South African Cricketers, Nazi Judges, and Other Thoughts on (Not) Playing the Game

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"Yet another book about adjudication requires justification." So reads the first line of William Lucy's *Understanding and Explaining Adjudication*. It is not my intention here to explore whether Professor Lucy justifies his own project. Nor is it my purpose to examine other recently published works which deal with the theory and/or practice of judging. Instead, what I want to explore in the sections which follow are some of the ways in which reading Allan Hutchinson's *It's All in the Game* have made me think about "law and adjudication" and about "law" and about "adjudication."

If Hutchinson's book does in fact need the justification Lucy apparently demands, for me that can easily be found in a series of events which occurred between the time I was asked to write this review and the moment at which I began processing the words which follow. In other words, the insights, arguments, and analyses set forth in *It's All in the Game* have found the only justification they need for me in the theory...
and practice of my quotidian existential reality as a law teacher and consumer of popular and legal culture. As I play the game of law and life, I find examples of Hutchinsonian ludic jurisprudence everywhere. For example, in this relatively short time frame, Manchester United (Man U) had won the English Premier League title for the sixth time in eight years; Manchester City had at last been promoted to the Premier League; in the first match of the annual three game State of Origin series in Rugby League between Queensland and New South Wales, Queensland forward Gordon Tallis was sent off by referee Bill Harrigan after he called the referee "a fucking cheat" over a disputed call; at the Australian Olympic selection swimming trial, veteran Phil Rogers accused fellow competitor Jim Piper of employing an illegal kick; and finally throughout this period, news and revelations about allegations of bribery, cheating and match-fixing permeated the world of international cricket. Each of these events in its own way raises jurisprudential issues which are at the heart of Allan Hutchinson's plea for a re-imagined politics of adjudication and of law. Each calls into question what it is we know and understand about what it means to play, or not, the game. Man U, as any reader of It's All in the Game will know, is Allan Hutchinson's team. The Reds have played a key part in his own game of life. Man U and his personal relationship to football are central to his decision to take games, and law as a game, as seriously as he has in this book. At the same time, he would be the first to admit, since this is the central and crucial theme of his jurisprudence of politics, law and life that there is in fact, not one Man U but many, that it is a multifaceted, multi-contextualized phenomenon which can only be "understood," or perhaps more accurately, posited in a contingent way. Thus, what is understood and experienced by Allan Hutchinson as the Manchester United Football Club, is not the same, (nor is it entirely different) as those Thai Buddhist monks who offer praise to a golden statue of David Beckham, or to those who are "fans" of the team simply because Posh Spice is married to Beckham. Manchester United remains the "same." It is the richest football club in the world;\(^3\) the object of Rupert Murdoch's rapacious desire to consume football as a pay-tv product; a passionate and all consuming drive for those for whom the treble (Premiership, FA Cup, Champions' Cup) is indeed proof that dreams can come true; and for Hutchinson père, a City fan, United is simply that other club in Manchester. Manchester United Football Club is the epitome of all those elements of contingency, context and the search for meaning

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which characterizes, informs and drives the jurisprudence of adjudication and Hutchinson’s politico-legal struggle.

Similarly, Allan Hutchinson would not be uncomfortable with the idea that when Bill Harrigan sent Gordon Tallis from the field, the forward was being punished for not playing the game. He was putting the game into disrepute. He was in contempt of court. Tallis stepped over the invisible line of proper and acceptable behavior which despite its invisibility is nonetheless knowable and subject again to context, contest and adjudication. By calling the referee “a fucking cheat,” Tallis was calling into question the nature of adjudication and status of law as a game, and of the game as a law-bound exercise. In point of fact, he asserted that the process of adjudication was a sham, a fake, and an exercise in bad faith. Again, as Hutchinson points out throughout *It’s All in the Game*, this is the issue around which the validity of adjudication must turn. His non-foundationalist position must hold that while no outcome is determined or determinative, the process of the game must be one which, however contextualized and impermanent, is governed by a respect for the rules, for the rules about the rules and for the rule-making process. Only a game played in good faith, where the referee or the judge is not “a fucking cheat,” is a game of and about law and adjudication. Is it possible to assert that positions such as Tallis’ jurisprudential critique of Harrigan are grounded in a Platonic perspective? Are law and playing the game simply an appearance on the wall of the adjudicative cave? Or, on the other hand, is the front row forward offering an Aristotelian assertion that the game had stopped being the game at the point at which adjudication had stopped being fundamentally adjudication? Had it been turned into something new called “not Rugby League” or the new sport of “fucking cheating”? I will return below to a consideration of the absence of good faith. What is clear is that Allan Hutchinson would appreciate and savor the jurisprudential possibilities and political contingencies of Gordon Tallis, legal theorist, political critic and front-row forward.

Likewise the Rogers/Piper swimming debate demonstrates the ways in which the process of adjudication is one which is only apparently rule-bound in the traditional sense. In reality, like all ludic activities, it is again open to contestation and interpretation. Here, Roger’s complaint is that Piper’s “breaststroke” is in fact not a “breaststroke” as defined in the rules of the sport. FINA, the sport’s international governing body, has rules which state that scissors, flutter or a downward dolphin kick are not permitted. However,
Slow-motion TV footage, taken from the remote control underwater reveals that Rogers has a point ... . At the end of the familiar frog kick, his feet stay together for a mini dolphin kick before separating again.4

The legal and jurisprudential questions raised here are multiple and multifaceted. Most obvious are the fact/law questions about what constitutes a “scissors, flutter or downward dolphin” kick and how that might be applied in any adjudicative process about when a “breaststroke” is in fact and in law a “breaststroke.” More problematic are ideas concerning the nature and role of adjudication and the lingering desire for epistemological and ontological certainty which seems to inform not just the jurisprudence of swimming but both the foundationalist and anti-foundationalist schools of legal theory which Hutchinson so carefully and fully demolishes throughout It’s All in the Game. As journalist Brock puts it:

But Roger’s comments raise two issues. Is it right for one teammate to criticise another in the middle of competition? And has the adjudication system kept pace with the improvements in technology?5

The first point clearly raises basic questions of what it means to play the game. Is it proper to criticize one’s fellow judges for example? What are the rules of collective and individual judicial behavior? What are the limits imposed on a “proper” dissenting judgment? When and how can extra-judicial and public criticism be justified, if ever? What are the limits imposed by free speech, judicial decorum, democracy and other signifiers deployed in cases such as these? The recent debate between Ronald Dworkin and Richard Posner over Posner’s (extra-judicial) writings on impeachment and Dworkin’s assertion that Posner was in violation both of the technical legal restraints imposed on judicial office holders and of a broader scholarly ethos, might offer an intriguing legal example of battles similar to those surrounding the jurisprudence of Australian swimming.6

The other legal theoretical and practical element of the swimming stroke debate, “when is a kick, not a kick?,” is admittedly as traditional as the “what is a vehicle?” debate. It is also as easily deconstructed. The desire for certainty in adjudication, the epistemological conceit of foundationalism, finds yet another

5 Ibid.
embodiment in claims of scientific certainty and the perfectibility of law through technology. Again, as Hutchinson amply demonstrates, this is nothing more than an existential desire for an impossible certainty. The issue here is not one with which Hutchinson deals specifically but it is one which could be dealt with employing his non-foundationalist perspectives. Currently swimming judges determine the legality of a stroke by walking along the length of the pool and, in effect, watching from above. There is no provision for them to make use of underwater cameras to assist in their adjudicative function.

At the easiest level of analysis, this might be seen as a procedural matter, or as an evidentiary question, of rules about rules. Why not allow cameras in the pool? It will give a fuller picture of the "facts" to the judge and this can only help the adjudicative process. A more complex analysis might point to the "fact" that a fact is a fact only if and when it is interpreted within the rules, and the rules about the rules, as a fact. One might also point out in a moment of Baudrillardian jurisprudence that a television picture of a swimming stroke is not the same thing as a swimming stroke. It is a simulacrum, or legally and semiotically, it is an imaginary reproduction of a swimming stroke. It is in this signifier/signified gap, that the moment of interpretation always occurs. Proponents of TV adjudication at the poolside, like those who favor DNA and other "scientific" evidence in family or criminal law cases, appear to be under the mistaken impression that science is epistemologically pure and law and adjudication are corrupt and imperfect. As Hutchinson establishes again and again in *It's All in the Game*, they are correct about the latter and completely fooled about the former. Interpretation is all there is. A kick might or might not be a kick, but TV is of no more help than a reference to Kantian imperatives or any other claim to universal infallibility. That iconic process of scientific certainty in and about law has bitten the Hutchisonian dust.

These examples from the world of soccer, rugby league and swimming offer what has been for me sufficient justification for *It's All in the Game*. I think about these questions differently than I did before undertaking the project of reading and writing about the book. But it is, not surprisingly I suppose, in the world of cricket and the law that I find the most compelling justification for playing the game of politics and law. Perhaps, as Hutchinson asserts, I take the game of cricket itself too seriously and the law not seriously enough. Perhaps I collapse into anti-foundationalist negativism at some ultimate stage. Whatever the case may be, recent developments in the law and politics of international

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7 Hutchinson, *supra* note 2 at 28-35.
cricket offer what I believe are important insights into what it means to play (or not) the game.

II. HANSIE CRONJE AND PLAYING THE GAME

Good faith is at the heart of the game of law and adjudication which is a practice at once free and constrained. It is in the understanding and deployment of good faith that we encounter and play with the vital Hutchinsonian distinction between “anything goes” and “anything might go.” Thus,

Accordingly, good faith can be thought of as acting in line with the spirit of the enterprise in which one is engaged and respecting other people’s expectations about what is supposed to happen.8

Of course, because good faith adjudication takes place within the limited confines of the contingent possibilities of what may or might happen, it is a limiting concept which has only temporary status at any given time and place.

What the requirement of good faith does demand, however, is that whatever interpretation is offered or whatever application is suggested, it must result from a genuine effort to make sense of the rule in hand or to deploy law’s argumentative resources in a conscientious way. “Understood in this way, the requirement of good faith is more an issue of moral integrity than a matter of analytical accuracy; it is less about legal rightness than it is about political reasonableness.”9

Of course, bribery and corruption strike at the heart of any good faith adjudicative process. In essence, the game is fixed, the result predetermined, an unfair advantage obtained, the very process of judging tainted and changed. Naturally enough though, in a contingent and non-foundationalist account, all of these statements would have to be subjected to political and analytical scrutiny, contextualized and deconstructed. Is a bribed judge, for example, ever still a judge? Does proof of corruption in the judicial process offer per se proof that the outcome was “wrong”? These questions have always troubled our understanding of judicial bribery and corruption.10 Recent events in

8 Ibid. at 190.
9 Ibid. at 191.
world cricket offer us an excellent opportunity to address these issues in a context in which playing the game is the literal and legal *grundnorm* and in which the "spirit of the game" is an explicit part of what it means to play that game.

In December and January of the 1999-2000 cricket season, England visited South Africa for a Test Match series. As usual, England lost. But they did not lose everything. In the fifth Test, at Centurion Park in Pretoria, England actually won a game. But this is in reality and in law of secondary importance. What is vital here is the way in which they won, for quite literally, the legal and ethical questions are all in the game.

A normal Test Match takes place over a five-day period. Each team will bat in each of its two innings until its ten wickets have fallen. Thus the winner is the team which scores more total runs than the other side while managing to take a total of twenty opposition wickets. The laws of cricket allow a captain to "declare" the team's innings closed before all wickets have been lost. Normally this will occur when a team feels it has enough runs to win the game and wishes to leave itself enough time to bowl the other team out in order to win the match. However, this is not what happened at Centurion Park.

There, almost all of the first four days of play had been lost due to rain. In the normal course of events, the batting side, the South Africans in this case, would have batted on Day Five until it became obvious under the laws that no result was possible and the match would have ended in a typical dull sort of draw for which cricket is unfortunately noted. However, the South African captain, Hansie Cronje, met with the England Captain Nasser Hussain, at breakfast before the final day's play and proposed a novel, even revolutionary, solution. Cronje would declare his innings closed, after setting a score which England had a reasonable, but far from certain, chance to overcome in its second innings. In return, England would declare their first innings without batting. In other words, the Test would be played to its full in one day instead of five, an exciting run chase would be guaranteed for the fans instead of the predictable batting practice, and the "spirit of the game" would triumph. Hussain agreed, South Africa set a target and England won in the last over of an exciting day's play.

Centurion Park was the first time in the history of Test cricket that a side had declared its innings without batting. For the jurisprudential traditionalists, this constituted a "forfeiture," rather than a declaration, while for others, in the majority, the agreement between

the captains was cricket at its finest. This was not corruption, but
competition in the spirit of the game. A result was, if not guaranteed, at
least on the cards, but the result depended purely on England’s ability to
score the runs against a South African side bent on preventing them
from doing so. In other words, there would be a real game of cricket in
which, as Allan Hutchinson would put it, anything might go.

Christopher Martin-Jenkins, one of the most experienced and
respected cricket journalists in attendance, declared that while there
might be some room for “legal” debate over the distinction between a
“forfeiture” (illegal) and a “declaration” (legal), the two sides played a
game of cricket, the fans saw a game of cricket, and the umpires
rendered decisions within the context of a game of Test Match cricket.

He wrote:

Traditional sportsmanship often seems to be under threat from the exaggerated
aggression of those playing the game for increasingly high financial stakes. The events of
yesterday can have only been good for the spirit of the game.1

He added:

Initiative and a sense of public responsibility triumphed over the kind of
dog-in-the-manger attitude that sometimes gives cricket a bad name. The result was an
unexpectedly tense, intense and downright thrilling conclusion to a Test match that had
threatened to meander away meaninglessly.2

For another commentator, writing with the hyperbole often associated
with cricket, the game was the triumph of the human spirit.

In any case, cricket was treated respectfully by the captains. Nothing untoward occurred.
No rubbish was sent down, nor any easy runs given away. They did the right thing. Nature
cannot be allowed to dictate terms. Man is not so woefully short of imagination nor Test
cricket so insufferably serious that a fair contest cannot be produced when time is tight.3

Allan Hutchinson and all those of us who might for better or for
worse fall at some time or another into the non-foundationalist camp,
would be proud. Here was a case of democratic rule-making and
adjudication in which the possibilities inherent in playing the game,
anything might happen, clearly triumphed over those who would offer a
narrow and formalist technical reading of the legal text and assert as an

2000) 56.


13 P. Roebuck, “Historic Test a Victory for Imagination over Introversion” The Sydney
Morning Herald (20 January 2000).
apparent epistemological certainty that a "forfeiture" is not a "declaration" and can never be one. Anything might and can happen when the players of the game, in good faith, construct a legal practice open to the contingencies of human existence. The Centurion Park Test was non-foundationalist legal practice at its best. Herein however lies the rub.

To "prove" this assertion, or at least to argue for this interpretation in a persuasive and good faith manner, we must place this Test within its context as completely as we can. We must publicly declare our reasoning and our beliefs in order to meet the test (no pun intended) of good faith. We must return to the question of bribery, corruption and bad faith. We must be open to another possibility in the world of anything might go.

The world of cricket, from its very beginnings, has been mixed up with gambling and the possibility of corruption. In the past few years, with the rise of global telecommunications, more and more international cricket, particularly of the one-day variety, and the existence of a sub-continental diaspora, allegations of bribery and corruption in Indian, Pakistani and Sri Lankan cricket have come to the fore. The law, history, politics and other contingencies of cricket bribery and match-fixing allegations are complex and I will not go into them here. It is sufficient for the purposes of playing the game at hand to note simply that in the past few months serious allegations surrounding inter alia Hansie Cronje and his connections with illegal bookmakers and possible match-fixing have arisen. After his original declaration of complete innocence, Cronje has since admitted to receiving money from bookmakers to provide pre-match information, allegedly limited to weather forecasts, pitch conditions and possibly to the make up of his side. A judicial inquiry has been appointed in South Africa to deal with the issue and the International Cricket Council (icc) has held an emergency meeting to discuss appropriate measures as the scandal threatens to envelope many more players and officials. An icc anti-corruption commission has been put in place.

Two aspects of the Cronje case are interesting for the

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14 I explore some of the early context of recent cases in, "Balls, Bribes and Bails: The Jurisprudence of Salim Malik" 3 Working Papers in Law and Popular Culture, Manchester Metropolitan University, 1995. More recently, Malik has alleged that both sides in a Pakistan/Australia match had been bribed and that neither knew what the other was doing. According to Malik, batters were trying to get out while bowlers and fielders were at the same time trying to let them score runs. If true, these allegations raise interesting jurisprudential possibilities about our understanding of what it means to play the game. See M. Ray, "Match-Fixing: New Claims by Malik" The Sydney Morning Herald (22 May 2000) 27.
development of a Hutchinsonian jurisprudence. The first brings us back to the Centurion Park Test match. As a result of ongoing revelations about Cronje’s possible involvement in match fixing (which he continues to deny), a re-examination of the result from Pretoria is beginning to take place. The idea that the match was played as the result of a democratic agreement between the captains and that it was in fact, “good cricket” played in a state of the ludic interpretive triumph of possibilities, has now been replaced in some quarters by the idea that the game was fixed by Cronje. In other words, he made a “sporting declaration” not out of some dedication to “playing the game” but because his bookmaker friends stood to make lots of money out of an entirely unexpected and unforeseeable England victory, or even out of a South African win, neither of which would have been possible if the normal course of a boring draw had eventuated.\textsuperscript{15} In other words, a new, unexpected element can alter the context in which our moral, political and legal decisionmaking process occurs. History is, like all else, interpretation and interpretation is contingent. This is of course not fatal to the Hutchinsonian and non-foundationalist project. Rather, it reinforces the idea that all judgement and all judgments occur in a contingent world. Anything might happen. A match which took place and was judged to be in the finest spirit of the game can now, in a matter of months, in a changing human, legal, political and moral landscape, become, “not cricket.” An apparent apotheosis of good faith comes to epitomize the contingent possibility of bad faith.

This brings me to the second point about Hansie Cronje’s impact on current legal theory and practice. It has now emerged, although there is still some doubt around the exact circumstances of the events, that during a previous tour by South Africa to India, Cronje passed on an offer to his entire team from an illegal bookmaker for them to lose a game in return for a large sum of money, rumored to be $250,000 (US). There are several elements of interpretive and jurisprudential significance here. There is the fact of bribery, and the possibility of mass corruption in the playing of the game. Of equal interpretive and jurisprudential significance here. There is the fact of bribery, and the possibility of mass corruption in the playing of the game.

is the fact that three team meetings were apparently required before Cronje was told that the offer was rejected.16 Perhaps even more troubling for a system of legal practice dependent on our moral and political choices is the fact that one team member who adamantly refused the offer and who argued against it was Dave Richardson, the former South African wicketkeeper. Richardson is and was a solicitor who apparently did not realize at the time that even having a conversation (or three) about whether to accept a bribe was ethically compromised. He was ethically, politically, and legally incapable of questioning what kind of captain would communicate the offer to his team in the first place. Here what we find is at least some evidence within one team which "plays the game" that "not playing the game" is a real possibility. A simple assertion of a good faith versus a bad faith test will not, I fear, be of much assistance to us here. I am not asserting that Allan Hutchinson would or does make such an argument. Indeed, he is a firm and therefore never fixed non-foundationalist who always recognizes that even the content of good faith is never determined and is always contingent. Instead I am saying that if the test is good faith, playing the game is truly always a problematic political, moral and legal issue. In effect, I think that the Hansie Cronje case again reaffirms the basic thrust of It's All in the Game, by demonstrating the contingency even of what it means to play the game.

One of the central allegations in the current match-fixing imbroglio surrounds the bribery of players for so-called side betting. Here, the bettor does not wager on the outcome of the game, or even on the more familiar winning/losing margin or the spread. Instead, bets are placed on all aspects of the contingent occurrences within the playing of the game. Thus, one might bet that a particular batter will score less than twenty runs. If a player has been bribed, she or he might have chosen to play a "bad" shot after scoring nineteen runs. Those watching, judging and playing will in all likelihood be unable to tell whether what happened was in fact simply a careless shot or a deliberate attempt to get out. The basic question posed by this sort of bad faith is whether one is still playing the game and how can we tell if bad faith is present when and if the formal aspects of rule adhesion appear to have been fulfilled.

Naturally, one might begin by asserting here that the batter is not playing the game since she or he is participating in a conspiracy to score fewer than twenty runs. Playing the game requires the batter to do the best they can and to score as many runs as possible. But a fuller understanding of the complexities of the game will demonstrate that this

16 O. Slot, "Money or the Boks" The Sydney Morning Herald (17 April 2000).
is not a universally verifiable truth of what it means to play the game. A batter may get out for less than an optimum score for any number of reasons. They might be batting when the captain chooses to declare. They might have been instructed to pick up the scoring rate and as a result have played a shot they might otherwise not have attempted. They might have believed the umpire made a mistake in a prior decision to give them not “out,” and as a result have played a shot deliberately intended to right that wrong by giving up their wicket. The possibilities are endless, anything might happen. And any of those things would still be cricket. The batter would still be playing the game. Good faith and bad faith are not bright lines of adjudicative demarcation but rather never fixed points of reference about what it means to talk about talking about playing the game. Hansie Cronje and his South African teammates simply had a series of democratic conversations about what it meant to them to play (or not) the game. Anything might go.

I will close this part of my engagement with It's All in the Game by imagining that the South African team had all decided to take up the bookmaker’s offer and throw the game. I assume that they would have had to do so while still giving the appearance of playing the game. Would we spectators and the players on the opposing side, as well as the umpires, have witnessed and participated in a game of cricket? Would we know? Is that important? What if only seven players had agreed, would the other four have been playing a different game? Is this a Platonic problem of shadows in the judicial and adjudicative cave called “playing the game” or is it an Aristotelian game which is no longer a game, or is it another game? Just what are we and they playing at here? Is good faith simply a way of making rules about making rules about making rules in a matrix of contingency spiraling away from us at all times?

During the infamous Bodyline series, the Australian captain, Bill Woodfull, famously said to the English team manager at the end of a bitter day’s play: “Of two teams out there, one is playing cricket, the other is making no effort to play the game of cricket.”

17 See D. Fraser, The Man in White is Always Right (Sydney: Institute of Criminology, 1993) 264-266. It is interesting to note here that when a Pakistani judicial inquiry into cricket corruption found Salim Malik guilty of attempting to fix matches by bribing opposition players, Australian commentators asserted that Malik had now replaced the English captain behind Bodyline, Douglas Jardine as “cricket’s biggest pariah.” Jardine, it should be noted, was guilty “only” of using the laws of the game to their fullest extent. He was a pure legal formalist who relied on the written text and ignored the spirit of the game. Malik, on the other hand, has been found to be a simple cheat. Australian moral judgments, which place legality a close second to cheating, demonstrate that “playing the game,” is, as Allan Hutchinson would no doubt agree, a complicated matter. See G. Baum, “The Man who Usurped Jardine as the Game’s Greatest Pariah” The Sydney Morning Herald
What would Hansie Cronje have made of such a conversation? Could he have been a good faith participant in the collective dialogue of Hutchinson's democratic non-foundationalist politics of law? Is he a good cricketer? Is he a cricketer only part of the time? Or is he a cricketer at all? I turn now to the final section of my engagement with It's All in the Game to look briefly at the question of what makes a "great judge," which may or may not answer these questions, however contingently.

III. LORD DENNING, NAZI JUDGES AND PLAYING (OR NOT) THE GAME

Like the issue of good faith, the question of what makes a great judge is central to the Hutchinson project of describing, explicating and critiquing the theory and practice of adjudication. Faithful to his iconoclasm, he proceeds to demolish all potential pretenders to the throne of an epistemological or ontological status for law. Through It's All in the Game, Hutchinson unfailingly explores what it means when he asserts that anything might go, even, especially when what might go may not be consistent with his self-professed political desires. He recognizes that coming to the point at which he can only say what might happen or what may be possible within a system of law demands that he confirm:

After all, slavery, anti-Semitism and racism are as much the creatures of law as antiracist initiatives to eradicate them; the judiciary cannot claim to be the consistent champions of the oppressed.18

Thus, the question of importance here is how do we, within all the contingent possibilities, find out what makes a great judge, and who fits the bill. For me, this is the most troubling aspect of Hutchinson's jurisprudential game and the part of his work which continues to bother me. By this I do not necessarily mean to suggest that the problem is with the author. In fact, as a reader who has read the author, I realize that the text which troubles me is at least partly of my own making. Nonetheless, I believe that a brief discussion of the "great judge" exposes not just the workings of my reading practices or of my psyche but that it also sheds some light on the politics of law inside and outside the game of adjudication.

Hutchinson offers Lord Denning as an example of a judge who meets his test for possible inclusion among the good and the great.

(26 May 2000) 42.

18 Hutchinson, supra note 2 at 136.
Denning fits into this category, as Hutchinson is at pains to point out, not on result based criteria, i.e. did he get it ’right,’ but on performance rankings and evaluations. Denning, like all “great” performers,

... played with a panache, a style that caught the imagination and changed people’s understanding of what the game is about. By making moves, they played the game as much with the rules as within the rules. Great judges recognize that law is not something to be mastered, but that it is an infinite game of transformation in which experimentation and improvisation are valued above predictability and faithfulness to existing rules and ideas of what it is to play the game.19

At this point, I do not want to bring into question the criteria for judging judges and judgments. Rather I wish to examine briefly whether Hutchinson has kicked a goal or booted the jurisprudential ball above the bar and into the crowd. In doing this, I am mindful that Hutchinson himself is critical of certain aspects of Denning’s adjudicative expertise and practice and is unsparing in unmasking judicial epistemological pretence, even when put forward by a “great judge.”20 Nonetheless, while Hutchinson’s performance is clearly marked by greatness, informed as it is with panache, style and innovation, in this case he may run the risk of booting the penalty wide of the goal.

Lord Denning is noted for writing well about bluebells in Kent and gruesome encounters with airplane propellers and for stretching the law in innovative and creative ways. That would put him into the category of “the great.” However, he is also known for his public comments about the unsuitability of Afro-Caribbeans for service on a proper English jury. He is infamous for his remarks about the attacks on the administration of British justice as a result of a series of “Irish cases,” which called into question police practices, and therefore the safety of criminal convictions. He declared that these assaults on the integrity of the system of justice could and should have been cured by the reintroduction of the death penalty. If that had been the law, according to Lord Denning, a “great” judge, there would be no, or at least fewer, disgruntled appellants left to bring British justice into disrepute.

I would argue that such statements do more than merely disqualify Denning from the category of the “great” judge. They also bring into question his very “good faith,” which as Hutchinson carefully points out, is the sine qua non of adjudication. At some level, we are revisiting here the oft-debated issue of “character,” of one important

19 Ibid. at 36. See also, to similar effect, ibid. at 300.

20 A fine example of Hutchinson’s intellectual good faith to the consequences of his own project can be found, ibid. at 167-70.
aspect of the public/private distinction and its relationship to suitability for judicial or related office. But this is, I believe, central to Hutchinson's interventions on the issues of identity and good faith in adjudication. As he carefully points out, good faith is vital to decisionmaking and playing the game in good faith is a moral and political practice. There are of course similar debates and examples from other fields of play which one could bring to bear here as well. Is Wagner (1) a great composer and an anti-Semite; (2) a great composer because he is an anti-Semite; (3) a great composer despite being an anti-Semite; or (4) not a great composer because he is an anti-Semite? What do we make, if anything, of Don Bradman, cricket's greatest batter, and allegations from his teammate Bill O'Reilly, that when he was captain, Bradman let his Masonic links and Protestant background influence his team selection policies to the detriment of Irish Catholic cricketers? Is he still a great cricketer? Two related examples from the world of the law, past and present, illustrate the dilemma and why identifying Denning as a great judge bothers me so much.

In 1999, Matthew Hale graduated from law school, completed the technical requirements for admission to the practice of law and applied for admission to the Bar of the State of Illinois. The Bar rejected his application. They rejected his application because Hale is the leader of the World Church of the Creator, a pseudo-religious organization which espouses the racial inferiority of Blacks and Jews, among other groups and which advocates a perverted "theology" of race hatred. He was deemed unsuitable for the practice of law. It is clear that many of us who share in Hutchinson's political and legal vision are at some level untroubled by the Bar's decision. Racism is an evil which must be combated and race hatred is a particularly pernicious variant of that social disease. Nonetheless, we would, as good non-foundationists, also be troubled by the Bar's decision. There is, for example, a long recent history of attempts to ban communists from the practice of law because of their belief in the revolutionary overthrow of the Constitution of the United States. There are First Amendment concerns, there are jurisprudential slippery slope scenarios, there are any number of

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21 See, for example, his discussion of gender identity and Justice Bertha Wilson, *ibid.* at 98-103.


contingencies to be considered before we decide whether a white
supremacist can or should be a lawyer, and when and how we are to
mount arguments to support our good faith decision in adopting our
never final position.

Many of these issues are discussed and critiqued in a non-
foundationalist way by Hutchinson in his analysis of the U.S. Supreme
Court decision in the cross-burning case of \textit{R.A.V.} \textsuperscript{24} For him, the
problems of criminalizing (or not) cross burning offer a clear way
forward to understanding what is meant by playing the game of legal
adjudication.

Of course, to fulfill such responsibilities, ludic judges will understand the need to go
much further than consulting legal materials in heeding the nonfoundational request to
pay close attention to context. Mindful that context itself is never entirely fixed and is
always reconfigurable, they will look to the social, historical, and economic dimensions of
the political context in which any practice of thinking about law must itself be
contextualized. They will ensure that they begin with a rigorous effort to understand the
social role of cross burning in American society and its political and psychological effects
on people of color. At the same time, they will wish to evaluate historically and
sociologically claims that banning such activities will actually result in general censorship
and a decrease in the extent and openness of political dialogue. In both instances, the
inquiry will be nonfoundational in scope and ambition. While gathering more
information and data about law and its social effects will not alone resolve the immediate
challenge of judicial decision making, it is an important undertaking. Such a critical
empiricism need not be positivist, determinist, behaviorist, or reductionist: being
nonfoundational in practice and purpose, it questions the very activity it undertakes.\textsuperscript{25}

This is an excellent concrete example of non-foundationalism, (if
it can be an –ism). It is also a fine example of what troubles me here. As
Allan Hutchinson would be the first to admit, the point at which the
deconstructive incision occurs is the result of a political choice. Here, the
choice has left no room in the political, legal and social context for
Matthew Hale and his like. Surely it is conceivable within any non-
foundationalist project, that one may be required to recognize that any
legal system which seeks to protect the innocent, or even one which
seeks to fully apprehend the political reality of a particular case, must
make room for the alleged perpetrator. Where in this analysis is the
need for a judicial socio-psychological investigation into how white
suburban youth become so alienated that neo-Nazi groups can convert
them to the cause of evil? What is it about “America” that young men
can feel that burning a cross on an African American family’s lawn is

\textsuperscript{24} Hutchinson, \textit{supra} note 2 at 301-13.

\textsuperscript{25} \textit{Ibid.} at 311.
either a valid political activity or "fun"? Why do many white Americans feel that the government is a vast conspiracy, controlled by international Jewry and aimed at excluding them from their own country? Why can’t Matthew Hale practice law and call for the segregation of Whites and Blacks? If the racist, Irish-bashing Lord Denning can be a judge, even a great judge, why does Matthew Hale fall over the wrong side of the touchline? What game are we playing here anyway?

The answer is that we are apparently playing the game of democratic adjudication or perhaps of adjudication within a democracy. But why? Where does democracy come from in Hutchinson’s brilliant account of the freedom and constraint of adjudication? It seemingly just appears. Thus: “Indeed, not only does a nonfoundational critique allow for talk of justice and betterment, but it provides the most fitting and effective complement to the transformative ambitions of a truly democratic politics.”

Hutchinson also writes that:

Of course, all commentators and critics will approach specific problems with their own prejudices and presumptions, but they must work to put them in political and judicial play. In participating in democracy's games in good faith, they can avoid the foundationalist tendency to allow generalizable principle to be the enemy of pragmatic good and to resist the antifoundationalist temptation to permit the political end to justify the institutional means. Nonfoundationalist critics recognize and accept that in playing the game, the issue of what it means to play the game both defines and is transformed by its continuing performances.

Of course, Allan Hutchinson is too good at what he does to essentialize democracy and to argue that it is a system of governance which is any more or less contingent in its possibilities than any other. Yet in his apparent insistence that judging, adjudication, good faith and greatness are to be determined to some extent against the template of democratic values and conversations, however contingent, he comes perilously close to kicking an own goal. Matthew Hale does not get to play the game, or even to sit on the bench, while Denning gets to make the rules, because, at some level, Hale is an un- or anti-democratic racist. Denning, on the other hand, was a racist and a bigot committed to some

27 Hutchinson, supra note 2 at 257.
28 Ibid. at 325.
29 For example, the index to Hutchinson, supra note 2 contains approximately twenty references to “democracy.”
contingent version of democracy in which he could innovatively find ways to exclude the Irish and Afro-Caribbeans.

Again I am not claiming that Allan Hutchinson is making this argument. I am saying that these are questions which trouble me after reading the book. I am however suggesting that if we are to take non-foundationalism seriously, we must, in the absence of any other possible epistemological or ontological template, accept the idea that any understanding of democracy is itself so possibly contingent that we can, in fact and in law, imagine a great Nazi judge. If that is the case, we should be both exhilarated by the ludic possibilities and scared to death of the game we are playing.

Imagine two judges in Weimar Germany in 1930. One is a Socialist, the other is a National Socialist. One interprets the Constitution as an instrument for the promotion of participatory democracy and the elimination of injustice. Certainly, the fact that the Weimar Constitution contained provisions guaranteeing social welfare and other "collective" rights would serve as a textual and contextual adjudicative support for this interpretative position. The second, influenced by the jurisprudence of Professor Carl Schmitt, believes that the true meaning and character of the Weimar Constitution is to be found in Article 48 which allows for a strong central executive to suspend other parts of the Constitution in times of emergency.

What we have here is a clear jurisprudential debate between two alternate readings of the same text. Each can be articulated by deploying the technical tools available to and recognizable by judges and lawyers as adjudication. There is here no epistemological, ontological or phenomenological distinction between these two judges or between these two judges and those Supreme Court justices described and deconstructed by Hutchinson in his discussion of R.A.V.

To return to Hutchinson’s articulation of the central requirement of good faith in adjudication:

What the requirement of good faith does demand, however, is that whatever interpretation is offered or whatever application is suggested, it must result from a genuine effort to make sense of the rule in hand or to deploy law’s argumentative resources in a conscientious way. Understood in this way, the requirement of good faith is more an issue of moral integrity than a matter of analytical accuracy; it is less about legal rightness than it is about political reasonableness.

We know from the sad and tragic history of Germany in the

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30 Or at least, wrongly convicted Irish "terrorists."

31 Hutchinson, supra note 2 at 191.
1930s and 1940s that the Nazi judge here, assuming she or he truly believes what she or he believes, can easily be seen to be a judge engaging in acts of adjudication. We also know, as I have argued elsewhere in more detail,\textsuperscript{32} that, after 1933, the Nazi judge would be recognizable as a great judge if and when she or he in good faith interpreted the text of a statute or of the Constitution in line not with its letter but with the spirit of the mass of Germany's citizenry and the political, cultural and social possibilities of that context. Then a judge who based a decision not in the black letter text of the Civil Code but in an innovative, skillful, new way of reading the political and cultural contingencies of the time and place in which the law was to be contextualized, the \textit{Volksgeist} in other words, could be easily classified as a great judge. Here the great judge would offer an expansive and contextualized reading of the apparent legal bar to annulment unless there was proof of an essential vice or defect not known to the petitioner at the time of marriage. The judge would find that even though the petitioner "knew" when they married in the 1920s that their spouse was a Jew, they could not have "known" then what it really meant to be a Jew and to marry a Jew. The legal text would take on a new life, breathed into it by the ludic brilliance and panache of a great judge. An apparently insurmountable bar to annulment is removed by innovative and good faith interpretation as part of playing the law game.

This same great judge might argue in another case that the legislative intent informing the ban on "sexual intercourse" between German and Jew must be read broadly; it must be construed in line with the latest discoveries of racial science and within the social and political context of the society. It must be read in light of other provisions prohibiting, for example, the employment of young German women as domestic servants in the households of Jewish men. The conclusion would be presented as a rigorous finding of law grounded in a non-foundationalist (or apparently so) approach. "Sexual intercourse" then includes a social kiss or hug as a matter of law.\textsuperscript{34} Great judge.

Nazi judges can and must be seen, within the intellectual and

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political practices of non-foundational jurisprudence, as complying (potentially at least) with the ideas of good faith and judicial greatness, unless we impose democracy as an informing *grundnorm*. Then, of course, there is the obvious danger that democracy might easily be constructed by some as a foundationalist norm. In non-foundational practice, however, there is no inevitable and unassailable, i.e. non-contingent, guarantee that adjudication in one version of the always temporary political arrangement known as “democracy,” can not include a respect for the opinions of the vast majority of 1930s German anti-Semites and for the cultural norms shared and created by them.

This, then, is what bothers me about Allan Hutchinson’s brilliant and exciting *It’s All in the Game*. I don’t know if Hansie Cronje was playing the game or not; I don’t want Matthew Hale to be a lawyer; I don’t think Lord Denning was a great judge; or at the very least I don’t want to cope with my involvement in a system in which he can be both a great judge and a racist bastard.

I agree with Mike Marqusee when he writes about the cure for cricket corruption: “Only in the democratic domain, where cricket and its meanings are shared and shaped by multitudes, can there arise a force strong enough to override the manipulations of the elite.”

I agree with Allan Hutchinson again that: “[Good faith] is more a matter of moral integrity than of analytical accuracy ….”

I also agree with Michael Stolleis, that:

Once the recommendations of natural law of the postwar period had lost their persuasive force ... the only thing left was recourse to a value-bound private morality, civic virtues, and democratic consciousness, and an appeal to the legal profession’s sense of political responsibility.

When I remember that Stolleis is talking about what separates Germany (and us) from a relapse into Nazi legality, I get a bit nervous. Allan Hutchinson has written an engaging, brilliant, insightful and troubling work. He has put the ball in play, kept it there and the result of the game is and will remain, in doubt. Him I trust, I’m just not sure about everybody else.


36 Hutchinson, supra note 2 at 191.