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A Response: Why William Nelson's Analysis of the Law Department 1946–1965 Is Wrong

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THE HONORABLE PAUL A. CROTTY

A Response: Why William Nelson's Analysis of the Law Department 1946–1965 Is Wrong

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At the Law Department's Alumni/ae Dinner on September 6, 2006, William Nelson read excerpts from his forthcoming book, *Fighting for the City: A History of the New York City Corporation Counsel*.[1] He reached a remarkable conclusion: for the two decades from 1946 to 1965, the Catholic Archdiocese of New York exerted a considerable influence over the leadership at the Law Department, and led the Department astray to engage in the pursuit of Communists in city government. The author's thesis seemed to be: (1) the Catholic Church was vigorously anti-Communist; (2) all Corporation Counsels during this period were practicing Catholics, of Irish heritage from Brooklyn; and, therefore, (3) the Law Department's enforcement of anti-Communist loyalty statutes must be attributable to the Catholic Church. This syllogism is quite defective. The thesis continues: not only were the Corporation Counsels Catholic, most of them graduated from a less prestigious, Church-affiliated law school—the Fordham University School of Law. The implication is that they were either overly-attentive or outright submissive to ecclesiastical dictates. At the time, I expressed my doubts about the validity of the author's theory. I was assured that others shared my concern and that the matter would be corrected.

When I received the final version of the book in January 2008, in connection with the seminar which was held on February 6, 2008, at New York Law School, I was distressed to find that the conclusion, now set forth at length in Chapter Seven of the history, had not been corrected at all, except for the insertion of a single false disclaimer.[2] Since there was no correction of the author's assertions and rank speculation continued to substitute for fact, I protested. Both the Law Department and New York Law School suggested I comment in writing so that my responses could be considered at the symposium to be held at the law school on February 6, 2008. This writing is an amplification of my comments.

A history commissioned to honor the memory of Allen G. Schwartz should be accurate and not based on speculation or vilification.[3] Instead, we are treated to the author's own idiosyncratic view of the Law Department during the two decades following World War II. To paraphrase the late Senator Daniel Moynihan, the author may be entitled to his opinions, but he is not entitled to his own facts. I write now to set the record straight and to correct the author's misinterpretations and mistakes in the order in which he makes them.

As an initial matter, the author pays little attention to the tremendous changes in New York City during the post-war years. There is no discussion of the city's remarkable growth, the enactment of anti-discrimination legislation to address the rapid changes in the city's demographic composition, new highways that carved up

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1. William E. Nelson, Fighting for the City: A History of the New York City Corporation Counsel (2008).

2. *See id.* at 210.

3. In his February 1, 2008, reply to my initial letter, the author states that Michael Cardozo instructed him that "the book had to be dedicated to Allen Schwartz and that it had to recognize the special contribution that Allen made to the creation of the Law Department as we know today." Response from William E. Nelson to author (Feb. 1, 2008) (on file with the New York Law School Law Review). All of us who respect Allen Schwartz's memory are pleased that Mr. Cardozo had the foresight to so instruct the author. Otherwise, he would have been free, as he stated, to "determine the book's substance." *Id.* at 2.

communities, urban renewal programs and policies, new housing programs, the state's takeover of the city subways, the rise of municipal labor unions, massive shifts in the economy, or the adoption of a new zoning code and landmarks law, which still governs the city today. The Law Department was involved in all of these changes, and many more. Rather than analyze the Law Department's work on these critical issues, however, we are treated to the author's screed on the Red Scare. Though it was a decidedly dark moment in American history, the Law Department was only one of many actors in this drama. The polemic continues on the Corporation Counsel's qualifications and on some Law Department employees who are said not to have worked very hard. It is hard to divine what these personal *ad hominem* attacks add to the history of the Law Department.

Concerning the supposedly reduced qualifications of the Corporation Counsels during this period, the men who served O'Dwyer, Impellitteri, and Wagner were quite able, as their subsequent careers demonstrated.[4] Murphy and his family created Capital City Broadcasting, which later took over the ABC Network; McGrath formed his own law firm and served as the president of East New York Savings Bank; Adrian Burke went on to the New York Court of Appeals; Leo Larkin became General Counsel at W.R. Grace & Co.; and Charles Tenney, a distinguished United States district judge.

The author seems to suggest that the Corporation Counsels were less qualified for the position, in part, because they attended Fordham Law School, rather than a more prestigious—read Ivy League—law school. Tenney, for example, a Yale graduate, is not criticized, because he had "a different background and political sensibility."[5] Attendance at Fordham does not mean the student was of limited ability; it reflects other matters. Before World War II, Catholics and Jews were excluded from Ivy League schools or admitted in only small numbers. As members of first- or second-generation immigrant families hit hard by the Depression, many lacked the resources to attend distant law schools. Thus, the fact that many Catholics and Jews went to Fordham and other local law schools probably reflects the social and economic realities of the interwar period. The appointment of Fordham graduates as Corporation Counsel does not indicate, as the author suggests, a diminishment or reduction in quality. It means that qualified people were coming from different, and heretofore disenfranchised, segments of our population.

The suggestion that the Archdiocese of New York or Cardinal Spellman had a special influence during this period is rebutted by the fact that all the Corporation Counsels came from Brooklyn. If the Archdiocese or Cardinal Spellman had the claimed influence the author suggests, the Corporation Counsel would have come from Manhattan or the Bronx, where the Archdiocese is located. Brooklyn is a separate, independent diocese, with its own hierarchy.

It is far more likely that Corporation Counsels being from Brooklyn reflected an allocation of inter-borough political power. Politics has always played a role in the

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4. *See* Nelson, *supra* note 1, at 183–88.

5. *Id.* at 187.

governance of the city. And politics and geography have always played a role in what persons are appointed to which positions. The Board of Estimate was composed not only of the three city-wide officials, but also the five borough presidents, whose chief responsibility was to advocate for his borough's needs in the city budget. But the borough presidents also had to accommodate important constituents in city offices. To this end, the city developed something of an appointment allocation arrangement based on borough characteristics. For example, Staten Island might be particularly interested in who ran the ferries. Accordingly, a Staten Island resident would be preferred for a Ports and Terminals post. Likewise, the Borough of Queens has the largest system of roads. Its borough president might advocate for a Queens resident to be the head of Transportation. It is not surprising then that another borough, Brooklyn, had a hold on the Corporation Counsel post.[6]

The sourcing of the author's quotes is troublesome. Sometimes, Chapter VII reads more like a breathless disclosure in the New York Post. There are a series of quotes about a "long term" lawyer who describes Corporation Counsels who long preceded him in a disparaging way.[7] It is not clear whether the source of this information is Edith Spivack or John Hogrogian. It is important to distinguish between the two. Hogrogian, of course, is not a historian, and it is not clear whether Ms. Spivack was really speaking for the record or simply passing time with Hogrogian's tape recorder. Ms. Spivack is entitled to her opinion; she knew and worked with the individuals who are mentioned. Hogrogian was not even born when some of them were serving. And if he is the actual source for the author's comments, then he (not Edith Spivack) should be cited.

As to Edward J. McLaughlin, who is said to be "bright but not interested in working hard,"[8] what legitimate historical purpose is served by insulting and demeaning the memory of the departed? I met Mr. McLaughlin many times when he and other "old timers" would join Ms. Spivack in her office and recall the "glory days of yesteryear." She always told me he was a wonderful gentleman who worked hard and helped establish the Law Department's excellent reputation. She never said what is attributed to her in this history.[9]

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6. Mayors are accustomed to these informal arrangements. The story is told that when Mayor O'Brien was elected, he was asked who his Commissioners were going to be. He replied that he did not know because the leaders—both political and elected—had not told him yet. Chris McNickle, To Be Mayor of New York: Ethnic Politics in the City 80–81 (1993). When Ed Koch appointed Bob McGuire as his Police Commissioner, Gabe Pressman asked Koch, "What is so new or remarkable about that? The Police Commissioner has always been an Irish Catholic." Koch turned to McGuire and deadpanned, "Bob, you told me you were Jewish." *Id*. at 271–72.

7. *See* Nelson, *supra* note 1, at 187.

8. *Id*. at 190 (quoting Interview of John Hogrogian with Edith Spivack (May 29, 2003) (on file with the Law Department)).

9. I do not believe the author realizes how out of touch he is with what goes on in the Corporation Counsel's office. He portrays Peter Campbell Brown as quixotic for suggesting that the "[c]ity could acquire land by eminent domain and sell it to the Brooklyn Dodgers to build a new stadium and thereby dissuade the team from moving to Los Angeles . . . ." *Id.* at 195. But that is just what the Bloomberg administration did to attract the basketball Nets to Brooklyn. The Law Department was surely involved

That said, I want to focus on the author's views discussed under the heading, "B. The Politics of Demagoguery," where he elaborates on his remarkable thesis that the Catholic Archdiocese of New York dominated the work of the Law Department for the two decades of the post-War period, and induced Catholic Corporation Counsels to pursue Communists in city government.[10]

During the post-World War II decades, American democracy was in a battle with Soviet dictatorship and our system of capitalism was engaged in a titanic struggle with worldwide Communism. In retrospect, it might be said that the Law Department—indeed all of America—could have done a better job in resisting the "Red Scare." It is quite another thing to say it failed to do so because the Corporation Counsel was a Catholic. The author believes "context" is important.[11] During the years from 1946 to 1965, the full context must include, at a minimum, America's reaction to what the Soviet Union did to Eastern Europe, turning independent nations into captive satellite states; to the Berlin Airlift; to China's fall to Communism; to the treaty alliances in Europe and Asia to contain the spread of Communism; to the Korean war; to the enactment of loyalty programs at the federal, state, and local levels; to immigration legislation to keep Communists out of the United States; and to the entire atmosphere of the Cold War. America's battle against worldwide Communism continued for more than four decades. In the 1980s, Ronald Reagan was still referring to the Soviet Union as the "evil empire." All of this is context. America's concern with Communism was not limited locally to New York. It was a national concern and it was not limited temporally, as it spanned over four decades.

Here in New York City, the Law Department was not the only entity to engage in a vigorous form of anti-Communism. For example, in the 1940s and 1950s, David Dubinsky and Alex Rose led their unions out of the American Labor Party, because it was Communist-dominated and founded New York's Liberal Party. Dubinsky and Rose recognized that being labeled "Communist" was fatal to the accomplishment of their labor and political goals. Further, there was a strong reaction in New York City to the revival of anti-Semitic purges in the Soviet Union and the exiling of Russian Jews to Siberia in the late 1940s.[12] From diving under desks in public school air raid drills to watching grainy images of congressional witch hunts, for all Americans,

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with that project, including condemnation of privately held property, with resale or long-term lease to the developer. The Law Department has been involved in various economic development deals for New York's sports teams, including the New York Yankees, the New York Mets, and the U.S. Tennis Open. This occurred during the Koch, Dinkins, and Giuliani years, and, as indicated, continues in the Bloomberg administration. None of these mayoral initiatives could succeed without the full cooperation of the Law Department and the Corporation Counsel. The author cannot deny that.

10. *Id.* at 193–218.

11. The author's reply of February 1, 2008, says it is the historian's task to place known events in a "broader context." Context does not justify speculation, however, and it cannot substitute for the facts. Nelson Response, *supra* note 3, at 1.

12. *See* McNickle, *supra* note 6, at 81.

including all New Yorkers, there was a steady drum beat of anti-Communist talk.[13] Had the Law Department stood up against this onslaught, it would have been perhaps the only public law agency in America to do so.

Nor was this Red Scare unprecedented: America engaged in the great Red Raids after World War I.[14] Interning Japanese citizens during World War II is another unfortunate example of what America does when it feels threatened. Perhaps some of this same attitude explains our combined legislative, executive, and judicial actions in the post-9/11 world. These fevers which overcome the American body politic from time to time do not have their primary source in the Catholic Church. Perhaps the source is worthy of analysis, but it does not belong in the history of the New York City Law Department.

I dwell on this because it is ludicrous to think that the Law Department and Corporation Counsels were somehow acting on the Church's anti-Communist bidding. The Law Department was simply doing what it had always done: analyzing, interpreting, and enforcing the laws on the books. Indeed, buried within the text is the reason for the Law Department's actions: state legislation that insisted on a loyalty regime and the exclusion of Communists from civil service and public schools.[15] Moreover, these laws survived sustained constitutional scrutiny by the Supreme Court. The author seems to find fault with "lawyers, in thrall to a

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13. No less a legal mind than Judge Learned Hand, writing for the Second Circuit in *United States v. Dennis*, demonstrates just how ingrained the perceived threat of Communism was in American legal circles:

> The American Communist Party, of which the defendants are the controlling spirits, is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. It has its Founder, its apostles, its sacred texts—perhaps even its martyrs. It seeks converts far and wide by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy. The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means. That article, which is a common-place among initiates, is a part of the homiletics for novitiates, although, so far as conveniently it can be, it is covered by an innocent terminology, designed to prevent its disclosure. Our democracy, like any other, must meet that faith and that creed on the merits, or it will perish; and we must not flinch at the challenge.

183 F.2d 201, 212 (2d Cir. 1950). The Supreme Court affirmed the conviction and adopted Judge Hand's formulation of the clear and present danger test. *See* Dennis v. United States, 341 U.S. 494, 510 (1951).

14. The Espionage Act of 1917, as amended by the Sedition Act of 1918, proscribed promoting the success of and rendering aid to America's enemies. In *Debs v. United States*, a Socialist who had previously run for president of the United States was tried, convicted, and imprisoned for violating the Espionage Act of 1917. 249 U.S. 211 (1919). Additionally, in *Gitlow v. New York*, the Supreme Court also sustained New York's indictment and conviction for anarchy (i.e., advocating the overthrow of government by force or violence) of a Socialist who published a "Left Wing Manifesto." 268 U.S. 652 (1925). Of course, prosecutions such as those in *Debs* and *Gitlow* might not be possible today, but as of the post-World War II decades, the Supreme Court's holdings on the First Amendment had not yet evolved to today's more rigorous standards for protecting speech and association.

15. Judge Hand underscored the motivation for such laws in holding that the potential infiltration of Communists in American government posed a "clear and present" danger:

majoritarian democratic ethos."[16] But the Law Department is not a free agent. It did what the law requires: operate within the legal framework and enforce the law, especially laws that, on challenge, are found to be constitutional by the highest court in the land. In all of these circumstances, it is passing strange to suggest that the Law Department agenda was hijacked by the Catholic Church when it simply served the city in the same capacity it always had.

While Communism certainly had an impact on the Catholic Church in Eastern Europe,[17] the fact is that the author is simply speculating when he claims the events influenced how the Law Department practiced law. Nothing in the Law Department files or opinions suggests any such relationship. In his February 1, 2008 rejoinder, the author complains that limiting his research to the Law Department's file would be "antiquarian."[18] But at the symposium held on February 6, 2008, the author called for the Catholic Church to open up its files so that he or others might continue to search for any evidence of his remarkable thesis.

As to the Catholic Church's view on the Establishment Clause, disputes over public aid to parochial education are well known and still on-going. It is not unusual for church groups to seek public benefits available to others. I might add that these efforts are not limited to Catholics.[19] With regard to goals of the Catholic Church, surely one of the Law Department's greatest victories was *Walz v. Tax Commissioner of New York,* which sustained a New York State law that made churches, temples, and other charitable institutions exempt from real property taxes.[20] The author states that the city's victory was "clearly . . . correct," and that the city "clearly was right" to defend a law enacted by the state legislature.[21] But, as we have already seen, the author thinks that other validly enacted statutes (e.g., loyalty oaths) should not have been enforced. He does not intimate, however, how one is to discern what statutes should or should not be enforced. Obviously, it cannot be done forty years after the fact.

> True, we must not forget our own faith; we must be sensitive to the dangers that lurk in any choice; but choose we must, and we shall be silly dupes if we forget that again and again in the past thirty years, just such preparations in other countries have aided to supplant existing governments, when the time was ripe. Nothing short of a revived doctrine of laissez faire, which would have amazed even the Manchester School at its apogee, can fail to realize that such a conspiracy creates a danger of the utmost gravity and of enough probability to justify its suppression.

Dennis, 183 F.2d at 213.

16. Nelson, *supra* note 1, at 196.

17. *See id.* at 197–99.

18. *See* Nelson Response, *supra* note 3, at 1.

19. *See generally* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (Christian); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (Jewish); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (Evangelical).

20. 397 U.S. 664 (1970).

21. Nelson, *supra* note 1, at 246–47.

The author talks of a sermon given by a priest in 1949 at a mass celebrated by a Cardinal in a cathedral.[22] Shortly after the sermon, we are told, the Law Department began its pursuit of Communists. The reader is not told how many Law Department officials or employees were there to hear the sermon. I am sure the sermon was given, but the fact that the Law Department started pursuing subversive groups shortly after the sermon does not mean the two events are related. The logical fallacy has a Latin name, which I will give, even at the risk of being called a Catholic: *post hoc ergo propter hoc.* Indeed, they are not related, as the author admits, because the Law Department's implementation of the loyalty program started two years earlier in 1947.[23]

The basis for the Law Department's actions was the New York State statute, which mandated a loyalty program, and not the 1949 sermon in a cathedral. The lawyer in charge of investigating alleged Communist infiltration into the civil service ranks was Saul Moskoff.[24] He was from Queens, not Brooklyn, and he certainly was not an Irish Catholic. In one of the reminiscences attributed to Edith Spivack, she said she felt badly that "Saul had undertaken to do this kind of prosecuting";[25] not badly enough, however, to leave the Law Department in protest. Indeed, Edith Spivack was still there fifty years after Saul Moskoff stopped prosecuting Communists who were city employees.

The author also does something else that is an open attempt to introduce prejudice. He quotes from a speech by Peter Campbell Brown whose "rhetoric [was] reminiscent of that used several years earlier" by the priest who gave a sermon at which a Cardinal celebrated mass in a cathedral.[26] A few pages later, the author repeats the same tactic. This time, he demonstrates how absurd his argument is. He notes that the constitutionality of New York State's loyalty statute was affirmed by the U.S. Supreme Court in an opinion by Mr. Justice Sherman Minton "in language strikingly similar to that appearing earlier in the *Brooklyn Tablet*."[27]

At issue in *Adler v. New York City Board of Education*[28] was the constitutionality of the Feinberg Law, enacted by the New York State legislature and signed into law by Governor Dewey.[29] The Feinberg Law barred from civil service employment those who advocated the overthrow of government by force or violence and prevented Communists from teaching in New York State's public schools. While the case was

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22. *Id.* at 200.

23. *Id.* at 201.

24. *Id.* at 203.

25. *Id.* at 204.

26. *Id.* at 202.

27. *Id.* at 204–05. The *Brooklyn Tablet* is the Catholic Newspaper of the Brooklyn Diocese.

28. 342 U.S. 485 (1952).

29. Feinberg Law, N.Y. Educ. Law § 3022 (Consol. 1949), invalidated by Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

argued when Denis Hurley was the Corporation Counsel, Michael Castaldi[30] argued the case for the city. With him on the brief were Seymour B. Quell[31] and Bernie Friedlander.[32] The author claims to respect all of them, but does not explain how they were overcome by this Catholic anti-Communist fever. Indeed, they were not: they were simply very good lawyers doing their very best to interpret and apply the law, without regard to religious support for a particular law. The New York Attorney General's office, represented by Wendell Brown, Nathaniel Goldstein, and Ruth Kessler Toch, joined as *amici*, urging the constitutionality of the Feinberg Law. None are Irish Catholics.

It is highly doubtful that Mr. Justice Minton read the *Brooklyn Tablet*. We know he did not cite it in his opinion. The Supreme Court found six to three that the Law Department's enforcement of the Feinberg law was not unconstitutional.

If someone read the Supreme Court reports—as opposed to conjuring what the *Brooklyn Tablet* may have said—one would appreciate the context of the decision. In the two years immediately prior to *Adler*, the Supreme Court held that Congress and the National Labor Relations Board could constitutionally require affidavits from union officials attesting that they were not Communists.[33] Further, the Court in *Dennis v. United States* had sustained the convictions of leading members of the Communist Party for advocating the overthrow of the government, in violation of the Smith Act.[34] The *Dennis* trial was conducted before Judge Harold Medina in the Southern District of New York, just across the river from the Brooklyn Supreme Court where *Adler* was tried. The chief prosecutor in *Dennis* was Irving Saypol, later a distinguished New York State Supreme Court judge. Yet, no one can claim that the federal government's decision to prosecute Communists can be attributed to the Catholic Church. No such claim is made against any other agency (e.g., the National Labor Relations Board) for prosecuting Communists during the same period. I submit that any claim that the city's enforcement efforts against Communists is attributable to a Corporation Counsel's Catholicism is baseless.

The author does not tell us whether the Mayor directed the Law Department to proceed to enforce the Feinberg law, or whether the Law Department acted on its own. Either way, the Law Department had any number of good reasons to enforce the Feinberg law—it was validly enacted by the state legislature, duly signed into law by the governor, its enforcement was consistent with at least three decades of Supreme Court precedents, and upon challenge, it was held to be constitutional by the Supreme Court. None of these reasons have anything to do with religion or the religious affiliation of the Corporation Counsel.

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30. Castaldi is reported to be a "knowledgeable lawyer." Nelson, *supra* note 1, at 189.

31. Quell is "one of the bright young stars" who was the head of the Law Department's Appeals Division. *Id.* at 189.

32. Bernie Friedlander was a long-time, distinguished lawyer who served well into the 1990s, and during my tenure was one of the Law Department's resident experts on municipal pension law.

33. Am. Communications Ass'n v. Douds, 339 U.S. 382 (1950).

34. 341 U.S. 494 (1951).

The author objects to the notion that Catholics were pretending to be the "true expression of Americanism."[35] The charge may reveal something about the author's own mindset, but it has nothing to do with the history of the Law Department.[36] The author appears not to be mindful of American history which shows a prejudice against Catholics, starting with the Know Nothing Party (a reaction to immigration by the famine Irish); the Klu Klux Klan; "Rum, Romanism and Rebellion" during the campaign of James G. Blaine for president; and the South's (and the rest of the country's) reaction to Al Smith's candidacy in 1928. Surely it is not unusual for the objects of prejudice, here Catholics, to try to establish that they are Americans and entitled the same blessings as any other citizen, regardless of their religious faith. But that is a story for a different book. It does not belong in the history of the Law Department.

It is a slur for the author to suggest that Tammany Hall—at the behest of the Catholic Church—was attacking Jewish academics.[37] It will be recalled that the Law Department's prosecutor of Communists in city government was Saul Moskoff. Surely, Catholic politicians never conducted pogroms against Jewish academics. New York City was never run that way. The Tammany Hall politics was based on the coalescing of differing racial, religious, and ethnic groups—Jews, Christians, Irish, Italians, Poles, Russians, African-Americans, Hispanic Americans—into one political party. The success of that formula kept Tammany Hall in power for a majority of the first sixty years of the twentieth century. Certainly there were tensions and conflicts, but Tammany's strength was based on intergroup harmony, not the promotion of discord.

After this sixteen-page attack, the author inserts a false disclaimer: "We should pause here to ask who should be blamed for New York City's Red Hunt and for the Law Department's role in it. Not, I urge, the Catholic Church."[38] This disclaimer changes none of the false claims made in the prior sixteen pages, where the author maintains precisely the opposite position.

The author suggests that the Law Department's participation in the Red Hunt could have been stopped had the Corporation Counsel and the legal staff at the Law Department made professional judgments on the basis "of their understanding of the law and of the obligations to the City as a whole."[39] I am sure that if any attorney at the Law Department had a moral objection to enforcing constitutional statutes, she or he would not be asked to do so. It is possible that the Law Department could have challenged state and local law, or even federal law, which imposed a regime of loyalty oaths and exclusion of Communists from government and trade unions. Such

35. Nelson, *supra* note 1, at 207.

36. Indeed, the charge reflects a recurrent theme of American nativism, which seeks to impose a Protestant or secular "Americanism" on an "un-American" Catholic minority. Philip Hamburger, Separation of Church and State 191 (2002).

37. *See* Nelson, *supra* note 1, at 208.

38. *Id.* at 209.

39. *Id.* at 210–11.

a position would have been unprecedented, however, and I am not aware that any public law organization ever did so. Certainly, Supreme Court decisions stretching over thirty years consistently held that federal and state loyalty programs and the banning of Communists from public employment and labor unions were constitutionally permissible. Perhaps most lawyers at the Law Department believed that validly enacted statutes should be enforced, until held to be invalid by a court of competent jurisdiction. The author's argument might be a worthy subject for legal philosophy, but it does not remotely suggest that the Catholic Church led the Law Department astray.

The falseness of the purported disclaimer[40] is further demonstrated by the author's immediate return to the attack. This time, we are told that Adrian Burke's "campaign against smut" was linked to the Catholic Church's campaign against secularism and sin.[41] Mr. Justice Frankfurter upheld the constitutionality of the statute by which the Corporation Counsel had obtained an injunction "against one Louis Finkelstein"[42] in *Kingsley Books v. Brown*.[43] According to the author, Mr. Justice Frankfurter's opinion "contained the usual echoes of religiosity."[44] Any assumption that these echoes were seeded in Justice Frankfurter's mind by Peter Campbell Brown, who succeeded Burke, and mouthed Catholic pieties when he argued the case before the Supreme Court, would not be well-grounded. Brown did not argue the case; Seymour Quell did, and Fred J. Iscol[45] wrote the brief.

The author's mischaracterization of the decision continues: "[f]or the five justice majority, . . . as for Corporation Counsel and the Catholic hierarchy . . . the government could properly restrain citizens from succumbing to the temptation of sin."[46]

According to the author, the decision was an effort to "protect citizens from sin so that those citizens could remain free to do God's will."[47] Even a casual reading of *Kingsley* demonstrates how absurd this is. The opinion does not reek of "religiosity"; but rather it is an arid analysis of the First Amendment and section 22(a) of the New York Code of Criminal Procedure, which provided for the seizure of materials found to be obscene after a non-jury trial.[48] The law at issue was enacted by the New York

40. *See id.* at 209; *see also supra* text accompanying note 38.

41. *See* Nelson, *supra* note 1, at 185, 211.

42. *Id.* at 212.

43. 354 U.S. 436, 445 (1957).

44. Nelson, *supra* note 1, at 212.

45. Iscol is reported to be "an older man" who "read all of the advance sheets" and was a source of both wisdom and guidance to younger lawyers at the Law Department. *Id.* at 189–90. His reputation is well-deserved.

46. *Id.* at 212.

47. *Id.*

48. N.Y. Crim. Proc. Law § 22(a) (2007) (current version at N.Y. C.P.L.R. § 6330 (McKinney 1996)); *see also* Laws of the State of New York, ch. 925, § 22(a) (1941) (providing the original language of N.Y. Crim. Proc. Law § 22(a) (1941)).

State legislature in 1941, signed into law by Governor Herbert Lehman, and amended in 1954 when Thomas Dewey was the governor. Louis Lefkowitz, the Attorney General of New York, appeared as *amicus*, urging the constitutional validity of the New York statute. Lehman, Dewey, Lefkowitz, Quell, and Iscol were not Irish or Catholic; and they were not under the thumb of the Catholic Church.

The author clearly prefers the dissenters who were "unabashedly secularist."[49] Incidentally, one of the secularists whom the author prefers is Mr. Justice Brennan. Justice Brennan was a Catholic, but we can all agree that he was under no one's thumb.

The Law Department is belittled for taking on "a number of other endeavors to please other Tammany constituencies."[50] These efforts included protecting the rent control laws and fighting Con Ed rate increases. Tammany is long gone now, but even today, the Law Department is engaged in similar efforts to maintain rent control and rent stabilization; it fights rate increases sought by regulated utilities; it participates in efforts to keep housing in the Mitchell-Lama program and resists owners' attempts to buy out their subsidized mortgages and go to market rates. The Law Department has always helped to preserve the economic well-being of New Yorkers; I hope it continues to do so.

Fair readers of this chapter will come to their own conclusions. I believe that Allen G. Schwartz's blessed memory would be far better served by an accurate history than it is by the author's unfortunate opinions.

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49. Nelson, *supra* note 1, at 212.

50. *Id.* at 213.