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Defending the Historian's Art: A Response to Paul A. Crotty's Attack on *Fighting for the City*

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Judge Paul Crotty's attack on Chapter 7 of *Fighting for the City*[1] is not guilty of understatement. Comments that he makes, such as one that my "sourcing . . . is troublesome,"[2] another that I am "out of touch . . . with what goes on in the Corporation Counsel's office,"[3] and a third accusing me of "an open attempt to introduce prejudice,"[4] undermine the scholarly integrity of the entire book, which Judge Crotty, at one point, labels a "polemic."[5] Comments such as these require a response on my part.[6]

Writing history, in my view, entails more than simply reading and summarizing sources in an archive. Nothing I ever have written or ever will write reflects such a cramped view of the historian's art, and I never misrepresented myself as a mere antiquarian to those with whom I discussed whether I should undertake this project. The historian's task is to place archival facts in a broader context that helps explain the past meaningfully to the present. Thus, I reject out-of-hand Judge Crotty's criticisms that I incorporated into the book material not based on any documents from the Law Department's files[7] that "has nothing to do with the history of the Law Department."[8] I do not know any other way to write history than to bring outside context to bear on documents in archives. Of course, I agree with Judge Crotty that history "should be accurate" and not based on an author's "own facts."[9]

1. William E. Nelson, Fighting for the City: A History of the New York City Corporation Counsel 183–219 (2008).

2. Paul A. Crotty, *A Response: Why William Nelson's Analysis of the Law Department 1946–1965 Is Wrong*, 53 N.Y.L. Sch. L. Rev. 519, 522 (2009). The particular reference Judge Crotty is questioning is to an interview of Edith Spivak by John Hogrogian. *See* Nelson, *supra* note 1, at 190 n.15. It is obvious from the reference that Edith Spivak is the person being quoted, and, if Judge Crotty had checked the reference, the obvious would have been confirmed.

3. Crotty, *supra* note 2, at 522 n.9. I am "out of touch," says Judge Crotty, because I allegedly portrayed Peter Campbell Brown in a "demeaning way" for his efforts to keep the Brooklyn Dodgers in New York. *Id.* I have reread the paragraph to which Judge Crotty refers several times and fail to see anything demeaning about it. *See* Nelson, *supra* note 1, at 190 n.15. And I certainly am not out of touch with the role that the Law Department has played in encouraging business, including sports businesses, to come to and remain in New York. *See id.* at 264–65. For an example of the role the Law Department has played in encouraging sports businesses to remain in New York, see Michael A. Cardozo, *The New York City Corporation Counsel: The Best Legal Job in America*, 53 N.Y.L. Sch. L. Rev. 459, 475 (2009) (describing the work done by Law Department attorneys to negotiate the construction of new stadium facilities for the Yankees and Mets).

4. Crotty, *supra* note 2, at 526 (referring to Nelson, *supra* note 1, at 202–03). This scandalous accusation is without evidentiary support and simply wrong. In fact, I have always admired the efforts of the Catholic Church to fight Communism on behalf of the faithful. I was thrilled when, slightly more than a decade ago, I heard a Budapest congregation sing the Hungarian national anthem at the end of Mass; the singing made clear how much the Church meant to Hungarian freedom, and it renewed my faith that my prayers for Cardinal Mindszenty four decades earlier had meant something. None of this, however, assuages my concern for the many loyal American citizens whose lives were destroyed by the anti-Communism of the 1950s. *See generally* Nelson, *supra* note 1, at 195–213.

5. Crotty, *supra* note 2, at 521.

6. Judge Crotty also takes me to task for ignoring the tremendous changes in New York between 1946 and 1966 and the Law Department's involvement in them. In fact, I discussed many of the issues he mentions. *See* Nelson, *supra* note 1, at 193–95.

7. *See* Crotty, *supra* note 2, at 525.

8. *Id.* at 528.

9. *Id.* at 520.

But a historian can never achieve factual accuracy by ignoring information widely known to other professional historians[10] simply because some lay readers, as a result of their preexisting ethical commitments, find the information offensive and demand that it "be corrected."[11]

Perhaps I am overreacting to Judge Crotty's decision to cast his critique in the strong language of advocacy rather than in calmer language of inquiry. Perhaps his words that I have quoted above, and others like them, are mere hyperbole. Perhaps he and I only disagree about a fairly narrow issue—namely, the context in which I put the facts about the Law Department's activities against Communists in the late 1940s and the 1950s. If that is the nub of our disagreement, I think I owe an explanation of how I came to identify that context.

In persuading me to undertake this project, Michael Cardozo promised, as I indicated in the acknowledgments, that I would be free to determine the book's substance. There was only one exception: Cardozo told me that the book had to be dedicated to Allen Schwartz and that it had to recognize the special contribution that Allen had made to the creation of the Law Department we know today. I quickly came to appreciate how special Allen was and how, with the support of Mayor Ed Koch, he did, in fact, transform the Law Department for the better. But that only brought me to the deeper issue of how to define the transformation: how did the Law Department Allen Schwartz created differ from the one he had inherited?

The Law Department Allen Schwartz inherited had not been created solely by the Beame administration or even by the Beame and Lindsay administrations together. It went back far—at least to the early twentieth century days of Tammany Hall. I sought to understand Tammany as an anti-elitist, small-d democratic entity striving to give the common people of the city both jobs in and policy control over the Law Department. There is much to be said in favor of democracy, and I believe I said it.[12] But if I was going to explain how Allen Schwartz made the Law Department better, I also had to discuss democracy's downsides, such as its reliance on political patronage and the negative effects of patronage on internal operations. That was the "historical purpose"[13] served by my reporting Edith Spivak's somewhat unfavorable comments about Edward McLaughlin, as well as my many other, less than favorable judgments about some other staff members who are no longer alive.

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10. The Catholic Church's anti-Communism and its effects on American politics in the late 1940s and the 1950s have been a subject of substantial historical scholarship. *See infra* note 15.

11. *See* Crotty, *supra* note 2, at 520.

12. *See, e.g.*, Nelson, *supra* note 1, at 149–54. I agree with Judge Crotty that "Catholics and Jews were excluded from Ivy League Schools or admitted in only small numbers" prior to World War II, and that Tammany's post-war appointment policies probably reflected that fact. Crotty, *supra* note 2, at 521, 528. As I said more than once in *Fighting for the City*, "Tammany used the Law Department as a vehicle of upward mobility for young men, and even young women, of ambition," Nelson, *supra* note 1, at 138, and found it "more important to employ attorneys who remain close to the people than attorneys with elite backgrounds and fancy academic training." *Id.* at 151; *see also id.* at 109–10.

13. Crotty, *supra* note 2, at 522.

I also had to analyze the downsides of popular influence on Law Department policy. In so doing, I do not see how I could have avoided discussing one of the darkest moments in the Department's history—namely, the activities against Communists in the late 1940s and the 1950s that were highlighted in the Department's own annual reports.[14] And, once I had decided to address mid-twentieth century anti-Communism, I do not see how I could have ignored the large body of historical scholarship connecting it to the Catholic Church.[15] I could not, as I think Judge Crotty would have been inclined to do, simply ignore or condemn that professional literature. What I did try to do was develop a more nuanced understanding than it reflected—an understanding, incidentally, more favorable to the Church.

In the end, I explicitly said that the Catholic Church should not be blamed for the Law Department's dark moment. Instead, we should attribute the darkness to a systemic failure of democracy. I wrote that

> those in the hierarchy like Cardinal Spellman who called for action against Communism rightly held sincere beliefs. The Church properly saw Communism as "essentially atheistic and irreligious . . . and opposed to . . . what the church was about, namely the world of God and the spirit." As experience in Eastern Europe had demonstrated, Communists were prepared to persecute the faithful if given a chance, and there was every reason for Church prelates, personally acquainted as they often were with victims of that persecution, to urge the faithful to support fellow Catholics around the world, to protect each other, to fight back, and to resist what they saw as incursions on the Church by American secularists that paralleled those by Eastern European Communists.[16]

I also made it clear that the Tammany Corporation Counsels did

> "not take orders from any Pope, Cardinal, Bishop or priest, nor would they try to give . . . orders." Those who searched for Communists in city government acted as they did not because the Church gave them orders, but because they understood that the voters who had put Tammany in power wanted them so to act.[17]

The problem thus lay with the voters themselves and with the democratic ideal that the public lawyer should be bound by the wishes of the people who put her in office. As I wrote:

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14. For a brief discussion of these reports, see Nelson, *supra* note 1, at 202–03.

15. This scholarship, which is cited in Chapter 7, includes Donald F. Crosby, God, Church, and Flag: Senator Joseph R. McCarthy and the Catholic Church, 1950–1957 (1978); Mark S. Massa, Catholics and American Culture: Fulton Sheen, Dorothy Day, and the Notre Dame Football Team (1999); Charles R. Morris, American Catholic: The Saints and Sinners Who Built America's Most Powerful Church (1997); Jim Tuck, McCarthyism and New York's Hurst Press: A Study of Roles in the Witch Hunt (1995); Joshua M. Zeitz, White Ethnic New York: Jews, Catholics, and the Shaping of Postwar Politics (2007); Donald F. Crosby, *The Jesuits and Joe McCarthy*, 46 Church Hist. 374 (1977).

16. Nelson, *supra* note 1, at 210.

17. *Id.* (internal citation omitted).

> We may, that is, need to recognize that ordinary voters simply lack the capacity to fine tune messages they hear from religious leaders and other spokespeople for moral interests, and that society accordingly needs lawyers to scrutinize attempts to translate religious values into public policy. In the context of mid-twentieth century New York, where Roman Catholics were a majority or near majority of voters, we may need to recognize that, in the absence of such scrutiny, democracy ineluctably gave the Church hierarchy significant, albeit imperceptible influence over the Law Department—influence which the hierarchy did not necessarily seek to exert and with which no one in the Law Department consciously complied, but which was nonetheless real.[18]

Judge Crotty is wrong in calling the language from *Fighting for the City* that I have just quoted a "false disclaimer."[19] Chapter 7 never advanced the *post hoc ergo propter hoc* claim "that the Catholic Archdiocese of New York . . . induced Catholic Corporation Counsels to pursue Communists in city government" by "somehow acting on the Church's anti-Communist bidding."[20] Chapter 7 merely elaborated a series of parallel, contemporaneous historical developments from which Judge Crotty drew an erroneous *post hoc ergo propter hoc* conclusion. Chapter 7 was clear on the first full page on which it discussed the Law Department's anti-Communism—that the Department was "in thrall to a majoritarian democratic ethos," not to the Church hierarchy.[21]

Judge Crotty believes fervently in majoritarian democracy. He believes that "the Law Department is not a free agent. It did," he says, "what the law requires: operate within the legal framework and enforce the law" duly enacted by the majoritarian political process.[22] I have no doubt that the often religiously inspired voters who favored the enactment of legislation against Communists were sincere, committed, and, in retrospect, even morally right, and that the Law Department faithfully enforced their legislation. If, however, we are to live in a pluralist society committed to protecting the rights of individuals, public lawyers must treat the rule of law—a neutral, objective, principled standard limiting the power of government—as superior to a religiously inspired agenda of a majority, however sincere, committed, and even morally right that majority might be. Because the Tammany Law Department did not raise the rule of law as an obstacle in the majority's path, intolerance resulted and a minority suffered.

Judge Crotty undoubtedly is correct that intolerance resulting in oppression of minorities has frequently occurred in American history: he mentions the Palmer raids in the aftermath of World War I, the internment of Japanese-Americans during

18. *Id.* at 211.

19. Crotty, *supra* note 2, at 520, 528.

20. *Id.* at 523–25.

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

22. Crotty, *supra* note 2, at 525.

World War II, and activity after the terrorist attack on 9/11.[23] One could also cite earlier examples, such as the banishment of religious dissenters from seventeenth century Massachusetts Bay,[24] the burning of the Ursuline Convent in Charlestown, Massachusetts in 1834,[25] and the persecution that drove Mormons out of the Northeast United States to Utah several years later.[26] The frequency of intolerance, however, neither excuses it nor eliminates the need to better understand why and how it occurs.

We continue to live in a world where intolerance is frequently a by-product of religious inspiration. We lawyers accordingly need to consider whether a professionally administered rule of law, which demands respectful treatment of diverse opinions, should trump religious peoples' deepest faith when, as sometimes happens, the rule of law provides the only barrier that keeps faith from turning into intolerance. Allen Schwartz's achievement lay in his imbuing the Law Department with a commitment to the power of professionalism. Judge Crotty, as already noted, appears to disagree. He believes that, even if they are a product of intolerance, "validly enacted statutes should be enforced, until held to be invalid by a court of competent jurisdiction."[27]

My own view about how to balance the power of a democratic majority against the rights of unpopular minorities is irrelevant. I tried to write *Fighting for the City* to portray the arguments for both majority power and minority rights fairly and sympathetically. I even had the temerity in a book dedicated to Allen Schwartz's achievements and memory to note that "some readers might find Schwartz's vision of the Law Department disquieting."[28] I regret that Judge Crotty misunderstood my attempt to raise questions about how government lawyers should respond to religiously inspired majority policies as a "screed" attacking the Catholic Church,[29] for whose opposition to Communism I have, in fact, the highest respect. I am pleased, on the other hand, that several former Corporation Counsels who wrote essays for this symposium, as well as Judge Crotty in his oral remarks, took up the book's invitation to explore what role, if any, professionalism should play in trumping majoritarian intolerance.

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23. *Id.* at 524.

24. *See* 1 William E. Nelson, The Common Law in Colonial America: The Chesapeake and New England, 1607–1660, at 54–55 (2008).

25. *See* Ray Allen Billington, *The Burning of the Charlestown Convent*, 10 New Eng. Q. 4 (1937).

26. *See* Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America 24–25 (2002).

27. *See* Crotty, *supra* note 2, at 529.

28. *See* Nelson, *supra* note 1, at 268.

29. *See* Crotty, *supra* note 2, at 521.