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John Felipe Acevedo

University of Alabama - School of Law, [jacevedo@law.ua.edu](mailto:jacevedo@law.ua.edu)

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# Article

## CRIME FANTASIES

John Felipe Acevedo\*

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\*Visiting Lecturer of Law, University of Alabama School of Law. J.D., University of Southern California Gould School of Law and Ph.D., The University of Chicago. I would like to thank Richard Delgado, Jean Stefancic, Jenny Carroll, Ron Krotoszynski, Al Brophy, Eve Hanan, Ben Levin, and Anna Roberts for comments on various aspects of the project; Richard Helmholz for his guidance on earlier work exploring the criminal law of colonial Massachusetts; the members of the Junior Faculty Workshop at the University of Alabama School of Law; the participants of CrimFest!; and the faculty at Duquesne School of Law for their comments. As always, I thank Deepa Das Acevedo for her comments, corrections, and inspiration. All errors remain mine alone.

## I. INTRODUCTION

Throughout American history the public has been gripped by fantasies of criminal activity. These crime fantasies manifest in two distinct but related typologies: *witch-hunts* and *crime panics*. On the one hand, witch-hunts target individuals based on their beliefs and are exemplified by the two Red Scares of the early and mid-twentieth century and the persecution of the Quakers in seventeenth century Massachusetts Bay. These are fundamentally distinct from crime panics, which target activity that was already classified as criminal but do so in a way that exacerbate deep procedural deficiencies in the criminal justice system. Crime panics are exemplified by the Salem witchcraft trials and the “Satanic Panic” of the 1980s and 1990s. President Trump’s relentless focus on undocumented immigration can be seen as a partially successful attempt to create a crime panic, while, perhaps surprisingly, the investigation by Robert Mueller is neither a witch-hunt nor a crime panic. By bringing ongoing criminal law issues into conversation with legal history scholarship, this article clarifies our understanding of the relationship between politics and large-scale criminal investigations and highlights areas for future reform.

The President and First Lady, who hated being a political wife, were barely speaking anymore. An “aide, joked that his duties included briefing [The President] on how to kiss his wife.”<sup>1</sup> The President was himself “increasingly moody, exuberant at one moment, depressed the next, alternately optimistic and pessimistic, especially in his nocturnal phone calls.”<sup>2</sup> Longtime friends who had no direct involvement in the core of the Special Prosecutor’s case were being ensnared in the investigation.<sup>3</sup> His closest aides, even his White House counsel, were talking with the Special Prosecutor and trying to cut deals.<sup>4</sup> The President and his allies called the investigation a “purge” and a “witch-hunt.”<sup>5</sup> “He wondered aloud . . . whether it was worth it to stick things out and fight and then vowed he would never be driven from office.”<sup>6</sup> President Nixon would not finish his term in office.

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<sup>1</sup> BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 165 (1976) (The authors attribute the comment to Lieutenant Colonel Jack Brennan).

<sup>2</sup> *Id.* at 104.

<sup>3</sup> Lawrence Mayer, *Rebozo Blasts Hill Unit Staff*, WASH. POST, May 21, 1974, at A7 (Rebozo was not involved with any aspect of the Watergate break-in or cover-up, but was ensnared in the investigation for his role in campaign finance irregularities associated with Nixon’s re-election).

<sup>4</sup> JOHN DEAN, *THE NIXON DEFENSE: WHAT HE KNEW AND WHEN HE KNEW IT* 363 (2014).

<sup>5</sup> See, e.g., Mayer, *supra* note 3, at A7 (Rebozo called the congressional investigation a witch-hunt); see also, e.g., Aldo Beckman, *Nixon Complains Probe has become a Purge*, CHI. TRIB., April 21, 1974, at 6; see also, e.g., William Safire, *Why the President should not Step Down*, CHI. TRIB., November 7, 1973 (arguing that investigation was a miscarriage of justice that harmed the country).

<sup>6</sup> WOODWARD & BERNSTEIN, *supra* note 1, at 104.

The Watergate scandal transfixed the nation.<sup>7</sup> Two of the primary investigators, Bob Woodward and Carl Bernstein, would write a bestselling book even before all of the trials had ended.<sup>8</sup> Whether it involves high-profile defendants or specific types of criminal activity, social theorists have attributed this fixation as arising from both fear<sup>9</sup> and voyeuristic tendencies.<sup>10</sup> Watching crime shows—true-crime shows in particular—allows the audience to experience fear in a controlled and safe environment.<sup>11</sup> Similarly, crime entertainment allows the public to indulge in voyeuristic fantasies similar to viewing pornography from the comfort of their homes.<sup>12</sup>

But when the public's fantasization of crime begins to influence the criminal justice system, it creates profound issues of unfairness.<sup>13</sup> This article shows that there are two distinct types of crime fantasies: witch-hunts and crime panics. Witch-hunts create new crimes by penalizing people because of their beliefs, while crime panics involve the overzealous prosecution of a particular type of crime. These two types of related, but distinct, crime fantasies ought to be kept separate for the sake of conceptual clarity and to enable tailored criminal justice reform.

In true witch-hunts new laws are passed to target a disfavored ideological group. The type of ideology involved is not significant—as Part II will show, both religious and political ideologies have been the focus of witch-hunts over the course of American history. Instead, the defining feature of a witch-

<sup>7</sup> See e.g., Christopher Lehmann-Haupt: *Books of the Times: Story of an Unfinished Story*, N.Y. TIMES, May 14, 1974, at 35 (noting that *All the President's Men* was published at the same time as three editions of the White House transcripts, which distracted readers from their book).

<sup>8</sup> See generally CARL BERNSTEIN AND BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974); see also *Best Sellers*, N.Y. TIMES, Dec. 29, 1974, at 25 (noting that at the end of 1974, Woodward & Bernstein's book had been on the New York Times' Best Sellers list for 31 weeks); see also Doris Kearns, *A Whodunit Without an Ending*, N.Y. TIMES, June 9, 1974, at 7-1 (discussing that Woodward and Bernstein published their book before the end of the trials, making it feel unfinished).

<sup>9</sup> See Thomas H. Pauly, *The Criminal as Culture*, 9 AM. LIT. HIST. 776, 776-77 (1997) (stating that criminals represent fear of the other, which can lead to scapegoating of unpopular groups for the ills of society. But, under social pressures, such as the Great Depression, the public can see criminals as heroic and the system as corrupt); see also Scott Bonn, *Why we are Drawn to True Crime Shows*, TIME MAG., Jan. 8, 2016 (discussing his own research into the subject and concluding that the fixation on crime, and especially murders, is a form of spectacle-gazing that is made powerful as it triggers fear in an exciting and controlled way; viewers do not actually face the killer directly).

<sup>10</sup> Slavoj Žižek, *Looking Awry*, 50 OCT. 30, 35-39 (1989) (discussing crime movies, such as *Manhunter*, as being equivalent to pornography as both involve a voyeuristic tendency).

<sup>11</sup> Bonn, *supra* note 9.

<sup>12</sup> Žižek, *supra* note 10, at 35-39 (noting that while crime movies involve us taking on the Lacanian gaze of the other, pornography inverts this paradigm by turning the gaze back onto the pornography viewer who is the target of the arousal seen on film and thus the true object of the film rather than the pornography actors).

<sup>13</sup> See Lisa A. Kort-Butler & Kelly J. Sittner Hartshorn, *Watching the Detectives: Crime Programming, Fear of Crime, and Attitudes about the Criminal Justice System*, 52 SOC. Q. 36, 51-53 (2011) (describing a correlation between the types of programming that people watch and their fear of crime and attitudes toward how to deal with crime; the more police shows watched the higher the fear in crime and harsher attitudes toward criminals); see also Mark Fishman, *Crime Waves as Ideology*, 25 SOC. PROBS. 531, 531, 534-36 (1978) (proposing that crime waves are media constructions based on the way actual crimes are presented to the public to make it appear that a crime wave is occurring).

hunt is that the criminal system is deployed to target a group of persons because of the group's beliefs. In other words, witch-hunts reflect a breakdown of substantive due process or equal protection through the passing of unfair laws designed to target the disfavored group. Paradigmatic American examples include the targeting of Quakers by the colonists in the Massachusetts Bay colony and the Red Scares of the twentieth century.

In contrast, crime panics focus on an existing type of criminal activity but with a zeal that exacerbates weak points in the criminal law system. Crime panics produce unjust trials, overly harsh punishments (including the passing of new punishments for existing crimes), and, at their worst, wrongful convictions.<sup>14</sup> Consequently, they exacerbate either existing flaws in criminal procedure or a breakdown in procedural due process. Unlike witch-hunts, crime panics are unrelated to ideological position, although they may rely on stereotypes of particular groups and thus disproportionately affect protected classes.<sup>15</sup> Crime panics are exemplified by the Salem Witchcraft trials and the Satanic Panic of the late twentieth century, among numerous others.

As discussed above, both witch-hunts and crime panics contain an element of fantasy in them. This fantasy can be seen in witch-hunts in the disproportionate and unjust fear of a group of persons because of their beliefs. Similarly, crime panics are based on a disproportionate fixation on a type of criminal activity. Nevertheless, a distinction needs to be drawn between the types of crime fantasies—to more accurately understand landmark events in American criminal law and, more importantly, to enact criminal justice reform. Witch-hunts—although more odious, given their intentional targeting of specific groups—are easier to identify and cure. Religious minorities are now largely (if not always satisfactorily) protected under the First Amendment.<sup>16</sup> Similarly, the Red Scares have abated and have not risen again. To be sure, there is great room for improvement.<sup>17</sup> But true witch-

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<sup>14</sup> See, e.g., JOHN HAGAN, *WHO ARE THE CRIMINALS?: THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN* 157–61 (2010) (describing the passage of the Anti-Drug Abuse Act of 1986 as linked to the media focus on the death of a star college basketball player as well as the subsequent failure of the desperate sentencing between powder and crack cocaine to significantly reduce crime).

<sup>15</sup> See BERNARD SCHISSEL, *BLAMING CHILDREN: YOUTH CRIME, MORAL PANICS AND THE POLITICS OF HATE* 82–85 (1997) (finding that aboriginal youth are more closely watched by the police as are males over females and those youths living in urban centers, which leads to a disparity in their arrest rates); see, e.g., GRACE PALLADINO, *TEENAGERS: AN AMERICAN HISTORY* 81–85 (1996) (discussing the juvenile delinquency panic of the 1940s, which linked comic books and science fiction movies to a rise in juvenile crime and gangs).

<sup>16</sup> See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (striking down on First Amendment grounds the prohibition of ritual sacrifice of animals when it was passed by the city to target Santeria practitioners).

<sup>17</sup> Although political dissidents in American democracy have been unfairly targeted, individuals like Upton Sinclair were arrested for such absurd things as reading the Constitution in public. UPTON SINCLAIR, *THE AUTOBIOGRAPHY OF UPTON SINCLAIR* 228 (1962).

hunts are increasingly unlikely to occur in American society.<sup>18</sup> In contrast, crime panics are far more difficult to resolve as they criminalize behavior that society wants criminalized but introduce or rely on processes that undermine individual rights.<sup>19</sup>

Additionally, although both witch-hunts and crime panics can appear to target individuals solely on the basis of suspect classifications—particularly race and national origin—this is not a required or even dominant feature of either phenomenon.<sup>20</sup> Indeed, some events that would seem to be either a crime panic or a witch-hunt precisely because they turn on suspect classifications (such as the internment of Japanese during World War II) do not fit well into either category because no ideology is implicated and no criminal activity triggered state action.<sup>21</sup> The interplay of race with witch-hunts and crime panics will be discussed in Section I(c) and Section II(d).

Part I explores two paradigmatic incidents of witch-hunting: the seventeenth-century persecution of Quakers in the Massachusetts Bay colony and the Red Scares of the twentieth century. Part II examines the Salem witchcraft trials and the Satanic Panic of the 1980s and 90s and shows why they are exemplary crime panics. This part also explains why the investigation by Special Prosecutor Robert Mueller is neither a witch-hunt nor a crime panic despite considerable political rhetoric to the contrary. As this broad cross-section of American history demonstrates, the distinction between witch-hunts and crime panics is both deep seated and wide ranging. Finally, Part IV articulates why the distinction between the two types of crime fantasies, witch-hunts and crime panics, matters—they exacerbate different weaknesses in the American criminal system and demand different solutions—and suggests some possible reforms to the criminal law. When we haphazardly lump these events under one descriptive term, we hamper our ability to engage targeted and effective criminal law reform.

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<sup>18</sup> *But see* ERWIN CHEREMINSKY, *THE CASE AGAINST THE SUPREME COURT* 77–82 (2014) (describing the detentions of American citizens as enemy combatants on U.S. soil in contravention of the Constitution).

<sup>19</sup> *See generally, e.g.*, MARA LEVERITT, *DEVIL'S KNOT: THE TRUE STORY OF THE WEST MEMPHIS THREE* (2002) (telling the story of three teens convicted for murder on dubious evidence in large part because they were seen as Satan worshipers by the police, district attorney, and jury).

<sup>20</sup> SCHISSEL, *supra* note 15, at 82–85; *see also* PALLADINO, *supra* note 15, at 81–85.

<sup>21</sup> *Korematsu v. United States*, 323 U.S. 214 (1944), overruled by *Trump v. Hawaii*, 138 S.Ct. 2392 (2018) (noting *Korematsu's* only crime was not leaving the evacuation zone; he had no connection to the Japanese government).

## II. WITCH-HUNTS

When President Nixon wrongly claimed the Watergate investigation was a witch-hunt, he made an all-too-common mistake.<sup>22</sup> The term witch-hunt has been tossed around in American discourse for years, often by presidents themselves: Nixon, Clinton, and Trump each in turn has described investigations targeting their activities as witch-hunts.<sup>23</sup> But, there are witch-hunts and then there are *witch-hunts*. Literally the term signifies “a search for witches, or for someone suspected or accused of witchcraft.”<sup>24</sup> The more common figurative definition is, “a single-minded and uncompromising campaign against a group of people with unacceptable views or behavior, *spec.* communists; *esp.* one regarded as unfair or malicious persecution.”<sup>25</sup> This understanding of the term was popularized by *The Crucible* and is the one that President Nixon—as well as Presidents Clinton and Trump—have used. They may not have known it, but they were drawing on an understanding of the term that was popularized by Arthur Miller’s retelling of the Salem witchcraft trials in *The Crucible*.<sup>26</sup>

In fact, however, *The Crucible* was not about Salem at all. It was an allegory for the Red Scare besieging mid-twentieth-century America, and it was written with the House Un-American Activities Committee explicitly in

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<sup>22</sup> See, e.g., *Witch hunt*, BLACK’S LAW DICTIONARY (11th ed. 2019) (1. Hist. A group attempt to identify and obtain evidence against a witch. – Also termed witch-finding. 2. By extension, a concerted attempt to identify and punish people whose opinions are regarded as wrong or dangerous; an investigation whose ostensible purpose is to uncover unlawful or unethical conduct but whose actual purpose is to persecute, harass, or suppress the person, group, or entity investigated because of differences in politics, ideology, viewpoints, etc.); see also, e.g., *witch hunt*, RANDOM-HOUSE WEBSTER’S C. DICTIONARY (2<sup>nd</sup> ed. 1997) (an intensive, often highly publicized effort to discover and expose those who are disloyal, subversive, etc., as in a government or political party, usu. on the basis of slight or doubtful evidence); see also, e.g., *witch-hunt*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Witch-hunt> (last visited on 21 January 2019) (“In current language, “witch hunt” metaphorically means an investigation usually conducted with much publicity, supposedly to uncover subversive activity, disloyalty and so on, but really to weaken political opposition.”) (citation omitted).

<sup>23</sup> See, e.g., MICHAEL SAVAGE, STOP MASS HYSTERIA: AMERICA’S INSANITY FROM THE SALEM WITCH TRIALS TO THE TRUMP WITCH HUNT (2018) (positing the interesting claim that the Mueller investigation is a witch-hunt caused by mass hysteria brought on by the media); see also, e.g., George Anastaplo, *Parallels to McCarthyism?: Self-Restraint Needed in Impeachment*, CHI. TRIB., April 20, 1974, at S16 (comparing the Democratic pushed Watergate investigation with the McCarthy era); see also, e.g., Peter Baker & Juliet Eilperin, *Panel Votes on Party Lines for Impeachment Inquiry*, WASH. POST, Oct. 6, 1998, at A1, A7 (describing House Democrats accusing Special Prosecutor Ken Starr of engaging in a witch-hunt); see also, e.g., Lee Moran, *Rudy Giuliani Roasted Over Bonkers Late-Night Twitter Rant about Witches*, HUFF. POST, (Jan. 3, 2019, 2:01 PM), [https://www.huffingtonpost.in/entry/rudy-giuliani-witch-hunt-tweet-reaction\\_n\\_5c2db62be4b0407e90881303](https://www.huffingtonpost.in/entry/rudy-giuliani-witch-hunt-tweet-reaction_n_5c2db62be4b0407e90881303) (Giuliani attempted to make a comparison between the Muller investigation and the Salem Witchcraft trials while also discussing the distancing of modern Wicca followers from Trump).

<sup>24</sup> *Witch-hunt*, OXFORD ENGLISH DICTIONARY (2<sup>nd</sup> ed. 1989).

<sup>25</sup> *Id.*

<sup>26</sup> See generally ARTHUR MILLER, *THE CRUCIBLE* (1953), reprinted in *THE PORTABLE ARTHUR MILLER* 132 (Christopher Bigsby ed., Penguin 1995) [hereinafter MILLER, *CRUCIBLE*].

mind.<sup>27</sup> Miller's play created an equivalency between two major instances of criminal injustice in America—the Salem trials and the Red Scare—in a way that has had an enduring influence on popular understandings of fairness in the criminal law and any large-scale investigative proceeding.<sup>28</sup>

If the most famous witchcraft trial in American history does not constitute a “witch-hunt,” then what does a witch-hunt *actually* look like? In fact, various well-known episodes from American criminal legal history exemplify the concept of unfair prosecution based on false accusations tied to ideological beliefs. The targeting of Quakers in Massachusetts Bay was more of a witch-hunt than the Salem trials themselves. Somewhat closer to our own time, the Red Scares of the mid-twentieth century—the second of which provided the inspiration for Arthur Miller's *The Crucible*<sup>29</sup>—also epitomize the focus on ideological persuasion and the criminalization of belief that lies at the heart of true witch-hunts.

#### A. *Quaker-Hunting in Colonial Massachusetts Bay*

The Colony of Massachusetts Bay was largely spared the turmoil, destruction, and financial burdens that ravaged the English countryside during the English Civil War of the mid-seventeenth century.<sup>30</sup> Bay colonists, far off in America, did not begin to feel England's disorder until the Civil War prompted new religious communities—in particular Anabaptists and Quakers—to bring their unconventional ideas to Massachusetts's shores in the mid-1650s.<sup>31</sup>

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<sup>27</sup> Arthur Miller, *The Crucible in History: The Massey Lecture, Harvard University*, in *THE CRUCIBLE IN HISTORY AND OTHER ESSAYS* 3, 3-4, 49 (1st ed. 2000) [hereinafter Miller, *Crucible in History*].

<sup>28</sup> See, e.g., Stacy Schiff, *The Single Greatest Witch Hunt in American History*, *THE NEW YORKER* (May 18, 2017) (describing Donald Trump calling the appointment of a special prosecutor the greatest witch-hunt in American history); see also, e.g., Danielle Isman, *Gardner's Witch-hunt*, 1 *U.C. DAVIS J. JUV. L. & POL'Y* 12, 13 (1996) (describing Richard Gardner's promotion of the Parental Alienation Syndrom as a witch-hunt against parents); see also, e.g., Judith Barrington, *Witch Hunt at Portland State*, 12 *OFF OUR BACKS* 32 (1982) (equating the purging of radical and lesbian elements from the Portland State Women's Studies Department to a witch-hunt); see also, e.g., Judith Gabriel, *Palestinians Arrested in Los Angeles Witch-Hunt*, 145 *MERIP MID. E. REP.* 40 (1987) (equating with FBI arrests of supporters of Palestine as a witch-hunt designed to silence them); see also, e.g., Ray Moynihan, *Reality Check: Assaulting Alternative Medicine: Worthwhile or Witch-Hunt?*, 344 *BRIT. MED. J.* 29 (2012) (questioning if the movement to close complementary and alternative medicine courses in the United Kingdom and Australia is a witch-hunt).

<sup>29</sup> Miller, *Crucible in History*, *supra* note 27, at 49, 51–53.

<sup>30</sup> See DAVID UNDERDOWN, *REVEL, RIOT, & REBELLION: POPULAR POLITICS AND CULTURE IN ENGLAND 1603–1660*, at 148–49 (1985) (describing the ravages of the English Civil War on the counties of England and Wales).

<sup>31</sup> PERRY MILLER, *THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE* 123 (1953) [hereinafter MILLER, *NEW ENGLAND MIND*] (discussing Puritans throughout New England, but paying special attention to the Puritan reaction to Quakers in the Massachusetts Bay colony).



The Quakers were part of a wider proliferation of religious communities triggered by the English Civil War.<sup>32</sup> Several factors contributed to the sudden rise of new sects: the end of censorship laws that had inhibited the flow of ideas in the English-speaking world;<sup>33</sup> Oliver Cromwell's inability to firmly establish a Presbyterian Church; a lack of hegemony among the clergy, including the rise of local independent ministers; and Cromwell's willingness to tolerate religious innovation.<sup>34</sup> The rise of Quakerism is also associated with disillusionment that was caused by the conflation of religion with politics, which led many to turn toward forms of religion that were separated from politics.<sup>35</sup> Most importantly, on both sides of the Atlantic, the chaos of the Civil War "seemed to open up infinite possibilities," which made actions and rhetoric that deviated from the norm seem far more dangerous and disruptive of society.<sup>36</sup>

Quaker behavior was subversive in ways that were both small and large but were always noticeable.<sup>37</sup> Unsettling Quaker behaviors in the mid-seventeenth century included refusing to doff one's hat to social superiors, refusing to swear oaths, using informal language, disrupting church meetings, preaching on the streets, and refusing to pay tithes.<sup>38</sup> Some members paraded through towns naked as a sign of their inner spirit, a practice defended by the movement's leaders.<sup>39</sup> If these acts were not controversial enough, the early Quaker leader James Nayler caused a major controversy when he reenacted Jesus's entry into Jerusalem by riding a donkey into the English city of Bristol while his supporters sang and tossed clothes before him.<sup>40</sup> Finally, although all Quakers asserted that the Bible was no more authoritative than their inward light, for a few, their inward light actually led them to the burning of Bibles.<sup>41</sup>

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<sup>32</sup> See BARRY COWARD, *THE STUART AGE: ENGLAND 1603–1714*, at 235–37 (4th ed. 2014) (attributing the rise of new religions thought that occurred during the English Civil War as resulting from the belief that the war signaled the creation of a perfect society and the return of god on earth).

<sup>33</sup> See JOHN MORRILL, *THE NATURE OF THE ENGLISH REVOLUTION: ESSAYS BY JOHN MORRILL* 359–61 (1993).

<sup>34</sup> See UNDERDOWN, *supra* note 30, at 239.

<sup>35</sup> HUGH TREVOR-ROPER, *THE CRISIS OF THE SEVENTEENTH CENTURY: RELIGION, THE REFORMATION AND SOCIAL CHANGE* 313 (Liberty Fund, 1999).

<sup>36</sup> CHRISTOPHER HILL, *THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION* 118–20, 187 (Penguin, 1991) [hereinafter HILL, *WORLD TURNED*] (promoting the interesting thesis that many of these groups, particularly the Levelers and True Levelers or Diggers, were proto-Communists. Nevertheless, his observations about the chaos that ensued from these groups running all over England is valid).

<sup>37</sup> MORRILL, *supra* note 33, at 387.

<sup>38</sup> CHRISTOPHER HILL, *THE INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION, REVISITED* 340 (2001) (discussing the refusal to doff their hats to social superiors as well as magistrates and informal language of the Quakers); see also UNDERDOWN, *supra* note 30, at 251 (discussing refusing to swear oaths, doff hats, or pay tithes, and their interrupting church services); see also MORRILL, *supra* note 33, at 387–388 (describing the disruption of church meetings, refusal to pay tithes, and other disturbances).

<sup>39</sup> HILL, *WORLD TURNED*, *supra* note 36, at 317–18.

<sup>40</sup> See COWARD, *supra* note 32, at 273.

<sup>41</sup> ADRIAN DAVIES, *THE QUAKERS IN ENGLISH SOCIETY, 1655–1725*, at 17 (2000).

Although the above acts all took place in England, such behavior was not confined to that side of the Atlantic: in 1662 the wife of Robert Wilson was convicted of parading through the streets of Salem naked with the aid of her mother and her sister.<sup>42</sup> She was ordered to be tied naked to a cart and whipped thirty times through the town, while her mother and sister were to be stripped to the waist and forced to walk along side of her.<sup>43</sup> Moreover, although Quakers did engage in some acts of disorder related to their faith, they were often targeted for their beliefs or, simply, for attending worship meetings of their faith.<sup>44</sup>

Indeed, as shocking as these *behaviors* would have been to many seventeenth-century observers, what truly upset Puritans on both sides of the Atlantic were Quaker *beliefs*.<sup>45</sup> “The Quakers were . . . threatening to the forces of order because their rejection of ministry and ecclesiastical structure, [and] their emphasis on the quality of all who were guided by the ‘inner light,’ were accompanied by stricter moral rectitude . . . .”<sup>46</sup> For the Puritans of Massachusetts Bay, Quaker belief in an inward light forcefully reminded them of the earlier religious heresy of Anne Hutchinson, who preached the existence of a direct personal relationship with God and the dispensability of ministers.<sup>47</sup> By the time the Quakers arrived in Massachusetts Bay, the colony had endured Hutchinson’s trial and banishment, which had nearly torn the nascent colony asunder.<sup>48</sup> Local leaders did not want to risk similar disruption with the Quakers and acted swiftly and harshly.<sup>49</sup>

In July 1656, Ann Austin and Mary Fisher became the first Quakers to enter Massachusetts Bay, landing in Boston onboard the ship *Swallow*.<sup>50</sup> The women were immediately imprisoned, and all of their belongings were ordered to be searched by the Deputy Governor. The General Court convened in September and ordered all of their books burned and then ordered Captain

<sup>42</sup> Essex Institute, 3 THE RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY MASSACHUSETTS IN NINE VOLUMES 17 (1911) [hereinafter ECCR].

<sup>43</sup> *Id.*

<sup>44</sup> See John Felipe Acevedo, Harsh Mercy: Criminal Law in Seventeenth-Century Massachusetts Bay, at Appendix E (Dec. 13, 2013) (unpublished Ph.D. dissertation, The University of Chicago) (on file with ProQuest) [hereinafter Acevedo, Harsh Mercy] (providing an overview list of crimes committed in Massachusetts Bay during this time period including attending a Quaker meeting).

<sup>45</sup> See MORRILL, *supra* note 33, at 387–88 (noting that the Quakers’ actions were upsetting to the Puritans as it signified their disrespect for the current order it was not violent towards others, but provoked violence towards themselves).

<sup>46</sup> UNDERDOWN, *supra* note 30, at 250.

<sup>47</sup> THE ANTI-NOMIAN CONTROVERSY, 1636–1638, at 18 (David D. Hall ed., Duke Univ. Press 1990) (1968); see also MICHAEL P. WINSHIP, THE TIMES AND TRIALS OF ANNE HUTCHINSON: PURITANS DIVIDED 120–23 (2005) (giving a description of Hutchinson’s theological beliefs).

<sup>48</sup> See WINSHIP, *supra* note 47, at 98–101, 144–45 (2005) (discussing the difficult position colonial leaders were in because Anne Hutchinson was on good terms with John Cotton, one of the colony’s most prominent citizens, who could have left with his followers if the trial was not carried out in a just manner).

<sup>49</sup> KAI T. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 108 (1966).

<sup>50</sup> See GEORGE A. SELLECK, QUAKERS IN BOSTON, 1656–1964: THREE CENTURIES OF FRIENDS IN BOSTON AND CAMBRIDGE 1 (1976).

Locke to transport them and six other Quakers to England.<sup>51</sup> George Bishop, a Quaker advocate, condemned these acts as both cruel and against the laws of the colony on the grounds that no law against Quakers was in force at the time.<sup>52</sup>

The Colony's leadership apparently anticipated the Bishop's complaints, as the General Court quickly passed an Order against Quakers, on October 14, 1656.<sup>53</sup> The Order was exceedingly harsh: not only did it impose a hundred-pound fine on anyone who knowingly brought Quakers into the colony, it also decreed that all Quakers should be immediately imprisoned, severely whipped, kept at hard labor, and denied all visitors.<sup>54</sup> Anyone found with Quaker books would be fined five pounds, while those defending Quaker beliefs would be fined forty shillings. Finally, anyone who disrespected (or in the Order's language, *reviled*) a magistrate or minister, "as is usuall with the Quakers," was to be severely whipped or fined five pounds.<sup>55</sup>

Quakers were not the only religious dissenters of the era: mid-seventeenth-century Massachusetts Bay was rife with heterodox spirituality.<sup>56</sup> Nevertheless, the courts of Massachusetts Bay singled out Quakers for particularly harsh punishment.<sup>57</sup> Of the twenty-seven persons convicted for being Quakers, one was admonished (a form of state-enforced public chastisement),<sup>58</sup> one was fined;<sup>59</sup> two were whipped;<sup>60</sup> two were whipped and imprisoned with hard labor and coarse diet,<sup>61</sup> fourteen were

<sup>51</sup> GEORGE BISHOP, *NEW ENGLAND JUDGED BY THE SPIRIT OF THE LORD*, IN TWO PARTS 10–15 (1703).

<sup>52</sup> See BISHOP, *supra* note 51, at 11.

<sup>53</sup> 3 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 415–16 (Nathaniel B. Shurtleff ed., 1854) [hereinafter RCMB] (containing the text of *An Order Against Quakers*); see also ERIKSON, *supra* note 49, at 115–16.

<sup>54</sup> 3 RCMB, *supra* note 53, at 115–16.

<sup>55</sup> *Id.* (all spelling from the seventeenth century is left as it appears in the original text and *sic* is not used because spelling was not standardized at the time; sic erat scriptum).

<sup>56</sup> MILLER, *NEW ENGLAND MIND*, *supra* note 31, at 123; see also Acevedo, *Harsh Mercy*, *supra* note 44, at appendix E (providing an overview list of crimes committed in Massachusetts Bay).

<sup>57</sup> Acevedo, *Harsh Mercy*, *supra* note 44, at app. E (during the same period six persons were tried for Anabaptism, thirty for disturbing public ordinances, and fifty-seven for sabbath breaking).

<sup>58</sup> See 4i RCMB, *supra* note 53, at 410–11 (describing the case of Hannah Phelps, but not stating why her sentence was lighter than her co-defendants).

<sup>59</sup> See *id.*, at 369 (describing the cases of Thomas Brakett who was only fined after he humbly acknowledging his error in being drawn away by the Quakers he was thus shown leniency)

<sup>60</sup> See *id.*, at 410–11 (William King was ordered whipped with fifteen stripes and Provided Southwicke with ten stripes).

<sup>61</sup> *Id.* at 410–11, 433 (Margaret Smith and Mary Traske were both ordered to be whipped with ten stripes and imprisoned with constant labor and mean diet).

banished;<sup>62</sup> three were admonished then banished;<sup>63</sup> and four were whipped then banished.<sup>64</sup> In addition, charges would be brought against individuals no fewer than seventy-three times for attending Quaker meetings and eleven times simply for entertaining Quakers.<sup>65</sup>

In contrast, none of the seven persons convicted<sup>66</sup> of Anabaptism were subjected to whipping, hard labor, coarse diet, or banishment. Instead, they were given comparatively lenient sentences; five were disfranchised, admonished, and threatened to be imprisoned if they continued with their beliefs;<sup>67</sup> one was admonished and bound to good behavior;<sup>68</sup> and the last was ordered to renounce his beliefs or be imprisoned.<sup>69</sup> Although these punishments were severe, they were clearly designed to bring the offenders back into the established church. Quakers, on the other hand, were almost never the focus of rehabilitative efforts.<sup>70</sup>

The persecution of Quakers in Massachusetts reached a zenith in 1659 when William Robinson, Marmaduke Stephenson, and Mary Dryer were sentenced to death for returning from banishment.<sup>71</sup> Dryer's sentence was commuted upon the petitioning of Rhode Island officials, but she was executed the following year when she returned from banishment a second time.<sup>72</sup> In 1661 William Ledra became the fourth Quaker executed in Massachusetts Bay for returning from banishment.<sup>73</sup> Although all of these

<sup>62</sup> See 3 COUNTY OF SUFFOLK, RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY, 1630-1692 IN THREE VOLUMES, 68-70 (1901) [hereinafter RCA] (describing the case of Mary Dyer, Nicholas Davis, William Robbinson, and Marmaduke Stephenson); see also, 4i RCMB, *supra* note 53, at 349, 367, 371, 391 (discussing the cases of Cassandra Southwicke, Joshua Buffam, Nicholas Phelps, Sammuell Shattocke, Josiah Southwicke, Laurence Southwicke, William Brend, and Christopher Holder); see also 4ii RCMB, *supra* note 53, at 20-21, 23-24, 55 (describing the case against Anne Coleman who was ordered to return to England and the case of Wendlocke Christopherson who was ordered executed or banished and chose banishment).

<sup>63</sup> See 4i RCMB, *supra* note 53, at 410-11 (describing the cases of Hope Clifton, Alice Couland, and Mary Scott).

<sup>64</sup> *Id.* (Robert Harper was ordered to be whipped fifteen stripes then banished and Daniell Gold was ordered to be whipped thirty stripes and then banished); see also 4ii RCMB, *supra* note 53, at 20, 24 (Peter Pierson and Judah Broune both stood mute and refused to enter a plea. In response the magistrates ordered that they be whipped in twenty stripes each in Boston, Roxbury, and Dedham then banished from the colony).

<sup>65</sup> See Acevedo, Harsh Mercy, *supra* note 44, at appendix E.

<sup>66</sup> An eighth person, Joseph Redknap, was discharged by the Essex County Court when he proved that it was necessary because of the condition of his family. See 1 ECCR, *supra* note 42, at 245.

<sup>67</sup> See 4ii RCMB, *supra* note 53, at 290-91, 316 (discussing the cases of Edward Drinker Jr., John George, Thomas Gold, Thomas Osborne, and William Turner).

<sup>68</sup> See 3 ECCR, *supra* note 42, at 148 (giving brief description of the case of Henry Roby).

<sup>69</sup> See 3 RCA, *supra* note 62, at 213-215 (giving a description of the case of John Russell).

<sup>70</sup> *But see* 4i RCMB, *supra* note 53, at 369 (providing an example of leniency against a Quaker, Thomas Brakett, when he humbly acknowledging his error in being drawn away by the Quakers).

<sup>71</sup> See ERIKSON, *supra* note 49, at 120 (citing to Bishop, New England Judged); see also 4i RCMB, *supra* note 53, at 383-391 (providing a description of William Robbins and Marmaduke Stephenson's trials).

<sup>72</sup> See 4i RCMB, *supra* note 53, at 419.

<sup>73</sup> See 3 RCA, *supra* note 62, at 93-111.

individuals were technically executed for returning from banishment, this is clearly a pretext, since William King was discharged upon his return from banishment after he renounced his Quaker beliefs.<sup>74</sup>

The persecution of Quakers declined shortly after these executions, due in large part to events surrounding the English Restoration that overtook the “Quaker threat” in the eyes of the Colony’s leadership.<sup>75</sup> However, in the space of a little over a decade, Massachusetts Bay contrived to charge, fine, physically punish, or banish Quakers—a harsh response compared to the way other religious dissenters were treated.<sup>76</sup> And unlike their English counterparts, Massachusetts officials had little reason to punish Quakers for illegal behavior.<sup>77</sup> Instead, the colonists targeted Quakers almost entirely because of their views on issues like biblical supremacy, the necessity of ministers, and the moral authority of one’s “inward light.”<sup>78</sup>

### B. *The First Red Scare*

A little over 250 years after the last Quaker was executed in Massachusetts Bay, the first Red Scare began. The Russian Revolution of 1917 had made the possibility of communism in America seem frighteningly real and amplified elite anxieties about the rise of labor unions—most of all the Industrial Workers of the World (IWW).<sup>79</sup> In response, Congress passed the legal groundwork for what would become this country’s first true witch-hunt of the twentieth century.<sup>80</sup> Just a year or two later, a series of strikes and bombings in 1919 transformed the country’s latent concern regarding the Communist threat into a frenzy of paranoia.<sup>81</sup>

On January 2, 1905 a group of thirty-six radical labor leaders convened in Chicago to discuss creating a new union that would bring together both skilled and unskilled workers.<sup>82</sup> The organization that arose from their

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<sup>74</sup> See 4ii RCMB, *supra* note 53, at 8.

<sup>75</sup> ERIKSON, *supra* note 49, at 135–36; see also ALAN TAYLOR, *AMERICAN COLONIES: THE SETTLING OF NORTH AMERICA 185* (Penguin, 2002) (asserting that the Restoration ended the brief Puritan rule in England, and with it, the relevance of New England to the English).

<sup>76</sup> See Acevedo, *Harsh Mercy*, *supra* note 44, at 163–65 (discussing the punishments dispensed to various religious dissenters including Baptists and Quakers); see, e.g., 4i RCMB, *supra* note 53, at 369 (describing how Thomas Brakett was only fined for Quakerism when he admitted his error and repented).

<sup>77</sup> WILLIAM C. BRAITHWAITE, *THE BEGINNINGS OF QUAKERISM 405* (1912) (discussing the opposition between Quakerism and the rigid Calvinism of the Massachusetts Bay officials, which lead to the persecution of the Quakers).

<sup>78</sup> See ERIKSON, *supra* note 49, at 107–08 (describing how Quakerism reminded colonial leaders of the antinomian controversy of Anne Hutchinson).

<sup>79</sup> TED MORGAN, *REDS: MCCARTHYISM IN TWENTIETH-CENTURY AMERICA 55* (2003).

<sup>80</sup> See MICHAEL E. PARRISH, *ANXIOUS DECADES: AMERICA IN PROSPERITY AND DEPRESSION, 1920–1941*, at 110–11 (1992) (discussing the motivations behind passing the Immigration Act of 1917).

<sup>81</sup> See FREDRICK L. ALLEN, *ONLY YESTERDAY: AN INFORMAL HISTORY OF THE 1920S*, at 36–41 (reprint ed. 1997) [hereinafter ALLEN, *ONLY YESTERDAY*].

<sup>82</sup> PHILIP S. FONER, *4 HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: THE INDUSTRIAL WORKERS OF THE WORLD, 1905–1917*, at 15 (1997) (among the leaders to attend were William “Big Bill” Haywood, John M. O’Neil, Frank Bohn, and Mary Harris “Mother” Jones representing the Socialist Party

discussions combined socialism with radical union syndicalism (revolutionary unionism with the general strike as its primary weapon) and a tinge of anarchism as well—it was the Industrial Workers of the World or *Wobblies*.<sup>83</sup>

The IWW took its concept of “One Big Union” seriously.<sup>84</sup> Unlike the American Federation of Labor (AFL), which focused on skilled labor, the IWW included skilled and unskilled workers alike.<sup>85</sup> Similarly, the IWW included women, African Americans, and immigrants in its membership. Consequently, it appeared even more radical in an era that was otherwise marked by Jim Crow and that preceded women’s suffrage.<sup>86</sup>

Even more importantly, the IWW explicitly advocated a replacement of the capitalist system.<sup>87</sup> As the preamble of the IWW Constitution put it:

The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of working people and the few, who make up the employing class, have all the good things in life. Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the means of production, [and] abolish the wage system . . . .<sup>88</sup>

In other words, the IWW was uninterested in merely improving the conditions of some workers within the current framework of production (as was the AFL); rather Wobblies sought to fundamentally alter American industry.<sup>89</sup> In the eyes of the public, all of these beliefs tied the IWW to upheaval and, more damagingly, to anarchism and violence.<sup>90</sup>

This reputation was partly their own doing. The IWW’s tactics often sounded as radical as its beliefs—the group held sabotage was a legitimate strategy to improve the workers’ lot—but in fact, there was a debate within the union about the legitimacy of violence and the meaning of “sabotage.”<sup>91</sup> Instead, Wobblies imagined that workers would sabotage the capitalist system by slowing down the pace of work, sitting down at the machines, or

plus various unions representing mine workers. The socialist leader Eugene V. Debs was unable to attend due to poor health, but supported the unions creation).

<sup>83</sup> *Id.* at 23.

<sup>84</sup> *Id.* at 33–34. (discussing the belief among IWW organizers that the AF of L could not be reformed and searching for a compromise between the anarchistic, socialist, and labor factions of the new IWW); see also MORGAN, *supra* note 79, at 55 (describing the IWW recruiting unskilled immigrant workers shunned by the AFL in the logging, construction, and agricultural industries).

<sup>85</sup> JEREMY BRECHER, *STRIKE!* 102 (revised ed. 2014).

<sup>86</sup> See HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES, 1492–PRESENT* 337 (20th anniversary ed. 1999).

<sup>87</sup> BRECHER, *supra* note 85, at 102.

<sup>88</sup> FRED W. THOMPSON & JON BEKKEN, *THE INDUSTRIAL WORKERS OF THE WORLD: ITS FIRST 100 YEARS: 1905 THROUGH 2005*, at iv (2006) (the clause “...and live in harmony with the earth” was added in 1999).

<sup>89</sup> BRECHER, *supra* note 85, at 102.

<sup>90</sup> See James W. Byrkit, *The IWW in Wartime Arizona*, 18 J. ARIZ. HIST. 149, 156–157 (1977).

<sup>91</sup> FONER, *supra* note 82, at 164–65 (describing the spectrum of positions on the use of violence within the IWW).

doing work in a shoddy manner. Although some members of the IWW did advocate, and carry out, the destruction of property, it was more a rhetoric of violence.<sup>92</sup> But, some members of the IWW did engage in violence, especially in response to perceived violence by bosses.<sup>93</sup> The damage had been done: in the public's view, the IWW's embrace of sabotage and violence, in any form, linked it to the late-nineteenth-century anarchists who had engaged in riots, bombings, and assassinations.<sup>94</sup>

Other tactics that were *not* misinterpreted nonetheless also added to the Wobblies' disproportionate visibility and reputation for radicalism.<sup>95</sup> Because they lacked the funding of the skilled workers' union, the IWW sought to expand its ranks through speeches, singing,<sup>96</sup> and pamphleteering that they conducted on street corners and in the face of severe objections from local governments.<sup>97</sup> For instance, the Spokane City Council passed an ordinance forbidding *all* street speaking, which the IWW initially obeyed until an exemption was granted to Christian organizations.<sup>98</sup> At that point the IWW employed a low cost tactic: the local branch put out a call for all available members to come to Spokane to violate the ordinance, be arrested, and demand a separate jury trial.<sup>99</sup> By flooding the criminal justice system and imposing large costs on the city government—a tactic that it also employed in Kansas City, Aberdeen, Fresno and San Diego among others—the IWW created the impression that it was a massive organization with a membership far out of proportion to its actual numbers.<sup>100</sup> The tactics of the IWW and their numerous free speech victories created in the public a feeling that the union was a massive organization.<sup>101</sup>

Public and governmental fear of anarchists and communists grew completely out of disproportion to their actual numbers, which at their

<sup>92</sup> *Id.*, at 164–67.

<sup>93</sup> *Id.*, at 164–66.

<sup>94</sup> See BRECHER, *supra* note 85, at 56–59 (discussing the reaction of the public to the Haymarket bombing, which was blamed on anarchists).

<sup>95</sup> THOMPSON & BEKKEN, *supra* note 88, at 40–42 (describing the early free-speech fights of the IWW in Western states).

<sup>96</sup> See generally INDUSTRIAL WORKERS OF THE WORLD, SONGS OF THE IWW: TO FAN THE FLAMES OF DISCONTENT (38<sup>th</sup> ed. 2010) (listing many still-popular songs such as Solidarity Forever, Mr. Block, Casey Jones, Power in a Union, and The Preacher and the Slave).

<sup>97</sup> FONER, *supra* note 82, at 155–56 and 172; see also BRUCE WATSON, BREAD AND ROSES: MILLS, MIGRANTS, AND THE STRUGGLE FOR THE AMERICAN DREAM 154–55 (2005) (providing a description of the IWW's free-speech tactics and the example of Elizabeth Gurley Flynn's involvement and interaction with the criminal legal system).

<sup>98</sup> JOSEPH G. RAYBACK, A HISTORY OF AMERICAN LABOR 244 (1959).

<sup>99</sup> FONER, *supra* note 82, at 173–74 (describing the pattern of a “free-speech fight” conducted by IWW organizers: one organizer would get on the soapbox, open the speech with “Fellow workers and friends,” and immediately hauled off to jail; then, he would be replaced by another and the cycle would continue. Once arrested, Wobblies would sing and proselytize to the police, jailers, and other inmates).

<sup>100</sup> RAYBACK, *supra* note 97, at 244.

<sup>101</sup> FONER, *supra* note 82, at 174 (the goal was to create a spectacle in the public mind and give the impression that “ten men existed where there was only one”).

highest was less than two-tenths of one percent (0.02%) of the population.<sup>102</sup> Nevertheless, as the United States entered World War I, the government sought to counteract labor radicals by passing several acts designed to target their beliefs.<sup>103</sup> The Espionage Act of 1917 criminalized the dissemination of information with the purpose to interfere with the success of the military.<sup>104</sup> The following year, Congress expanded the Sedition Act to criminalize the discussion of any belief that tended to cause disloyalty to the United States or its institutions—essentially *any* IWW speech.<sup>105</sup> Above all else, the Immigration Act of 1918 provided for the deportation of any aliens who were anarchists or who “believe in . . . the overthrow by force or violence of the Government of the United States,” or who were members of organizations that advocated those beliefs.<sup>106</sup> The preamble to the IWW Constitution alone was enough to deport any immigrant members of the union. Indeed, whether Wobblies, anarchists, socialists, or communists, those persons caught up in the Red Scare were mostly convicted for speech or simple membership in radical organizations.<sup>107</sup>

In September 1917 federal agents conducted raids on forty-eight IWW offices across the country and seized documents said to be evidence that the union was hindering the draft.<sup>108</sup> These raids were followed by the conviction of ninety-nine union members, including IWW leaders, of violating the Espionage Act.<sup>109</sup> These espionage cases were followed by a series of criminal charges against union members that culminated in 1920 with the arrest of over 1,000 Wobblies for violating the Sedition Act as well as a variety of local laws.<sup>110</sup> Beyond these official measures, the IWW was frequently subject to extralegal attacks: mobs took to harassing and even lynching Wobblies, especially around Armistice Day, and were often lightly punished.<sup>111</sup>

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<sup>102</sup> ALLEN, ONLY YESTERDAY, *supra* note 81, at 35 (citing to Gordon S. Watkins who estimated in 1919 that the membership of the Socialist Party was 39,000, the Communist Labor Party from 10,000 to 30,000, and the Communist Party from 30,000 to 60,000); *see also* THOMPSON & BEKKEN, *supra* note 88, at 125 (estimating that the IWW membership in 1919 was around 20,000 members).

<sup>103</sup> MORGAN, *supra* note 79, at 54–55.

<sup>104</sup> Espionage Act of 1917, Pub. L. No. 65–24, ch. 30, §§ 3–4, 40 Stat. 217, 218–19 (1917) (also prohibiting passing of information to foreign governments that could harm the US war effort or cause mutiny or draft avoidance).

<sup>105</sup> Sedition Act of 1918, Pub. L. No. 65–150, ch. 75, § 3, 40 Stat. 553, 553 (1918).

<sup>106</sup> Immigration Act of 1918, Pub. L. No. 65–221, ch. 186, §§ 1–2, 40 Stat. 1012, 1012 (1918).

<sup>107</sup> ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919–1920, at 264–65 (1955) (discussing the continued power of calling someone a Red and quoting General Leonard Wood, “We do not want to be a dumping ground for radicals, agitators, Reds, who do not understand our ideals”).

<sup>108</sup> ZINN, *supra* note 86, at 372–73.

<sup>109</sup> MURRAY, *supra* note 107, at 30.

<sup>110</sup> *See* RAYBACK, *supra* note 98, at 289–90.

<sup>111</sup> *See* THOMPSON & BEKKEN, *supra* note 88, at 125–26 (describing the attack on IWW members in Centralia, Washington by members of the Citizens’ Protective League. In true IWW fashion the members fought back killing three of the mob before their headquarters was destroyed and one member, Wesley Everest, lynched).



The conviction of most of its leadership broke the back of the IWW, and it ceased to be a major force in American labor organizing by the mid-1920s.<sup>112</sup> But authorities deployed the same laws that led to the targeting and weakening of the Wobblies against anarchists, socialists, and communists.<sup>113</sup> In January 1920 over 4,000 suspected radicals, mostly communists, were arrested nationwide in an operation that affected virtually every local Communist association.<sup>114</sup> In December 1919, 249 Russian immigrants, including prominent anarchists, were deported to the Soviet Union.<sup>115</sup> The Socialist Party found itself torn apart by governmental measures and the Party's own expulsion of communists from its ranks.<sup>116</sup>

The Supreme Court did nothing to abate the First Red Scare's witch-hunt of the radical left. In *Schenck v. United States*, it upheld the Espionage Act against a First Amendment challenge by reasoning that the defendant's actions constituted a "clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."<sup>117</sup> Similarly, the Court upheld convictions under state laws that criminalized the advocating of the overthrow of the United States government unless such anarchist writings were clearly academic in nature.<sup>118</sup> When the First Red Scare finally subsided in the early 1920s, it was due not to any action by the Court or Congress that ameliorated the targeting of radical left beliefs. Instead, it was because paranoia over the radical threat had given way to other concerns (like the rise of a new public enemy in the form of bootleggers) or because the threat had been largely mitigated by the prosperity of the 1920s and the success of Red Scare tactics regarding immigration and the destruction of radical left organizations.<sup>119</sup> Perhaps most significantly, the United States entered into World War II with communist Russia as an ally.<sup>120</sup> Despite all of this, the state never fully ceased targeting radicals—as evidenced by the 1930s actions

<sup>112</sup> RAYBACK, *supra* note 98, at 290; *see also* THOMPSON & BEKKEN, *supra* note 88, at 149 (discussing how the Great Depression saw the IWW attempt to rebuild its membership, but that it had not recovered from its split in 1924 and the losses sustained in the early 1920s).

<sup>113</sup> *See* RAYBACK, *supra* note 98, at 287.

<sup>114</sup> MURRAY, *supra* note 107, at 213.

<sup>115</sup> *See id.* (describing the arrest of 800 radicals in Boston and about half of them being sent for deportation); *see also* ZINN, *supra* note 86, at 375 (describing the deportation of anarchists including Emma Goldman and Alexander Berkman).

<sup>116</sup> DAVID BRODY, IN LABOR'S CAUSE: MAIN THEMES ON THE HISTORY OF THE AMERICAN WORKER 61 (1993); *see also* MARGUERITE YOUNG, HARP SONG FOR A RADICAL: THE LIFE AND TIMES OF EUGENE VICTOR DEBS 4-5 (Charles Ruas ed., 1999) (describing Debs' imprisonment during the 1920 presidential campaign).

<sup>117</sup> 249 U.S. 47, 52 (1919).

<sup>118</sup> *See, e.g., Gitlow v. New York*, 268 U.S. 652, 670 (1925). Interestingly, although it upheld the statute in question, the *Gitlow* Court for the first time held that the freedom of speech clause of the First Amendment was incorporated against the states. *Id.* at 666.

<sup>119</sup> *See* MORGAN, *supra* note 79, at 86–87 (discussing the decline of the Communist Party and immigration rates).

<sup>120</sup> *See* FREDRICK LEWIS ALLEN, SINCE YESTERDAY: THE 1930S IN AMERICA, SEPTEMBER 3, 1929–SEPTEMBER 3, 1939, at 325–326 (1940) (discussing the change by Communists and other leftist organizations in America from being anti-war to pro-war).

of the Dies Committee on un-American activities.<sup>121</sup> However, the degree to which public hysteria about the radical left had subsided by the 1930s is evidenced by the widespread popular support of radical figures during the Great Depression.<sup>122</sup> The stage was set for a second scare.

### C. *The Second Red Scare*

Following the Allied victory in World War II and the start of the Cold War, a fear of the radical left returned to the United States.<sup>123</sup> As with the First Red Scare, the legal foundation for the Second Red Scare (the Alien Registration Act of 1940) had been established a couple of years before the action really began.<sup>124</sup> Moreover, concerns regarding the infiltration of communist spies *were* somewhat legitimate—Russian agents had in fact stolen the secret of the atomic bomb and turned it over to Russia.<sup>125</sup> Nevertheless, the Second Red Scare constituted a witch-hunt for much the same reasons as did the First Red Scare and the persecution of the Quakers: what was targeted was a belief whose influence was vastly overstated, with little proof of wrongdoing needed for convictions.<sup>126</sup> The ideology at issue had changed—the Second Red Scare was more directly tied to communism than to the labor radicalism that had garnered much of the attention thirty years earlier—but the structure remained the same.<sup>127</sup>

In 1945, Congress established the House Un-American Activities Committee (HUAC) as a permanent body with the power to investigate propaganda and suspicious organizations.<sup>128</sup> HUAC's investigations were the

<sup>121</sup>*Id.* at 210–11 (discussing the Committees' targeting of the National Maritime Union, teachers' unions, student groups, and suspected Communists in Hollywood).

<sup>122</sup>See ALAN BRINKLEY, *VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN & THE GREAT DEPRESSION* 110–12 (1982) (describing Father Coughlin's radical monetary policies, including revaluation of gold, remonetization of silver, and establishment of a government-owned central bank); see also HUEY P. LONG, *EVERY MAN A KING: THE AUTOBIOGRAPHY OF HUEY P. LONG* 338–40 (1996) (describing Long's program, including a 100% tax on all income above \$1,000,000 per year and limiting all inherited income to \$5,000,000 in the inheritor's lifetime); see also UPTON SINCLAIR, I, *GOVERNOR OF CALIFORNIA AND HOW I ENDED POVERTY* 59–62 (1934) (setting out Sinclair's End Poverty in California Plan, which focused on state ownership of industry and payment of wages in state script).

<sup>123</sup>See LANDON R. Y. STORRS, *THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT* 1–3 (2013) (attributing the start of the Second Red Scare to the 1947 federal employee loyalty program).

<sup>124</sup>Alien Registration Act of 1940, Pub. L. No. 76–670, ch. 439, 54 Stat. 670 (1940).

<sup>125</sup>See GRIFFIN FARIELLO, *RED SCARE: MEMORIES OF THE AMERICAN INQUISITION* 177–78 (discussing the attempts by the Soviet Union to infiltrate the Manhattan Project as well as HUAC's early investigations against spies); see also KATHERINE A.S. SIBLEY, *RED SPIES IN AMERICA: STOLEN SECRETS AND THE DAWN OF THE COLD WAR* 188 (2004) (discussing how several suspected spies were tried for perjury and not espionage because proof was difficult to establish and the statutes of limitations had run out).

<sup>126</sup>See MORGAN, *supra* note 79, at 308–09 (discussing the attempts by the Communist Party to create a third political party to run in the 1948 presidential election and the resulting damage to the Communist Party's relationship with the labor movement).

<sup>127</sup>*Id.* at 310–11 (describing how anti-communism became a major issue in the 1948 presidential campaign).

<sup>128</sup>See Robert K. Carr, *The Un-American Activities Committee*, 18 U. CHI. L.REV. 598, 598 (1951) (describing the first years of HUAC's operation as a permanent investigative committee).

classic witch-hunt: merely to be named as a potential wrongdoer was to be condemned and often blacklisted from one's job.<sup>129</sup> The Committee began by investigating suspected communists in Hollywood, which initially led to the blacklisting of ten writers who were ultimately convicted of contempt for holding HUAC in low regard.<sup>130</sup> The Hollywood investigations continued well into the 1950s, targeting writers, directors, and producers and creating a division between those who cooperated to save their careers or even "named names," and those who risked blacklisting by asserting their Fifth Amendment rights.<sup>131</sup>

It was not until 1950—five years after HUAC was established—that Senator Joseph McCarthy appeared on the stage.<sup>132</sup> Although McCarthy began his anti-communist crusade aiming to ferret out every last remaining Communist within the government, his actions often merely resulted in the destruction of civil service careers based on the merest allegations of communist sympathies.<sup>133</sup> McCarthy claimed to have a list of fifty-seven known communists working in the State Department.<sup>134</sup> Yet, of the eighty-one cases he investigated only one resulted in a criminal indictment.<sup>135</sup>

McCarthy's actions ramped up anxieties that had first taken form with the HUAC investigations and helped spread them to states and even towns.<sup>136</sup> His fall alone did not end the Second Red Scare.<sup>137</sup> It did, however, take the wind out of its sails. In *Slochower v. Board of Education*,<sup>138</sup> the Supreme Court held that invocation of one's Fifth Amendment rights could not by itself be held to indicate a sinister motive; in *Schwartz v. Bar Examiners*,<sup>139</sup> the Court held that past affiliations could not alone be held to indicate moral turpitude; and in *Watkins v. United States*,<sup>140</sup> the Court held that HUAC had to show *why* it needed witness information.

The same combination of baseless allegations, salvation through cooperation, and ideological prejudice that characterized the HUAC and

<sup>129</sup> See Miller, *Crucible in History*, *supra* note 27, at 23–24, 28–30 (linking the absurdities of HUAC with the Salem witchcraft trials and describing the author's own negative experience with the Committee).

<sup>130</sup> MORGAN, *supra* note 79, at 519–20.

<sup>131</sup> *Id.* at 521–25.

<sup>132</sup> See *Id.* at 374–76 (providing a description of McCarthy's early anti-communism in the Senate and giving 1950 as the year his activities began).

<sup>133</sup> *Id.* at 377 (noting that McCarthy began his Communist hunts in the State Department bureaucracy).

<sup>134</sup> See ZINN, *supra* note 86, at 430 (describing the initial claim of McCarthy that he had a list of 205 known members of the Communist Party who were employed by the State Department).

<sup>135</sup> MORGAN, *supra* note 79, at 385–86, 391 (noting that the lone person indicted was Val Lorwin who was eventually cleared).

<sup>136</sup> See e.g. ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 266–69 (1998) (describing the targeting of Lawrence Parker and other workers on the waterfront).

<sup>137</sup> *Id.*, at 262–64 (recounting the encounter between McCarthy army lawyer Joseph Welch in which Welch famously said "Let us not assassinate this lad further, Senator. You have done enough. Have you no sense of decency, sir, at long last? Have you left no sense of decency?").

<sup>138</sup> 350 U.S. 551, 559 (1956).

<sup>139</sup> 353 U.S. 232, 246 (1957).

<sup>140</sup> 354 U.S. 178, 215 (1957).

McCarthy investigations eventually found their way into Arthur Miller's portrayal of the Salem trials.<sup>141</sup> *The Crucible's* narrative has proved enduring: subversive individuals who threaten society are ruthlessly crushed by the authorities, who accuse numerous innocent persons in order to reach the few actual wrongdoers. But it is a narrative that reflects the realities of HUAC, McCarthy, the IWW crackdown, and the persecution of the Quakers—not the realities of Salem.

#### *D. Distinguishing Witch-hunts from Race Targeting*

Quakers, labor radicals, and communists were targeted for their beliefs rather than for their actions.<sup>142</sup> To be sure, some individuals from all three groups committed crimes and engaged in disruptive behavior,<sup>143</sup> but state authorities targeted anyone who subscribed to these beliefs regardless of their individual criminal liability. In other words, and as under the common law of centuries past, criminality in all of these circumstances arose from thought alone.<sup>144</sup> However, it is a basic principle of American criminal law that “a person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act....”<sup>145</sup> Therein lies the problem with true witch-hunts—they punish the thought not the action—and in doing so, they imperil substantive due process and equal protection.<sup>146</sup>

The ideologically-motivated targeting that is at the core of witch-hunts has occurred throughout American history. Indeed, it dates almost to the founding. Close on the heels of the Constitution and the Bill of Rights, Americans who supported the French during the Napoleonic Wars were often ousted from their jobs and even imprisoned pursuant to the Alien and Sedition acts of 1798.<sup>147</sup> As in this early example, witch-hunts often seemed simply to target difference from the imagined mainstream of American

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<sup>141</sup>Miller, *Crucible in History*, *supra* note 27, at 10–17 (describing the writing of *The Crucible* and the surrounding events).

<sup>142</sup>*Compare* Sedition Act of 1918, Pub. L. No. 65–150, ch. 75, § 3, 40 Stat. 553, 553 (1918) (providing for the punishment of war dissenters) *with, e.g.*, 3 RCMB, *supra* note 53, at 115–16 (containing the text of An Order Against Quakers).

<sup>143</sup>*See, e.g.*, SIBLEY, *supra* note 125, at 168–69 (discussing the espionage work of Klaus Fuchs and Ted Hall at Los Alamos during the Manhattan Project for the Soviet Union).

<sup>144</sup>*See* HENRY DE BRACON, 2 BRACON ON THE LAWS AND CUSTOMS OF ENGLAND 334–37 (Samuel E. Thorne, Trans., 1977) (c. 1265) (describing the crime of lese-majesty, or contemplating the death of the King).

<sup>145</sup>MODEL PENAL CODE, §2.01 (AM. LAW INST., Proposed Official Draft 1962).

<sup>146</sup>*See* *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes dissent) (criticizing the Majority for upholding the conviction based on the publication of a manifesto saying; “It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. . . . The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result.”).

<sup>147</sup>JAMES MORTON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 22–23, 95–96 (Cornell Paperbacks, 1966).

society.<sup>148</sup> Witch-hunts may even seem to be linked to suspect classifications—to target individuals based on their race, sex, or national origin.<sup>149</sup>

For example, racially motivated investigations and prosecutions can be especially hard to distinguish from true witch-hunts because they also improperly deploy the criminal legal system to target a specific group of persons, often via the creation of new laws.<sup>150</sup> Some authors have explicitly sought to associate witch-hunts with racism on the grounds that both signal the downfall of rational thought in favor of folk beliefs.<sup>151</sup> While racially motivated laws or legal campaigns and witch-hunts display clear parallels—including, often, deficiencies in due process, violations of equal protection, the targeting of a group because of “who they are,” and the subversion of the criminal legal system—they also exhibited salient differences.<sup>152</sup>

Racial campaigns target individuals on the basis of what is (widely perceived in the United States to be)<sup>153</sup> an immutable and self-evident characteristic.<sup>154</sup> Witch-hunts target the unseen: ideological positions. The Supreme Court has been hesitant to strike down laws because they target unpopular ideologies.<sup>155</sup> This is not to say that ideology is unimportant—as will be discussed in Section IV, the way to prevent witch-hunts is to provide searching scrutiny to laws that target persons on the basis of beliefs—but that

<sup>148</sup>See DAVID LIVINGSTON SMITH, *LESS THAN HUMAN: WHY WE Demean, ENslave, AND EXTERMINATE OTHERS* 130–32 (2011) (discussing the common tactic to dehumanize enemies during war and to promote genocide); see also John Felipe Acevedo, *Restoring Community Dignity Following Police Misconduct*, 59 HOWARD L.J. 621, 630–631 (2016) [hereinafter Acevedo, *Restoring Community*] (providing the example of the dehumanization of criminals in contemporary America as a way to justify increased punishments).

<sup>149</sup>See *United States v. Carolene Products*, 404 U.S. 144, 153 n. 4 (1934) (providing the first articulating of the belief that laws that target discrete and insular minorities may need to be subjected to heightened scrutiny).

<sup>150</sup>See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 52–54 (rev. ed. 2011) (discussing the passing of new laws to battle the crack epidemic of the mid-1980s).

<sup>151</sup>KAREN E. FIELDS & BARBARA J. FIELDS, *RACECRAFT: THE SOUL OF INEQUITY IN AMERICAN LIFE* 5–6 (Verso 2014).

<sup>152</sup>See, e.g., ZINN, *supra* note 86, at 416 (describing the internment of Japanese Americans during World War II without any criminal charges being filed against them or due process being followed); see also, e.g., JOHN HOPE FRANKLIN & ALFRED A. MOSS JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 312–313 (7<sup>th</sup> ed. 1994) (describing the illegal killings of African American persons of both genders and all ages as part of the system of punishment of the United States).

<sup>153</sup>*But see* FRANZ BOAS, *ANTHROPOLOGY AND MODERN LIFE* 18–61 (Dover 1986) (1928) (asserting that there are not certain biological differences between races sufficient to accurately classify and thus race is a social construction).

<sup>154</sup>See JODY ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 19–20 (1997) (describing the reasonable racist as asserting that although their “belief that Blacks are ‘prone to violence’ stems primarily from racism...” that it is reasonable because most Americans would agree with the belief).

<sup>155</sup>*U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) (holding unconstitutional a law designed to target hippies on grounds that it discriminated against the right to keep the family together).

it is widely seen as less in need of legal protection.<sup>156</sup> Conversely, the Court has extended heightened scrutiny to race,<sup>157</sup> national origin,<sup>158</sup> alienage at the state level,<sup>159</sup> legitimacy,<sup>160</sup> and gender.<sup>161</sup>

More significantly, unlike witch-hunts, racial campaigns build on a social and legal foundation that once explicitly validated the distinct and harsher treatment of individuals because of their race.<sup>162</sup> The perpetuation of slavery by the Constitution ensured that race has continued to be a defining issue of America.<sup>163</sup> Institutional racism was not only upheld by the Court, but actually expanded from slaves to freemen.<sup>164</sup> Indeed even after the abolition of slavery, segregation laws perpetuated inequality and racism with the full support of the Court.<sup>165</sup> Even though the Court has repudiated *de jure* segregation,<sup>166</sup> the legacy of its past legal sanctioning remains, making race a uniquely difficult issue in American law and society.<sup>167</sup>

For these reasons, racial campaigns, although they often appear to be witch-hunts because of the manifest sense of unfairness that characterizes

<sup>156</sup> *But see* United States v. Carolene Products, 404 U.S. 144, 153 n.4 (1934) (including both political organizations and religious groups among the list of discrete and insular minorities).

<sup>157</sup> *See generally* Korematsu v. United States, 323 U.S. 214 (1944), overruled by Trump v. Hawaii, 138 S.Ct. 2392 (2018). (Korematsu was the first case to articulate that laws which single out a single racial group are immediately suspect, but Justice Black went on to uphold the law as a military necessity during a time of war).

<sup>158</sup> *See, e.g.*, Oyama v. California, 332 U.S. 633, 647 (1948) (applying strict scrutiny to a law prohibiting the gift of land by a person who cannot be naturalized due to Japanese origin).

<sup>159</sup> *See* Graham v. Richardson, 403 U.S. 365, 381–83 (1971) (applying strict scrutiny review to invalidate an Arizona law that limited welfare benefits to persons who had been citizenship for 15 years).

<sup>160</sup> *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 658 (1972) (applying heightened scrutiny to invalidate an Illinois law that assumed fathers were not fit caregivers of children born out of wedlock).

<sup>161</sup> *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (holding that gender was an immutable characteristic and that there had been a long history of discrimination against women then applied strict scrutiny to strike down an Armed Forces regulation regarding the demonstration of spousal need); *But see* United States v. Virginia, 518 U.S. 515, 532–34 (1996) (applying intermediate scrutiny to strike down the State of Virginia's denial of admission to the Virginia Military Institute of female applicants and the insufficiency of an alternative program located at Mary Baldwin College, a state run university).

<sup>162</sup> *See* ERIC FONER, THE STORY OF AMERICAN FREEDOM 35–37 (1998) [hereinafter FONER, AMERICAN FREEDOM] (discussing the adoption of the Three-fifth Clause and Fugitive Slave Clauses as compromises made in order to secure passage of the Constitution).

<sup>163</sup> *See* PETER N. CARROLL & DAVID W. NOBBLE, THE FREE AND THE UNFREE: A NEW HISTORY OF THE UNITED STATES 129 (2<sup>nd</sup> ed. 1988) (asserting that by perpetuating slavery and leaving suffrage limitations in state hands the Constitution ensured the continuation of white male political power).

<sup>164</sup> *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (stating that African-Americans, "...had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that [they] might justly and lawfully be reduced to slavery for his benefit.").

<sup>165</sup> *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW: A COMMEMORATIVE EDITION 22-25 (2002) (describing the implementation of Jim Crow segregation in the South often with the tacit approval of Union officials during Reconstruction); *see also* Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding the Louisiana Separate Car Act, which mandated separate railway cars on the basis of race).

<sup>166</sup> *See, e.g.*, Brown v. Board of Education, 347 U.S. 483, 495 (1954) (holding that separate is inherently unequal).

<sup>167</sup> ARMOUR, *supra* note 154, at 19-20.

them, are distinct. Perhaps the most blatant, but difficult to distinguish, example of this difference is the Japanese internment during World War II and the Supreme Court's decision in *Korematsu v. United States* that affirmed its constitutionality.<sup>168</sup> The hysteria surrounding Japanese-Americans began immediately after the attack on Pearl Harbor and revolved around the belief that most, if not all, persons of Japanese descent were still loyal to the Empire of Japan; in this instance the ideology targeted was national loyalty.<sup>169</sup> This fantasy of disloyalty was combined with an equally unrealistic fantasy of imminent attack, as evidenced by the so called "Battle of Los Angeles," which saw military units fire at phantom Japanese airplanes.<sup>170</sup> As with the Red Scare, it is true that a handful of Japanese living in America did act as spies for the Empire of Japan, but they were primarily employees of the Japanese consulate in Hawaii.<sup>171</sup> As in the Red Scare and Quaker-hunts, the actions of this subset of the targeted community were attributed to the entire group and resulted in unfair targeting by the government.<sup>172</sup>

What makes the Japanese internment an unusual case is that the ideology targeted—loyalty to the Emperor of Japan—was almost solely based on the racist belief that persons of Japanese descent could *never* be loyal Americans.<sup>173</sup> In this event racism and witch-hunting merged—and approximately 110,000 persons were incarcerated without trial.<sup>174</sup> The interplay between race and ideology can be seen in *Korematsu*, wherein the Court equated internment with the imposition of a curfew because the loyalty of Japanese-Americans could not easily be established.<sup>175</sup> In contrast the

<sup>168</sup> See ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 115 (1997); see also generally *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>169</sup> *Id.* at 117–21 (describing the hysteria against Japanese-Americans in California and other western states in the months after the Pearl Harbor attack).

<sup>170</sup> See Lorraine Boissoneault, *The Great Los Angeles Air Raid Terrified Citizens—Even Though No Bombs were Dropped*, SMITHSONIAN.COM (Jan. 19, 2018) (attributing the false air raid to war jitters caused by the bombing of Pearl Harbor and the subsequent shelling of the Ellwood oilfield just north of the city two days before as contributing causes to the incident. Also, noting that the false air raid resulted in five deaths from car accidents and heart attacks caused by the incident and the ensuing blackout it caused).

<sup>171</sup> GORDON W. PRANGE, AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR, 50<sup>TH</sup> ANNIVERSARY EDITION 70–77, 309–12 (Penguin, 1991) (providing a brief history of Japanese and German spying in Pearl Harbor in the period before the Japanese air raid).

<sup>172</sup> See, e.g., MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 52 (2012) (stating that the internment of Japanese during World War II by President Roosevelt was a mass incursion on civil rights as it deprived the internees any chance to challenge their imprisonment).

<sup>173</sup> PRANGE, *supra* note 171, at 309–12 (noting that there were German-Americans employed by the Japanese for spying in Hawaii before the attack on Pearl Harbor); see also CRAY, *supra* note 168, at 115 (describing how in the days following Pearl Harbor the initial response by the government was to only target those German, Japanese, and Italians in America who had previously been flagged as security risks).

<sup>174</sup> ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II, REVISED EDITION 16–17 (2004) (providing the total population of Japanese Americans in 1940 at 126,947 and estimating that 113,000 lived on the West Coast).

<sup>175</sup> *Korematsu v. United States*, 323 U.S. 214, 218–19 (1944), *overruled by Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018).

dissent saw no ideology at play, just racism.<sup>176</sup> This degree of conflation between race and ideology was reminiscent of the First Red Scare that equated immigrants with anarchism. In general, calling race campaigns witch-hunts does them a disservice because it obscures the deep history of race discord in America. The role of race in connection to crime panics will come in for discussion in Section II(d).

### III. CRIME PANICS

Fortunately, true witch-hunts are now rare occurrences. Crime panics, on the other hand, are not. American history is littered with instances where the public becomes fixated on a particular type of criminal activity. The fixation results in unfair trials because of existing flaws in criminal procedure or because of new flaws resulting from attempts to crack down on criminal behavior that now seems even more loathsome than before. Put differently, in a crime panic the defendant may be guilty of the underlying legitimately criminalized activity, but deep flaws mar the procedural process by which society brings the malefactor to justice.

As the name suggests, the concept of a crime panic draws on the well-established sociological concept of a “moral panic,” in which the media drives society into a state of frenzied obsession of a perceived threat.<sup>177</sup> The concept of moral panics has been applied to a wide range of cultural phenomena including folk-devils,<sup>178</sup> muggings,<sup>179</sup> and even climate change.<sup>180</sup> Both crime panics and moral panics connote a sense that the

<sup>176</sup>*Id.* at 240 (Murphy, J., dissenting) (stating, “to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group..., this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy”).

<sup>177</sup>See SARAH WRIGHT MONOD, *MAKING SENSE OF MORAL PANICS: A FRAMEWORK FOR RESEARCH* 1–3 (2017) (noting that the concept of moral panic developed in the United Kingdom during a period when the relationship between the media, the state and those termed deviants was being examined by criminologists and sociologists); see also STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 1 (Routledge Classics 2011) (defining a moral panic as, “a condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible”).

<sup>178</sup>Rajesh Venugopal, *Demonic Violence and Moral Panic in Postwar Sri Lanka: Explaining the Grease Devil Crisis*, 74 J. ASIAN STUD. 615, 618 (2015) (describing the grease devil, a hairy or dark man from Sri Lankan folklore who is supposed to scratch and peep at women of all ages at night, as an example of a crime panic brought on by post-war tensions).

<sup>179</sup>See e.g., P.A.J. Waddington, *Mugging as a Moral Panic: A Question of Proportion*, 37 BRIT. J. SOC. 245, 245–47 (1986) (questioning the work of earlier sociologists who described an increase in reports of mugging in the 1970s as being a moral panic because the police were legitimately reacting to an increase in crime).

<sup>180</sup>Amanda Rohloff, *Extending the Concept of Moral Panic; Elias, Climate Change and Civilization*, 45 SOC. 634, 634–36 (2011) (using the example of climate change to assert that moral panics can be justified reaction to problems).



public, the media, and the state have responded disproportionately to some social development.<sup>181</sup>

However, crime panics stand apart from moral panics in at least two key ways. First, they constitute a much narrower subset of events: crime panics necessarily involve criminal prosecutions and do not extend to popular, *extra-judicial* concerns about ostensibly harmful societal trends.<sup>182</sup> Second, crime panics can be instigated by a variety of actors, whereas moral panics are widely considered to be the product of actions by the media.<sup>183</sup> In short, the key feature of a crime panic is a fantasy that a certain type of criminal activity is rampant and not the origin of the panic. The Salem witchcraft trials and the Satanic Panic centered on child sex abuse are prime examples of crime panics.

### A. Salem

The Salem witchcraft trials occupy a unique place in American legal history and are virtually synonymous with wrongful prosecution.<sup>184</sup> Implicated in this interpretation is the belief that witchcraft was simply a cover to promote other social ends or vent community prejudices.<sup>185</sup> The Enlightenment and growing focus on verifiable facts in the eighteenth and nineteenth centuries not only eroded the practice of trying witches in Europe, but also hinders our ability to understand the world of seventeenth-century Massachusetts.<sup>186</sup>

Calling the Salem trials a crime panic rather than a witch-hunt may seem counterintuitive. However, Salem fits each of the elements of a crime panic. First, Salem was clearly a fixation on one type of existing criminal behavior by the criminal system.<sup>187</sup> It was furthered by persons of influence—the ministers Samuel Parris and, later, Cotton Mather. Finally, it resulted in

<sup>181</sup>COHEN, *supra* note 177, at xxxiv-xxxv.

<sup>182</sup>*See, e.g., Id.* at 12–14 (describing the Mods and Rockers phenomenon of 1960s England as being associated with groups of youths who were known for “chasing across the beach, brandishing deckchairs over their heads, running along the pavements, riding on scooters or bikes down the streets, sleeping on beaches and so on.”).

<sup>183</sup>The moral panic literature focuses on the role of the media in creating and perpetuating moral panics. *See, e.g.,* COHEN, *supra* note 178, at xxviii-xxx (describing the original linking of media to moral panics in his work and noting that it is becoming more pervasive in the realm of crime and panics); *see also, e.g.,* PALLADINO, *supra* note 15, at 159–62 (noting that the media hyped juvenile delinquency stories to sell newspapers and blamed Hollywood for teens rioting – putting their feet up and dancing in movie theaters).

<sup>184</sup>*See, e.g.,* PETER CHARLES HOFFER, *THE SALEM WITCHCRAFT TRIALS: A LEGAL HISTORY* 7 (1997) (asserting that the trials were seen as unfair within decades of their ending).

<sup>185</sup>*See, e.g.,* LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* 61 (2006).

<sup>186</sup>Brian P. Levack, *The Decline and End of Witchcraft Prosecutions*, in *WITCHCRAFT AND MAGIC IN EUROPE: THE EIGHTEENTH AND NINETEENTH CENTURIES* 33-34 (Bengt Ankarloo & Stuart Clark eds., 1999); *see also* LORRAINE DASTON & PETER GALISON, *OBJECTIVITY* 27–29 (2011) (citing the rise of objectivity in the mid-nineteenth century and the subsequent rise in a belief in a reality independent of human observation).

<sup>187</sup>*See* Acevedo, Harsh Mercy, *supra* note 44, at 208–09 and 344 (describing that very few trials were conducted in the wake of the Glorious Revolution and focused on piracy in addition to witchcraft).

unfair trials because of existing flaws in criminal procedure. When we ignore these elements and call Salem a witch-hunt we lose the ability to properly understand the true legal lessons of the trials.

In order to understand the Salem trials, it must be accepted that witchcraft existed for the people in the seventeenth century and was an action that was seen as morally reprehensible enough to criminalize.<sup>188</sup> That is, there was no ideology of witchcraft—everyone believed in the devil—but merely a practice of witchcraft that centered on communing with the devil to secure an unfair advantage over one’s rivals.<sup>189</sup> More importantly there was no separate religion of witches; instead they were persons who “hath conference with the devill, to consult with him or to do some act.”<sup>190</sup> The belief that Salem was a witch-hunt is heightened by the emergence of Wicca and other witchcraft based religions, which both claim a heritage to older European folk practices and deem the events of Salem as a persecution of their people.<sup>191</sup> In the seventeenth century, witchcraft was simply “...a crime and thus like other crimes was a deed or ‘matter of fact’ to be proved in court to the satisfaction of a jury.”<sup>192</sup> To be clear, if laws were passed today that explicitly targeted the practitioners of witchcraft, Wiccans, they would of course violate the Free Exercise Clause.<sup>193</sup>

The common law of England was a late entrant into the criminalization of witchcraft among European legal systems: the first act criminalizing witchcraft passed in the reign of Henry VIII.<sup>194</sup> Early in his reign, James I

<sup>188</sup> The actions that were criminalized as witchcraft can still be performed today. It is just that we no longer believe they are likely to have any negative effect on society and therefore do not bother to criminalize them. See generally RAYMOND BUCKLAND, *BUCKLAND’S COMPLETE BOOK OF WITCHCRAFT, REVISED & EXPANDED* (2nd ed. 2007) (providing an introductory book on the casting of spells and other witchcraft related activities for modern practitioners).

<sup>189</sup> But see GERALD B. GARDNER, *WITCHCRAFT TODAY* 35–36 (Margaret A. Murray *Intro.*, 1954) (approving, in her introduction, of Gardner’s belief that the witchcraft rituals he discovered being practiced in the early twentieth century were remnants of medieval practices that had been suppressed); GERALD B. GARDNER, *THE MEANING OF WITCHCRAFT* 9 (1959) (citing to Murray as the primary academic proponent of the theory that modern witchcraft practices are remnants of pre-Christian pagan practices).

<sup>190</sup> EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES* 43 (Law Book Exchange, 18<sup>th</sup> ed. 2012) (1817); see also MIRCEA ELIADE, *Some Observations on European Witchcraft*, in 14 *HISTORY OF RELIGIONS* 164–65 (1976) (asserting that forms of witchcraft have always been practiced in Europe, but denying it was a coherent religion); but see generally MARGARET ALICE MURRAY, *THE GOD OF THE WITCHES* (Oxford Univ. Press 1952) (1931) (asserting the interesting thesis that modern witchcraft is a remnant of the ‘Old Religion’ of the horned god from pagan Europe, which survived the persecutions of the Christian Church).

<sup>191</sup> See MURRAY, *GOD OF THE WITCHES*, *supra* note 190, at 21.

<sup>192</sup> BARBARA J. SHAPIRO, *A CULTURE OF FACT: ENGLAND, 1550–1720*, at 179 (2000).

<sup>193</sup> See generally *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (recognizing Santeria as a religion within the scope of First Amendment protection).

<sup>194</sup> *Bill Agerst Conuracions & Wichcraftes and Sorcery and Enchantments*, 33 Hen. 8 c. 8, 9 (Eng.); see also JAMES FITZJAMES STEPHEN, *2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 410 (MacMillan and Co., 1883) (“No doubt the reason is that certain kinds of witchcraft were made felony in 1542 by 33 Hen. 8 c. 8...”); but see FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 555 (Lawyers’ Literary Club, 2<sup>nd</sup> ed. 1959) (stating that

was particularly interested in witchcraft and other occult practices, which coincided with a general increase in the interest in witchcraft and the occult in English popular culture.<sup>195</sup> Like many people of his time, James believed that the source of a magician's or witch's power came from a contract entered into between them and the devil.<sup>196</sup> In other words, witchcraft was not an ideology, but an action—as Edward Coke stated, a witch was, “a person that hath conference with the devill, to consult with him or to do some act.”<sup>197</sup> There seems to have been little controversy in witchcraft being a capital offense.<sup>198</sup> The key change in the law implemented under James I was the imposition of a death sentence without benefit of clergy for the practice of witchcraft that results in any physical harm to another person as opposed to capital punishment only being applied in cases of death under Elizabeth's statute.<sup>199</sup> This is not to say that the colonists had not criminalized witchcraft—far from it, both of their criminal codes, the *Laws and Liberties* and *Body of Liberties*, criminalized the practice.<sup>200</sup> It is clear that on both sides of the Atlantic, witchcraft was seen as a criminal act that could be detected and prosecuted.

Against this background—where belief in witchcraft was part of ordinary religion, where witchcraft itself was seen as an act (indeed, as a contract) and where criminalizing that act was unproblematic—the well-known events of the Salem trials acquire a new quality.<sup>201</sup> In January 1692, Abigail Williams

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Henry IV empowered the bishop of Norwich to arrest witches and try them. They also claim that witches could be prosecuted under the anti-heresy laws before the reign of Henry VIII).

<sup>195</sup>G.M. TREVELYAN, *ENGLAND UNDER THE STUARTS* 28–31 (2002) (attributing this interest the influence of continental thought that permeated Scotland and thus James); see also GEORGE LYMAN KITTREDGE, *WITCHCRAFT IN OLD AND NEW ENGLAND* 276–79 (1956); see, e.g., William Shakespeare, *Macbeth*, in *THE ARDEN SHAKESPEARE, REVISED EDITION* 773 (Kenneth Muir ed., 2001) (linking, in the introduction, the play to King James I due to James's tracing of his lineage to Thane Banquo and the king's interest in witchcraft); see also VANESSA MCMAHON, *MURDER IN SHAKESPEARE'S ENGLAND* 111 (2005) (stating that witchcraft was a preoccupation of early modern persons, especially as it was seen to give power to the normally powerless and was intriguing given its association with secretiveness and femininity).

<sup>196</sup>JAMES I OF ENGLAND, *DÆMONOLOGY: INCLUDES NEWS FROM SCOTLAND ON THE DEATH OF A NOTABLE SORCERER* 19–23 (G.B. Harrison ed., The Book Tree, 2002) (1597).

<sup>197</sup>Coke, *supra* note 190, at 43.

<sup>198</sup>See, e.g., WILLIAM PERKINS, *A DISCOURSE OF THE DAMNED ART OF WITCHCRAFT; SO FARRE FORTH AS IT IS REVEALED IN THE SCRIPTURES, AND MANIFEST BY TRUE EXPERIENCE* 181–84 (1610) (the pagination is misprinted in this edition so that the page referred to reads 168, but is the 181<sup>st</sup> page, all other pagination as in original) (defending death for convicted witches based both on biblical references and on the belief that witchcraft represents the convicted persons rebelling against God).

<sup>199</sup>1 Jac. 1 c. 12 (Eng.).

<sup>200</sup>*LAWS AND LIBERTIES*, Liberty 94 (1642) (stating, “If any man or woman be a witch, (that is hath or consulteth with a familiar spirit,) They shall be put to death.” And, providing justification for the execution of witches in Exodus 22.18, Leviticus 20.27, and Deuteronomy 18.10); see also *BODY OF LIBERTIES, Capital Laws* (1648) (stating, “if any man or woman be a WITCH, that is, hath or consulteth with a familiar spirit, they shall be put to death.” And also providing justification for the execution of witches in Exodus 22.20, Leviticus 20.27, and Deuteronomy 18.10.11)(emphasis in the original).

<sup>201</sup>See KEITH THOMAS, *RELIGION AND THE DECLINE OF MAGIC* 469–71 (1971) (asserting that the belief in witchcraft was dependent on a personal devil, which was promoted by Christianity both before and after the Reformation).

and her cousin Betty Parris fell ill with strange fits and convulsions.<sup>202</sup> Betty's father, the minister Samuel Parris, called doctor William Griggs to determine what illness the girls had. Finding no physical illness, Parris decided on fasting and prayer as the best remedies. A neighbor believed that there might be witchcraft afoot, so she instructed the Parrises' slaves to make a witch's cake and feed it to the family dog to discover the identity of the witches.<sup>203</sup> The girls cried out that it was Tituba, the family's Amerindian slave, who was bewitching them.<sup>204</sup> In a few weeks' time, the number of afflicted women would grow to seven, adding Ann Putnam, Mercy Lewis, Elizabeth Harris, Mary Walcott, and Mary Warren.<sup>205</sup>

The path towards trials was set when, in early February, the girls also named Sarah Osborne and Sarah Good as witches in addition to re-accusing Tituba.<sup>206</sup> In early March the town magistrates interrogated the three women, and Tituba confessed to being a witch and seeing Osborn and Good harm the children, thus giving credence to the girls' accusations.<sup>207</sup> The girls continued to implicate other people.<sup>208</sup> The number of imprisoned persons grew, but with the new charter having just arrived, no courts had been set up yet to handle the cases. On May 27<sup>th</sup> Governor Phips created a court of *oyer and terminer* to handle the witchcraft cases; that court has become popularly known as the Salem Witch Court.<sup>209</sup> By the time the trials were over, 156 persons were accused, 30 convicted, and 19 executed.<sup>210</sup>

At first glance, the Salem trials do not appear to fit the second element of a crime panic—being started or furthered by a person with influence. Indeed, the initial accusers were among the least powerful persons in the colony, young women.<sup>211</sup> In addition, they were initially substantiated by a member of the least powerful group, Tituba, an Amerindian slave.<sup>212</sup>

<sup>202</sup>MARY BETH NORTON, *IN THE DEVIL'S SNARE: THE SALEM WITCHCRAFT CRISIS OF 1692*, at 18 (2002).

<sup>203</sup>*Id.* at 19-20 (describing a witches' cake as made by combining the urine from the afflicted person with rye and baking it in the ashes of the fire. It is then fed to either the afflicted person, suspected witch or any creature, in this case the family dog, according to the varying beliefs).

<sup>204</sup>*Id.* at 20.

<sup>205</sup>HOFFER, *supra* note 184, at 47.

<sup>206</sup>NORTON, *supra* note 202, at 22.

<sup>207</sup>*Id.*, at 28.

<sup>208</sup>HOFFER, *supra* note 184, at 51-53.

<sup>209</sup>*Id.* at 71; *see also* EMORY WASHBURN, *SKETCHES OF THE JUDICIAL HISTORY OF MASSACHUSETTS: FROM 1630 TO THE REVOLUTION IN 1776*, at 141 (1840) (describing the court's composition of seven judges as Stoughton, John Richards, Bartholomew Gedney, Wait Winthrop, Samuel Sewall, Peter Sergeant, and Nathaniel Saltonstal replaced by Jonathan Curwin after the first case).

<sup>210</sup>RICHARD GODBEER, *THE DEVIL'S DOMINION: MAGIC AND RELIGION IN EARLY NEW ENGLAND* 238-42 (1994).

<sup>211</sup>*See* NANCY WOLOCH, *WOMEN AND THE AMERICAN EXPERIENCE* 44 (2<sup>d</sup> ed. 1994) (asserting that the trials themselves gave these women the opportunity to assert power).

<sup>212</sup>ELAINE G. BRESLAW, *TITUBA RELUCTANT WITCH OF SALEM: DEVILISH INDIANS AND PURITAN FANTASIES* 58 (1996) (describing Tituba's enslavement and treatment in New England).

However, their accusations were approved and spread by the colony's leaders; indeed, the town's minister was the father of the first afflicted girl.<sup>213</sup>

The procedural problems exposed during the Salem trials included a lack of defense counsel, torture, and various evidentiary deficiencies. Under the common law of England, defendants charged with felonies—including witchcraft—were not allowed the right of the assistance of counsel.<sup>214</sup> The rationale for the prohibition was that trials should be so fair that counsel was not needed, and if counsel was needed, then the court itself would act as counsel.<sup>215</sup> The colonists of Massachusetts experimented with allowing defense counsel, but the practice never gained wide support.<sup>216</sup> The Colony's laws were removed with the merging of Massachusetts with other nearby colonies during the Dominion of New England and were not re-established by the time of the Salem Trials.<sup>217</sup> Therefore the accused at Salem, like all other felony defendants in Massachusetts and England, went to trial without access to defense counsel.

Some scholars have suggested that local authorities used torture to extract confessions from the accused at Salem.<sup>218</sup> But these accusations are questionable as no clear grounds for them appear in the colonial records and confessions did not necessarily lead to convictions.<sup>219</sup> Torture, if it did occur, would have been an anomaly since torture was not part of the normal common law system of adjudication and only rarely used in treason cases.<sup>220</sup> The colonists made a considerable effort to follow the common law procedures—for example they did not engage in “witch-dunking” (the dunking of suspects in water to determine guilt), which was not within the normal procedure of the common law.<sup>221</sup>

The pressing death of Giles Cory is often thought of as torture, but it was not: the goal was not to obtain information or a confession from him, but

<sup>213</sup>EMERSON W. BAKER, *A STORM OF WITCHCRAFT: THE SALEM TRIALS AND THE AMERICAN EXPERIENCE* 22 (2015) [hereinafter BAKER, *STORM OF WITCHCRAFT*].

<sup>214</sup>WILLIAM HAWKINS, *2 PLEAS OF THE CROWN* 352-353 (1978).

<sup>215</sup>COKE, *supra* note 190, at 137.

<sup>216</sup>John Felipe Acevedo, *Ideological Origins of the Right to Counsel*, 68 S.C. L. REV. 87, 111-14 (2017) [hereinafter Acevedo, *Ideological Origins*] (describing the colony's law and the case of James Ward who appears to have received the advice of counsel).

<sup>217</sup>FRANCIS J. BREMER, *THE PURITAN EXPERIMENT: NEW ENGLAND SOCIETY FROM BRADFORD TO EDWARDS 174-75* (rev. ed. 1995).

<sup>218</sup>ROBERT CALEF, *MORE WONDERS OF THE INVISIBLE WORLD* (1700), *reprinted in* NARRATIVES OF THE WITCHCRAFT CASES 1648-1706, at 363 (George Lincoln Burr ed. 1914) (citing to the claim made by John Procter that his son William Procter was tortured to confess).

<sup>219</sup>*See, e.g.*, RECORDS OF THE SALEM WITCH-HUNT 826-27 (Bernard Rosenthal ed., 2009) [hereinafter RECORDS OF THE SALEM WITCH-HUNT] (describing the cases of Mary and William Baker, who both confessed but were found not guilty).

<sup>220</sup>*See* JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME, WITH A NEW PREFACE* 73-74 (1977) [hereinafter LANGBEIN, *TORTURE*].

<sup>221</sup>*Cf.* NARRATIVES OF THE WITCHCRAFT CASES, 1648-1706, at 441-42 (George Lincoln Burr ed., 1914) (introducing the 1706 case of Grace Sherwood in Norfolk County, Virginia during which Sherwood was dunked in an attempt to ascertain her guilt).

simply to induce him to enter a plea.<sup>222</sup> Pressing, or *peine forte et dure*,<sup>223</sup> became a feature of the common law because of the unusual adoption of the jury trial, which was never formally mandated but required defendants to put themselves before the jury.<sup>224</sup> If defendants refused to plead, or stood mute, then they could not be tried and could not be convicted.<sup>225</sup> The pressing of Cory clearly demonstrates the overzealousness of the magistrates during the Salem trials as no one, not even a Quaker who stood mute,<sup>226</sup> was previously pressed in Massachusetts Bay.<sup>227</sup> But it is not evidence of a witch-hunt because it did not constitute persecution in its day—it was standard criminal procedure.

In addition to problematic procedures, the Salem trials were littered with evidentiary deficiencies. The only universally agreed-upon proofs for the conviction of a witch were the accused's confession and the testimony of two eyewitnesses.<sup>228</sup> Conversely, the most controversial types of evidence were hearsay and spectral evidence—in which the victim saw a projection or specter of the witch afflicting them, although no one else did.<sup>229</sup> During the Salem trials, hearsay—including rumors, gossip, surmises and tales—was admitted as evidence to be considered by the judges.<sup>230</sup> Hearsay was routinely admitted in English criminal cases until the eighteenth century.<sup>231</sup> For example, in the case against Dorcas Hoar, a witness gave testimony about what her son had witnessed nine years before.<sup>232</sup> Spectral evidence was controversial at the time, and several commentators warned against its use,

<sup>222</sup> See LANGBEIN, TORTURE, *supra* note 220, at 74–77 (describing the general confusion of torture with *peine forte et dure*, a distinct practice permitted at common law which involved physical abuse).

<sup>223</sup> See J.H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 580–81 (3d. ed. 1990) [hereinafter BAKER, INTRODUCTION] (the term is law French for strong and hard punishment).

<sup>224</sup> See *id.* at 578–81 (describing pressing as a consequence of the jury system).

<sup>225</sup> See LANGBEIN, TORTURE, *supra* note 220, at 75–76 (describing the usual incentive for defendants to endure this process was in order to prevent the forfeiture of their property to the crown if they knew they would be convicted at a jury trial, since no trial would have taken place if they died while being pressed); see also DAVID THOMAS KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS, ESSEX COUNTY 1629–1692, at 174 (1979) (asserting that Cory's refusal to plead was an act of rebellion against the unjust proceedings of the court against him).

<sup>226</sup> See 4ii RCMB, *supra* note 53, at 20, 24 (describing the cases of Peter Pierson and Judah Broune, who both refused to enter a guilty plea but were tried anyway).

<sup>227</sup> See generally Acevedo, Harsh Mercy, *supra* note 44 (providing a survey of criminal cases from the founding of Massachusetts Bay through the Salem trials and noting the only cases of a defendant having refused to plea being those of Pierson and Broune).

<sup>228</sup> ROBERT FILMER, AN ADVERTISEMENT TO THE JURY-MEN OF ENGLAND TOUCHING WITCHES. TOGETHER WITH A DIFFERENCE BETWEEN AN ENGLISH AND HEBREW WITCH 12–14 (The Rota, 1975) (1653).

<sup>229</sup> BAKER, STORM OF WITCHCRAFT, *supra* note 213, at 27 (describing spectral evidence).

<sup>230</sup> HOFFER, *supra* note 184, at 75.

<sup>231</sup> BAKER, INTRODUCTION, *supra* note 223, at 582 (noting that there were virtually no rules of evidence until the 18<sup>th</sup> century).

<sup>232</sup> RECORDS OF THE SALEM WITCH-HUNT, *supra* note 219, at 592–93 (providing a transcript of the deposition provided by Mary Gage against Dorcas Hoar and other accused persons).

but it was not unheard-of.<sup>233</sup> The evidentiary flaws seen during Salem were systemic in the common law, but, as with pressing, zealous prosecutors led the magistrates to ignore warning signs.<sup>234</sup>

The Salem trials thus fit into all aspects of the *crime panic* model: fixation on the criminal behavior (witchcraft) furthered by persons with influence (Parris and Mather) that exacerbated flaws in criminal procedure (procedural and evidentiary rules). Many of the flaws in the criminal legal system that make Salem seem unfair to us today were addressed in whole or in part after the trials.<sup>235</sup> The Treason Trials Act of 1696 would allow criminal defendants the right to the assistance of counsel for the first time in England.<sup>236</sup> Similarly, hearsay began to be disallowed in criminal trials by the early eighteenth century,<sup>237</sup> and spectral evidence would never find use again.<sup>238</sup> The unfairness that is felt around the Salem trials is thus explainable in that we no longer believe in the crime and that the trials proceeded under a system that was proving unfair in even ordinary trials.

### B. *Satanic Panic*

Whereas the Salem trials focused on communications with the devil, the Satanic Panic of the 1980s and 1990s was concerned with the abuse of children in connection with satanic rites. Also unlike the Salem trials, which took place over a single period of two years, the “Satanic Panic” refers to a series of discrete yet interconnected events that stretched for nearly fifteen years.<sup>239</sup> Despite these superficial differences, the Satanic Panic has been similarly labeled a *witch-hunt* when it is in fact better understood as a *crime panic*.

Scholars have identified various causes for the Panic: an anti-pornography (especially anti-child pornography) campaign that came to

<sup>233</sup> See Jane Campbell Moriarty, *Wonders of the Invisible World: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials*, 26 VT. L. REV. 43, 58–60 (2001) (discussing the contradictory views on the reliability of spectral evidence among English commentators of the seventeenth century to show that the evidence, although used, was controversial at the time).

<sup>234</sup> KONIG, *supra* note 225, at 171–73 (1979) (asserting that the admission of spectral evidence can be attributed to the colonist’s use of the common law during the Salem trials as it had not been previously used in witchcraft trials in Massachusetts Bay).

<sup>235</sup> Acevedo, *Ideological Origins*, *supra* note 216, at 94 (discussing the Bloody Assizes following Monmouth’s Rebellion as an example of the unfairness of the defendant lacking access to counsel).

<sup>236</sup> See JOHN H. LANGBEIN, *ORIGINS OF ADVERSARY CRIMINAL TRIAL* 67–68 (A.W. Brian Simpson ed., 2003) [hereinafter LANGBEIN, *ORIGINS OF ADVERSARY*]; see also JOHN BEATTIE, *CRIME AND COURTS IN ENGLAND 1600–1800*, at 356–62 (1986).

<sup>237</sup> See JOHN HENRY WIGMORE, *TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES* §1364(4) (1904) (asserting that the earliest the rule could have been adopted was the 1680s as early eighteenth century treatises were still not firm on the general prohibition on hearsay).

<sup>238</sup> BAKER, *STORM OF WITCHCRAFT*, *supra* note 213, at 208.

<sup>239</sup> Stuart A. Wright, *Satanic Cults, Ritual Abuse, and Moral Panic: Deconstructing a Modern Witch-Hunt*, in *WITCHCRAFT AND MAGIC: CONTEMPORARY NORTH AMERICA* 120 (Helen A. Berger ed., 2005).

equate pornography with incest and abuse;<sup>240</sup> the rise, in the 1970s, of new religious movements and cult activities;<sup>241</sup> and a change in psychological analysis toward taking patient narratives at face value.<sup>242</sup> Whatever its cause, the Panic was enthusiastically spread by enterprising tabloid TV hosts looking for a ratings boost—Geraldo Rivera alone claimed one million Satanists practiced their art in America.<sup>243</sup>

The first major case of ritual sexual abuse was the McMartin pre-school trial, named for the school's owner, Virginia McMartin; it illustrates the pattern and problems of the Satanic Panic cases. "McMartin" lasted from 1983 to 1990 and cost over \$15 million, making it the longest and one of the most expensive criminal cases in American history.<sup>244</sup> The case began with just one accusation of sexual abuse centering on one child and one daycare employee, but it soon mushroomed to include numerous children accusing multiple pre-school staff.<sup>245</sup> The children's stories became more outlandish as the case developed, eventually incorporating accounts of animal killings, sexual rites, cannibalism, secret tunnels, pornography sessions, and exposure to corpses. As with Salem, the initial accusers "named names"—although in this case they were names of other victims—and those who were named helped to perpetuate the Panic in their efforts to please their investigators. Initially, many of the children denied that any abuse had occurred, but after persistent questioning by police and their parents they declared they had been abused and began to embellish their stories.<sup>246</sup> McMartin defendants were all acquitted or not retried after mistrials where the juries deadlocked.<sup>247</sup>

In fact, very little of the behavior in question during the Satanic Panic included anything satanic at all: much of the claims were imagined, and what was not imagined was usually a kernel of already criminalized conduct like child abuse.<sup>248</sup> A 1994 British report found that of the 232 cases of satanic ritual abuse said to have occurred in Britain during the same period as the

<sup>240</sup> See DEBBIE NATHAN & MICHAEL SNEDEKER, *SATAN'S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT* 39–41 (1995).

<sup>241</sup> See JEFFREY S. VICTOR, *SATANIC PANIC: THE CREATION OF A CONTEMPORARY LEGEND* 8–10 (1993).

<sup>242</sup> See RICHARD BECK, *WE BELIEVE THE CHILDREN: MORAL PANIC IN THE 1980S*, at 15–17 (2015) (tying the rise of taking what patients said seriously to the feminist challenge of Freud, which began in the 1970s).

<sup>243</sup> VICTOR, *supra* note 241, at 24–25, 32–33 (providing a timeline of events surrounding the Satanic Panic in both the United States and Jamestown, New York).

<sup>244</sup> *Id.* at 15–16.

<sup>245</sup> See NATHAN & SNEDEKER, *supra* note 240, at 67–74 (providing a brief account of the McMartin case).

<sup>246</sup> See Debbie Nathan, *Satanism and Child Molestation: Constructing the Ritual Abuse Scare*, in *THE SATANISM SCARE* 75–77 (James T. Richardson, Joel Best & David G. Bromley eds., 1991) [hereinafter Nathan] (describing some of the allegations made during the McMartin case); see also VICTOR, *supra* note 241, at 116–17 (describing the news media's publication of accounts).

<sup>247</sup> ROSS E. CHEIT, *THE WITCH-HUNT NARRATIVE: POLITICS, PSYCHOLOGY, AND THE SEXUAL ABUSE OF CHILDREN* 83–84 (2014).

<sup>248</sup> *Id.* at 115–17.



American Satanic Panic, only three had any evidence of actual ritual activity—that is, they involved masks, robes, or altars. In these three instances, the items had been used to frighten children into not reporting the abuse rather than as part of any satanic ritual.<sup>249</sup> Similarly, a comprehensive FBI investigation of the period 1981-1989 found no murders that could be attributed to satanic cults.<sup>250</sup> Indeed, even the claims of ritual abuse and animal sacrifices that were widespread during this period were completely unsubstantiated.<sup>251</sup> Recent studies have concluded that some cases of satanic sexual abuse *did* have actual sexual abuse at their core, but the satanic aspects of the accusations were embellishments.<sup>252</sup> More significantly, even this study found that in at least three instances wrongful convictions had resulted from children's accusations that they had been ritually abused.<sup>253</sup> That is, of course, three instances too many.

The primary failing of the Satanic Panic cases was their reliance on the unreliable testimony of children.<sup>254</sup> The accusations were not initiated by the police but by psychologists, social workers, and therapists who were attempting to use repressed memory treatments to search for trauma underlying certain pathological behaviors but who actually implanted false memories in their patients' minds.<sup>255</sup> Therapists, police, and prosecutors all ignored the preternatural elements of the stories while still trying to assert that the core allegations were true.<sup>256</sup> Even more surprising is that cases advanced to trial when the available physical evidence did not support the core claims of the purported victims. Tellingly the practice of intensive psychotherapy to recover repressed memories of abuse victims continued even after the Satanic Panic ebbed and despite the uniformly poor outcomes of the trials it involved. Whether or not these forms of treatment are good therapy is an open question, but they certainly make for bad witnesses.<sup>257</sup>

The Satanic Panic bears all the hallmarks of a crime panic. It centered on a fixation with one type of existing criminal behavior (child abuse), led by persons of influence (medical and therapy professionals), resulting in trials

<sup>249</sup>Owen Dyer, *Ritual Abuse Dismissed as Mythical in Britain*, 308 BRIT. MED. J. 1527, 1527 (1994).

<sup>250</sup>Wright, *supra* note 239, at 121; *see also* Daniel Coleman, *Proof Lacking for Ritual Abuse by Satanists*, N.Y. TIMES, Oct. 31, 1994, at 13 (citing a study by University of California at Davis researchers that found there was no evidence of satanic ritual abuse in 12,000 accusations of such abuse).

<sup>251</sup>Philip Jenkins & Daniel Maier-Katkin, *Occult Survivors: The Making of a Myth*, in THE SATANISM SCARE 127, 127-31 (James T. Richardson, Joel Best & David G. Bromley, eds., 1991).

<sup>252</sup>CHEIT, *supra* note 247, at 115-17 (challenging the work of earlier scholars who claimed that virtually all of the cases of ritual sexual abuse reported were fabrications).

<sup>253</sup>*Id.* at 116.

<sup>254</sup>*See, e.g.*, NATHAN & SNEDEKER, *supra* note 240, at 140-41 (describing the leading questions posed to children during sessions with therapists).

<sup>255</sup>Wright, *supra* note 239, at 123-24.

<sup>256</sup>*See* Robert D. Hicks, *The Police Model of Satanic Crime*, in THE SATANISM SCARE 176-77 (James T. Richardson, Joel Best & David G. Bromley eds., 1991) (describing the rise of the satanic crime model by police in order to detect crimes related to satanism and the occult).

<sup>257</sup>Sherrill Mulhern, *Satanism and Psychotherapy: A Rumor in Search of an Inquisition*, in THE SATANISM SCARE 165 (James T. Richardson, Joel Best & David G. Bromley eds., 1991).

that were markedly unfair because of existing flaws in criminal procedure law (the use of unreliable child testimony). Let us now consider some of these flaws, which—unlike some of the core procedural errors of the Salem trials—remain with us today. Importantly, and like the Mueller investigation discussed below, the Satanic Panic was not actually concerned with criminalizing beliefs or, more specifically, with creating new laws in order to target a particular ideology.

### C. *The Mueller Investigation*

On May 17, 2017, Deputy Attorney General Rod Rosenstein appointed Robert S. Mueller III as Special Prosecutor with a mandate to investigate, “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump.”<sup>258</sup> A host of investigators are, in fact, conducting several ongoing investigations, including one regarding campaign finance violations in relation to payments to Stormy Daniels<sup>259</sup> and another concerning irregularities with the Inauguration Committee,<sup>260</sup> but the focus of this section will be on the Special Prosecutor’s actions.

Mueller’s investigation has focused on possible coordination between Russian operatives and members of the Trump campaign to release Democratic emails via Wikileaks.<sup>261</sup> In particular, the investigation has centered on a meeting that was held at Trump Tower in June 2016 between campaign members and suspected Russian operatives.<sup>262</sup> By the end of 2018, the investigation had resulted in four individuals being sentenced to prison, one trial conviction, seven guilty pleas, and thirty-six indictments.<sup>263</sup> One of these indictments—that of Roger Stone, President Trump’s campaign chairman—suggests that there is direct evidence that Stone coordinated the

<sup>258</sup>Dep’t of Just., *Appointment of Special Counsel*, Order No. 3915-2017 (2017).

<sup>259</sup>Rick Newman, *Trump Struggled to Pay Stormy Daniels Hush Money*, YAHOO! FIN. (Feb. 27, 2019), <https://finance.yahoo.com/news/trump-struggled-to-pay-stormy-daniels-hush-money-175045593.html>; see also Michael D. Shear, *Testimony From Cohen Could Create New Legal Issues for Trump*, N.Y. TIMES, Feb. 27, 2019 (describing Michael Cohen’s testimony during which he revealed checks that he claims were from Donald Trump to help pay for Stormy Daniels’ hush money).

<sup>260</sup>Eliza Newlin Carney, *Trump’s Inaugural Was a Hot Mess from the Start, and Now it Puts Him in Legal Peril*, AMER. PROSPECT (Feb. 14, 2019), <https://prospect.org/article/trumps-inaugural-was-hot-mess-start-and-now-it-puts-him-legal-peril> (describing the alleged violations of laws during the planning and paying for the 2017 inauguration as the raising of \$106.7 million was not properly documented).

<sup>261</sup>Aaron Blakc, *What Roger Stone’s Indictment Means for Collusion*, WASH. POST (Jan. 25, 2019), [https://www.washingtonpost.com/politics/2019/01/25/roger-stones-indictment-thickens-russia-collusion-plot/?utm\\_term=.b80fa421b7a4](https://www.washingtonpost.com/politics/2019/01/25/roger-stones-indictment-thickens-russia-collusion-plot/?utm_term=.b80fa421b7a4).

<sup>262</sup>Abigail Simon, *What we Know about the Controversial 2016 Trump Tower Meeting with Russian Officials*, TIME MAG. (Jan. 27, 2018), <http://time.com/5351648/2016-trump-tower-meeting-facts/>

<sup>263</sup>Marshall Cohen & Tal Yelin, *What 2018 Looked Like for the Mueller Investigation*, CNN.COM (Dec. 17, 2018), <https://www.cnn.com/interactive/2018/politics/mueller-investigation-year-in-review/index.html> (describing the events of 2018).

release of the emails, although it is still unclear what the President knew or when he knew it.<sup>264</sup>

President Trump has frequently used the term *witch-hunt* to characterize the Mueller investigation.<sup>265</sup> In fact, and perhaps in response to his choice of terms, the use of *witch-hunt* in media coverage—even in coverage that is critical of the President<sup>266</sup>—is a frequent occurrence.<sup>267</sup> There is more than some irony that the President cries “witch-hunt” about the legitimate probe into his campaign even as he attempts to instigate a crime panic surrounding undocumented immigrants in America.<sup>268</sup>

This does not mean, of course, that *all* of the complaints he has raised about the Special Prosecutor’s process are without merit.<sup>269</sup> The primary criticism President Trump and his administration raises has to do with a valid and generalizable problem with our criminal law system: the flipping of co-conspirators as part of striking a plea bargain.<sup>270</sup> This defect parallels some of the procedural flaws exacerbated by the Salem trials and Satanic Panic but, as we shall see, it does not mean that the Mueller investigation is a crime panic—nor, as the President would have it, is the investigation a witch-hunt. It is neither.

The use of co-conspirator testimony introduces unreliable evidence into criminal investigations just as the use of spectral evidence compromised the Salem trials and child testimony weakened the trials of the Satanic Panic. Prosecutors in the American system are under immense pressure to reach plea

<sup>264</sup>Katelyn Polantz, *Special Counsel Prosecutors Say They have Communications of Stone with Wikileaks*, CNN.COM (Feb. 16, 2019), <https://www.cnn.com/2019/02/15/politics/roger-stone-wikileaks/index.html>.

<sup>265</sup>Susan B. Glasser, “*This is Not a Normal Time: Trump and the Rapidly Expanding ‘Witch Hunt,’*” NEW YORKER (Dec. 14, 2008) (discussing the investigation and Trump’s calling it a witch-hunt).

<sup>266</sup>Michael Burke, *Former Acting Solicitor General: If Mueller Investigation is a Witch Hunt He’s ‘Found a Covenant,’* THE HILL (Feb. 24, 2019), <https://thehill.com/homenews/sunday-talk-shows/431318-former-acting-solicitor-general-if-mueller-investigation-is-a> (describing former Solicitor General Neal Katyal’s comments on NBC’s *Meet the Press* about the Mueller investigation).

<sup>267</sup>Will Sommer, *Hocus POTUS: Witches to Trump: Stop Calling the Mueller Investigation a ‘Witch Hunt,’* THE DAILY BEAST (Dec. 17, 2018), <https://www.thedailybeast.com/witches-to-trump-stop-calling-the-mueller-investigation-a-witch-hunt> (asserting that trump has called the Mueller Investigation a witch-hunt at least sixty times as of the date of the publication).

<sup>268</sup>Janell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, WASH. POST (Oct. 20, 2016) (providing an overview of the opening speech of President Trump’s 2016 campaign in which he claimed Mexico sent rapists and criminals to the United States).

<sup>269</sup>See Jacqueline Thomsen, *Giuliani: We Warned Cohen that he Violated Attorney-Client Privilege*, THE HILL (July 28, 2018), <https://thehill.com/homenews/administration/399362-giuliani-we-warned-cohen-that-he-violated-attorney-client-privilege> (setting out claims by Trump’s legal team that disclosures by Cohen violated the attorney-client privilege. It is not clear if the attorney-client privilege was violated as not enough information has been released at the writing of this article).

<sup>270</sup>Ken White, *Witness ‘Flipping’ Does Corrupt Justice But Not Because They Are Rats*, WASH. POST, Aug. 24, 2018, [https://www.google.com/url?q=https://www.washingtonpost.com/outlook/yes-witnesses-flipping-does-corrupt-justice-but-not-because-theyre-rats/2018/08/23/c88871c4-a71e-11e8-a656-943eefab5daf\\_story.html&sa=D&ust=1573996564854000&usg=AFQjCNFvNH1a4WkUeNgcgYiTP12fJpvnQ](https://www.google.com/url?q=https://www.washingtonpost.com/outlook/yes-witnesses-flipping-does-corrupt-justice-but-not-because-theyre-rats/2018/08/23/c88871c4-a71e-11e8-a656-943eefab5daf_story.html&sa=D&ust=1573996564854000&usg=AFQjCNFvNH1a4WkUeNgcgYiTP12fJpvnQ); Christopher T. Robertson and D. Alex Winkelman, *Incentives, Lies, and Disclosure*, 20 U. PA. J. CONST. L. 33, 83-84 (2017).

agreements, and they pass on some of that pressure to co-conspirators, which often leads to pleas that impose unusual or illegal punishments.<sup>271</sup> The original approach to co-conspirator testimony under medieval common law reflects some of the perverse incentives built into this practice (although admittedly the *particular* perverse incentives are different now than they were then): if the defendant was convicted, the testifying conspirator's life was spared, but if the defendant was acquitted, the conspirator was executed.<sup>272</sup> In England, this practice was replaced by the "Crown witness system," which introduced an important safeguard via the requirement that co-conspirator testimony had to be corroborated through independent evidence.<sup>273</sup> However, in the United States, the Supreme Court has upheld co-conspirator testimony that was induced through a plea bargain and that consequently carries with it some of the taint of the earlier rule.<sup>274</sup> Even more strikingly, the Court has held that that co-conspirator testimony need not be corroborated by other evidence in order to serve as the basis for conviction.<sup>275</sup>

President Trump is right, then, to critique the Mueller investigation's reliance on co-conspirator testimony.<sup>276</sup> In the Mueller investigation, one of the co-conspirators being flipped is Michael Cohen, President Trump's former attorney, which only increases the probability of impropriety as the attorney-client privilege calls this form of testimony in question too.<sup>277</sup> This aspect of the investigation is certainly a flaw, but it is not necessarily a flaw of the type that frequently contributes to the development of crime panics.<sup>278</sup>

<sup>271</sup> Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 696–98 (2001).

<sup>272</sup> BAKER, INTRODUCTION, *supra* note 223, at 504.

<sup>273</sup> H. Lloyd King Jr., *Why Prosecutors are Permitted to Offer Witness Inducements: A Matter of Constitutional Authority*, 29 STETSON L. REV. 155, 160–61 (1999).

<sup>274</sup> *Lisenba v. California*, 314 U.S. 219, 226–28 (1941) (holding that promise of leniency to the testifying co-conspirator did not violate the defendant's rights or make the testimony suspect).

<sup>275</sup> J. Arthur L. Alarcon, *Suspect Evidence: Admissibility of Co-Conspirator Statements and Uncorroborated Accomplice Testimony*, 25 LOY. L.A. L. REV. 953, 962 (1992) (discussing the Supreme Court's jurisprudence that does not require corroborating evidence, but several Circuits have found that jurors should be instructed to be cautious with co-defendant testimony).

<sup>276</sup> See, e.g., Niall Stange, *The Memo: Team Trump in Shock as Flynn Flips*, THE HILL (Dec. 2, 2017), <https://thehill.com/homenews/administration/362882-the-memo-team-trump-in-shock-as-flynn-flips> (providing a description of President Trump's legal team to news that Mueller had flipped Michael Flynn, a former national security advisor, against the President).

<sup>277</sup> Ryan Lucas, *Does FBI Raid on Trump Lawyer Cohen Mean Attorney-Client Privilege is Dead?*, NPR (Apr. 10, 2018), <https://www.npr.org/2018/04/10/601153729/does-fbi-raid-on-trump-lawyer-cohen-mean-attorney-client-privilege-is-dead> (discussing the warrant issued for Michael Cohen and President Trump's claim that the attorney-client privilege is dead).

<sup>278</sup> See, e.g., Brandon J. Lester, *System Failure: The Case for Supplanting Negotiations with Mediation in Plea Bargaining*, 20 OHIO ST. J. ON DISP. RESOL. 563, 563–66 (2005) (noting that many poor defendants find themselves having to choose between asserting their innocence at the cost of remaining imprisoned because they cannot make bail and facing an uncertain outcome or accepting a plea deal); see also Colquitt, *supra* note 271, at 711–12 (describing what he terms "ad hoc plea bargaining," which results in non-legislatively approved punishments being implemented as part of plea agreements).

Despite procedural flaws such as these, the Mueller investigation does not qualify as a crime panic. To begin with, the “fixation” on illegal collusion is largely limited to the media and the spectating public—the Special Prosecutor and the United States Attorney for the Southern District of New York are simply doing their jobs.<sup>279</sup> In fact there is no defined federal crime of collusion, although the federal statute preventing bribery of public officials does include a crime of collusion to defraud the government.<sup>280</sup> But, the Court has limited the application of this statute to instances where there is a link between the bribery and personal gain.<sup>281</sup> In contrast, a preoccupation with witchcraft extended to virtually the entire population of Salem, and an obsession with satanic ritual was shared by several medical and therapy professionals as well as activists, school officials, and parents.

Additionally, notwithstanding President Trump’s vociferous statements to the contrary, it is as yet difficult to tell whether the procedural problems discussed earlier (or any others) have led to much unfairness, let alone objectively unfair trials. Indeed, no criminal charges were recommended against President Trump even though some commentators believe there is evidence of criminal activity on his part in the report.<sup>282</sup> It is true that the forceful methods by which Roger Stone was arrested made many conservatives question a practice that minority communities have complained of for years, but this is a far cry from the defects at issue in the classic cases of Salem and the Satanic Panic.<sup>283</sup>

At the same time, the Mueller investigation clearly does not represent a witch-hunt. For one thing, no ideological system or belief has been at issue. Seventeenth-century Quakers were targeted for their heterodox religion, labor radicals during the First Red Scare for their belief that capitalist industry was antithetical to worker welfare, and a wide range of individuals—

<sup>279</sup>Natasha Bertrand, *New York Prosecutors May Pose a Bigger Threat to Trump than Mueller*, THE ATLANTIC (Aug. 24, 2018), <https://www.theatlantic.com/politics/archive/2018/08/new-york-prosecutors-allen-weisselberg-trump/568516/>.

<sup>280</sup>Tessa Berenson, *Collusion Isn't a Specific Crime. But These Four Things Are Against the Law*, TIME (Jan. 18, 2019), <https://time.com/5506815/collusion-crime-obstruction-finance-trump-cohen/>; see also Seth B. Waxman, *Sorry, President Trump, Collusion IS a Crime*, CNN (Dec. 14, 2018), <https://www.cnn.com/2018/12/13/opinions/collusion-is-a-crime-waxman/index.html> (asserting that 18 U.S.C. § 201(b)(2)(B) makes collusion a crime).

<sup>281</sup>United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 414 (1999).

<sup>282</sup>See, e.g., Benjamin Wittes, *Five Things I Learned from the Mueller Report: A Careful Reading of the Dense Document Delivers some Urgent Insights*, THE ATLANTIC (Apr. 29, 2019), [https://www.theatlantic.com/ideas/archive/2019/04/ben-wittes-five-conclusions-mueller-report/588259/?utm\\_source=pocket-newtab](https://www.theatlantic.com/ideas/archive/2019/04/ben-wittes-five-conclusions-mueller-report/588259/?utm_source=pocket-newtab) (asserting that the report reveals that President Trump committed obstruction of justice as well as impeachable offenses).

<sup>283</sup>See, e.g., Andrew O'Reilly, *Ranking Judiciary Committee Republican wants FBI to Explain Use of Force in Stone Arrest*, FOX NEWS (Jan. 30, 2019), <https://www.foxnews.com/politics/ranking-judiciary-committee-republican-wants-fbi-to-explain-use-of-force-in-stone-arrest> (describing a letter sent by Doug Collins, a Republican member of the House Judiciary Committee to FBI Director Christopher Wray asking that he explain why so much force was used to arrest Roger Stone); see also, e.g., ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY 61-67 (Picador 2014) (describing the destructive behavior of police plus threats made by police against inhabitants of a home they are searching for a wanted person).

from civil servants to film industry workers—came under fire during the Second Red Scare for their supposed belief in communist governance. President Trump and his administration cannot point to any similar belief for which they are being investigated.<sup>284</sup> On the contrary, and based on currently available information, the Mueller investigation appears to have been a relatively methodical investigation of predefined crimes by a select group of prosecutors and centering on a select group of potential wrongdoers.<sup>285</sup> It certainly shares some of the problematic characteristics of crime panics, but that is all.

#### D. *Crime Panics and Race*

As the Salem trials and Satanic Panic demonstrate, crime panics do not target individuals based on their characteristics—instead, they target a particular type of criminal activity. However, race has often been used to foster fear among the general public by those seeking to incite a crime panic, including the police.<sup>286</sup> This does not mean that race-based targeting (or prosecution based on any other personal characteristic) is a necessary or sufficient feature of a crime panic. Once again, the Japanese Internment during World War II and the Supreme Court's *Korematsu* decision are useful examples.

Although it is true that there was a rapidly rising (and abating) fear that Japanese-Americans were incapable of being loyal to the United States,<sup>287</sup> hysteria *alone* does not demarcate a crime panic. In a crime panic, the criminal behavior is one that has been previously defined, not created for the purposes of targeting a group of persons. For example, in Fred Korematsu's case, his only crime was not obeying an internment order that was created *solely* for Japanese-Americans—in other words, it was not a pre-existing crime, like theft or fraud.<sup>288</sup> Additionally, and perhaps contrary to the widespread and understandable sense that the internment and its validation in *Korematsu* were tied to a failure of the legal system, that failure was the law's willingness to give force to racist beliefs—not procedural flaws

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<sup>284</sup>But see SAVAGE, *supra* note 23, at 10 (asserting the interesting thesis that the attacks on President Trump are a left-wing media conspiracy).

<sup>285</sup>See David Taylor, 'America's Straightest Arrow': Robert Mueller Silent as Urgency Mounts, THE GUARDIAN (Nov. 24, 2018), <https://www.theguardian.com/us-news/2018/nov/23/robert-mueller-profile-donald-trump-russia-investigation> (noting that in a year of leaks the Mueller led team has had virtually none. In addition, discussing the overall positive view of Mueller by politicians and other government officials).

<sup>286</sup>See MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 294–95 (1992) (describing LAPD Chief Parker using the factitious and racist threat of hordes of criminal black men living in South Central LA to promote police funding and authority in the city).

<sup>287</sup>LORRAINE K. BANNI, ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE 21–22 (2015).

<sup>288</sup>See DANIELS, *supra* note 174, at 61 (describing Fred Korematsu continuing to work under an assumed name rather than reporting to be interned and his arrest).

of the type discussed earlier.<sup>289</sup> Despite the fact that the Japanese Internment itself was not a crime panic, it does not mean that race cannot play a role in crime panics.

Similarly, the “War on Drugs” of the 1980s and 1990s looks at first glance like a crime panic because it targeted a specific group (African-Americans) to punish an already criminal act (drug use and sales) and it included practices that are now widely recognized as unfair.<sup>290</sup> President Reagan and the popular media repeatedly used terms like “welfare queen” to describe African-American women to justify calls to be tougher on crime.<sup>291</sup> New police tactics were developed during this period, as were laws that disproportionately targeted minorities. To use just one example, African-Americans suffered greatly due to the combination of racial profiling and restructured sentencing guidelines, since the latter more harshly punished offenses involving the cheaper crack-cocaine used by African-Americans compared to crimes involving powdered cocaine, which was more expensive.<sup>292</sup> Unsurprisingly, these practices as well as the “us versus them” mentality promoted by authority figures during the War on Drugs has led minorities, especially African-Americans, to harbor a deep mistrust of the criminal system because they sense it unfairly targets them.<sup>293</sup>

The War on Drugs began as a crime panic, but the virtually complete buy-in of politicians from both sides of the political spectrum led to an institutionalization of its associated policies.<sup>294</sup> Therefore, and despite its deeply flawed premises and execution, the War on Drugs *ceased* to be a crime panic. The targeting of racial minorities in America—and in particular, of African-Americans—has been going on for decades.<sup>295</sup> Even the “law and order” theme that is commonly associated with the War on Drugs was used as a coded attack on minorities well before the Reagan presidency: it first surfaced with Barry Goldwater’s failed presidential campaign in 1964 and

<sup>289</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (condemning the Court’s earlier decision in *Korematsu*).

<sup>290</sup> BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 213–14 (2007) (discussing the need to find the natural offending rate of motorists found with drugs as opposed to relying on police numbers, which include racial profiling distortion).

<sup>291</sup> ALEXANDER, *supra* note 150, at 48.

<sup>292</sup> *Id.* at 53–54.

<sup>293</sup> GOFFMAN, *supra* note 283, at 61–67.

<sup>294</sup> See ALEXANDER, *supra* 150, at 48–49 (discussing the immediate and drastic increase in anti-drug funding given to federal law enforcement agency budgets); see also, e.g., Jonathan Fuerbringer, *House Approves Use of Military to Fight Drugs*, N.Y. TIMES, Sept. 12, 1986, at A1 (describing the bipartisan vote in the House, 392–16, of an act approving the use of the military for the prevention of drugs entering the country as well as the death penalty for some drug crimes. Also noting that even liberal representatives voted for the bill); see also, e.g., Todd S. Purdum, *Politics: The Drug War; In Florida, Clinton Says He’ll Widen the Battle*, N.Y. TIMES, April 30, 1996, at B8 (describing President Clinton’s speech in Florida announcing his proposal for increased sentences for possession of methamphetamine and for the traffickers of chemicals used to make drugs).

<sup>295</sup> See HAGAN, *supra* note 14, at 149–57 (attributing the rise of law and order politics to Barry Goldwater’s 1964 presidential campaign and Richard Nixon’s 1968 campaign, but also noting that the law and order theme was reminiscent of Jim Crow laws).

gained momentum with Richard Nixon's successful 1968 campaign.<sup>296</sup> To call any specific manifestation of that racial targeting a "panic" is to minimize its institutionalized nature and thus misidentify the systemic reforms that are needed to combat it.<sup>297</sup>

Just like past presidents did with regards to the War on Drugs, President Trump has attempted to instigate a crime panic—but this time, one focused on undocumented immigration. From the moment he announced his candidacy, Trump began attempting to create a panic around the idea that undocumented immigrants pose a threat to the United States, stating,

When Mexico sends its people, they're not sending their best. They're not sending you . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.<sup>298</sup>

Candidate Trump continued to attempt to whip up a fervor around undocumented immigration by inviting families of persons killed by undocumented immigrants to the third presidential debate, where he restated his desire to build a wall between the United States and Mexico.<sup>299</sup> He clearly tied undocumented immigration to Latinos in general, and Mexican-Americans in particular stating, "We have some bad hombres here, and we're going to get them out."<sup>300</sup> In doing so he echoed the targeting of Japanese-Americans because of their ancestry.

Indeed, the building of a wall between the United States and Mexico has remained one of President Trump's goals as president.<sup>301</sup> On February 15, 2019, President Trump declared a dubious emergency along the United States–Mexico border in order to obtain funding for his wall, after both Congress and the nation of Mexico refused to fund it.<sup>302</sup> Despite the use of disparaging rhetoric about immigrants from Mexico, and other Latin American countries, administration officials have publicly admitted that most

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<sup>296</sup> IAN HANEY LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS* 21–24 (2014).

<sup>297</sup> See, e.g., ALEXANDER, *supra* note 150, at 236–40 (calling for a radical rethinking of how criminals are described and how Americans think about race and crime, especially drugs).

<sup>298</sup> Time Staff, *Here's Donald Trump's Presidential Announcement Speech*, TIME MAG. (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/> (providing a complete transcript of Donald Trump's presidential candidacy announcement).

<sup>299</sup> Matt Pearce, *Trump on Immigration: 'We have some bad hombres here, and we're going to get them out.'* L.A. TIMES (Oct. 19, 2016, 8:38 PM), <https://www.latimes.com/nation/politics/trailguide/la-na-trailguide-third-presidential-trump-on-immigration-we-have-some-bad-1476927107-htm1story.html>.

<sup>300</sup> *Id.*

<sup>301</sup> Miriam Valverde, *Trump Says 400 Miles of Wall are Coming Soon. But Most Projects Replace Existing Barriers*, POLITIFACT (May 15, 2019, 11:23 AM), <https://www.politifact.com/truth-ometer/article/2019/may/15/donald-trump-says-400-miles-wall-will-be-done-2020/> (noting that although President Trump claims that 400 miles of wall is being built, most of that replaces existing fencing, and none of the repairs are being paid for by Mexico).

<sup>302</sup> The Editorial Board, *Opinion, Phony Wall, Phony Emergency*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/opinion/trump-border-wall-national-emergency.html>.



undocumented immigrants are simply searching for better economic conditions.<sup>303</sup>

President Trump's focus on undocumented immigration is an attempt to create a crime panic. A person with influence (Donald Trump) is promoting a fixation on a criminal behavior (undocumented immigration), that has exacerbated procedural flaws (delays in processing cases, detainment of persons without bail, and separation of families). The new "zero tolerance" policy implemented by the Trump administration has led to a dramatic increase in the number of persons detained by immigration officers and the duration for which they are detained.<sup>304</sup> The increase in detained persons has in turn exacerbated several flaws in the immigration system, including a denial of the right to counsel to detainees despite attempts by their lawyers to see them.<sup>305</sup> The right to counsel has been viewed as fundamental to a fair trial since the seventeenth century—indeed, its violation is one of the reasons the Salem Trials now appear to have been so unfair.<sup>306</sup> The undermining of this right hearkens back to the most unfair aspects of the Salem Witchcraft Trials.

Similarly, the Trump administration's "zero tolerance" policy also led to the separation of families and the detention in hazardous conditions of migrant children, which contributed to the death of at least five children.<sup>307</sup> Despite a change in policy,<sup>308</sup> immigration officials have not been able to

<sup>303</sup> See, e.g., Julia Musto, *Trump Admin Push to Stop Illegal Immigration Hampered by District Judges, Despite Surge: US Attorney*, FOX NEWS (May 15, 2019), <https://www.foxnews.com/politics/trump-admin-immigration-district-judges> (quoting John Bash, U.S. Attorney for the Western District of Texas).

<sup>304</sup> WILLIAM A. KANDEL, CONG. RESEARCH SERV. (CRS), R45266, *THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION POLICY 1-2* (2019) (describing the Zero Tolerance policy as the detention of 100% of adults caught entering the United States without authorization and the prosecution, even if a misdemeanor first offence, of 100% of persons caught).

<sup>305</sup> See Deanna Paul, *Migrants Denied Access to Lawyers, Held in Cells 23 Hours a Day, ACLU Lawsuit Alleges*, WASH. POST (June 22, 2018), [https://www.washingtonpost.com/news/post-nation/wp/2018/06/22/migrants-denied-access-to-lawyers-held-in-cells-23-hours-a-day-aclu-lawsuit-alleges/?noredirect=on&utm\\_term=.eca9e4e4589a](https://www.washingtonpost.com/news/post-nation/wp/2018/06/22/migrants-denied-access-to-lawyers-held-in-cells-23-hours-a-day-aclu-lawsuit-alleges/?noredirect=on&utm_term=.eca9e4e4589a) (describing a lawsuit filed by the ACLU of Oregon on behalf of detainees in federal prisons in the state who have been denied access to lawyers).

<sup>306</sup> See Acevedo, *Ideological Origins*, *supra* note 216, at 93-95, 113-14 (describing the removal of the prohibition of counsel in seventeenth-century England and the Massachusetts Bay Colony); see also *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (holding that the Sixth Amendment's right to counsel was fundamental and incorporating it against the states via the Fourteenth Amendment).

<sup>307</sup> See Antonia Blumberg, *Guatemalan Teen Becomes 5<sup>th</sup> Migrant Child to Die After Being Detained by Border Patrol*, HUFF. POST (May 20, 2019, 11:21 PM) [https://www.huffingtonpost.in/entry/fifth-guatemalan-child-dies-border-patrol\\_n\\_5ce2d85ee4b087700992cb0e](https://www.huffingtonpost.in/entry/fifth-guatemalan-child-dies-border-patrol_n_5ce2d85ee4b087700992cb0e) (describing the death of a 16-year-old Guatemalan boy in detention in Weslaco, Texas—his cause of death is unknown); see also Nomaan Merchant, *4<sup>th</sup> Migrant Child Dies in U.S. Custody Since December*, PBS (May 16, 2019, 6:17 PM), (describing the deaths of four children in the custody of U.S. immigration officials through the middle of May 2019).

<sup>308</sup> Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 25, 2018) (directing immigration officials to detain minor children with their families, unless it would pose a risk to the safety of the child); *but see* Michael D. Shear et al., *Trump Retreats on Separating Families, but Thousands May Remain Apart*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html> (noting that despite the executive order, over 2,300 already-separated children still need to be reunited with their families).

reunite all separated children with their families and may not even know the total number of separated children because of poor recordkeeping.<sup>309</sup> The loss of migrant children is unparalleled in its scale and violation of rights when compared to the consequences of previous cases of crime panics.<sup>310</sup> Finally, the Trump Administration increase in detention exacerbated the over-reliance of the criminal justice system on private prisons to house detainees and prisoners.<sup>311</sup> Private prisons have been shown to be less safe than publicly controlled prisons because they are driven by profit, which has led them to employ low-skilled workers.<sup>312</sup>

President Trump's attempts to stoke public fears regarding undocumented immigration have not yet emerged as a full crime panic because a large portion of the public—and more importantly, state and local governments—has been resisting those attempts. At a basic level, many Americans do not feel a sense of panic related to undocumented immigration.<sup>313</sup> In January 2019, 58% of Americans opposed expanding the wall along the U.S.–Mexico border. In addition, there is a sharp divide based on party affiliation on whether undocumented immigration is even a major problem—Trump's attempted panic has only taken hold among his supporters and not the general public.<sup>314</sup> In addition, entire state governments

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<sup>309</sup> See Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children Than Reported*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html> (describing that thousands more migrant children were separated from their families than initially reported due to the lack of coordination of recordkeeping by various governmental departments).

<sup>310</sup> See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 657–59 (1972) (striking down an Illinois law that favored giving custody of children born out of wedlock to the state over their biological fathers in cases where the mother became unfit to care for the child on due process grounds); see also, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923) (striking down on due process grounds a state law that prohibited the teaching of modern foreign languages and recognizing a liberty interest in the upbringing of children); see also, e.g., *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (plurality) (reaffirming that parents have a fundamental right to control the upbringing of their children and striking down a state law that allowed grandparents to petition for visitation rights with the child over their parent's objections).

<sup>311</sup> See Madison Pauly, *Trump's Immigration Crackdown is a Boom Time for Private Prisons*, MOTHER JONES MAG. (May/June 2018), <https://www.motherjones.com/politics/2018/05/trumps-immigration-crackdown-is-a-boom-time-for-private-prisons/> (discussing that despite immigration arrests being down 57%, the detained immigrant population has increased by 91%—a majority of whom are being held in private prisons or detention centers); see also KARA GOTSCH & VINAY BASTI, THE SENTENCING PROJECT, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS 5 (2018) (noting a 47% overall increase in the number of persons in private prisons and immigration detention centers and a 120% rise in private facilities contracted to the Federal government from 2000 and 2016).

<sup>312</sup> See GOTSCH & BASTI, *supra* note 311, at 10–11.

<sup>313</sup> John Gramlich, *How Americans see Illegal Immigration, the Border Wall and Political Compromise*, PEW RES. CTR. FACTTANK (Jan. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/01/16/how-americans-see-illegal-immigration-the-border-wall-and-political-compromise/> (also noting that only 40% of Americans support expanding the border wall).

<sup>314</sup> *Id.* (noting that the division along party lines is deep with 75% of registered Republicans saying it is a major problem but only 19% of registered Democrats); see also Noah Lanard, *Americans' Support for Immigration is at a Record High. There's No Need to Appease Fascists.*, MOTHER JONES ONLINE (March 11, 2019), <https://www.motherjones.com/politics/2019/03/americans-support-for-immigration-is-at-a-record-high-theres-no-need-to-appease-fascists-1/> (noting that only 24 percent of Americans supported

are resisting his supposed crime panic through non-cooperation with federal officials.<sup>315</sup> Public and official responses to President Trump's attempts to induce a crime panic demonstrate that resistance is possible and that great understanding of crime panics—and of crime fantasies more generally—could have important beneficial effects.

#### IV. LESSONS FROM CRIME FANTASIES

Parts I and II of this article laid out two types of crime fantasies: witch-hunts and crime panics. Although witch-hunts are characterized by the targeting of disfavored groups of persons because of the beliefs, while crime panics overzealously target a particular type of criminal activity, both represent public fantasies about criminal activity out of proportion to reality. In the case of witch-hunts, the fantasy is often of disloyalty—Quakers in Massachusetts Bay, Socialists and Anarchists in the early 20<sup>th</sup> century, Communists in the mid-20<sup>th</sup> century, and Japanese-Americans during the Second World War. On the other hand, crime panics are caused by a fantasy about the existence of rampant criminal behavior, often out of proportion to reality.

Although there are similarities between witch-hunts and crime panics, they are distinct types of events needing different solutions. Since witch-hunts target ideologies, they can only be avoided by strengthening legal protections for beliefs under both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Conversely, it is unreasonable to expect that crime panics can be avoided altogether because societies will always marginalize some individuals and target them for behaviors that are perceived to be unacceptable.<sup>316</sup> Nevertheless, the damage that crime panics cause can be mitigated by increasing procedural safeguards for defendants.<sup>317</sup> This final section of the Article explains why our legal system does not now adequately guard against witch-hunts or minimize the damage caused by crime panics and elaborates on potential ways of addressing these phenomena both generally and using the specific examples that were discussed earlier.

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cutting legal immigration, which is down from 40 percent in 2006, as well as noting that a majority of Democrats and independents view immigrants favorably).

<sup>315</sup>See, e.g., *United States v. California*, No. 18-16496, slip op. at 10 (9th Cir. Apr. 18, 2019) (affirming the denial of injunction against California SB 54, which prevented the communication of information regarding the immigration status of detainees, prisoners, or incarcerated individuals to the immigration officials, because it is likely protected under the 10<sup>th</sup> Amendment); see also, e.g., *California Values Act*, S.B. 54, 2017–18 Leg., Reg. Sess. (Cal. 2017) (prohibiting officers from sharing information about persons stopped for a crime with immigration officers, using immigration officers as translators, detaining a person longer than needed so that immigration officials may assess their immigration status, or otherwise providing immigration officials with information).

<sup>316</sup>MONOD, *supra* note 177, at 45.

<sup>317</sup>COHEN, *supra* note 177, at 232-33 (asserting that moral panics will continue to happen, "...because our society as presently structured will continue to generate problems for some of its members – like working-class adolescents – and then condemn whatever solution these groups find.").

### A. Preventing Witch-Hunts

Witch-hunts reveal the extent to which American public law under-prioritizes the protection of belief. In the decades after the Japanese Internment, the Supreme Court strengthened protections for most non-ideological minorities by extending heightened judicial scrutiny to race,<sup>318</sup> national origin,<sup>319</sup> alienage at the state level,<sup>320</sup> legitimacy,<sup>321</sup> and gender.<sup>322</sup> However, the Court has declined to clearly apply heightened scrutiny to disfavored political groups. It has preferred instead to rigorously apply the rational basis test when assessing laws that target such groups, whose members are minorities because of their beliefs.<sup>323</sup> Consequently, the Court has left open the possibility that witch-hunts will continue to occur.

For instance in *U.S. Department of Agriculture v. Moreno*, the Court acknowledged that the rule in question—which denied food stamps to non-traditional families—was meant to prevent hippie communes from gaining access to the government food assistance program, and it went so far as to warn about the dangers of targeting disfavored ideological groups.<sup>324</sup> Nevertheless, instead of analyzing the dispute using strict scrutiny, the *Moreno* Court applied *rational basis* analysis to strike down the law.<sup>325</sup> Although *Moreno* did not involve a criminal law issue, it exemplifies the Court’s attitude towards ideological minorities, and its lessons are applicable in other contexts.

Similarly, 72 years after *Korematsu*, the Court finally acknowledged that the Japanese Internment was based on simple racism and stated that the president did not have the authority to engage in “forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race.”<sup>326</sup> But even as the Court acknowledged past wrongdoings in one breath, it opened the door to continued witch-hunts in the next by dismissing the relevance of President Trump’s statement that the order was indeed a “Muslim ban.”<sup>327</sup> By employing a formalistic application of the rational basis test while ignoring the context of the passage of the law, a majority of the Court weakened constitutional protections for religious minorities—an ideological group, just as in the persecution of the Quakers—and thus

<sup>318</sup> See generally *Korematsu v. United States*, 323 U.S. 214 (1944), *overruled by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (articulating that laws which single out a single racial group are immediately suspect).

<sup>319</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez* 411 U.S. 1, 61 (Stewart, J., concurring) (citing *Oyama v. California*, 332 U.S. 633, 644–46 (1948)).

<sup>320</sup> See generally *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>321</sup> See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

<sup>322</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 555 (1996).

<sup>323</sup> See, e.g., *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 537–38 (1973).

<sup>324</sup> *Id.* at 534 (noting that the legislative history behind the challenged regulation indicated that the goal was to prevent hippies and hippie communes from receiving food stamps).

<sup>325</sup> *Id.* at 538.

<sup>326</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

<sup>327</sup> *Id.* at 2417–18.

diminished the Constitution's ability to prevent future witch-hunts.<sup>328</sup> A simple solution would be to take government officials at their word: if a president is honest enough to say that he is targeting a religious group, then the Court ought to believe him and apply strict scrutiny to the relevant state action.<sup>329</sup>

Admittedly, the Court has provided protection to unpopular religious groups via its Establishment Clause jurisprudence, and it has also prohibited laws that promote secularism over religiousness and vice versa.<sup>330</sup> Similarly, the Court has found that the Free Exercise Clause prohibits laws that were passed simply to target a particular religious group<sup>331</sup> and prohibits the *implementation* of laws in a manner hostile to religion.<sup>332</sup>

Nevertheless, these efforts are neither broad enough nor deep enough. The Court's Free Exercise jurisprudence since *Employment Division v. Smith* has left open the possibility that unpopular religious groups may be targeted via generally applicable laws, which remain subject to rational basis analysis.<sup>333</sup> *Smith* is an illustrative case of what happens when criminal law is allowed to combine with religious animus. The *Smith* plaintiff was denied unemployment insurance after being dismissed for smoking peyote as part of his religion, and the Court upheld the denial on the grounds that the law prohibiting drug use was of general applicability.<sup>334</sup> Since criminal laws are usually generally applicable, the Court has not adequately guarded against this type of potential discrimination. Its insistence on using a lowered standard of scrutiny for generally applicable laws that impact religious beliefs has created a gap in the protection for unpopular religious groups, and that gap ought to be closed to minimize the risk of future witch-hunts.<sup>335</sup>

The Court's jurisprudence in the areas of Equal Protection and the First Amendment has made witch-hunts less likely, but it has not completely eliminated their possibility. And yet, witch-hunts are very much within the Court's power to prevent because all of the solutions are judicial in nature. By taking government officials at their word when they say they are targeting

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<sup>328</sup> See, e.g., *id.* at 2433-34 (Sotomayor, J., dissenting).

<sup>329</sup> See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963) (requiring strict scrutiny for laws that inhibit religious practice); *but see* *Emp't Div. v. Smith*, 494 U.S. 872, 885-86 (1990) (lowering scrutiny requirements for laws that are generally applicable).

<sup>330</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968)).

<sup>331</sup> See generally *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545 (1993) (striking down a town ordinance prohibiting the killing of animals for ritual purposes as targeting the Santeria Religion).

<sup>332</sup> See generally *Masterpiece Cakeshop v. Colo. Civil Rights*, 138 S. Ct. 1719 (2018) (applying strict scrutiny, the Court invalidated the proceedings by the Commission for failure to act neutrally toward the petitioner's religious beliefs during the hearing).

<sup>333</sup> *Emp't Div.*, 494 U.S. at 888-89.

<sup>334</sup> See generally *id.*

<sup>335</sup> See, e.g., *Dunn v. Ray*, No. 18A815, slip op. at 1-3 (Feb. 7, 2019) (Kagan, J., dissenting) (declining to hear a challenge on Establishment Clause grounds to an Alabama prison policy which denied the plaintiff a Muslim cleric at his execution while permitting a Christian cleric to attend executions on the grounds that the claim was not timely).

persons based on their views,<sup>336</sup> providing heightened scrutiny for laws that target individuals with politically unpopular views,<sup>337</sup> and applying heightened scrutiny to laws that impinge on the free exercise of religion, the Court can largely resolve this particular failing of the criminal law.<sup>338</sup> Until it acts, however, witch-hunts will remain more than just a specter of the past.

### B. *Mitigating Crime Panics*

As the Salem trials, the Satanic Panic, and the Mueller investigation demonstrate, crime panics are characterized by procedural flaws—and perhaps the most common of these is the introduction of unreliable evidence. During the Salem trials, unreliable spectral and hearsay evidence was used against the accused who, furthermore, were subjected to torture and lacked any right to the assistance of counsel. Although the latter two “systemic” flaws of Salem were fixed within mere decades of the trials, similarly severe evidentiary flaws persisted and contributed to subsequent crime panics.<sup>339</sup>

By the time of the Satanic Panic, spectral evidence was no longer used and hearsay was limited, but a new kind of unreliable evidence—in the form of children who were coached by therapists using dubious tactics—emerged to feed public paranoia and compromise the legal process.<sup>340</sup> Although the backlash against children’s stories may have gone too far, it did prompt debate over how to accurately measure testimonial reliability.<sup>341</sup> One reform that has already been proposed in response to the Satanic Panic is the mandatory videotaping of interviews with child sex abuse victims.<sup>342</sup> This would partially solve the problem, since indeed it was videotape that revealed leading interview tactics, including coaching, that led many jurors to acquit adult defendants.<sup>343</sup>

A second potential area of reform is a mandatory minimum age for witness testimony. Most states simply require witnesses, including children,

<sup>336</sup> See *Trump v. Hawaii*, 138 S. Ct. 2392, 2433–35 (2018) (Sotomayor, J., dissenting) (discussing how the policy was first openly advertised as a “total and complete shutdown of Muslims entering the United States”).

<sup>337</sup> See *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 543 (1973) (Douglas, J., concurring) (noting that the limitation on food stamps was included to target hippie communes and asserting that the act should be narrowly drawn as it implicates the right of association).

<sup>338</sup> See generally *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

<sup>339</sup> See, e.g., LANGBEIN, *ORIGINS OF ADVERSARY*, *supra* note 236, at 92–95 (describing the adoption of defense counsel).

<sup>340</sup> See *VICTOR*, *supra* note 241, at 112–13 (noting that child protection workers and therapists are not impartial, but instead are advocates for children and are therefore not suited to criminal investigation).

<sup>341</sup> See, e.g., Elliott, *Sexual Abuse, Memory and the Law*, 26 *OFF OUR BACKS* NO. 5 10, 11 (providing a description of a conference on the subject held at the University of Pennsylvania).

<sup>342</sup> See Frank E. Vandervort, *Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community’s Approach*, 96 *J. CRIM. L. & CRIMINOLOGY* 1353, 1355 (2006) (describing the debate between prosecutors who are opposed to videotaping and defense attorneys who favor videotaping).

<sup>343</sup> *NATHAN & SNEDEKER*, *supra* note 240, at 224–25.

to take an oath or affirmation that they will tell the truth, which has led to the implementation of inquiries to determine if a child understands the difference between truth and falsehood.<sup>344</sup> Under the common law, children could only testify in court if they were above the age of twelve, since that was the age at which a child was held competent to take an oath.<sup>345</sup> However, even the common law permitted certain exceptions: children under twelve could testify in cases of rape, sometimes even without swearing an oath (although their testimony would then be discounted).<sup>346</sup> Certain American cases in the 1980s pushed this to the extreme, with children as young as three years old testifying.<sup>347</sup> At least one study has shown that children under the age of five are particularly susceptible to confirming information that is invited using leading questions.<sup>348</sup> While all age limits are arbitrary by nature, and despite the common law's countenancing the testimony of children under the age of twelve,<sup>349</sup> a possible solution to the issue would be a prohibition on testimony from children under the age of five.<sup>350</sup>

Like Salem and the Satanic Panic, the Mueller investigation has highlighted a particular kind of evidentiary flaw—the unreliability of co-conspirator testimony—as a factor contributing to the rise of crime panics.<sup>351</sup> As far as co-conspirator testimony is concerned, one solution would be to make the testimony more reliable by requiring independent corroboration and prohibiting one co-conspirator from corroborating the testimony of another.<sup>352</sup> India, for instance, has gone one step further by not only limiting co-conspirator testimony to the secondary task of lending support to the

<sup>344</sup>Thomas D. Lyon, *Child Witnesses and the Oath*, in CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 245, 245 (Helen L. Westcott, Graham M. Davies & Ray H.C. Bull eds., 2002).

<sup>345</sup>WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK IV: OF PUBLIC WRONGS 141 (Ruth Paley ed., Oxford Univ. Press, 2016) (1769).

<sup>346</sup>*Id.* (citing to Hale).

<sup>347</sup>*See, e.g.*, State v. Hussey, 521 A.2d 278, 279 (Me. 1987) (upholding the validity of a three year old's testimony during a criminal case against her father for molesting her).

<sup>348</sup>CHEIT, *supra* note 247, at 275–76 (citing to a 1993 study by Ceci & Bruck, "Child Witnesses: Translating Research into Policy," that concluded that young children were susceptible to leading questions).

<sup>349</sup>BLACKSTONE, *supra* note 345, at 141.

<sup>350</sup>*But see generally* Gail S. Goodman & Beth M. Schwartz-Kenney, *Why Knowing a Child's Age is Not Enough: Influences of Cognitive, Social, and Emotional Factors on Children's Testimony*, in CHILDREN AS WITNESSES 18 (Helen Dent & Rhona Flin eds., 1992) (arguing that in addition to age, social pressures and other factors play into the reliability of children, but also noting that the older the children, the better able they are to understand events).

<sup>351</sup>*See* Alan Dershowitz, Opinion, *Dershowitz: Targeting Trump's Lawyer Should Worry Us All*, THE HILL (April 10, 2018), <https://thehill.com/opinion/judiciary/382459-dershowitz-targeting-trumps-lawyer-should-worry-us-all> (discussing concerns relating to the government interfering with the attorney-client relationship); *see also* Ryan Lucas, *Does FBI Raid on Trump Lawyer Cohen Mean Attorney-Client Privilege is 'Dead'?*, NPR (Apr. 10, 2018), <https://www.npr.org/2018/04/10/601153729/does-fbi-raid-on-trump-lawyer-cohen-mean-attorney-client-privilege-is-dead> (discussing the warrant issued for Michael Cohen and President Trump's claim that the attorney-client privilege is dead).

<sup>352</sup>*See* S.K. SINHA RAY, CRIMINAL TRIAL 371–72 (2nd ed. 2014) (describing India's requirements for co-conspirator testimony).

prosecution's case, but also requiring that the testifying co-conspirator be granted a pardon *before* testifying.<sup>353</sup> A second approach to the problem of co-conspirator testimony would be to remove the incentive for co-conspirators to cooperate in a *quid pro quo* relationship with the prosecution.<sup>354</sup>

## V. CONCLUSION

The popularity of crime as a topic among the public is undeniable,<sup>355</sup> but when criminal fantasies emerge in the form of witch-hunts or crime panics they pose a grave danger to the fairness of the criminal justice system. Witch-hunts and crime panics share a quality of overreaction by authorities and the public. In *witch-hunts*, authorities target an entire group of believers—religious (Quakers) or political (labor radicals or communists)—justified by the wrongdoings of a few members, but really targeting their beliefs. Conversely, in *crime panics* the public becomes fixated on a particular type of criminal activity—witchcraft (Salem) or sexual abuse (Satanic Panic)—and that fixation leads the authorities to overzealously prosecute the crime. Although they are related, witch-hunts and crime panics are distinct from each other and require distinct solutions. Both represent crime fantasies—one created by authorities to target a particular ideological group and the other created by the public and pushed out of proportion.

Witch-hunts have partially been addressed via case law and legal reform, but much room remains for improvement. The Supreme Court should apply heightened scrutiny to laws that target disfavored political groups, and it should maintain First Amendment protections for disfavored religious groups.<sup>356</sup> Despite recent progress, witch-hunts are far from completely behind us—many consider the War on Terror to be a war against ideology, hence a type of witch-hunt.<sup>357</sup>

Similarly, although the most egregious abuses of Salem appear to have been dealt with, torture in criminal prosecution is still a part of the criminal law: the CIA, for instance, has openly admitted to violating human rights in its investigation of terrorism suspects.<sup>358</sup> While we may never be able to completely avoid crime panics, with increased defendant safeguards, we

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<sup>353</sup> *Id.*; see also P. S. NARAYANA, PLEA BARGAINING 105–11 (2013) (describing the process of applying for a plea bargain, which must be made jointly by the defendant and prosecutor).

<sup>354</sup> See Colquitt, *supra* note 271, at 773–74 (discussing the danger of allowing quid pro quo plea bargaining as it may result in agreements that include unethical or illegal elements of a plea bargain).

<sup>355</sup> See Kort-Butler & Sittner Hartshorn, *supra* note 13, at 52–53 (discussing how what people watch on television matters when it comes to fear of crime and their attitudes about criminal justice).

<sup>356</sup> *But see generally* Trump v. Hawaii, 138 S. Ct. 2392 (2018) (upholding the “Muslim” ban to challenges that it targeted a religious groups).

<sup>357</sup> DUDZIAK, *supra* note 172, at 113–14 (describing the war on terror as a war on tactics and ideology).

<sup>358</sup> Daniel Kanstroom, *On “Waterboarding”*: Legal Interpretation and the Continuing Struggle for Human Rights, 32 B. C. INT’L & COMP. L. REV. 203, 204–206 (2009) (describing water boarding as torture and noting the CIA director admitted to using waterboarding on at least three prisoners in 2002 and 2003).



could minimize the extent to which the next panic results in wrongful convictions. History, however, shows that escaping our own worst tendencies is harder than it looks, particularly when it comes to heaping punishment on people and groups that, basically, we do not like.

But there is hope in the current resistance by a large segment of the population and government officials for resisting a contemporary crime fantasy.<sup>359</sup> This article provided a taxonomy of crime fantasies and showed the dangers of each type as well as ways to prevent them. Crime fantasies may be inevitable in either the form of witch-hunts or crime panics. However, by implementing strong safeguards and learning from the errors of the past, the injustice caused by them can be avoided.

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<sup>359</sup>See David Smith, *Donald Trump Fuels Immigration Fears in TV Address on 'Border Crisis,'* THE GUARDIAN (Jan. 9, 2019, 10:50 AM EST), <https://www.theguardian.com/us-news/2019/jan/08/donald-trump-speech-tv-address-border-wall-oval-office> (describing the president increasing the fear of immigration while offering no new solutions to the problem); see also Ronald Brownstein & Nat'l J., *Republicans and Democrats Flip Usual Positions Over 'Sanctuary Cities,'* THE ATLANTIC (July 31, 2015), <https://www.theatlantic.com/politics/archive/2015/07/republicans-and-democrats-flip-usual-positions-over-sanctuary-cities/432441/> (describing the inversion of the normal stances of Republicans being pro flexibility by local government and Democrats opposing local resistance to federal laws).