

## ARTICLES

### COGITATIONS CONCERNING THE SPECIAL PROSECUTOR PARADIGM:

#### IS THE CURE WORSE THAN THE DISEASE?

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My tribute to the Honorable Hugh R. Jones starts with a borrowed first word. The title of my exertion begins with “Cogitations.” It is the same word Judge Jones so carefully chose as the first word in the title of his masterful Cardozo Lecture in 1979, *Cogitations on Appellate Decision-Making*.<sup>1</sup> However, after my imitative highest form of compliment, everything else that follows is my much more modest contribution to our jurisprudence on the subject of special and independent prosecutors.<sup>2</sup>

At the outset, please let me say that I am deeply grateful especially to Chief Judge Judith S. Kaye, and also to all my former and present Colleagues on the New York State Court of Appeals, for the privilege of serving with them here, and for allowing me to appear in this sacred space—our secular sanctum sanctorum—this most beautiful courtroom of the Court of Appeals to deliver this lecture in Judge Jones’ esteemed name and cherished memory. I am thrilled and honored to do so.

By the way, isn’t “Cogitations” a splendid word, not surprisingly, from a fastidious wordsmith and mind like Judge Jones’? It is

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<sup>1</sup> Hon. Hugh R. Jones, 35th Benjamin N. Cardozo Lecture Delivered Before the Association of the Bar of the City of New York: *Cogitations on Appellate Decision-Making* (Nov. 28, 1979), [http://www.courts.state.ny.us/history/pdf/Library/Juidges/Cogitations\\_on\\_Appellate\\_Decision\\_Making.pdf](http://www.courts.state.ny.us/history/pdf/Library/Juidges/Cogitations_on_Appellate_Decision_Making.pdf).

<sup>2</sup> For my thesis, I use the terms special prosecutor, independent counsel, and the like interchangeably, although I recognize that there can be some important structural and operational differences.

derived from the Latin verb, *cogitare*, to think, to ponder, or as a favorite Synonym Finder of mine suggests, to meditate and even to brood over.<sup>3</sup> These seem apt images for what I am about to do right before your very eyes—and ears, too. Judge Jones' exquisite word, therefore, starts me on this somewhat brooding, but I hope constructive, journey concerning this theme. I trust you will find it of some interest.

I also thank the Fund for Modern Courts, the principal sponsor for the last five years, for extending the privilege of this invitation to me. I thank Albany Law School as the co-sponsor, and the institution affording CLE credit. They instructed me, by the way, to speak long enough (fifty minutes) to qualify for the credit. The lecture version was an abridged version, therefore, of what I have prepared for the article to be published, with its necessary and attendant footnotes.

And I particularly thank Kimberly Troisi-Paton, who picked up where she left off as my law clerk in 1998–2000 to assist me in a myriad of excellent ways throughout this project, as my research assistant extraordinaire.<sup>4</sup> This renewed collaboration came about, in part, thanks to a generous grant I sought from my former judicial colleague, retired Supreme Court Justice Joan Marie Durante, whom I acknowledge on behalf of Kim and myself for being so immediately supportive and instinctively collegial.

Now, since this is not an Oscars' event, I must end the litany of thank yous—though my family and dear parents, of beloved memory, do spring to mind and heart in deep gratitude. I will instead now turn to Judge Hugh R. Jones and the subject at hand, my lecture theme: the purpose and dangers of special prosecutors in our criminal justice and jurisprudential universe. As may be surmised from the rhetorical query I pose as my subtitle, it is my personal opinion that, generally and usually, the cure is definitely worse than the disease.

Readers may recall or imagine Judge Jones' portrait up on the side wall of the courtroom he graced at the Court of Appeals for twelve years; it is worthy of a moment of silent tribute. You will see an accurate representation of this fine man and outstanding jurist right there. His portrait reflects many of his fine qualities: intelligence, intellectual discipline, and ramrod rectitude in his

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<sup>3</sup> J. I. RODALE ET AL., *THE SYNONYM FINDER* 183 (Rodale Press 1978).

<sup>4</sup> Sadly, Kim died, after the Lecture and work on this article, on August 10, 2007 after a courageous struggle against colon cancer.

erect posture and in his refined habits of mind and conduct. Those of us privileged to work alongside Judge Jones in various capacities over many years came to know how he loved charts and color-coded pens and pencils, denoting the stages of his and the Court's deliberative regimen and decision-making steps. These personal protocols reflected a disciplined analytical progression, thoroughness to a fault—that his colleague and “Chief” for the 1970s era described as the work of a micro-logician. Chief Judge Breitel meant it as a compliment, and Judge Jones loved to laugh hardest of all at the characterization. His wonderful sense of humor was always inner-directed, but that was no surprise because Judge Jones was a very kind and thoughtful man. Former Chief Judge Wachtler, his colleague for over a decade and dear friend, describes him as the “perfect Judge,” the finest craftsman and jurist among the many with whom he had the privilege of service and true friendship at the Court of Appeals.

Judge Jones was a Judge of the Court of Appeals for just over one year when I first met him in 1974 as part of the interview process with each of the seven Judges that led to my appointment as Clerk and Counsel to the Court. It was mutual respect at first sight. Mine for him was truly instantaneous, and I am not being presumptuous about earning his respect for me. He later told me so. One might say that our first meeting was the “beginning of a beautiful friendship,” with kudos for that memorable phrase to Bogart, as Rick, in *Casablanca*.<sup>5</sup>

The unparalleled devotion of Judge Jones to the Institution of the Court of Appeals is memorably inspiring. I recall that it gently nudged everyone, Judges and staff alike, also to aspire to excellence and the collegial common good that he so earnestly heralded. He knew our Court's capacity to deliver really good works for people and society. His powers of concentration towards what he saw as the sacred trust of the work of the Court are legendary. He spared no time and showed no patience for the collateral cacophony and distractions that sometimes surrounded or intruded on the sessions of Court. Instead, he enthusiastically loved and methodically enjoyed the pure rhythmic three-step dance of (1) chambers work, (2) conference work, and (3) courtroom work each day of every session. It was an exclusive concentration, and if you doubt my recollection and testimony, go read his *Cardozo Cogitations*

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<sup>5</sup> CASABLANCA (Warner Bros. 1942), <http://www.dailyscript.com/scripts/casablanca.pdf>.

Lecture.<sup>6</sup>

Yet, let me emphasize that this was no automaton, operating with some assembly-line methodology. The charm of the man at work included his humanity, grace, and good humor all laced with an unerring sense of dispassionate perspective and genuine concern for all the people around him—the lawyers, the litigants, the staff, and the general citizenry. His patrician bearing and demeanor exuded a professional classiness that camouflaged the delightfully impish human being within. In a capsule, I could say he had character, and was a character.

Some true anecdotal illustrations help me to make the point.<sup>7</sup> He could shrug off, for example, having someone steal his shoes from the Albany Hotel around the corner, while Court was in session, as “just one of those things.” He could announce he was going off to a sound sleep on his own election night before the returns were in on his sharply contested election to the Court of Appeals in 1972,<sup>8</sup> because as he said to his running mate, friend, and soon-to-be colleague, Judge Wachtler, “there’s just nothing else we can do now anyway.” He could drive from Utica to Manhasset, through a horrendous snowstorm, to spend a day with that dear former colleague at a time of that friend’s most dire need of companionship, and think nothing of it because Judge Jones valued true friendship and acted on it selflessly and with compassionate aplomb.

In addition to the adjudicative side of Judge Jones’ contributions to New York State’s jurisprudential universe, let me also provide a glimpse of this excellent jurist from the administrative side. Through that angle of the prism, what appears is a consistent person—no surprise there, I guess, for a micro-logician!

As few intimates know from privileged personal experience at the marvelous Court of Appeals, its executive work, as distinguished from its primary adjudicative role, is administered through discrete committees of the Judges, appointed by the Chief Judge, and pulled together under collegial leadership skills of the Center Chair

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<sup>6</sup> See Jones, *supra* note 1.

<sup>7</sup> The following anecdotes, and more, are documented in Matthew J. Jasen, Senior Assoc. J., N.Y. Ct. App., Remarks at Ceremony Marking Retirement of Associate Judge Hugh R. Jones (Dec. 19, 1984), *in* 63 N.Y.2d xiii–xviii and Chief Judge Judith S. Kaye, N.Y. Ct. App., Remarks in Memoriam Read in Open Court in Reference to the Death of Honorable Hugh R. Jones (Mar. 20, 2001), *in* 95 N.Y.2d xxi–xxiii.

<sup>8</sup> In 1977, the Constitution of the State of New York was amended to change the selection method for Court of Appeals Judges to a merit-based appointive system. N.Y. CONST. art. VI, § 2.

Presider at plenary conference sessions of the Court in its other *sanctum sanctorum*—the conference room upstairs on the second floor of the courthouse. I can still see Judge Jones pushing his own conference cart (as all the Judges do) to and from the conference room; the cart is loaded with case-files and the front end of Judge Jones' (his alone) has an attached holster, armed with his stapler! No one was better or more precisely organized for a day's work.

In part because he came to the Court in 1973, after the 1972 election, as a practicing lawyer and former State Bar President with no prior judicial experience, Judge Jones was appointed and remained for his entire term of judicial office the Chair and sole member of the Court's Bar Relations Committee, with jurisdiction for all such matters and relationships, including the Bar Associations and admission to the Bar. The unfolding of two major administrative issues demonstrates his skill and undeviating dedication to the Institution first. To him, subordination of persona, which is countercultural in our day and age where glorification of personality seems to be paramount, was critical to the well being and proper operation of the Court because the greater common good of the Institution would, thereby, be better served.

For years in the 1970s and early 1980s, the organized Bar pressed the Court to inaugurate, by rule-making, a "Lawyers' Fund for Client Protection," with a biennial lawyers' registration fee. The Court, under Judge Jones' committee tutelage, demurred on the ground that this substantive step must come about by legislation—a demonstration of his respectful core value for the distribution of governmental powers.

In the early 1980s, the Legislature was finally persuaded to act, but the negotiations of details became quite entangled. Suddenly, as so often happens in the legislative process, its session was about to end, when, as Clerk, I received a late night call from the chief legislative counsels of the two Houses—Ken Shapiro and Jack Haggerty. A single direct question, allowing no time for reflection or consultation, was put to me: In the bill about to be passed at that moment, along with hundreds of other last minute items, should they put in "Chief Judge" or "Court of Appeals" as the appointing entity for the seven members of the board of trustees of this new Client Security Fund? Though I knew that the then-Chief Judge wanted "Chief Judge" in the bill, my long collaboration and discussions with Judge Jones in his committee role on this matter prompted me to answer: "Court of Appeals." And, as they say in

Scriptures, and in legislative sausage-making, “so, it came to pass.” Well, when the dust settled and that bill, with the “court of appeals” as the appointing authority, emerged as the law,<sup>9</sup> the then-Chief Judge was disappointed—especially with me when he found out how the law came to pass. Judge Jones, as always a stand-up guy, took all the heat and told the Chief and the Court that that was his direction to me. Besides, he added, it was the right institutional choice because the new board should be answerable and accountable to the full Court, not just the person who happened to be Chief at any given time. One of the delightful twists of history is that a charter member of that new body in 1981 was none other than the present Chief Judge (Hon. Judith S. Kaye), *appointed* then by *the Court*, on the *nomination* of her predecessor *Chief Judge* Lawrence Cooke, both of Monticello!

Judge Jones was also the astute sole Court committee member on another key development directly affecting this Court’s docket. He engineered the selection of ABA President Robert MacCrate, Columbia Professor Maury Rosenberg, and Appellate Division Justice James D. Hopkins as the three member committee, under the auspices of the American Judicature Society, to work with me as Clerk and produce the independent documentary report, *Appellate Justice in New York*,<sup>10</sup> without which I could not have later successfully negotiated Chapter 300 of the Laws of 1985<sup>11</sup> when I was then-Chief Administrative Judge of the State.

As all insiders and astute analysts know, that law profoundly reduced this Court’s docket from over 700 argued appeals per year to fewer than 200 on a wise *certiorari* re-allocation of judicial resources and power.<sup>12</sup> It gave virtually total control to the Court of Appeals of its own civil case docket. The linchpin and selling point in the negotiation of this reform were quality over volume, and Judge Jones saw how the external committee report would lend independent credibility and help to get this legislation passed, over

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<sup>9</sup> See N.Y. JUD. LAW § 468-b (McKinney 2005) (originally enacted 1988). See generally N.Y. STATE FIN. LAW § 97-t (McKinney 2005) (establishing the Lawyers’ Fund for Client Protection of the State of New York).

<sup>10</sup> ROBERT MACCRATE, JAMES D. HOPKINS & MAURICE ROSENBERG, *APPELLATE JUSTICE IN NEW YORK* (1982).

<sup>11</sup> 1985 N.Y. Laws 2182 (effective Jan. 1, 1986).

<sup>12</sup> See DONALD M. SHERAW, 1985 ANNUAL REPORT OF CLERK OF THE COURT TO THE JUDGES OF THE NEW YORK STATE COURT OF APPEALS app. 5(B) (indicating the number of appeals argued from 1981 through 1985); STUART M. COHEN, 2005 ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK 6 (indicating the number of appeals argued from 1986 to 2005).

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heavy opposition from the Bench and Bar and among the Legislature itself. He wisely secured this objective documentation outside the Court, to validate the merits of the case for the goal the Court deemed desirable. It took years but, in the end, was successful thanks to a very savvy fellow—the Honorable Hugh R. Jones. He demonstrated his administrative acumen to forge an adjudicative benefit—always with his eye on the ball of Institution first.

Frankly, the many sweet and instructive anecdotes, and also the list of serious stories about significant cases that I could personally recount involving Judge Jones' unique contributions and personality, would earn some extra CLE credits! Indeed, our honoree and my dear friend's spirit—ever present in this courtroom—is no doubt becoming impatient with me. I can feel his cogitating, brooding presence in the air, as though he were channeling me. He wants me to get on, already, with the serious business of the lecture theme. I suppose if Judge Jones were to speak the language of my heritage, he would crisply utter the words "Basta!" and "Avanti!" or some Welsh variation of same. Unmistakably, it would be: "Enough, and get on with it, Joe." I will obey because I sense my dear wife, Mary, is thinking the same thing. And then there always lurks the deterrent of last resort—the Chief Judge's red lectern light!

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The topic I have chosen seems ripe because more than three decades of time for reflection have passed since the 1970s era of the State-appointed New York City Special Prosecutor who was charged with investigating corruption in the criminal justice system. There has been opportunity for some dispassionate reflection and detailed assessment—qualities Judge Jones liked.

Discussion of this topic requires a contextual appreciation of one of Judge Jones' favorite principles and overarching themes: the distribution and allocation of governmental powers and responsibilities, checks and balances, accountability. Call it what you will. Some call it separation of powers; the latter, however, is a phrase not favored by Judge Jones. He preferred the positive semantical nomenclature: the embracive power of collegiality and complementarity—the working together of differently gifted and experienced individuals among distributed duties and powers in a respected, tested institution, designed to render a common good, larger than the mere sum of separate, individual parts.

I initially set the table of the presentation of my views with some helpful allies. I invoke: (1) a couple of paragraphs from United States Attorney General, Supreme Court Justice, and Special Prosecutor at Nuremberg, the Honorable Robert Jackson; (2) some pithy extracts from a dissenting opinion of Supreme Court Justice Antonin Scalia; and (3) most importantly, some comments and thinking from Judge Jones himself. I really liked working with the materials of these three outstanding jurists, all New Yorkers—Jamestown, Queens, and Utica, respectively! The only thing better would be someone from Brooklyn because that is from where I hail.

In proper order then, first, I turn to Judge Jones. In his 1979 “Cogitations” Cardozo Lecture, he remarked on his own “very healthy respect . . . for the distribution of powers in our governmental polity.”<sup>13</sup> This was not simply a turn of phrase—a function of terminology—that sounded lovely for his lecture, or even to be used as a quickie sound-bite quote. Rather, the genius of that succinct guiding star finds resonance and application in his judicial opinions for the Court. For example, in *Board of Education, Levittown Union Free School District v. Nyquist*,<sup>14</sup> in 1982, the Court examined the constitutionality of the state school finance system, to be sure—in a context different, however, from the school financing controversy decided shortly after this lecture.<sup>15</sup>

Judge Jones wrote in *Levittown*:

With full recognition and respect . . . for the *distribution* of powers . . . among the legislative, executive and judicial branches, it is . . . *the responsibility of the courts* to adjudicate contentions that actions taken by the Legislature and the executive fail to conform to the mandates of the Constitutions *which constrain the activities of all three branches*. That because of limited capabilities and competences the courts might encounter great difficulty in fashioning and then enforcing particularized remedies appropriate to repair unconstitutional action on the part of the Legislature or the executive is neither to be ignored on the one hand *nor on the other to dictate judicial abstention in every case*.<sup>16</sup>

That is a brilliant, cohesive, and comprehensive articulation—

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<sup>13</sup> Jones, *supra* note 1.

<sup>14</sup> 439 N.E.2d 359 (N.Y. 1982).

<sup>15</sup> See Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50 (N.Y. 2006).

<sup>16</sup> *Levittown*, 439 N.E.2d at 363 (emphasis added).

succinct and helpful, too, for all it portends.<sup>17</sup>

There, Judge Jones explicitly encapsulated the respectful limitations and expansive potentialities of checks and balances, and the deliberate distribution of power. Indeed, I have not discovered a demarcated *separation* of powers established by the federal and state laws of our land. Instead, one often finds interdependence and interplay, rather than metes and bounds segmentation. That is the foundation stone and genius of our system, in my view.

So, what happens when one branch within the cogwheels of the distribution goes awry? Today, I propose that when that happens, when special prosecutors, for example, are appointed and exercise their mandates beyond the structure of the distribution of power calibrations to the executive branch, of which they are a part, then an inherent flaw in the harmonious system is exposed. Special prosecutors are too often given a kind of pass and seeming immunity from well-tested restraints on regular officers, and are perceived and empowered to be free agents pursuing their own notions of good and even allowed and expected to pursue a preconceived objective or a targeted person. The seeds of trouble are embedded in that Dodge City Marshal or Sheriff imagery because it is antithetical to the neutral pursuit of fair and objective justice. Maurice Sendak, the ingenious illustrator, might conjure up a peculiar allegorical and metaphorical creature, like a cross-breed between a “Sacred Cow” with a “Rogue Elephant,” to produce, from that Dr. Strangelove laboratory: “Voilà: A Special Prosecutor!”

Justice Scalia recognized much of this in 1988. He famously and forebodingly dissented alone in *Morrison v. Olson*,<sup>18</sup> a case in which the Supreme Court ironically upheld the footloose power of a federal independent counsel. Justice Scalia wrote, “That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish . . . .”<sup>19</sup> Justice Scalia “fear[ed]”<sup>20</sup> that the institution of a special prosecutor or independent counsel would destabilize this balanced allocation of powers.<sup>21</sup> To buttress his concerns, Justice Scalia summoned words

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<sup>17</sup> Future commentators will have to ponder and dissect how *Levittown* played out in *Campaign for Fiscal Equity III*.

<sup>18</sup> 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

<sup>19</sup> *Id.* at 699.

<sup>20</sup> *Id.* at 733 (“I fear the Court has permanently encumbered the Republic with an institution that will do it great harm.”).

<sup>21</sup> It is particularly appropriate in my Fifth Hugh R. Jones Memorial Lecture to highlight

of Justice Robert Jackson, my third key source in this threshold section of the lecture. Subsequent history also proved him prescient.

Then-Attorney General Jackson in 1940 admonished the United States Attorneys of this great nation, as follows, concerning their “dangerous” prosecutorial powers:

“There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. . . . One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

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this jurisprudential contribution from Justice Scalia’s extraordinary record. This superior jurist needs no defense from me, as he takes excellent personal care of his own record by his own opinions and extra-judicial/academic presentations. However, in the immediately preceding Fourth Hugh R. Jones Memorial Lecture on September 12, 2005, retired Court of Appeals Judge Richard D. Simons used the occasion to sharply criticize Justice Scalia on an ethical issue. See Honorable Richard D. Simons, Retired J., N.Y. Ct. App., Fourth Hugh R. Jones Memorial Lecture at Albany Law School (Sept. 12, 2005) (referencing the Memorandum of Justice Scalia on Sierra Club’s Motion for Recusal in *Cheney v. U.S. D. for D.C.*, 541 U.S. 913, 914 (2004)). Judge Simons’ criticism subsequently became a highlighted lead in the *New York Law Journal* the very next day. See John Caher, *Former Judge Speaks at Albany Law School*, N.Y. L.J., Sept. 13, 2005, at 4. It is my purpose in this extended footnote, in part, to provide a counterpoint and a more appropriate perspective on an illustration of Justice Scalia’s jurisprudential excellence and judicial role. See also Scott Turow, *Scalia the Civil Libertarian?*, N.Y. TIMES, Nov. 26, 2006, § 6 (Magazine), at 22.

Curiously and additionally, in another section of Judge Simons’ 2005 Jones Lecture, *stare decisis* and respect for a court’s overall *oeuvre* are also somewhat obliquely discussed, subjects on which Judge Simons and I have also differed significantly in the past. See *People v. Damiano*, 663 N.E.2d 607, 613 (N.Y. 1996) (Simons, J., concurring); *id.* at 615 (Bellacosa, J., dissenting). In that case, with a solo cramped interpretation of *stare decisis*, Judge Simons would have interdicted my conscientious judicial duty and function to vote and express my views on a point of law as I saw it. See *id.* at 615 n.1, 623–25 (Bellacosa, J., dissenting); see also *Merced v. City of N.Y.*, 551 N.E.2d 589, 590 (N.Y. 1990) (Bellacosa, J., concurring) (voting on constraint of *Kircher v. City of Jamestown*, 543 N.E.2d 443 (N.Y. 1989)); *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 57 (N.Y. 1989) (Simons, J., dissenting) (where as Acting Chief Judge, Judge Simons attempted to starchily stifle my separate concurring/plurality opinion with his dissent). Ironically, and of note with respect to my later themes in this lecture concerning the relationship between legal players and the media, Judge Simons’ criticism of other jurists harbors little self-awareness of his own departure from collegial propriety. See generally Richard D. Simons, *Oral History*, 1 N.Y. LEGAL HIST. 53 (2005) (divulging confidences of the innermost deliberations and conversations of the Court of Appeals and its judges on many controversial cases and matters to the approbation of the media); see also John Caher, *Ex-Judge’s Straight-Shooter Image Is Reinforced by His Oral Record*, N.Y. L.J., Feb. 2, 2006, at 1.

“If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that *he thinks he should get*, rather than cases that need to be prosecuted. . . . [I]t is not a question of discovering the commission of a crime and then looking for the man who has committed it, *it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him*. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.”<sup>22</sup>

Indeed, Justice Scalia’s premonitions and Justice Jackson’s admonitions have rung true—both with respect to the federal independent counsel miscarriages that would occupy the attention of the nation toward the end of the twentieth century, and now into the twenty-first, as well as under the special prosecutor regime in New York State, which ran through the 1970s and on which Judge Jones and the Court of Appeals had much impact and many important things to say during that period.

Let me emphasize right here, I do not intend by my criticisms of the paradigm to demonize Maurice Nadjari or Kenneth Starr, or similarly situated special prosecutors or independent counsels in some personal or ad hominem manner. Rather, my focus is on the culture and operations of their, and like, offices where officious self-righteousness can take hold under misguided leadership. It can infuse such staffs, too, with an excessive zeal, an inflated sense of importance, and a kind of hubris, driven with the energy of concentrated power, that blinds them to their own human fallibilities and to institutional self-restraints, or even external limitations.

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<sup>22</sup> *Morrison*, 487 U.S. at 727–28 (Scalia, J., dissenting) (quoting Robert H. Jackson, U.S. Att’y Gen., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)) (emphasis added).

Thus, I tender another key corollary to my overall thesis. I am referring to the acknowledgment of institutional humility. This modest virtue recognizes and respects the human element in the discharge of the powers of all branches and the charisms provided by other gifted persons—differently-experienced members of any of the various spindles of government. This elementary rubric acknowledges the nature of temporary entrustments, and the interrelationship and dependence on other institutions, wherein each is in league and in collaborative efforts to perform the public business of the people in limited spheres of operation. The pact rests on mutual respect. Avoidance of macho individualism, with ready acceptance of the time-tested balancing mechanisms underpinning our system of governance, are what make the system work well—most of the time.

The genius of the common law process can be tapped into to appreciate the helpful methodology of trial, error, correction, and interstitial small steps supported by healthy respect for the principle of *stare decisis*<sup>23</sup>—the wisdom and building blocks of those who have gone before and what they have had to say. This recognition is the counterpoint to big gigantic leaps, sweeping forays, and silver-bulleted solutions to problems and crises, dealt with by some as though on a *tabula rasa*—as though the world begins anew with each of them. These misguided majoritarians (lonely dissenters are mere voices crying in the wilderness) suffer from personal hubris and an institutional immaturity. Within the reality-based and time-tested system that I endorse, humility connotes strength, not weakness. The common law process and the distributive system of powers of governance offer much in common. They march to a similar drumbeat in a procession that all people can gracefully join and appreciate for their helpful guidance.

Consider power itself as a component and manifestation of the human experience, insofar as it bears on my major and minor themes. Power offers an additional backdrop to the further particularized assessment of the special prosecutor role, especially in New York's jurisprudence and experience. History teaches that pure power can be a dangerous intoxicant, and its unchecked exercise can generate exponentially-expanded and unintended

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<sup>23</sup> See *supra* note 21 (discussion of *People v. Damiano*, 663 N.E.2d 607 (N.Y. 1996)). See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 142–67 (Yale Univ. Press 28th prtg. 1968).

deliriums. Its Latin root word is *imperium*.<sup>24</sup>

When special prosecutors are invested with their enormous power, the appointing agents enjoy an easy way out of their personal accountability for navigating and solving crises on their own watches. They feel “compelled by necessity” to so act, and fail to “stick to the good.”<sup>25</sup> Shakespeare places a pointed literary reference—a ready rationalization—in Bassanio’s voice in the *Merchant of Venice* when he urges that there is justification for “little wrong[s]” to reach “great right[s]” and ends.<sup>26</sup> Lord Acton summarized this notion with his adage that “[p]ower tends to corrupt and absolute power corrupts absolutely.”<sup>27</sup> Machiavelli instructed: “[The Prince] must stick to the good so long as he can, *but, being compelled by necessity, he must be ready to take the way of evil.*”<sup>28</sup> That is his classical utterance of the warning against “ends justifying means.”<sup>29</sup>

For me, nothing in relatively recent New York history dramatizes the pitfalls of potential and actual abuse of power more than the special prosecutorial machinations exhibited during the Nadjari era—perhaps because I was involved in it so closely in my own professional life and career. I witnessed the sweep of it first-hand, from distinct overlapping roles as a lawyer, academician, and court official.

The particular special prosecutor of whom I speak was appointed by Governor Rockefeller because of corruption uncovered in the criminal justice system of New York City. The Knapp Commission investigation, in 1972, recommended the appointment of a special prosecutor. That office and the person selected to lead it was authorized by executive order to supersede the five elected District Attorneys of New York City’s five counties. This new, somewhat unique, office was given exclusive jurisdiction and feared power, on a virtually open-ended scale, with almost on-demand resources in

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<sup>24</sup> See generally ROBERT HARRIS, *IMPERIUM: A NOVEL OF ANCIENT ROME* 3–4 (2006) (a recent novel about Cicero and “power” during Roman times).

<sup>25</sup> NICCOLO MACHIAVELLI, *THE PRINCE* 63 (Daniel Donno trans., Bantam Books 1966) (1513).

<sup>26</sup> See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. I, l. 212 (M. M. Mahood ed., Cambridge Univ. Press 1987) (1600).

<sup>27</sup> F. Engel de Janösi, *The Correspondence Between Lord Acton and Bishop Creighton*, 6 *CAMBRIDGE HIST. J.* 307, 316 (1940), available at <http://www.jstor.org> (search “The Correspondence Between Lord Acton and Bishop Creighton”).

<sup>28</sup> MACHIAVELLI, *supra* note 25, at 63 (emphasis added).

<sup>29</sup> *Id.*

money and personnel.<sup>30</sup> The recommendation was implemented with the appointment of Maurice Nadjari and even a special judge, John Murtagh, also appointed by the Governor by executive order, authorized under an unusual provision of the State Constitution, not by the assignment within the judiciary itself, as is customary and wise. That sole judge was to preside over all matters coming out of the Nadjari envelopment—a problem of even deeper dimension and concern for the fair and neutral administration of justice, because they appeared to exist and operate as a sort of “team.”<sup>31</sup>

Within a few years, matters had spun badly out of control with cases that failed to hold up under scrutiny and appellate review, and with press releases, press conferences, and leaks of grand jury investigations of an inflammatory, tenuous, and unfair nature seeming to flow endlessly. Ironically, an ensuing Commission on Investigation, in a study of the operations of the Special Prosecutor’s Office itself, would find that the special prosecutor had made false and unauthorized disclosures to the media and public about investigations of public corruption, including unfounded public attacks on the judiciary and the judicial process itself.<sup>32</sup> Meanwhile, as the various cases brought by that office wound their way through the independent court system—independent at least at the appellate level—both the Special Prosecutor’s Office and many targets of its investigations jostled, and jockeyed, with their respective advocacy efforts, to gain the upper-hand or some advantage of the justice system in service of their own ends.<sup>33</sup> This unseemly tension, not a healthy, professional adversarial system, created an atmosphere for a perfect storm of further irony, considering the initial purpose and intent of the Knapp Commission’s recommendations to clean up corruption and restore integrity and confidence to the system. Irony does not, however, do justice as a characterization of the corrosive harm done to presumptively innocent people and to the loss of respect and dignity in the administration of justice—by the very office charged specially

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<sup>30</sup> See generally Robert M. Pitler, *Superseding the District Attorneys in New York City—The Constitutionality and Legality of Executive Order No. 55*, 41 FORDHAM L. REV. 517 (1972–1973).

<sup>31</sup> See generally Maurice H. Nadjari, *New York State’s Office of the Special Prosecutor: A Creation Born of Necessity*, 2 HOFSTRA L. REV. 97 (1974).

<sup>32</sup> N.Y. COMM’N OF INVESTIGATION, THE NADJARI OFFICE AND THE PRESS 37 (1976).

<sup>33</sup> See Lawrence T. Kurlander & Valerie Friedlander, *Perilous Executive Power—Perspective on Special Prosecutors in New York*, 16 HOFSTRA L. REV. 35, 53–54 (1987).

to root out the old corruption!<sup>34</sup> The incarnation of this Special Prosecutor's Office seemed to me to implode on itself and spawn a new and different form of breakdown of process.

For example, in *People v. Mackell*,<sup>35</sup> the special prosecutor succeeded at a jury trial in convicting a local district attorney (Queens County, New York City) of misdemeanors. When the special prosecutor decisively lost the intermediate Appellate Division appeal, based in part on massive prosecutorial misconduct at the trial, he then proceeded to secure an appeal to the Court of Appeals. The jurisdictional limitations at the time concerning "law and facts" reversals by the Appellate Division did not allow such an appeal—or at least did not allow review of the issues with any legal consequence—an important procedural limitation and technicality. Judge Jones' customarily tempered approach to the distribution of powers is reflected in the four judge majority opinion of the Court, which said:

Needless to say, a procedural law, adopted after careful legislative consideration of competing public policy considerations, is not to be disregarded at will simply because its impact on a particular case precludes additional appellate review after both parties have already enjoyed the advantages of a full and lengthy trial and of an equally exhaustive appeal. . . . [E]ven the State's highest court may not refuse, as the [solo] dissent [in support of the special prosecutor] would have us do, to apply the plain import of an applicable statute, which, until and unless amended or repealed, must be respected as the law for all our people, no matter where positioned.<sup>36</sup>

Chief Judge Breitel concurred separately with two judges joining his opinion, and Judge Jasen dissented alone. As a footnote of sorts, the jurisdiction-limiting statute that caused so much consternation was later amended to provide a bit more review flexibility.<sup>37</sup>

I happen to be intimately familiar with the egregious special prosecutor's machinations in that case, because I was one of the successful appellate counsel for our clients at the Appellate

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<sup>34</sup> *See id.*

<sup>35</sup> 351 N.E.2d 684 (N.Y. 1976), *aff'g* 366 N.Y.S.2d 173 (App. Div. 1975).

<sup>36</sup> *Id.* at 687.

<sup>37</sup> *See* N.Y. CRIM. PROC. LAW § 450.90(2)(a) (McKinney 2005) (the subject of an extensive Practice Commentary by Joseph W. Bellacosa after the 1979 amendment to the section as part of the now superseded CPL volume covering Proceedings After Judgment).

Division. By the time that the final litigation chapter of that case was written, I was Clerk and Counsel of the Court of Appeals. To avoid even the appearance of a conflict of interest and role, Chief Judge Breitel instructed me to take a walk in the park on the day that appeal was argued in the court of last resort—literally, “leave the building,” said he to me. That instruction included my absence from my usual attendance at the formal conferencing of the case, too, right up to the announcement of the decision. I came to love the park across the street from the courthouse!

As another laser ray through the prism of this subject and case, let me also share a disturbing episode, revealed for the first time publicly. I had agreed to collaborate with two outstanding lawyers on the appeal to the Appellate Division in the *Mackell* case. My esteemed co-counsels were former Chief Judge Charles Desmond (his portrait is up there on the wall, too, just above Judge Jones’), and my classmate at St. John’s, Robert McGuire (later to be a great New York City Police Commissioner in the Mayor Koch administration, and my lifelong dear friend). As we were working on the appellate brief back in 1974, one day, a student of mine (as I was then a Professor of Law at St. John’s) asked for an appointment to see me after class in Criminal Procedure. He proceeded to describe to me his job interview at the Office of the Special Prosecutor. It concentrated heavily on questions to him about me: What was I like in the classroom?; Did I have strong opinions about prosecutorial tactics like entrapment?; and the like. I was shocked that, apparently because I had dared to join the appellate defense team against that Office, my academic viewpoints, and I, then became a subject of this kind of collateral inquiry. Worst of all, the student was being misused in this misguided, clumsy effort to scope me out, or try to intimidate me. This incident angered me, and motivated me to work even harder to defeat something I then came to see as dangerous, as well as flat-out wrong on the law. Fortunately, we went on to win the case and, in the ultimate “high-fiver,” we not only beat the wrong-headed guys on the law in court, but we also helped to get them fired. The undertones of McCarthy-era-like tactics, however, with their foreboding clouds of incursions on right to zealous and independent representation by counsel of choice, and prosecutorial dirty tricks like processing phony cases and improper entrapments (reported activities of that Office<sup>38</sup>) have

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<sup>38</sup> See CODES COMM., N.Y. STATE ASSEMB., ABUSE OF POWER: A STAFF REPORT OF THE

stayed with me as deep concerns and reminders of how fragile, yet carefully calibrated, our balanced criminal justice process is, and how easy it is for a heavy thumb to tip the scales of justice.

Another case saga of that period is instructive. In *Dondi v. Jones*,<sup>39</sup> the prosecuted party switched his defense strategy back and forth between civil and criminal forums with differing procedural consequences. As a result, the indicted attorney, accused of bribing police officers in order to obtain testimony favorable to clients in civil cases, ran a crazy-quilt procedural race to different courtrooms that eventually had to be sorted out by the Court of Appeals.

The majority opinion by then-Judge Cooke granted a writ of prohibition against the special prosecutor. It was a four to three decision. At the time, in my role as Clerk and Counsel to the Court, I privately agreed with the Majority—largely based on my academic background and practice commentaries publications in the criminal procedure area, and also based on my personal experience in the *Mackell* case. Frankly, I so intensely disliked the odious brand of justice that seemed to be emanating from the special prosecutor's tactics that I saw a need for him and his tactics to be stopped, by any procedural device and means available. That view might warrant some personal recrimination, as a latter-day reflection of my own knee-jerk version of ends justifying means. During my review and work for the Jones' Lecture, however, I came away still convinced that the Majority was right, with the frank acknowledgement of the weighty reasons expressed in the Breitel-Jones dissent in that case that legitimate process was being distorted and manipulated, in justification, to overcome or neutralize the special prosecutor's first-strike procedural abuses. *Mackell* and *Dondi*, among the blizzard of Nadjari cases<sup>40</sup> grinding

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CODES COMMITTEE OF THE NEW YORK STATE ASSEMBLY 34–46 (1976); see also Bennett L. Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest*, 66 MINN. L. REV. 567 (1982), available at <http://digitalcommons.pace.edu/lawfaculty/175> (Professor Gershman argued the *Mackell* appeal on behalf of the Special Prosecutor's Office).

<sup>39</sup> 351 N.E.2d 650 (N.Y. 1976).

<sup>40</sup> See, e.g., *Rao v. Nadjari*, No. 75 Civ. 2377 (S.D.N.Y. 1975); *Cunningham v. Nadjari*, 347 N.E.2d 915 (N.Y. 1976); *People v. Weiner*, 405 N.Y.S.2d 282 (App. Div. 1978); *People v. DiFalco*, 388 N.Y.S.2d 91 (App. Div. 1976), *aff'd*, 377 N.E.2d 732 (N.Y. 1978); *Democratic County Comm. v. Nadjari*, 383 N.Y.S.2d 311 (App. Div. 1976); *Moritt v. Nadjari*, 380 N.Y.S.2d 33 (App. Div. 1976), *stay denied*, 39 N.Y.2d 744 (1976); *Steinman v. Nadjari*, 375 N.Y.S.2d 622 (App. Div. 1975); *Alessi v. Nadjari*, 365 N.Y.S.2d 859 (App. Div. 1975); *Nigrone v. Murtagh*, 362 N.Y.S.2d 513 (App. Div. 1974), *aff'd*, 330 N.E.2d 45 (N.Y. 1975); *People v. Rao*, 359 N.Y.S.2d 997 (App. Div. 1974), *aff'd*, *Nigrone v. Murtagh*, 330 N.E.2d 45 (N.Y. 1975); *People v. Steinman*, 356 N.Y.S.2d 215 (App. Div. 1974); *Klein v. Murtagh*, 355 N.Y.S.2d 622 (App. Div.

through the courts during that era, prove to me once again, as described by Chief Judge Cardozo in the *Nature of the Judicial Process*,<sup>41</sup> how hard and how close these cases and this justice business can be.

A notable almost afterthought in Judge Cooke's majority opinion is worthy of mention: "By this determination we do not free Dondi. Rather, his prosecution for the crimes charged, either under the present indictment or any superseding indictments, should be undertaken by the District Attorney of Queens County," the successor to the removed (but criminally exonerated) D.A. Thomas Mackell.<sup>42</sup> In other words, the Court underscored the value of letting the regular, measured, time-tested processes, with all their known warts, work their way through and around issues. The implication is that justice will triumph—albeit, eventually.

Indeed, New York jurisprudence reflects the evolution of another nuance in this arena. Seven years after *Dondi*, Judge Jones joined the majority opinion for five judges, with two recusals, in *Schumer v. Holtzman*.<sup>43</sup> It stated:

[The District Attorney and Special Prosecutor] urge that prohibition should not be available to prevent the investigation before it even starts. The short answer to that contention is that we are not stopping the District Attorney from pursuing her duties. She or her subordinates may exercise all the powers of her office to investigate and, if the evidence warrants it, to prosecute petitioner [then-Assemblyman and now United States Senator Charles Schumer] or those involved with him. . . . [Prohibition will] lie to void an *ultra vires* appointment by the District Attorney.

. . . .

. . . The embarrassment of respondent Holtzman or the fact that she may be accused of a vendetta because of prior political differences [with Schumer] are considerations which she must weigh in either proceeding with the matter herself or moving for the judicial appointment of a special

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1974), *aff'd*, 318 N.E.2d 606 (N.Y. 1974); *People v. Vitale*, No. K340266 (N.Y. Crim. Ct. Kings County 1973); *see also* *Rao v. State*, 425 N.Y.S.2d 888 (App. Div. 1980), *appeal denied*, 409 N.E.2d 1003 (N.Y. 1980), *cert. denied*, 449 U.S. 982 (1980).

<sup>41</sup> *See generally* CARDOZO, *supra* note 23, at 150, 165–67.

<sup>42</sup> *Dondi*, 351 N.E.2d at 659.

<sup>43</sup> 454 N.E.2d 522 (N.Y. 1983).

prosecutor.<sup>44</sup>

In other words, the judicial direction is to fulfill the elected responsibility and be accountable for it. That is a very good and simple rule, as I see it, and stopping a special prosecutor from even starting up sure helped then-Assemblyman Schumer's career by keeping his record and reputation clean. The zealous and intelligent advocacy of his outstanding lawyer, my friend and former colleague in other pursuits, the late Arthur Liman, surely also helped.

The consequences of the Nadjari blizzard of publicity-seeking broadsides and questionable or marginal cases (and I have barely scratched the surface with my selected illustrations) demonstrate the preferred imperative: trust should be invested in the regularized, tested processes, entities, and institutions to maintain and develop respect for and confidence in them, not disrespect and cynicism by diversion and superseder. By the time Nadjari was "fired" by Governor Carey after the *Mackell* case debacle, with the eventual and needed acquiescence of the New York State's Attorney General Louis Lefkowitz (a different check-and-balance mechanism), the Special Prosecutor's Office had done a lot of damage to individuals, and to the torn tapestry of ordered process.<sup>45</sup> Despite a scant record of successful prosecutions, the annual budget of that exceedingly privileged Office averaged about \$2 million.<sup>46</sup>

The wreckage left behind in the wake of this prosecutorial hurricane was enormous: lives and reputations were wrongly ruined; regularized and legitimate criminal processes, including innocent judicial officers and the judicial system itself, were scarred with cynical suspicion; and some corruption, intended to be rooted out, instead festered with a nefarious new special prosecutorial form of official mischief. That is one lousy legacy!

Ironically, after Governor Carey ousted Nadjari, the special prosecutor audaciously and publicly leaked that some of Governor

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<sup>44</sup> *Id.* at 526–27.

<sup>45</sup> *An Abrupt Exit for The Superprosecutor*, TIME, Jan. 5, 1976, at 38, 38–39 [hereinafter *Superprosecutor*], available at <http://www.time.com/time/printout/0,8816,947607,00.html>. During his time as New York's special prosecutor, Nadjari indicted 296 people on various accusations of corruption. *Id.* at 39. Some guilty verdicts were obtained against low-level government officials; one guilty verdict against a local District Attorney (Thomas Mackell) was eventually overturned and all charges dismissed; at least 500 investigations were underway. *Id.*; see also Kurlander & Friedlander, *supra* note 33, at 53–54 (explaining the jurisdictional disputes in New York's criminal justice system).

<sup>46</sup> Kurlander & Friedlander, *supra* note 33, at 53–54.

Carey's appointments were also being investigated.<sup>47</sup> Nadjari even asserted that he fell out of political favor because he was getting too close to the hard core of corruption—high level Democratic judges and public officials.<sup>48</sup> He even tried to subpoena the Governor before a grand jury, as a press and media stunt to hold onto his waning power. His desperation tactics thankfully failed. In an effort to clear the air, Governor Carey ironically appointed a successor special prosecutor, of all things, to investigate the allegations made by Nadjari.<sup>49</sup> No substantiation was found. The Assembly also investigated the Nadjari Office and documented its abuses.<sup>50</sup> Later, Governor Cuomo tried to reform the whole process with a comprehensive review and a regularized regime, with direct-line accountability.<sup>51</sup> Unfortunately, it never fully materialized with any legislative *imprimatur*.

The graphic history lesson of the 1970s with the New York laboratory of its special prosecutor experience, sadly, did not prevent other mistakes from recurring with some of the experiences of federal independent counsels of the 1980s and 1990s. Society's inability to learn from past mistakes condemned it to suffer similar mistakes anew, as George Santayana warned.<sup>52</sup> Karl Marx put it more trenchantly: history repeats itself "the first time as tragedy, the second time as farce!"<sup>53</sup>

History also is studded with other bad special prosecutor analogies—e.g., the French Reign of Terror and Revolution; the British Star Chamber; the Spanish Inquisition; and the Senator Joseph McCarthy's House UnAmerican Activities Committee. On the other hand, I note that some really good and necessary special prosecutor prototypes of integrity and effectiveness have occasionally emerged—e.g., the N.Y.S. Office of Special Prosecutor for Nursing Homes, my friend and jurisprudential trailblazer in that field, Charles "Joe" Hynes, now five-times-elected District Attorney of Brooklyn; Governor Dewey and his groundbreaking prosecution of racketeers like Lucky Luciano in New York County

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<sup>47</sup> *Superprosecutor*, *supra* note 45, at 39.

<sup>48</sup> *Id.*

<sup>49</sup> STATE OF N.Y., PUBLIC PAPERS OF HUGH L. CAREY: FIFTY-FIRST GOVERNOR OF THE STATE OF NEW YORK, 1975, at 791 (1982).

<sup>50</sup> See CODES COMM., N.Y. STATE ASSEMB., *supra* note 38, at 33–46.

<sup>51</sup> Kurlander & Friedlander, *supra* note 33, at 62.

<sup>52</sup> George Santayana, *Reason in Common Sense*, in 1 THE LIFE OF REASON 284 (1905) ("Those who cannot remember the past are condemned to repeat it.").

<sup>53</sup> KARL MARX, *The Eighteenth Brumaire of Louis Napoleon*, in ON REVOLUTION 243, 245 (Saul K. Padover ed. & trans., 1971).

with the help of two young assistant prosecutors who went on to become Chief Judges of the Court of Appeals, Stanley H. Fuld and Charles D. Breitell; the Judge Seabury Commission chasing the disappearing Judge Joseph Crater and the ocean-cruising Mayor Jimmy Walker in corruption of the 1930s; remember, too, Archibald Cox with President Nixon and then Watergate, in contrast to Whitewater's turbulence between Kenneth Starr and President Clinton.

A lesson I would draw from these few comparisons is that the special prosecutor paradigm ought to be the rarity, reserved for truly exceptional situations, when a crisis renders ordinary process and officers powerless to act—totally unavailable and inoperable, in fact or in effect—*functus officio*. The designated responsibility should be narrowly and exclusively circumscribed. Then let regular process otherwise run its course, even if bumpy at times. Appointing entities should, first and persistently, search and strain to find any alternative, other than a special prosecutor; and even when an alternative is found, go back and try yet another truly Jonesian touch of genius as the fallback, a *deus ex machina* that nevertheless keeps the crisis in house and in regular channels. This device is found in *Morgenthau v. Cooke* with its famous footnote three in the *per curiam opinion*, applying the exceptional “Rule of Necessity” that allowed the Court to rule on its own judicial branch powers.<sup>54</sup>

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<sup>54</sup> 436 N.E.2d 467, 469 n.3 (N.Y. 1982).

At the outset we dispose of any speculation that, because one of the constitutional deficiencies urged by petitioners was the failure to obtain approval of any pertinent standard or administrative policy by the Court of Appeals, the members of this court should decline to participate in the appeal. Even if we were to assume that a disqualifying *ex officio* interest exists which might be a basis for recusal (but see *Matter of Ryers*, 72 N.Y. 1), we would nevertheless be required to proceed in the matter under the “Rule of Necessity”. As stated by Sir Frederick Pollock, that rule mandates that “although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise” (Pollock, *A First Book of Jurisprudence* [6th ed., 1929], p. 270; cf. *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392). With respect to the litigation before us, this court has exclusive jurisdiction under the Constitution of this State to hear the appeal from the order of the Appellate Division (art. VI, § 3, subd. b, par. 1); no other judicial body exists to which this appeal could be referred for disposition. Nor would the situation be different if the members of this court were to recuse themselves and summon other jurists to serve in their place for the purpose of deciding this appeal. Substitute Judges who might be designated to this Bench would themselves, for the period of their service, assume the institutional character of this court and would therefore be subject to the same suggestion of disability that might be thought to exist as to the court as presently composed. Indeed, the present

Speaking of which, I cannot resist sharing one of my favorite recollections from my years as a Clerk at the Court of Appeals. It revolves around the previously noted case in which the Manhattan District Attorney, Robert Morgenthau, sued the Chief Judge, Lawrence Cooke. This Court did not punt, vouch-in, or otherwise avoid its duty in that extraordinary case, as explained in the famous footnote. The “Rule of Necessity” allowed the Court to rule on some of its own administrative—consultative—approval powers under the State Constitution,<sup>55</sup> as a check-and-balance restraint against unilateral Chief Judge rule and policy-making powers for the management of the Unified Court System. Remarkably, the six remaining Associate Judges ruled to uphold their own administrative role, function, and powers. They decided that their leader-Colleague, the then-Chief Judge, had exceeded his authority because he did not consult and gain their approval on a trial judge assignment policy and rule that he had unilaterally promulgated.<sup>56</sup> In one of my personally more memorable functions as Clerk of the Court, I had the unique “privilege” (gulp) of leaving the conference room (the other *sanctum sanctorum* on the second floor) to inform the Chief Judge in his chambers across the hall that the Court—his Colleagues—had just unanimously ruled against him on the ground that *he*, yes, he the Chief Judge, had acted unconstitutionally. Try to imagine that notification one-on-one.

The case itself is historically and precedentially important with respect to judicial branch check-and-balance governance, of course, but it is the “Rule of Necessity” aspect, found in a footnote of all places, that allowed the permanent Court to rule on its own powers rather than invoking some substitute entity, transfer, or vouched-in Justices. And it was Judge Jones who engineered the idea, and fabulous footnote, as a solution for how the permanent Court could retain the case and rule on that issue despite the manifest conflict.

In another of Judge Jones’ extraordinary exhibitions of subordination of ego to the sublimation of Institution, I draw

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circumstance is not conceptually different from the situation in which the court is called on to determine the scope of its own jurisdiction, a determination which it makes with some frequency. Finally, *to the extent that there might be apprehended some personal discomfiture to the members of this court in ruling on an appeal in which the Chief Judge is a litigant, such discomfort provides no justification for our declining to execute the duties of our judicial offices.*

*Id.* (emphasis added).

<sup>55</sup> N.Y. CONST. art. VI, §§ 26(i), 28(c).

<sup>56</sup> *Morgenthau*, 436 N.E.2d at 471.

attention to the case of *People v. Warner-Lambert Co.*<sup>57</sup> in 1980, also when I was Clerk of the Court. Two Judges were recused, and the remaining five split three to two in favor of sustaining an indictment against corporate defendants in a criminal prosecution for criminally negligent manslaughter arising out of a factory explosion in Queens. The State Constitution requires a minimum quorum of five Judges to hear a case, and a separate, lesser known, additional requirement that at least four Judges coalesce to rule one way or the other.<sup>58</sup> Not one of the five Judges could find a justifiable way to budge off the three-two split, so the case had to be set down for reargument, with two Justices of the Appellate Division, selected by the Court of Appeals, vouched-in to participate in that case. That development made a full complement of seven Judges, and ultimately flipped the result. At conference after reargument, the two vouched-in Judges voted with the former minority of two permanent Court of Appeals Judges. That made four votes for throwing out the indictment. Judge Jones who had written the original draft (internal only) opinion for the three Judges voting to sustain it, immediately offered and strongly recommended abandoning the majority-turned-minority position. His rationale: the greater institutional interest called for unanimity in this unusual circumstance, especially since the very significant precedent would otherwise, ironically, be established by and comprise only a minority number of the permanent members of the Court. He further explained: the reliability and stability of the rulings of this Court of last resort would otherwise be placed at risk or doubt, subject to renewed challenges. Judge Jones instinctively saw the higher value and purpose in having the Court speak with a single definitive voice in this extraordinary circumstance, readily sacrificing the strongly and personally held belief that he and two other members of the permanent Court had previously believed to be the correct outcome. In an exclamation recalled from my early classical education (*Mirabile dictu!*), the unanimous signed opinion for the Court is by no other than the original reporting-to-Conference Judge, Hugh R. Jones.<sup>59</sup> That case evolution is a transcendent lesson for all time, of the class of this great jurist and his dedication to a principle higher than himself. The simple toast used at dinner during Albany sessions of Court by the Judges of

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<sup>57</sup> 414 N.E.2d 660 (N.Y. 1980).

<sup>58</sup> N.Y. CONST. art. VI, § 2(a).

<sup>59</sup> *Warner-Lambert Co.*, 414 N.E.2d at 661.

Court, “To the Court,” was truly honored in this one humble illustration.

Returning to my main theme, I acknowledge a part of my own judicial reputation, for better or worse as they say, that includes a strong belief in the avoidance of absolutes<sup>60</sup>—so did Judge Jones, so I am in very good company. Because I do not want my effort in this lecture to be understood as urging total avoidance of the special prosecutor paradigm, I need to supply some semblance of balance, for the rare times that the device may be unavoidably needed. Indeed, my “caveats” are designed mainly to raise a bright orange cautionary flag. My effort might, thus, serve to alert appointing entities or individuals, and their key advisors (e.g., any president, U.S. or N.Y.S. attorneys general, governors, or the like) to the dangers of using the canon (homonym pun intended) of a special prosecutor. Unfortunately, I have witnessed an almost knee-jerk invocation as a style too much evident and at play in our modern political landscape and culture, though the federal independent counsel statute was allowed to lapse.<sup>61</sup> In any event, the use of this special prosecutor model, keyed to star power, instantaneity, and specific expectations, tends to generate more hype and heat than is appropriate to the deliberative, careful handling of public accusations of wrongdoing. It is result-oriented and result-driven, aspects alien and at odds with the pursuit of neutral justice, wherever that course may lead.

So, in that connection, I offer also a word of caution here about future mutations—as something to watch for, on a parallel track or offshoot of some of these notions and concerns about special prosecutors. The jurisprudence is witnessing a modern phenomenon, a new wave of the exercise of virtually unfettered powers, in the form of federal monitors. They oversee, supervise, and even seem to direct the actions of corporate boards of directors of public companies. These monitors are appointed or recommended

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<sup>60</sup> See, e.g., *People v. Jones*, 517 N.E.2d 865, 869 (N.Y. 1987) (Bellacosa, J., concurring); see also *People v. Thompson*, 633 N.E.2d 1074, 1081 (N.Y. 1994) (Bellacosa, J., dissenting); *People v. Roe*, 542 N.E.2d 610, 614 (N.Y. 1989) (Bellacosa, J., dissenting); *People v. Register*, 457 N.E.2d 704 (N.Y. 1983), *overruled by* *People v. Feingold*, 852 N.E.2d 1163, 1167 (N.Y. 2006); Abraham Abramovsky, *Depraved Indifference Cases: ‘Feingold’ Means Demise of ‘Register’*, N.Y. L.J., July 20, 2006, at 3 (“registering” Bellacosa, J. as a “prophet” for the dissent in *Roe*, in the wake of *Feingold’s* overruler of *Register*, seventeen years too late).

<sup>61</sup> The statute expired at midnight June 30, 1999, after a lapse in the Independent Counsel Reauthorization Act of 1994, which was set to automatically sunset after five years, absent reauthorization. See 28 U.S.C. § 599 (2000); Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732. The necessary reauthorization did not occur.

by U.S. Attorneys, the U.S. Attorney General, district attorneys in some cases, or powerful regulatory agencies. Some monitors in their most recent incarnation are accompanied, actually or in spirit, by “their” appointing principal to boardroom meetings and deliberations. Confidential reports and documents are exchanged among these “uber-board members,” creating, in my mind, troublesome layers of non-transparency, and even occasionally personal conflicts of interest. These relatively newfangled “public officials,” of sorts, direct corporate activities, at least indirectly, with an “attention must be paid” attitude that is far more dramatic than Willy Loman’s woeful wail in Arthur Miller’s classic *Death of a Salesman*.<sup>62</sup> What functionally transpires in this new dynamic is a substitution and superseder of authority with unfettered, intimidating, and unilateral “suggestions” by an outsider, taken as “directives” by all the insiders. The monitors to boards, in effect, replace the independent exercise of fiduciary responsibilities by the boards to their shareholders and the public. These situations, as publicly reported (the ones we know about), seem to be growing, and are sometimes based *not* on wrongdoing or violations of the so-called deferred prosecution agreements. They seem, instead, to rest on and slip over into ordinary or grey business judgment calls or even personal interests of the overseers (e.g., the New Jersey United States Attorney having a Chair founded and funded in his name at his *alma mater* as part of a monitored deferred prosecution agreement with a major U.S. drug corporation).<sup>63</sup> They can relate to close-call, marginal differing business judgments or even second guessings. What, I ask rhetorically, is going on here, and where is this stuff headed? Is this a trend? Is it licit, justifiable, prudent, or smart? I have considerable doubts and concerns—as you can sense by how I frame the questions I pose.

A fascinating scenario is described in a recent *Wall Street Journal* article dealing with the ouster of a CEO and a corporate general counsel, essentially at the overnight direction of the retired federal judge serving as monitor, with the apparent support of the New Jersey U.S. Attorney.<sup>64</sup> The Board of Directors did as it was told—

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<sup>62</sup> ARTHUR MILLER, *DEATH OF A SALESMAN* 56 (Viking Press 1949) (“He’s not the finest character that ever lived. But he’s a human being, and a terrible thing is happening to him. So attention must be paid.”).

<sup>63</sup> Richard A. Epstein, Letters to the Editor, *Deferred Prosecution Deals Create Harmful Incentives*, *WALL ST. J.*, Dec. 18, 2006, at A17 [hereinafter Epstein, *Harmful Incentives*].

<sup>64</sup> John Carreyrou & Joann S. Lublin, *At Bristol-Myers Mr. Robinson Finds More Woes—Ousted American Express CEO, Now Drug Maker’s Chairman, Takes On Crisis From Other*

immediately. Maybe these leadership personnel changes were the right ultimate decisions. But is that the right way for them to be made? The precedent is dubious as to process, and the question for down the road remains: is this a Son of the Special Prosecutor? Time will tell. But let no one be unaware, because this modality, this so-called cure could also turn out to have unintended side effects worse than whatever disease generated the perceived need for this newest and proliferating phenomenon in the first place.<sup>65</sup>

I now return to another prescient, and I think helpful, observation by Justice Scalia in his *Morrison* dissent:

Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, "crooks." And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution. . . . The [Ethics in Government] statute's highly visible procedures assure, moreover, that unlike most investigations these will be widely known and prominently displayed. Thus, in the 10 years since the institution of the independent counsel was established by law, there have been *nine highly publicized investigations*, a source of constant political damage to two administrations. *That they could not remotely be described as merely the application of "normal" investigatory and prosecutory standards is demonstrated by . . . the following facts: Congress appropriates approximately \$50 million annually for general legal activities, salaries, and expenses of the Criminal Division of the Department of Justice. . . . By comparison, between May 1986 and August 1987, four independent counsel (not all of whom were operating for that entire period of time) spent almost \$5 million (one-tenth of the amount annually appropriated to the entire Criminal Division), spending almost \$1 million in the month of August 1987 alone. For fiscal year 1989, the Department of Justice has requested \$52 million for the entire Criminal Division*

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*Side*, WALL ST. J., Sept. 23, 2006, at B1.

<sup>65</sup> See Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14. This Article and a subsequent exchange of Letters to the Editor (Dec. 8, 2006 and Dec. 18, 2006) after my Jones Lecture, resonate strongly to the concerns and cautions I express. See Patrick E. Hobbs & Timothy J. Coleman, Letters to the Editor, *Fighting the Infection of Unethical Behavior in Corporate Culture*, WALL ST. J., Dec. 8, 2006, at A17; Epstein, *Harmful Incentives*, *supra* note 63, at A17.

and \$7 million to support the activities of independent counsel.<sup>66</sup>

Those raw numbers are stunning, and the bottom-line political and personal impact should be disturbing to any studious observer of the process. The time and money wasted (relatively) and reputations ruined or damaged (often permanently) in many of these investigations and prosecutions present a real, modern-life spectacle reminiscent of Charles Dickens' infamous *Bleak House* description of justice at Chancery Court:

Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why . . . .

. . . .

To see everything going on so smoothly, and to think of the roughness of the suitors' lives and deaths; to see all that full dress and ceremony, and to think of the waste, and want, and beggared misery it represented; to consider that, while the sickness of hope deferred was raging in so many hearts, this polite show went calmly on from day to day, and year to year, in such good order and composure; to behold the Lord Chancellor, and the whole array of practitioners under him . . . as if nobody had ever heard that all over England the name in which they were assembled was a bitter jest . . . .<sup>67</sup>

My theme and concern summon up the spectacles of Dickens in *Bleak House*,<sup>68</sup> and even of Franz Kafka in *The Trial*.<sup>69</sup> Why? Well, I try to imagine myself or a client or any good citizen caught up and chewed out in pieces from some seemingly endless special

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<sup>66</sup> *Morrison v. Olson*, 487 U.S. 654, 713–14 (1988) (Scalia, J., dissenting) (citations omitted) (emphasis added); see also *supra* notes 18–22 and accompanying text.

<sup>67</sup> CHARLES DICKENS, *BLEAK HOUSE* 4, 320 (Bantam Books 1983) (1868).

<sup>68</sup> *Id.* at 320.

<sup>69</sup> FRANZ KAFKA, *THE TRIAL* 38 (Willa & Edwin Muir trans., Schocken Books 1968) (1937).

prosecution or modern mutation, either as a witness, or worse, a target. The process of pursuing justice can become so distorted and “spectacularized” in these circumstances as to seem a Javert pursuit of a Jean Valjean melodrama—without the lovely music.<sup>70</sup> Literary references and actual experience can trigger the imagination to appreciate somewhat the psychological trauma involved. In fact, in *American Prometheus: The Triumph and Tragedy of J. Robert Oppenheimer*, by Kai Bird and Martin J. Sherwin, a chilling description is given of “a veritable kangaroo court” (the authors’ phrase).<sup>71</sup> There, “the head judge [of the Atomic Energy Commission] accepted the prosecutor’s lead” to reach a pre-ordained result to destroy Dr. Oppenheimer’s national security clearance and reputation as an American.<sup>72</sup> That recent Pulitzer Prize biography describes painstakingly a relatively modern-day horror story of what could be a parody of the paradigm I severely critique in this Lecture. Ah, but there is the rub, for the story is not a parody, but a harsh reality and real history—in both Oppenheimer’s case and in too many of the myriad special prosecutor scenarios, lately and throughout recent history.

Notably, in *Bleak House*, it was the “regularized process” that had gotten so entangled. A good aspect of our regular system is that it seems to enjoy, for the most part, a self-correction mechanism to prevent the whole legal system from total collapse or dysfunction. Indeed, Justice Scalia was wrong (happily so, I am sure) in his further dire prediction in *Morrison*, that Congress would never let the Ethics in Government Act lapse.<sup>73</sup> In 1999, Congress did that very thing and let the independent counsel authorization expire.<sup>74</sup> Therefore, the imperfections that inhere in the human agents who operate our system of governance that occasionally allow fault lines to crack institutional processes also function to resuscitate the primary virtues by acknowledging error and correcting it—another marvelous exertion of checks and balances and another borrowed moral lesson of the common law decision process.

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<sup>70</sup> *Les Misérables* is a musical by Alain Boublil and Claude-Michel Schönberg and is based on the novel by Victor Hugo. See VICTOR HUGO, *LES MISÉRABLES* (Charles E. Wilbour trans., Modern Library 1992) (1862).

<sup>71</sup> KAI BIRD & MARTIN J. SHERWIN, *AMERICAN PROMETHEUS: THE TRIUMPH AND TRAGEDY OF J. ROBERT OPPENHEIMER* 537 (2005).

<sup>72</sup> *Id.*

<sup>73</sup> *Morrison v. Olson*, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting).

<sup>74</sup> The Act expired on June 30, 1999. See generally Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732.

The laboratory of the very bad New York State Special Prosecutor Nadjari experience did not interpose a stop-in-your-tracks red flag, nor at least a bright orange caution light to the Feds. Indeed, President Clinton opened the Ken Starr Independent Counsel Whitewater channel (pun intended), yet had this to say about it in a September 18 *New Yorker* article by David Remnick.<sup>75</sup> He told the author that the special prosecutor decision and appointment was “‘the worst decision’ of his Presidency.”<sup>76</sup> I suppose this personal re-appraisal was made not just because of the personal hell it unleashed on him and the country, but maybe also because of a belated and anguished historical awareness of the massive distractions from elementary governance and from other enormously pressing issues of the day that that independent counsel investigation, permutations, and period caused. When those dam (as in holding back the waters—another pun) gates were opened, few could have envisioned (although Justice Scalia warned of it in *Morrison*<sup>77</sup>) the unintended tributaries of investigation it cut into the land and across many lives.

At this point, I wish to interject a cautionary comment about the media role in these situations. Often, media beat the drum demanding special prosecutor appointments, investing their own reportorial and editorial interest in the outcomes of recurring “scandals,” and then “collaborating” with the Appointee’s Office in an inimical and conflicted way, for example, by accepting and publishing unauthorized leaks.<sup>78</sup> They help in order to give their own initial stories “journalistic legs.” This is yet another of the great dangers of the Fourth Estate promoting the facile special prosecutor path, with their own scoops and exposés as a journalistic agenda of self-fulfilling prophecy. In a sense, this is the media angle and version of ends justifying means. This self-serving and self-justifying symbiosis, when it occurs, distorts process and creates other bad unintended consequences (e.g., dilution, ultimately and ironically, of First Amendment free press protections because the abuses tend to breed rebound abuses).<sup>79</sup> The

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<sup>75</sup> David Remnick, *The Wanderer*, NEW YORKER, Sept. 18, 2006, at 42, 66.

<sup>76</sup> *Id.*

<sup>77</sup> *Morrison*, 487 U.S. at 730–31 (Scalia, J., dissenting) (discussing the nearly unlimited ability of a special prosecutor to expand the scope of his or her investigation).

<sup>78</sup> See N.Y. COMM’N OF INVESTIGATION, *supra* note 32, at 10.

<sup>79</sup> On June 3, 2006, *The Washington Post* reported that Wen Ho Lee (a U.S. Nuclear Scientist identified in the news as target of a spy investigation) was to receive \$1.6 million to settle allegations that government leaks violated his privacy—\$895,000 from United States

justification for questionable actions is a breast-beating altruism of the right to inform the public. Polonius gives us another Shakespearean admonition about the human condition and rationalizations in this regard: “[By] pious action, we do sugar o’er [t]he devil himself.”<sup>80</sup>

Just because the lore (the more fun word intended) of history shows that the government got Al Capone on IRS charges, when they could not prove any of the substantive mob atrocities he committed, does not warrant modern day Javerts, and other untouchable-types, being pumped up by the press to go after and get the *really* “bad guys.” Whoever the Jean Valjeans may happen to be at a given historical moment can not justify pursuit by questionable or indirect methods—or by destructive and unfair leaks just to weaken or destroy the “bad guys” and their reputations—when a provable crime in a court of law by due process means happens to be unavailable. That is vigilante justice, not the constitutional variety that should be this Country’s proud hallmark.

While I am on this press/media “beat,” so to speak, I think we might all idealistically agree to deplore the leaks, and maybe even the tabloid-driven perp walks as unwholesome, even possibly unethical—as some may conclude as I do. Personally, I do not much like press conferences conducted in advance of and on indictment announcements because they frankly and inevitably have prejudicial effects. These practices are employed largely to gain an improper edge, though the public’s right to know is always trotted out as the self-serving justification. They constitute a modern day exhibitionism—a latter-day *Circus Maximus*—pure and simple. The media plays the often shouting role of whipping up largely uninformed public fascination as they chase the story and targets of interest. This produces a fevered or frenzied atmosphere of frontier-type justice—a paparazzi-like chase and confrontation. Folks are titillated to revel unthinkingly in tabloidal gossip, in extreme and unfounded inferences, and in utter speculations. Individuals are

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plus \$750,000 from news organizations so they would not have to reveal the names of the government sources. Paul Farhi, *U.S., Media Settle with Wen Ho Lee; News Organizations Pay to Keep Sources Secret*, WASH. POST, June 3, 2006, at A1; *see also* Carol D. Leonnig, *Judges Order 2 Reporters to Testify on Leak*, WASH. POST, Feb. 16, 2005, at A1 (noting the threats of jail and subpoenas flying with respect to reporters who refused to reveal their confidential government sources in reference to the Valerie Plame matter, the subject of a notorious Independent Counsel investigation, indictment, and trial of I. Lewis (“Scooter”) Libby).

<sup>80</sup> WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* act 3, sc. 1, ll. 48–49 (Philip Edwards ed., Cambridge Univ. Press 1985) (1602).

hung out to dry, with a smug assumption that reliable, credible, relevant, and appropriate facts and evidence, if any, can come later, long after ruination of lives and reputations—to say nothing of the pocketbooks being emptied to cover costly defenses against deep-pocket, virtually unlimited prosecutorial resources. Is this too dismal and critical a portrayal? I stand ever ready to be persuaded otherwise and cheered up with a prettier, more reassuring picture. But, for context, I vividly invoke the movie “Network” with its signature screaming scene: “I’m mad as hell, and I’m not going to take this anymore!”<sup>81</sup>

As a fantasy counterpoint to this dark picture, for example, readers should conjure up for a moment a special prosecutor standing up before a bank of microphones, declaring humbly and after a responsible look-see: “There’s no case here. We are now closed for business!” That unheard of or rarely seen fantasy world would, of course, take real courage and strength of character, contrasted to the hubristic huffing and puffing that goes on in press settings, characterized by a more typical “*J’Accuse*.” By the way, the fantasy announcement I propose, if it were ever to occur, would probably be met by a media-public “*sturm und drang*” of unfulfilled expectations, and might be relegated to three or four lines on the obituary pages; the accusatory blast, of course, would have been blasted on a “Hear Ye, Hear Ye, Read All About It” page one headline, followed by chattering bobbleheads pontificating over at least a seventy-two hour news cable cycle.

To support this personal fulmination as not entirely unfounded or unrealistic, note the still quite vivid and recent clamorings outside the Washington, D.C. courthouse, as certain targets of interest (witnesses) were repeatedly paraded into and out of grand jury deliberations in pursuit of a national security leaker’s name—recently revealed as known all along by the special counsel. To be sure, the mandate in that matter also included an investigation of a potential high-level obstruction of justice concerns.

While the media’s own dissatisfaction with some of Special Counsel Fitzgerald’s actions in pursuing and jailing journalists, and the media may have their own agenda as to him and his future work including prosecution of Lewis Libby, the recent revelations cannot have framed the future issue any more pithily than by the journalistic lead in *The New York Times* story on September 2,

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<sup>81</sup> NETWORK (Metro-Goldwyn-Mayer 1976).

2006, "Leak Revelation Leaves Questions."<sup>82</sup> The story lead-in began:

An enduring mystery of the C.I.A. leak case has been solved in recent days, but with a new twist: Patrick J. Fitzgerald, the prosecutor, knew the identity of the leaker from his very first day in the special counsel's chair, *but kept the inquiry open for nearly two more years before indicting I. Lewis Libby Jr.*, Vice President Dick Cheney's former chief of staff, *on obstruction charges*.

Now, the question of whether Mr. Fitzgerald properly exercised his prosecutorial discretion in continuing to pursue possible wrongdoing in the case has become the subject of rich debate on editorial pages and in legal and political circles.<sup>83</sup>

The public will at some point, I suppose, hear the rationalization, relevant theory, and evidence, if any, for why this over-the-top scenario has been allowed to be played out over these now several years before the world and in the federal courts.<sup>84</sup>

My Jonesian cogitation is very skeptical. Fitzgerald was a deputy attorney general, the Chicago U.S. Attorney, a Brooklyn-bred, New Yorker-type prosecutor, a public official of impeccable reputation, who was directed to serve additionally as a kind of separate special counsel within the Justice Department for this "red hot potato" matter. Was he seduced or blinded by the circumstances and high profile power, or simply justified in his buttoned-down straight-arrow actions? Is this yet another special prosecutor-type mutation? Will the unmistakable public spectacle—to the extent this Deputy Attorney General, Special Prosecutor fed into it—be rationalized, and the perjury obstruction indictment (and now conviction) of a high executive branch public official, who was (now we know) not the initial source of the so-called CIA operative leak, be upheld? Was the penumbral crime—it could be conspiracy, perjury, official misconduct, or a host and variety of others constituting "obstruction of justice" that always orbit a core crime investigation, if there ever was one—just another of the available pressure points, power-plays, and mechanisms in the powerful prosecutorial playbook? Often these collateral pursuits are justified

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<sup>82</sup> David Johnston, *Leak Revelation Leaves Questions*, N.Y. TIMES, Sept. 2, 2006, at A1.

<sup>83</sup> *Id.* (emphasis added).

<sup>84</sup> Mr. Libby has subsequently been convicted of perjury and the commentaries and appeals will continue about that.

and legitimate, to be sure. Maybe they were in this case, too. But, just as often, they are abused, as when they become the staple—the S.O.P., standard operating procedure—designed to reach a desired or predetermined result by any means. That causes me again to ask: Is this cure also worse than the suspected disease? Is there some inherent infirmity in the paradigm itself? History may tell, but my answer is discernible from my queries and this mischievous quip: it has been my experience that those whom the gods will destroy, they first make foolish at press conferences. In the instant situation, and in other like ones, the repeated insistence at the indictment press announcement and extravaganza that “process” is the preeminent value and a trump card rings hollow in my ears and judgment.<sup>85</sup> The mantra sounds a lot like ends justifying questionable means, all over again, as it has throughout history.

My personal and professional experiences, and my academic study of the special prosecutor model, thus, lead me to a discerning and grudging acceptance of the methodology, as an exceptional mechanism only rarely to be employed and tolerated. Countervailing checks and balances, right upfront, must always be explicitly embedded in any exceptional investiture of such virtually unbridled power.

As a windup, I do not think it is too far a stretch to liken special prosecutors to a runaway grand jury—at least it has the potential to operate in a somewhat like fashion. What I mean by that strong imagery is that they both presume to be unconstrained by the boundaries of ordinary and prescribed rules. They are often puffed up or blinded by their own purity of purpose and an excessively zealous vision of the idealized end result. Their common thread may be described as a self-righteous and “I alone know best” attitude. Fortunately, sometimes later—often too late, however—the ultimate guardian of fairness and justice, usually the judicial branch, may finally act with neutral oversight to rein in renegade operations. Belated corrections, however, are like an apology in the back of a newspaper, weeks after a page one headline story. Tell

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<sup>85</sup> See Press Release, Office of Special Counsel, White House Official I. Lewis Libby Indicted on Obstruction of Justice, False Statement and Perjury Charges Relating to Leak of Classified Information Revealing CIA Officer's Identity 2 (Oct. 28, 2005), *available at* [http://www.usdoj.gov/usao/iln/osc/documents/libby\\_pr\\_28102005.pdf](http://www.usdoj.gov/usao/iln/osc/documents/libby_pr_28102005.pdf) (“The requirement to tell the truth applies equally to all citizens, including persons who hold high positions in government.”); *see also* Editorial, *Fitzgerald's Wild Source Chase*, WALL ST. J., Jan. 8, 2007, at A16 (discussing Special Prosecutor Fitzgerald's problems involving his sources in the Libby trial).

Dr. Oppenheimer, for example, in the twilight of his life that his eventual redemption with a Medal of Honor from his Country made up for decades of disgrace and excommunication from his professional society and country. Latter-day efforts, apologies, and recriminations do little more good than Lady Macbeth's repeated hand-scrubbing in her unsuccessful effort to erase the spots and stains of her Macbethian-Machiavellian machinations.<sup>86</sup>

For a summary exercise, I gather a series of lessons, or admonitions (some might say, lamentations):

Consider:

The inherent dangers of unaccountable power. Tacitus taught: The lust for power is ancient and ingrained in the human soul.<sup>87</sup>

Consider:

The easy-out tendency to substitute the special prosecutor modality for regularized process and institutional officers, with defined terms of office and accountability.

Consider:

The "atrophy" and diminishment of respect and real power, actually and perceptually, for regular processes, by investing a superseding authority with unbridled power.

Consider:

Enormous diversions and disproportionate re-allocation of resources, and loss of the currency of the realm: integrity—the trust, confidence, and respect of the People, breeding cynicism and frustration.

Consider:

The expectations of appointing agents and media-driven populist-desired results, akin to a Salome-like macabre request to "[b]ring me the head of John the Bapti[st] on a platter."<sup>88</sup>

Consider:

The perverse transmogrification of a "guilty 'till proven otherwise" syndrome.

Consider:

Fallible human nature, at its most essential, which must be balanced and checked especially with respect to those to whom such enormous, unfettered, and irregular power would be bestowed.

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<sup>86</sup> See WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 1.

<sup>87</sup> See CORNELIUS TACITUS, *THE ANNALS OF IMPERIAL ROME* (Michael Grant trans., Penguin Books 1956).

<sup>88</sup> *Matthew* 14:8 (The New American Bible).

Consider:

Hubris among the self-righteous—a fatal flaw—paired in Greek tragedy with the Persona of Nemesis who always prevailed. This is also appreciated nicely in a dramatic Shakespearean setting, as when Cassius speaks to Brutus of Julius Caesar:

“Why, man, he doth bestride the narrow world  
Like a Colossus, and we petty men  
Walk under his huge legs and peep about

. . . .

Upon what meat doth this our Caesar feed  
That he is grown so great?”<sup>89</sup>

Consider:

Portia’s most apt and relevant warning for the theme of this Lecture: “Thou shalt have justice *more than thou desirest*”—the reminder to Shylock and all those demanding a strict “pound of flesh,” as so many special prosecutors do.<sup>90</sup>

Consider:

Justice Scalia’s caution concerning the Latin proverb: “*Fiat justitia, ruat coelum*. Let justice be done, though the heavens may fall.”<sup>91</sup> The warning about extreme, disproportionate, unmeasured, and inhumane demands playing to a mob psyche.

Consider:

The “Untouchables” portrayals in characters like Eliot Ness, Gary Cooper, et al.: Clean up Dodge City melodramas that represent over-simplifications of complex and nuanced problems that instead require even-handed and level-headed fairness and justice, applied on a principled basis, to be sure, but with individualized awareness and circumspection.

Consider:

Opponents who fear to criticize those given great powers, and the extreme misuse of people and process, as illustrated by my student job interview story, *supra*.<sup>92</sup> Embedded or implicit here is the innate human desire for fame, glory, and personal advancement or against aggrandizement.

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<sup>89</sup> WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2, ll. 135–37, 149–50 (Marvin Spevack ed., Cambridge Univ. Press 1988) (1623).

<sup>90</sup> WILLIAM SHAKESPEARE, MERCHANT OF VENICE act 4, sc. 1, ll. 99, 312 (M. M. Mahood ed., Cambridge Univ. Press 1987) (1600) (emphasis added).

<sup>91</sup> Morrison v. Olson, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting).

<sup>92</sup> See *supra* p. 16–17.

I conclude with a thank you for the patience and attention to my effort in this extraordinary venue of the Court of Appeals Courtroom to celebrate Judge Hugh R. Jones. All may offer a crisp salute to the individual whose spirit and memory brought this Lecture to life—The Honorable Hugh R. Jones—a gentleman, scholar, and jurist in the finest traditions of this fabulous Institution. He brought—and still brings I hope through my constructive cogitations, modest imitations, lovely reminiscences, and, yes, candid criticisms—great credit and honor to this Institution and its decision-making process, both of which he relished, loved, and served so joyfully, and with such zest and distinction. God bless him in revered memory, and God bless the work of the Court of Appeals.