prior* to their inspection, is not self-explanatory. Posterity ponders Patton’s exquisitely precise exactions.

Quaere, whether a sexually insecure warlord schemed to persuade posterity not to judge Junior a sissy because he vomited three days earlier, in the Ohrdruf-Nord Labor Camp. Patton never recorded on paper his gut reaction to Ohrdruf.¹⁷⁵ The General (through that theory of the evidence) fixed to vindicate virility vicariously, via scheming to induce just-fed, footsore civilians (helpless in Patton’s pressgang’s clutches) to vomit in horror-stricken surprise, as had the hero of his own life-story. Even if that picture of Patton (true or false) appears ridiculous, its mere risibility could have engendered a satirical Smith Myth.

C. *The Major General James M. Gavin History*

The University of Texas at Austin historian Robert H. Abzug relates that on May 2, 1945, the 82nd Airborne Division under Major General James M. Gavin was in reach of the north German town of Ludwigslust; Gavin was informed on May 3 of the suicides of Ludwigslust’s mayor and his wife.¹⁷⁶ Those spouses’ incentive grew plain on May 4, when Gavin’s troops came upon Woebbelin, the Nazi camp outside Ludwigslust; while Gavin’s men were nearing, circumstances were reducing some inmates to

¹⁷² PATTON & HARKINS, *supra* note 166, at 299.

¹⁷³ MARCUSE, *supra* note 171, at 55–56.

¹⁷⁴ *Id.*

¹⁷⁵ SUSAN L. CARRUTHERS, *THE GOOD OCCUPATION: AMERICAN SOLDIERS AND THE HAZARDS OF PEACE 173–74* (President and Fellows of Harvard College ed., 2016).

¹⁷⁶ ROBERT H. ABZUG, *INSIDE THE VICIOUS HEART: AMERICANS AND THE LIBERATION OF NAZI CONCENTRATION CAMPS* 62 (1985) (citing JAMES M. GAVIN, *ON TO BERLIN: BATTLES OF AN AIRBORNE COMMANDER 1943–46*, 288–89 (1978)); DAVID ROUSSET ET AL., *THE OTHER KINGDOM* 160–62 (1974).

cannibalism (and during their initial week of liberation by Gavin's forces, a thousand starved to death).¹⁷⁷

After such knowledge, what wrath? As Abzug teaches: "General Gavin was so outraged by what he saw at Woebbelin that he ordered all the people of Ludwigslust ten years of age and older to visit the camp.¹⁷⁸ Then able-bodied civilians were required to bury the dead and create a permanent cemetery in the town.¹⁷⁹ Uninflicted by the Major General was *Germans' residence within the camp.*¹⁸⁰

Herein one finds a named camp, a named town, and a named date. Thereby, one could trace a named mayor.

D. The Timberwolf Division History

On April 11, 1945, the First Army neared the town of Nordhausen.¹⁸¹ Nordhausen lay close to a Nazi camp the Germans called Boelke Kaserne.¹⁸² Boelke Kaserne was populated by 4,000 inmates.¹⁸³ Some forty to seventy-five had been dying daily; therein the Timberwolf Division met 700 scarcely-alive prisoners among 3,000 dead.¹⁸⁴ And after such knowledge, what wrath?

Thereupon, says Abzug:

The Americans evacuated survivors to army hospitals or evicted Germans from apartments in town and used these living quarters as makeshift clinics. The dead, thousands of them, posed a greater challenge. First the bodies were taken from the barracks and laid side by side over an area of two acres. Two thousand townspeople, who had been forcibly enlisted for the burial effort,

¹⁷⁷ ABZUG, *supra* note 176, at 62. "Conditions deteriorated so quickly that by the time the paratroopers arrived prisoners were eating the livers of those who had died." DAVID STAFFORD, *ENDGAME 1945: THE MISSING FINAL CHAPTER OF WORLD WAR II*, 310 (2007). "On the other hand, David Stafford has the Ludwiglust Mayor and his wife and daughter committing suicide by poison the *day after* he was "tongue-lashed" by the 82nd Airborne's local commander and taken to see Wobbelin." *Id.* at 311.

¹⁷⁸ ABZUG, *supra* note 176, at 68.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ ZIEMKE, *supra* note 125, at 234.

¹⁸² ABZUG, *supra* note 176, at 31.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

were divided in two groups. The first dug a series of trench graves 150 feet long and 5 feet wide, room, enough for somewhere between fifty and a hundred bodies, on a hill overlooking the camp. The other group carried the corpses the half-mile between the camp and the burial trenches, sometimes two or four men to a body, in a seemingly endless procession.¹⁸⁵

Abzug omits mentioning any Germans whom their conquerors consigned into Boelke Kaseme.¹⁸⁶ *Evicted Germans and used living quarters as makeshift clinics.*

Herein one finds a named camp, a named town, and a named date. Thereby, one could trace a named mayor.

E. The Credibility of a Onetime Captain

In Supreme Allied Commander Eisenhower's case, he had civilians "parade through the camp" plus "bury the dead."¹⁸⁷ Compare the credibility of Nazi Party members being drafted into disinterring the Wenzelnberg Massacre dead. In General Patton's case, Weimar's townswomen and men were marched to "view the camp at Buchenwald and the hospital attached to it."¹⁸⁸ In General Gavin's case, Ludwiglust's citizenry was required to visit Woebbelin and inter its victims.¹⁸⁹ The early occupation-phase practices exemplified by those episodes proved believable.

Abzug found: "The tour of liberated concentration camps, in fact, became a ritual of exorcism and revelation in the occupied Germany of late April and early May 1945."¹⁹⁰ Generals Eisenhower and Patton ordered every soldier in the area not committed to the front line to visit the camps.¹⁹¹ So few Germans admitted to knowing anything about the camps that American officers in charge made it a practice to force local citizens to view them."¹⁹² *American officers' practice to force citizens to view the camps.*

Historian Professor Susan Lisa Carruthers of Rutgers explains of seizing Germans' homes for invading Yank troops' own residences:

¹⁸⁵ *Id.* at 33.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 128.

¹⁸⁸ PATTON & HARKINS, *supra* note 166, at 299.

¹⁸⁹ ABZUG, *supra* note 176, at 289.

¹⁹⁰ ABZUG, *supra* note 176, at 128.

¹⁹¹ *Id.*

¹⁹² *Id.*

Germans, unsurprisingly, did not respond with equanimity to either the prospect or the fact of eviction. The surrender of homes for the victors' inhabitation was a predictable consequence of defeat shouldered with grim acquiescence, judging from soldiers' accounts of these initial ejections. But the American demand that Germans trade places with the Third Reich's erstwhile victims was more unpalatable.¹⁹³

Nor were Carruthers's conquerors heartless: "In Erlangen, the detachment allowed Germans whose houses had been requisitioned as troop billets to have access to their gardens."¹⁹⁴ Numbered among visitors making themselves at home in Germany, in more ways than one, was Captain Smith: "There were no forces in there on the other side. It was just German persons. We moved in and lived in good houses and stayed there."¹⁹⁵ *Good houses*. "Big houses."¹⁹⁶

Weigh the probabilities, given pressures actually awash across American-occupied Germany in spring 1945, anyone was fearless enough to extremely exceed what *Supreme Allied Commander* Eisenhower, the Third Army's *General* Patton and the 82nd Airborne's *Lieutenant General* Gavin had coerced. Nonetheless, in the *Captain's* case, Smith in 2000 personally spotlights ("One thing") within his army-comrade's account concerning when "I ordered all the Germans to move into the prison camp, or a bunch of them by designation, out of the big houses, and I sent the prisoners to live in the big houses."¹⁹⁷

Smith's alleged measures equaled, in Carruthers's formulation, an "American demand that Germans trade places with the Third Reich's erstwhile victims."¹⁹⁸ Carruthers frames the entire thrust of Wendell's Smith

¹⁹³ CARRUTHERS, *supra* note 175, at 174.

¹⁹⁴ ZIEMKE, *supra* note 125. According to the History of the 94th Infantry Division in World War II, after VE Day: "On the whole the attitude of the German civilians was docile, amenable, and cooperative." BYRNES, *supra* note 105, at 480. The claim of meek surrender of the family's hearth to the conquerors carries credibility contextually. Correspondent with the 3rd Army Osmar White reports: "Germans were only too anxious to obey. Theirs was a wordless docility of a people reduced to complete dependence." WHITE, *supra* note 74, at 201.

Nothing I could observe in Germany supported the contention that the docility of the people was a sham. Restoration and preservation of order was not complicated by the resistance of 'patriots' . . . As far as I know, the first phase of the occupation of Germany passed without one single major act of revolt or disobedience by any organized group of Germans.

Id. at 203.

¹⁹⁵ Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ CARRUTHERS, *supra* note 175, at 174.

anecdote. Thereby, how many were to live in those big houses? Dr. Wendell claims his personal job was care of 8,000 slave laborers.¹⁹⁹ If only fifty percent of Smith's instantaneous de-campees were adequately ambulatory to amble into town to their next address, then Smith needed civilians' "big houses" in plenitude.²⁰⁰ *Quaere*, whether in Smith's personal exposure to the war, it really was needy "prisoners" Smith settled comfortably into German civilians' nice "big houses."²⁰¹ Given the atmosphere in US Army-ruled Germany (throughout the spring of Captain Smith's camp policymaking), envision who other than the Nazis' prey possibly made themselves right at home "in the local homes."²⁰²

V. THAT APRIL-JUNE 1945 ATMOSPHERE OF AMERICAN- OCCUPIED GERMANY

A. *The Harrison Report*

Historian of World War II Nazi Germany Richard J. Evans explains that liberation of inmates from the camps advanced gradually; some survivors "were transferred to displaced persons camps . . ."²⁰³ Such frictions emerged from US Army-occupation handling of Displaced Persons that President Truman in June dispatched former Dean of the University of Pennsylvania School of Law²⁰⁴ Earl G. Harrison of the State Department to the American occupation zone for fact-finding.²⁰⁵ That month Smith still was on-duty.

During July, the Harrison team inspected the camps; in August Harrison and his committee released their report.²⁰⁶ The main portion in the Harrison Report opened:

Generally speaking, three months after V-E Day and even longer after the liberation of the camps, many Jewish displaced persons and other possibly non-repatriables are living under guard behind barbed-wire fences, in camps of several descriptions (built by the Germans for slave-laborers and Jews) including

¹⁹⁹ Wendell, *supra* note 98, at 17.

²⁰⁰ Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Richard J. Evans, *The Anatomy of Hell*, NYBOOKS.COM, <https://www.nybooks.com/articles/2015/07/09/concentration-camps-anatomy-hell/> (July 9, 2015).

²⁰⁴ CARRUTHERS, *supra* note 175, at 171.

²⁰⁵ *Id.*

²⁰⁶ ABZUG, *supra* note 176, at 161.

some of the most notorious of the concentration camps, amidst crowded, frequently unsanitary and generally grim conditions, in complete idleness, with no opportunity, except surreptitiously, to communicate with the outside world²⁰⁷

Harrison held:

As matters now stand, we appear to be treating the Jews as the Nazis treated them except that we do not exterminate them. They are in concentration camps in large numbers under our military guard instead of S.S. troops. One is led to wonder whether the German people, seeing this, are not supposing that we are following or at least condoning Nazi policy.²⁰⁸

According to Carruthers: “Harrison’s 8,000-word report appeared verbatim in the *New York Times*”²⁰⁹ Therein, as Abzug found: “He recommended a general approach based on the experience of a few commanders in the field who had favored, when necessary, the displaced persons at the expense of the local German population. In these isolated instances, German houses were turned over to survivors”²¹⁰ *Few. Isolated. Necessary.*²¹¹ Abzug’s language conspicuously omits Germans’ *assignment into any camp.*²¹²

Indeed, as late as his diary entry of September 15, 1945, General Patton (Smith’s erstwhile Third Army superior) would confide, while Patton served as military governor of Bavaria.²¹³

Harrison and his associates indicate that they feel German civilians should be removed from houses for the purpose of housing Displaced Persons.

There are two errors in this assumption. First, when we remove an individual German, we punish an individual German while the punishment is not intended for the individual but the race. Furthermore, it is against my Anglo-Saxon conscience to remove a person from a house, which is a punishment, without due process of law. In the second place, Harrison and his ilk believe that the Displaced Person is a human being, which he is not, and this applies particularly to the Jews who are lower than animals.²¹⁴

²⁰⁷ *Id.*

²⁰⁸ CARRUTHERS, *supra* note 175, at 171. JEWISH VIRTUAL LIBRARY, *U.S. Policy During WWII: U.S. Army & the Holocaust* (last visited July 5, 2015 3:54PM), https://www.jewishvirtuallibrary.org/jsource/Holocaust/usarmy_holo.html.

²⁰⁹ CARRUTHERS, *supra* note 175, at 171.

²¹⁰ ABZUG, *supra* note 176, at 162.

²¹¹ *Id.*

²¹² *Id.*

²¹³ KORDA, *supra* note 154, at 595.

²¹⁴ PATTON & HARKINS, *supra* note 166, at 751.

The Anglo-Saxon conscience of Bavaria's military governor compares instructively with a 1999 work by College of William and Mary Professor of Philosophy Emeritus David H. Jones: *Moral Responsibility in the Holocaust: A Study in the Ethics of Character*.²¹⁵ In explaining three central elements of the rule of law-legal concept, Professor Jones delineated this feature:

[N]o one can be legally deprived of their liberty (arrested, detained, imprisoned, etc.) or their property, except through due process of law. For example, no one can be imprisoned or punished in any way without being convicted in a duly constituted court of law for having committed a crime, and a crime has been committed only if there has been a violation of a valid public law duly enacted by the legislature and signed by the executive.²¹⁶

Deprived of their property. Imprisoned in any way.

Whatever the rule of law could count for, Carruthers clarifies of Patton:

The immediate trigger for this toxic emission was receipt of Eisenhower's order that Jewish DPs were to be afforded distinct and better treatment [than afforded other DPs]—a policy Patton argued would produce “a severe pogrom.” He would follow Ike's command, he mockingly announced, by placing Jews in “sort of improved ghettos.” In practice, Patton willfully disobeyed both the spirit and the letter of Eisenhower's injunction.²¹⁷

Or as Abzug reminded his readers of Patton's incendiary antisemitism: “This was the man who, until relieved of his duties in the fall of 1945, in part because of such attitudes, was in charge of the single largest concentration of Jewish DPs.”²¹⁸ In sum: Harrison during mid-September lobbies for Displaced Persons (including Jews) to be relocated into the homes of Germans.²¹⁹ Harrison lobbies in the teeth of Patton's repulsion from that undertaking.²²⁰ Moreover, former Dean Harrison lobbies while the General's disagreement derives from Patton's Anglo-Saxon legal-principles plus Paton's robust conscience (however queasy Patton's stomach).²²¹

Not very long post-release of the Harrison Report, Major Irving Heymont undertook command of an area encompassing Landsberg Displaced Persons Camp; sheltering within were 5,000 Jewish DPs among 6,000

²¹⁵ DAVID H. JONES, *MORAL RESPONSIBILITY IN THE HOLOCAUST: A STUDY IN THE ETHICS OF CHARACTER* (1999).

²¹⁶ *Id.* at 240.

²¹⁷ CARRUTHERS, *supra* note 175, at 174.

²¹⁸ ABZUG, *supra* note 176, at 157.

²¹⁹ *Id.* at 161.

²²⁰ *Id.* at 162.

²²¹ *Id.*

DPs.²²² Abzug displays how Major Heymont learned a lesson in psychology nineteen days following Patton's diary entry:

Heymont began to see that the damage done to the survivors in the camps would not easily be undone. Then, on October 4, he was jolted into recognition of the deepest emotions running through the camp. It had been decided that overcrowding was one of the basic problems at Landsberg, and that to alleviate the condition nearby German housing would be requisitioned. When word got to the DPs, they gathered to see the Germans being evicted, but soon got upset because the Germans were taking with them household items that the DPs needed. It was not long before the survivors were forcing their way into the houses as they were being vacated, and "looting and pillaging."²²³

Reality harshly hit Heymont ("German housing would be requisitioned") come October: Eisenhower had removed General Patton from the 3rd Army on September 28, 1945.²²⁴

Now, back-up from Heymont's unhappy October 4 to April 1–25, 1945, the, roughly, Reign of Smith. According to that History of the 94th Infantry Division in World War II:

During the Division's occupation of the Krefeld area, attempts at sabotage and subversive acts by German civilians were few and of a minor nature. Displaced Persons (DPs) presented many problems even after they were located in retaining camps. Feeding the vast numbers of former slave laborers proved difficult as their food supplies were drawn from captured German dumps which were never completely adequate for the demands placed upon them. Krefeld *Kaserne*, the largest DP camp in the Division area was a deserted army barrack capable of holding three thousand persons. On April 13 it held 1,458 DPs including Russians, Poles, Ukrainians, Italians, Lithuanians, Dutch and Yugoslavs. Both Russians and Slavs had old scores to settle with the Germans and did so at every opportunity. Looting and mayhem on the part of displaced persons were common when they were beyond the surveillance of the camp guards.²²⁵

The then-largest DP camp in the 94th Division's then-area was not even half-full.²²⁶ The *retaining* camps were less to defend DPs from Germans than to protect Germans from the DPs.²²⁷ *Old scores to settle at every opportunity. Commonplace mayhem and looting.* In Landsberg it was to be "looting and pillaging."²²⁸

²²² *Id.* at 163.

²²³ *Id.* at 164.

²²⁴ CARLO D'ESTE, PATTON: A GENIUS FOR WAR 772 (1995).

²²⁵ BYRNES, *supra* note 105, at 460–61.

²²⁶ *Id.* at 460.

²²⁷ *Id.*

²²⁸ ABZUG, *supra* note 176, at 164.

Alert to dates between April 1 and April 25, consider that the coronation of mini-Emperor Smith apparently transpired about April 10, 1945.²²⁹ For according to that History of the 94th Infantry Division in World War II: “On April 10, the sector of responsibility of the Division was expanded. The new boundaries were non-tactical following the perimeters of German administrative areas called *Landkreise* and *Stadtkreise* which are similar to American counties.”²³⁰ And precisely during the April 5 to April 13 span, proclaims the History: “Huge numbers of slave laborers liberated by the American advance had to be rounded up, placed in camps and processed for return to their native lands.”²³¹ *Rounded up.*²³² *Had to be.* People “liberated by the American advance”²³³ revealed their own ideas about being “placed in camps.”²³⁴

Quaere, whether these reports picture an April time and place wherein any 94th Division officer dared reverse residences of slave laborers and German civilians. Determine whether Patton’s one-time subordinate Smith, lowly captain, dared do during 1945’s springtime of Patton’s imperial power what hapless Harrison still struggled to promote for the autumn wherein Patton toppled. Decide whether long-later anecdotes glorifying Smith’s *both* dishousing/rehousing Germans (e.g., “lock the townsfolk in the Jewish slave labor camps”) look likely, illuminated by Landsburg looting/pillaging in Heymont’s endeavor to dishouse *alone*.

B. *A Feared March into Battle*

The Smith biographical-assertions under examination transpired before August 1945, i.e., when countless US soldiers in Europe were wary of retention by an Army steeling itself to invade Japan. Yank troops in Europe were expected for training in the United States by Army Ground Forces.²³⁵ As early as June 1945 the initial redeployed divisions arrived.²³⁶ As Wendell declared: “When Capt. Runde was up for discharge, it was

²²⁹ BYRNES, *supra* note 105, at 459.

²³⁰ *Id.*

²³¹ *Id.* at 458. The overwhelming bulk of the DP population was found inside the American occupation zone. STAFFORD, *supra* note 177, at 18.

²³² BYRNES, *supra* note 105, at 459.

²³³ *Id.* at 458.

²³⁴ *Id.*

²³⁵ WALDO H. HEINRICH AND MARC S. GALLICCHIO, *IMPLACABLE FOES: WAR IN THE PACIFIC, 1944–1945*, at 490 (2017).

²³⁶ *Id.* at 491.

noted in the States that his experience with mobile rocket batteries suggested he should be sent to the Pacific Theatre to instruct others.²³⁷ In Smith's own words: "Everybody was worried about training and going to Japan, and they did not want to."²³⁸

Quaere, whether it is likely, given this nonfictional 1945 context, that US Army Captain Smith ("under instructions from above") so spectacularly ("exceedingly proud of their grandfather") dared contravene ("invite the slave laborers to . . . live in the local homes") the US Army practice.²³⁹ *Jews in concentration camps under military guard*. Only improbably felt such captains any appetite to either: (1) risk retaliatory retention in a Japan-bound Army; or even (2) hit a November-chilled beach in Japan after being busted. *Everybody did not want to go*. To be sure, this evidence does not disprove the conveniently two generations-old war-story about the Captain as repeated by some Old Soldier. Often it is challenging to prove a *negative*.

C. The Evans Expert Evaluation

However, in Smith's case supplemental circumstantial evidence obtains. For Evans reviews: (1) Nikolaus Wachsmann, *KL: A History of the Nazi Concentration Camps* (Farrar, Straus and Giroux); (2) Kim Wunschmann, *Before Auschwitz: Jewish Prisoners in the Prewar Concentration Camps* (Harvard U. Press); (3) Sarah Helm, *Ravensbruck: Life and Death in Hitler's Concentration Camp for Women* (Nan A. Talese/Doubleday); (4) Elissa Mailander, *Female SS Guards and Workaday Violence: The Majdamek Concentration Camp, 1942-1944* (Michigan St. U. Press); (5) Dan Stone, *The Liberation of the Camps: The End of the Holocaust and Its Aftermath* (Yale U. Press); and (6) Michael J. Bazylar, *Forgotten Trials of the Holocaust* (NYU Press) in Evans's review-essay, "The Anatomy of Hell."²⁴⁰

Regius Professor Emeritus of History at Cambridge, Evans is also the Provost of Gresham College, in the City of London, and author of *The*

²³⁷ Wendell, *supra* note 98, at 23.

²³⁸ Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 14. The fear Captain Smith recalls was justified: "Everyone knew that the invasion of Japan's home islands would almost certainly be a bloodbath on an unprecedented scale, and George C. Marshall had even advised Truman that American casualties might reach a million." STAFFORD, *supra* note 177, at 517.

²³⁹ Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 14.

²⁴⁰ Evans, *supra* note 203, at 52.

Third Reich at War.²⁴¹ His expertise having been refreshed and updated by the foregoing works, Evans pronounced: "In the West, the most that Allied troops did was to force German civilians to visit the camps and see the results of Nazism for themselves, and in some cases force them to bury the dead and assist with clean-up operations."²⁴² *The most that Allied troops did*. Sure enough, David Eisenhower follows description of his grandfather's April 12 Labor Camp inspection: "Beginning on the fourteenth, in towns and villages throughout Germany, sullen populations formed lines and trudged through the camps to observe and clean up under the gaze of armed sentries."²⁴³ *Throughout Germany: observe and clean-up*. Expert Evans's categorical promulgation negates Wendell-Smith fancies about as nearly as such inquests permit.

Even that leaves the question of how a Nazi camp Smith Myth could germinate.

VI. EVIDENCE COMPORTING WITH COUNTERFEITED GLORY

A. *Facts in the History Books: Fodder for Confabulation*

The historicity of April 12-May 4, 1945, engagements of Supreme Allied Commander Eisenhower, Third Army commander Patton, and Major General Gavin provide, among them, to students of the Smith case: camps, a mayor, a *Gauleiter's* house, and local civilians forced through nearby Nazi camps. Hypothetically, Hades-tourism by those Generals laid sufficient factual substrata to synthesize Wendell-Smith mythologizing encompassing: a Burgomeister, camps, and houses. Potentially, an early occupation-confabulation conceived offhandedly *circa* April 20, 1945 (the day the 390th occupied Langenfeld) or summer 1945 constituted a simple, cynical soldiers' jest.

The immediately-past inspections by Eisenhower and Patton might mark the signal for their timely confabulation. Some sarcasm-tropic, junior officers (civilians, deep down: Huck Finn and Tom Sawyer in the Second World War) enviously parodied their internationally-toasted, erstwhile chieftain, leonine Old Blood and Guts: *We can play pretend-Pattons in our own little Langenfeld*. (A male so insecure about masculinity as to induce defenseless females to vomit, lest he be mocked because more effete than they, implores parodization.) In the words of that History of the

²⁴¹ See RICHARD J. EVANS, *THE THIRD REICH AT WAR* (2009).

²⁴² Evans, *supra* note 203, at 54.

²⁴³ EISENHOWER, *supra* note 154, at 766.

94th Infantry Division in World War II, its troops (raised in the Depression and under wartime rationing) underwent this ordeal post-VE Day:

During those days life passed pleasantly for the men of the Division, who were enjoying the best billets of their army service. Clean modern apartment houses and German homes became dormitories for platoons and sections There was usually the luxury of a connecting bath and sitting room. Beer was plentiful and the quality fine. As often as not, a keg was found in the kitchen and around this the nightly bull sessions were held.²⁴⁴

Luxury of a sitting room. Fine beer aplenty. Bull sessions. Smith Myth.

Alternatively, judge whether self-promoting, sometime warriors become established, civilian professionals decades-on (e.g., 1975–1995) cooked-up confabulations, and cold-bloodedly distorted documents such as, e.g., General Patton’s biography or memoirs to obtain their ingredients. The starting pistol for their timely collusion could have been Spielberg’s *Schindler’s List*. Gauge the odds the real Captain Smith incarnated courage to push past the maximum inflicted upon German civilians by expert Evans’s “Allied troops” except him. Supposedly, the latter alone would (in Wendell’s record borrowed by Smith as displayed before Smith’s son): “lock the townfolk in the Jewish slave labor camps.”²⁴⁵

Had humble Captain Smith so performed, ponder whether his ploy more merited honor or disdain. Concerning the major features of the rule of law, Professor Emeritus Jones began:

The first thing to note is that the rule of law is the denial of autocratic or dictatorial rule; the precept “no one is above the law” is meant to express this idea, which is fundamental to the very conception of a legal system as opposed to personal rule. All persons who hold a public office, no matter how high or low it may be, are restricted in what they can do by the legally defined powers of their particular office. Furthermore, wherever the powers of office include the direct use of force or coercion (e.g., police, prisons, and the military) there are significant limits to the discretion allowed in its use.²⁴⁶

All public officers, however low or exalted, are restricted in exercise of officers’ power.²⁴⁷ Discretionary military powers everywhere are

²⁴⁴ BYRNES, *supra* note 105, at 483. In the Anglo-American occupation-hiring of locals: “It seems that most of these jobs went to educated, often upper-class women, who before the war would not have dreamed of working as, essentially, servants, but who, at least for now, saw it as a privilege.” TAYLOR, *supra* note 123, at 199, (citing J. Willoughby, *The Sexual Behavior of American GIs during the Early Years of the Occupation of Germany*, 12 J. MIL. HIST. 155, 155–74 (1998)).

²⁴⁵ Pudlow, *supra* note 3, at 15.

²⁴⁶ JONES, *supra* note 215, at 240.

²⁴⁷ *Id.*

curbed significantly.²⁴⁸ *Quintessential American patriot and lawyer*. Suppose Captain Smith were to throw his weight around exactly as someday variously noised. *Quaere*, whether then he likely could have netted discharge “with the rank of major,” notwithstanding Napoleonic propensities.²⁴⁹

NO ONE IS ABOVE THE LAW.

B. *Facts on the Ground: Fodder for Confabulation*

In 2019, displaced persons as facts on the ground loom large. The Office of the United Nations High Commissioner for Refugees (UN Refugee Agency) verifies claims of people it refers for resettlement.²⁵⁰ President and CEO of the International Rescue Committee David Milibrand reports:

According to the UNHCR, in 2015 there were some 65.3 million people throughout the world who had been uprooted from their homes by conflict and persecution. Over 20 million of these people are refugees i.e., they have fled from a well-founded fear of persecution, have crossed a national border, and received refugee status from either the United Nations or a state. Between three and four million of them are now in the process of claiming asylum outside their home country. The rest are “internally displaced persons” who have not crossed national borders.

Such large numbers of displaced people have not been seen since World War II²⁵¹

²⁴⁸ *Id.*

²⁴⁹ Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 15.

²⁵⁰ David Milibrand, *The Best Ways to Deal with the Refugee Crisis*, NEW YORK REVIEW OF BOOKS (Oct. 13, 2016), <https://www.nybooks.com/articles/2016/10/13/best-ways-to-deal-with-refugee-crisis/>.

²⁵¹ *Id.* The depths of compassion aroused by such facts on the ground are well-documented:

The refugee crisis in Europe began with the shipwrecks off the coast of Libya in April 2015 and ended seven months later with the terrorist attacks in Paris. The long journeys, deaths, detentions and expulsions faced by the many thousands of uninvited migrants who try to reach Europe by sea or by land did not begin or end there. But the “refugee crisis” is best understood as the brief period in which European leaders were forced to confront the disaster of their border policies; when the strength of public feeling at the damage caused by these policies was enough to force many politicians into making grand statements about Europe’s obligation to save lives, and even to consider opening borders or increase resettlement numbers. The Paris attacks supplied an excuse to start closing borders again, since it appeared that one or more of the perpetrators had slipped into Europe along the refugee trail from Turkey.

Daniel Trilling, *Should We Build a Wall around North Wales?*, 39 LONDON REVIEW OF BOOKS 15, 15 (2017). How deeply did compassion run? The *brief* period.

A three-dimensional reality was the Solingen Displaced Persons Camp, sited at Solingen.²⁵² The total of DPs held by SHAEF (Supreme Headquarters Allied Expeditionary Force) had doubled during March 1945's final week.²⁵³ DPs were to be delivered to United Nations Relief and Rehabilitation (UNRRA) teams.²⁵⁴ Military government PFC Irving Stern operated a 3,000 DPs-strong camp in a prison at Krefeld,²⁵⁵ the town familiar firsthand to the 94th Infantry Division. It seems the Solingen Displaced Persons Camp sheltered some 2,400 Poles plus some Yugoslavs and Balts.²⁵⁶ Ex-Captain Smith submitted of his own occupation command locality: "They had prisoner of war camps that were primarily Polish.²⁵⁷ Some were Russians."²⁵⁸ Compare the Museum of Florida History's draft script, with its "former allied prisoners of war." *POW*.

The United Nations Relief and Rehabilitation Administration Team "was so successful in 1946 at Solingen in the North Rhine region that a description of the camp was circulated to other UNRRA teams."²⁵⁹ Fewer than fifteen kilometers, i.e., under ten miles, distance Solingen from Langenfeld. Solingen Displaced Persons Camp, becoming a United Nations sanctuary for the innocent, could be fictionalized as unholy stage-set for Nazi slave driving, until newcomer-lawman Smith came to town. (If

²⁵² MARK WYMAN, *DPS: EUROPE'S DISPLACED PERSONS, 1945-1951*, at 247 (1998).

²⁵³ ZIEMKE, *supra* note 125, at 200.

²⁵⁴ *Id.* at 201. According to the Director Emeritus of the Max Planck Institute for the Study of Societies, German economic sociologist Wolfgang Streeck:

First among the events that put West Germany on the path to what it would later become was the arrival of ten million refugees and expellees from the East, who made up roughly one in five inhabitants of a devastated territory less than half the size of the prewar Reich. While some of them remained isolated, depressed and poor for the rest of their lives, others had brought with them a determination to fit in and succeed in what was for them in many ways a foreign country. Their arrival disrupted forever the fabric of what had been until then a largely traditional society divided between urban and rural, Catholic and Protestant, left and right. Centuries-old parochial ways of life and socio-cultural milieux were broken up, often in the face of adamant resistance

Wolfgang Streeck, *Playing Catch Up*, 39 *LONDON REVIEW OF BOOKS* 26, 26 (2017).

²⁵⁵ ZIEMKE, *supra* note 125, at 203.

²⁵⁶ *German DP Camps Sa-So*, DP CAMPS, <http://www.dpcamps.org/dpcampsGermanySa-So.html> (last visited January 14, 2017).

²⁵⁷ Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13.

²⁵⁸ *Id.*

²⁵⁹ WYMAN, *supra* note 252, at 74. "By May 1945, the United Nations Relief and Rehabilitation Administration (UNRRA), founded with impressive foresight at [President] Roosevelt's behest two years earlier to cater for these eventualities, had already set up five hundred assembly centres for DPs." TAYLOR, *supra* note 123, at 166.

that sounds far-fetched, consider whether a peacetime June 1945 trip southward to Czechoslovakia, *infra* Section VII.B.ii, transmuted into a wartime April journey southward to an embattled Munich.)

Wendell's 8,000 "slave labor" camp residents could be an erroneous total.²⁶⁰ At any rate, Dr. Wendell did remark of medics spraying "displaced persons" with DDT.²⁶¹ Determine the probability anyone commanded "all of the citizens" locally into, e.g., the Solingen Displaced Persons Camp, on two hours' notice.²⁶² Captain Smith supposedly ruled "like 50,000 people that was in charge of."²⁶³ Consider whether anyone commanded the entirety of a citizenry 50,000-strong into any camp.

VII. EVIDENCE COMPORTING WITH INNOCENT SELF-DECEPTION

A. *Facts in Innocent, Aged Heads*

A seeming Smith Myth-Nazi camps legend lies at confluence of tragic histories of the Holocaust and of the Second World War. But by 1995, a gap of two score years yawned between fresh-faced soldiers in the various, Wendell-Smith German camps-stories and stateside old timers repeating them. How truths survive time is always serious query. And how truths survive time relative to large-scale events of such profound impact as were the Holocaust and World War II proves particularly relevant herein.

i. The Holocaust

Historian Novick understood of the real Holocaust:

A few years ago [e.g., pre-1999] the director of Yad Vashem's archive told a reporter that most of the twenty thousand testimonies it had collected were unreliable: "Many were never in the places where they claim to have witnessed atrocities, while others relied on secondhand information given them by friends or passing strangers."²⁶⁴ Primo Levi, one of the most renowned of survivor witnesses, has described this phenomenon:

"The greater part of the witnesses . . . have ever more blurred and stylized memories, often, unbeknownst to them, influenced by information gained from later readings or the stories of others A memory evoked too often, and expressed in the form of a story, tends to become fixed in

²⁶⁰ Wendell, *supra* note 98, at 17.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13.

²⁶⁴ NOVICK, *supra* note 41, at 275.

a stereotype . . . crystallized, perfected, adorned, installing itself in the place of the raw memory and growing at its expense.”²⁶⁵

ii. The Second World War

Catherine Merridale authored the Red Army oral history, *Ivan’s War: Life and Death in the Red Army, 1939-1945*.²⁶⁶ Of the real Second World War, Merridale warns against gullibility:

The memory of trauma is notoriously insecure. Some people lock the horror in the deepest recesses of their minds, others recall no more than glimpses, flashbacks, cinematic stills. In the 1990s, when I interviewed hundreds of Soviet veterans myself, the supposedly first-person testimony turned out to have been borrowed from war films or popular fiction. The narrators were not lying; they had simply corralled their own shapeless, terrifying memories into a more manageable frame.²⁶⁷

Compassion compels consideration by investigators of these Novick and Merridale reports. In the instant examination, speculate sympathetically whether Wendell-Smith reliable memories were supplanted by crystallized unrealities (crystallizations contaminated by years-later readings of, e.g., the Eisenhower, Patton and Gavin episodes, plus one another’s mistakes). Compassion means historians must posit whether Wendell’s own flower-tossing, cheering French bearing wine were begotten by grainy newsreels and unending cinema-output postwar. Compassion commands anyone, thus hypothesizing, to weigh what one or another of those two truly witnessed.

²⁶⁵ *Id.* (citing Shmuel Krakowski, quoted in Barbara Amouyal, *Doubts Over Evidence of Camp Survivors*, JERUSALEM POST, Aug. 17, 1986, at 1, and P. Levi, *The Drowned and the Saved* 19, 21 (1986) (English transaction. 1988)).

Once there was—Do you mark how the wisteria, sun-impacted on this wall here, distills and penetrates this room as though (light-unimpeded) by secret and attritive progress from mote to mote of obscurity’s myriad components? That is the substance of remembering—sense, sight, smell: the muscles with which we see and hear and feel—not mind, not thought: there is no such thing as memory: the brain recalls just what the muscles grope for: no more, no less: and its resultant sum is usually incorrect and false and worthy only of the name of dream.

WILLIAM FAULKNER, *ABSALOM, ABSALOM!* 115 (1936).

²⁶⁶ CATHERINE MERRIDALE, *IVAN’S WAR: LIFE AND DEATH IN THE RED ARMY, 1939–1945* (2006).

²⁶⁷ Catherine Merridale, *Memory, Myth and Mother Russia*, WALL ST. J., Aug. 12–13, 2017, at C5.

In 2000, Mr. Smith reviewed his unit's history subsequent to his aforementioned occupation command.²⁶⁸ Smith shared this exchange with University of Florida interviewer Julian Pleasants:

P: The camp was Dachau?

S: Yes.

P: Did you go in there and see any of the prison?

S: Yes, I did.

P: What was that like?

S: It was just as bad as it sounded. We could see where people had been buried, and we were told all about it. The American Army had taken over and, to some extent, were propagandizing the badness of it. But, we were shown and saw everything²⁶⁹

Meanwhile, the account in that History of the 94th Infantry Division in World War II regarding the April 20 through May 7, 1945, interval proves devoid of Dachau.²⁷⁰ Decide whether any human being (understandably propagandizing the badness of it, while living-out his life's late-autumn) might be forgiven for falsely advertising his modest, real role as (instead) Avenging Angel, and actually persuading himself of its accuracy. *More in sorrow than in anger.*

B. *On the Other Hand*

i. Dachau

Contrariwise, less ruthless reading of Smith's Dachau rendition might prove viable. The just-quoted Smith-Pleasants exchange was immediately preceded by Mr. Smith:

So, this must have been in April. They sent us to go fight some more. We were destined to go over towards Dusseldorf was right near us on the Rhine where we were. We were in Germany. I forget the name of the biggest little town, but it was like 50,000 people that I was in charge of. We were going towards Munich, basically, where there was still some fighting on. We started across there when VE Day came. We did not know where we were. We stopped near that most well-known prison camp over there. I remember going in and looking at it in May. We stayed there about ten days when they sent us into Czechoslovakia. We stayed in Czechoslovakia, perhaps, ninety days. I played golf several times in Czechoslovakia.²⁷¹

²⁶⁸ See Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 1.

²⁶⁹ *Id.* at 13–14.

²⁷⁰ See BYRNES, *supra* note 105, at 467–77.

²⁷¹ See Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13.

Respect-evoking is a grizzled veteran's "They sent us to go fight some more."²⁷²

a. Problem One: The Unappealable Geography

Meanwhile, in that History of the 94th Infantry Division in World War II the account of April 18 to May 7, 1945, says the 94th went out of enemy contact on April 18; it develops devoid mention of Munich.²⁷³ Small wonder, since Dusseldorf ("right near us") and Munich lie 300 miles apart.²⁷⁴ Moreover, Munich ("where there was still some fighting"²⁷⁵) was entered by U.S. forces early on April 30: "Yet Munich was in no position to defend itself against four American divisions. The Wehrmacht had left the city to its fate, and it was now only Nazi zealots were ready to resist."²⁷⁶ Units of two divisions reached the middle of Munich before the middle of the day, and by close of day the city's capture concluded.²⁷⁷ Weigh whether four U.S. divisions unresisted by the Wehrmacht wanted reinforcement from Smith's team (maybe 300 miles remote) to crush local lunatics.

b. Problem Two: The Unforgiving Calendar

V-E Day was on May 8.²⁷⁸ If Smith's unit departed for Munich on April 29 and if V-E Day really interrupted its progress, then his unit hurtled toward melodramatic Munich through nine days and nights, at a minimum.²⁷⁹ Yet it halted short of its goal: Dachau ("that most well-known prison camp over there") lies more than ten miles shy of Munich.²⁸⁰ Alternatively, if the unit never travelled toward Munich, then what occasion

²⁷² *Id.*

²⁷³ See BYRNES, *supra* note 105, at 467–77.

²⁷⁴ Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13 (stating that "Dusseldorf was right near us on the Rhine where we were"); see also Measure Distance from Dusseldorf to Munich, GOOGLE MAPS, <https://maps.google.com> (approximately 302 miles).

²⁷⁵ Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13 (stating "[w]e went going towards Munich . . . where there was still some fighting on"). STAFFORD, *supra* note 177, at 243.

²⁷⁶ STAFFORD, *supra* note 177, at 243.

²⁷⁷ MACDONALD, *supra* note 126, at 437.

²⁷⁸ MARTIN GILBERT, THE DAY THE WAR ENDED: MAY 8, 1945–VICTORY IN EUROPE 1 (1995).

²⁷⁹ See Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13.

²⁸⁰ *Id.* at 13 (stating "[w]e stopped near that most well-known prison camp over there"); see also Measure Distance from Dachau to Munich, GOOGLE MAPS, <https://maps.google.com> (approximately 11 miles).

had wartime, fulltime-soldier Smith for pilgrimage to Dachau, distant from Dusseldorf by 200 miles or more? *Quaere*, whether a somber Dachau visit simply sounded rewarding to paint for a sympathetic interviewer, trustingly hearing-out Smith sans 1945's calendar and without Germany's map in his lap.

c. Problem Three: The Unsympathetic Commander

In all events, Patton barked as though Old Blood and Guts could coerce April's female civilians (emerging from the Third Reich's death-throes winter) to march above thirty miles in a day. Envision yourself some Field Artillery Battalion's commander genuinely ordered in April to Munich "where there was still some fighting going on."²⁸¹ Further, suppose yourself in May before Patton (or Patton's proxy/successor), to excuse your baffled ("We did not know where we were"), battle-long absence from Munich.²⁸² For your Patton presentation, picture your pace (passing nine days unbloodied): "Why, one that rode to's execution, man,/Could never go so slow"²⁸³ Define that picture's level of likelihood.

If an admiration-evoking claim ("sent us to go fight") proves bogus, then estimate the credibility of its source.²⁸⁴

ii. Czechoslovakia

Too, that History of the 94th Infantry Division in World War II has the 94th Division alerted for movement on June 7, with its Division Command Post opening in Susice, Czechoslovakia, on June 12 and the Division assuming responsibility for its area on June 17, 1945.²⁸⁵ Its Division Command Post would remain in Susice until July 21, 1945.²⁸⁶ Consistently therewith, World War II military historian Bryan J. Dickerson recites of Smith's Division commanded by Brigadier General Louis J. Fortier: "In mid-June the 94th Infantry Division [whether or not Smith's 390th Field

²⁸¹ See Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13.

²⁸² *Id.*

²⁸³ WILLIAM SHAKESPEARE, *CYMBELINE* act 3, sc. 2 (Mary Carolyn Waldrep ed., Dover Publ'n 2015).

²⁸⁴ See Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13.

²⁸⁵ BYRNES, *supra* note 105, at 489.

²⁸⁶ *Id.* at 515.

Artillery Battalion] travelled from Dusseldorf to Czechoslovakia and relieved the 26th Infantry Division of occupation duties in and around Susice.”²⁸⁷

Merridale says supposedly first-person testimony turns-out borrowed.²⁸⁸ Decide whether somebody synthesized, *ex post facto*, wartime April’s mission of Munich-bound, bold fire-eaters from an actually irenic trip toward June’s summery golf games. (If that sounds far-fetched, then reconsider whether a 1946 United Nations Relief and Rehabilitation Administration Team’s Solingen Displaced Persons Camp, *supra* Section VI.B., transformed into Captain Smith’s camp post-*Schindler’s List*.)

Cui bono?

For Smith supposed that his unit entered Czechoslovakia “about ten days” after V-E Day, *i.e.*, May 17 or 18.²⁸⁹ Therewith somewhat consistently, concerning the 3rd Army, the U.S. Army’s Center of Military History’s *The U.S. Army in the Occupation of Germany, 1944-46* discloses that as of May 11, “The Third Army had northern and eastern Bavaria, the western Sudetenland in Czechoslovakia, and a dozen *Landkreise* in Austria.”²⁹⁰ However, Dickerson (like that *History of the 94th Infantry Division in World War II*) sees Smith’s own 94th Infantry entering Czechoslovakia in the middle of the *next* month (*i.e.*, mid-June, not May).²⁹¹ Determine whether Smith silently mislaid four weeks (mid-May to mid-June).

The Museum of Florida History produced that 1997 video entitled “Chesterfield Smith: A Great Floridian.”²⁹² A reflection of the burgomeister/prisoners/homes story appears in a draft script. But it disappears subsequently. *Quaere*, whether an unsubstantiated story (circulated at least privately) being retailed in 1995 (or earlier) appealed to its self-flattering “yarnspinnings,” originally. Nonetheless, repetition thereof in its video by the Museum of Florida History smelled objectionable to the Museum’s

²⁸⁷ Bryan Dickerson, *The U.S. Army in Czechoslovakia 1945: An Operational Overview*, MILITARY HISTORY ONLINE (Mar. 4, 2009), <https://www.militaryhistoryonline.com/wwii/articles/usarmyzechopoverview.aspx>.

²⁸⁸ Merridale, *supra* note 267.

²⁸⁹ See Interview by Julian Pleasants with Chesterfield Smith, JD, *supra* note 15, at 13.

²⁹⁰ ZIEMKE, *supra* note 125, at 269.

²⁹¹ See Dickerson, *supra* note 287.

²⁹² CHESTERFIELD SMITH: A GREAT FLORIDIAN (Florida History Associates 1997) (on file with the University of Florida).

staff by 1997. If the Museum's humiliation loomed should outsiders impartially probe the story, then professional historians might have vetoed its insertion in the video. *Credibility*.

C. *Speculating Selective Advertising of Nazi Camp Contretemps*

In NBC News-anchor Tom Brokaw's *The Greatest Generation*,²⁹³ Mr. Brokaw penned a fan's chapter on Smith. It makes no mention of any Nazi camp contretemps.²⁹⁴ Any cagey self-promoter's prevarications wisely would be withheld from any auditor wielding resources to delve deeply into emotion-impregnated, pretentious pipedreams (were witnesses—Europeans once young—still surviving someplace to disprove dubious memoirs). Before 1998, Brokaw himself definitely represented so resourceful an auditor.²⁹⁵ Whereas before 1997, to Smith it perhaps appeared as if a Local Boy Makes Good-boosting Museum of Florida History had not.

In such speculative reading of the evidence, the draft-script reflects a pre-1997 offensive to persuade the Museum about the story herein examined. But thereafter any burgomeister/prisoners/homes tale was withheld from Brokaw, for fear the more heftily resources-endowed Brokaw-team might discredit deep distortions. As it transpired, on January 23, 1999, Dr. Wendell wrote Brokaw: "At Chesterfield's instigation, I received a call from your secretary before your book was published. I told her that I doubted that I had anything to contribute."²⁹⁶ It was as if a Smith Myth were not for promotion before Brokaw's book was published, for fear of exposure.

Dr. Wendell at once continues: "However, I had no idea that a whole chapter was going to be devoted to my old friend. Under the circumstances, I am enclosing a memoir recounting my experiences Chesterfield is mentioned"²⁹⁷ By one reading of the evidence, the memoir was withheld prepublication of *The Greatest Generation*, defensively. Whereas, post-publication, the war story opportunistically could be advanced in the hope a trusting Brokaw now, more casually, would noise it nationally: *The Greatest Generation* already rested safely on the shelves of

²⁹³ BROKAW, *supra* note 8.

²⁹⁴ *See id.* at 307–17.

²⁹⁵ *See id.* at vii–viii (acknowledging Brokaw's efforts in assuring the historical accuracy of the book's contents).

²⁹⁶ Wendell, *supra* note 10, at 1.

²⁹⁷ *Id.*

countless libraries across the United States. Through that hypothesis, no Army veteran in old age innocently had sold himself on a dodgy tale's veracity.

VIII. TOPICS FOR SPECIALIZED RESEARCH

The foregoing opens the door to professional inquiries including:

A. *Quaere*, what other lower-rung occupation chief like Smith was allowed leeway to tolerate “commanders” of “a concentration camp” being left in “their homes” post-surrender. *Quaere*, whether instead “commanders” more practically would have been rounded-up from their families' homes as POWs (like Joseph Ratzinger, the future Pontiff), or even arrested as suspected Nazi criminals.²⁹⁸

For in 2017, former Deputy Assistant to the President for National Security Strategy Nadia Schadlow pronounced of the 1945 American military occupiers in Germany: “Initially the military government had wide powers to arrest not only high-level Nazi officials but also lower-level personnel—persons who held commissions down to and including the rank of major.”²⁹⁹ Serendipitously accessible to Captain Smith seemed on-point advice if 8,000 slave laborers fell into his hands. As Dr. Wendell submits: “Orlin, meanwhile, had been delegated as counter-intelligence officer (CIC). His job was to ferret out those responsible for war crimes, largely SS and Gestapo. As training for this he was sent to a CIC [Counter Intelligence Corps] school.”³⁰⁰

B. *Quaere*, even antecedently, how many “camp's commanders” truly made their “homes” (not wartime assignment, temporary government quarters or barracks, etc.) neighboring any such camp.

²⁹⁸ See JOSEPH CARDINAL RATZINGER, MILESTONES: MEMOIRS 1927–1977, at 37 (Erasmus Leiva-Merikakis trans., 1998).

²⁹⁹ NADIA SCHADLOW, WAR AND THE ART OF GOVERNANCE: CONSOLIDATING COMBAT SUCCESS INTO POLITICAL VICTORY 120 (2017).

³⁰⁰ Wendell, *supra* note 98, 17–18. Wendell is credible: J.D. Salinger as corporal trained at the Army's Fort Holabird, Maryland, as “CIC agent”; Salinger was embedded in a unit of troops and “expected to use his talents to increase their advance by arresting and investigating elements of the population that might pose a threat.” KENNETH SLAWENSKI, J.D. SALINGER: A LIFE 70 (2010). *Quaere*, whether “concentration camp commanders” among the populace posed a threat. *Quaere*, whether arrest authority of enlisted man-Salinger was matched by that of officers like Orlin.

C. Evans pronounces that many camp personnel of the Western Allies-liberated camps “were shot by horrified Allied troops as they uncovered the terrible realities of the camps in their final days and weeks. Some were beaten to death by enraged prisoners; and many were arrested and put on trial for their crimes.”³⁰¹ Supreme Allied Commander Eisenhower’s Special Coverage Unit (organized during 1943) included Hollywood director George Stevens and postwar screenwriter Ivan Moffat while in spring 1945 it documented Nazi crimes³⁰²; their crew reached Dachau, the Nazi camp in Upper Bavaria, some days before Captain Smith.³⁰³ Stevens reminisced years thereafter:

I went into a room in one of the buildings where they were interrogating SS soldiers. They had this old man—I say old, but I wouldn’t say old today—on his knees, and behind him is a GI with a rifle butt, and the man is screaming. A Polish camp prisoner had caught him up the road on a farm wagon heading for Munich and brought him back. The strange thing is that at the end of the room were SS officers and soldiers stripped to the waist. I never saw such a ridiculous operation, waiting their turn for this, after which they were sent down to be rehabilitated. That night I was with Ivan Moffat who speaks good German, and we went over to these fellows who were laid out, and this old man says, “Americans are supposed to be honorable people. They’re dirty torturers.”³⁰⁴

Quaere, whether—given (1) Wendell’s “occupation duties” of Smith’s 94th Infantry Division and given (2) the homicidal revulsion against camp personnel on the part of “horrified Allied troops”—any camp commander loitered homebound to await GIs pounding his door with fists and pounding his bared back with rifle butts. *Ordered the camp’s commanders to vacate their homes.*

D. Evans pronounces of non-Western Ally troops liberating Nazi camps:

Red Army soldiers were appalled at the discovery of the emaciated, lice-ridden bodies of the survivors and the piles of corpses that littered the grounds of the camps. Their outrage fueled the savagery of their treatment of the German population they encountered and was subsequently used to justify the orgy of rape and murder in which they indulged.³⁰⁵

³⁰¹ Evans, *supra* note 203.

³⁰² Mark Yost, *Documenting Atrocities*, WALL ST. J., Feb. 16, 2017, at A11.

³⁰³ *Id.*

³⁰⁴ WILLIAM KIRSCHNER, CONVERSATION WITH GEORGE STEVENS (August 1963), *reprinted in* GEORGE STEVENS INTERVIEWS 19 (Paul Cronin, Ed., 2004).

³⁰⁵ Evans, *supra* note 203.

Soviet troops exploded in anti-civilian Saturnalia of rape and rapine.³⁰⁶ Regional Red Army rape-storms broke across, e.g., Vienna (April 1945), Prague and Berlin (May 1945).³⁰⁷ In 2017, Miriam Gebhardt reminded the world how “in Berlin, rape was so common in spring 1945 that women are said merely to have asked one another, ‘How many times have they done you?’”³⁰⁸ *Quaere*, how many of Smith’s camp commanders declined lingering in Smith’s neighborhood, instead to hurry (in pre-planned anonymity) to families frightened by sub-bestial Bacchanalias.

E. The son shown Wendell’s memoir indicates this proud portion of their family history will help his children “understand the dark but important part of their Jewish heritage.”³⁰⁹ *Quaere*, whether Smith deliberately absorbed for himself goodwill he knew actually owed the genuine victims of cruel Nazi *Kultur*.

F. *Quaere*, whether either photographic or written evidence of a seeming Smith Myth about his own local Nazi camps exists from provably prior to Spielberg’s *Schindler’s List*.

IX. CONCLUSION

A. *The Smith Myth Thus Far*

The preceding discussion recalled the glories ascribed to the late American Bar Association President Chesterfield H. Smith, Senior. During the Watergate Era, President Smith reaped acclaim for his post-Saturday Night Massacre denunciation of beleaguered President Nixon.³¹⁰ Become equated with the popular storybook attorney-hero Atticus Finch (as the Finch character, in those days, was), he saw himself apotheosized as “Citizen Smith,” and “America’s Lawyer.”³¹¹ Meanwhile, canny Mr. Smith repeatedly directed people to a third-party’s rendition of his eye-catching tactic as local military-occupation chief, to resolve housing dilemmas associated with residents of a liberated Nazi camp, or camps: Smith decreed, through a burgomeister, removal of locals from their own

³⁰⁶ GEBHARDT, *supra* note 123, at 39.

³⁰⁷ *Id.* at 38.

³⁰⁸ *Id.* at 59.

³⁰⁹ Pudlow, *supra* note 3, at 15.

³¹⁰ Moore, *supra* note 133.

³¹¹ Pudlow, *supra* note 3.

homes to swap places with camp residents.³¹² Anyone invoking a third-party reference eludes affirming facts firsthand.

At least one permutation of this incident composed by Smith's Army-pal, James I. Wendell, Jr., MD, surfaces sans suggestion writer-Wendell witnessed it firsthand. Thereby, Wendell, too, eluded affirming facts firsthand. The query arises whether anybody ever announced himself or herself an eyewitness to Smith's faraway melodrama. Perhaps this passage in the Wendell document and a minimum of two of Smith's referrals of other people to some third-party account about Smith's soldierly career all date from after 1993.

As of approximately 1995's fiftieth anniversary of the close of the Second World War, numerous figures bid to inflate their statures through linking themselves with the Nazi Holocaust's history.³¹³ Notably, that juncture more or less followed release of Steven Spielberg's monster-hit motion picture, *Schindler's List* in 1993.³¹⁴ Post-*Schindler's List*, varieties of Smith's Nazi camp or camps episode trace (at least via hearsay) to 1995 and thereafter. Sortation of incongruities identifiable among variants of a seeming Smith Myth has begun herein.

³¹² Wendell, *supra* note 98, at 17.

³¹³ The UCLA scholar of history Michael Casper inspects the biography of Lithuanian native and respected filmmaker Jonas Mekas (b. 1922): "Mekas has made a long career of chronicling his life in extreme detail." Michael Casper, *I Was There*, NEW YORK REVIEW OF BOOKS, June 7, 2018, at 39, citing, inter alia, J. MEKAS, *I HAD NOWHERE TO GO* (2017). The Soviets invaded Lithuania in 1940, with Nazis invading her during 1941:

On the first page of *I Had Nowhere to Go*, Mekas writes that during the war, he worked at two newspapers, as "editor-in-chief of a provincial weekly" and later at a "national semi-literary weekly." To get a better sense of his life in those years, I read through these newspapers and other documents from the period, conducted an extended correspondence with Mekas, and interviewed him over three visits to his Brooklyn home. Reading his memoir and diaries in light of this other material shows that Mekas's life during the war years was more complicated than he makes it out to be.

Id. at 39. "Mekas has been identified so often as a survivor of Nazi persecution that his story has become associated with Jewish victimhood. He fosters this association when, in *I Had Nowhere to Go*, he discusses Lithuanian Jews with the surname Mekas . . ." *Id.* at 41. "But Mekas's experience of the war in Lithuania was nothing like the Jewish one." *Id.* To be sure, the original publication of *I Had Nowhere to Go* preceded *Schindler's List*. But it followed Spielberg's high-profile (e.g., Man Booker Prize-winning) source from a high-profile author. T. KENEALLY, *SCHINDLER'S ARK* (1982). And Casper, like anyone, might prove an imperfect chronicler. Casper has Vienna besieged by the Allies *circa* July 12–13, 1944. *Id.* at 41. Vienna fell to the Soviets on April 13, 1945.

³¹⁴ *SCHINDLER'S LIST* (Universal Pictures 1993).

B. *An Agenda for Future Textual Investigations*

Accuracy of any particular variant of a Smith Myth, whether or not the veracity of its storyteller, approximately might be gauged after initially clarifying why: (1) one or more versions encompass camps, whereas one or more others include only one camp; (2) one or more versions encompass “Jewish” camps, whereas one or more others embody no “Jewish” dimension; (3) one or more versions encompass “slave labor,” whereas others do not; (4) one or more versions encompass a “prison camp,” whereas others do not; one or more versions encompass a burgomeister, whereas others do not; (5) one or more versions encompass “former allied prisoners of war,” whereas others do not; and (6) one or more versions encompass the entirety of local civilians coerced into the camp, whereas others have only an element of that defenseless populace coercively dishoused for dispatch to some Nazi camp, or even include only the still locally-resident camp “commanders” dishoused for return to their own Nazi “camp.” These inconsistencies undercut confidence in a tale’s teller.

Simultaneously with those story-divergences, commonalities among variants of the Smith story shared herein are specifiable. The names of the camp or camps go unidentified. The name of the local town or towns go unidentified. The name of the burgomeister goes unidentified. The names of any grateful, former allied prisoners of war rewarded by Smith with a more comfortable home (that literally had enjoyed *Hausfrau* care) go unidentified. These consistencies, too, undercut confidence in the storyteller. Of course, identifications of these camps, town, burgomeisters and grateful rescuees will speed completing proof of Captain Smith’s striking, Nazi camps-order.

C. *Captain Smith’s Soul-Stirring D-Day Record*

i. June 1944 and Captain Smith

Imperatives press for more rather than less scrutiny of the Smith Myth, and sooner rather than later. More than a decade ago, the American Bar Association already attached superhero qualities to its saintly ex-President’s war record.³¹⁵ Publisher of *The Reflective Counselor: Daily Meditations for Lawyers*³¹⁶ (2008) was the American Bar Association. That

³¹⁵ Pudlow, *supra* note 3.

³¹⁶ F. GREGORY COFFEY & MAUREEN C. KESSLER, *THE REFLECTIVE COUNSELOR: DAILY MEDITATIONS FOR LAWYERS* (2008).

book was listed for readers toward readers' "Contemplation and Mindfulness"³¹⁷ in a second American Bar Association book published two years later: *Lawyers as Peacemakers: Practicing Holistic, Problem-Solving Law*.³¹⁸ During December 2013, *The Reflective Counselor: Daily Meditations for Lawyers* returned in the American Bar Association's *ABA Publishing Gift Guide*.³¹⁹

The co-authors of *The Reflective Counselor: Daily Meditations for Lawyers*, F. Gregory Coffey and Maureen C. Kessler, invoke Brokaw's 1998 text:

One of the heroes highlighted in Brokaw's book was Chesterfield Smith. On D-Day, despite gunshot wounds already suffered, Smith demonstrated incredible valor in personally dismantling enemy gunnery. Without Smith's actions, the equipment, positioned on a hilltop, could have killed and maimed many more thousands of disembarking soldiers as the invasion of Normandy began.³²⁰

Moreover:

After the war, Smith became a lawyer, and he exhibited equivalent valor during his fifty-five-year legal career . . . Smith's unambiguous manifesto, *No man is above the law*, appeared on the front page of the *New York Times* following the infamous Saturday Night Massacre on October 20, 1973.

Smith's words and actions were defining moments in the American legal system, just as his deeds had been on June 6, 1944.

Many lawyer-statesmen like Chesterfield Smith have sanctified our legal history . . .³²¹

Sanctified. Saint. Both 'saint' and 'sanctify' derive from the Latin *sanc-tus*: Holy.³²²

The dearly-purchased June 6, 1944, landings by the Allies allegedly afforded the backdrop to Captain Smith's bravery. *Quintessential American patriot*. Indisputably, Mr. Smith's Watergate words were definitive features of America's legal history exactly equivalent to his Homeric D-Day defense of disembarking troops in their thousands. The confirmed

³¹⁷ J. KIM WRIGHT, *LAWYERS AS PEACEMAKERS: PRACTICING HOLISTIC, PROBLEM-SOLVING LAW* 415 (2010).

³¹⁸ *Id.*

³¹⁹ ABA Gift Guide at 3 (2014), https://www.americanbar.org/content/dam/aba/marketing/ebus/catalogs/2014/12/2014-gift-catalog_final_w_links.authcheckdam.pdf.

³²⁰ COFFEY & KESSLER, *supra* note 316, at 145. Why was an *artilleryman* on the beach, to assault a hilltop *directly*?

³²¹ *Id.* (italics in original).

³²² *Sanctified*, WEBSTER'S COLLEGIATE DICTIONARY, <https://www.merriam-webster.com/dictionary/sanctify>.

cost to America of D-Day (excluding US airborne divisions) approximated 1,465 dead, 3,184 wounded and 1,928 Missing in Action, i.e., 4,649 dead and wounded.³²³ Therefore, it beggars belief that multiply-gunshot Chesterfield Harvey Smith's intrepidity on one hilltop personally precluded the deaths and maiming of "many more thousands."³²⁴ Supposedly, Smith singlehandedly sliced in half the threatened losses of his brothers-in-arms.³²⁵

Such proves "incredible valor" if simply because Smith slept that night never yet spending an hour in England, (let alone invaded France).³²⁶ The History of the 94th Infantry Division in World War II is silent concerning D-Day's heroism (Coffey and Kessler: "heroes highlighted" by Brokaw) of Chesterfield Harvey Smith.³²⁷ Silence proves fair. Smith spent June 6, 1944, housed in Mississippi, with a unit to reach Utah Beach ninety-four days *after* that life and death struggle.³²⁸

Who might midwife so preposterous a fiction (embracing warriors in their thousands whom Smith gallantly shielded) challenges the imagination. Everything can be mythologized, Roland Barthes³²⁹ taught: "[I]t is human history which converts reality into speech, and it alone rules the life and death of mythical language. Ancient or not, mythology can only have a historical foundation, for myth is a type of speech chosen by history: it cannot possibly evolve from the 'nature' of things'."³³⁰ *Myth marks* chosen *speech*.

The Army's Jim Wendell, MD, necessarily proved professionally mindful of venereal disease. Too, Wendell memorialized Captain Smith's jesting, as seen hereinabove, over the venereal disease level in Smith's "highest battery in the highest battalion in the highest division in the highest army" of the European Theatre of Operations.³³¹ In December 1957, the cover of *Battle Cry*, the slightly lurid, bimonthly pulp-magazine, trumpeted a World War II recounting therein of how: "I PREVENTED 1000 CASUALTIES A DAY, the dramatic, action-packed story of the Army's

³²³ CARLO D'ESTE, EISENHOWER: A SOLDIER'S LIFE 534 (2002).

³²⁴ COFFEY & KESSLER, *supra* note 316, at 145.

³²⁵ *Id.*

³²⁶ BYRNES, *supra* note 105, at 7.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ See TIPHANIE SAMOYAULT, BARTHES: A BIOGRAPHY (Andrew Brown ed., 2017).

³³⁰ ROLAND BARTHES, MYTHOLOGIES 110 (2012).

³³¹ Wendell, *supra* note 98, at 20.

PROPHYLACTIC PATROL.”³³² Opening in a “shabby Greensboro, N.C. bar,”³³³ the memoir stretched to Europe (in light of “The seriousness of VD in relation to the Allied conquest of Germany...”³³⁴). Such stories circulating (in no one knows how many venues over how many decades), physician Wendell well might imagine himself revitalizing the military service of thousands of troops otherwise to be lost (their services to be temporarily impeded, in any case) to venereal infections. Were Wendell or Smith ever an elderly Walter Mitty, perusing pulp adventure magazines for men, then the pair could parent an estimate of Wendell’s thousands saved and jocularly overmatch it with Smithian D-Day derring-do.

The page in *The Reflective Counselor* reporting D-Day and Smith is its only one to mention Brokaw.³³⁵ It almost seems someone fed Coffey and Kessler an incorrect, hagiographical story of Smith (inaccurately attributed to Brokaw). Innocent authors could unknowingly digest hearsay-misreport about some Brokaw account concerning Smith as D-Day combatant. Then they inspiringly could repeat it unverified. “Hagiography” derives from the Greek *hagios*: Holy.³³⁶

To take root successfully, such hypothesized misreport probably was a story sounding strikingly like Brokaw himself. Sure enough, the D-Day Smith fiction distorts an actual Brokaw tale. But Brokaw’s told of Sergeants Leonard Lomell (immediately before Lomell’s heroics shot *once*, in later years an attorney) and Jack E. Kuhn on Utah Beach as Rangers, not Field Artillerymen.³³⁷ Somebody took two soldiers plus a single gunshot wound and transmuted them into a single soldier plus multiple gunshot wounds. *Chosen* speech.

ii. August 1973 and President Smith

Equivalently, American Bar Association President Smith’s “unambiguous manifesto” no more graced the first page of the *New York Times* than Smith’s presence graced any Normandy beach on D-Day. That page

³³² David Lucas, *I Prevented 1000 Casualties a Day: The Dramatic, Action Packed Story of the Army’s Prophylactic Patrol*, BATTLE CRY, Dec. 1957, cover. The instant report of that cover-blurb is not satirical. The “Contents for December, 1957” lists this memoir among “Front Line Action Stories,” although a memoir devoid of combat and never set at any front line. *Id.* at 4.

³³³ *Id.* at 36–37.

³³⁴ *Id.* at 59.

³³⁵ COFFEY & KESSLER, *supra* note 316, at 376.

³³⁶ WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 366, at 447.

³³⁷ BROKAW, *supra* note 8, at 127–28, 130.

one maybe mentioned his name as progenitor of the Essay (no title mentioned) at page 47.³³⁸ Smith's "manifesto" failed to proclaim "No man is above the law," even devoid dramatic italics.³³⁹ *Unambiguous*.

In any case, in the Watergate context any tight, latterday linkage of the October 1973 Smith with the "No man is above the law" proposition (or even associating the phrase especially with Mr. Smith, in the Watergate context solely) proves problematic.³⁴⁰ On Tuesday, August 14, 1973, some real page-one news in America opened: "Special Watergate prosecutor Archibald Cox asked a federal court Monday to reaffirm 'the American constitutional tradition that no man is above the law' with an order that President Nixon release subpoenaed tape recordings and documents."³⁴¹ Cox's legal brief (being quoted) ties his advocacy to "the American constitutional tradition."³⁴² Therefore, it is natural that Cox's own language proves profoundly unoriginal.

To proffer one example: October 1973's President of the American Bar Association surely had read its American Bar Association Journal, sometimes. Skimming the December 1967 issue reveals "No Man Is Above the Law."³⁴³ The author thereof was the respected Dean of the Notre Dame Law School, Joseph O'Meara.³⁴⁴ Notre Dame's Dean O'Meara understandably inserted his own title into quotation marks. For Dean O'Meara's article opened: "'No man is above the law and no man is below it'—this was Theodore Roosevelt's magnificent capsule statement of the rule of law, which served as the theme for Law Day 1967."³⁴⁵

Remember Roland Barthes: "And a myth-hunter, as you know, must hunt everywhere."³⁴⁶ And before your eyes, the Smith Myth expands like an oil slick.

More in sorrow than in anger.

³³⁸ Chesterfield H. Smith, *The Constitutional Crisis*, N.Y. TIMES, Oct. 23, 1973, at 47.

³³⁹ *Id.* But Brokaw quoted Smith: "It began, 'No man is above the law.' The next day it was on the front page of the *New York Times* and about eleven other major papers." BROKAW, *supra* note 8.

³⁴⁰ See Joseph O'Meara, *No Man Is Above the Law*, 53 A.B.A. J. 1107 (1967).

³⁴¹ *Cox Files Legal Brief*, MICH. DAILY, Aug. 14, 1973, at 2.

³⁴² *Id.*

³⁴³ O'Meara, *supra* note 340, at 1107.

³⁴⁴ *Id.* at 1107.

³⁴⁵ *Id.* (citing 38 Cong. Rec. 3 (1903)).

³⁴⁶ MARTIN MCQUILLAN, ROLAND BARTHES: (OR THE PROFESSION OF CULTURAL STUDIES) 69 (2011).

APPENDIX

*Senator Edward M. Kennedy's Televised Address of July 25, 1969
(excerpt).*³⁴⁷

³⁴⁷ Text of Kennedy's Television Address (July 25, 1969), in JAMES LANGE AND KATHERINE DEWITT, CHAPPAQUIDDICK: THE REAL STORY, 171-75 (1993). "Written by Ted Sorenson, David Burke, Milton Gwirtzman; reviewed by Burke Marshall, Kennedy's personal attorney." *Id.* at 171.

Senator Edward M. Kennedy, a Massachusetts attorney, recalled departing a cookout-party on Chappaquiddick Island (Massachusetts) at approximately 11:15 p.m. with Ms. Mary Jo Kopechne³⁴⁸:

There is no truth, no truth whatever, to the widely circulated suspicions of immoral conduct that have been leveled at my behavior and hers regarding that evening Nor was I driving under the influence of liquor.

Little over one mile away, the car I was driving on an unlit road went off a narrow bridge which had no guardrails and was built on a left angle to the road. The car overturned in a deep pond and immediately filled with water. I remember thinking as the cold water rushed in around my head that I was for certain drowning. Then water entered my lungs and I actually felt the sensation of drowning. But somehow, I struggled to the surface alive. I made immediate and repeated efforts to save Mary Jo by diving into the strong and murky current but succeeded only in increasing my state of utter exhaustion and alarm.

My conduct and conversations during the next several hours to the extent that I can remember them make no sense to me at all. Although my doctors informed me that I suffered a cerebral concussion as well as shock, I do not seek to escape responsibility for my actions by placing the blame either on the physical, emotional trauma brought on by the accident or on anyone else. I regard as indefensible the fact that I did not report the accident to the police immediately.

Instead of looking directly for a telephone after lying exhausted in the grass for an undetermined time, I walked back to the cottage where the party was being held and requested the help of my two friends, my cousin [Massachusetts attorney] Joseph Gargan and [Massachusetts attorney] Paul Markham and directed them to return immediately to the scene with me—this was some time after midnight—in order to undertake a new effort to dive down and locate Miss Kopechne. Their strenuous efforts, undertaken at some risk to their own lives, also proved futile.³⁴⁹

Instructing Gargan and Markham not to alarm Mary Jo's friends that night, I had them take me to the ferry crossing. The ferry having shut down for the night, I suddenly jumped into the water and impulsively swam across, nearly drowning once again in the effort, and returned to my hotel about 2 A.M. and collapsed in my room. I remember going out at one point and saying something to the room clerk.

In the morning, with my mind somewhat more lucid, I made an effort to call a family legal advisor, Burke Marshall, from a public telephone on the Chappaquiddick side of the ferry and belatedly reported the accident to the Martha's Vineyard police.³⁵⁰

³⁴⁸ *Id.* at 172.

³⁴⁹ *Id.* at 172–73.

³⁵⁰ *Id.* at 173. "While the speech presented an accurate portrayal of the rescue effort Gargan and Markham made at Dike Bridge—the only part of the accident in which they played a direct part—the rest of it was fake, Gargan said later, 'It was made up, all of it, including thoughts and

Belatedly.

Comparing Senator Kennedy with hypothesized “Joe Street, a reasonably well-to-do citizen who could afford to vacation in Edgartown [Massachusetts] and could afford competent counsel,”³⁵¹ some investigators emphasize:

Had it really been Joe Street and not Ted Kennedy who was driving the car, he would probably have copped to the lesser charge [than leaving the scene of an accident after causing personal injury, without making himself known]—reckless driving—and gotten a two-*week* suspended sentence, not a two-*month* suspended sentence, as Kennedy did. He would not have been subjected to the ordeal of the [Justice of the District Court of Dukes County, Massachusetts] inquest. There would have been no [Court of Common Pleas of Luzerne County, Pennsylvania] exhumation hearing. His career probably would not have been blighted. Joe Street, anonymous affluent American, would have gotten off much easier than Ted Kennedy, scion of the Kennedy family, U.S. Senator, and the Kennedy machine’s next presidential candidate.³⁵²

Quaere, whether Mr. Street could opt as did the Senator. He personally provided Mary Jo’s parents \$90,923 (atop \$50,000 paid by his automobile accident insurer).³⁵³

The identical investigators properly entreat: “Please remember that our word ‘murder’ grows out of the Old English ‘murdrum,’ which was the fine or blood money paid the killer of one individual to the family of the dead individual or to the king.”³⁵⁴ Their entreaty befits its context. As *elsewhere* authoritatively³⁵⁵ defined the year before the Senator’s Address, *murdrum* meant: “In old English law, the killing of a man in a secret manner.”³⁵⁶ *Secret*.

emotions.” LEO DAMORE, SENATORIAL PRIVILEGE: THE CHAPPAQUIDDICK COVER-UP 200 (1988).

³⁵¹ LANGE & DEWITT, *supra* note 347, at 160.

³⁵² *Id.* at 162 (emphasis in original).

³⁵³ DAMORE, *supra* note 350, at 407.

³⁵⁴ LANGE & DEWITT, *supra* note 347, at 152.

³⁵⁵ University of Nebraska College of Law Professor Stephanie S. Pearlman has examined 69 opinions (dating between October 21, 2016, and March 9, 2017) found in the advance opinions in volume 295 of the Nebraska Reports; those 69 included opinions by all seven Nebraska Supreme Court Justices. Stefanie S. Pearlman, *Persuasive Authority and the Nebraska Supreme Court: Are Certain Jurisdictions or Secondary Sources More Persuasive Than Others?* THE NEBRASKA LAWYER, Mar. 2018, at 33. She thereby noted, *inter alia*, every instance wherein a secondary resource was in any fashion cited. *Id.* “Not surprisingly, the only legal dictionary cited was Black’s Law Dictionary, which was cited in five opinions.” *Id.* at 35. It was cited by one or more among three Justices. *Id.* at 37 n.26. These five opinions she herself cites. *Id.*

³⁵⁶ BLACK’S LAW DICTIONARY, 1171 (4th ed. 1968).

That said, the same investigators assert: “Even those who maintain that the Kennedys ‘bought off’ the Kopechnes can’t say what it is that was bought.”³⁵⁷ Inflation meant that \$90,923 in 1969 equaled over \$631,000 in 2018.³⁵⁸ Payment to the Kopechnes emerged only *post*-denial of the petition (by the District Attorney and Medical Examiner in Massachusetts to the Court of Common Pleas of Luzerne County, Pennsylvania) for Mary Jo’s exhumation.³⁵⁹ According to the Court:

[W]e must be mindful that Joseph A. Kopechne and Gwen L. Kopechne, the parents of Mary Jo Kopechne, have indicated they are unalterably opposed to exhumation and autopsy. While their disapproval is not an absolute bar to an exhumation and autopsy, in view of the facts presented to this court, the objections are well taken.³⁶⁰

Kill by secret manner. \$631,000. Say what was bought. Unalterably opposed to autopsy.

NO MAN IS ABOVE THE LAW.

³⁵⁷ LANGE & DEWITT, *supra* note 347, at 152.

³⁵⁸ DOLLAR TIMES, *Inflation Calculator*, <https://www.dollartimes.com/inflation/inflation.php?amount=1&year=1969> (last visited Feb. 24, 2018).

³⁵⁹ JOE MCGINNIS, *THE LAST BROTHER* 625 (1994).

³⁶⁰ LANGE & DEWITT, *supra* note 347, at 250. The Senator’s memoirs discuss Ms. Kopechne and her parents, but omit anything regarding monetary payments, exhumation, and autopsy. EDWARD M. KENNEDY, *TRUE COMPASS: A MEMOIR* 288–92 (2009). They have room for: “I had suffered sudden and violent loss far too many times . . .” *Id.* at 288. “I was rational enough to understand that the accident would be devastating to my family.” *Id.* at 291. “I had suffered many losses during my life. I had lost all of my brothers and my sister Kathleen. My father had been lost to me . . . because of his debilitating stroke.” *Id.* at 292. “I wondered whether I had shortened my father’s life from the shock I had visited on him with my news of the tragic accident on Chappaquiddick Island. The pain of that burden was almost unbearable.” *Id.* at 293.

Also: “I grew up in a family of people who didn’t want to hear you complain, and, quite frankly, I don’t have a lot of respect for people who whine or go around feeling sorry for themselves.” *Id.* at 289. *Res ipsa loquitur.*