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# ARTICLES

## DEVILS AND ANGELS OF JUDICIAL INTEGRITY

JOSEPH W. BELLACOSA<sup>†</sup>

### INTRODUCTION

Judicial integrity and the highest standards of conduct are the bedrock principles for any respectable legal structure. History provides heroes who demonstrate punctilious adherence to, and villains who commit gross departures from, the *sine qua nons* needed for the achievement, or at least advancement towards the fair administration of the rule of law and ideals of justice.

A “Master Teacher”<sup>1</sup> of the law, New York State Court of Appeals Chief Judge—later Associate Justice of the U.S. Supreme Court—Benjamin N. Cardozo, referred to the rule of law as “what you and I are making it.”<sup>2</sup> He exemplified an abiding reverence for and deep understanding of the values,

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<sup>1</sup> See generally, Joseph W. Bellacosa, *Benjamin Nathan Cardozo The Teacher*, 16 CARDOZO L. REV. 2415, 2417 (1995). This Essay is dedicated to the illustrious service and sweet memory of my friend and colleague on the New York State Court of Appeals who passed away on January 7, 2016—The Honorable Judith S. Kaye, Associate Judge and Chief Judge (1983-1993; 1993-2007). As a successor to Chief Judge Cardozo’s seat and a great admirer of his unique judicial leadership, she authored the institutional biography of him found in *The Judges of the New York Court of Appeals*. See Judith S. Kaye, *Benjamin Nathan Cardozo*, in THE JUDGES OF THE NEW YORK COURT OF APPEALS 377 (Albert M. Rosenblatt ed., 2007).

<sup>2</sup> See Benjamin N. Cardozo, Former Chief Judge, N.Y. Court of Appeals, Address to the Graduating Class of St. John’s University School of Law (1928), *Our Lady of the Common Law*, in 13 ST. JOHN’S L. REV. 231 (1939), reprinted in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE 87, 95 (Margaret Hall ed., 1947). The Commencement Address to the first graduating class of St. John’s University School of Law in 1928. *Id.* at 87.

principles, character, standards, and traditions of how judicial officers serve a fundamental role in any civilized society. In “making” the rule of law, judges inevitably face challenges and choices to act in accordance with the highest standards of the offices they are privileged to hold. As the premier model of what any judge ought to be, Cardozo insightfully posed this about the art of judging:

The principles that are to determine choice must be formulated by that branch of the philosophy of law which is concerned with ends and functions. . . . You must not think of the choice as solely between logic and history, or logic and custom, or logic and justice. Often [] the strife will be one of civil war between the logics, the analogies, themselves, with social utility stepping in as the arbiter between them. A choice must be made.<sup>3</sup>

Speaking elsewhere on the subject of “Values,” he expanded his thesis with this soaring exhortation: “The submergence of self in the pursuit of an ideal, the readiness to spend oneself without measure, prodigally, almost ecstatically, for something intuitively apprehended as great and noble.”<sup>4</sup> Additionally, in his judicial opinions, Cardozo set the bar of service at its highest aspirational pinnacle in the oft-quoted: “Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”<sup>5</sup>

Against this luminous light, a foreboding dark cloud sweeps over from recorded colonial history demonstrating judicial hubris and unbridled zealotry, employed in ways that instead serve personal and predetermined ends by questionable means, unleashed in the abyss of standards and values.

## I. NEW YORK CONSPIRACY OF 1741

Historians and ordinary readers are intermittently fascinated by, and reminded of, the Salem witchcraft trials conducted in 1692 in the Massachusetts Bay Colony that resulted

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<sup>3</sup> See BENJAMIN N. CARDOZO, *GROWTH OF THE LAW* 56 (1924), reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 211, 220 (Margaret Hall ed., 1947) (delivered in 1921 as part of the William L. Storrs Lecture series at Yale Law School).

<sup>4</sup> See Benjamin Cardozo, Former Chief Judge, N.Y. Court of Appeals, *Values: Commencement Address to the Jewish Institute of Religion* (May 24, 1931), reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 1, 4 (Margaret Hall ed., 1947).

<sup>5</sup> See *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

in twenty public executions.<sup>6</sup> Less prominent in the public memory, though, are the arson conspiracy trials that took place in colonial New York City in 1741. The latter trials, conducted over a period of four months, resulted in thirty-four death sentences carried out by hanging, burning at the stake, and grotesque public obloquy of the bodies.<sup>7</sup> Dozens of other supposed wrongdoers were banished from the colony under the guise of pardons for flimsy accusations, like bearing false witness and noncooperation. A series of suspicious fires, initially investigated as insurrectionary conspiratorial arsons, set off this lower Manhattan version of a hysterical “witch-hunt.”<sup>8</sup>

While somewhat lost to history, the arson conspiracy trials were comprehensively recounted in 2005 in Jill Lepore’s *New York Burning: Liberty, Slavery, and Conspiracy in Eighteenth-Century Manhattan*. It cataloged the dark events of colonial New York’s past in vivid detail.<sup>9</sup> Lepore’s book makes for chilling reading of New York City’s colonial judicial history, with an important admonition of possibly useful application to perennial outbursts affecting the fair administration of justice. The revived stories of yester-centuries resonate with heightened interest and

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<sup>6</sup> See Michiko Kakutani, *Review: Stacy Schiff’s ‘The Witches,’ a Reign of Terror in 17th-Century Salem*, N.Y. TIMES (Nov. 12, 2015), <http://www.nytimes.com/2015/11/13/books/review-stacy-schiffs-the-witches-a-reign-of-terror-in-17th-century-salem.html>; see also Jane Kamensky, *The Witches: Salem, 1692*, by Stacy Schiff, N.Y. TIMES (Oct. 27, 2015), <http://www.nytimes.com/2015/11/01/books/review/the-witches-salem-1692-by-stacy-schiff.html>; Stacy Schiff, *Anger: An American History*, N.Y. TIMES (Dec. 18, 2015), <http://www.nytimes.com/2015/12/20/opinion/sunday/anger-an-american-history.html>; Stacy Schiff, *The Witches of Salem: Diabolical Doings in a Puritan Village*, THE NEW YORKER (Sept. 7, 2015), <http://www.newyorker.com/magazine/2015/09/07/the-witches-of-salem> [hereinafter *Witches of Salem*].

<sup>7</sup> See JILL LEPORE, *NEW YORK BURNING: LIBERTY, SLAVERY, AND CONSPIRACY IN EIGHTEENTH-CENTURY MANHATTAN* 109–10, 120 (2005); see also Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 11–12 (1995).

<sup>8</sup> See LEPORE, *supra* note 7, at 49–50.

<sup>9</sup> The book and the Horsmanden *Journal*, *infra*, were the subject of a “Welcome Home Re-Accession” Symposium at the historic Newport, Rhode Island Redwood Library & Athenaeum on May 11, 2012. An original copy of the *Journal* was restored to the permanent collection of that Library after having gone missing for 200 years. The panelists included Frank Williams, Former Chief Justice of the Supreme Court of Rhode Island, Keith Stokes, and the author, Joseph W. Bellacosa.

potential usefulness, as they sharpen the focus on these events against the screens of recent controversies arising out of modern challenges in the judicial realm of the criminal justice system.<sup>10</sup>

Daniel Horsmanden, the Third Justice appointed by the King's Governor in the New York colony, is a principal, albeit unprincipled, character of focus in the first section of this retrospective Essay.<sup>11</sup> The relentless zealotry of his conduct reflects that of an Inspector Javert-type character. Horsmanden, however, is cast as a real figure in this historical revisitation, not some fictional character in a Greek or Shakespearean tragedy. His misconduct ranks so inordinately high—or more aptly, low—in infamy because it constituted a serious departure from the very virtues of justice and integrity he was entrusted to dispense and sworn to uphold.

Horsmanden perpetrated a procedurally and time-compressed spectacle of investigation, indictment, trial, and a string of hideous executions of mostly black slaves. The underlying alleged arson crimes, as perceived by him and others in the tiny New York enclave, may have been accidental fires. Even if some of them constituted criminal arsons, they were amplified from wispy webs of gossiped conspiracies into a nefariously concocted widespread rebellious plot against the colony itself.<sup>12</sup>

Only a few decades before he arrived on the New York City scene, the fledgling colony had experienced early slave uprisings in 1712, in addition to some sporadic flare-ups elsewhere in the colonies as well.<sup>13</sup> These feeble insurrections were, thus, on the

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<sup>10</sup> See LEPORE, *supra* note 7, at 279–80; see generally THOMAS J. DAVIS, A RUMOR OF REVOLT: THE “GREAT NEGRO PLOT” IN COLONIAL NEW YORK (1985); PETER CHARLES HOFFER, THE GREAT NEW YORK CONSPIRACY OF 1741: SLAVERY, CRIME, AND COLONIAL LAW (2003); DON STEERS, THE COUNSELLORS: COURTS AND CRIMES OF COLONIAL NEW YORK (1968); KERRY WALTERS, AMERICAN SLAVE REVOLTS AND CONSPIRACIES: A REFERENCE GUIDE (2015).

<sup>11</sup> Long relegated to obscurity, Daniel Horsmanden has been restored to his ruefully earned public infamy by historian Jill Lepore, whose book provides an extensively researched account of the arson conspiracy trials of 1741. See LEPORE, *supra* note 7, at xv.

<sup>12</sup> See LEPORE, *supra* note 7, at 10–11.

<sup>13</sup> See 1 REVOLTS, PROTESTS, DEMONSTRATIONS, AND REBELLIONS IN AMERICAN HISTORY: AN ENCYCLOPEDIA 76, 78–81 (Steven L. Danver ed., 2011) (cataloging similar revolts in South Carolina in 1720 and 1739). Slave uprisings occurred long before colonial America, including the well-documented episode during the consulship of Cicero in 63 B.C.E., with the historic defeat of Cataline and his co-conspirators. See also MARY BEARD, S.P.Q.R.: A HISTORY OF ANCIENT ROME (2015).

anxious minds of the early settlers and their leaders, and posed at least a psychological threat to the stability, and even survival, of the communities.<sup>14</sup> The slave inhabitants in New York City constituted nearly twenty percent of the total population at that formative stage in the first decades of the eighteenth century, a significant number of unhappy and aggrieved residents, understandably so by today's standards of democratic freedoms and basic civil and human rights.<sup>15</sup>

Another foundational flaw in the rudimentary justice system that allowed matters to get out of hand was the absence of any checks or balances protocol as a firewall against Horsmand-en's arrogation and exercise of virtually exclusive judicial power.<sup>16</sup> He took advantage of the absence of the Chief Justice from the colony and filled the vacuum as the chief judicial presider motivated by his personally distorted standards and goals.<sup>17</sup> For example, instead of dispassionately and neutrally calming matters down, he fanned the flames of community paranoia, adding to the tensions among free, slave, and indentured residents, and the enduring rivalries and prejudices of the old Dutch and English communities.

That *ultra vires* agitation engendered, or at least contributed to, street violence, resulting in roving mobs shouting demands for extreme measures against the class of slaves suspected of threatening insurrection. Having helped whip up the community, instead of standing firmly athwart the unrest, Horsmanden then used the hysterical reactions as a form of perverse validation for the ensuing activities he stimulated.<sup>18</sup>

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*See generally* ROBERT HARRIS, *CONSPIRATA: A NOVEL OF ANCIENT ROME* (2011) (the second book of a trilogy of the era about Cicero and other famous Romans).

<sup>14</sup> *See* William E. Nelson, *Legal Turmoil in a Factious Colony: New York, 1664-1776*, 38 HOFSTRA L. REV. 69, 137-38 (2009) (noting white New Yorkers lived in constant fear of a slave revolt).

<sup>15</sup> *See* LEPORE, *supra* note 7, at xii; *see also* IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 54 (1998) (discussing the growth of slave populations nationwide and in New York).

<sup>16</sup> *See* LEPORE, *supra* note 7, at 83-85.

<sup>17</sup> Chief Justice James DeLancey had left the colony to mediate a land dispute in Massachusetts. It is intriguing to note that upon his return, DeLancey quickly ended the proceedings. *See id.* at 175.

<sup>18</sup> *See* Joseph W. Bellacosa, *Wise Words for the Present*, N.Y.L.J. (Dec. 22, 2014), <http://www.newyorklawjournal.com/id=1202712945539/Wise-Words-for-the-Present>. As a young man, Abraham Lincoln stated:

Whenever this effect [the agitation to take the law into a mob's own hands] shall be produced among us, whenever the vicious portion of the population

Although it was not wholly unusual in the eighteenth century for a judicial officer, often serving in multiple municipal roles, to head or participate in a criminal investigation, Horsmanden went beyond regularity and any objective standards related to allocated distribution of roles of authority, irrespective of more enlightened safeguards and principles of good conduct that may be operative when viewed from the clearer perch of hindsight.<sup>19</sup> For example, while exercising the role of presiding judge, he personally interrogated a host of conspirators and collaborators, including some highly questionable whistleblowers, anxious to curry favor or avoid prosecution themselves.<sup>20</sup> He then operated as both investigating prosecutor and accusatory body, treating the serially empanelled grand juries as compliant rubber stamps.<sup>21</sup>

Presiding over the majority of the ensuing trials, he sometimes directly instructed juries to return guilty verdicts.<sup>22</sup> In his *coup de grâce*, he sentenced thirty-four individuals to summary execution carried out under his obsessed personal direction, including seventeen sentences of burning at the stake, enacted in the equivalent of the medieval square.<sup>23</sup> In his zeal to identify, prosecute, and punish a long line of presumed guilty co-conspirators, Horsmanden seemed also driven by a personal ambition to enhance his own political stature, fueled by bigotry of class and race.<sup>24</sup>

Horsmanden was not satisfied with the powerful yet circumscribed judicial function, even as more flexibly understood and tolerated in that early frontier-like era.<sup>25</sup> Prejudgments of

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shall be permitted to gather in bands of hundreds and thousands, and burn churches, ravage and rob provision stores, throw printing presses into rivers, shoot editors and hand and burn obnoxious persons at pleasure, and with impunity, then depend on it, this Government cannot last.

See *id.* (alteration in original) (quoting HAROLD HOLZER, *LINCOLN AND THE POWER OF THE PRESS: THE WAR FOR PUBLIC OPINION* (2014)).

<sup>19</sup> See LEPORE, *supra* note 7, at 83.

<sup>20</sup> *Id.* at 113–15.

<sup>21</sup> *Id.* at 78–79.

<sup>22</sup> See SERENA R. ZABIN, *THE NEW YORK CONSPIRACY TRIALS OF 1741: DANIEL HORSMANDEN'S JOURNAL OF THE PROCEEDINGS* 64 (2004).

<sup>23</sup> See LEPORE, *supra* note 7, at 246 (listing causes of death in Appendix A, Table 9).

<sup>24</sup> *Id.* at 82.

<sup>25</sup> *Id.* at 78–80. It is historically significant that the decision to hold a trial for a slave was unusual in itself. In New York, at the time, slaves were rarely brought before any court, especially the highest court. *Id.* at 80.

these incidents constitute one of the other all-time deadly sins of the neutral magistrate principle, to say nothing of the inversion of the presumption of innocence.<sup>26</sup> Curiously, in order to enhance the fear of a slave insurrection as the justification of the “Kangaroo Court” operation, Horsmanden propped up the cases almost entirely on the sandy and shifting depositions of one Mary Burton, a servant girl who would repeatedly change her stories throughout the judicial reign of terror.<sup>27</sup>

When Horsmanden interrogated suspected persons, he badgered them until they coughed up what he was determined to get out of them by admission of guilt or implication of others.<sup>28</sup> He even descended to the depths of the horrid prison conditions of their confinement—secretly outside the public view—to continue his Javert-like inquests.<sup>29</sup> If some stalwart individual did not provide him with the information he wanted, he would simply remand the perplexed poor soul back to the extremely unpleasant and dangerous confinement.<sup>30</sup> By this method, it did not take the suspected individuals long to realize that in order to save their own skins—or so they thought—they needed to name names.<sup>31</sup> Still, as the jails swelled with suspected “co-conspirators,” Horsmanden never doubted his practices or methods as even possibly inconsistent with the proper execution

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<sup>26</sup> *Id.* at 83. However, by the standards of the eighteenth century, it was not unusual for defendants to go unrepresented. Ironically, the judge was deemed the protector of the accused. *Id.* at 84.

<sup>27</sup> *Id.* at 85, 177. Again, Horsmanden took the frontier-like rules of the time to the extreme. There were few rules of evidence, besides an unequally applied rule against hearsay, and a strong reliance on “crown witnesses.” *Id.* 83, 88. However, Burton was an especially poor witness, likely capitalizing on her own opportunity. *Id.* at 85.

<sup>28</sup> *Id.* at 90, 131. Not until 1783 had an English court disallowed forced confessions in *Rex v. Warwickshall*. See Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 482–83 (2005); see also LEPORE, *supra* note 7, at 106.

<sup>29</sup> See LEPORE, *supra* note 7, at 110, 194.

<sup>30</sup> *Id.* at 108. The proceedings echo the paradoxical situation of a “Catch-22.”

<sup>31</sup> A modern manifestation of this oppressive methodology might be excessive or unfair bail practices that lead to long confinements, such as at Rikers Island, with no opportunity for a speedy trial. Thus, psychological and unrealistically coercing pleas of guilty result just to escape some interminable and horrid circumstances. See Andrew Denney, *Lippman Announces Initiatives to Reform “Broken” Bail System*, N.Y.L.J. (Oct., 2, 2015), <http://www.newyorklawjournal.com/id=1202738656935/Lippman-Announces-Initiatives-to-Reform-Broken-Bail-System?slreturn=20160103102004>.

of the judicial function by fair standards of procedure. Rather, he simply charged forward to expedite the conflated proceedings.<sup>32</sup> Frightening to contemplate, Horsmanden considered the coerced confessions especially reliable, despite the medieval methods under which they were extracted, as “particularly and expressly confirmed in the Midst of the Flames, which are the highest Attestation.”<sup>33</sup>

In yet another odd twist, when the trials and executions had come to an end, Horsmanden engaged in another masquerade. Charged by the legislature to compile the laws of the colony, he finessed that discrete role into an opportunity to write a self-serving “history” of the proceedings.<sup>34</sup> Drawing on his personal account of the events, he published a “Journal” under the name “Recorder of the City of New York.”<sup>35</sup> This endeavor may have been designed to give the appearance of a disinterested official third party account. Lepore notes, “Horsmanden called himself ‘the Compiler’ of his *Journal*, never its author.”<sup>36</sup> Although Horsmanden likely intended the “Journal” as a contemporary and historical rationalization for the travesty he had perpetrated, it ironically provides some of the best contemporaneous evidence of his manifest departure from judicial standards of conduct, ethics, sound judgment, and basic human decency. Sadly, virtually all the official historical judicial records of the New York City Colonial Supreme Court of Judicature were lost in a fire in 1911 at the New York State Capitol that consumed many early records of the period, so the record is found abysmally wanting, except for his self-serving account.<sup>37</sup> History, however, has gained the upper hand with Lepore’s well-documented book.

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<sup>32</sup> See LEPORE, *supra* note 7, at 121.

<sup>33</sup> *Id.* at 106.

<sup>34</sup> *Id.* at 94.

<sup>35</sup> *Id.* at 122. Horsmanden had been given the title “Recorder” in 1735 and may have used the title to mask his more public and ignominious role as Third Justice. See *id.* at 77.

<sup>36</sup> *Id.* at 122. An original published copy of the Horsmanden *Journal* was re-discovered and placed in the permanent archival collection of The Redwood Library & Athenaeum in Newport, Rhode Island; another copy may be found in the collection of the New York Historical Society in New York City. See DAVIS, *supra* note 10.

<sup>37</sup> See LEPORE, *supra* note 7, at 93.

Daniel Horsmanden was a man reputedly mocked even by the lawyers who appeared in his courtroom, as they characterized his pompous grandiosity.<sup>38</sup> Although puffed up by his English legal education, he was terribly insecure in his lack of achievement.<sup>39</sup>

His career, fascinatingly, also includes a cameo appearance at the John Peter Zenger free-press trial, decided in New York in 1735, only six years before his date with infamy in the arson conspiracy trials.<sup>40</sup> Might that case have contributed, as some have theorized, to Horsmanden's over-reaction in the "arson-conspiracy" cases of 1741? Might that have triggered his micro-managed control over all phases of his docket? It could very well be that he was influenced, even if only subconsciously, by the shocked dismay of the powers-that-were over the jury nullification of the Crown's position in the Zenger case. This time Horsmanden would brook no chance of that on his watch, or so he may have thought.<sup>41</sup>

To such a man of failed ambition and mediocrity came a major civic crisis and judicial challenge, in the framework of a system that lacked matured legal principles, including the checks and balances principle.<sup>42</sup> A patronage judgeship from the Royal Governor vaulted him into the high and powerful position and circumstance that might have allowed him to rise to the occasion—a kind of "profile in courage"—and to make of himself a truly heroic figure, instead of one so weak in character and so lacking in wisdom as to be capable of inflicting fatal injustices on so many innocent individuals. He foolishly, and even seemingly with malice aforethought, chose the latter road to judicial infamy.

This sordid episode of New York's colonial legal history is thus useful to recall for the relevant lessons, especially as they pertain to today's legal systems experiencing their own

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<sup>38</sup> *Id.* at 66–67.

<sup>39</sup> *Id.*

<sup>40</sup> *See id.* at 72–74. By 1736, Horsmanden bragged about his role, saying, "Zenger is perfectly Silent as to polliticks." *Id.* at xv.

<sup>41</sup> Zenger's revenge of sorts was covering Horsmanden's trial proceedings, as the renowned journalist of the period in 1741, although the jurist evidently kept that reporter at arms length. *See id.* at 93–94.

<sup>42</sup> *See Nelson, supra* note 14, at 127–28 (explaining the judicial turmoil of the colonies in the early eighteenth century).

challenges and imperfections in the never-ending quest to honor and strive for Aristotle's ideal of Justice as the highest of the virtues.<sup>43</sup>

To contrast starkly the lack of Horsmanden's character and his degradation of any decent standards of judicial conduct, it is helpful to recall Cardozo through the beautiful words of Chief Judge Cuthbert Pound, the successor to Cardozo's Center Chair at the Court of Appeals. Judge Pound honored his colleague when the latter departed Albany for Washington in 1932 to take his seat on the United States Supreme Court. Lamenting the loss of "the sunshine of our beloved Chief's smile,"<sup>44</sup> Judge Pound wrote:

The bar knows what earnestness of consideration, fairness of grasp, and force and grace of utterance you have made your power felt. . . . Only your associates can know the tender relations which have existed among us . . . the diligence with which you have risen before it was yet dawn and have burned the midnight lamp to satisfy yourself that no cause was being neglected.<sup>45</sup>

Just as Cardozo rightfully earned the highest rank in the Pantheon of great jurists, Horsmanden sank to a Dantean circle of condemnation.<sup>46</sup> In sum, the renowned Judicial Saint is juxtaposed in plain view opposite a lowly Judicial Fallen Angel.<sup>47</sup>

## II. SALEM WITCH TRIALS OF 1692

The 1741 events in New York City reverberate across the centuries with a haunting echo of the more infamously renowned "witch trials" that erupted a mere half-century earlier and just 200 miles up the northeast coast. The latter episode was given fresh attention in 2015 with the publication of Stacy Schiff's best

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<sup>43</sup> ARISTOTLE, *POLITICS* 9 (Aeterna Press 2015) (classifying justice as the highest of the virtues).

<sup>44</sup> See Bellacosa, *supra* note 1, at 2425 (quoting FRANCIS BERGAN, *THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932*, at 342 (1985)).

<sup>45</sup> See Kaye, *supra* note 1, at 381.

<sup>46</sup> Dante reserved the ninth and lowest circle of hell, in *Canto XXXI to XXXIV*, for those who violate the public trust. See EDWARD WILBERFORCE, *DANTE'S INFERNO AND OTHER TRANSLATIONS* 158 (Macmillan & Co. 1903).

<sup>47</sup> See Cardozo, *supra* note 4, at 5 ("The end comes, and behold it is illuminated with the white and piercing light of the divinity with it. We have walked with angels unawares.").

seller, *The Witches: Salem, 1692*, and the 2016 Broadway revival of Arthur Miller's masterpiece play, "The Crucible," demonstrating renewed fascination with the subject.<sup>48</sup>

Even during its own period of the eighteenth century, some of the public became troubled by the events in Salem. An observer made this astute observation diagnosing a rueful metastasis between the New York City and Salem occurrences: "It makes me suspect that your present case, [and] ours heretofore, are much the same," penned an anonymous letter writer to one of New York's most prestigious lawyers, pointing out that the series of "horrible executions" in New York "puts me in mind of our New England Witchcraft in the year 1692 Which if I dont [sic] mistake New York justly reproached us for, & mockt at our Credulity about."<sup>49</sup> The infamous events of Salem involving its own chilling cast of judicial villains, spins a tale described as "one of the greatest legal fiascos of our nation's history."<sup>50</sup>

In 1692, the judicial authorities of the Massachusetts Bay Colony of Salem rendered its sweeping set of miscarriages, to wit, twenty death sentences. From that calamity, two judicial villains stand out among a larger Salem cast: Magistrate Judge John Hathorne and Chief Justice of the Court of Oyer and Terminer, William Stoughton. For the purposes of this Essay, the historical events of Salem and New York in time and nature, whatever their differences, share a common theme: distorted exercise of the awesome judicial power, borne of arrogant over-reaching of invested authority. Yet, they differ in provenance—the first

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<sup>48</sup> See Ben Brantley, *Review: In Arthur Miller's 'Crucible,' First They Came for the Witches*, N.Y. TIMES (March 31, 2016), <http://www.nytimes.com/2016/04/01/theater/review-in-arthur-millers-crucible-first-they-came-for-the-witches.html>; Adam Goodheart, *How Satan Came to Salem*, ATLANTIC (Nov. 2015), <http://www.theatlantic.com/magazine/archive/2015/11/how-satan-came-to-salem/407866/>; Buzzy Jackson, "The Witches: Salem, 1692" by Stacy Schiff, BOS. GLOBE (Oct. 24, 2015), <https://www.bostonglobe.com/arts/books/2015/10/24/book-review-the-witches-salem-stacy-schiff/fWmnl29igBdED8x0jPqfHN/story.html>; Kakutani, *supra* note 6; Kevin Nance, *Stacy Schiff's "The Witches" Is an Intoxicating Brew of History*, USA TODAY (Nov. 1, 2015), <http://www.usatoday.com/story/life/books/2015/11/01/the-witches-salem-1692/74704552/>.

<sup>49</sup> See LEPORE, *supra* note 7, at 203–04.

<sup>50</sup> At least up to then, in pre-Nationhood colonial era including New York City as well, with some lessons learned for the Nation's foundational documents of governance. See Martha M. Young, *The Salem Witch Trials 300 Years Later: How Far Has The American Legal System Come? How Much Further Does It Need To Go?*, 64 TUL. L. REV. 235 (1989).

driven by out-of-control religious fervor of a diabolical nature, and the other, a half-century later in Old Manhattan, by secular discord and civic paranoia.

As Lepore notes about Manhattan, nothing in colonial America “just happened.”<sup>51</sup> Perhaps then it is no surprise that when adolescent young women in Salem began a “foray[] into the occult,” and befriended a slave named Tituba, locals cried “witchcraft.”<sup>52</sup> In both England and the colonies, witchcraft was a serious crime, punishable by death, with the local laws relying on biblical justifications.<sup>53</sup> When colonists compiled a legal code, they classified witchcraft as a capital offense more serious than murder, poisoning, and bestiality.<sup>54</sup> The Salem religious paranoia resulted in nineteen people being hanged, and one crushed by rocks, suffering death by suffocation.<sup>55</sup> What is surprising, however, is that in the midst of these manic disturbances, no one had the presence of mind or pangs of conscience, nor the courage, intelligence, wisdom or downright common decency to stand up and shout, “Stop!”

The Salem community trials also gained momentum from some muscle flexing of the new court, wishing to demonstrate its authority. On May 14, 1692, William Phips, the appointed Royal Governor, arrived back from England to the colony with a newly authorized legal charter, thus establishing a new judicial structure.<sup>56</sup> The charter had been negotiated by Increase Mather, a Puritan minister, who would work with his son, Cotton Mather, to defend unqualifiedly the actions and members of the court they helped to put in place.<sup>57</sup>

By June 10, less than one month later in the midst of the witchcraft mania, the court issued its first death sentence. Although Horsmanden in New York City largely played the role of inquisitor and enforcer, these roles were divided among several officials in late seventeenth-century Salem. Phips's lieutenant governor, William Stoughton, was appointed Chief Justice, joined

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<sup>51</sup> See LEPORE, *supra* note 7, at 51.

<sup>52</sup> See Young, *supra* note 50, at 236–37.

<sup>53</sup> See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 45 (1993).

<sup>54</sup> See STACY SCHIFF, THE WITCHES: SALEM, 1692, at 66 (2015).

<sup>55</sup> See FRIEDMAN, *supra* note 53, at 46.

<sup>56</sup> See Young, *supra* note 50, at 239–40.

<sup>57</sup> See SCHIFF, *supra* note 54, at 169–70.

on the bench by John Hathorne and Jonathan Corwin. They struggled with mounting caseloads of rampant witch accusations that fed off one another.<sup>58</sup>

As in colonial New York City, the rudimentary criminal procedures of the era strongly favored the prosecution; the trial was an inquisitorial process, an accused rarely had counsel, and standards of proof and reliability of evidence were barely observed.<sup>59</sup> Moreover, even compared to the early-stage modalities of the era, the professional protocols of practice were also relaxed or altogether dispensed with in Salem due to the “dangerous character of witchcraft.”<sup>60</sup>

Stoughton, revered and respected in the colonial community as a gifted legal authority, believed a good judge “dared to follow his conscience.”<sup>61</sup> With no higher authority than his own “shock-the-conscience” sense of danger, Stoughton’s inner voice was deaf to the high standards of objective law and procedure evoked and promulgated in a more enlightened later century by the likes of Chief Judge Cardozo and so many other wise jurists with a more refined and better calibrated compass setting.<sup>62</sup> A political drifter like Stoughton, on the other hand, seemed determined to be on every side of every colonial dispute, polemically playing to the crowd and strategizing for his own best interest.<sup>63</sup>

During the yearlong “Inquisition-like” proceedings, Stoughton and his colleagues, especially Hathorne, imprisoned nearly 150 individuals and coerced many of them to confess to devil inhabitation of selves and others—accusations based on little more than unreliable hearsay and hysterical fantasies. The judges arbitrarily ordered speedy executions of some of those unwilling to admit guilt and imprisoning others who did not, calculating that their testimony might eventually be induced and useful in implicating others as a result of horrid prison conditions.<sup>64</sup> In order to gain control of the situation and damp down the perceived crisis of wild paranoia unleashed in the community, Stoughton worked equally feverishly to indict many

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<sup>58</sup> SCHIFF, *supra* note 54, at 182–83.

<sup>59</sup> *Id.* at 206.

<sup>60</sup> See FRIEDMAN, *supra* note 53, at 46.

<sup>61</sup> See SCHIFF, *supra* note 54, at 236.

<sup>62</sup> See *infra* notes 79–80, for comments on the separation of powers and John Adams.

<sup>63</sup> SCHIFF, *supra* note 54, at 312.

<sup>64</sup> *Id.* at 283–84.

“on . . . meager evidence and at an accelerated pace.”<sup>65</sup> Even as some of the suspected persons of interest invoked venerable English judicial protections to assert innocence or bewilderment about what was happening, Stoughton instead impatiently sentenced them to hang in the interest of time.<sup>66</sup>

Stoughton went egregiously further. When Governor Phips's expedition to Maine left Stoughton in primary control—shades of Horsmanden filling the New York City vacuum—one of his first acts was simply to overrule a pardon Phips had granted, in effect recommitting a case back to the jury with a direction for a guilty verdict.<sup>67</sup> While some in Salem would come to see the error of their ways and even apologize for their roles, Stoughton remained adamant and never relented.<sup>68</sup> A madness had taken hold of the community, and unfortunately Stoughton wielded his gavel to give it frightful and fatal force.

In the Salem debacle, another notable historical figure emerged. Cotton Mather was among the colony's renowned authors and famed religious authorities. He wrote extensively, but with cautious equivocation, about the merits and methods being employed in Salem's witch hunt.<sup>69</sup> Yet, he was steadfastly supportive of the authoritarian jurists, especially Stoughton, extolling the latter's intellectual expertise, integrity, and probity. His authorial objective was also self-promotional, however, and

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<sup>65</sup> *Id.* at 308.

<sup>66</sup> *Id.* at 308–09. Despite the rudimentary criminal process, colonial lawyers were surely familiar with the renowned rights guaranteed by the Magna Carta. For over 800 years, the Magna Carta has served as a foundation “to establish the rights of subjects against authority,” exalting “the principle that authority was subject to law.” See J.C. HOLT, *MAGNA CARTA* 46 (3d ed. 2015); see also Michael Steenson, *Roots of Constitutional Government Magna Carta at 800*, 72 *BENCH & B. MINN.* 18, 21 (2015) (“The entire social and political structure of America rests upon the cornerstone that all men have certain rights which are inherent and inalienable.”); see generally THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>67</sup> See SCHIFF, *supra* note 54, at 233.

<sup>68</sup> See John M. Lund, *The Contested Will of “Goodman Penn”: Anglo-New England Politics, Culture, and Legalities, 1688-1716*, 27 *L. & HIST. REV.* 549, 567 (2009); see also SCHIFF, *supra* note 54, at 375 (noting that Judge Sewall reflected on the witch trials when reading Matthew 12 at home in 1696: “If ye had known what this meaneth, I will have mercy and not sacrifice, ye would not have condemned the guiltless”).

<sup>69</sup> See SCHIFF, *supra* note 54, at 323.

not a factually faithful contemporary historical account.<sup>70</sup> Like Horsmanden's *Journal*, Mather's writings in retrospect suffer a boomerang fate—demolition by exposure to facts and truth.

No acquittals were rendered in the witch trials—everybody was deemed and found guilty. Moreover, an accused individual became guilty before even stepping into the courtroom. While Stoughton's tribunal distorted due and fair process to achieve a predetermined endgame, Sheriff George Corwin, the nephew of Judge Corwin, took further advantage with scandalous nepotistic lawlessness. He stole or destroyed property of many of the accuseds, sometimes even before verdict.<sup>71</sup> Without any court order or justification, the sheriff seized land and possessions, sold cattle, and stole their victuals.<sup>72</sup> Surviving family members were often forced to buy back their possessions or pay steep fines.<sup>73</sup>

Only a few years earlier, some of these same men had toppled a colonial government.<sup>74</sup> By 1692, as collaborators in this witch siege, they slipped over into the role of “outlaws” manipulating the law and their authority to satisfy their own personal fears and goals by a twisted execution of the rule of law.<sup>75</sup>

### III. COMPARISONS

It is important to make this caveat that these illustrative—not at all illustrious—jurists were exceptions to faithful oath-guided service. They came across as so weak that they succumbed to the temptations of their awesome authority and thus became blinded into making fatal wrong choices, as Cardozo posed the challenge.<sup>76</sup> They thus failed to rise to the occasion of conducting themselves as fair-minded neutral magistrates.<sup>77</sup> Instead, these outliers disgraced the black-robe roles by

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<sup>70</sup> See Richard H. Werking, Note, “Reformation Is Our Only Preservation”: *Cotton Mather and Salem Witchcraft*, 29 WM. & MARY Q. 281, 286 (1972).

<sup>71</sup> See *id.*

<sup>72</sup> See SCHIFF, *supra* note 54, at 253.

<sup>73</sup> *Id.* at 315–16.

<sup>74</sup> *Id.* at 313.

<sup>75</sup> See *Witches of Salem*, *supra* note 6.

<sup>76</sup> See CARDOZO, *supra* note 3.

<sup>77</sup> Even their own descendants were uneasy about what happened. For example, Nathaniel Hawthorne, the grandson of Judge Hathorne, wrote generations later to criticize the Salem Trials atmosphere and even changed the spelling of his name out of embarrassment for the tie to his ancestor. See SCHIFF, *supra* note 54, at 415.

transmogrifying their unique duty into a rogue and conflated prosecutorial fury and frenzy.<sup>78</sup> Their conduct surely lacked the latter-day Cardocean exaltation for the fundamentals of integrity, probity, and wisdom; they substituted self-interest for the common good, and abuse of invested authority for personal fame and privileged rank. What should have been an opportunity for true heroism, attaining the heights of Aristotelian justice and laudable civic virtue, became a mockery of justice.

The later-evolved, unique contribution to the framework of a system of checks and balances<sup>79</sup>—a bedrock genius principle of the American secular creed with its renowned “wall of separation” between state and religion—might also have helped them. At the very least, it might have exposed them to some “push-back” or even removal from their positions, which they wielded with unfettered and feared, not respected, judicial power. Sadly, the secular differentiated governance enlightenment came too late for them, and yet it came about perhaps in part as a result of hard lessons learned from an historical attentiveness to their egregious lapses.<sup>80</sup>

The fires in lower New York had set off a localized hysteria. It was as though that jittery core conspiracy was some sort of early hint of a “national security threat” outcry within the little colony, seeming to justify or rationalize the relaxation or even

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<sup>78</sup> “The prosecutor has more control over life, liberty, and reputation than any other person in America.” See Robert H. Jackson, Attorney Gen. of the U.S., later Supreme Court Associate Justice and Nuremberg Chief Prosecutor, *The Federal Prosecutor*, Address at the Second Annual Conference of U.S. Attorneys (Apr. 1, 1940) (transcript available at <http://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>).

<sup>79</sup> A system of checks and balances has been essential to the governing structure of this Nation. During the “second revolution,” adopting the Constitution after the failure of the Articles of Confederation, the founders implemented a framework that has become the envy and beacon of the world for over two centuries. Deserving of special attention and gratitude for this contribution to wise governance is John Jay, New York’s first Chief Judge and, notably also, the first Chief Justice of the U.S. Supreme Court. See generally JOSEPH J. ELLIS, *THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783-1789* (2015).

<sup>80</sup> John Adams, a founder of the Massachusetts commonwealth, would refer to the trials as a “foul stain upon this country.” See SCHIFF, *supra* note 54, at 412.

elimination of ordinary procedural rights and safeguards. Similarly, in Salem, the populace was jittery from a religious craze, with an added dose of bigotry at work as well.<sup>81</sup>

Both episodes damaged the delicate inner ear of acceptable norms of humane conduct in a civilized and well-governed society. While these atrocities are not likely to be replicated in the same form or degree in modern times or anywhere in this great Nation, vigilance must be constant lest evil disguised in some modern garb exerted by a new cast of extreme zealots makes an appearance. Mature North-Star principles of prudent and tested judicial procedure should be kept on high alert as the firewall against intruders supplanting their operation on the seat of true justice.

In its own place and time zone, the Horsmanden catastrophe even outdid the madness of the more infamous Salem Witch Trials, at least as to the body count of thirty-four victims over twenty innocent souls, and in the ferocity in the form and manner of those New York City executions.

At bottom, the powerful public officials described in this Essay operated as officious elitists who deemed their weaker neighbors in the two colonies as inferior to their super-inflated rank and puffed-up egos. They not only prejudged those whom they personally dragooned before themselves to “the bar of justice” as presumed guilty of allegedly dangerous crimes and sins of the most severe nature, but they also psychologically bludgeoned these many individuals to adduce coerced and fantasized evidence against themselves and their neighbors. They showcased their victims to the communities with their mockery of so-called “show trials” and brutal executions, sacrificing any semblance of legitimacy and human decency driven by a paranoid obsession of incipient conspiratorial rebellions and insidious devil witchcraft inhabitation.

The judgment of history is rightly not kind to these traitors to justice and to their oaths of service to a higher authority than themselves. Salem and New York City during the periods and

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<sup>81</sup> Of course, one cannot escape the irony of the Puritans’ emigration to escape from England’s religious bigotry against them, only to have them establish colonies thoroughly intolerant of people of other faiths. See SCHIFF, *supra* note 54, at 405.

episodes described were alien places in this New World, reflecting a Kafkaesque Old World quality, ultimately roundly condemned.<sup>82</sup>

#### IV. A MODERN-DAY MANIFESTATION

As fascinating and instructive as the distant historical record of these New York City and Salem events are detailing the exercise of unchecked power, they set a context and gain enhanced significance from empirically experienced events in my own career over the last six decades. I happened to witness—and played a role in part as well—an aberrational episode in New York's modern history in the late twentieth century concerning abuse of prosecutorial and judicial power. To be sure, it was different in kind and gravity, but in its own genre it demonstrates how enormous power exercised by zealots can run amuck with disastrous consequences to many victims' rights and reputations.<sup>83</sup> In the modern age, media instantaneity and symbiotic collaborations amplify the wrongs, engendered by officials flaunting their authority and violating fair dealing by leaking prejudicial and confidential information, either as unfounded rumors or speculative theories.<sup>84</sup>

The dangers and pitfalls of this particular facet of recent history is dramatized by the conflicted deployment of judicial and prosecutorial power, working in tandem—shades of the New York City and Salem confluences of discrete functions. My observation of these disturbing manifestations spring from discrete overlapping roles as a lawyer, academician, Practice Commentator for McKinney's CPL volume set from 1974 to 1985, and as a court official, first as Clerk and Counsel to the Court of Appeals, then Chief Administrative Judge, and ultimately a Judge of the Court of Appeals from 1987 to 2000.

By Executive Order in 1972, Governor Nelson Rockefeller appointed a special prosecutor with jurisdiction over perceived rampant corruption in the criminal justice system of New York

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<sup>82</sup> See, e.g., FRANZ KAFKA, *THE TRIAL* (David Wyllie trans., Dover Publications, Inc. 2012) (1925).

<sup>83</sup> See Joseph W. Bellacosa, *Cogitations Concerning the Special Prosecutor Paradigm: Is the Cure Worse Than the Disease?*, 21 ST. JOHN'S J. LEGAL COMMENT. 615, 634–35 (2007).

<sup>84</sup> *Id.* at 629.

City.<sup>85</sup> Political forces as well as founded concerns were in play when that office, and the person selected to lead it, superseded the five elected District Attorneys of New York City's five counties with a wide-ranging jurisdictional power.<sup>86</sup> This new edifice was given a virtually unlimited personnel and budget operation.<sup>87</sup>

My pointed focus in this perspective flows naturally into the theme of this Essay because of the joint designation in the Executive Order of a Special Judge as the sole authorized trial jurist, albeit, authorized under an unusual provision of the State Constitution.<sup>88</sup> The handling of this unusual docket emanating from the work of the Special Prosecutor should have raised immediate red flags. What ensued eventually exposed the inherent flaw as the lawyers of Special Prosecutor Office and the Special Presiding Judge seemed to operate at times and in key cases in a loose familiar form of behind-the-scenes collaboration, instead of on a neutral distanced arms-length basis.<sup>89</sup> Inevitably, real and perceived conflicts of interest occurred, including private ex parte meetings between the Special Prosecutor attorneys and their "Special Judge." Defense counsel were excluded and their clients were disadvantaged by this flagrantly unethical practice, no matter how massaged their unreassuring rationalizations that the meetings, even during ongoing trials, were related only to nonsubstantive, administrative, technical details and scheduling.

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<sup>85</sup> See Richard J. Condon, *The Office of the Special Prosecutor to Investigate Corruption in the Criminal Justice System in New York City*, 1 POLICE STUD. 32, 33 (1978) (explaining the executive orders utilized by the Governor in 1972).

<sup>86</sup> Bellacosa, *supra* note 83, at 629.

<sup>87</sup> *Id.*

<sup>88</sup> See Lawrence T. Kurlander & Valerie Friedlander, *Perilous Executive Power—Perspective on Special Prosecutors in New York*, 16 HOFSTRA L. REV. 35, 38 (1987) (explaining the vague powers granted in the New York State Constitution regarding the appointment of special prosecutors).

<sup>89</sup> See Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS, 355, 375 n. 134 ("You must never forget that your goal is total annihilation.") (quoting Maurice Nadjari); see also Herman Schwartz & Bruce Jackson, *The Prosecutor*, 4 STUDENT LAW. 16, 19 (1976) (noting that Nadjari's staff committed at least a dozen felonies, including lying to a grand jury, falsifying public records, intentionally misleading a public official, and filing a statement known to be false).

Over a course of years, many cases that went to trial or adduced pleas were reversed and dismissed on appeal.<sup>90</sup> Appeals, however, do not restore lost reputations and careers after the enormous damage is inflicted on many individuals and especially upon the fragile integrity fabric of the fair administration of justice.<sup>91</sup>

The core vice in the framework of this Executive Order, conflating the prosecutorial and judicial role in a virtual or perceived joint venture, led to many other procedural vices. Apart and in addition to the inherent flaws to the integrity of process and in the insubstantiality of many of the cases themselves that could not withstand the independent scrutiny of neutral appellate review, the investigations and prosecutions were marred by other excesses of a chest-thumping and chest-puffing variety. For example, press releases, press conferences, and leaks of Grand Jury investigations of an inflammatory, tenuous, and unfair nature seemed to spew forth from tabloids, and even the *New York Times*, so-called Paper of Record, because some of the reporters were favored “leakees” by the Office of the Special Prosecutor.

As if the too-cozy working relationship with the Special Judge were not bad enough, this Fifth Estate factor weighed its finger onto the already unbalanced scale in favor of the Special Prosecutor’s loaded hand. Ironically, a special set of targets of the Special Prosecutor was the judicial branch of government itself, or at least targeted members of the judicial class.<sup>92</sup>

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<sup>90</sup> See *People v. Mackell*, 40 N.Y.2d 59, 63, 351 N.E.2d 684, 686, 386 N.Y.S.2d 37, 39 (1976); *Cunningham v. Nadjari*, 39 N.Y.2d 314, 317–18, 347 N.E.2d 915, 917, 383 N.Y.S.2d 590, 591–92 (1976); *People v. Rao*, 53 A.D.2d 904, 906, 386 N.Y.S.2d 441, 444 (2d Dep’t 1976); *Steinman v. Nadjari*, 49 A.D.2d 456, 458, 375 N.Y.S.2d 622, 623 (2d Dep’t 1975).

<sup>91</sup> See *Bellacosa*, *supra* note 83, at 626. A tip of the hat is called for to the memory of Supreme Court Justice Antonin Scalia whose prescient dissent in *Morrison v. Olson* lays out the policy and jurisprudential faults of the Special Prosecutor “pass-the-buck” modality. See 487 U.S. 654, 697–99 (1988) (Scalia, J., dissenting) (“Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.”).

<sup>92</sup> History is littered with illustrative examples of corrupt power. Notorious episodes of false accusations have ranged from the Red-baiting era of Senator Joe McCarthy in the 1950s to the McMartin child molestation trial in the 1990s to the false rape accusations of the Duke Lacrosse team in 2006. See generally STUART TAYLOR & KC JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND

The point of this particularized reference is to emphasize what was forgotten, or never learned, from the misdeeds of Horsmanden, Stoughton, and Hathorne: the extreme dangers of concentration of unchecked and inherently conflicted power. At least in the modern manifestation, appellate court checks and balances and the power of outspoken opposing voices willing to shout “Stop” eventually ended the reign of prosecutorial abuses.<sup>93</sup> After four years, that Special Prosecutor’s Office had inflicted considerable unjustified harm on individuals, and to the torn tapestry of the administration of justice: 296 people were indicted on various accusations of corruption, 500 investigations were ongoing, and \$14 million of taxpayer dollars had been spent.<sup>94</sup> And very little of this misguided zealotry held up, so it ended up a waste of resources and abuse of process as well. Then and now, reverence for the law must triumph over the “extremist emotionalism” of zealotry.<sup>95</sup>

## V. CONCLUSION

Today, entrusted guardians of the noble ideal and treasured virtue of justice might take for granted that, in addition to other foundational protections this Nation’s people enjoy, overt acts and proven reasonable linkages—modern-day barriers to prosecutorial overreaching affecting “conspiracy” indictments and sustainable convictions—are essential elements of proof. These barriers were unknown to “conspiracies” of bygone eras. Other, virtually universal, modern-day protections—found in

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THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE (2008) (the accusations ended with the removal, disbarment, and imprisonment of District Attorney Michael Nifong); *see also* David Shaw, *Where Was Skepticism in Media?*, L.A. TIMES (Jan. 19, 1990), [http://articles.latimes.com/1990-01-19/news/mn-226\\_1\\_media-coverage](http://articles.latimes.com/1990-01-19/news/mn-226_1_media-coverage) (recounting how “a lynch mob syndrome” fueled the investigation into the McMartin childcare molestation case). I became acutely aware of this kind of abuse of power when a student of mine informed me that a job interview with the Office of the Special Prosecutor shifted to questions about me, his Criminal Law professor. That my role on the appellate defense team would be used as a collateral inquiry of an unsophisticated young student shocked my conscience and emboldened my determination to defeat and expose this kind of unethical behavior. *See* BELLACOSA, *supra* note 83, at 631–32.

<sup>93</sup> *See New York: An Abrupt Exit for the Superprosecutor*, TIME (Jan. 5, 1976), <http://content.time.com/time/magazine/article/0,9171,947607,00.html>.

<sup>94</sup> *See id.*; Jack Newfield, *Nadjari: In His Heart He Knows You’re Guilty*, VILLAGE VOICE (Oct. 17, 1977), at 11, <https://news.google.com/newspapers?nid=KEtq3P1Vf8oC&dat=19771017&printsec=frontpage&hl>.

<sup>95</sup> *See* Bellacosa, *supra* note 18.

matured and tested criminal trial practices dealing with voluntariness, fairness, psychologically humane conditions, and admissible evidentiary corroboration requirements to discern and cross-verify reliability and truthfulness of confessions—were nowhere to be found in Horsmanden's, Hathorne's, and Stoughton's times and tribunals. Their times and tribunals said nothing of the investigatory means used to find, acquire, and extract admissible evidence, nor the total absence or diametric inversion of the presumption of innocence. None of these later developed protections, however, lets these reprobates so easily off the hook for their fundamental misuse of their judicial powers.

As neutral ministers and objective guardians of justice, the misconduct of these colonial public officers was misdirected towards the elimination of imagined threats of evil-doers and devil-witched-dazed neighbors. Their actions manifested a self-righteous hubris and arrogant abuse of power entrusted to them. They committed fundamental violations of natural law and corrupted the core code and virtue of justice. Justice, in the end and pervasively, ought to be the operational foundation stone of any judicial system. Of course, how it is realistically administered by the boots on the ground in the courthouses is as important as the high ground upon which its definitional edifice and abstracted ideal are erected.

In my opinion, however, any list of illustrative misdeeds and rogue operators—past, present, and realistically and ruefully likely to be replicated in some form in the future—rate as comparatively lesser lapses when measured against the fatal and numerous atrocities perpetrated by this one British jurist on the New York bench, and the Massachusetts Bay colonial jurists on their “stacked bench” in Salem.

George Santayana warned, “Those who cannot remember the past are condemned to repeat it.”<sup>96</sup> Centuries earlier, Cicero looked back to history, contemplated his existential present, and pondered the future of the Roman Republic: “To be ignorant of what occurred before you were born is to remain always a child. For what is the worth of human life, unless it is woven into the life of our ancestors by the records of history.”<sup>97</sup> A young and

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<sup>96</sup> See GEORGE SANTAYANA, *THE LIFE OF REASON: THE PHASES OF HUMAN PROGRESS* 312 (The Floating Press 2009) (1906).

<sup>97</sup> See Geoffrey Kellow, *The Rise of Global Power and the Music of the Spheres: Philosophy and History in Cicero's De re publica*, in *ENDURING EMPIRE: ANCIENT*

already astute Lincoln applied that learning to the necessity to avoid mob rule, warning of “the growing disposition to substitute the wild and furious passions, in lieu of the sober judgment of courts; and the worse than savage mobs, for the executive ministers of justice.”<sup>98</sup>

Fortunately, New York and the Nation are the beneficiaries of the wisdom of the unique genius of President Lincoln and Chief Judge Benjamin N. Cardozo. The latter’s illuminating writings and his purity of a purposed life as a jurist shine a light of highest integrity, intellectual excellence, and objective standards of conduct that eclipses personal subjective machinations. Emphatically, as a newly inaugurated Abraham Lincoln said, “The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.”<sup>99</sup>

Those who are given the responsibility to administer justice and to navigate new challenges in today’s juridical world, however different from those described in this Essay, must do better. Abuses of power that can show up anytime in many forms, shapes, and degrees of gravity and consequence can be checked and trumped by fine and faithful jurists who pay attention to history and adhere to enduring values. The guidance and admonitions are available to sustain intellectual integrity and principled stability of public institutions by judges acting with fairness, humble restraint, under the highest objective standards promulgated by wise forebears.

To return to and close with Chief Judge Cardozo, where the journey through this Essay began, “The end comes, and behold it is illuminated with the white and piercing light of the divinity with it. We have walked with angels unawares.”<sup>100</sup> The aspiration is that judicial process and the communities it serves will benefit from those better angels, in defeating fallen judicial angels who may exercise a devilish form of judicial zealotry. In doing so, all may learn from history and its finest teachers, who

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LESSONS FOR GLOBAL POLITICS 147–50 (David Tabachnik ed., 2009). *See generally*, ROBERT HARRIS, *DICTATOR* (2015).

<sup>98</sup> *See* Bellacosa, *supra* note 18.

<sup>99</sup> Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).

<sup>100</sup> *See* Cardozo, *supra* note 4, at 5.

inculcate through the passion of a “Preacher Militant,”<sup>101</sup> a respect, and even reverence, for the rule of law administered with principled and fair justice for all.

Cardozo held as a personal treasure a letter sent to him by Justice Oliver Wendell Holmes, in which the hard-bitten realist and thrice-wounded veteran of the Civil War defined for his friend the “measure of success” in life and the law. It is the “trembling hope” of striving each day to achieve one’s ideals; it is not the place, prominence, power or prestige that one amasses.<sup>102</sup>

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<sup>101</sup> See EDMUND MORRIS, COLONEL ROOSEVELT 263 (2010).

<sup>102</sup> Bellacosa, *supra* note 1, at 2433; Benjamin Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682–92 (1931) reprinted in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 77, 86 (Margaret Hall ed., 1947).