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FEATURED ARTICLES

DEPARTMENTS

FROM THE EXECUTIVE DIRECTOR

Dear Members

This marks the 10th issue of *Judicial Notice*, and I find my thoughts going back to the beginning…thinking of our own history within the sweep of New York's legal history. As I opened past issues of this publication, it was clear that as it has grown and matured, it speaks to our highest ambitions…to record and remember history.

I began my review with Volume 1, published in fall 2003 with just 11 pages, and the opening piece "Why a Historical Society?" by the Society's founders, Judith S. Kaye and Albert M. Rosenblatt. In that inaugural issue, here's how they answered the question:

> *Centuries or even decades from now, our successors will want to know what life and law were like up through the dawning of this millennium. We should not disappoint them. Perhaps if we can help them understand us and our forebears, they can improve on what we have done.*

Indeed, this new issue does not disappoint. We begin with Walter Stahr's article *Seward the Lawyer.* As Walter points out, while William H. Seward was many things, he started as a New York lawyer. Walter focuses on this aspect of the multi-faceted figure's long and illustrious career. He draws from his recently published book *Seward: Lincoln's Indispensable Man*. Walter is also the author of *John Jay: Founding Father*, and his article on Jay was published in an earlier issue of *Judicial Notice.*

Daniel Kornstein, a practicing lawyer and past contributor to our publication (*The Roberson Privacy Controversy*), embodies the best of the working lawyer who draws inspiration from our legal past and writes about it with proficiency. Quite an accomplishment! In this issue, Dan ponders *Gitlow v. New York,* a red scare free speech case decided by the U.S. Supreme Court in 1925. He looks to Holmes' concept that law responds to felt necessities of the times, and eloquently makes the case for the need to protect civil liberties in the face of safety and security concerns in this post-9/11 world.

John Gordan embodies the best attributes of the scholar-lawyer, illuminating many forgotten moments in our collective legal history to light our way into the future. He is a founding Trustee of the Society, and his scholarship has been in evidence from the beginning. He has contributed articles on a prosecution for criminal libel tried in the Court of General Sessions of New York City in 1817; on the *Lemmon Slave Case*; and on Charles Peabody, a New York judge who served on the Provisional Court in Civil War Louisiana. He now explores the nefarious exploits of Alexander Hamilton's nephew as he proceeded to swindle the stockholders of the New York and New Haven Railroad Company.

The untimely death of Hon. Theodore Theopolis Jones, Jr. in 2012 during his tenure on the NYS Court of Appeals created a void both on the bench and in the hearts of those privileged to have known and worked with him. That void is admirably filled by two of his former clerks, Janice Taylor and Clifton Branch. Janice and Clif have presented a warm and personal biography, full of photos, that includes a meticulous look back on his career as a lawyer and judge.

Our thanks to *Managing Editor* Henry Greenberg, and to Michael Benowitz and David Goodwin, *Associate Editors,* who moved the articles from author to publication. Finally, our thanks for the magnificent layout provided by Teodors Ermansons, NYS Unified Court System Graphics Department, under the direction of Patricia Everson Ryan.

Marilyn Marcus, Executive Director

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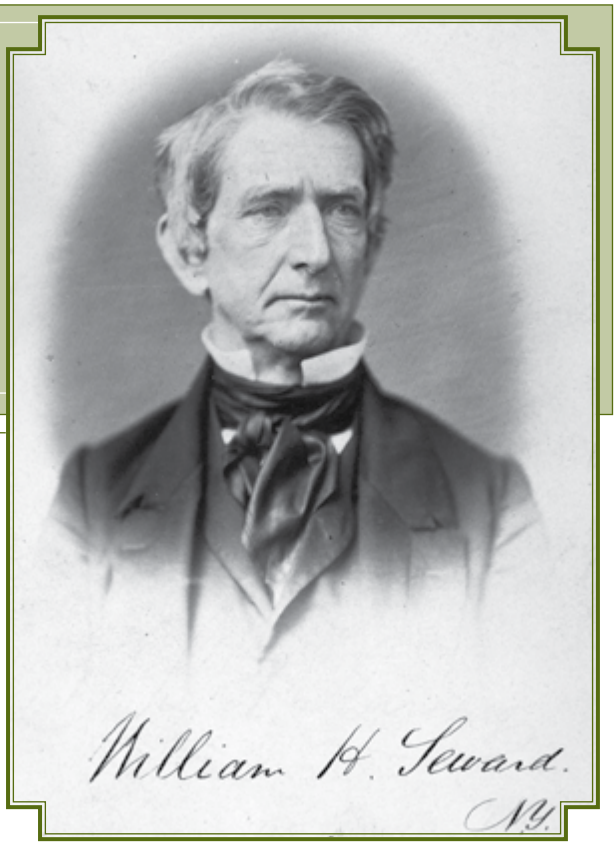
SUBMISSIONS - ***Judicial Notice*** accepts article submissions on a continual basis throughout the year. Submissions are reviewed by members of the Board of Editors. Authors are not restricted from submitting to other journals simultaneously. ***Judicial Notice*** will consider papers on any topic relating to New York State's legal history. Submissions should be mailed to the Executive Director.

Seward —THE— Lawyer

WALTER STAHR*



William H. Seward
Library of Congress, Prints & Photographs Division
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William Henry Seward was many things: state senator, New York governor, federal senator, Lincoln's Secretary of State. His first career, however, was as a New York lawyer. And although in later years he did less and less legal work, and more and more political and diplomatic work, Seward never ceased to be a New York lawyer.

Starting a Career in the Law & Politics

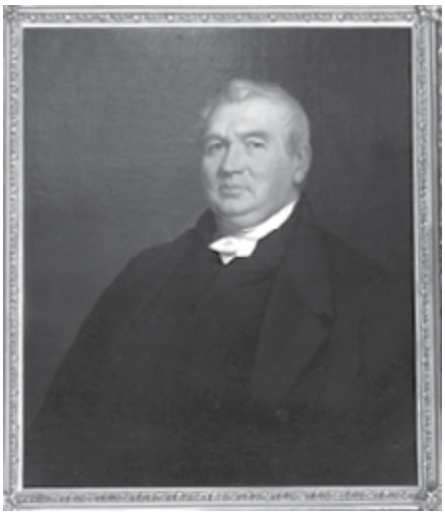
After graduating from Union College in 1820, Seward read law: that was how one became a lawyer in those days. He started his reading in Goshen, near his family's home, then in the fall of 1821 he moved to New York City, working with John Anthon, already a leader of the New York bar. In the spring, Seward returned to Goshen, where he joined the office of Ogden Hoffman, later the State's Attorney General. When Seward passed the bar exam in the fall of 1822, he moved upstate, to Auburn, joining the firm that would soon be Miller & Seward, a predecessor of Cravath, Swaine & Moore.[1]

The senior lawyer in the firm, Elijah Miller, at this time fifty years old, was known as "Judge Miller" because of earlier judicial service. In his memoir, Seward recalled that he had two offers from lawyers in Auburn: he "declined the one which promised the largest business, but involved debt for a law library, and accepted the less hopeful one which I might assume without new embarrassment." Seward downplayed, in his memoir, his other connection with the Miller family: he had already met Judge Miller's beautiful daughter, Frances, through his sister Cornelia. William Henry Seward and Frances Miller were married in October 1824 and, at Judge Miller's demand, they moved into the Judge's fine home on South Street in Auburn.[2]

Like most lawyers of the time, Seward was a generalist: he handled civil and criminal cases, drafted contracts, managed bankruptcies. He was also busy, almost from the outset of his career, in politics. The two careers worked together: his work as a lawyer took him to surrounding counties, where he met people who would become his political friends and supporters. In 1830, when Seward was elected to the State Senate, one paper claimed that he was "well known as a sound lawyer, an eloquent advocate and

** This article is based on the author's acclaimed biography* **Seward: Lincoln's Indispensable Man** *(2012). We recommend that anyone interested in Seward pick up this volume.*

Walter Stahr, a member of the District of Columbia Bar, is also the author of **John Jay: Founding Father** *(2006). He is at work now on a biography of Edwin Stanton, and will teach during the 2014-15 school year at Chapman University in California.*



Hon. Elijah Miller
Seward House Historic Museum

ripe scholar." Another paper noted that he was "a high-minded honorable man" and "the smartest lawyer in Cayuga County."[3]

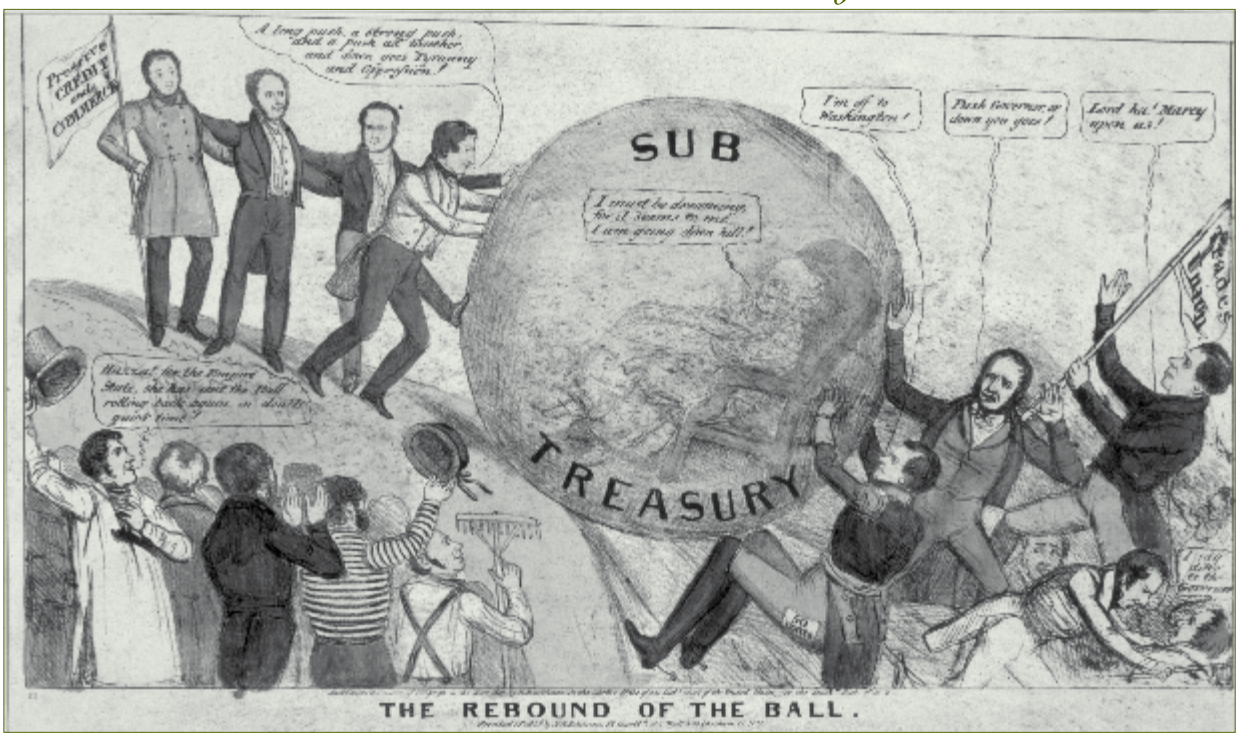
It was good that Seward was a smart lawyer, because at this time state senators were not only legislators: they were judges. The Court for the Trial of Impeachments and the Correction of Errors was composed of all the state senators, all the members of the Supreme Court, and the Chancellor. This Court heard appeals from decisions of the Supreme Court and of the Chancellor, and the senator-lawyers on the court, including young Seward, played an active role in questioning counsel and writing opinions.[4]

One of Seward's opinions involved a settler in western New York who, like many others, had signed a contract to acquire land at a future date, after improving the property and making payments over time. The settler made the payments and improvements, but lost the land due to a third-party claim against the seller. Seward was outraged that a settler could lose his land because of an unknown lawsuit against a distant seller. It made little sense, he wrote, to expect "the humble tenant, located in the woods in the extreme western part of the state, to search the office of the Register or Assistant Register of Chancery, at Albany or New York, every time an installment becomes due on his contract, to see if peradventure a bill may not have been filed by some creditor." The Chancellor drafted an opinion against the settler, and Seward drafted an opinion in his favor, and he still recalled years later his pleasure when all his

Map of the Village of Auburn, published by Hagaman & Markham 1837. Engraved by M.M. Peabody.
David Rumsey Historical Map Collection.

colleagues agreed with him, rather than the learned Chancellor.[5]

Seward continued his law practice during the breaks between sessions of the State Legislature, and then, when his four-year term in the Senate was over, returned to full-time practice in Auburn. Like many lawyers, Seward did not always like legal work: he once wrote to his wife that "we have a bright morning, which it seems almost a sacrilege to devote to this vile litigation." But these complaints must be weighed against the evidence of how hard he worked. A clerk recalled that Seward would do much of his work at night: in the morning he and the other clerks would come into the office and find the pages of the brief or other document scattered on the floor.[6]



"The Rebound of the Ball" Cartoon depicting Seward's (who is pushing the ball downhill) victory over Martin Van Buren and the Democrats in the 1838 Election.
Library of Congress, Prints & Photographs Division, LC-USZ62-84450

Two Terms as Governor

In 1838, Seward was elected Governor of New York, at the time by far the nation's most important state. He faced and raised many important legal issues during his time as Governor. For example, in his first message to the legislature, Seward advocated eliminating the Court of Chancery, arguing that its powers "were too vast, and its patronage too great, to be vested in a single individual," the Chancellor. He recommended that judges should not have any powers of appointment, for this involved them in politics. Neither change was made while Seward was in office, although the Chancellor was eliminated in the 1846 Constitution.[7]

In late July of 1839, Governor Seward received an official request from Virginia to hand over three free black seamen who had allegedly helped a slave to escape from Norfolk, Virginia. Seward's initial response was cautious: he thought the three men, who were at the time in jail in New York City, should have a chance to be heard in court. A month later, after city officials had released the three men, Seward responded at more length; he cited various technical defects in the Virginia papers, but also noted that "there is no law of this State which recognizes slavery, no statute which admits that one man can be stolen from another."

This was the start of a long and public feud between Seward and Virginia, partly political but also partly legal. The Virginia authorities argued that New York law was irrelevant; under the full faith and credit clause of the Constitution, New York (they said) had no choice but to hand over the fugitives for prosecution under Virginia law. Seward responded that New York's laws and policies were relevant; that there was what we would call a "public policy" exception to the general requirement that each state extradite criminals to other states. Virginia ultimately enacted legislation to impose sanctions on New York shipping, but Seward (and the New York legislature) remained firm; the men were never extradited to Virginia.[8]

During his four years as Governor, Seward handled many pardon petitions, including the controversial case of his friend James Watson Webb. Webb's newspaper had mercilessly attacked certain members of Congress and one of them challenged him to a duel. Webb traveled to Delaware for the confronta-

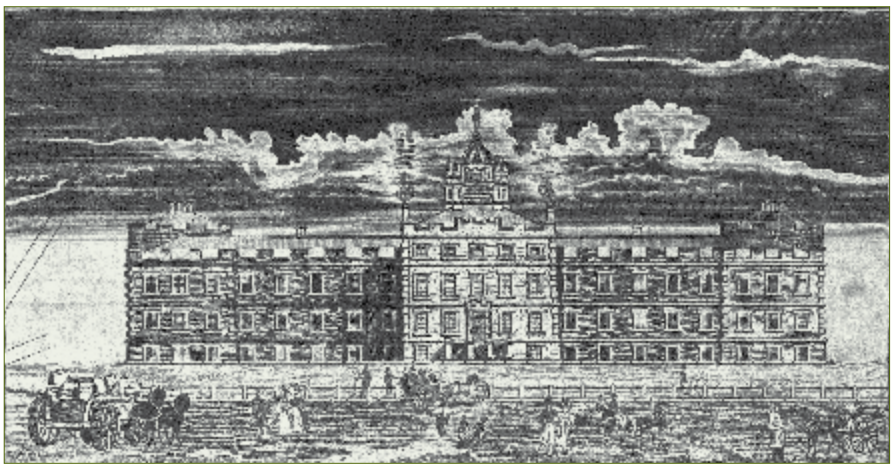
tion, during which he was slightly wounded. Upon his return to New York City, he was accused of violating the law against leaving the state for purposes of a duel. Webb admitted the facts, was convicted, and sentenced to two years. Seward received hundreds of letters, some urging that he force Webb to serve his sentence, most urging that he let Webb go free. Seward granted the pardon, noting that although dueling was immoral and illegal, Webb was one of very few ever charged or convicted under this law, and that none had ever served prison time. The pardon included some questionable conditions: Seward prohibited Webb from dueling or publishing "any justification or defense of the practice."[9]

Taking a Stand: The William Freeman Trial

Seward did not run for a third term as Governor, but returned to his legal work in Auburn. He would became one of the most famous lawyers of his generation, arguing complex cases in the highest courts, but his most famous case was the Freeman trial, a comparatively simple local murder trial. To understand the Freeman trial, one must start with another murder trial, that of Henry Wyatt.

In March of 1845, Wyatt, an inmate at Auburn Prison, stabbed and killed another inmate with a broken pair of shears. In early 1846, a few days before the scheduled start of the Wyatt trial, Seward volunteered to defend Wyatt. There was no question that Wyatt had killed the victim, but there were indications that Wyatt was not sane, and Seward arranged for experts to examine him and testify at trial. Seward also presented evidence of how Wyatt had been "flogged and tortured with an inhuman instrument of torture" while in prison. The trial lasted six days, and Seward's closing argument ("an extremely eloquent and ingenious effort" per the local paper) lasted for eight hours. After a day and night of deliberation, the jurors reported that they were hopelessly divided, with seven men favoring conviction and five favoring acquittal. Judge Bowen Whiting discharged the jury and sent Wyatt back to prison to await another trial.[10]

William Freeman
Auburn Journal and Advertiser, March 25, 1846
Courtesy Old Fulton NY Postcards, fultonhistory.com



Auburn State Prison
Inset from Map of the Village of Auburn. See p. 5 for full caption.

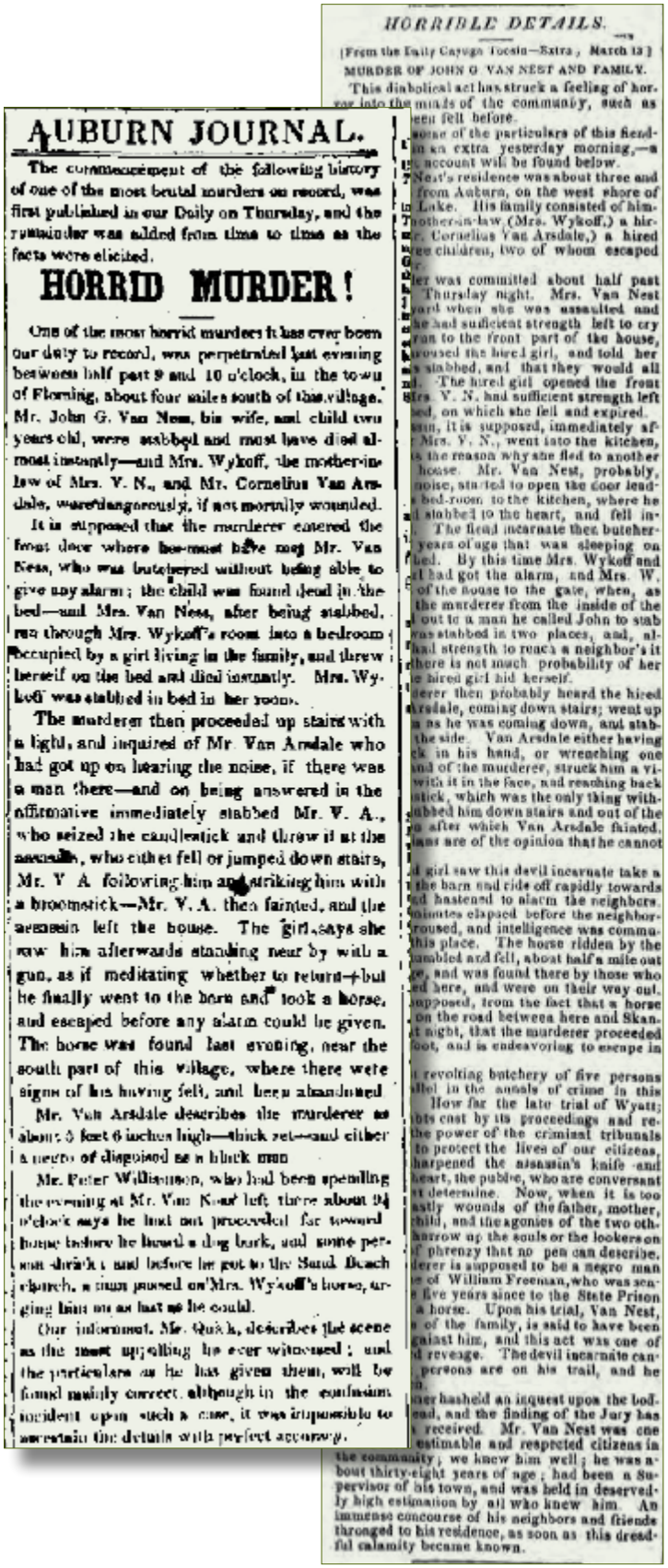
Only three weeks later, William Freeman, a young black man recently released from the same prison, entered a home about four miles outside of

Auburn and stabbed to death John Van Nest, his pregnant wife Sarah, Van Nest's elderly mother-in-law, and his two-year old daughter. Freeman was soon captured and nearly killed by an angry mob as he was escorted to prison. Frances Seward wrote to her husband, who was in Albany at the time, that "there was a terrible commotion in the village as [Freeman] was carried through; it is a matter of wonder to me now that, in that excited state of popular feeling, the creature was not murdered on the spot. Fortunately, the law triumphed; and he is in prison awaiting his trial, condemnation and execution."

People and papers soon began linking the two murders, saying that Seward's strong defense of Wyatt had encouraged Freeman. The *New York Tribune* printed a letter from Auburn describing the "horrible murder" and reporting that "an unfortunate and, I think, false connection has been made of this and the case of Wyatt; many boldly and loudly asserting that a failure to convict Wyatt settled all doubt in Freeman's mind as to his premeditated act." Another paper argued that "wretches" such as Freeman would learn from events such as the Wyatt trial, and consider "the probabilities and possibilities of disagreement among the jurymen, either on the grounds of stupidity, obstinacy, prejudice, or corrupt motive."[11]

Although many assumed that Seward would defend Freeman as he had defended Wyatt, he did not immediately undertake the task. Instead, partly to work on court cases, and partly for pleasure, he took a long trip south and west, visiting Ohio, Kentucky, Louisiana, and South and North Carolina. Seward's legal work was important to his political career not just in shaping his mind and methods; it also gave him a much broader knowledge of the whole nation than most other politicians of his generation.[12]

When Seward returned to Auburn in late May 1846, the second trial of Wyatt, and the trial of Freeman, were imminent. Seward wrote to his friend and advisor Thurlow Weed that "there is a busy war



AUBURN JOURNAL.

The commencement of the following history of one of the most brutal murders on record, was first published in our Daily on Thursday, and the remainder was added from time to time as the facts were elicited.

HORRID MURDER!

One of the most horrid murders it has ever been our duty to record, was perpetrated last evening between half past 9 and 10 o'clock, in the town of Fleming, about four miles south of this village. Mr. John G. Van Ness, his wife, and child two years old, were stabbed and must have died almost instantly—and Mrs. Wykoff, the mother-in-law of Mrs. V. N., and Mr. Cornelius Van Arsdale, were dangerously, if not mortally wounded.

It is supposed that the murderer entered the front door where he must have met Mr. Van Ness, who was butchered without being able to give any alarm; the child was found dead in the bed—and Mrs. Van Ness, after being stabbed, ran through Mrs. Wykoff's room into a bedroom occupied by a girl living in the family, and threw herself on the bed and died instantly. Mrs. Wykoff was stabbed in bed in her room.

The murderer then proceeded up stairs with a light, and inquired of Mr. Van Arsdale who had got up on hearing the noise, if there was a man there—and on being answered in the affirmative immediately stabbed Mr. V. A., who seized the candlestick and threw it at the assassin, who either fell or jumped down stairs, Mr. V. A. following him and striking him with a broomstick—Mr. V. A. then fainted, and the assassin left the house. The girl says she saw him afterwards standing near by with a gun, as if meditating whether to return—but he finally went to the barn and took a horse, and escaped before any alarm could be given. The horse was found last evening, near the south part of this village, where there were signs of his having fell, and been abandoned.

Mr. Van Arsdale describes the murderer as about 5 feet 6 inches high—thick set—and either a negro or disguised as a black man.

Mr. Peter Williamson, who had been spending the evening at Mr. Van Ness' left there about 9½ o'clock says he had not proceeded far toward home before he heard a dog bark, and some person shriek; and before he got to the Sand Beach church, a man passed on Mrs. Wykoff's horse, urging him on as fast as he could.

Our informant, Mr. Quick, describes the scene as the most appalling he ever witnessed; and the particulars as he has given them, will be found mainly correct, although in the confusion incident upon such a case, it was impossible to ascertain the details with perfect accuracy.

HORRIBLE DETAILS.

(From the Daily Cayuga Tocsin—Extra, March 13)

MURDER OF JOHN G. VAN NEST AND FAMILY.

This diabolical act has struck a feeling of horror into the minds of the community, such as never fell before.

Some of the particulars of this fiendish act we learn by an extra yesterday morning,—a full account will be found below.

Van Nest's residence was about three and a half miles from Auburn, on the west shore of Owasco Lake. His family consisted of himself, mother-in-law (Mrs. Wykoff,) a hired man (Mr. Cornelius Van Arsdale,) a hired girl, and three children, two of whom escaped

Mrs. Van Ness was committed about half past 9 o'clock Thursday night. Mrs. Van Nest was in the front yard when she was assaulted and stabbed, but had sufficient strength left to cry out, run to the front part of the house, and rouse the hired girl, and told her she was stabbed, and that they would all be killed. The hired girl opened the front door, and Mrs. V. N. had sufficient strength left to reach a bed, on which she fell and expired.

The murderer then, it is supposed, immediately after killing Mrs. V. N., went into the kitchen, which is the reason why she fled to another part of the house. Mr. Van Nest, probably, hearing a noise, started to open the door leading from the bed-room to the kitchen, where he was also stabbed to the heart, and fell instantly dead.

The fiend incarnate then butchered the two years of age that was sleeping on the bed. By this time Mrs. Wykoff and the girl had got the alarm, and Mrs. W. got out of the house to the gate, when, as she says, the murderer from the inside of the house called out to a man he called John to stab her. She was stabbed in two places, and, although she had strength to reach a neighbor's house, there is not much probability of her recovery. The hired girl hid herself.

The murderer then probably heard the hired man, Van Arsdale, coming down stairs; went up stairs as he was coming down, and stabbed him in the side. Van Arsdale either having a club in his hand, or wrenching one from the hand of the murderer, struck him a violent blow with it in the face, and reaching back with the club, which was the only thing with which he struck him down stairs and out of the house, after which Van Arsdale fainted.

Some are of the opinion that he cannot

The little girl saw this devil incarnate take a horse from the barn and ride off rapidly towards Auburn. She hastened to alarm the neighbors. Some minutes elapsed before the neighborhood was aroused, and intelligence was communicated to this place. The horse ridden by the murderer stumbled and fell, about half a mile out of Auburn, and was found there by those who had started here, and were on their way out. It is supposed, from the fact that a horse was found on the road between here and Skaneateles last night, that the murderer proceeded on foot, and is endeavoring to escape in that way.

The most revolting butchery of five persons recorded in the annals of crime in this country. How far the late trial of Wyatt; and the cost by its proceedings and results, the power of the criminal tribunals to protect the lives of our citizens, has sharpened the assassin's knife and steeled the heart, the public, who are conversant with facts, will determine. Now, when it is too true that the ghastly wounds of the father, mother, and child, and the agonies of the two others harrow up the souls or the lookers-on to a state of phrenzy that no pen can describe, the murderer is supposed to be a negro man named Jim, or William Freeman, who was sentenced five years since to the State Prison for stealing a horse. Upon his trial, Van Nest, a brother of the family, is said to have been very active against him, and this act was one of deliberate revenge. The devil incarnate cannot escape. Persons are on his trail, and he will be taken.

Coroner Hasbrouck held an inquest upon the bodies of the dead, and the finding of the Jury has not been received. Mr. Van Nest was one of the most estimable and respected citizens in the community; we knew him well; he was about thirty-eight years of age; had been a Supervisor of his town, and was held in deservedly high estimation by all who knew him. An immense concourse of his neighbors and friends thronged to his residence, as soon as this dreadful calamity became known.

Articles on the Freeman Case
left: Auburn Journal and Advertiser, March 18, 1846
right: Albany Argus, March 16, 1846
Courtesy Old Fulton NY Postcards, fultonhistory.com

Cayuga County Courthouse where the Wyatt and Freeman trials took place. Historic Courthouse of the State of New York: A Study in Postcards 24 (Albert and Julia Rosenblatt eds., 2006)

around me, to drive me from defending and securing a fair trial for the negro Freeman. . . . No priest (except one Universalist), no Levite, no lawyer, no man, no woman, has visited him. He is deaf, deserted, ignorant, and his conduct is unexplainable on any principle of *sanity*. It is natural that he trusts me to defend him. If he does, I shall do so." The tone of this letter, and others from this period, make it clear that even Weed was among those who urged Seward not to defend Freeman. But in this instance, Seward disregarded the advice of Weed, and heeded instead the advice of his wife, and of his friend John Austin, the Universalist minister in Auburn.

On Monday morning the first of June, the Auburn courthouse was densely packed with an eager crowd. Judge Whiting opened court, defendant Freeman was brought in, and District Attorney Robert Sherwood arraigned him on the four murder charges. Seward argued that Freeman could not be tried because he was not competent, not sane, and that a jury should determine this question of sanity. Sherwood objected, arguing that the judge could decide the issue himself, with or without the aid of medical experts. Judge Whiting was not ready to rule on this issue immediately, so the Freeman trial was suspended.[13]

On the next day, at the outset of the second Wyatt trial, Seward moved that the trial be postponed until "popular prejudice and passion shall have subsided," or should be moved to another county. Seward argued that almost everyone in Cayuga County "eagerly believed and thoughtlessly published that [Wyatt's] partial escape from justice has excited Freeman to commit his crimes, by diminishing the salutary effect of capital punishment upon his mind." Judge Whiting denied the motion, saying he would not "presume the power to postpone the trial unless an attempt to impanel a jury in Auburn failed."

The attempt almost did fail: it took two weeks, and the examination of almost two hundred potential jurors, before a jury that satisfied at least Judge Whiting was in place. After that, the second trial of Wyatt moved relatively quickly, and the jury took less than two hours to render a verdict of guilty. On June 24, Judge Whiting sentenced Wyatt to death by hanging. Frances, writing to her sister Lazette, reported that "Wyatt received his sentence this morning in the presence of a thousand men and also three hundred female barbarians. I will not degrade the name of women by applying it to them." Frances noted that almost all Seward's friends were urging him not to defend Freeman—even her father urged him to "abandon the nigger"—but Seward "will do what is right. He will not close his eyes and know that a great wrong is perpetrated."[14]

When the trial of Freeman resumed later on the same day, Judge Whiting granted Seward's request to have a jury trial on the question of sanity, but denied him the right to challenge these jurors.[15] As a result, in Seward's words, "many of the jurors entered the panel with settled opinions that the prisoner was not only guilty of the homicide, but sane." Seward presented expert medical evidence, notably from Dr. Amariah Brigham, at the time America's foremost expert on insanity, who testified that on the basis of his own examination of the prisoner, and the

evidence of others at the trial, he had concluded the prisoner was insane. Seward also presented lay witnesses who recounted bizarre conversations with Freeman in prison, including one in which he claimed to "read" the Bible in a nonsense mixture of religious words. When asked why he had killed the Van Nests, Freeman had responded variously "I had my work to do" or "I don't know."

Seward started his closing argument in this preliminary trial at about two in the afternoon of July Fourth and continued until about eleven that night. Unfortunately, we do not have a full transcript, but we do have the description of Seward's friend John Austin, who found the argument "thrilling—powerful—convincing—overwhelming!" And we do have Seward's famous final words:

> *In due time, gentlemen of the jury, when I shall have paid the debt of nature, my remains will rest here in your midst, with those of my kindred and neighbors. It is very possible that they may be unhonored, neglected, spurned! But perhaps, years hence, when the passion and excitement which now agitate this community shall have passed away, some wandering stranger, some lone exile, some Indian, some Negro, may erect over them a humble stone, and thereon this epitaph, "He was faithful."*

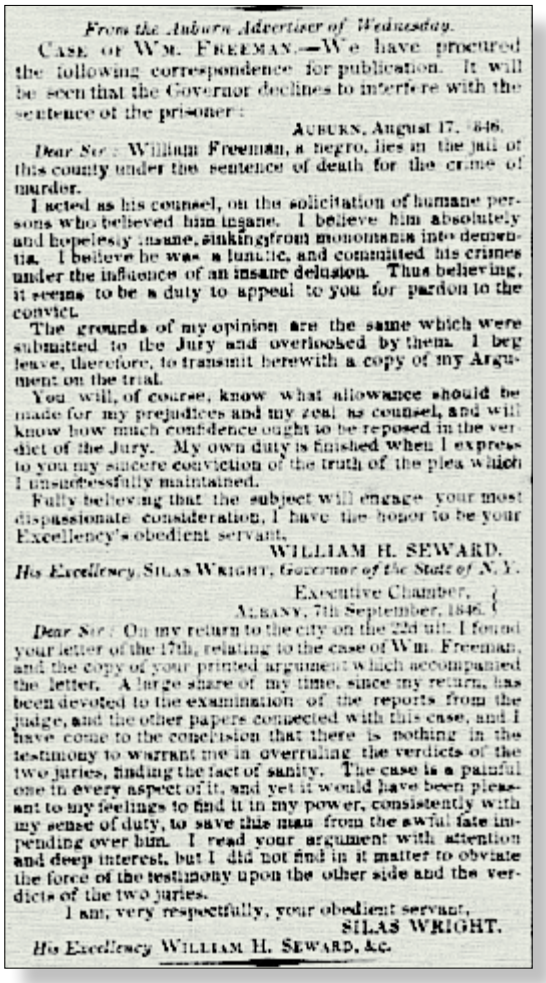
This last phrase, "he was faithful," is the epitaph on Seward's tomb today.[16]

On the next day, a Sunday, the jury deliberated all day, and finally returned a compromise verdict: "We find the prisoner sufficiently sane in mind and memory to distinguish between right and wrong." Seward objected and asked the court to instruct the jury to render a verdict on the proper legal question of whether Freeman was sane or insane. But Judge Whiting declined, finding that the jury's verdict was "equivalent to a verdict of sanity, under the rule laid down in his charge."

The next morning, when Freeman was again arraigned, there was a scene Austin found "sufficient to melt the heart of a stone." When District Attorney Sherwood asked Freeman to respond to the indictment, he answered "ha!" When Sherwood asked how Freeman would plead, he said, "I don't know." After several similar responses to similar questions, "Gov. Seward could no longer restrain himself. He buried his face in his hands, and burst into tears—and finally seized his hat and rushed from the courtroom." Seward's co-counsel David Wright then "declared that he could not consent longer to take part in a cause which had so much the appearance of a *terrible farce.*" Seward had by this time returned to the courtroom, and when the judge asked whether anyone would represent Freeman, he "sprang to his feet and exclaimed, *I shall remain counsel for the prisoner until his death!*,"[17]

The main Freeman trial covered much of the same ground as the preliminary trial; Seward and Wright (who also agreed to remain counsel) again brought Dr. Brigham and others to testify that Freeman was insane. Seward again closed for Freeman. In this instance we *do* have his full argument, running to more than sixty printed pages. Seward skillfully showed the jury that he, too, was grieved by the murders. "A whole family, just, gentle, and pure, were thus, in their own house, in the night time, without any provocation, without one moment's warning, sent by the murderer to join the assembly of the just." He argued, however, that it would be just as wrong for the jury to convict Freeman, if he was indeed insane, as it had been for Freeman to kill the Van Nest family.

The prosecution had alluded to Freeman's mixed race (he was largely black but partly Indian) and argued that the "prisoner's intellect is to be compared with the depreciated standard of the African, and his passions with the violent and ferocious character erroneously imputed to the aborigines." Seward responded that "the color of the prisoner's skin, and the form of his features, are not impressed upon the spiritual, immortal mind which works beneath. In spite of human pride, he is still your brother, and mine, and bears equally with us the proudest inheritance of our race—the image of our Maker. Hold him then to be a man. Exact of him all the responsibilities which should be exacted under like circumstances if he belonged to the Anglo-Saxon race, and make for him all the allowances, and deal with him with all the tendernesses which, under the circumstances, you would expect for yourselves."



From the Auburn Advertiser of Wednesday.

CASE OF WM. FREEMAN.—We have procured the following correspondence for publication. It will be seen that the Governor declines to interfere with the sentence of the prisoner:

AUBURN, August 17, 1846.

Dear Sir: William Freeman, a negro, lies in the jail of this county under the sentence of death for the crime of murder.

I acted as his counsel, on the solicitation of humane persons who believed him insane. I believe him absolutely and hopelesly insane, sinking from monomania into dementia. I believe he was a lunatic, and committed his crimes under the influence of an insane delusion. Thus believing, it seems to be a duty to appeal to you for pardon to the convict.

The grounds of my opinion are the same which were submitted to the Jury and overlooked by them. I beg leave, therefore, to transmit herewith a copy of my Argument on the trial.

You will, of course, know what allowance should be made for my prejudices and my zeal as counsel, and will know how much confidence ought to be reposed in the verdict of the Jury. My own duty is finished when I express to you my sincere conviction of the truth of the plea which I unsuccessfully maintained.

Fully believing that the subject will engage your most dispassionate consideration, I have the honor to be your Excellency's obedient servant,

WILLIAM H. SEWARD.

His Excellency SILAS WRIGHT, *Governor of the State of N.Y.*

Executive Chamber,
ALBANY, 7th September, 1846.

Dear Sir: On my return to the city on the 22d ult. I found your letter of the 17th, relating to the case of Wm. Freeman, and the copy of your printed argument which accompanied the letter. A large share of my time, since my return, has been devoted to the examination of the reports from the judge, and the other papers connected with this case, and I have come to the conclusion that there is nothing in the testimony to warrant me in overruling the verdicts of the two juries, finding the fact of sanity. The case is a painful one in every aspect of it, and yet it would have been pleasant to my feelings to find it in my power, consistently with my sense of duty, to save this man from the awful fate impending over him. I read your argument with attention and deep interest, but I did not find in it matter to obviate the force of the testimony upon the other side and the verdicts of the two juries.

I am, very respectfully, your obedient servant,

SILAS WRIGHT.

His Excellency WILLIAM H. SEWARD, &c.

On the question of Freeman's sanity, Seward not only summarized the testimony of the experts, but speculated on the factors that might have caused Freeman to change from "an active, smart boy" to the silent defendant, with the "*idiotic* smile which plays continually upon the face of the maniac." He noted that "there has been no school here for children of his caste" and "*neglect of education* is a fruitful cause of insanity." He recounted how Freeman was whipped as a boy, and beaten so severely about the head while in prison that he had lost almost all hearing.

Seward's eloquence had no effect; the jury convicted Freeman after only two hours of deliberation. The next morning, at 6:30 A.M., Judge Whiting sentenced Freeman to death by hanging.

Seward attempted to secure a delay of Wyatt's execution, but it was carried out as scheduled in mid-August. Seward also attempted to persuade the Governor to pardon Freeman, but was rebuffed.

From the Auburn Advertiser of Wednesday.

CASE OF WM. FREEMAN - We have procured the following correspondence for publication. It will be seen that the Governor declines to interfere with the sentence of the prisoner:

AUBURN, August 17, 1846

Dear Sir: William Freeman, a negro, lies in the jail of this county under the sentence of death for the crime of murder.

I acted as his counsel, on the solicitation of humane persons who believed him insane. I believe him absolutely and hopelesly insane, sinking from monomania into dementia. I believe he was a lunatic, and committed his crimes under the influence of an insane delusion. Thus believing, it seems to be a duty to appeal to you for pardon to the convict.

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Fully believing that the subject will engage your most dispassionate consideration, I have the honor to be your Excellency's obedient servant,

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His Excellency, Silas Wright, Governor of the State of N.Y.

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Dear Sir: On my return to the city on the 22d ult. I found your letter of the 17th, relating to the case of Wm. Freeman, and the copy of your printed argument which accompanied the letter. A large share of my time, since my return, has been devoted to the examination of the reports from the judge, and the other papers connected with this case, and I have come to the conclusion that there is nothing in the testimony to warrant me in overruling the verdicts of the two juries, finding the fact of sanity. The case is a painful one in every aspect of it, and yet it would have been pleasant to my feelings to find it in my power, consistently with with my sense of duty, to save this man from the awful fate impending over him. I read your argument with attention and deep interest, but I did not find in it matter to obviate the force of the testimony upon the other side and the verdicts of the two juries.

I am, very respectfully, your obedient servant,

SILAS WRIGHT

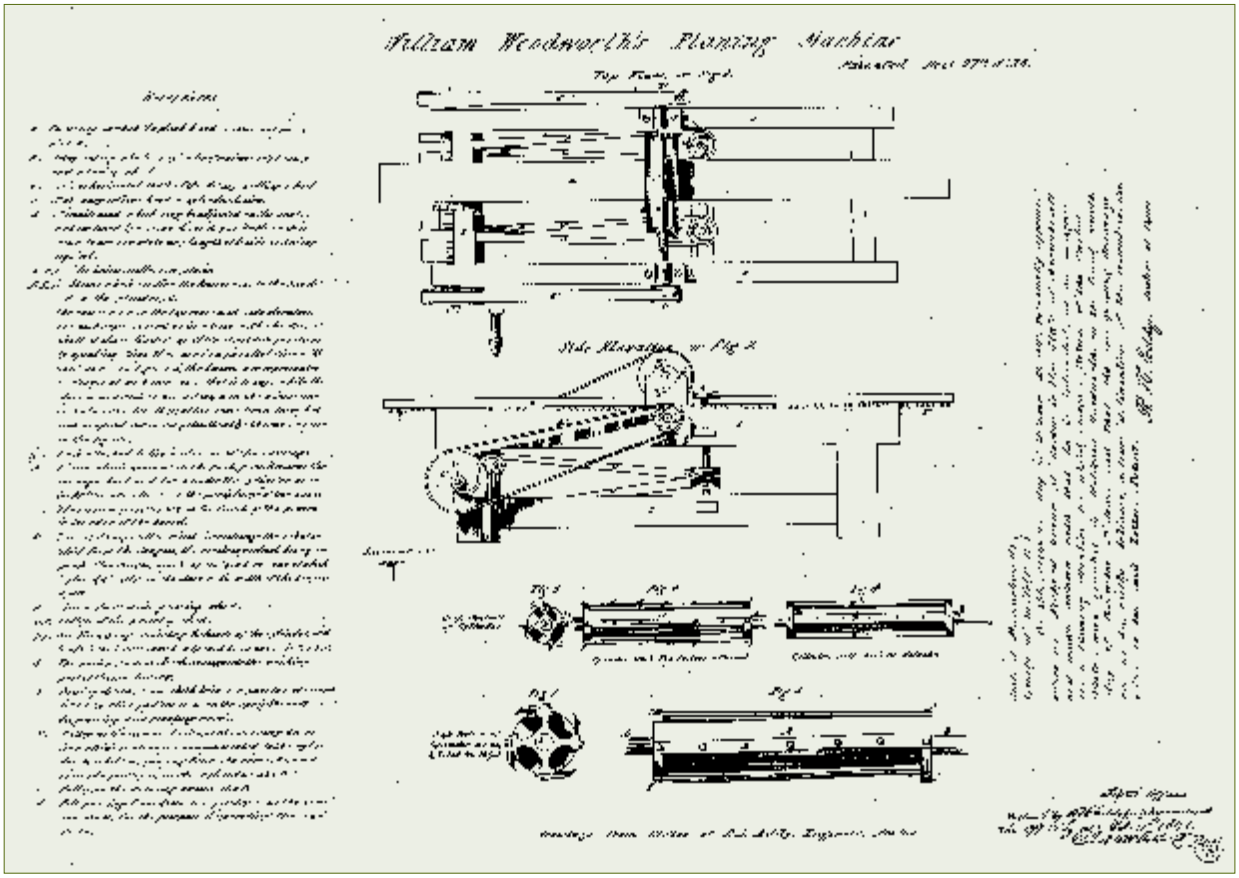
Letter from Seward and Governor Wright's response as published in the New-York Daily Tribune. (New York, NY), 14 Sept. 1846. Chronicling America: Historic American Newspapers. Library of Congress.

In September, however, just days before the scheduled execution, the State Supreme Court stayed the Freeman execution. Seward traveled to Rochester in November, where he successfully argued Freeman's appeal before the State Supreme Court. The Court agreed with Seward that Whiting had improperly accepted the compromise verdict on sanity and improperly excluded evidence of insanity from the main trial. After this decision, prison officials attempted to determine whether Freeman was competent for a second trial; it was clear that he was not. When Freeman died in his jail cell, in August of 1847, Frances reported to her husband that "he is gone to Him who openeth the eyes of the blind and causeth the deaf to hear, one whose benevolence is not chilled by the color of the skin of his children."[18]

Seward the Attorney: A Career

Seward's work on the Freeman trial was soon well known, in part because Seward himself arranged for the publication of a pamphlet with parts of his arguments. Less well known than that, but perhaps more important in getting the full picture of Seward the lawyer, was his work as a patent lawyer.

Seward was indeed one of the nation's leading patent lawyers, almost always on the side of the patent owner rather than the challenger. Seward's key client was James G. Wilson, who owned the patent on a wood-planing machine invented by William Woodworth. By the end of the 1840s, according to *Scientific American*, the Woodworth patent was "known to almost every child in the land by the



William Woodworth's Planing Machine. U.S. Patent No. 5315X (filed Dec. 27, 1828).

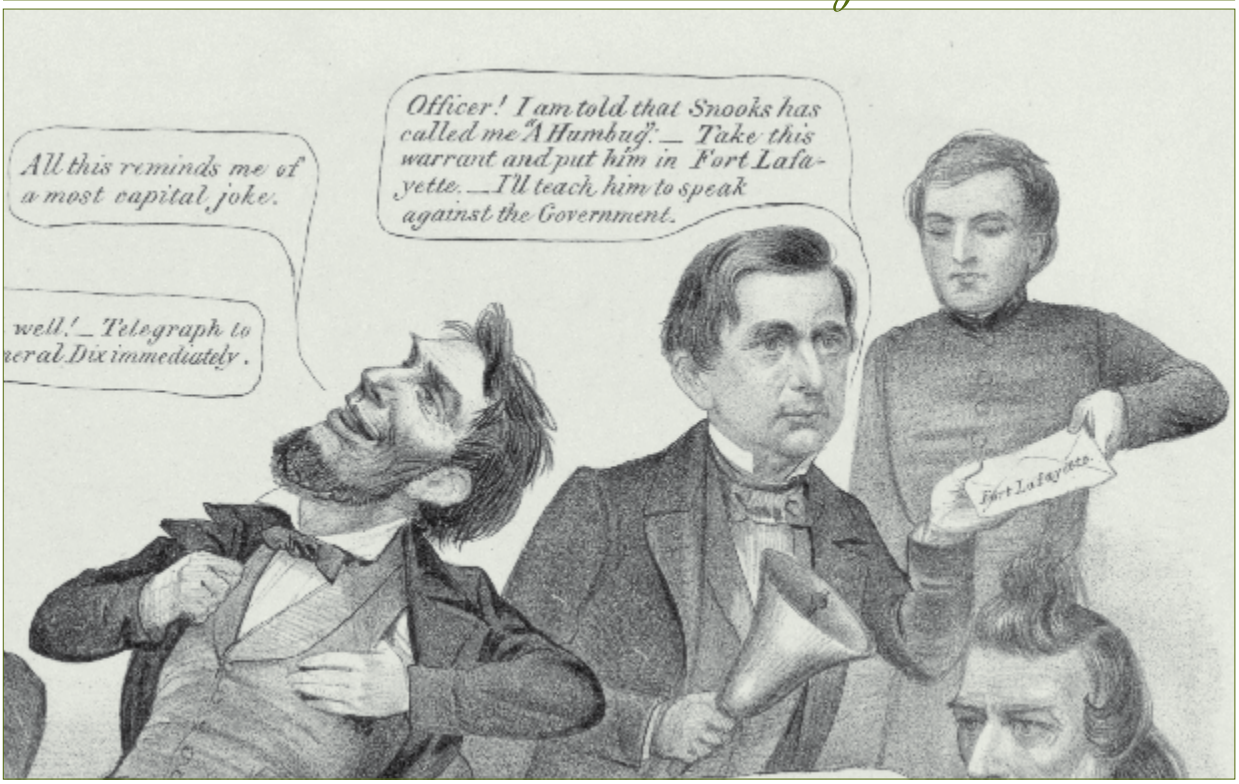
Lincoln's Cabinet, 1861, Seward standing next to Lincoln
Library of Congress, Prints & Photographs Division, LC-DIG-ppmsca-19482

amount of litigation arising therefrom." *Scientific American* waged a minor war against Wilson, arguing that he was using the patent to discourage other investors. Wilson was what we would call a "patent troll," skilled in litigation rather than invention, and Wilson's key lawyer in this unpopular effort was Seward. Seward represented Wilson not only in New York, but around the country: in Pennsylvania, Ohio, South Carolina, and elsewhere. But Seward did *not* emphasize this work in public, and so it has not received much attention in Seward biographies.[19]

Seward's work for Wilson led to other patent work: his clients included Jethro Tull, inventor of the modern iron plow; Erastus Corning, manufacturer of railroad spikes, and founder of the town of the same name in New York; and Samuel Morse, inventor of the telegraph. The Freeman case may have added to Seward's fame; but his patent work paid the bills, and enabled him to consider running for office again. He did: in early 1849 the New York Legislature selected him as the State's next federal Senator.[20]

Seward's legal career continued during the dozen years in which he was a federal senator. He argued several cases in the Supreme Court during this period. One was a complex case involving rival claims to a property in Mobile, Alabama. The *New York Times* found it "a little singular that a client in Alabama should wander all the way up to Mr. Seward's latitude in search of a safe counsel."[21]

Perhaps the most important case of Seward's legal career, from the perspective of current law, was the *Genesee Chief* case. Before this case, following English precedents, the federal courts had limited admiralty jurisdiction to the oceans and seas and inlets affected by the tides. In the *Genesee Chief* case, Seward persuaded the Supreme Court to abandon this rule, to extend federal admiralty jurisdiction to the Great Lakes. Seward argued, and the Court agreed, that they should be viewed as inland seas, vital elements of interstate and international commerce, and therefore subject to federal jurisdiction.[22]



Portion of political cartoon "Running the Machine" depicting Lincoln, Seward and his "little bell," Library of Congress, Prints & Photographs Division, LC-USZ62-9407

No Folly: As Secretary of State

By 1860, Seward was the leading candidate for the Republican nomination for President. The delegates opted instead for a comparatively unknown Illinois lawyer, Abraham Lincoln. Seward mastered his disappointment, and campaigned for his rival Lincoln in almost every northern state. No man did more to secure Lincoln's election than Seward, and it was in part for this that Lincoln named Seward Secretary of State.

Secretary Seward was responsible for foreign policy; but he was also responsible for many other issues, including, during the first year of the war, domestic security. Seward reportedly boasted, during this period, that he could ring a little bell on his desk, and order the arrest of any man or woman in the United States, and that no man, other the President, could order their release thereafter.

I do not believe that Seward actually said this—the first instance of the quote I can find is in opposition newspapers—but it sounds like Seward and so people believed that he said it.

"Seward's little bell" became shorthand, for political opponents, for the way in which Lincoln and Seward were disregarding civil liberties—arresting men and women on slight charges, holding them in prison for months on end.[23]

In early 1862, Lincoln transferred formal responsibility for domestic security from Seward to the new Secretary of War, Edwin Stanton. Seward remained involved, however, in many cases. For example, in May 1864, Seward received a telegram from John Dix, the general in charge in New York City, asking whether a presidential proclamation that had appeared in two morning papers was authentic. Seward responded that the message was a forgery, then hastily conferred with Lincoln and Stanton. Soon orders were on their way to Dix: he should arrest and imprison the editors of the two papers and seize their offices and printing presses. A few days later, when the culprit was caught, the editors were released and the papers resumed publication. Although the orders were signed by Stanton, Navy Secretary Gideon Welles was sure that Seward was to blame. "The act of suspending these journals," Welles wrote in his diary, "and the whole

Cancelled check in the amount of $7.2 million, for the purchase of Alaska issued August 1, 1868.
Courtesy National Archives and Records Administration

arbitrary and oppressive proceeding, had its origin with the Secretary of State."[24]

The *Trent* crisis provides another good example of Seward drawing on his legal background. In November 1861, an American naval ship fired across the bow of the British merchant ship *Trent* and seized from its deck four Confederate diplomats. Many Americans rejoiced, both because the Confederate plans were foiled, and because the British were insulted in the process. The British, however, were outraged, and soon Seward had on his desk a formal British demand for an apology and return of the four prisoners.[25]

The *Trent* seizure raised political and international issues, but it was also a *legal* issue; had the American naval captain, Wilkes, complied with maritime law? As the *New York Times* noted, the streets were filled with lawyers and would-be lawyers, citing "Grotius, Puffendorf, Vattel and Wheaton to support different positions." As Seward himself studied the law books, he came to the view that Wilkes had acted improperly: that he should have forced the *Trent* into port, so that the issues could be resolved by a prize court, rather than simply seizing the men on the high seas. Moreover, Seward found many *American* precedents, from the tensions leading up to the War of 1812, to support his legal view. By citing Jefferson and Madison and Monroe, in his response to the British minister, Seward worked to persuade his real audience, the American public, that he was doing the right thing in releasing the four prisoners. So, instead of the expected firestorm of protest against the release of the prisoners, there was instead widespread praise for Seward's sagacious approach.[26]

On the night that John Wilkes Booth shot and killed Lincoln, Seward was nearly killed by one of Booth's co-conspirators, who reached Seward's room and slashed him about the face and neck with an eight-inch Bowie knife. Seward survived, however, and remained Secretary of State through the controversial administration of President Andrew Johnson.[27]

It was during this period that he signed a treaty with Russia to purchase Russian America, what we know as Alaska, for $7.2 million in gold. Here again, Seward put his legal training to work; he prepared the first draft of the treaty, and rejected Russian demands for complex compensation clauses, preferring a simple "all-in" price for the territory. It is a myth that the purchase was immediately mocked as "Seward's folly;" the initial newspaper coverage was almost entirely favorable. The *Daily Alta California*, for example, said that this would be just the first step, that soon the American flag would wave along the entire Pacific Coast, from the southern tip of Baja California to the Bering Strait.[28]

Postscript

Seward remained in office until March 1869, when Grant was inaugurated President. Seward retired but did not return to the law: his health was not up to the work, and he did not need the money. Instead he traveled widely, around the world, and died in late 1872.

In his obituary of Seward, Charles Francis Adams wrote that if Seward had "devoted himself to [the law] exclusively, I have not a shadow of doubt he would have attained a position of the very first rank." Jeremiah Black, a political enemy of Seward, responded that Seward "knew less of the law and cared less for it than any other man who has held high office in this country. If he had not abandoned the law, he might have been a sharp attorney; but he could never have risen to the upper ranks of the profession."[29]

Adams was closer to the truth than Black on this point. Seward may not have been one of the great lawyers, but he was a very good one, and his legal skills served him and the nation well.

ENDNOTES

1. Walter Stahr, *Seward: Lincoln's Indispensable Man* 16–17 (2012); 1 Robert Swaine, *The Cravath Firm and its Predecessors* 59–60 (1946-48).
2. Frederick Seward, *Autobiography of William H. Seward, From 1801 to 1846: With a Memoir of His Life, and Selections of His Letters* 51 (1877); Stahr, *supra* note 1, at 16–19.
3. Stahr, *supra* note 1, at 26–31 (citing newspaper articles).
4. 1 Alden Chester, *Courts and Lawyers of New York: A History* 792–803 (1925); Stahr, *supra* note 1, at 35–36.
5. *Parks v. Jackson*, 11 Wend. 442, 463 (N.Y. 1833); Court for the Correction of Errors Minutes, Dec. 26, 1833, New York State Library; Seward, *supra* note 2, at 142–44.
6. Stahr, *supra* note 1, at 46–51, 93 (quote on 93) (citing letter to Frances Seward).
7. Id. at 61.
8. Id. at 65, 71, 74, 82.
9. Id. at 83–84 (citing The Works of William Seward).
10. Id. at 99–100.
11. Stahr, *supra* note 1, at 100; *New York Tribune*, Mar. 20, 1846; *New York Morning Express*, Mar. 21, 1846
12. Stahr, *supra* note 1, at 90–93, 101.
13. Id. at 100–01.
14. Id. at 101–02 (citing Frances Steward to Lazette Worden).
15. Curiously, Judge Whiting's pre-arraignment charge, which mixed "unable to distinguish between right and wrong" and "could not control his passions" concepts, amounted to an uneasy combination of two different insanity rules: the then-new M'Naughten test, which would govern New York jurisprudence until the age of the Modern Penal Code, and the "irresistible impulse" test, which never gained a foothold in New York law.
16. Stahr, *supra* note 1, at 102.
17. Id. at 102–03 (citing John Austin Journal).
18. Id. at 103–05 (citing Frances Seward to William Seward).
19. Id. at 91–92.
20. Id. at 92–93, 113–15.
21. Stahr, *supra* note 1, at 139; *New York Times*, Dec. 16, 1852.
22. *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 457 (1852); David Currie, *The Constitution in the Supreme Court: The First Hundred Years* 257–58 (1985).
23. Mark Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (1991); Stahr, *supra* note 1, at 4, 285–88; Jennifer Weber, *Copperheads: The Rise and Fall of Lincoln's Opponents in the North* (2006).
24. Stahr, *supra* note 1, at 395 (citing Welles's Diary).
25. Id. at 307–09, 313–14; Gordon Warren, *Fountain of Discontent: The Trent Affair and Freedom of the Seas* (1981).
26. Stahr, *supra* note 1, at 308–23; *New York Times*, Nov. 17, 1861.
27. James Swanson, *Manhunt: The 12-Day Chase for Lincoln's Killer* 49–61 (2006); Stahr, *supra* note 1, at 1–3.
28. Stahr, *supra* note 1, at 482–91 (quote on 490).
29. Charles Francis Adams, *An Address on the Life, Character, and Services of William H. Seward* 34 (1873); Jeremiah Black, "Mr. Black to Mr. Adams," *Galaxy* 17 (1874), 108.

ELOQUENCE, REASON AND NECESSITY

GITLOW AND NEW YORK AFTER 9/11

DANIEL J. KORNSTEIN

Famous cases can have checkered careers. Such cases may represent the felt necessities of their times, but those necessities may change as times change. A good example, especially for New York after 9/11, is *Gitlow v. New York*.[1]

Decided by the U.S. Supreme Court in 1925, *Gitlow* is one of the Red Scare free speech cases. In 1920, amid widespread public hysteria, a state court jury in Manhattan convicted 29-year-old Benjamin Gitlow of advocating criminal anarchy because he helped publish a pamphlet in favor of "revolutionary Socialism" and the ultimate overthrow of the existing government by class struggle, strikes and other "revolutionary" action. Although the pamphlet had no practical effect or consequence, Gitlow's conviction was affirmed all the way up to the Supreme Court. Free speech paid the price.

Benjamin Gitlow
Revolutionary Radicalism: Its History, Purpose and Tactics, Part I, Volume I
(Albany: J.B. Lyon Company, 1920), p. 680

Since then, however, *Gitlow* has been largely discredited. The Supreme Court has eroded it to the vanishing point. By 1969, in *Brandenburg v. Ohio*, the Court seemed to repudiate *Gitlow* in all but name by holding that advocacy could not be constitutionally prohibited unless it was "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action."[2] *Gitlow* might thus be regarded as an historical curiosity, were it not for current events. Our anxious post-9/11 world, beset as it is by the new face of terrorism, has much to learn from *Gitlow*, if only as a cautionary tale.

The High Court's decision in *Gitlow* matters for several reasons. *Gitlow* was the first case to "assume" that the First Amendment is "protected by the due process clause of the Fourteenth Amendment from impairment by the States." That "assumption" started the selective application of the Bill of Rights to the states via the process of incorporation.

Gitlow is also important because it provoked our modern approach to free speech. The Supreme Court in *Gitlow* relied on the "bad tendency" test, which made speakers and writers liable for the reasonable, probable outcome of what they said, regardless of how likely it is that their words would actually cause an overt criminal act. Once the legislature determined that certain speech—advocacy of anarchy, for example—was likely to cause harm, the inquiry was over. The idea behind the "bad tendency" test was to "suppress the threatened danger in its incipiency."[3] This test marked a low point in free speech jurisprudence; *Gitlow* set a bad precedent. But a bad precedent can be a good catalyst for change, and *Gitlow* precipitated a long-term reaction, really a transformation in First Amendment law, favoring the more tolerant positions taken by the dissenting justices.

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The Taft Court, 1923-1925
Left to Right Standing: Pierce Butler, Louis D. Brandeis, George Sutherland, Edward T. Sanford
Sitting: Willis Van Devanter, Joseph McKenna, William Howard Taft, Oliver W. Holmes, Jr., James C. McReynolds
Library of Congress, Prints & Photographs Division, photograph by Harris & Ewing, LC-DIG-hec-20429

Indeed, some of us remember *Gitlow* not so much for what the majority did, but for what one dissenting justice said; the brief, impassioned dissent of an elderly Civil War veteran named Holmes, joined in by Brandeis, still rings in our mind's ear more than 40 years after first reading it. Holmes disagreed with the majority's description of Gitlow's left-wing polemics as a "direct incitement." "Every idea is an incitement," responded Holmes. "It offers itself for belief," he went on, "and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason." Invoking his fledgling "clear and present danger" test, Holmes found "no present danger of an attempt to overthrow the government by force."[4]

Eloquence may also set fire to a law student's (and a lawyer's) enthusiasm, and ignite intellectual passion. Holmes's inspiring dissent is part of what made us want to study and then spend our lives practicing law.

Much more than a case name forever yokes together *Gitlow* and New York. The case traces its origins to an anarchist's assassination of President McKinley in Buffalo in September 1901. The New York authorities felt frustrated by their inability to prosecute those whom they saw as the real perpetrators of the McKinley murder: anarchist orator Emma Goldman (at least one of whose lectures the assassin

WEATHER FORECAST.

The Sun.

IT SHINES FOR ALL

VOL. LXXXVI.—NO. 274. NEW YORK, TUESDAY, JUNE 3, 1919. PRICE TWO CENTS.

BOMBS SENT TO OFFICIALS IN MANY CITIES; ONE EXPLODES AT A. MITCHELL PALMER'S HOME; ATTEMPT MADE TO KILL JUDGE NOTT IN N. Y.

Explosions Occur Also in Boston, Philadelphia, Pittsburg, Cleveland and Paterson—Man Killed by Bomb Set Off in Judge Nott's House.

Explosions of bombs and infernal machines containing bombs and nitro-glycerin around midnight last night at the homes of prominent officials and citizens in a dozen different cities throughout the United States marked the effort of radical agitators and anarchists to usher in a reign of terrorism similar to that which was frustrated on May 1, when bombs addressed to officials were found in the mails.

At 8 o'clock this morning explosions had occurred in Washington, Cleveland, Boston, Pittsburg, Philadelphia, Paterson, N. J.; Newtonville, Mass., and New York City, with reports having been received by Government authorities of explosions in several other cities.

Left: Home of Mitchell Palmer following the bombing, Prints & Photographs Division, NYWT&S Collection, LC-USZ62-136235

Above: The Sun. (New York, N.Y.), 03 Jun. 1919. Chronicling America: Historic American Newspapers. Library of Congress.

had attended) and her like. Quickly reacting to fill this perceived gap, the New York Legislature in 1902 made it a felony to advocate the "doctrine that organized government must be overthrown by force or violence."

Both before and after the 1902 law was enacted, there was frequent labor unrest and other social protests punctuated by violence. Opposition to World War I and the draft produced more angry demonstrations. Then, in 1917, came the Russian Revolution, encouraging leftists in America to be even more aggressive.

The turning point was 1919. In that year, turmoil spread as bombs exploded around the country at the homes of several judges and other prominent figures, including U.S. Attorney General Mitchell Palmer. This growing wave of violence, coming as it did on the heels of the Russian Revolution, frightened many people and became known as the Red Scare. In late 1919, in so-called "Palmer Raids" named for the Attorney General, federal and state authorities entered homes and meeting places in 15 cities in search of Communists and anarchists. The national atmosphere filled with fear.

New York breathed this same highly charged air. In 1919 the New York Legislature formed a Joint Committee to Investigate Seditious Activities. The Committee obtained search warrants and, months before the Palmer Raids, suddenly invaded several left-wing offices and organizations in New York. This was the frenzied, tense climate in New York and America when Ben Gitlow walked on stage.

Gitlow, one of ten Socialists elected to the New York State Assembly in 1917, was arrested in November 1919 at a New York celebration of the second anniversary of the Russian Revolution. He was apprehended, along with hundreds of others, in raids by police on 73 "Red-Centers" in New York. Gitlow's crime: violating the state's 1902 criminal anarchy law by publishing a polemical tract called the "Left Wing Manifesto." It was the first time the criminal anarchy statute had ever been invoked.

New York Tribune

Hundreds Arrested Here in 71 New Raids on Reds;
Court Orders Coal Strike Off, Calls It "Rebellion";
Senate, 50-35, Reserves Right to Quit World League

Union Given 72 Hours to Revoke Call

State Police Aid in Hunt For Plotters

Parley of Leaders Of Workers Called

Ban on Strikes Is Rejected in House Rail Bill

Above: New-York Tribune. (New York, N.Y.), 09 Nov. 1919. Chronicling America: Historic American Newspapers. Library of Congress.

Left: IWW headquarters, New York City, after the raid of November 15, 1919. Joseph A. Labadie Collection, University of Michigan.

Gitlow's Manifesto was a fairly typical example of Communist rhetoric. In overheated, hyperbolic style, the Manifesto reviewed the rise of Socialism, condemned "moderate Socialism" for relying on democratic means, and advocated a "Communist Revolution" by a militant Socialism based on antagonism between classes. It referred favorably to mobilizing the "power of the proletariat in action" through mass industrial revolts, political strikes, and "revolutionary mass action," with the aim of destroying the parliamentary state and replacing it with Communist Socialism and a dictatorship of the proletariat.

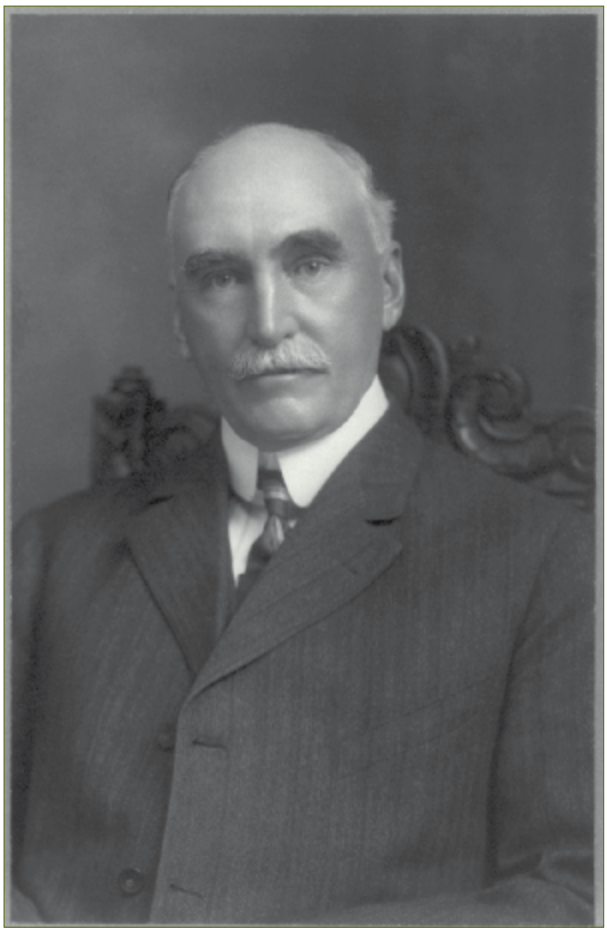
With the public jittery to begin with, the Manifesto's language only aggravated antagonism toward Gitlow, as he learned almost immediately. A week after his arrest, Gitlow was hauled into Magistrate's Court for a hearing to determine if grand jury action was warranted. William McAdoo, the chief magistrate and a former New York City police commissioner, not only ruled that the grand jury should act, but wrote a vitriolic opinion excoriating Gitlow and his colleagues as "mad and cruel men," and "positively dangerous men."

McAdoo set the tone for the rest of the case by interpreting the Manifesto as implicitly calling for force and violence as part of a "militant uprising of the red revolutionists." "Are we to lose ourselves," asked McAdoo, "in legal subtleties and nice disquisitions and historical references, and bury our heads in clouds of rhetoric about liberty of speech?"[5]

At his trial in January and February 1920, Gitlow was represented by Clarence Darrow. Parachuting in at the last minute, Darrow met Gitlow for the first time only the night before the trial began.

For a trial strategy, Darrow chose a minimalist presentation that resembled the successful approach used in the most famous New York free speech trial. In 1735, when John Peter Zenger was tried for seditious libel, his lawyer Andrew Hamilton admitted publication, called no witnesses for the defense, yet argued that Zenger committed no crime. Darrow closely followed this model, presenting essentially no defense—giving no opening statement, call-

The Left Wing Manifesto



Top: The First Page of Gitlow's Manifesto. The Revolutionary Age (New York, N.Y.), 05 Jul. 1919.

Right: William McAdoo, 1853-1930, Library of Congress, Prints & Photographs Division, LC-USZ62-54248

ing no witnesses on Gitlow's behalf, and (to avoid cross-examination) persuading Gitlow not to take the stand. Darrow even stipulated that Gitlow was responsible for publishing and circulating the Manifesto.

The state, by contrast, sought to harness the public's fear and hostility toward Gitlow and what he stood for, hostility that spilled beyond the courtroom; three weeks earlier, the New York State Assembly, reflecting the public's mood, had expelled all the Socialists elected to it.[6] The prosecutor, Alexander Rorke, read Gitlow's Manifesto to the jury. Darrow told the trial judge that the Manifesto would probably put the jury to sleep; Rorke said it would make their hair stand on end. Rorke thundered that Gitlow "would make America a red ruby in the red treasure chest of the Red Terror."

Although Gitlow did not take the stand, he made an unusual request of the judge: to personally address the jury. The judge, Bartow Weeks, granted the request, presumably because he thought Gitlow would only make matters worse for himself. Gitlow mounted his courtroom soapbox and proudly delivered a spirited, unrepentant, unremorseful defense of his views. "I am a revolutionist," he declared. "No jails will change my opinion." "[T]o bring about socialism, capitalist governments must be overthrown. . . . I ask no clemency."

He got none. The minimalist gambit may have worked for Zenger, but not for Gitlow; even the skillful Darrow could not overcome the hostility that radiated from the public.

In his closing argument before the verdict, Darrow described Gitlow as a harmless "dreamer" whose ideas posed no threat, were protected by the First Amendment, and stood in the American tradition. Darrow asked the jury to separate "sense" from

Clarence Darrow
Library of Congress, Prints & Photographs Division, photograph by Harris & Ewing, LC-DIG-hec-06038

"nonsense" in the Manifesto. There was "not a word" in the Manifesto, argued Darrow, "inciting anyone to violence, not a word inciting anyone to unlawful activity." (Darrow knew his pitch would not work and, done with the case, did not even wait around for the verdict.)

The jury convicted Gitlow in less than three hours, and the judge sentenced him to the maximum five-to-ten years at hard labor.

From Sing Sing, Gitlow hired a recent former Governor of New York, Charles Whitman, to write a brief for bail pending appeal. That effort failed.

Gitlow also had no luck appealing his conviction. In 1921, the Appellate Division affirmed unanimously. After quoting extensively from the Manifesto, Judge Frank Laughlin declared it was "not a discussion of ideas and theories," but advocacy for doctrines that "are not harmless. They are a menace." To Laughlin and many others, Gitlow threatened their security and challenged their values.

Laughlin's opinion illustrates the general nervousness and clouded judgment surrounding the *Gitlow* case. Americans, Laughlin warned, should "be on their guard" against a movement that "may undermine and endanger our cherished institutions of liberty and equality." The danger could be averted, stated Laughlin, if "immigration is properly supervised and restricted," so that the "propaganda of class prejudice and hatred — by a very small minority, mostly of foreign birth," will not "take root in America." These "pernicious doctrines," Laughlin continued, should be rejected by "God-fearing, liberty-loving Americans."[7]

Gitlow fared no better in the New York Court of Appeals. Five of the seven judges voted to affirm. Judge Frederick Crane found the criminal anarchy law constitutional because freedom of speech does "not protect the violation of liberty or permit attempts to destroy that freedom."[8] Crane, it was said later, "never lingered in legal technicalities," but supposedly allowed "common sense, always with respect for the moral and social implications, to control the determination and application of the law."[9]

In a separate opinion, Chief Judge Frank Hiscock, known for his "doctrinaire legal philosophy,"[10]

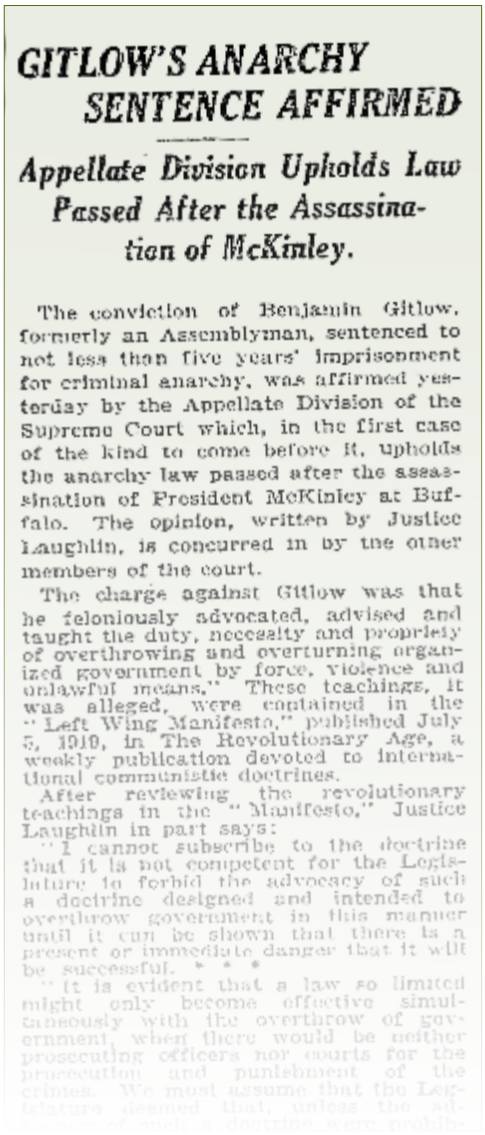
Sing Sing Prison
Library of Congress, Prints & Photographs Division
LC-DIG-ggbain-31293

found the jury justified in rejecting the view that the Manifesto "was a mere academic and harmless discussion of the advantages of communism and advanced socialism and a mere Utopian portrayal of the blessings which would flow from the establishment of those conditions." Hiscock regarded it as "advocacy of action," even though he found "no advocacy in specific terms" of the use of force or violence. Hiscock also swept aside any constitutional objection. "We shall spend no time in discussing the proposition urged upon us that this statute is unconstitutional" as a violation of the First Amendment.[11] Hiscock's judicial opinions were said to "reflect the attitudes of the time."[12]

The most curious opinion was the dissent. Written by Judge Cuthbert Pound, with whom Benjamin Cardozo silently joined, the dissent argued for reversal, not on First Amendment grounds, but on the ground that Gitlow did not violate the criminal anarchy law because he was advocating revolution, not anarchy. According to the dissent, advocacy of revolution—change of government by unlawful means to substitute another form of government (*e.g.*, dictatorship of the proletariat)—is not advocacy of anarchy, which is, on the contrary, the total absence of government. Citing Tolstoy, Kropotkin and Marx for support, the dissent developed this line of argument, ending on a high note: "Although the defendant may be the worst of men; although Left Wing socialism is a menace to organized government; the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected."[13]

Following the adverse ruling by the Court of Appeals, Gitlow, now represented by lawyers from the American Civil Liberties Union, pursued his appeal to the Supreme Court, where he lost seven to two. After that decision, Governor Al Smith pardoned Gitlow.

The common thread running through all stages of the *Gitlow* case, from Magistrate's Court up to the Supreme Court, is evergreen. That timeless theme is deciding when, if ever, it is appropriate to censor or punish subversive speech. *Gitlow* gave one answer, an answer that met with approval at the time but has since been rejected. However, the impulse behind *Gitlow's* "bad tendency" test—public fear and anxiety—waxes and wanes.



GITLOW'S ANARCHY SENTENCE AFFIRMED

Appellate Division Upholds Law Passed After the Assassination of McKinley.

The conviction of Benjamin Gitlow, formerly an Assemblyman, sentenced to not less than five years' imprisonment for criminal anarchy, was affirmed yesterday by the Appellate Division of the Supreme Court which, in the first case of the kind to come before it, upholds the anarchy law passed after the assassination of President McKinley at Buffalo. The opinion, written by Justice Laughlin, is concurred in by the other members of the court.

The charge against Gitlow was that he feloniously advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means." These teachings, it was alleged, were contained in the "Left Wing Manifesto," published July 5, 1919, in The Revolutionary Age, a weekly publication devoted to international communistic doctrines.

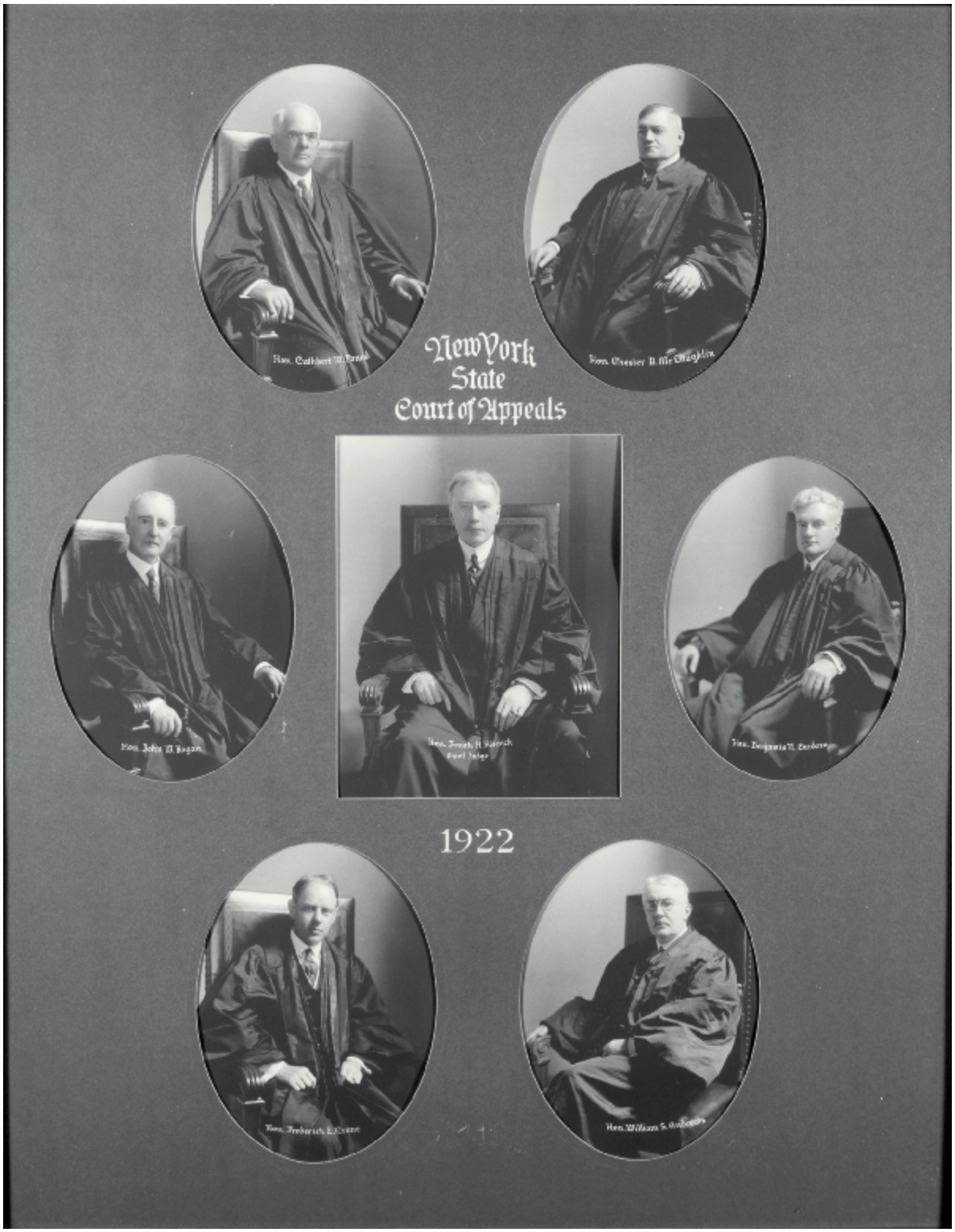
After reviewing the revolutionary teachings in the "Manifesto," Justice Laughlin in part says:

"I cannot subscribe to the doctrine that it is not competent for the Legislature to forbid the advocacy of such a doctrine designed and intended to overthrow government in this manner until it can be shown that there is a present or immediate danger that it will be successful. * * *

"It is evident that a law so limited might only become effective simultaneously with the overthrow of government, when there would be neither prosecuting officers nor courts for the prosecution and punishment of the crimes. We must assume that the Legislature deemed that, unless the ad-

The New York Times Published April 2, 1921.
Copyright (c) The New York Times

Parallels exist between our own political climate and the political climate that surrounded *Gitlow*. To paraphrase the opening of another manifesto familiar to *Gitlow*, today a new specter is haunting New York and America: the specter of terrorism. That specter may confront the ghost of *Gitlow*, if it has not already done so. Ever since the terror attacks of 9/11, New York and the rest of the country have felt an extreme but understandable anxiety and fear, with predictable results. From the USA PATRIOT Act to prosecutions of Muslim clerics who advocate jihad, from indefinite detentions to warrantless searches, from denial of habeas corpus to enhanced interrogation techniques, today's government counterterrorism policies resemble what happened around the time Ben Gitlow was arrested.



1922 Court of Appeals Bench, Clockwise from Top Left: Cuthbert W. Pound, Chester B. McLaughlin, Benjamin N. Cardozo, William S. Andrews, Frederick E. Crane, John W. Hogan. Center: Chief Judge Frank H. Hiscock. New York Court of Appeals Collection.

Gitlow is part of a pattern we see over and over again. When anger, anxiety, fear, and frustration mix with a genuine feeling of being threatened—and when they become widespread and overwhelm people's hearts and minds—there is a strong reaction, often an overreaction.

Fear begets repression. During the Civil War, Lincoln suspended habeas corpus. After the attack on Pearl Harbor, our government interned many thousands of innocent Japanese-Americans. The insecurity bred in America by the Russian Revolution abroad and by violence at home produced here an emotional response of repressive statutes, prosecutions and court decisions. The post-9/11 landscape of threat and deterrence is similar. Then it was the Red Scare; today, after 9/11, it is militant Islam.

Although a few cases initially followed *Gitlow*, favoring safety over civil liberties, by 1950 the weight of authority went the other way, giving speech more protection. But the path has not been straight. Soon after World War II, a second Red Scare frightened America. Federal statutes modeled on New York's criminal anarchy law became the basis for prosecuting American Communists for advocating their doctrines. In those cases, judges who worried about an international Communist conspiracy wrestled with many of the same issues posed by *Gitlow*.

In 1951, *Gitlow* figured in *Dennis v. United States*,[14] when the Supreme Court considered the prosecutions of the leaders of the American Communist Party. Some justices in *Dennis* indicated that time had undermined *Gitlow* and the clear and present danger test had become the law. But the same justices then distinguished *Gitlow* on its facts and affirmed the convictions in *Dennis*.

A cynic or a skeptic might say that *Dennis* paid lip service to the clear and present danger test, but then came to the same result as in *Gitlow*. One judge's clear and present danger is another's vague and far-in-the-future unlikely hazard. The end result may be the same, but at least *Dennis* requires analysis of facts and circumstances, and is not the rubber stamp of the legislature it would be under *Gitlow*.

The *Dennis* approach influenced the final ruling from the New York Court of Appeals on the *Gitlow* criminal anarchy law. In 1967, that statute again came before the New York Court of Appeals in a case arising from the 1964 Harlem riots. In that case, *People v. Epton*, Judge John Scileppi wrote for the Court of Appeals that "the Supreme Court's view of the First Amendment's protection of speech has been altered drastically since *Gitlow* was decided." All the judges on the Court of Appeals agreed that the Holmes-Brandeis dissent represents "today's law." The Court in *Epton* stated that the statute as interpreted by *Gitlow* was unconstitutional but, citing *Dennis*, ruled it would be constitutional if the government could demonstrate an intent to bring about violent acts and that there was a "clear and present danger" based on circumstances.[15] *Epton* recognized that circumstances change. The Court there said it had interpreted the same statute in 1922 "in light of the prevailing conditions of that time and in accordance with the current understanding of First Amendment freedom." The passage of time has led to a "clearer understanding of the scope of constitutional protection of speech."[16] These statements mean that different "prevailing conditions" and a different "understanding of First Amendment freedom" could bring about a different result.

Thus old Holmes eventually had a double victory in *Gitlow*. Not only has his admirable *Gitlow* dissent become the law (and was even strengthened by *Brandenburg*), but his early reference to public policy considerations — the felt necessities of the times[17] — has won the day, and applies to our own day, when we are more aware of the effect of pressures, passions and fears on the law.

If law responds to the felt necessities of the times, as Holmes famously said, the question always is, which necessity is felt at the moment to be more pressing, civil liberties or the community's safety? One hopes they can be reconciled, so that the answer is civil liberties without sacrificing safety and security. Sharing this hope, President Obama in his first inaugural address rejected "as false the choice between our safety and our ideals." *Gitlow* was such a false choice.

On July 19, 1965, two years before the *Epton* decision, the New York Legislature repealed the criminal anarchy law. Ben Gitlow died a day earlier.

ENDNOTES

1. *People v. Gitlow,* 268 U.S. 652 (1925).
2. *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969).
3. *Gitlow*, 268 U.S. at 669.
4. *Id.* at 672 (Holmes, J., dissenting).
5. *People v. Gitlow,* slip op. at 5 (N.Y.C. Mag. Ct. Nov. 14, 1919), *available at* http://darrow.law.umn.edu/documents/NY_versus_Gitlow_Larkin_1919_McAdoo_order_Optimized_cropped.pdf.
6. *See* Henry M. Greenberg, *New York's Assembly Indicts a Political Party*, 8 Jud. Notice 28, 34 (2012).
7. *People v. Gitlow,* 195 A.D. 773, 791–92 (1st Dep't 1921).
8. *People v. Gitlow,* 234 N.Y. 132, 137 (1922).
9. In Memoriam, 297 N.Y. ix, x.
10. Albert M. Rosenblatt & Timothy M. Kerr, *Frank Harris Hiscock*, in *The Judges of the New York Court of Appeals: A Biographical History,* 366 (Albert M. Rosenblatt ed., 2007).
11. *Gitlow*, 234 N.Y. at 145–54.
12. Rosenblatt & Kerr, *supra* note 11, at 366.
13. *Gitlow*, 234 N.Y. at 154-58 (Pound, J., dissenting).
14. 341 U.S. 494 (1951).
15. *People v. Epton*, 19 N.Y.2d 496, 504–05 (1967).
16. *Id.* at 505.
17. Oliver Wendell Holmes, Jr., *The Common Law* 5 (Mark DeWolfe Howe ed., Little Brown 1963) (1881).

The NEW YORK AND NEW HAVEN RAILROAD CO. STOCK FRAUD CASES

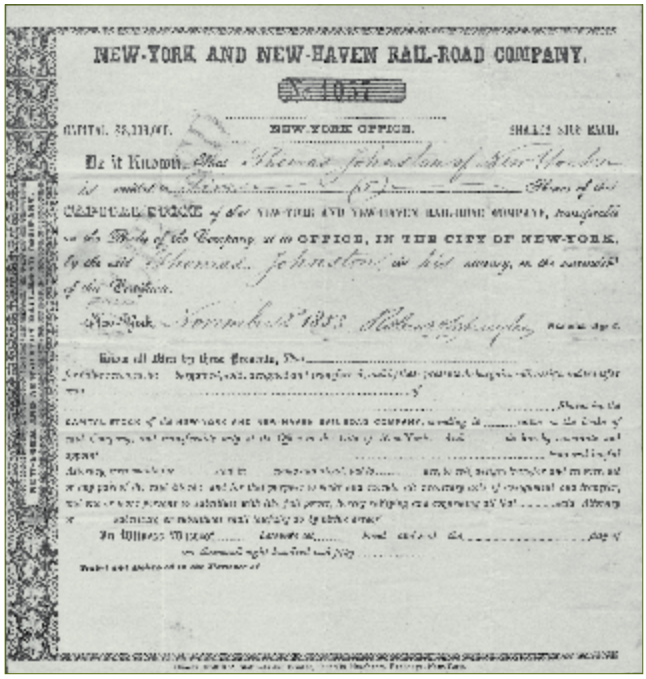
How Alexander Hamilton's nephew swindled his investors

JOHN D. GORDAN, III

The thing that hath been, it *is that* which shall be;
and that which is done *is* that which shall be done:
and *there is* no new *thing* under the sun.
Ecclesiastes 1, verse 9 (King James version).

People like Dreier and Madoff were highly intelligent individuals, they were very charismatic and they were giving people what they wanted.
New York Times, December 8, 2012, B5.

In today's terms it was not that big a fraud — about $45 million in 2012 dollars. In some respects, though, it followed the modern vogue. The method was not particularly imaginative: selling unauthorized — essentially counterfeit except that the certificates themselves and the signature on them were genuine — shares of stock in the New York and New Haven Railroad Co. equal to two thirds of its existing $3 million capitalization between October 1853 and the end of June 1854, when the fraud began to unravel. Substantial individuals — such as Cornelius Vanderbilt, August Belmont and Gouverneur Morris, Jr. — and firms such as Brown Brothers were victims, the prices of railroad shares plunged, and the outcry was very loud: *The New York Times* even printed the full text of the arrest warrant issued on the criminal complaint the railroad filed three months later.


NEW-YORK AND NEW-HAVEN RAIL-ROAD COMPANY.

NEW-YORK OFFICE.

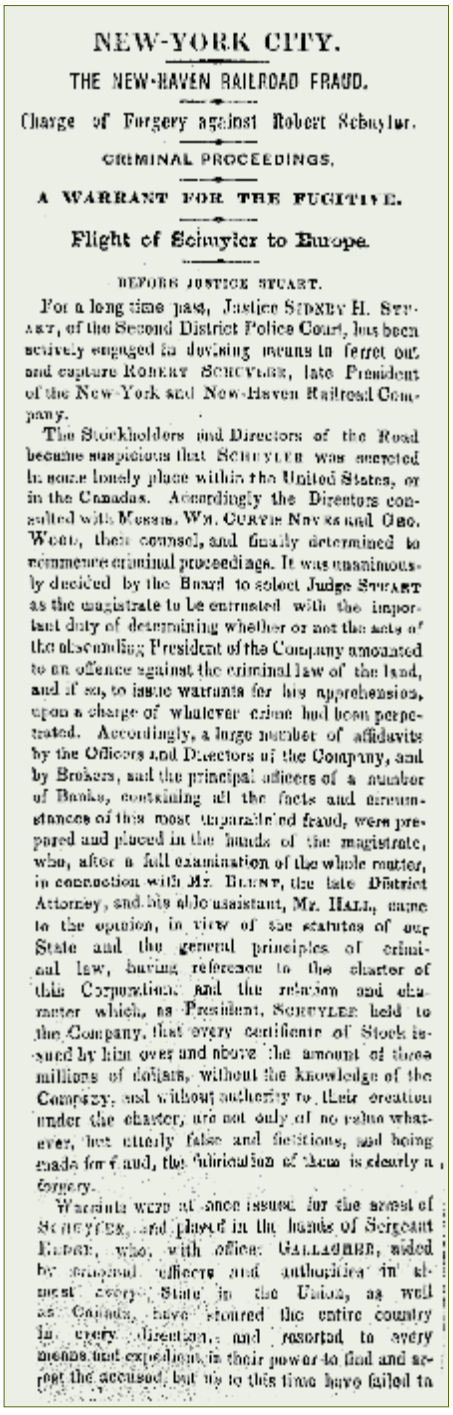
Be it Known, That

CAPITAL STOCK of the NEW-YORK AND NEW-HAVEN RAILROAD COMPANY, transferable on the Books of the Company at the OFFICE, IN THE CITY OF NEW-YORK,

Fraudulent New-York and New-Haven Rail-Road Company Stock Certificate. From Michael Mahler, Robert Schuyler's 1853-4 Stock Fraud on the New York and New Haven Rail Road: the Paper Trail. The American Revenuer, November-December 2007 (Vol. 61, No. 6)

John Norton Pomeroy called the lawsuit that the railroad subsequently brought against the holders of the fraudulent shares "one of the most remarkable actions recorded in the

John D. Gordan, III, a graduate of Harvard Law School, clerked for the Hon. Inzer B. Wyatt, United States District Judge for the Southern District of New York, from 1969-1971 and served as an Assistant United States Attorney (S.D.N.Y.) from 1971-1976. A member of the New York bar, he was in private practice in New York City from 1976 to June 2011. *The author thanks Conrad K. Harper, Esq. for his many improvements in earlier drafts.*



NEW-YORK CITY.

THE NEW-HAVEN RAILROAD FRAUD.

Charge of Forgery against Robert Schuyler.

CRIMINAL PROCEEDINGS.

A WARRANT FOR THE FUGITIVE.

Flight of Schuyler to Europe.

BEFORE JUSTICE STUART.

For a long time past, Justice SIDNEY H. STUART, of the Second District Police Court, has been actively engaged in devising means to ferret out and capture ROBERT SCHUYLER, late President of the New-York and New-Haven Railroad Company.

The Stockholders and Directors of the Road became suspicious that SCHUYLER was secreted in some lonely place within the United States, or in the Canadas. Accordingly the Directors consulted with Messrs. WM. CURTIS NOYES and GEO. WOOD, their counsel, and finally determined to commence criminal proceedings. It was unanimously decided by the Board to select Judge STUART as the magistrate to be entrusted with the important duty of determining whether or not the acts of the absconding President of the Company amounted to an offence against the criminal law of the land, and if so, to issue warrants for his apprehension, upon a charge of whatever crime had been perpetrated. Accordingly, a large number of affidavits by the Officers and Directors of the Company, and by Brokers, and the principal officers of a number of Banks, containing all the facts and circumstances of this most unparalleled fraud, were prepared and placed in the hands of the magistrate, who, after a full examination of the whole matter, in connection with Mr. BLUNT, the late District Attorney, and his able assistant, Mr. HALL, came to the opinion, in view of the statutes of our State and the general principles of criminal law, having reference to the charter of this Corporation, and the relation and character which, as President, SCHUYLER held to the Company, that every certificate of Stock issued by him over and above the amount of three millions of dollars, without the knowledge of the Company, and without authority to their creation under the charter, are not only of no value whatever, but utterly false and fictitious, and being made for it and, the fabrication of them is clearly a forgery.

Warrants were at once issued for the arrest of SCHUYLER, and placed in the hands of Sergeant EGAN, who, with officer GALLAGHER, aided by original officers and authorities in almost every State in the Union, as well as Canada, have scoured the entire country in every direction, and resorted to every means and expedient in their power to find and arrest the accused, but up to this time have failed to

Article Announcing Warrant for Schuyler
The New-York Daily Times. Published August 14, 1854.
Copyright (c) The New York Times.

annals of litigation."[1] The cream of the New York Bar was employed for over ten years in the New York courts to resolve on whom the loss would fall — the *bona fide* purchasers and innocent pledgees of the fraudulent shares, or the shareholders of the railroad "of whom many are widows, orphans, and persons comparatively helpless, who have invested small sums in the stock of this Company ... ."[2] To control the litigation the railroad pioneered the procedurally innovative consolidation strategy Pomeroy admired — now commonly employed in both New York and federal courts — which ultimately facilitated the railroad's undoing. As also sometimes still happens nowadays, the losers of the moment twice ran to federal court and were rebuffed.

The New York Court of Appeals made a one hundred eighty degree turn on the merits in the course of four appeals over nine years in cases growing out of the fraud. The rule of law the Court finally adopted had been previously rejected not only by New York's then-highest court but also by unanimously by the Court of Appeals itself in its first encounter with the case. To some extent that may be attributable to the "revolving door" structure built into the Court of Appeals when it was first established: with half of its roster changing every year, only two of the eight judges who participated in the first Court of Appeals decision in 1856 were on the court when it formally reached the opposite result in 1865. More unusually, the judge who had written the unanimous 1856 decision in favor of the railroad had become the railroad's counsel and lost the case in the Court of Appeals in 1865 in a unanimous decision which repudiated his 1856 opinion — and rubbed it in. But irrespective of these unusual features and of its startling factual context, this doctrinal struggle can be viewed as an example of the judicial evolution of American law to keep pace with the consequences of an increasingly industrialized society.

Robert Schuyler – the unlikely fraudster

Robert Schuyler was the grandson of General Philip Schuyler of Revolutionary War fame and the nephew of Alexander Hamilton, who had married his father's sister. Born in 1798 and an 1817 graduate of Harvard College, Schuyler attended the Litchfield

Reported Portrait of Robert Schuyler. Identified in Main Line of Mid-America: The Story of the Illinois Central by Carlton Corliss (Creative Age Press: New York, 1950)

Law School and went into finance; his specialty soon became starting and running railroads, then in their infancy and thus most attractive to entrepreneurs who could secure capital.[3]

By 1837 Schuyler was serving as secretary of the Brooklyn and Jamaica Rail-Road Co., now part of the Long Island Rail Road, and president of the Boston and New-York Transportation Co.[4] In 1844 the New York and New Haven Railroad Co. was chartered by Connecticut legislature to provide rail service between those two cities, opening in part in 1848 and completely in 1849; in 1846 Robert Schuyler was elected its president and a director.[5] He was also the New York transfer agent[6] for the New York and New Haven Railroad, and, with his brother George, a principal in R. & G. L. Schuyler, a brokerage firm which also served as the New York office of the railroad and through which Robert Schuyler sold the bogus shares he issued as transfer agent in 1853-1854.

By 1848 Robert Schuyler was also president of the Sangamon & Morgan Rail-Road Co., vice-president of the New Jersey Rail-Road and Transportation Co. and transfer agent of the Housatonic Railroad Co.[7] By 1850 he was also president of the New York and Harlem Railroad Company, a position in which his brother George Schuyler had succeeded him by 1854 while Robert remained a director.[8] At the time of the formation of the Illinois Central Railroad in early 1851, Schuyler assumed its presidency, which he held for over two years, remaining as a director thereafter. The official history of that railroad describes him thus:

> *He was a pioneer in American railway construction and justly deserved the title of the first railroad king. He was at one time the president of five railways, viz., the New York & New Haven, the Harlem, the Illinois Central, the Rensselaer & Saratoga, and the Sangamon & Morgan, and these various positions he held up to a certain period with great credit to himself. He was a man of unusual business ability, aided by a sound judgment and a liberal education. In his devotion to duty, he was no less remarkable; though broken in health, he was frequently found laboring in his private rooms until an early hour in the morning in a conscientious effort to serve the best interests of his share-holders. His versatility of mind enabled him to accomplish great results in a short space of time. He was a main of keen perceptions, clear and comprehensive views, and these constituted him a wise counselor. His unaffected dignity, courteous bearing, and refined manner, commanded the respect of all who knew him, and these included many eminent persons of his day. Such qualities lent a peculiar charm to his office and station, and gave him the presence of an American gentleman.*[9]

Among his associates in the formation of the Illinois Central was Robert Rantoul, Jr., who in the same year also served as United States Senator from Massachusetts and counsel for Thomas Sims in his unsuccessful resistance to rendition under the Fugitive Slave Act. Others, such as Thomas Ketchum of the bankers Ketchum, Rogers & Bement and Gouverneur Morris, Jr., were also shareholders in the New York and New Haven Railroad Co. — or thought they were.[10]

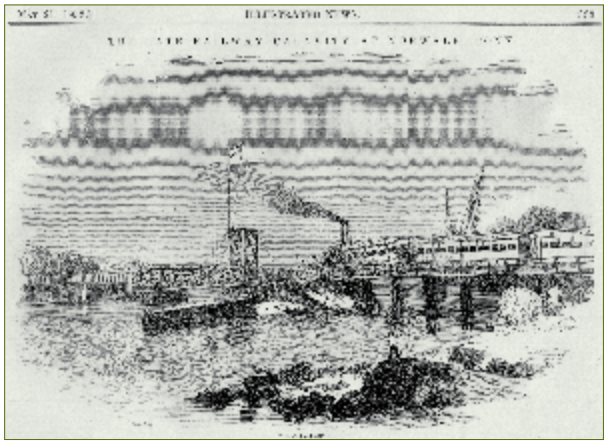
The New York and New Haven Railroad was not very extensive, having only 61 miles of its own track

Detail from Anderson, P. Map Exhibiting the...Lines for the New-York and New-Haven Rail-Road. (1:20,000) 1845. David Rumsey Historical Map Collection.

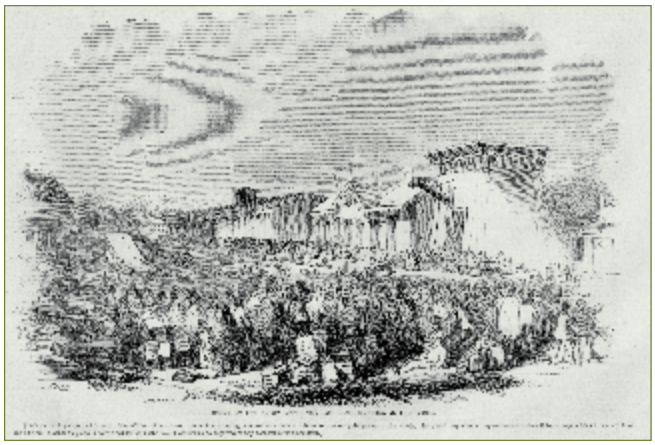
because a portion of its route used Harlem Railroad tracks; under way, its trains traveled only 35 miles an hour.[11] Nevertheless, on May 6, 1853, it was involved in the worst American railroad disaster up to that time:

> *On that day the passenger express running through to Boston and made up of two baggage and five passenger cars carrying about 150 persons, left New York at 8 o'clock A.M. in charge of an inexperienced engineer, who, as substitute, had made but two previous trips over the line. At Norwalk, where a navigable estuary runs up for several miles from the Sound, the engineer, for some reason not explained, until a few hundred feet from the local drawbridge failed to see the ball at the masthead, which in those days and for many years after on the line signalled that the draw was open. He gave the whistle for the brakes, reversed the engine and with the fireman leaped to safety. But the train went on with scarcely diminished speed. The locomotive and tender leaped across the draw to the opposite abutment, falling back into 12 feet of water followed by the two baggage and two of the passenger cars, the third passenger car breaking midway and checking the rest of the train. Altogether 46 persons lost their lives, many of them by drowning, and about as many were seriously injured.*[12]

Beginning on October 18, 1853, a few months after the Norwalk crash, Schuyler began using his position as transfer agent for the New York and New Haven Railroad to issue bogus shares of its stock. In



The Catastrophe. Leslie's Illustrated Newspaper, May 21, 1853, p. 333.



Scene at the Depot After the Accident - Bringing in the Bodies. Leslie's Illustrated Newspaper, May 21, 1853, p. 333.

some instances he resold legitimate shares which had been transferred but for which new stock certificates had not been issued. Typically, however, he simply used blank share certificates from the stock ledger that he held as transfer agent without having received the corresponding amount of outstanding stock. In all, Schuyler's activities generated over 19,000 bogus shares — which, if valid, would have a face amount of nearly $2 million — in a railroad whose legitimate shares had been fixed by the legislation which created it at the 30,000 shares already issued at $100 a share.

The bogus shares were transferred through R. & G. L. Schuyler & Co., which became the central source of funding for the railroad's immediate cash needs, according to the 1860 trial testimony by the stock book keepers who worked in the office that firm shared with the railroad. In some instances the bogus shares were sold, in others pledged as security for loans by the firm or by third parties. As 1854 progressed the volume of such "overissuance" increased:

> *Late in June of 1854 the uncommon abundance of New York & New Haven stock in the market and offered as collateral security for loans had begun to attract some attention and about that time a director of the company received an anonymous letter asserting that the president had issued spurious shares. The letter was ignored and, so far as contemporaneous history reveals, the director did not even mention his warning.*[13]

A subsequent report by the company to the shareholders similarly acknowledged that "[t]he large sales of the Company's stock had attracted the attention of one or two of the Directors as early as the 29th of June, but no suspicions were entertained by any one of Mr. Schuyler's integrity, or that anything was wrong in the management of the Company… ."[14] The trial record reveals that the share price of the railroad's stock, which stood at 94 on June 1, 1854, declined to 83 by June 22.

Finally, on July 1, 1854, came the public announcement of the failure of the R. & G.L. Schuyler firm the day before. By July 3, 1854 the railroad company management learned of Schuyler's fraudulent issuance of its stock from a conversation with Schuyler's lawyer about a letter Schuyler had written to the board; that day the shares fell to 73.[15] Schuyler's letter was delivered on July 4:

> *I beg to resign my seat in the Board of Directors of the New York and New Haven Railroad Company, and also the office of President, and the appointment of Transfer Agent of the stock of the Company. Your attention to the stock ledger of your Company is essential, as you will find much that is wrong. … In reference to the connection of these transactions with R. & G.L. Schuyler, I wish to make my solemn assurance, that in no way has my brother been concerned in them, nor has he ever known or been informed of them… .*[16]

With that, Robert Schuyler departed for Canada, from which he later fled to Europe.[17]

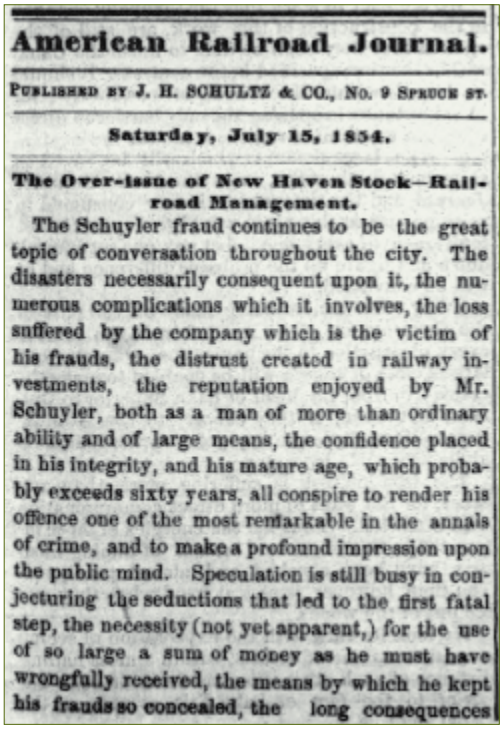
Recriminations and competing explanations for Schuyler's behavior naturally followed. The admiring history of the Illinois Central offers one explanation for it:

> *There was a provision in the charter of one of the railroad companies with which he was connected that required its completion within a certain time under penalty of forfeiture. In an effort to complete it within the specified time, as was supposed, he in an evil moment of his mistaken zeal, resorted to very questionable measures, which in the end proved his down-fall.*[18]

This version of the facts is supported by a contemporaneous publication, which asserts:

> *Mr. Schuyler's course was the consequence of the difficulties in which he had involved himself in connection with the building of other railroads, especially in the construction of the Vermont Valley and the Washington and Saratoga railroads, where large sums had been sunk by the original subscribers.*[19]

A contemporary British periodical was supportive, to the point of purple prose:



American Railroad Journal.

PUBLISHED BY J. H. SCHULTZ & CO., No. 9 SPRUCE ST.

Saturday, July 15, 1854.

The Over-issue of New Haven Stock—Railroad Management.

The Schuyler fraud continues to be the great topic of conversation throughout the city. The disasters necessarily consequent upon it, the numerous complications which it involves, the loss suffered by the company which is the victim of his frauds, the distrust created in railway investments, the reputation enjoyed by Mr. Schuyler, both as a man of more than ordinary ability and of large means, the confidence placed in his integrity, and his mature age, which probably exceeds sixty years, all conspire to render his offence one of the most remarkable in the annals of crime, and to make a profound impression upon the public mind. Speculation is still busy in conjecturing the seductions that led to the first fatal step, the necessity (not yet apparent,) for the use of so large a sum of money as he must have wrongfully received, the means by which he kept his frauds so concealed, the long consequences

The American Railroad Journal, Vol. 27, p. 433. July 15, 1854. Courtesy HathiTrust.

[N]o one for a moment supposes that Robert Schuyler committed those frauds through sordid motives of private gain. He held situations of immense responsibility; he was at the head of gigantic enterprises, with the management of which he had been entrusted by his fellow citizens, confident in his skill and integrity. He found all those interests jeopardised by the adverse state of financial affairs generally. There are few persons in such a position that would hesitate to use all the means in their power to sustain that position, to uphold the interests committed to their care, in the hope that time might afford chances for recovery. … Having earned, by a long course of honourable conduct, the respect of, we might say, the financial world, and become almost a "railroad king," who can estimate the struggles of mind and the fierce mental strife that attended the first desperate act which jeopardized his honour, or contemplate without sympathy the thickening despair that settled upon his spirit when resource after resource failed him, and the awful certainty of final perdition became daily more manifest![20]

Not surprisingly, there was a competing point of view. American publications, notably the *American Railroad Journal*, denounced Schuyler:

> *We had, however, always regarded his success as purchased at the expense of other parties. …[A] blight seemed to rest upon everything he touched, which lead us to suppose that he used all such schemes to promote his private advantage. …We have consequently, when we have been appealed to, as has frequently been the case, given his connection to any scheme as a sufficient reason why no one should buy into it as an investment.*

denounced the New Haven directors:

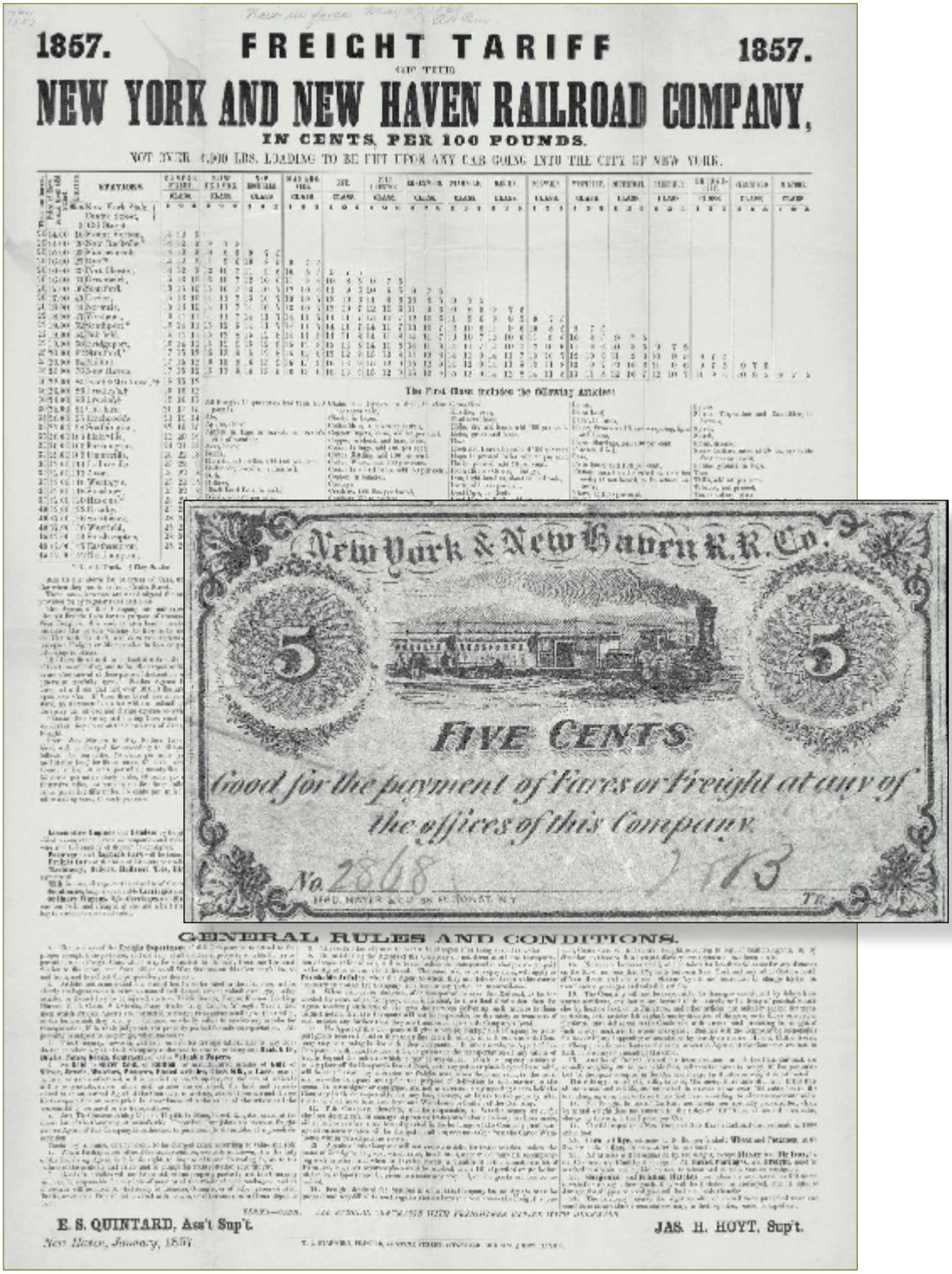
> *No one of the directors but Mr. Schuyler appears to have interfered in the slightest degree in the direction of the company's affairs.— They were all intent upon schemes of their own, leaving to him the New Haven, an undisputed field in which to carry on his financiering forays. They have either been criminally neglectful of their trust, or grossly incompetent for the places they fill.*

and denounced its shareholders:

> *If the stockholders in a road will allow themselves to be fooled and their interests trifled with in the manner that the New Haven stockholders have done, they have no cause of complaint save against themselves.*[21]

Any favorable view of Schuyler was further clouded by the discovery, nearly contemporaneously with his departure, that the same fraud had been committed on a lesser scale at the New York and Harlem Railroad, of which his brother was president and he himself a director, by the corporate secretary Alexander Kyle, Jr. The fraud was alleged not only to support Kyle's life style and personal speculations in the market, but, as shortly will appear, Robert Schuyler's as well.[22]

Schuyler, who started his exile at age sixty-six, died either in November 1855 in Nice or in mid-February 1856 in Genoa; the reports are conflicting.[23] In any case, in the spring of 1855 he had occasion



Freight tariff of the New York and New Haven Railroad Company, in cents, per 100 pounds. New Haven: T.J. Stafford, 1857. Baker Old Class Collection. Baker Library, Harvard Business School.

Inset: New York and New Haven Railroad Company, 5 cents, 1862. Ferd. Mayer & Co. Lithographers, New York, NY. American Currency Collection. Baker Library, Harvard Business School.

to write one exculpatory letter addressing one small aspect of the accusations against him, concluding that he wrote "in the greatest debility of body, and in a broken spirit... ."[24]

What the Judges Did

It was a practice in these times for a party confronted by a major legal exposure to obtain and publish a favorable legal opinion from a prominent lawyer.

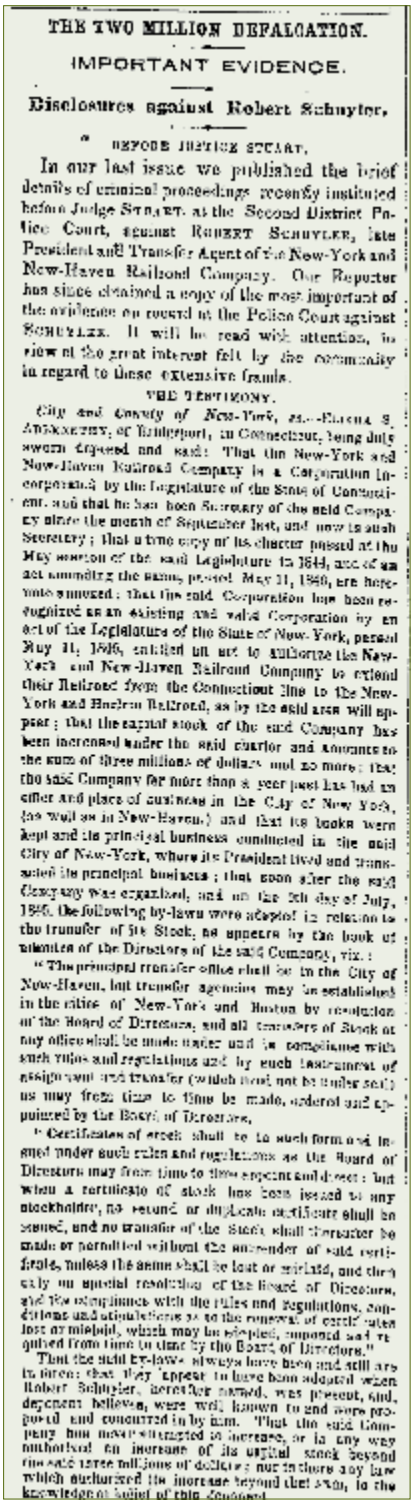
The railroad secured the services of a leader of the New York Bar, William Curtis Noyes, who concluded that, both because the bogus shares exceeded the statutory limits of the railroad's capital and because Schuyler had no authority from the railroad to issue them, the holders of the bogus shares had acquired neither an interest in or a claim against the railroad. Noyes's opinion, dated August 9, 1854, was published with the printed report of the railroad's directors to the stockholders at a special meeting on October 3, 1854. A separate pamphlet apparently available that same month contained contrary opinions by Greene C. Bronson, former Chief Judge of the New York Court of Appeals, dated September 28, 1854; and prominent leaders of the bar Charles P. Kirkland, dated October 14, 1854; Charles O'Conor, undated, and Daniel Lord, Jr., dated October 2, 1854.[25]

Litigation had begun as well. The first salvos concerned the New York and Harlem Railroad and related to a large shipment of imported railroad iron, held in the Customs House, which R. & G.L. Schuyler had contracted to buy, paying with notes guaranteed by the New York and Harlem Railroad, which later repudiated the guarantee. Litigation to prevent delivery of the shipment was brought by the seller in the Superior Court and the endorsee of the notes in the Court of Common Pleas. The published records are scanty, but it appears that, because of lack of jurisdiction over the federal collector of customs, the litigation was transferred to the United States circuit court.[26]

In addition, the New York and Harlem Railroad also brought an action against its former secretary, Alexander Kyle, Jr., for issuing bogus stock. His answer, printed in the *New York Times* on November 2, 1854, asserted that these transactions were either to reimburse him for $80,000 in losses in trading intended to "keep up the price" of the railroad's shares or for "the supplying of the necessities of Robert Schuyler, late president of the said Company," who paid for the bogus shares with notes of R. & G.L. Schuyler & Co.

1. ***Ketchum, and others v. Stevens, President of the Bank of Commerce of New York***

The first reported decision occurred in the Superior Court in an unattractive action brought against the Bank of Commerce by the financial firm Ketchum, Rogers and Bement, Morris Ketchum being one of the New York and New Haven Railroad directors. To simplify drastically the facts the Court found, on June 29, 1854 the Ketchum, Rogers firm had attempted to cash a $10,000 check drawn on the Bank of Commerce by R. & G.L. Schuyler in payment of a loan to the firm. The bank had refused it for insufficient funds; R. & G.L. Schuyler deposited the necessary funds just before the bank closed that day. The check was represented the next morning and was again refused owing to insufficient funds



THE TWO MILLION DEFALCATION.

IMPORTANT EVIDENCE.

Disclosures against Robert Schuyler.

BEFORE JUSTICE SUTHAT.

In our last issue we published the brief details of criminal proceedings recently instituted before Judge STUART, at the Second District Police Court, against ROBERT SCHUYLER, late President and Transfer Agent of the New-York and New-Haven Railroad Company. Our Reporter has since obtained a copy of the most important of the evidence on record at the Police Court against SCHUYLER. It will be read with attention, in view of the great interest felt by the community in regard to these extensive frauds.

THE TESTIMONY.

City and County of New-York, ss.—EDWIN S. ANDREWS, of Bridgeport, in Connecticut, being duly sworn deposed and said: That the New-York and New-Haven Railroad Company is a Corporation incorporated by the Legislature of the State of Connecticut, and that he has been Secretary of the said Company since the month of September last, and now is such Secretary; that a true copy of its charter passed at the May session of the said Legislature in 1844, and of an act amending the same, passed May 11, 1846, are hereunto annexed; that the said Corporation has been recognized as an existing and valid Corporation by an act of the Legislature of the State of New-York, passed May 11, 1846, entitled an act to authorize the New-York and New-Haven Railroad Company to extend their Railroad from the Connecticut line to the New-York and Harlem Railroad, as by the said acts will appear; that the capital stock of the said Company has been increased under the said charter and amounts to the sum of three millions of dollars and no more; that the said Company for more than a year past has had an office and place of business in the City of New York, (as well as in New-Haven,) and that its books were kept and its principal business conducted in the said City of New-York, where its President lived and transacted its principal business; that soon after the said Company was organized, and on the 5th day of July, 1845, the following by-laws were adopted in relation to the transfer of its Stock, as appears by the book of minutes of the Directors of the said Company, viz.:

"The principal transfer office shall be in the City of New-Haven, but transfer agencies may be established in the cities of New-York and Boston by resolution of the Board of Directors; and all transfers of Stock at any office shall be made under and in compliance with such rules and regulations and by such instrument of assignment and transfer (which need not be under seal) as may from time to time be made, ordered and appointed by the Board of Directors.

"Certificates of stock shall be in such form and issued under such rules and regulations as the Board of Directors may from time to time appoint and direct: but when a certificate of stock has been issued to any stockholder, no second or duplicate certificate shall be issued, and no transfer of the Stock shall thereafter be made or permitted without the surrender of said certificate, unless the same shall be lost or mislaid, and then only on special resolution of the Board of Directors, and on compliance with the rules and regulations, conditions and stipulations as to the renewal of certificates lost or mislaid, which may be adopted, imposed and required from time to time by the Board of Directors."

That the said by-laws always have been and still are in force; that they appear to have been adopted when Robert Schuyler, hereafter named, was present, and, deponent believes, were well known to and were proposed and concurred in by him. That the said Company has never attempted to increase, or in any way authorized an increase of its capital stock beyond the said three millions of dollars; nor is there any law which authorized its increase beyond that sum, to the knowledge or belief of this deponent.

The Two Million Defalcation. The New-York Daily Times. Published September 25, 1854. Copyright (c) The New York Times.

to cover an outstanding loan balance owed to the bank by R. & G.L. Schuyler. Later that day, after the failure of R. & G.L. Schuyler, Robert Schuyler arranged for the assignment to the Ketchum, Rogers firm of 370 New York and New Haven Railroad shares securing a $25,000 loan at the Bank of Commerce to R & G. L. Schuyler, upon Ketchum, Rogers paying the bank $25,000 to discharge the loan. In turn, the Bank of Commerce honored the $10,000 R. & G.L. Schuyler check that Ketchum, Rogers had been attempting to cash for the previous two days. Thus Ketchum, Rogers appeared to have adroitly solved its problem: for $25,000 cash, it got its $10,000 in cash and shares, even at $73 per share, worth $27,000 – if the pledged shares were valid, that is, which of course is not what they turned out to be.

Ketchum, Rogers sought to rescind the transaction on the legal grounds of a purported mutual mistake in the validity of the stock shared by the bank. However, at the November 1854 Special Term of the Superior Court of the City of New York, Judge Hoffman ruled that there was no such mistake because the shares, even if bogus, gave the Ketchum, Rogers firm an enforceable equitable claim against the railroad and dismissed the complaint.[27]

2. *The Mechanics' Bank v. The New York and New Haven Rail Road Company*

This litigation originated in a $12,000 loan taken out on May 13, 1854, by Alexander Kyle, Jr., secured by 110 shares of purported New York and Harlem Railroad preferred stock and 85 purported shares of New York and New Haven Railroad stock. Kyle paid $2,000 on the loan a month later but became insolvent; both railroads refused to transfer the bogus shares. After trial, the Superior Court found that Kyle had illegally issued the New York and Harlem Stock and that Robert Schuyler had fabricated the shares of New York and New Haven stock pledged for the loan and provided them to Kyle in "a fraud on the part of Schuyler, to raise money for his own private purposes." Apparently because of Schuyler's status as president, director and transfer agent of the railroad, judgment was awarded against the railroad for the value of the 85 shares of its stock.[28]

On June 27, 1855, the judgment was affirmed at General Term, one judge dissenting. The Court held that Schuyler had been acting with the scope of the apparent authority the railroad had conferred on him and held him out as possessing. It further ruled that a purchaser in good faith and in the ordinary course of business of a certificate regular on its face was entitled to damages if the certificate was not honored by its ostensible issuer.[29] Each of the five judges filed a separate opinion. Several opinions relied on a Pennsylvania precedent, cited by counsel for the bank, in a successful action for indemnity by a Kentucky bank after making good an over-issuance of its stock by a venal transfer agent.[30] Judge Hoffman also stated that:

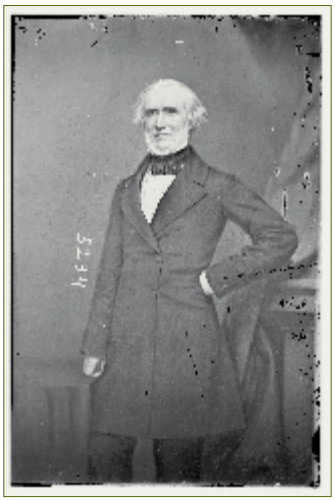
> *It appears to me that the rule adopted by the Supreme Court in* The North River Bank v. Aymar *(3 Hill [262], 270[1842]) covers this case. "Whenever the very act of the agent is authorized by the terms of the power — that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used — such act is binding on the constituent as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts* aliunde. *The apparent authority is the real authority."* Id. *at 537.*[31]

Counsel for the bank, however, had not relied upon that case in argument.

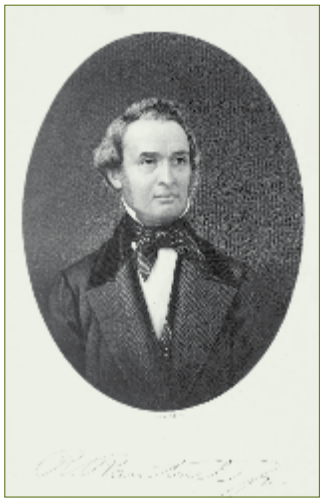
The case was heard in the Court of Appeals at the March 1856 term before Chief Judge Denio, Court of Appeals Judges Alexander S. Johnson and George F. Comstock, and Supreme Court Justices William B. Wright, William Mitchell and Frederick W. Hubbard; Court of Appeals Judge Samuel Selden and Supreme Court Justice Thomas Johnson did not sit. In the unanimous opinion reversing the judgment below and ordering a new trial, announced on June 17, 1856, Judge George F. Comstock held, first, that the New York and New Haven Railroad shares were void because (a) Kyle hadn't paid for them and knew they were fraudulent; (b) Schuyler had no authority to issue them; and (c) the railroad had already previously issued the 30,000 shares that its legislative charter permitted. Second, since the share certificate was not a negotiable instrument, Kyle's transferee could

IMPORTANT FIGURES IN THE FRAUD CASES

Daniel Lord, Jr., Attorney who participated in several cases pertaining to the fraud Library of Congress, Prints & Photographs Division, LC-DIG-cwpbh-02373



Charles O'Conor, Former U.S. Attorney for the Southern District of New York Library of Congress, Prints & Photographs Division, LC-DIG-cwpbh-02787



Robert Rantoul, Jr., A Director of the Illinois Central Railroad Memoirs, Speeches and Writings of Robert Rantoul, Jr. (Boston: J.P. Jewett and Company, 1854), frontispiece

obtain no greater rights against the railroad than had been possessed by Kyle. Third, as Schuyler's authority from the railroad did not extend to issuing fraudulent shares, the bank's remedy was only against Schuyler, not his principal.

In reaching these conclusions, Judge Comstock emphasized the difference in theories among the Superior Court judges and "the professional opinions which have been submitted to our examination," specifically former Chief Judge Bronson's and Charles O'Conor's, snidely remarking that: "If those who assert that this action can be maintained were able to agree on a reason for that opinion, there would be fewer propositions to discuss than I shall feel obliged to examine."[32] He also addressed the two authorities which had been cited by General Term. His opinion said:

> *But suppose an agent is authorized by the terms of his appointment to enter into an engagement. . . on behalf of his principal, and while the appointment is in force he fraudulently makes one in his own or a stranger's business, but in the form contemplated by the power, and which he asserts to be in the business of his employer, by using his name in the contract, can the dealer rely upon that assertion and hold the principal, or is he bound to inquire and to ascertain, at his peril, whether the transaction is not only in appearance but in fact within the authority? According to the decision of the supreme court of this state, in the case of* The North River Bank v. Aymar *(3 Hill, 262), he can. … Justice Cowen and Chief Justice Nelson delivered opposing opinions, in which the question is very elaborately discussed. The decision was reversed in the court of errors, but the case is not reported in that court. The reversal, however, proceeded, as I learn, upon a doctrine directly opposite to that held by the supreme court. The case therefore certainly suggests a limit of great importance to the liability of principals, the recognition of which would be decisive of the present controversy.*[33]

So far as *The Bank of Kentucky* was concerned, Judge Comstock's opinion frankly acknowledged that "in the opinion…some principles were stated scarcely reconcilable with the conclusion to which we have come." *Id.* at 641.

For those holding the bogus shares, this unanimous decision must have seemed fatal to any claims against the railroad.[34] On June 26, 1856, George

Templeton Strong recorded in his diary that the decision was "very acute, wise and sound, I think, generally approved, except by the Board of Brokers."[35]

3. *The Farmers and Mechanics' Bank, of Kent County, Maryland, v. The Butchers and Drovers' Bank*

But in September 1857, only fifteen months later, the Court of Appeals made a u-turn. This case did not involve railroads. Rather, in violation of the Butchers Bank's president's instructions, a Butchers Bank teller surreptitiously certified checks "off the books", payable to the Farmers Bank at the request of a customer named Green; although Farmers Bank presented these checks for payment in the same way it had previously successfully negotiated certified checks drawn on Butchers Bank by Green, these checks were refused.[36] The four Supreme Court justices who heard this case had replaced those on the *Mechanics' Bank* case, but the Court of Appeals judges were the same, except that this time Judge Samuel Selden not only participated, he also wrote an opinion for the Court which was adopted by all of its members except Judge Comstock.

Judge Selden's opinion held that the certification by the teller of a negotiable check was binding on the bank which employed him, even though he was acting in violation of express instructions he had received from its president. He quoted and treated as dispositive the same passage from Judge Cowen's opinion for the majority in *North River Bank* as Judge Hoffman (*supra*, at p. 36) had in his opinion in *Mechanics' Bank*, dismissing Chief Justice Nelson's dissent in *North River Bank* as irreconcilable with two of that justice's other opinions,[37] and continuing:

> *It is true that the decision in the case of* The North River Bank v. Aymar *was reversed in the Court of Errors; but the opinions pronounced in that court have never been published, and consequently the views there expressed are unknown. Under these circumstances the principal reason against the reconsideration of a question, which has been passed upon by the court of last resort, viz., that the public needs a fixed and definite rule upon which it can rely in the transaction of business, loses most of its force. The opinion of the Supreme Court, which is published at large in the reports, is more likely to be taken as the rule than that of the Court of Errors, to which attention is rarely directed. The question, therefore, should, I think, be considered as still open for examination; and I have little hesitation in holding that it was properly decided by the Supreme Court.*

Judge Selden concluded by pointing out that had the New York and New Haven Railroad stock certificates in question in *Mechanics Bank* been negotiable, the plaintiff in that case would have prevailed, and that the two members of the present court who participated in that case agreed with him, an assertion confirmed by Chief Judge Denio, who also agreed that the Supreme Court decision in *North River Bank* was "good authority, notwithstanding the reversal of the judgment in that case by the late Court of Errors."[38]

Judge Comstock, of course, disagreed. As to *North River Bank*:

> *The judgment of the Supreme Court was removed, by writ of error, into the late Court for the Correction of Errors, and was there reversed. The case is not reported in that court, for the reason, as the reporter informs me, that the prevailing opinion was not handed to him at the time by the senator who delivered it, and was afterwards lost or mislaid. I have examined, however, the record, and learn from the reporter and one of the judges whose vote was for affirmance, that the reversal was distinctly upon the question discussed in the Supreme Court. *** It was a decision of the highest court in this state, and I hold that we are bound by it. We have never refused to follow a clear and distinct determination of that tribunal.*[39]

His discussion of *Mechanics Bank* — raising a question "identical in principle with the present one"— is the same vein:

> *We held [plaintiffs] could not recover, and reversed the judgment; placing our decision prominently on the ground that the acts of the*

> *agent, in signing and issuing spurious instruments, were not within the real or apparent scope of power delegated to him. We certainly did not put our judgment upon the ground that the plaintiffs were not in privity of dealing with the defendants, by reason of the non-negotiable character of the certificates, and therefore could not sue for fraud. It had been argued that they were negotiable or quasi negotiable. We held that they were not; but we further held that whatever might be their character in that respect, they were void everywhere, because issued without authority.*[40]

4. *The New-York and New Haven Railroad Company v. Robert Schuyler, William Cross and 324 Others*

The New York and New Haven Railroad filed this action, christened the "omnibus" case, in January 1855, against the over three hundred persons and firms it asserted held bogus stock. The Supreme Court sustained a demurrer and dismissed the action at its May 1855 Special Term. Engaging in what is now a typical class action certification analysis, Justice Cowles found that issues specific to individual defendants greatly predominated over issues common to all defendants and thus the action was "multifarious". He also concluded that the action was neither an interpleader nor a bill of peace and that the company had neither a right of action against the innocent holders of bogus stock nor the right to pick the forums where the claims against it were to be litigated.[41] The decision was affirmed at General Term, but in the Court of Appeals it was reversed at the June 1858 term, nine months after the decision in *Farmer and Mechanics' Bank*.

A unanimous opinion favorable to the railroad was, once again, written by Judge George F. Comstock.[42] His opinion justified the joinder of all holders of bogus shares in a single action by the railroad because of its duty to seek cancellation of the bogus shares, the impact on the value of valid shares of the unresolved claims of those holding bogus shares issued by Schuyler, and the common questions posed with respect to all bogus shares even though their holders held different certificates. Although his insistence that in *Mechanics Bank* "we held [the bogus shares] void to all intents and purposes, and that the corporation and its genuine shareholders were entirely unaffected by them" might weaken these arguments, his response was:

> *It is true, we held in the case already mentioned, that the company could successfully defend an action brought against it for refusing to recognize one of these certificates; but the defense rested, as it must if actions were to be brought upon every other certificate, upon the extrinsic facts to be proved. Conceding, even, that every one of these claims may be defended, at whatever distance of time under whatever circumstances they may be pressed upon the corporation, this by no means meets the equity of the case. If, as we have held, no just claim against the corporation arises out of these certificates, it is plainly unconsciousness [sic; unconscionable (?)] and inequitable that they should be kept on foot.*[43]

The case was remanded to the Supreme Court, and at its June 1859 Special Term Justice Josiah Sutherland ordered an injunction against the prosecution of any other lawsuit.[44]

The "omnibus" case was tried before Justice Daniel P. Ingraham at Special Term from March 20 to June 1, 1860. It was very much of a books and records trial, consisting of the authentication of the railroad's stock records and proof concerning their maintenance, the specific identification of the bogus shares and the individual circumstances of their acquisition by their aggrieved holders. On July 2, 1860, Judge Ingraham rendered an opinion, misdated in the published report,[45] followed in November by 161 pages of findings of fact with respect to the individual claimants. Although George F. Comstock remained Chief Judge of the Court of Appeals until the expiration of his term at the end of 1861, Justice Ingraham chose to treat his pointed assertions of the invalidity of the bogus shares in both *Mechanics' Bank* and *Farmer and Mechanics' Bank* as non-binding dictum that was merely representative of Judge Comstock's own opinion. For the railroad's liability for Schuyler's acts as transfer agent, he relied upon instead Judge Selden's opinion in *Farmers and*

Mechanics' Bank.[46] Most importantly, he found that:

> *a proper examination of the books by the directors would have enabled them to discover the frauds which were perpetrated by Schuyler, and that the board of directors were guilty of negligence in not making such examinations and in leaving the entire charge and control of the transfer of shares, and giving certificates, with Schuyler, without making such examination.*

and that:

> *the defendants who have received transfers of spurious stock by the acts of the transfer agent of the company or certificates of spurious stock from the transfer agent of the company, without knowledge or ground of suspicion of fraud or irregularity, and have advanced money thereon, are entitled to recover damages against the company, in a proper action.*

Because this was an equitable proceeding, Judge Ingraham did not feel able to award any damages to those parties he thought entitled to them.[47]

Appeals were taken on both sides to the General Term, where, on November 9, 1863, in an unreported decision, with two minor adjustments Justice Ingraham's judgment was affirmed in all respects but one by a panel consisting of Justice Sutherland, Justice Leonard — and Justice Ingraham. The one exception was that "this Court is of the opinion that the Judge, at Special Term, should have assessed the damages" for those defendants it considered were entitled to them, and it remanded the case for that purpose. The defendants were represented on the appeal by a stellar cast that included Daniel Lord, Jr., future United States Supreme Court Justice Samuel Blatchford and future Court of Appeals Judge Charles Rapallo. The Railroad was represented both by its long-time counsel, William Curtis Noyes, and a new lawyer — George F. Comstock, no longer on the Court of Appeals, having failed to gain re-election in 1861.[48]

An amended judgment was entered on June 30, 1864, at Special Term, awarding specific damages against the railroad to individual plaintiffs. Even Mechanics' Bank — whose new trial had been lumped into the "omnibus" suit — got its damages for the Kyle transaction in New York and New Haven shares, having previously recovered against the New York and Harlem Railroad in a separate action.[49]

Justices Ingraham, Clerke and Sutherland affirmed that judgment at General Term on February 24, 1865 in an unreported decision, permitting the railroad to deposit the damages pending appeal to the Court of Appeals. George F. Comstock again appeared for the railroad, William Curtis Noyes having died in the meantime.[50] The case then went to the Court of Appeals, where the railroad was again represented by George F. Comstock and the same luminaries mentioned before appeared for various of the defendants: Daniel DeForest Lord standing in for his father, Charles O'Conor joining Charles Rapallo for Cornelius Vanderbilt, and William M. Evarts appearing for Edward Whitehouse.

However, in contrast to the earlier cases discussed, the composition of that court had substantially changed. As usual, there were four new Supreme Court justices for that year, but one of them, John W. Brown, had been on the court for the *Farmer and Mechanics' Bank* decision. In addition, William B. Wright, who had sat on the *Mechanics' Bank* court as a Supreme Court justice, was now on the court as a full-fledged Court of Appeals judge, having defeated Judge Comstock in the election for the seat. Only Chief Judge Denio had sat on the court continuously since the railroad appeals began.

All the other judges were new. Two of the four Court of Appeals judges, Henry E. Davies and John K. Porter did not sit; Judge Davies had represented one of the defendants at the trial before Justice Ingraham in 1860. One of the justices, William Campbell, also did not sit.

But Judge Davies's views were hardly unknown. He was the author of the opinion for a unanimous court in March 1863, in a case in which the trial judge had fallen victim to the Court of Appeals's inconsistencies on the scope of a principal's liability.[51] Judge Davies's opinion not only quoted Judge Selden's from *Farmers and Mechanics' Bank* (*see*, *supra*, at p. 38), he also included a more extensive quotation from Chief Judge Denio's than appears in the official report of that case:

> *"I am clearly of the opinion that the case of*

> *the* North River Bank v. Aymar, *was correctly adjudged in the Supreme Court. If the Court of Errors laid down a different rule, in reversing that judgment, they ran counter, as I think I have shown, to a strong course of adjudication in that court and in the Supreme Court and overturned a legal position which was then well established in this State, and has since been repeatedly acted upon."*[52]

In the headnote to this case in the official report, the reporter summed up succinctly and, apparently, sardonically:

> *The doctrine of* Aymar v. North River Bank *(3 Hill, 263), reaffirmed for the fourth or fifth time, notwithstanding the known reversal of the judgment in that case by the late Court for the Correction of Errors — the reversal remaining unreported, except by such posthumous remembrances as the present.*

The decision for the Court of Appeals in the second appeal in the *New York and New Haven Railroad* case, affirming the judgment below, was written for a unanimous court by Supreme Court Justice Noah Davis, Jr.[53] To be brief, *Mechanics' Bank* as a precedent was obliterated by the effective overruling of the Court for the Correction of Errors in *North River Bank*. Justice Davis repeatedly quoted from *Mechanics' Bank*, pointedly referring to its author — "The question of that case is stated by Comstock, J.… with succinctness and accuracy", "the learned judge" and "we find ourselves quite unable to say, with the able jurist in that case". He then rejected its legal position on the basis of later authority and contradicted its factual assertions based on the more fully developed record at the 1860 trial about Schuyler's unfettered control of the financial management of the railroad and the directors' delinquency: "the board of directors, by passive submission or active surrender, handed over to Schuyler the substance of all their authority relating to their business in New York, and then for nearly seven years laid down to sleep in supine indifference at his feet." Justice Davis went so far as to say:

> *If ever a case, discrowned by reversal, was lifted to its feet and restored to authority by adjudication,* The North River Bank v. Aymar *has been; and its vindication is all the more signal because of the ability with which its chief antagonist has conducted the remarkable warfare against it.*

He also dismissed Judge Comstock's view of the law of agency as "singularly inconvenient, if not absurd, in practice."[54] In addition, in several instances this decision of the Court of Appeals granted relief to injured shareholders who had not succeeded in the proceedings below, including the Ketchum, Rogers firm, which the Court of Appeals felt had been unfairly treated below because of Ketchum's having been a director of the railroad.

Resolving the case was financially painful for the railroad but did not destroy it. It appears that the board of the railroad did establish a settlement program whereby spurious shares could be exchanged for half their number in valid shares.[55] The final costs of the Schuyler fraud appear to have been charged off by the end of 1867, when improvements in the line resumed.[56]

The Legal Importance of these Cases

In the second volume of his magisterial survey of American law,[57] Professor Morton Horwitz uses these cases to illustrate the tension between the courts and the academy over gradually evolving legal doctrines during the period surrounding the Civil War. The opinion expressed by Judge Comstock, expounded in the treatises well after the New York Court of Appeals had reached the opposite conclusion, reflects the classical view that the law of contract defined the relationship of principal and agent and protected the principal from liabilities arising out of the agent's unauthorized conduct in the principal's name. The progressive view adopted in the later cases — and arguably the consequence of the increased use of the expanded corporate form of business organization — departed from strict notions of contract and established the more relaxed concept of apparent authority in the law of agency. Hence what on its face seems a rather unprincipled series of contradictory decisions simply reflects the growing pains of courts needing to keep pace with the country.

Another innovative aspect of this litigation, noted at the outset, was the consolidation into a single action brought by the railroad of all holders of bogus shares. Despite resistance in the lower courts, the Court of Appeals, for reasons that resonate to 21st century lawyers, held the joinder not only permissible but desirable. It may fairly be said that the first decision in *New York and New Haven Railroad v. Schuyler* represented a major step forward in case management that has been carried further by case transfer statutes and the Judicial Panel on Multidistrict Litigation.[58] Given the substantive outcome of this litigation, however, it is open to question whether the successful consolidation of all potential claimants in one proceeding, rather than leaving each to file his own action, improved the railroad's tactical position.

ENDNOTES

1. 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* 413 (1905). Despite that encomium, nothing of any length has been written about the case other than one law review article: Thaddeus D. Kenneson, *A Misapplication of the Doctrine of Estoppel*, 5 Col. L. Rev. 261 (1905). Judge Bergan devotes only a page and a half to the case, and misstates the name of the Court of Appeals judge who wrote the dispositive opinion, in his *The History of the New York Court of Appeals, 1847-1932*, at 72 (1985).
2. Argument of Wm. Curtis Noyes, Esq. for the Appellants in *Mechanics' Bank v. New York and New Haven Railroad*, in the Court of Appeals. Albany, April 5th. 1856 (New York 1856), 3.
3. *See generally* Christian Wolmar, *The Great Railroad Revolution – The History of Trains in America* 25–87 (2012).
4. *New-York as It Is, in 1837*, at 152–53. He is also shown as Superintendent of the Jersey City Ferry, while his brother and business partner, George. L. Schuyler, appears as a director of the New Jersey Rail-Road and Transportation Co. The Boston and New-York Transportation Co. had an exclusive arrangement with the Boston & Providence Railroad to transport by water from Providence to New York passengers carried to Providence from Boston on the railroad. Cornelius Vanderbilt went into competition with the Transportation Co. with faster vessels on the Long Island Sound segment of the journey, and Schuyler ultimately had to buy him out. T. J. Stiles, *The First Tycoon — The Epic Life of Cornelius Vanderbilt* 104–24 (2010).
5. *New York Court of Appeals: The New York and New Haven Railroad Company against Robert Schuyler and others, Respondents –Case on Appeal*, Vol. 3, 2, 5.
6. A transfer agent held the stock books and blank stock certificates of the company and was responsible for recording the transfer of its shares between purchasers and sellers.
7. *Doggett's New York City Directory, Illustrated with Maps for New York and Brooklyn, 1848-1849*, at 7 (7th ed.).
8. *Annual Report of the State Engineer and Surveyor of the State of New-York on Railroad Statistics Made to the Legislature, on the 7th January, 1851*, at 84 (1851); 27 Am. Railroad J. (1854).
9. W.K. Ackerman, *History of the Illinois Central Railroad Company and Representative Employees* 97 (1900); *See generally* Carlton J. Corliss, *Main Line of Mid-America — the Story of the Illinois Central* (1950).
10. *Trial of Thomas Sims on an Issue of Personal Liberty* (1851); Corliss, *supra* note 9, at 23–25.
11. *Annual Report, supra* note 8, at 86.
12. Clarence Deming, *The Upbuilding of a Railroad System*, 36 Railroad Gazette 317 (April 29, 1904).
13. *Id.*
14. *Report of the Directors of the New York & New Haven R.R. Co. to the Stockholders, at their Special Meeting, October 3d, 1854*, at 4 (1854).

15. Case on Appeal, *supra* note 5, at 1183
16. *Report of the Directors, supra* note 14, at 5. Robert Schuyler's exculpation of his younger brother appears to have been undisputed. George Schuyler, who was not only Alexander Hamilton's nephew but also the husband of Hamilton's granddaughter, later established the America's Cup, an international trophy for which yachts compete to this day, and remained a pillar of polite society into the post-Civil War period. *See* Killis Campbell, *The Kennedy Papers: A Sheaf of Unpublished Letters from Washington Irving,* 25 Sewanee Rev. 1, 13–14 (January 1917) ("From all that I know of George I have acquitted him, from the first, of any participation in his brother's delinquency, and such I am happy to find is the verdict of some of our most able and experienced men of business who have investigated the matter . . . .").
17. The company filed criminal charges against Robert Schuyler, and although a warrant for his arrest was issued, it was never executed. N.Y. Times, Sept. 23 & 24, 1854. At a shareholders' meeting on September 21, 1854, it was recommended that the company offer a five thousand dollar reward for Schuyler's apprehension. Am. Railroad J., *supra* note 8, at 616.
18. Ackerman, *supra* note 9, at 97–98.
19. 31 Hunt's Merchants' Mag. and Com. Rev. 207 (August 1854).
20. *The American Railway Defalcations,* 14 Bankers' Mag. – J. of the Money Market and Com. Dig. 494–99 (September 1854).
21. Am. Railroad J., *supra* note 8, at 433-434 (July 15, 1854), 610 (September 30, 1854).
22. *See N.Y. and Harlem R.R. v. Kyle,* 5 Bosworth's Reports 587 (1859); 32 Hunt's Merchants' Mag. and Com. Rev. 276 (March 1855); *The American Railway Defalcations, supra* note 20, at 496. There was a mist about Schuyler's private life, too. One contemporaneous source claimed that, although ostensibly single and residing in a downtown hotel near his office at 2 Hanover Street, under another name Schuyler maintained a home in upper Manhattan where his two daughters and their mother, to whom he was not married, also resided. Allegedly, when a clergyman who wished to marry the eldest daughter finally learned who her father was, he conditioned his marriage to her on a double wedding at which her parents also wed. Schuyler did so and then apparently arranged more opulent living quarters in town where he resided with his wife and younger daughter. Matthew Hale Smith, *Twenty Years Among the Bulls and Bears of Wall Street* 168–71 (1871).
23. For 1855, *see* Edward J. Renahan, *Commodore: The Life of Cornelius Vanderbilt* 244 (paperback ed. 2009). For 1856, *see* T. J. Stiles, *supra* note 4, at 249; 5 Bankers' Mag. and Statistical Reg. 723 (March 1856).
24. N.Y. Trib. July 2, 1855; N.Y. Times, July 4, 1855.
25. *Opinions of Judge Bronson & Messrs. Kirkland, O'Conor & Lord on the Subject of the Over-Issues of the New York & New Haven Railroad Stock* (New York 1854).
26. *Illius v. New York and Harlem Railroad and Heman J. Redfield, Collector of the Port of New York,* N.Y. Times, Oct. 9, 1854; Am. Railroad J., *supra* note 8, at 868 (October 21, 1854); *Dennistoun v. Heman J. Redfield, Collector of the Port of New York, and the New York and Harlem Railroad,* N.Y. Times, Nov. 17, 1854.
27. 3 Am. L. Reg. 145 (January 1855). On appeal, after the *Mechanics Bank* decision discussed *infra*, the Superior Court, at its November 1857 General Term, affirmed the judgment:

    > The defendants having received no more than was their strict right, and having received that as a payment in behalf of their debtor, and being guilty of no fraud, the judgment should be affirmed, but not for the reasons assigned in support of it by the learned Judge by whom it was rendered.

    6 Duer's *Superior Court Reports* 463, 485. The Court of Appeals affirmed. *See generally Ketchum v. Stevens*, 19 N.Y. 499 (N.Y. 1859). The bank was represented throughout by Daniel Lord, Jr.
28. 4 Duer's *Superior Court Reports* 480, 497–501 (1855) (Bosworth, J.) The opinion at [nisi prius] is vague on this issue and on why the judgment does not address the New York and Harlem Railroad shares found to have been improperly issued by Kyle. At General Term Judge Bosworth's opinion clarifies the former issue but it remains opaque whether the New York and Harlem was even a party to the action; although the Railroad is not in the caption, the opinion refers to "defendants."
29. *Id.* at 519–69. There was an apparent difference in view whether, since the fraudulent shares exceeded the limit authorized by the railroad's charter, they could be honored by reducing the equity of all legitimate shareholders *pro tanto* or whether the correct remedy was damages.
30. *Bank of Ky. v. Schuylkill Bank,* 1 Pars. 180 (Pa. Ct. Com. Pl. 1846). The case was affirmed by the Pennsylvania Supreme Court on March 7, 1849, without opinion.
31. In *North River Bank*, Justice Esek Cowen wrote the majority opinion, with the concurrence of Justice Greene C. Bronson, later Chief Judge of the New York Court of Appeals. A dissenting opinion was filed by Chief Justice Nelson.
32. *Mechanics' Bank v. N.Y. & New Haven R.R. Co.*, 13 N.Y. 599, 615–16 (1856). Daniel Lord, Jr., was counsel to the bank throughout the litigation, and William Curtis Noyes was counsel to the railroad.
33. *Id.* at 632–33. Until 1846, the highest appellate court in New York State was the Court for the Trial of Impeachments and the Correction of Errors; its presiding officer

was the Lieutenant Governor, and its members the Chancellor, the Justices of the Supreme Court, and the Senators. The Chancellor and the Justices did not sit on appeals in cases from their respective courts. *See* Bergan, *supra* note 1, at 9–24, 33–34.

34. It seems likely that at this time desperation drove Daniel D. Lord, son of Daniel Lord, Jr., to bring an action in the United States circuit court for the southern district of New York. Ironically, the Circuit Justice then and for many years more was Samuel Nelson, who as Chief Justice had dissented in the *North River Bank* case. Although Justice Nelson dismissed the action for want of jurisdiction, the last statement in his opinion shows that he understood exactly what the game was: "[A]nd if my opinion upon the point was more doubtful than it is, I should be unwilling, in a case of the magnitude of the present one, to entertain jurisdiction, when there are tribunals before which the case may be heard and determined unembarrassed with this question." *Pomeroy v. N.Y. & New Haven R.R. Co.*, 19 F. Cas. 965, 966 (C.C.S.D.N.Y. 1857) (No. 11,261).
35. 2 *The Diary of George Templeton Strong* 282 (Allan Nevins ed. 1952).
36. *Farmers & Mechanics' Bank of Kent Cnty., Md. v. Butchers & Drovers' Bank*, 16 N.Y. 125 (N.Y. 1857).
37. *Id.* at 138–39; *Gansevoort v. Williams & Johnson*, 14 Wend. 133 (N.Y. Sup. Ct. 1835); *Boyd v. Plumb*, 7 Wend. 309 (N.Y. Sup. Ct. 1831).
38. *Id.* at 142-43
39. *Id.* at 154. With the kind and indispensable assistance of Christine Ward, New York State Archivist, and Dr. James D. Folts, Head, Research Services, New York State Archives, an effort has been made to unearth the record of *Aymar v. North River Bank*. The case register and the minute book of the Court for the Trial of Impeachments and the Correction of Errors reflect the lodging of the appeal in December 1842, the argument of the appeal on November 17, 1843, and the reversal of the judgment of the Supreme Court and reinstatement of the judgment of the Superior Court on December 27, 1843, by a vote of 13-4, the Chancellor not sitting. Nothing reveals the reasoning of the Court.

    At the Division of Old Records of the New York County Clerk's Office, the error books for the appeals from the Superior Court and the Supreme Court remain on file, but there is no recoverable record in either of those courts of the judgment of the Court for the Trial of Impeachments and the Correction of Errors or proceedings thereafter.

    Further research has uncovered a report of proceedings in the Superior Court in the case of *Jackson v. Aymar* (reported as occurring on March 11, 1845) that was published in volume fifteen of *The Merchants' Magazine and Commercial Review* for July to December, 1846. The single-page report describes a fact pattern very similar to *Aymar v. North River Bank* and involving the same individuals. The jury instructions of Judge Vanderpoel are reported to have been (in pertinent part) as follows:

    > The Court charged the jury that under a decision of the Court of Errors a written power of attorney was only intended to apply to Pexel Fowler's own business, and could not authorize endorsements for purchases except such as were made for Pexel Fowler, and, under that decision, unless the plaintiff proved that the purchase was made for the benefit of Pexel Fowler, it did not come within the written power of attorney.

    The plaintiff prevailed, relying on other evidence of authority from Fowler to his brother.

    Curiously, the file in the Division of Old Records shows that the correct date for this *Aymar* trial was March 2, 1846.
40. *Id.* at 154–55.
41. 1 Abb. Pr. 417 (May 1855).
42. *N.Y. & New Haven R.R. Co. v. Schuyler,* 17 N.Y. 592 (1858). Again, the four Supreme Court justices on the court were new, but the four Court of Appeals judges were the same as in the prior cases. However, Judge Samuel Selden, who wrote the opinion in *Farmer and Mechanics' Bank* and did not sit in *Mechanics' Bank*, once again did not sit, nor did Justice James J. Roosevelt. Also, for some unknown reason, the LEXIS version of the report identifies Judge Comstock as both not sitting in the case and as the author of the opinion. Recourse to the original report sets the matter straight.
43. *Id.* at 598, 600. Characteristically, Judge Comstock deployed the rough side of his tongue, this time on the authors of the Field Code:

    > The authors of the Code, in framing this and most of its other provisions, appear to have had some remote knowledge of what the previous law had been. … The amendment, therefore, was not designed to introduce any novelty in pleading or practice. Its language is, I think, well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretations which shall be found most convenient . . . .

    Id. at 604.
44. 17 How. Pr. 464. (1859)
45. *The New York and New Haven Rail Road Company v. Robert Schuyler,* 38 Barb. 534 (1860); N.Y. Times, July 3, 1860.
46. *The New York and New Haven Rail Road Company v. Robert Schuyler*, 38 Barb. 534 at 546–47. Although Justice Ingraham's approach was affirmed by both the General Term and the New York Court of Appeals, it is interesting to contrast it with the opinion rendered three months later

by Justice Samuel Nelson, the dissenter in the Supreme Court in *North River Bank*, in dismissing another related case in the federal circuit court:

> The question in this case is whether the defendants are responsible for the spurious certificates of stock issued by Schuyler, the president of the company, and transfer agent of the stock, which certificates passed into the hands of a bona fide holder for value. The question has been twice before the court of appeals for this state, and, after a very full and able examination, has been determined in the negative. *Mechanics' Bank v. New York & N. H. R. R. Co.*, 3 Kern. [13 N.Y.] 599, and *New York & N. H. R. R. v. Schuyler,* 17 N.Y. 592. The action in the first case was founded on one of these certificates, and presented the question, directly, raised in the present case upon the demurrers. It was also necessarily involved in the second case, and the principle of the first again affirmed. According to our view of the practice of the federal courts in similar and analogous cases, these courts follow the decisions of the highest state judicial tribunal, the question involved being essentially one of local law . . . .

Illius v. N.Y. & New Haven R.R. Co., 13 F. Cas. 1 (C. C. S. D. N. Y. 1860) (No. 7,010).

47. *The New York and New Haven Rail Road Company v. Robert Schuyler,* 38 Barb. at 562, 565.
48. Jed S. Shugerman, *The People's Courts — Pursuing Judicial Independence in America* 137 (2012). Judge Comstock was a conservative who had dissented in the Lemmon Slave Case and opposed the re-election of Lincoln, whom he characterized as an anarchist and whose Emancipation Proclamation he contended was "his betrayal of the Constitution." Speech of Judge George F. Comstock, Delivered at the Brooklyn Academy of Music [undated]. After the Civil War he was one of the founders of Syracuse University.
49. Case on Appeal, *supra* note 5, at 663i–x.
50. *Id.* at 663gg–kk.
51. *Exchange Bank v. Montheath*, 26 N.Y. 505 (N.Y. 1863). The distinction from *Mechanics Bank* taken in *Farmers and Mechanics' Bank* — that the application of the broader scope of principal liability stated in the former applied only in cases of negotiable paper — had already been swept away in the previous term in *Griswold v. Haven*, 25 N.Y. 595, 601 (N.Y. 1862), although the Court divided on the appropriateness of the application of the doctrine of estoppel in that case for other reasons.
52. *Exchange Bank*, 26 N.Y. at 510.
53. *N.Y. and New Haven R.R. Co. v. Schuyler*, 34 N.Y. 30 (N.Y. 1865).
54. *Id.* at 58, 68, 71.
55. *See* Michael Mahler, *Robert Schuyler's 1853-4 Stock Fraud on the New York and New Haven Rail Road: the Paper Trail*, Figs. 8A and 8B
56. 41 *Am. Railroad J.* 510–11 (May 30, 1868).
57. Morton J. Horwitz, *The Transformation of American Law — 1870-1960, The Crisis of Legal Orthodoxy* 44–45 (1992).
58. John H. Langbein, *The Disappearance of Civil Trial in the United States,* 122 Yale L. J. 522 (2012).

Theodore Theopolis Jones, Jr.

(1944-2012)

New York State Court of Appeals 2007-2012

Janice E. Taylor and Clifton R. Branch, Jr.

Theodore Theopolis Jones, Jr. was the fourth African American appointed to serve on New York State's highest court.[1] He was nominated to the Court of Appeals by the then-newly elected Governor Eliot Spitzer in January 2007 and confirmed by the State Senate in February 2007. Sadly, Judge Jones's time on the Court was cut short when he passed away unexpectedly on November 6, 2012 at the age of 68.

On February 15, 2013, Chief Judge Jonathan Lippman, speaking at the Court of Appeals' annual Diversity Day event to celebrate Judge Jones's life and unveil his portrait at Court of Appeals Hall, said of his colleague and friend, "Ted Jones was not like anyone else I've ever known, and was not like anyone else in the history of the Court of Appeals. He had a singular personality that absolutely captivated us—he was smart, charming, gentle, street-wise, down to

Janice E. Taylor was a personal friend of Judge Jones and his wife Joan for more than 40 years, beginning when she and Judge Jones were both attorneys in the Community Defender Office of The Legal Aid Society. Ms. Taylor received a B.A. from Brooklyn College and J.D. from New York Law School. She worked as a staff attorney and supervisor at The Legal Aid Society (1971-1991) and General Counsel at The New York City Department of Probation (1991-2001) before becoming Judge Jones's law clerk in Kings County Supreme Court and the Court of Appeals (2002-2010).

Clifton R. Branch, Jr. presently works as a law clerk at the NYS Judicial Institute of the NYS Unified Court System. He previously worked as a personal law clerk at the Court of Appeals for Judge Jones (2007-2012) and the Hon. George Bundy Smith (ret.) (2004-2006). Mr. Branch received his B.A. from the Pennsylvania State University and J.D. from Fordham University School of Law.

Judge Jones's Family, Left to Right: His brother Lawrence, his father Theodore, Sr., his sister Theodora, and Judge Jones

earth, and down-right inspiring."[2] Recounting how Judge Jones's colleagues on the Court viewed him, Chief Judge Lippman further said, "Ted's warm demeanor, and his insightful grasp of the intricacies of the legal cases confronting the Court, made him an instant favorite of his colleagues. When Ted Jones spoke at conference or asked questions from the Bench, we all listened knowing that he was always wise, cogent and insightful in expressing his views on the law."[3]

Dean Michael A. Simons of St. John's University School of Law, where Judge Jones taught for several years, further wrote, "New York State lost a public servant of intense intellect, impeccable integrity, and deep compassion. St. John's lost a dear friend."[4] In describing Judge Jones, Dean Simons focused on three words: "humility, compassion, and service."[5] He wrote:

> *When you met Ted Jones, you wouldn't have known that he was a great lawyer or a great judge, and that's because he carried himself with such genuine humility—a humility that I believe grew out of his understanding of other people. It is impossible to be a criminal defense lawyer and not have a deep understanding of and compassion for the struggles that affect others' lives. And Ted Jones' compassion for others led him to a lifetime of service.*[6]

The foregoing remarks and the many other tributes celebrating Judge Jones's life provide a glimpse of the type of man Judge Jones was and the high esteem in which he was held. However, to uncover the full measure of the man and understand what informed his views and shaped his values, we necessarily start at the beginning.

Family History, Early Years and Education

Judge Jones was born in Brooklyn, New York on March 10, 1944, to Theodore T. Jones, Sr. and Hortense Parker Jones of Newport News, Virginia. The youngest of three children, Judge Jones was affectionately known as "Teddy" to his family and friends. His mother, one of 13 children, was an educator, while his father worked for the Long Island Railroad, eventually becoming the Stationmaster at Pennsylvania Station.[7]

"Teddy" and his siblings were greatly influenced by their parents and their extended family of aunts and uncles. These close-knit family members stressed the importance of hard work and, through their own professional achievements in business, law and education, demonstrated many other valuable qualities. In fact, Judge Jones's decision to pursue a career in law was influenced by his uncle Lutrelle F. Parker, Sr., a patent attorney who was the first African American to hold the positions of Deputy and Acting Commissioner at the United States Patent and Trademark Office. The Jones children were always encouraged to strive for excellence and to take advantage of educational opportunities; Judge Jones's sister, Theodora J. Blackmon, has a Master's Degree in Education, and his brother, Lawrence Jones, has a Doctorate in Education.

Judge Jones's parents owned a 120-acre farm in Delaware County, New York, where they ran a summer camp and brought children from Harlem to spend time in the country. This farm played an important part in Judge Jones's development and family life. Well known to his colleagues and friends as an avid golfer, Judge Jones was also a sportsman. It was at the farm where Judge Jones learned, from his father, how to fish, hunt, and ride a horse. In later years, the farm became a place where family and friends would gather to spend time together.

Back home, Judge Jones was a product of New York City public schools. He originally attended P.S. 93 elementary school in Brooklyn. When the family moved to Jamaica, Queens in 1952, he transferred

Judge Jones as an artillery officer in Vietnam

to P.S. 123 and Shimer Junior High School. Significantly, it was at Shimer where Judge Jones met Joan Sarah Hogans, who would become his wife.

After graduating from John Adams High School in Queens, Judge Jones attended Hampton Institute (now Hampton University) in Hampton, Virginia, along with his siblings. While at Hampton, he was involved in a number of student organizations. He also joined the Omega Psi Phi Fraternity, Gamma Epsilon Chapter, in the spring of 1963 and the Reserve Officers' Training Corps (ROTC). He graduated in 1965 with a Bachelor of Science Degree in History and Political Science. At his graduation, he was commissioned as a Second Lieutenant in the United States Army.

Judge Jones served as a Field Artillery Officer and subsequently completed Special Forces training at the John F. Kennedy School of Special Warfare at Fort Bragg, North Carolina. He was then stationed in the Republic of Vietnam where he served his country with distinction and honor from June 1968 until July 1969. He relinquished his commission at the rank of Captain.

Making His Mark as an Attorney

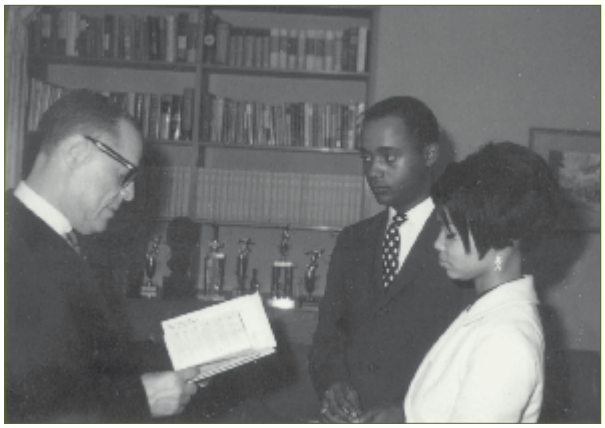
Upon his return home, Judge Jones decided to pursue a legal career. He graduated from St. John's University School of Law in 1972 with a Juris Doctor degree and was soon after admitted to the New York State Bar.

Judge Jones began his legal career working for the Community Defender Office of the Legal Aid Society, Criminal Defense Division, located in Bedford-Stuyvesant, Brooklyn, New York. This was a small neighborhood office where the staff attorneys represented clients from arraignment through the disposition of their cases. This office was funded by the federal *Model Cities* program, which was founded in 1966 by President Lyndon B. Johnson and supported novel and alternative means of municipal government. After leaving the Community Defender Office, Judge Jones served as Law Secretary to the Hon. Howard A. Jones (no relation) of the New York State Court of Claims.

In 1975, Judge Jones established a private practice on Fulton Street in the Bedford-Stuyvesant section of Brooklyn, New York, later moving to downtown Brooklyn at 16 Court Street. Although Judge Jones was a general practitioner, he relished the challenges associated with the practice of criminal law and quickly developed into a skilled trial attorney, taking on pro bono cases when individuals accused of crime lacked financial resources.

In the first felony case Judge Jones tried, he represented a young teenage boy who was charged with robbery. Working with investigators, he found two witnesses who remembered seeing, at the time of

Judge Jones with his mother, Hortense, on the day of his graduation from St. John's Law School



Judge Jones and his wife, Joan, at their marriage ceremony

the crime, the defendant bouncing a basketball in a park far away from the scene. The two witnesses, both elderly women, had reservations about getting involved. Judge Jones persuaded them to come forward and testify in court on behalf of his client. The young man was acquitted.

Judge Jones's ability to read people and situations enhanced his skill as a criminal defense attorney. On one occasion, while representing a client in a murder case involving grisly facts, he decided to waive a trial by jury and try the case in front of a judge with a reputation for being extremely tough. This was thought to be a very risky decision. In making this call, Judge Jones thought that, due to the facts of the crime, his client would be found guilty by a jury regardless of his defense. He also believed that the assigned trial judge would consider only the evidence and make a decision devoid of passion. Judge Jones was right; his client was acquitted.

Transition to the Bench

In 1989, after a long and successful career in private practice, Judge Jones was elected to serve as a Justice of the New York State Supreme Court for a 14 year term and was later reelected in 2003. The move from highly respected trial attorney to trial judge was a logical next step for Judge Jones. He wanted to effect wide-reaching change in the legal community and in the lives of ordinary litigants. Further, he understood the challenges facing litigants and their attorneys.

Starting in September 1993, Judge Jones presided over the Juvenile Offender Part in Kings County, handling cases involving juveniles charged with felonies under the Juvenile Offender Law. This specialized Part was modeled after the Youth Part in the Supreme Court of New York County and was designed to focus attention and scarce resources on youth who were being prosecuted as adults. The aim was to reduce the delays in youth cases, provide consistent sentencing, increase the number of youth diverted away from incarceration, and reduce recidivism by marshaling treatment resources, social services, and alternatives to incarceration. Judge Jones was by temperament and interest ideally suited to preside over this Part, and he sought to be a positive influence on the lives of the young people who appeared before him.

It was not unusual for Judge Jones, while presiding over the Juvenile Offender Part, to invite students to observe court proceedings and then talk with them about what happened. During one occasion, a group of sixth grade students from a local elementary school in Brooklyn visited Judge Jones's courtroom where he was presiding over the preliminary hearing of a juvenile. After the hearing, Judge Jones asked the students, "Did you learn something from all that?" Several students responded, "Yes, crime doesn't pay." Judge Jones then took the time to explain that the cases before him involved young people almost as young as the visitors themselves. Judge Jones said, as parting words, "I hope the next time you kids come here, you're all attorneys."

Judge Jones on the day he received his first judicial robes with his secretary, Dora Hancock

From January 1998 through January 2006, Judge Jones presided over civil cases in Supreme Court, Kings County. Later in 2006, he was appointed Administrative Judge of the Civil Term of Supreme Court, Kings County. He served in this capacity until he was appointed to the New York State Court of Appeals to fill the seat vacated by the Hon. Albert M. Rosenblatt, who retired from the bench in December 2006.

2005 Transit Strike Case

In late 2005, Local 100 of Transport Workers Union of America, AFL-CIO (Local 100)—the collective bargaining representative for most employees involved in the operation and maintenance of New York City's transit system—and the public authorities responsible for the operation and maintenance of New York City's transit facilities (Authorities) were negotiating a collective bargaining agreement (CBA) to replace the existing CBA due to expire on December 16, 2005 at 12:01 a.m. Officers and members of Local 100 expressed a readiness to strike if a new CBA was not in place by December 16.

The Authorities brought suit against Local 100 and other transportation workers' unions (Local 726 and Local 1056 of the Amalgamated Transit Union) days before the expiration date and sought preliminary injunctions under the Taylor Law—specifically, Civil Service Law §§ 210 and 211.[8] After considering the parties' evidence and hearing oral arguments, Judge Jones issued preliminary injunctions enjoining members of the transportation workers' unions from, among other things, conducting, engaging, or participating in a strike.

On December 20, 2005, after the CBA negotiations broke down, Local 100 called for an illegal strike to begin at 3:00 a.m. that morning.[9] Members of Local 726 and Local 1056 also joined the strike and New York City's mass transit system was effectively shut down. Following a hearing later that day, Judge Jones, consistent with the Taylor Law's mandates and concerned about the crippling effects a strike would have on New York City and its residents, adjudged Local 100 in contempt of two preliminary injunctions ordering it not to strike, and imposed a $1,000,000 per day fine against the union. On December 22, 2005, at about 2:35 p.m., a tentative agreement between the Authorities and Local 100 was reached and the strike ended. It is widely believed that Judge Jones's swift and decisive action influenced Local 100 to end the strike when it did (after roughly three days). In April 2006, Judge Jones ruled on the penalties for Local 100's violation of the court's preliminary injunction orders. He held the union in contempt, fined the union $2,500,000, sentenced the union president to 10 days in jail for contempt of court, and suspended the union's right to deduct dues from the paychecks of its members.[10]

Judge Jones's decisive handling of the litigation related to the 2005 transit strike, which was extensively covered by the media, brought him to public attention.[11]

Court of Appeals Years: 2007-2012

For almost six years, Judge Jones ably contributed to the Court's traditions of excellence through, among other things, his written opinions and insights and suggestions during case conferences. A staunch advocate for the fair administration of justice, Judge Jones also used his time on the Court to promote change within the legal profession and the court system. As will be discussed below, he fought for increased diversity in the courts as chair of the Court's Diversity Committee, and worked to reduce wrongful convictions and eliminate their systemic causes as co-chair of the New York State Justice Task Force.

Writing Style / A Sample of Judge Jones's Writings

Judge Jones was most concerned about how his rulings would be "felt on the ground." In other words, he considered the practical consequences of his rulings on those who would have to abide by them, such as current and future litigants, attorneys, and trial and intermediate appellate judges. As a result, he wrote in a dispassionate and straightforward style.

Judge Jones often told his staff that the best way to find out where a judge stands is to read his or her dissenting opinions. For his part, Judge Jones made judicious use of such opinions. He only dissented in writing when he strongly disagreed with the majority's holding. He did not believe that dissents should

Court of Appeals Informal Bench Portrait
Standing L to R: Robert S. Smith, Theodore T. Jones, Jr., Susan Phillips Read & Eugene F. Pigott, Jr.
Sitting L to R: Carmen Beauchamp Ciparick, Judith S. Kaye & Victoria A. Graffeo
Court of Appeals Collection

be written for entertainment value or for the sake of making arguments that had nothing to do with the appeal before the Court.

Turning to examples of Judge Jones's writings, the focus first falls on his criminal jurisprudence and its impact on the Court. Several articles were written on these subjects. In 2008, for example, Professor Vincent M. Bonventre of the Albany Law School wrote about Judge Jones's influence on the Court's decisions in criminal cases. Professor Bonventre concluded that "the [C]ourt adopted a pro-defendant position in 32% of the divided criminal cases in the five-year pre-Jones period. It did so in 39% of those cases in the immediate two year pre-Jones period. Those figures contrast markedly with the 63% [pro-defendant decisional record of the Court] since Jones's appointment."[12] In 2010, an Albany Law Review article analyzed eleven opinions written by Judge Jones, broken down into majority opinions in criminal cases where there was a dissenting opinion by another member of the Court and criminal cases where Judge Jones was the dissenting judge.[13] The author concluded that Judge Jones's opinions tend to favor the rights of defendants, and that his opinions have and will continue to have a distinct impact on the Court's criminal jurisprudence.

In his criminal jurisprudence Judge Jones wrote on certain practices and court rulings that could potentially contribute to wrongful convictions. The criminal case summaries which follow illustrate his concern in this area.

Judge Jones's first writing on the Court was the seminal decision *People v. LeGrand*.[14] *LeGrand* involved a murder where one witness to the crime, who saw the assailant up close, identified the defendant as the killer in a photographic array and lineup conducted seven years after the crime. Two other witnesses, who identified the defendant at trial after they failed to identify him in a photographic array, had seen his photograph in the same array the night before they

Judge Jones with Judge George Bundy Smith

testified. In addition, there was no physical evidence connecting him to the killing. At trial, the defendant, by motion, sought to introduce expert testimony on research concerning the following factors that may influence the perception and memory of eyewitnesses and the reliability of their identifications: the effect of weapon focus, the lack of correlation between witness confidence and accuracy of identification, the effect of post event information on accuracy, and confidence malleability. After a *Frye*[15] hearing to determine the admissibility of the expert's testimony, the trial court denied the defendant's motion concluding that although the expert witness was qualified, and the expert's proposed testimony was relevant and beyond the ken of the typical juror, the proposed testimony was not generally accepted in the relevant scientific community.

The unanimous Court first concluded that all of the proposed expert testimony, except for that pertaining to the impact of weapon focus, was generally accepted within the relevant scientific community. Further, and taking into account that trial courts generally have the power to limit the amount and scope of the evidence presented, the Court held that where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of the defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert, and (4) on a topic beyond the ken of the average juror.[16]

Another notable decision written by Judge Jones is *People v. Bryant*.[17] In reversing the Appellate Division order affirming the defendant's conviction, the Court held, among other things, that the defendant's motion for a *Mapp/Dunaway* hearing to suppress all evidence proffered against him should have been granted.[18] The unanimous Court concluded it was an error to deny the defendant's motion for a hearing to suppress evidence where he was not provided the critical information needed to support the motion —i.e., the factual predicate of his arrest—that only the People could provide. Because the defendant did not have this information, he could not allege facts disputing the basis of his arrest. In so holding, the Court reemphasized the pragmatic approach courts must take in deciding whether to hold hearings on suppression motions.[19]

In *People v. Bailey*,[20] the issue before the Court was whether the defendant's conviction for criminal possession of a forged instrument in the first degree was supported by legally sufficient evidence. Judge Jones wrote for the 5-2 majority, which held that the defendant's mere knowledge that he possessed a forged instrument (such as counterfeit $10 bills), where the circumstances surrounding his arrest only suggest that the defendant evinced an intent to steal from the patrons of the certain restaurants he went into and out of, did not provide legally sufficient evidence from which the jury could infer an intent to defraud, deceive or injure another by way of the bills, an element required for first-degree criminal possession of a forged instrument. In so holding, Judge Jones emphasized that knowledge and intent were two distinct elements of the offense, and that a ruling that the evidence was legally sufficient "effectively stripped the element of intent from the statute and criminalized knowing possession."[21] Judge Jones further noted that intent cannot be presumed from mere knowing possession unless a statute establishes such a presumption.[22]

Judge Jones and the other members of the Court of Appeals at an event at Albany Law School

But Judge Jones did not need to be in the majority to make his mark on criminal jurisprudence. In *People v. Bedessie*,[23] a case of first impression on the issue of admissibility of expert testimony on the reliability of confessions, the defendant recanted her confession and at trial proffered the testimony of an expert on false confessions. The trial court denied the defendant's application for a *Frye* hearing and did not allow the expert's testimony. Although the majority of the Court concluded that expert testimony concerning false confessions should be allowed if relevant to the facts of the case, they held, under the facts of this case, that the proffered expert testimony was inadmissible. In dissent, Judge Jones, joined by Chief Judge Lippman, concluded that it was an abuse of discretion for the trial court to deny the *Frye* hearing and exclude the expert's testimony on false confessions (if the testimony is supported by the relevant scientific community).[24] Judge Jones argued that *LeGrand*'s holding on eyewitness expert testimony should be extended to the phenomenon of false confessions especially where, as here, there is little to no corroborating evidence connecting the defendant to the charged crime.[25]

In addition, Judge Jones effectively dealt with many other criminal law and evidentiary questions. For example, his majority opinion in *People v. Rawlins*[26] addressed the following issue of first impression: "whether DNA and latent fingerprint comparison reports prepared by nontestifying experts are 'testimonial' statements within the meaning of *Crawford v. Washington* (541 US 36 [2004])," where the United States Supreme Court held that a testimonial out-of-court statement by a witness is inadmissible under the Confrontation Clause of the Sixth Amendment, regardless of whether the court deems the statement reliable, unless the witness testifies or the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. The People argued for an absolute rule that all business records are, by their nature, not testimonial. After analyzing the relevant constitutional requirements and case law, the Court rejected the above-mentioned absolute rule and set forth a case-by-case approach for courts to use in deciding whether DNA and latent fingerprint comparison reports, and other reports of scientific procedures, are testimonial. Under this approach, a court must consider "multiple factors, not all of equal import in every case," that include, but are not limited to, the extent to which the entity conducting the procedure is an "arm" of (influenced by) law enforcement; whether the contents of the report are a contemporaneous record of objective facts, or reflect the exercise of "fallible human judgment"; and whether the report's contents directly link the defendant to the crime or amount to the type of ex parte communication the Confrontation Clause was designed to protect against.[27]

Judge Jones also wrote on important civil law issues. For example, *Williamson v. Pricewaterhouse Coopers LLP*[28] presented the Court with its first opportunity to address whether the continuous representation doctrine, which tolls the statute of limitations for filing malpractice lawsuits against certain professionals until the professional's representation concerning the particular matter in question is completed, applied to an auditing malpractice claim. The Court held the doctrine inapplicable where the professional engagement between the parties consisted of

"separate and discrete" annual engagements and such engagements did not concern "a course of representation as to the particular problems (conditions) that gave rise to the plaintiff's malpractice claims."[29]

Hotel 71 Mezz Lender LLC v. Falor[30] involved the issuance of a prejudgment order of attachment on the defendant judgment debtor, a nondomiciliary garnishee of the defendants' intangible personal property (their ownership interests in a number of business entities formed outside of New York State) who voluntarily submitted to personal jurisdiction in New York. The main issue before the Court was whether the intangible personal property the plaintiff sought to attach (i.e., the above-mentioned ownership interests) was "property" subject to prejudgment attachment under CPLR Article 62. The Court answered in the affirmative, concluding that, even though the interests were not evidenced by a certificate or other written instrument, the issuance of an order of attachment in New York on the out-of-state garnishee of the defendants' ownership interests, who voluntarily submitted to personal jurisdiction in New York State, was appropriate.[31]

Judge Jones's first dissent was in *Haywood v. Drown*.[32] As framed by Judge Jones, the question presented was "whether Correction Law § 24 violates the Supremacy Clause insofar as it bars litigants from bringing 42 USC § 1983 claims for money damages in state court against DOCS [Department of Correctional Services] employees for actions committed within the scope of their employment." The four-judge majority held that the Supremacy Clause was not violated because Section 24 did not treat Section 1983 claims differently than it treated state law causes of action. In the dissenting opinion,[33] Judge Jones, joined by Judges Robert Smith and Eugene Pigott, noted that Section 1983[34] specifically enables an individual, deprived of his federal civil rights by a person acting under color of state law, to bring a civil suit against the state actor, in their personal capacity, for compensatory relief. Judge Jones concluded that in Correction Law § 24, the State Legislature enacted a statute that immunized official conduct that was actionable under federal law and was inconsistent with Section 1983 and in violation of the Supremacy Clause. After granting certiorari, the U.S. Supreme Court, agreeing with Judge Jones's conclusion, reversed *Haywood v. Drown*.[35]

Focus on Diversity in the Courts

One of the most important roles Judge Jones assumed during his time at the Court was that of chair of the Court's Diversity Committee. He believed that people coming to the courts could not have trust and confidence in the judicial system if the courts' workforce did not reflect the ethnic and racial diversity of the general public. This belief was the cornerstone of Judge Jones's work on the Diversity Committee and the major reason why he pushed so hard to increase the minority presence in non-attorney positions in the Unified Court System and in upstate jury pools.

To that end, Judge Jones worked tirelessly to raise the public's awareness of the need for and importance of increased diversity. In the months leading up to the last civil service exam for Court Officers, he spoke with local community leaders and certain minority bar association representatives to get the word out and encourage as many minority applicants as possible to sit for the exam. He also traveled extensively throughout the state (both upstate and downstate) and hosted events where he spoke to high school students and community groups on issues related to increasing diversity, encouraging minority students to consider the court system when choosing their careers.

In addition, Judge Jones developed and hosted the Court's annual Diversity events which celebrated the contributions of certain prominent jurists (such as Hon. Carmen Beauchamp Ciparick [ret.], Hon. George Bundy Smith [ret.] and Court of Appeals Judges of Italian American descent, including Hon. Joseph W. Bellacosa [ret.] and Hon. Victoria A. Graffeo) and various ethnic groups.

The Justice Task Force[36]

On May 1, 2009, Chief Judge Jonathan Lippman, in one of his first major initiatives as Chief Judge of New York State, created the New York State Justice Task Force, one of the first permanent task forces in the country to address wrongful convictions. The goals of the Justice Task Force are to (1) examine wrongful conviction cases and the issues, practices,

Judges Jones with Chief Judge Jonathan Lippman at an event in New York City
Rick Kopstein, Photo Editor, New York Law Journal

procedures and rules contributing to wrongful convictions, and (2) recommend legislation and policy changes to reduce wrongful convictions and eliminate their systemic causes. The Justice Task Force was also created to collect, on a continuing basis, data on wrongful convictions, and monitor the effectiveness of any implemented policy changes. The creation of this task force, which includes judges, prosecutors, defense attorneys, legislative representatives, legal scholars, forensic scientists and police chiefs, was an acknowledgment by the judiciary that many innocent people are wrongfully convicted.

The Chief Judge appointed Judge Jones and Janet DiFiore, District Attorney of Westchester County, to serve as co-chairs of the Justice Task Force. By the time of this appointment, Judge Jones, through his writings, had already proven himself a leading voice in the fight to prevent wrongful convictions. In addition, Judge Jones was well known as a practical man who had the ability to develop reasonable solutions under difficult circumstances. Regarding Judge Jones's ability to steer the work of the task force, whose members had strong and in some cases widely divergent views, District Attorney DiFiore once said that he could "find ways to round the edges and bring people to consensus."[37]

Under the leadership of Judge Jones and District Attorney DiFiore, the Justice Task Force made several important recommendations consistent with eliminating the systemic causes of wrongful convictions. For example, in an effort to address the problems of false and coerced confessions, the task force proposed legislation requiring the electronic recording of custodial interrogations. The recording requirement would apply only to interrogations of suspects concerning the investigation of certain serious crimes, including homicide and sex offenses.

The task force also recommended that state law enforcement offices adopt certain best practices for the administration of identification procedures in order to increase the accuracy and reliability of witness identifications. The proposed best practices cover instructions to the witness, witness confidence statements, documentation of identification procedures, photo arrays, and live lineups.

Another important measure proposed by the task force concerned expanding defendants' post-guilty plea access to DNA testing. In particular, the task force proposed the creation of a new provision in New York's post-conviction DNA testing statute that would allow defendants who pleaded guilty to seek post-conviction DNA testing in limited circumstances. In making this recommendation, the task force recognized how important it was to provide a formal mechanism to exonerate the innocent after a guilty plea and at the same time preserve the integrity of the plea process.

Judge Jones knew from his years as an attorney and judge how wrongful convictions taint and negatively affect the fundamental soundness of the criminal justice system, as well as the public's view of that system. He once said in an interview, "There is absolutely no disagreement on the fact that one of the most horrendous results we can conjure up is to wrongfully convict a defendant," but "[e]qually troubling is the fact that when that happens, the true perpetrator is still out there. . . . If the public loses faith in the integrity of criminal convictions, then we have lost control of our entire system."[38] In his role as co-chair of the Justice Task Force, Judge Jones took full advantage of the opportunity to help shape state criminal justice policy in terms of reducing wrongful convictions and eliminating their systemic causes, and raise the public's confidence in the integrity of criminal convictions and the criminal justice system as a whole.

Significant Activities Off the Bench

Judge Jones's duties were not confined to work on the bench or in preparation of cases. In addition to serving as chair of the Court of Appeals' Diversity Committee and co-chair of the Justice Task Force (discussed above), he served on the Committee on Character and Fitness for the Second Judicial Department, the Special Commission on the Future of the New York State Courts (the Dunne Commission), the Board of Directors of the Judicial Friends, the Board of Trustees of St. John's University, and the Board of Directors of St. John's University School of Law. For a number of years while he was on the trial bench, Judge Jones also contributed to the legal education of undergraduate and law students by teaching at the City College of New York and St. John's University School of Law.

On more than one occasion, Judge Jones noted that he stood of the shoulders of those who preceded him at the Court of Appeals, including Judge Harold A. Stevens, Judge Fritz W. Alexander, II and Judge George Bundy Smith. He was always mindful and appreciative of the people, attorneys and judges who helped or were examples to him. Taking his cue from them, he took time to mentor students, attorneys, and judges who sought his advice and counsel on wide range of topics, including pursuing career-related matters, dealing with substantive legal issues, and addressing the practical realities of the legal profession. While Judge Jones's door and phone lines were always open to anyone seeking advice, he took a particular interest in mentoring and otherwise helping minority law students and attorneys because of his feeling that there were not as many mentors or opportunities available to them.

Judge Jones was an active member of the Bedford-Stuyvesant Lawyers Association and the Metropolitan Black Bar Association.[39] In addition, he supported many of the bar associations in New York State and was often an honored guest at bar association, community and court events. Judge Jones was also a frequent speaker at numerous events throughout New York State, giving commencement addresses at Pace Law School and St. John's University School of Law. Even though he had an extremely busy schedule, Judge Jones rarely refused a request to speak at an event or otherwise lend assistance; for example he lectured at bar association and court events and served as a judge for moot court competitions.

Awards

Judge Jones received many honors, acknowledgments, and awards during his career, including: The Brooklyn Bar Association's Judicial Excellence Award and Special Appreciation Award; The Catholic Lawyers Guild Award; The Jewish Lawyers Guild Award; The Judicial Friends' Lifetime Achievement Award; The Legal Aid Society's Distinguished Alumni Award; The Macon B. Allen Black Bar Association's Thurgood Marshall Lifetime Achievement Award; Medgar Evers College President's Medal; The National Bar Association's Gertrude Rush Award; The New York City Trial Lawyers Association's Excellence in Jurisprudence Award; The New York State Bar Association's Diversity Trailblazer Award and Lifetime Achievement Award; The New York State Court of Claims' Judicial Achievement Award; The New York State Trial Lawyers Association's 2007 Annual Law Day Award; The Rochester Black Bar Association's Champion of Diversity Award; The Rockland County Bar Association's Judicial Achievement Award; The St. John's University School of Law's Alumni Achievement Award and Distinguished Alumni Award & The Westchester County Black Bar Association's Constance Baker Motley Judiciary Award. The foregoing list is not exhaustive. Judge Jones was also named an honorary member of the Kings County Inns of Court and honored by other organizations, including the Metropolitan Black Bar Association, the Tribune Society, and the Brooklyn Women's Bar Association. In addition, Pace Law School and St. John's University School of Law each awarded Judge Jones an Honorary Doctor of Laws Degree (LL.D.).

Family

Judge Jones and his wife Joan were married for 45 years. They have three sons, Theodore III, Wesley, and Michael (deceased). Theodore III and his wife Theresa have two children, Kira and Theodore IV, and live in Connecticut. Wesley and his wife Yendelela live in New York. Both Theodore III and Wesley

graduated from Hampton University, their father's alma mater. Theodore III graduated from Fordham University School of Law and is engaged in the private practice of law in Connecticut. Wesley has a Master's Degree in Computer Science from Marist College and works as a Software Engineer for IBM in New York.

Judge Jones and his family at his son's graduation from Hampton University

Personal Reflections from Staff

Judge Jones shared a unique relationship with his staff and created a supportive, collaborative, almost familial environment in chambers. The following remarks are by some of the people who worked side by side with him: Judge Jones's long-time confidential secretary Dora Hancock and his former Court of Appeals law clerks, Janice E. Taylor, Clifton R. Branch, Jr., Juan C. Gonzalez, Douglas Tang, Sandra H. Buchanan, and Jay Kim.

Janice E. Taylor, a friend of Judge Jones and godmother to his oldest son, wrote a little about her friendship and work with Judge Jones:

> *"In 1972, I was a Legal Aid Society attorney assigned to Part AP3 of Criminal Court in Manhattan when one of my colleagues introduced me to Judge Jones ("Ted") who had been her law school classmate. Within the year, both Ted and I were attorneys in a community based Legal Aid Society criminal defense program in Brooklyn. Although he was very serious about work and determined to be an outstanding trial attorney, he was also light-hearted and witty. Soon thereafter, Ted introduced me to his wife Joan and I became a regular visitor at their home. Ted, a big football fan, insisted that if I were to be a guest in their house on Sunday afternoons, I had to be able to follow the game of football. I had no interest in sports, least of all football. However, as anyone who knew Ted Jones could attest he worked his will over you. I had to learn about the game of football. That was the beginning of a friendship which embraced our extended family and friends.*
>
> *"In 2002, thirty years later, I was working as Judge Jones' law clerk. This position gave me the opportunity to see an outstanding jurist at work. He had all of the qualities that lawyers and litigants appreciate in a trial judge. He had an excellent grasp of the legal issues and was fair to both sides, treating the lawyers appearing before him with respect. If he was confronted with a novel issue, he would "hit the books" and dive into Westlaw. No matter how difficult or complicated the case, or how pressured the schedule, he was always calm. This was very evident in his handling of the Transit Strike case.*
>
> *"The appointment of the Judge to the Court of Appeals came as a shock, at least to me. We knew nothing about the inner workings of the Court. In fact, neither Dora, the Judge's secretary, nor I, even after the Judges' selection imagined that we would be traveling to Albany. When those first boxes filled with briefs and records on appeal arrived in our Supreme Court Chambers, I was overwhelmed. Needless to say, Judge Jones was calm. He embraced the new responsibility and assured us that it would be an adventure. And that it was. As was discussed earlier in this biography, the first case Judge Jones was assigned was a criminal case involving eyewitness identification. I think that was a propitious start of the Judge's career at the Court since he began his career as a criminal defense attorney. It certainly, along with the Judge's optimism and "can do" spirit, encouraged me.*
>
> *"Ted Jones, my brilliant and kind friend of forty years, was thoughtful and generous with his time. His advice, whether about law or life, was*

much sought after because of his wisdom. Most of all, whether he was telling a story or singing a song, he was great fun. His "one liners" constantly fill my head. My family and I feel his loss profoundly."

Dora Hancock, Judge Jones's long-time friend and secretary, wrote:

"Losing Judge Jones, my boss and dear friend, was hard. I honestly wasn't expecting a change so soon, but one never knows what life has in store for us and in January 2013, I started a new chapter. I always remember his words, "nothing is learned over night, it takes about a year to get your arms around it, and there's room to change it as you go along as nothing is written on stone," but I wasn't prepared for his passing. I had commenced many chapters in my life while working as Judge Jones' confidential secretary.

"In my new office among pictures of my family, there are also pictures of Judge Jones. One of my favorite pictures, when I look up, there he is among the other distinguished Court of Appeals Judges, with their robes, either standing or sitting in front of the beautiful fireplace in Court of Appeals Hall. As the Judge would often say, "we have come a long way." "We certainly have," I would say in return. I was one of his secretaries when he was in private practice at 16 Court Street, Suite 2308 with the best views of Manhattan and the Statue of Liberty.

"During the 29 years I worked with Judge Jones, I was a witness to how many people he defended, impacted and mentored, including my two sons. Judge Jones' knowledge was immeasurable and he would brighten a room with his mere presence. He was impartial and a careful thinker. During his time in private practice, as a Judge in Brooklyn Supreme and all the way to the Court of Appeals, he gave his utmost attention to every case before him.

"I also remember him as an adjunct professor at City College and at St. John's Law School, where he taught from his experience. Throughout the years students would call his chambers, send a note or he would see them at an event and they expressed how he had made a difference in their lives. Many of his former students moved on to become attorneys.

"Judge Jones was a caring person, down to earth and easy to talk to. He was there for his friends, colleagues and staff when someone needed advice, a pep talk, a word of encouragement, or a shoulder to lean on. Whether you were at a bar association event, golf outing, Brooklyn Supreme or the Court of Appeals, if you mentioned Judge Jones' name to anyone, they would have a memorable story or two about him and his dynamic personality.

"Judge Jones was not only my boss; he and his family are a part of my family. As a family, we celebrated many happy events, such as births and weddings. Unfortunately, we also had to deal with many tragedies.

"In recent years, a new family tradition was created. At the end of the summer, the Jones family would host a barbeque where his present and former staff got together to catch up while he cooked on the grill, the children played games, the adults would talk, some laughter in between and he would take memorable pictures. His wife, Joan, and family have continued with the tradition.

"My husband and I as well as my family all agree that Judge Jones was one of a kind, a true friend and although I have wonderful memories and pictures, he is missed."

Sandra H. Buchanan, reflecting on Judge Jones and capturing how Judge Jones was remembered by others, wrote:

"As of late, I have been meeting practitioners and jurists who knew Judge Jones and speak of his brilliance and humility. Judge Jones also had a fun personality, and a great sense of humor. When I speak with individuals who knew him, we are often smiling yet holding back tears. . . . In fact, most recently, opposing counsel and I were discussing the Court of Appeals, and he recalled Judge Jones. Counsel asked me if I knew him

as a trial judge. And I did not. So I sat there and listened attentively. Judge Jones loved to tell stories about being in Brooklyn. And on that autumn day, I was in Brooklyn hearing a great story about him.

"The general themes are always the same: he was revered, hard-working, and a consensus-builder, who had a warm, endearing personality. Although the themes repeat, the stories do vary and are never dull. It is amazing how many of us hold dear our friendships with Judge Jones, even beyond our legal community. I saw it more clearly at the services celebrating his life at Mount Pisgah Baptist Church. Working closely with him and through the testimonies of his wonderful family and his friends, this is what I take away: Judge Jones led by example; he remained rooted; and not only did he achieve, but he also lived."[40]

Jay Kim, on working as a law clerk in Judge Jones's chambers, wrote:

"[T]he work was challenging in light of the nature of the issues presented and the constant cycle of preparing for cases. Judge Jones, however, intuitively understood the demands of the position and afforded his clerks tremendous respect and autonomy in the management of the work load. In turn, we reciprocated that confidence by ensuring that Judge Jones was thoroughly prepared for every matter so as not to betray the trust he placed in our hands. He never imposed any additional pressure or burden on his staff, but heartily encouraged our efforts. Every submitted assignment would elicit a remark of 'Beautiful!' before he would offer his suggestions and edits. . . .

"To those who worked for him, with him, or simply had the pleasure of knowing him, Judge Jones was a singularly unique individual. He was kind, compassionate, thoughtful and wise—characteristics that many would ascribe to the ideal jurist. Indeed, I think it is a remarkable testament to his true character when his secretary once told me that in her nearly thirty years working for Judge Jones, in both his roles as a private practitioner and a Judge, she had never seen him raise his voice in anger. That he would joke or tell stories in chambers should not be understood to mean that he treated his position at the Court with equal levity. Judge Jones approached his job with passion and meticulous care. . . . That unceasing effort to strive for justice can be plainly evidenced in a body of legal work that will remain forever memorialized in textbooks and case reporters. Judge Jones' greatness as a person, however, is best measured by the indelible mark he impressed upon everyone he touched with his quiet humility, infectious enthusiasm and boundless generosity."[41]

Juan C. Gonzalez, sharing a little bit about the lighter side of life in Judge Jones's chambers, wrote:

"As a member of Judge Jones' inaugural class of law clerks at the Court of Appeals, I had the distinct honor of witnessing Judge Jones 'in action' in chambers, deep in the marbled halls of 20 Eagle Street. When not engaged in our case discussions, I and my fellow clerks relished the opportunity to listen to Judge Jones' countless stories, never dull and always lined with an important lesson or life observation. But most memorable were what I and my co-clerks fondly remember as Judge Jones' favorite one-liners. At the start of any confidential case discussion, Judge Jones would quip that the 'Cone of Silence is down,' a reference to a joke from 'Get Smart,' the 1960s T.V. comedy spy series; and then there was the memorable 'flaps down, we're about to hit the runway,' which Judge Jones was fond of saying as he returned to chambers following case conferences on the last day of the Court's session, a humorous reminder that it was time to head back home after a long two-week session in Albany. Last but not least was 'Into the valley of Death Rode the six hundred,' a quote from Lord Alfred Tennyson's 1854 poem, 'The Charge of the Light Brigade,' which Judge Jones frequently uttered before taking the bench for oral arguments. In Judge Jones' presence, one was never far from his unwitting reminders to laugh once and a while."[42]

Douglas Tang, remembering Judge Jones's cookouts and family gatherings, further wrote:

"I fondly recall that there was no better showcase of Judge Jones' skill, generosity, and hands-on nature than at the Judge's many well-stocked barbeques, cookouts and family gatherings. Like his mission for justice as a respected jurist, the Judge was tireless in his pursuit to make great food for his family and friends (including driving to the Fulton Fish Market at 5:00 a.m. to buy the liveliest bushel of crabs) and would put hours of labor into preparing one of his famous recipes, like steamed blue crab or curry goat, to the savory delight of all. The Judge not only generously shared his recipes with all who were interested but, drawing from his inner sportsman, also did not shy away from trying adventurous new dishes (including untested recipes made by his law clerks which, to be sure, involved not an insubstantial degree of risk). While the time, place, and food may have varied, one thing remained constant – sharing a meal with the Judge always meant good laughs and a great time."

Clifton R. Branch, Jr., sharing some insights about Judge Jones, wrote:

"It has been nearly two years since Judge Jones passed away and in that time I have thought of him often. One memory of the Judge goes back to when I first started working for him in late January 2007 in Supreme Court, Kings County. Although I had heard wonderful things about Judge Jones, I felt a little uneasy when I saw how close he and his staff (Janice Taylor and Dora Hancock) were. They had their routine down, running jokes and one-liners included, and I wasn't quite sure if I would fit in. The Judge, sensing this, thought of the perfect way to make me feel more at ease: he light-heartedly made me the butt of a joke. The office got a good laugh and I began to feel like I was part of the team. I thought if a judge as accomplished as Judge Jones would take the time to make fun of me, everything (concerning my new position) would work out.

"Shortly before he was confirmed by the Senate, I saw how intelligent and focused Judge Jones was. He worked extremely hard to learn as much about the Court of Appeals as possible. In between reviewing briefs and preparing reports on the appeals for the second half of the Court's February 2007 session, Judge Jones, Janice, Dora and I had quite a few meetings on everything involving the Court. Judge Jones, who did not have prior experience as an appellate judge, was a quick study who asked incisive questions to expand his knowledge of the Court and the appeals process.

"One great thing about the Judge was that if he did not understand something, he had no problem asking for assistance or seeking counsel. Another great thing about him was his confidence that he would, in short order, master the concept (or as he liked to say "get my arms around it"). I think his confidence, in part, came from his living through so many challenging situations.

"Over the years as his clerk, I grew to admire Judge Jones for how he lived his life and went about his work. His smarts and work ethic were balanced with an excellent judicial temperament and sense of the big picture. Off the bench, Judge Jones was funny, warm and genuinely decent. He loved to get together with family and regularly invited all of his staff, even those no longer working for him, to his family functions. Once you worked for Judge Jones, you were part of his extended family and he made sure you knew it.

"Some of my fondest recollections of Judge Jones concern his views on life and the law. His insights, which were always enlightening and colorful, along with the laughter we shared and the life lessons he taught me, are permanently etched in my memory. Judge Jones' influence on me from how I deal with people to how I think about the law cannot be measured. He irrevocably changed my life for the better.

"It is rare to find someone who positively and profoundly impacts the lives of many without celebrating himself. Judge Jones, through his work and the example he set, was such an individual

and more. He left the judiciary and the legal profession richer through his service."

Judge Ted Jones was beloved and well respected both inside and outside the New York State court system. Although he reached the heights of success as an attorney and judge, achieving success for the sake of it was not his goal. Being of service is what drove Judge Jones always and he left a legacy of excellence and purpose. As a criminal defense attorney, he represented all clients with skill and heart. As a judge, he consistently rendered legally sound, common sense-based decisions and opinions. Moreover, his work to promote diversity and on the Justice Task Force will have a lasting impact on the criminal justice system as a whole.

ENDNOTES

1. Harold A. Stevens (1974-1975); Fritz W. Alexander, II (1985-1992); George Bundy Smith (1992-2006).
2. Chief Judge Jonathan Lippman, Diversity Day Speech at Court of Appeals Hall (Feb. 15, 2013).
3. *Id.*
4. Dean Michael A. Simons, *Saying Goodbye to Ted Jones*, The Dean's Docket, St. John's University School of Law, Nov. 16, 2012, http://deansdocket.org/2012/11/16/saying-goodbye-to-ted-jones/.
5. *Id.*
6. *Id.*
7. Dennis Hevesi, *Theodore T. Jones, Jr., Judge on New York's Top Court, Dies at 68*, N.Y. Times, Nov. 9, 2012, at A34.
8. Civil Service Law § 210 prohibits public workers from striking and provides alternative means for dispute resolution. Civil Service Law § 211 allows for injunctions to remedy illegal strikes.
9. This was New York City's first transit strike since 1980's 11 day strike.
10. *N.Y.C. Transit Auth. v. Transp. Workers Union of Am.*, N.Y.L.J., Apr. 26, 2006, at 19.
11. Steven Greenhouse, *Tough Stance, Tougher Fines*, N.Y. Times, Dec. 22, 2005, at A1.
12. Vincent Bonventre, *New York Court of Appeals: The Jones Factor in Criminal Cases* (Part 2), N.Y. Ct. Watcher, Aug. 19, 2008, http://www.newyorkcourtwatcher.com/2008/08/new-york-court-of-appeals-jones-factor_19.html.
13. Erika L. Winkler, *Theodore T. Jones, The Defendant's Champion: Reviewing A Sample of Judge Jones's Criminal Jurisprudence*, 73 Alb. L. Rev. 1109 (2010).
14. 8 N.Y.3d 449 (N.Y. 2007). *LeGrand* set forth the standards governing the discretion of trial courts concerning whether expert testimony on the reliability of eyewitness identifications should be admitted. *See People v. Santiago*, 17 N.Y.3d 661, 669 (2011).
15. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
16. *See LeGrand*, 8 N.Y.3d at 452.

17. 8 N.Y.3d 530 (N.Y. 2007).
18. *See Dunaway v. New York*, 442 U.S. 200 (1979); *Mapp v. Ohio*, 367 U.S. 643 (1961). *See also People v. Mendoza*, 82 N.Y.2d 415, 422 (N.Y. 1993) (explaining *Mapp* and *Dunaway* hearings).
19. *Bryant*, 8 N.Y.3d at 533–34.
20. 13 N.Y.3d 67 (N.Y. 2009).
21. *Id*. at 72.
22. *Id*.
23. 19 N.Y.3d 147 (N.Y. 2012).
24. *Id*. at 161 (Jones, J., dissenting).
25. *Id*. at 161–62.
26. 10 N.Y.3d 136 (N.Y. 2008).
27. *Id*. at 153–56. The Court held that latent fingerprint comparison reports—which compare unknown latent fingerprints from the crime with the fingerprints of a known individual—prepared by a police detective who did not testify at the defendant's trial were testimonial statements and should not have been admitted into evidence. Such reports are inherently accusatory and, here, were used to prove an essential element of the crimes charged. However, the Court held that the trial court's error was harmless beyond a reasonable doubt.

    The Court also concluded that: (1) the report containing DNA test results (raw data in the form of nonidentifying graphical information) prepared by technicians from an independent private laboratory who did not testify at trial was not testimonial and was properly admitted into evidence; and (2) reports which interpreted the DNA test results were properly admitted into evidence at trial because the reports did not directly link defendant to the crime.
28. 9 N.Y.3d 1 (N.Y. 2007).
29. *Id*. at 10–11.
30. 14 N.Y.3d 303 (N.Y. 2010).
31. *Hotel 71* clarifies the law of enforcement with respect to fixing the situs of an intangible property interest, and potentially expands a judgment creditor's ability to attach a judgment debtor's property in satisfaction of a judgment.
32. 9 N.Y.3d 481 (N.Y. 2007).
33. *See id*. at 491–500.
34. 42 U.S.C. § 1983 is the current version of Section 1 of the Civil Rights Act of 1871 (one of the post-Civil War Reconstruction-Era civil rights statutes enacted by Congress).
35. 556 U.S. 729 (2009).
36. See the New York State Justice Task Force Website at www.nyjusticetaskforce.com.
37. Hevesi, *supra* note 6, at A34.
38. Joel Stashenko, *'Serious' Effort Vowed On False Convictions*, N.Y.L.J., July 15, 2009, at 1.
39. In 1984, the Metropolitan Black Bar Association, a unified association of African-American and other minority attorneys in New York City, was founded after the merger of the Bedford-Stuyvesant Lawyers Association, an organization in existence since 1933, and the Harlem Lawyers Association, which was founded in 1921.
40. Sandra H. Buchanan, *Memories of the Honorable Theodore T. Jones: An Admired Judge*, 77 Alb. L. Rev. 5, 7 (2013).
41. Jay Kim, *Clerking for Judge Theodore T. Jones*, 77 Alb. L. Rev. 9, 10–11 (2013).
42. Gonzalez, *Judge Jones: A Memoir, Leaveworthy*, Vol. III, No. 2, Summer 2013.

THE DAVID A. GARFINKEL ESSAY SCHOLARSHIP

For the past seven years, the David A. Garfinkel Essay Contest has engaged hundreds of community college students from across New York State on questions of legal history. This has been made possible by the generous support of Gloria and Barry Garfinkel, in memory of their son David. The students' essays and research have covered topics from the Erie Canal to the preservation of civil liberties in the digital age.

For 2015 the essay contest has been renamed the *David A. Garfinkel Essay Scholarship* to reflect the Society's goal to recognize the abilities of these students, and support their studies at community college and beyond. The Scholarship also serves as an opportunity for these students to explore the law as a career.

Law Day 2014
Left to Right: Zachary Field (Onondaga Community College), Judge Jenny Rivera, Lida Ramos Arce (Queensborough Community College) & Rhonda Parker (Genesee Community College)

The 2015 essay topic is *LGBT: The Road to Equality* and asks the question *How have the New York Courts addressed equal human rights for the LGBT Community?* Since the Stonewall Rebellion in 1969, which is generally recognized as the catalyst for the modern lesbian, gay, bisexual and transgender (LGBT) rights movement, New York has been a center of activism. Its courts and legislature have weighed in on many important issues, and their decisions have had far-reaching consequences.

The 2014 contest was titled *Who Watches the Watchers? Free Speech and Free Press in the Electronic Age*. After receiving submissions from across the State, the Society was proud to recognize **Zachary Field** from Onondaga Community College as the Grand Prize Winner. Zachary is the Contest's first two-time winner, having taken home the 2013 SUNY Community College prize as well. The other winners were **Lida Ramos Arce** of Queensborough Community College and **Rhonda Parker** from Genesee Community College.

The winners were honored at the April 30, 2014 Law Day Ceremony at the New York Court of Appeals in Albany, where Court of Appeals Judge Jenny Rivera presented the awards and read excerpts from the winning essays in front of the assembled leaders of New York's bench and bar, as well as the students' friends, families, and supporting faculty members. Following the ceremony a luncheon was hosted for the winners where they were able to meet the judges of the Court of Appeals.

The Society has a great deal of support in holding this annual contest, and would like to thank all of the court staff and others who make the contest possible. This includes the staff at the Court of Appeals, who volunteer to judge the contest and do so in such great numbers that we must turn away potential judges every year. We are also grateful for the help of the Office of Public Affairs and Gregory Murray and Andrea Garcia for their tireless and enthusiastic outreach across New York. We would also like to extend a special thanks to Frances Murray, who has played a key role since the essay contest's inception, including in the formulation of our essay contest topics and research materials. Finally we would like to thank Former Chief Judge Judith S. Kaye who strongly supports the contest and selects the winning essays and Chief Judge Jonathan Lippman for including the announcement of contest winners at the Law Day Ceremonies.

A complete history of the contest, with past topics, winners, winning essays and other information can be found in the Academic Center of the Society's website, and we invite you to visit.

A look back...and forward

Quite a lot can be accomplished in a year, and a look back will confirm this. Ranging from live music, literature and learning, to a panel discussion with U. S. Supreme Court Justice Elena Kagan and other notables, our public programs reflect the Society's unique style and contribution to New York State's legal history. We launched a project to bring legal history to our State's law schools with a program at Albany Law School coordinated with Dean Penelope Andrews, our Trustee. And we're looking ahead with much anticipation to *Asian Americans and the Law: New York Pioneers in the Judiciary,* on December 15, 2014, focusing on the too little explored contributions of Asian Americans to our State's legal history. In addition, we continue to expand our education initiatives, website, and outreach. Learn more about the past year in the pages that follow.

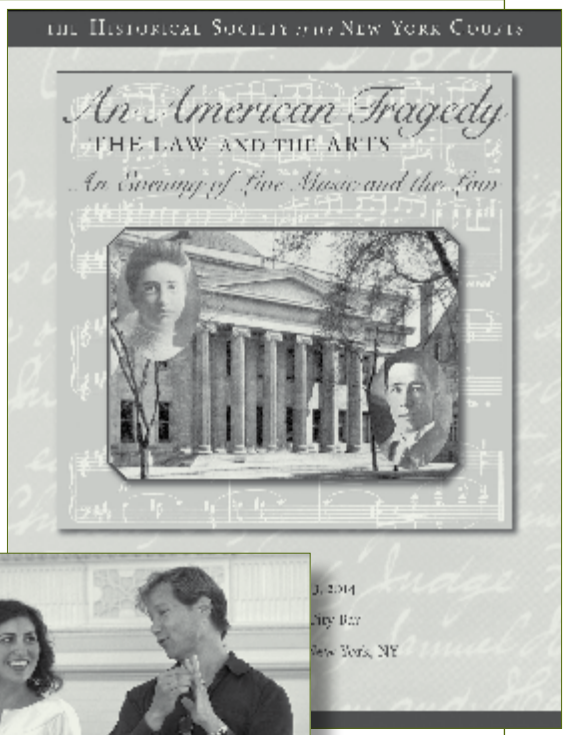
Marilyn Marcus, Executive Director

What's Happened Recently…

An American Tragedy: The Law and the Arts

May 13, 2014 • The New York City Bar

The Society hosted performers from The Glimmerglass Festival in Cooperstown, NY as we examined the legal and artistic legacy of the notorious 1906 murder of Grace Brown, the subsequent trial of Chester Gillette (*People v. Gillette*), and Theodore Drieser's acclaimed novel, *An American Tragedy*, based on the case.



People v. Gillette & An American Tragedy

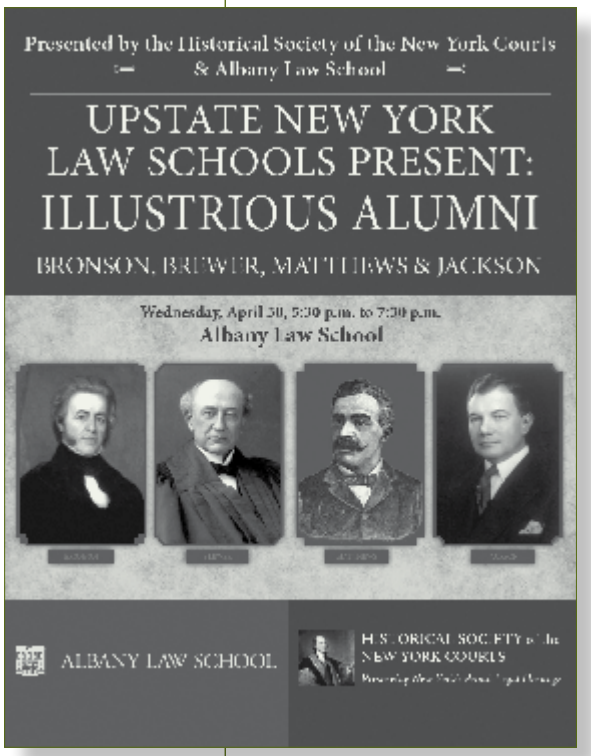
Susan N. Herman, *Centennial Professor of Law, Brooklyn Law School*

Francesca Zambello, *Artistic & General Director, The Glimmerglass Festival; Artistic Director, Washington National Opera*

Joined by Glimmerglass Young Arists Program Performers

Courtesy of the Glimmerglass Festival

Upstate New York Law Schools Present: *Illustrious Alumni* At Albany Law School: Bronson, Brewer, Matthews & Jackson



April 30, 2014 • Albany Law School

The inaugural program in the Society's new series, *Illustrious Alumni*, created in partnership with upstate New York law schools, examined the roles played by some of the law school's most notable graduates and one of its founding figures, Greene C. Bronson. The Society welcomed the participation of members of the bar, academia and judiciary in presenting engaging histories of these judges.

PANEL DISCUSSION

Prof. Vincent M. Bonventre, *Professor of Law, Albany Law School*
Presenting: Hon. Greene C. Bronson, Albany Law School Founder & Judge of the New York Court of Appeals

Dean Alicia Ouellette, *Associate Dean for Academic Affairs and Intellectual Life & Professor of Law, Abany Law School*
Presenting: Hon. David Josiah Brewer, Class of 1858 & U.S. Supreme Court Justice

Hon. Randolph F. Treece, *U.S. Magistrate Judge for the Northern District of New York*
Presenting: Hon. James Campbell Matthews, Class of 1870 & First African-American Judge in New York

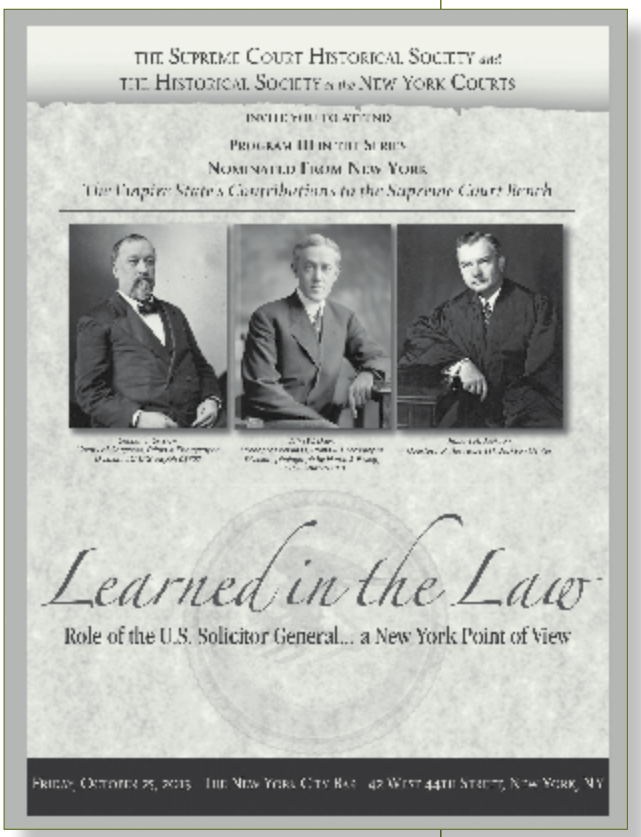
Prof. John Q. Barrett, *Professor of Law, St. John's University School of Law & Elizabeth S. Lenna Fellow, The Robert H. Jackson Center*
Presenting: Hon. Robert H. Jackson, Class of 1912 & U.S. Supreme Court Justice

Left to Right: Hon. Albert M. Rosenblatt, Prof. John Q. Barrett, Hon. Randolph F. Treece, Prof. Vincent M. Bonventre & Dean Alicia Ouellette speaking at the event.

Nominated From New York: The Empire State's Contributions to the Supreme Court Bench

Learned in the Law: Role of the U.S. Solicitor General...A New York Point of View

Presented with The United States Supreme Court Historical Society
October 25, 2013 • The New York City Bar
Available to view on C-SPAN



Featuring the participation of three past U.S. Solicitors General, including U.S. Supreme Court Justice Elena Kagan, *Learned in the Law* offered our audience a rare view into the important role played by this office. Accompanied by a lecture on the historical development of the position, this panel discussion touched upon many developments in the law and provided an inside look at the important relationship between the Justices and the Solicitors General who argue before them.

LECTURE

History of the Office of Solicitor General: The New York Influence

Prof. John Q. Barrett, *Professor of Law, St. John's University & Elizabeth S. Lenna Fellow, The Robert H. Jackson Center*

PANEL DISCUSSION

Justice Elena Kagan, *45th Solicitor General of the United States: 2009-2010*
Drew S. Days, III, *40th Solicitor General of the United States: 1993-1996*
Paul D. Clement, *43rd Solicitor General of the United States: 2004-2008*
Moderator: Jeffrey P. Minear,
Counsel to the Chief Justice of the United States

Left to Right: Jeffrey Minear, Drew S. Days, III, Justice Elena Kagan & Paul D. Clement speaking at the event

Chief Judge Robert A. Katzmann (U.S. Court of Appeals, 2nd Circuit), Justice Elena Kagan (U.S. Supreme Court), Former Chief Judge of New York Judith S. Kaye & Chief Judge of New York Jonathan Lippman

What's Ahead…Upcoming Programs

Asian-Americans and the Law: New York Pioneers in the Judiciary

December 15, 2014 • The New York City Bar

All too often, the contributions of minority communities to the history of our states and the nation are overlooked. We are therefore especially proud to host this program highlighting some of the many contributions of the Asian-American legal community. Moderated by Hon. Denny Chin, a panel of pioneering NYS judges, including Hon. Randall T. Eng (a Trustee of the Society), Hon. Peter Tom, and Hon. Dorothy Chin-Brandt, will talk about their experiences and road to the bench. Judge Chin will also present a look back on Asian-American legal history featuring historic photographs.

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The Legendary Learned Hand Up Close and Personal: 15 years on the District Court and Beyond

April 23, 2015 • The Thurgood Marshall Courthouse

A program of the Supreme Court Historical Society and The Historical Society of the New York Courts will provide a unique look at the celebrated Learned Hand. Hon. John M. Walker, Jr., U.S. Court of Appeals, 2nd Circuit, will explore the influence of Hand as a jurist during his 15 years on the bench of the U.S. District Court, SDNY, and beyond to his many years on the 2nd Circuit of the U.S. Court of Appeals. Constance Jordan, Professor of English and Comparative Literature Emerita at Claremont Graduate University, will provide a special perspective on Learned Hand, the man. Prof. Jordan is the granddaughter of Hand and the editor of a recently published volume of Hand's letters and other writings, some of which have not been available previously. Her presentation will provide insight into the personality and personal life of the great jurist through his influential and powerful words. In conclusion, brief personal recollections of Learned Hand will be presented by clerks, jurists and others.

Human Trafficking: New York Courts Right an Injustice

June 17, 2015 • The New York City Bar

We are working with Chief Judge Jonathan Lippman to present a program that will examine the pioneering creation of Human Trafficking Courts in New York under his administration. This will include a panel that will look at how courts are resolving this difficult modern-day problem, and the historical precedents of this topic.

What's We're Working on…

EDUCATION INITIATIVES

Bard High School Early College & The Bard Institute for Writing & Thinking

Bard High School Early College (BHSEC) has been a longstanding partner of the Society in developing curriculum that teaches students about the rule of law and the role of the courts. In Spring 2014, the Society sponsored the development of two units of study in 9th & 10th grade classrooms at the BHSEC campus in Queens. The focus for this grant was the use of court records from important cases as primary source documents in the classroom. Notable New York cases introduced such topics as the Red Scare of the 1920s and the Enlightenment. The use of the *Lemon Slave Case* in the classroom is captured in a wonderful video filmed in a classroom available for viewing on our website.

In 2015, the Society will be launching a new partnership with Bard College to bring units of study developed through our grants focusing on the courts to classrooms throughout the State. Through this project we expect that our curriculum will reach hundreds of new teachers and thousands of new students, helping increase awareness of the importance of our legal system.

David A. Garfinkel Essay Scholarship

We have now launched the 7th year of this essay contest, newly renamed the David A. Garfinkel Essay Scholarship, with the topic: *LGBT: The Road to Equality*. The contest asks *How have the New York Courts addressed equal human rights for the LGBT Community*? and invites students to explore a range of topics from same sex marriage to the rights of LGBT individuals on college campuses. The Scholarship is open to CUNY & SUNY Community College students and offers cash prizes to the top submissions. The Society thanks Gloria and Barry Garfinkel for their generous support of the Scholarship. *(See pg. 63 for a summary of previous contests. Detailed information about the contest is available on our website.)*

The Society is happy to announce that for the 2015 Scholarship, we will be hosting two campus events at which students can learn about the Scholarship and career opportunities in the law through open forums with New York State judges. In the Fall semester, Judge Edward O. Spain, who recently retired as a Justice of the Supreme Court, Appellate Division, 3rd Dept. and our Trustee, visited Hudson Valley Community College, and in the Spring, Court of Appeals Judge Jenny Rivera will visit a community college campus.

What's We're Working on…

2015 CALENDAR

Inspired by the 800th anniversary of Magna Carta, we have built the theme of our 2015 calendar around 100-year anniversaries. Starting in 915, the calendar covers a fascinating array of legal history, events and individuals from Henry I of England to Albert Einstein. Richly illustrated, this calendar provides interesing snapshots of these events. It culminates in December with a look at NYS Chief Judge Jonathan Lippman, whose term ends that month.

SOCIETY WEBSITE

The Society has continued to develop its website, focused on increasing its usability as a resource for researchers working on any topic of New York's legal history. It is now home to hundreds of judicial biographies and official portraits, court histories, historical publications, and archives of past Society activities.

It also hosts the Society's ambitious Legal History by Era project which seeks to link the courts, cases, attorneys, judges and other figures from a single time period so that our visitors can understand how and why the law developed as it did during those years. The section now covers the years 1674-1846 with many more decades currently in the works. As always, you can find all of this and more at our site www.nycourts.gov/history.

SOCIETY NEWSLETTER

In order to keep our members and supporters informed about the Society's work, we have launched a quarterly newsletter that provides updates on our initiatives, announcements of our upcoming public programs, and information on events of other organizations and people in NYS that would be of interest to our members. Check your inbox to be sure that you don't miss out!

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All Supporting Membership Benefits plus:
- Invitation to special Trustee receptions
- Free tickets & CLE credits to ALL public programs

Membership services for contributions under $1,000 amount to approximately $15 with remainder tax deductible.