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WITCH-HUNTS AND CRIME PANICS IN AMERICA

John Felipe Acevedo*

The term witch-hunt has been tossed around by media commentators, policy experts, and even presidents for years—Nixon, Clinton, and Trump each in turn. Accusations of a witch-hunt are used to signal perceived bias, procedural unfairness, and paranoia. This Article argues that drawing simplistic connections between witchcraft trials and unfairness in the criminal justice system severely hampers our understanding of both historical and contemporary events. It obscures the fact that the term witch-hunt is popularly used to describe two very different types of prosecutions that reflect distinct social and legal problems and demand distinct solutions.

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 reveals 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. In contrast, the ongoing special 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 on early American witch-hunts, this article clarifies our understanding of the relationship between politics and large-scale criminal investigations, and highlights areas for future reform.

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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."¹ The President was himself "...increasingly moody, exuberant at one moment, depressed the next, alternatively optimistic and pessimistic, especially in his nocturnal phone calls."² Longtime friends who had no direct involvement in the core of the Special Prosecutor's case were being ensnared in the investigation.³ His closest aides, even his Whitehouse Counsel, were talking with the Special Prosecutor and trying to cut deals.⁴ The President and his allies called the investigation a "purge" and a "witch-hunt."⁵ "He wondered aloud... whether it was worth it to stick things out and fight and then vowed he would never be driven from office."⁶ President Nixon would not finish his term in office.

The term *witch-hunt* has been tossed around in contemporary American discourse for years, often by presidents themselves: Nixon, Clinton, and Trump each in turn has described investigations targeting their activities as a witch-hunt.⁷ They may not have known it, but they were drawing on an understanding of the term that

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¹ BOB WOODWARD AND CARL BERNSTEIN, *THE FINAL DAYS* 165 (1976) (The author's attribute the comment to Lieutenant Colonel Jack Brennan).

² *Id.* at 104. Woodward and Bernstein

³ Lawrence Mayer, *Rebozo Blasts Hill Unit Staff*, *THE WASHINGTON 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).

⁴ HOWARD DEAN, *THE NIXON DEFENSE: WHAT HE KNEW AND WHEN HE KNEW IT* 363 (2014).

⁵ *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*, *CHICAGO TRIBUNE*, April 21, 1974, at 6; *see also e.g.*, William Safire, *Why the President should not Step Down*, *CHICAGO TRIBUNE*, November 7, 1973 (arguing that investigation was a miscarriage of justice that harmed the country).

⁶ WOODWARD AND BERNSTEIN, *supra* note 1, at 104.

⁷ *See e.g.*, MICHAEL SAVAGE, *STOP MASS HYSTERIA: AMERICA'S INSANITY FROM THE SALEM WITCH TRIALS TO THE TRUMP WITCH HUNT* (2018) (providing an 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*, *CHICAGO TRIBUNE*, April 20, 1974 (comparing the Democratic pushed Watergate investigation with the McCarthy era); *see also e.g.*, Peter Baker and Juliet Eilperin, *Panel Votes on Party Lines for Impeachment Inquiry*, *WASHINGTON POST*, October 6, 1998, at A01 and A07 (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*, *HUFFINGTON POST*, January 3, 2019, at Politics (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).

was solidified and popularized by Arthur Miller's retelling of the Salem witchcraft trials in *The Crucible*.⁸ In fact, however, *The Crucible* was not about the Salem at all, but an allegory for the Red Scare besieging mid-twentieth century America; it was written with the House Un-American Activities Committee explicitly in mind.⁹ Still, 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 or any investigative proceeding.¹⁰ But were these events actually comparable?

This article emphatically answers “no.” While there are similarities between the Red Scare and the Salem trials, they are of wholly different genres. Conflating the two has led to more than simple overuse of the term *witch-hunt*, it has also impaired our ability to analyze and respond to major developments in the criminal law. True witch-hunts target a group of persons for their beliefs. In contrast, crime panics are a zealous (often, overzealous) prosecution of individuals who are believed to have committed a specific type of criminal activity. Both types of events represent breakdowns in the criminal law system, but they are of different types and require different solutions.

Part I of this Article offers a detailed explanation of the differences between witch hunts and crime panics. Part II 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 III 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 ongoing 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 witch-hunts and crime panics matters—they reveal different

⁸ See generally, ARTHUR MILLER, *THE CRUCIBLE* (1953), reprinted in *THE PORTABLE ARTHUR MILLER* 132 (Christopher Bigsby ed. Penguin, 1995) (hereinafter *THE CRUCIBLE*)

⁹ Arthur Miller, *The Crucible in History: The Massey Lecture, Harvard University*, in *THE CRUCIBLE IN HISTORY AND OTHER ESSAYS* 3, 3-4 and 49 (Methuen, 2000).

¹⁰ 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 Jsmán, *Gardner's Witch-hunt*, 1 U.C. DAVIS J. JUV. L. & POL'Y 12 (1996) (describing Richard Gardner's promotion of the Parental Alienation Syndrome 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 MIDDLE EAST REPORT 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 BRITISH 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).

weaknesses in the American criminal system and demand different solutions—and suggests some possible reforms to the criminal law. When we haphazardly describe all these events as witch-hunts, we hamper our ability to engage targeted and effective criminal law reform.

I. Separating Witch-hunts and Crime Panics

There are witch-hunts and then there are *witch-hunts*. Literally the term signifies “a searching for witches, or for a person accused of witchcraft.”¹¹ But 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.”¹² This the understanding of the term that was popularized by *The Crucible* and it is the primary focus of this article, although what follows also demonstrates the extent to which Miller’s intentional conflation of the term’s literal and figurative meanings has resulted in widespread confusion.¹³

There are two types of related, but distinct events that ought to be kept separate for the sake of conceptual clarity and criminal justice reform: *witch-hunts*, which target groups because of their beliefs, and *crime panics*, which overzealously target types of criminal activities. 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-hunt is that the criminal system is improperly deployed to target a specific group of persons. 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.

¹¹ *Witch-hunt*, OXFORD ENGLISH DICTIONARY (2nd ed. 1989).

¹² *Id.*

¹³ See generally, THE CRUCIBLE, *supra* note 8; see also, *Witch hunt*, BLACKS LAW DICTIONARY (10th ed. 2014) (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, *Witch hunt*, RANDOM-HOUSE WEBSTER’S COLLEGE DICTIONARY (2nd 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).

In contrast, *crime panics* focus on an existing type of criminal activity but with a zeal that reveals 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, they result in wrongful convictions.¹⁴ Consequently, they reveal 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.¹⁵ Crime panics are exemplified by the Salem Witchcraft trials and the Satanic Panic of the late twentieth century, among numerous others.

As Part IV will show in greater detail, this typology is both more accurate as a way of understanding landmark events in American criminal law history and more useful in enacting criminal justice reform than the indiscriminate use of “witch-hunt.” For example, and counterintuitively, witch-hunts—although more odious, given their intentional targeting of specific groups—are easier to identify and also easier to cure. Religious minorities are now largely (if not always satisfactorily) protected under the First Amendment.¹⁶ Similarly, the Red Scares have abated and have not risen again. To be sure, there is great room for improvement.¹⁷ But true witch-hunts are increasingly unlikely to occur in American society.¹⁸ In contrast crime panics are far more difficult to resolve as they criminalize behavior that society

¹⁴ See e.g., JOHN HAGAN, WHO ARE THE CRIMINALS?: THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REGAN 157-161 (2010) (describing the passage of the Anti-Drug Abuse Act of 1986 as being 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).

¹⁵ See, BERNARD SCHISSEL, BLAMING CHILDREN: YOUTH CRIME, MORAL PANICS AND THE POLITICS OF HATE 82-85 (1997) (This study from Canada finds 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).

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

¹⁷ 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) (Sinclair was arrested for reading the Constitution of the United States at a meeting of striking workers in San Pedro Harbor).

¹⁸ But see, ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT, 77-82 (2014) (describing the detentions of American citizens as enemy combatants on US soil in contravariance of the Constitution).

wants criminalized; but introduce or rely on processes that undermine individual rights.¹⁹

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.²⁰ Both crime panics and moral panics reference a sense that the public, the media, and the state have responded disproportionately to some social development.²¹ However, crime panics stand apart 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.²² 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.²³ In short, the key feature of a crime panic is an obsession about a type of criminal activity and not the origin of the panic.

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.²⁴ Indeed, some events that would seem to be either a crime panic or a

¹⁹ See 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).

²⁰ 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, THIRD EDITION* 22 (Routledge, 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 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.”)

²¹ COHEN, *supra* note 20, at xxxv-xxxvi.

²² 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.”);

²³ The moral panic literature focuses on the role of the media in creating and perpetuating moral panics. See e.g., COHEN, *supra* note 20, 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., Grace PALLADINO, *TEENAGERS: AN AMERICAN HISTORY*, 159-162 (1996) (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).

²⁴ BERNARD SCHISSEL, *BLAMING CHILDREN: YOUTH CRIME, MORAL PANICS AND THE POLITICS OF HATE* 82-85 (1997) (This study from Canada finds that aboriginal youth are more closely watched by the police as are male over females and those youths living in urban centers, which leads to a disparity in their arrest rates); see also, PALLADINO, *supra* note 23, at 81-85 (discussing the juvenile delinquency

witch-hunt precisely because they involve 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.²⁵ The interplay of race with witch-hunts and crime panics will be discussed in Section II(c) and Section III(d).

II. Witch-Hunts

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 first of which provided the inspiration for Arthur Miller’s *The Crucible*²⁶—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.²⁷ 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’ shores in the mid-1650s.²⁸

The Quakers were part of a wider proliferation of religious communities triggered by the English Civil War.²⁹ Several factors contributed to the sudden rise of new sects: the end of censorship laws that had inhabited the flow of ideas in the

panic of the late 1940s, which linked comic books and science fiction movies to the rise in juvenile crime and gangs).

²⁵ *Korematsu v. United States*, 323 U.S. 214 (1944) (Korematsu’s only crime was not leaving the evacuation zone. He had no links to any connection to the Japanese government).

²⁶ Miller, *supra* note 9, at 49 and 51-53.

²⁷ See, DAVID UNDERDOWN, *REVEL, RIOT, & REBELLION: POPULAR POLITICS AND CULTURE IN ENGLAND 1603-1660*, at 148-149 (1985) (describing the ravages of the English Civil War on the counties of England and Wales).

²⁸ PERRY MILLER, *THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE*, 123 (1953) (hereinafter *NEW ENGLAND MIND*) (although Miller is discussing Puritans throughout New England he pays especial attention to the Puritan reaction to Quakers in the Massachusetts Bay colony).

²⁹ See, BARRY COWARD, *THE STUART AGE: ENGLAND 1603-1714*, FOURTH EDITION, 235-237 (Routledge, 2014) (describing the rise of new religious thought that occurred during the English Civil War era as a result of the belief that the war signaled the creation of a perfect society and the return of god on earth).

English speaking world;³⁰ 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.³¹ 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.³² 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.³³

Quaker behavior was subversive in ways that were both small and large but were always noticeable.³⁴ Unsettling Quaker behaviors in the mid seventeenth century included refusing to doff ones hat to social superiors, refusing to swear oaths, using informal language, disrupting church meetings, preaching on the streets, and refusing to pay tithes.³⁵ Some members paraded through towns naked as a sign of their inner spirit, a practice defended by the movement's leaders.³⁶ If these acts were not controversial enough, the early Quaker leader James Nayler caused a major controversy when he reenacted Jesus' entry into Jerusalem by riding a donkey into the English city of Bristol while his supporters sang and tossed clothes before him.³⁷ 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.³⁸

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

³⁰ See, JOHN MORRILL, *THE NATURE OF THE ENGLISH REVOLUTION: ESSAYS BY JOHN MORRILL*, 359-361 (1993).

³¹ See, UNDERDOWN, *supra* note 27, at 239.

³² HUGH TREVOR-ROPER, *THE CRISIS OF THE SEVENTEENTH CENTURY: RELIGION, THE REFORMATION & SOCIAL CHANGE*, 313 (Liberty Fund, 1999).

³³ CHRISTOPHER HILL, *THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION*, 187 (Penguin, 1991) (Although Hill is promoting the interesting thesis that many of these groups, particularly the Levelers and True Levelers or Diggers, were proto-Communists his observations about the chaos that ensued from these groups running all over England is nevertheless valid).

³⁴ MORRILL, *supra* note 30, at 387.

³⁵ CHRISTOPHER HILL, *THE INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION, REVISITED*, 340 (2001) (hereinafter *INTELLECTUAL ORIGINS*) (hereinafter *INTELLECTUAL ORIGINS*) (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 27, at 251 (discussing refusing to swear oaths, doff hats, or pay tithes, and their interrupting church services); see also, MORRILL, *supra* note 30, at 387-388 (describing the disruption of church meetings, refusal to pay tithes, and other disturbances).

³⁶ HILL, *supra* note 33, at 317-318.

³⁷ See, COWARD, *supra* note 29, at 273.

³⁸ ADRIAN DAVIES, *THE QUAKERS IN ENGLISH SOCIETY, 1655-1725*, at 17 (2000).

and her sister.³⁹ 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 as this was done.⁴⁰ 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.⁴¹

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*.⁴² “The Quakers were the most threatening of the forces of order because their rejection of ministry and ecclesiastical structure, their emphasis on the quality of all who were guided by the ‘inner light,’ were accompanied by stricter moral rectitude....”⁴³ 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 superfluousness of ministers.⁴⁴ 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.⁴⁵ Local leaders did not want to risk similar disruption with the Quakers and acted swiftly and harshly.⁴⁶

In July 1656, Ann Austin and Mary Fisher became the first Quakers to enter Massachusetts Bay, landing in Boston onboard the ship *Swallow*.⁴⁷ The women were immediately imprisoned and all of their belongings 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 Locke to transport them and six other Quakers to England.⁴⁸ George Bishop, a Quaker advocate, condemned these acts as

³⁹ Essex Institute, *THE RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY MASSACHUSETTS IN NINE VOLUMES*, v. III at 13 (1911) (hereinafter *ECCR*).

⁴⁰ *Id.*

⁴¹ See, John Felipe Acevedo, *Harsh Mercy: Criminal Law in Seventeenth-Century Massachusetts Bay*, at appendix E (Dec. 2013) (unpublished Ph.D. dissertation, The University of Chicago) (on file with ProQuest) (providing an overview list of crimes committed in Massachusetts Bay during this time period including attending a Quaker meeting).

⁴² See, MORRILL, *supra* note 30, at 387-388 (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).

⁴³ UNDERDOWN, *supra* note 27, at 250.

⁴⁴ MICHAEL P. WINSHIP, *THE TIMES AND TRIALS OF ANNE HUTCHINSON: PURITANS DIVIDED* 120-122 (2005) (giving a description of Hutchinson’s theological beliefs).

⁴⁵ KAI T. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE*, 108 (1966).

⁴⁶ See, WINSHIP, *supra* note 44, at 96-98 (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).

⁴⁷ See, GEORGE A. SELLECK, *QUAKERS IN BOSTON, 1656-1964: THREE CENTURIES OF FRIENDS IN BOSTON AND CAMBRIDGE*, 1 (1976).

⁴⁸ See, *RECORDS OF THE COLONY OF MASSACHUSETTS BAY IN NEW ENGLAND, FIVE VOLUMES IN SIX*, at v. IV p. i., 277-279, (Nathaniel B. Shurtleff ed., 1854) (hereinafter *RCMB*); see also, GEORGE BISHOP, *NEW ENGLAND JUDGED BY THE SPIRIT OF THE LORD, IN TWO PARTS*, 10-15 (1703).

both cruel and against the laws of the colony on the grounds that there was no law against Quakers at the time enforce.⁴⁹

The Colony's leadership apparently anticipated the Bishop's complaints, as the General Court quickly passed an *Order against Quakers*, on October 14, 1656.⁵⁰ The Order was exceedingly harsh: not only did it impose hundred pound fine on anyone who knowingly brought Quakers into the colony, it also decreed that all Quakers should be immediately imprisoned, severely whipped and kept at hard labor and denied all visitors.⁵¹ 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.⁵²

Quakers were not the only religious dissenters of the era: mid seventeenth century Massachusetts Bay was rife with heterodox spirituality.⁵³ Nevertheless, the courts of Massachusetts Bay singled out Quakers for particularly harsh punishment.⁵⁴ Of the twenty-seven persons convicted for being Quakers, one was admonished (a form of state-enforced public chastisement),⁵⁵ one was fined;⁵⁶ two were whipped;⁵⁷ two were whipped and imprisoned with hard labor and coarse diet;⁵⁸ fourteen were banished;⁵⁹ three were admonished then banished;⁶⁰ and four were whipped then

⁴⁹ See, BISHOP, *supra* note 48, at 11.

⁵⁰ See, RCMB v. IV p. i, *supra* note 48, at 277-278 (containing the text of *An Order Against Quakers*).

⁵¹ *Id.*

⁵² *Id.* (all spelling from the seventeenth century is left as originally spelled because spelling was not standardized at the time; sic erat scriptum).

⁵³ NEW ENGLAND MIND, *supra* note 28, at 123; see also, Acevedo, *supra* note 41, at appendix E (providing an overview list of crimes committed in Massachusetts Bay).

⁵⁴ Acevedo, *supra* note 41. (during the same period eight persons were tried for Anabaptism, thirty-one for disrupting church services, and fifty-seven cases for sabbath breaking).

⁵⁵ See, RCMB v. IV, p. i, *supra* note 48, at 410-411 (describing the case of Hannah Phelps, but not stating why her sentence was lighter than her co-defendants).

⁵⁶ 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)

⁵⁷ See, *Id.*, at 410-411 (William King was ordered whipped with fifteen stripes and Provided Southwicke with ten stripes).

⁵⁸ *Id.* at 410-411 and 433 (Margaret Smith and Mary Traske were both ordered to be whipped with ten stripes and imprisoned with constant labor and mean diet).

⁵⁹ See, COUNTY OF SUFFOLK, RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY, 1630-1692 IN THREE VOLUMES, v.III at 68-70 (1901) (hereinafter RCA) (describing the case of Mary Dyer, Nicholas Davis, William Robbinson, and Marmaduke Stephenson); see also, RCMB v. IV p. i., *supra* note 48, at 349, 367, 371, and 391 (discussing the cases of Cassandra Southwicke, Joshua Buffam, Nicholas Pelps, Sammuell Shattocke, Josiah Southwicke, Laurence Southwicke, William Brend, and Christopher Holder); see also, RCMB v. IV p. ii, *supra* note 48, at 20-21, 23-24, and 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).

⁶⁰ See, RCMB v. IV p. i, *supra* note 48, at 410-411 (describing the cases of Hope Clifton, Alice Couland, and Mary Scott).

banished.⁶¹ In addition, charges would be brought against individuals for attending Quaker meetings no fewer than seventy-three times and, eleven times, simply for entertaining Quakers.⁶²

In contrast, none of the seven persons convicted⁶³ 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;⁶⁴ one was admonished and bound to good behavior;⁶⁵ and the last was ordered to renounce his beliefs or be imprisoned.⁶⁶ 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.⁶⁷

The persecution of Quakers in Massachusetts reached a zenith in 1659 when William Robinson, Marmaduke Stevenson, and Mary Dryer were sentenced to death for returning from banishment.⁶⁸ 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.⁶⁹ In 1661 William Ledra became the fourth Quaker executed in Massachusetts Bay for returning from banishment.⁷⁰ Although all of these individuals were technically executed for returning from banishment this is clearly a pretext, exemplified by the fact that William King was discharged upon his return from banishment after he renounced his Quaker beliefs.⁷¹

The persecution of Quakers declined shortly after these executions, due in large part the fact that political events surrounding the English Restoration overtook

⁶¹ *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*, RCMB v. IV p. ii, *supra* note 48, at 20 and 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).

⁶² *See*, Acevedo, *supra* note 41, at appendix E.

⁶³ An eighth person Joseph Redknapp was discharged by the Essex County Court when he proved that it was necessary because of the condition of his family. *See*, ECCR v. I, *supra* note 39, at 245.

⁶⁴ *See*, RCMB v. IV, p. ii, *supra* note 48, at 290-2901 and 316 (discussing the cases of Edward Drinker Jr., John George, Thomas Gold, Thomas Osborne, and William Turner).

⁶⁵ *See*, ECCR v. III, *supra* note 39, at 148 (Giving brief description of the case of Henry Roby).

⁶⁶ *See*, RCA v. III, *supra* note 59, at 213-215 (giving a description of the case of John Russell).

⁶⁷ *But see*, RCMB v. IV p. i, *supra* note 48 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).

⁶⁸ *See*, ERIKSON, *supra* note 45, at 120 (citing to Bishop, New England Judged); *see also*, RCMB v. IV, p. i, *supra* note 48, at 383-391 (providing a description of William Robbins and Marmaduke Stephenson's trials).

⁶⁹ *See*, RCMB v. IV, p. i, *supra* note 48, at 419.

⁷⁰ *See*, RCA v. III, *supra* note 59, at 93-111.

⁷¹ *See*, RCMB v. IV, p. ii, *supra* note 48, 8.

the “Quaker threat” in the eyes of the Colony’s leadership.⁷² However, in the space of a little over a decade, Massachusetts Bay contrived to charge, fine, physically punish, or banish Quakers—a disproportionate response compared to the way other religious dissenters were treated.⁷³ And unlike their English counterparts, Massachusetts officials had little reason to punish Quakers for illegal behavior.⁷⁴ 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.”⁷⁵

b. The First Red Scare

A little over two hundred and fifty 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 about the Industrial Workers of the World (IWW).⁷⁶ In response, Congress passed the legal groundwork for what would become this country’s first true “witch-hunt” of the twentieth century.⁷⁷ 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.⁷⁸

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.⁷⁹ The organization that arose from their discussions combined socialism with radical union syndicalism (revolutionary unionism with the general

⁷² See, ALAN TAYLOR, AMERICAN COLONIES: THE SETTLING OF NORTH AMERICA 185 (Penguin, 2002) (The Restoration represented not only a repudiation of Puritan ideas, but also a direct threat to the independence of the colony).

⁷³ See, Acevedo, *supra* note 41, at 163-165 (discussing the punishments dispensed to various religious dissenters including Baptists and Quakers); see e.g., RCMB v. IV p. i, *supra* note 48, at 369 (describing how Thomas Brakett was only fined for Quakerism when he admitted his error and repented).

⁷⁴ WILLIAM C. BRAITHWAITE, THE BEGINNINGS OF QUAKERISM 405 (1912) (discussing the opposition between Quakerism and the rigid Calvinism of the Massachusetts Bay officials, which led to the persecution of the Quakers).

⁷⁵ See, ERIKSON, *supra* note 45, at 107-108 (describing how Quakerism reminded colonial leaders of the antinomian controversy of Anne Hutchinson).

⁷⁶ TED MORGAN, REDS: MCCARTHYISM IN TWENTIETH-CENTURY AMERICA 55 (2003).

⁷⁷ 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).

⁷⁸ See, FREDRICK LEWIS ALLEN, ONLY YESTERDAY: AN INFORMAL HISTORY OF THE 1920S 41-43 (1964).

⁷⁹ PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES VOLUME IV: 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 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).

strike as its primary weapon) and a tinge of anarchism as well—it was the Industrial Workers of the World or *Wobblies*.⁸⁰

The IWW took its concept of “One Big Union” seriously.⁸¹ Unlike the American Federation of Labor (AFL), which focused on skilled labor, the IWW included skilled and unskilled workers alike.⁸² Similarly, the IWW included women, African Americans and immigrants in its membership, and consequently appeared even more radical in an era that was otherwise marked by Jim Crow and that preceded women’s suffrage.⁸³

Even more importantly the IWW explicitly advocated a replacement of the capitalist system.⁸⁴ The preamble of the IWW Constitution clearly stated these views:

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, abolish the wage system.⁸⁵

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.⁸⁶ In the eyes of the public all of these beliefs tied the IWW to upheaval and, more damagingly, to anarchism and violence.⁸⁷

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, for much of its early history, the group intended such “sabotage” to be entirely nonviolent.⁸⁸ Instead, Wobblies imagined that workers

⁸⁰ *Id.*

⁸¹ *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 76, at 55 (describing the IWW recruiting unskilled immigrant workers shunned by the AFL in the logging, construction, and agricultural industries).

⁸² JEREMY BRECHER, *STRIKE!, REVISED, EXPANDED, AND UPDATED EDITION* 101-102 (2014).

⁸³ See, HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES, 1492-PRESENT, TWENTIETH ANNIVERSARY EDITION* 337 (Harper Collins, 1999).

⁸⁴ BRECHER, *supra* note 82, at 101.

⁸⁵ FRED W. THOMPSON AND 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).

⁸⁶ BRECHER, *supra* note 82, at 102.

⁸⁷ See, BRUCE LAURIE, *ARTISANS INTO WORKERS: LABOR IN NINETEENTH-CENTURY AMERICA* 186 (1997) (discussing how in Chicago labor unionism and anarchism as early as the 1870s).

⁸⁸ FONER, *supra* note 79, at 160-161.

would sabotage the capitalist system by slowing down the pace of work, sitting down at the machines, or doing work in a shoddy manner. Only much later did the IWW even contemplate the destruction of property, and even then, the group's focus was on machines rather than persons.⁸⁹ But in the damage had been done: in public's view the IWW's embrace of sabotage, in any form, linked them to the late-nineteenth century anarchists who had engaged in riots, bombings, and assassinations.⁹⁰

Other tactics that were *not* misinterpreted nonetheless also added to the Wobblies' disproportionate visibility and reputation for radicalism.⁹¹ Because they lacked the funding of the skilled workers' union, the IWW sought to expand its ranks through speeches, singing,⁹² and pamphleteering that they conducted on street corners and in the face of severe objections from local governments.⁹³ 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.⁹⁴ 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.⁹⁵ By flooding the criminal legal 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.⁹⁶ The tactics of the IWW and their numerous

⁸⁹ See, BRUCE WATSON, *BREAD AND ROSES: MILLS, MIGRANTS, AND THE STRUGGLE FOR THE AMERICAN DREAM* 54 (2005) (attributing the first sit-down strike to members of the IWW); see also, FONER, *supra* note 79, at 161-162 (noting that initially the IWW viewed sabotage as being equated with shoddy workmanship, but later provided instructions on how to damage machinery); but see, BRECHER, *supra* note 82, at 174-175 (describing sit-downs as the opposite of sabotage since they did not result in any damage to property).

⁹⁰ See, BRECHER, *supra* note 82, at 56-59 (discussing the reaction of the public to the Haymarket bombing, which was blamed on anarchists).

⁹¹ Thompson, *supra* note 85, at 40-43 (describing the early free speech fights of the IWW in western states).

⁹² See generally, INDUSTRIAL WORKERS OF THE WORLD, *SONGS OF THE IWW: TO FAN THE FLAMES OF DISCONTENT*, 38TH EDITION (2010) (The IWW's most enduring contribution to the labor movement are its songs which include, Solidarity Forever, Mr. Block, Casey Jones, Power in a Union, and the Preacher and the Slave).

⁹³ FONER, *supra* note 79, at 155-156 and 172; see also, WATSON, *supra* note 89, at 154-155 (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).

⁹⁴ JOSEPH G. RAYBACK, *A HISTORY OF AMERICAN LABOR* 244 (1959).

⁹⁵ FONER, *supra* note 79, at 172-175 (most speakers would only manage to get out "Fellow workers and friends," before they were arrested and once in prison they would make a further nuisance of themselves singing and trying to proselytize to their jailers).

⁹⁶ RAYBACK, *supra* note 94, at 244.

free speech victories created in the public a feeling that the union was a massive organization.⁹⁷

Public and governmental fear of anarchists and communists grew completely out of disproportion to their actual numbers, which at their highest was less than two-tenth of one percent (0.02%) of the population.⁹⁸ Nevertheless, as the United States entered World War I, the government sought to counteract labor radicals passing several acts designed to target their beliefs.⁹⁹ Although the *Espionage Act* of 1917 criminalized the dissemination of information with the purpose to interfere with the success of the military.¹⁰⁰ The following year, the *Sedition Act* expanded this to criminalize the discussion of any belief that tended to cause disloyalty to the United States or its institutions—essentially *any* IWW speech.¹⁰¹ Above all else, the *Immigration Act* of 1918 provided for the deportation of any aliens who were anarchists or who “believed in... the overthrow by force or violence of the Government of the United States,” or who were members of organizations that advocated those beliefs.¹⁰² The preamble to the IWW Constitution alone was enough to deport any immigrant member 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.¹⁰³

In September 1917 federal agents conducted raids on forty-eight IWW office across the country and seized documents said to be evidence that union was hindering the draft.¹⁰⁴ These raids were followed by the conviction of ninety-nine union members, including IWW leaders, of violating the *Espionage Act*.¹⁰⁵ These espionage cases were followed by a series of criminal charges against union members that culminated in 1920 with the arrest of over a 1,000 Wobblies for violating the *Sedition Act* as well as a variety of local laws.¹⁰⁶ Beyond these official measures the

⁹⁷ FONER, *supra* note 79, 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.”)

⁹⁸ ALLEN, *supra* note 78, at 40 (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, *supra* note x, at 125 (estimating that the IWW membership in 1919 was around 20,000 members)

⁹⁹ MORGAN, *supra* note 76, at 54-55.

¹⁰⁰ Espionage Act, 40 Stat. 217 (1917) (the law also prohibited the passing of information to foreign governments, which could harm the United States’ war effort or caused disloyalty or mutiny in the military or discouraged men from obeying the draft law).

¹⁰¹ Sedition Act, 40 Stat. 553 (1918).

¹⁰² Immigration Act, 40 Stat. 1012 (1918).

¹⁰³ ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920, at 264-265 (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.”)

¹⁰⁴ ZINN, *supra* note 83, at 372-373.

¹⁰⁵ MURRAY, *supra* note 103, at 30 (1955).

¹⁰⁶ *See*, RAYBACK, *supra* note 94, at 289-290.

IWW was frequently subject to extralegal attacks: mobs took to harassing and even lynching Wobblies, especially around Armistice Day, and were often lightly punished.¹⁰⁷

The conviction of most of its leadership broke the strength of the IWW and it ceased to be a major force in American labor organizing by the mid-1920s.¹⁰⁸ Moreover, the same laws that led to the targeting and weakening of the Wobblies were also deployed against anarchists, socialists, and communists.¹⁰⁹ In January 1920 over 4,000 suspected radicals, mostly communists, were arrested nationwide in an operation that affected virtually every local Communist association.¹¹⁰ In December 1919, 249 Russian immigrants, including prominent anarchists, were deported to the Soviet Union.¹¹¹ The Socialist Party torn apart by governmental measures and the Party's own expulsion of communists from its ranks.¹¹²

The Supreme Court did nothing to abate the First Red Scare's witch-hunt of the radical left. In *Schench* it upheld the *Espionage Act* to 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 the right to prevent."¹¹³ 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.¹¹⁴ 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

¹⁰⁷ See, THOMPSON, *supra* note 85, at 125-126 (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).

¹⁰⁸ RAYBACK, *supra* note 94, at 290; see also, THOMPSON, *supra* note 85, 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).

¹⁰⁹ See, RAYBACK, *supra* note 94, at 287.

¹¹⁰ MURRAY, *supra* note 103, at 213.

¹¹¹ See, *Id.*, at 212-213 (describing the arrest of 800 radicals in Boston and about half of them being sent for deportation); see also, ZINN, *supra* note 83, at 375 (describing the deportation of anarchists including Emma Goldman and Alexander Berkman).

¹¹² 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 before the 1920 presidential campaign).

¹¹³ See, *Schench v. US*, 249 U.S. 47, 52 (1919).

¹¹⁴ See generally, *Gitlow v. New York*, 268 U.S. 652 (1925) (interesting although his conviction was upheld the court simultaneously found that the First Amendment was to be incorporated against the states via the Fourteenth Amendment).

immigration and the destruction of radical left organizations.¹¹⁵ Perhaps most significantly, the United States entered into World War II with communist Russia as an ally.¹¹⁶ Despite all of this, the state never fully ceased targeting radicals—as evidenced by the 1930s actions of the Dies Committee on un-American activities.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ 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.¹²⁰ Moreover, concerns regarding the infiltration of communist spies *were* somewhat legitimate—the secret of the atomic bomb had been stolen and turned over to Russia, and American spies had been captured.¹²¹ 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

¹¹⁵ See, MORGAN, *supra* note 76, at 86-87 (discussing the decline of the Communist Party and immigration rates)

¹¹⁶ See, FREDRICK LEWIS ALLEN, SINCE YESTERDAY: THE 1930S IN AMERICA, SEPTEMBER 3, 1929-SEPTEMBER 3, 1939, at 325-326 (1940) (hereinafter SINCE YESTERDAY) (discussing the change by Communists and leftist organizations in America from being anti-warlike to pro-war against the Axis powers).

¹¹⁷ *Id.*, at 210-211 (discussing the Committees targeting of both the National Maritime Union as well as teachers unions, student groups plus Communists in Hollywood);

¹¹⁸ See, ALAN BRINKLEY, VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN & THE GREAT DEPRESSION 110-112 (1982) (describing Father Coughlin's plan as being based on a heightened regulation of banks and freeing of the money system); see also, HUEY P. LONG, EVERY MAN A KING: THE AUTOBIOGRAPHY OF HUEY P. LONG 293-298 (Quadrangle, 1964) (describing Long's Share our Wealth Program based on a 100% tax on all income above one million dollars per year and an inheritance tax on all inherited income above five million dollars in the inheritor's lifetime); see also generally, UPTON SINCLAIR, I, GOVERNOR OF CALIFORNIA AND HOW I ENDED POVERTY (1934) (setting out Sinclair's End Poverty in California Plan, which focused on state ownership of industry and payment of wages in state script).

¹¹⁹ See, LANDON R.Y. STORRS, THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT 2-3 (attributing the start of the Second Red Scare to the 1947 federal employee loyalty program).

¹²⁰ Alien Registration Act, 54 Stat. 670, c. 439 (1940) (more popularly known as the Smith Act).

¹²¹ See, GRIFFIN FARIELLO, RED SCARE: MEMORIES OF THE AMERICAN INQUISITION 176-177 (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 Alger Hiss's trial for perjury because the statute of limitations had run for espionage charges).

vastly overstated, and little to no proof of wrongdoing was needed for convictions.¹²² 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.¹²³

In 1945, Congress established the House Un-American Activities Committee (HUAC) as a permanent committee with the power to investigate propaganda and suspicious organizations.¹²⁴ HUAC's investigations were the classic witch-hunt: merely to be named as a potential wrongdoer was to be condemned and often blacklisted from one's job.¹²⁵ 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.¹²⁶ 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 and those who risked blacklisting by asserting their Fifth Amendment rights.¹²⁷

It was not until 1950—five years after HUAC was established—that Senator Joseph McCarthy appeared on the stage.¹²⁸ 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.¹²⁹ McCarthy claimed to have a list of fifty-seven known communists working in the State Department.¹³⁰ Yet, of the eighty-one cases he investigated only one resulted in a criminal indictment.¹³¹

¹²² See, MORGAN, *supra* note 76, at 308-309 (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).

¹²³ *Id.*, at 310-311 (describing how anti-communism became a major issue in the 1948 presidential campaign).

¹²⁴ See, Robert K. Carr, *The Un-American Activities Committee*, 18 U. CHI. L.REV. 598, 598 (1951) (describing the creation of HUAC as a permanent standing committee).

¹²⁵ See, Miller, *supra* note 9, at 23-24 and 28-30 (linking the absurdities of HUAC with the Salem witchcraft trials and describing his own negative experience with the committee).

¹²⁶ MORGAN, *supra* note 76, at 519-520.

¹²⁷ *Id.*, at 521-525.

¹²⁸ See, *Id.*, at 374-376 (providing a description of McCarthy's early anti-communism in the Senate and giving 1950 as the year his activities began).

¹²⁹ *Id.* at 377 (noting that McCarthy began his Communist hunts in the State Department bureaucracy).

¹³⁰ See, ZINN, *supra* note 83, 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).

¹³¹ MORGAN, *supra* note 76, at 385-386 and 391 (the lone person indicted was Val Lorwin who was eventually cleared).

McCarthy's actions ramped up anxieties that had first taken form with the HUAC investigations and helped spread it to states and even towns.¹³² His fall alone did not end the Second Red Scare.¹³³ It did, however, take the wind out of its sails. In *Slochower*,¹³⁴ the Supreme Court invocation of one's Fifth Amendment rights could not by itself be held to indicate a sinister motive; in *Schware*,¹³⁵ the Court held that past affiliations could not alone be held to indicate moral turpitude; and in *Watkins*,¹³⁶ the Court held that HUAC had to show *why* it needed witness information.¹³⁷

The same combination of baseless allegations, salvation through cooperation, and ideological prejudice that characterized the HUAC and McCarthy investigations eventually found their way into Arthur Miller's portrayal of the Salem trials.¹³⁸ *The Crucible's* narrative has proved enduring: subversives 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.¹³⁹ To be sure, some individuals from all three groups committed crimes and engaged in disruptive behavior, but state authorities targeted anyone who subscribed to these beliefs regardless of their individual criminal liability.¹⁴⁰ In other words, and as under the Common Law of centuries past, criminality in all of these circumstances arose from thought alone.¹⁴¹ However, it is a basic principle of American criminal law that “a person is not guilty of an offence

¹³² See e.g., ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 266-269 (1998) (describing the targeting of Lawrence Parker and other workers on the waterfront).

¹³³ *Id.*, at 262-264 (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?”).

¹³⁴ *Slochower v Board of Education*, 350 U.S. 551 (1956).

¹³⁵ *Schware v. Bar Examiners*, 353 U.S. 232 (1957).

¹³⁶ *Watkins v. United States*, 354 U.S. 178 (1957).

¹³⁷ *Id.*

¹³⁸ Miller, *supra* note 9, at 10-17 (describing the writing of *The Crucible* and the surrounding events).

¹³⁹ See e.g., Sedition Act, 40 Stat. 553 (1918) (providing for the punishment of all members of Communist or other radical associations); see also e.g., *RCMB v. IV p. i*, *supra* note 47, at 277-278 (containing the text of *An Order Against Quakers*).

¹⁴⁰ See e.g., SIBLEY, *supra* note 120, at 168-169 (discussing the espionage work of Klaus Fuchs and Ted Hall at Los Alamos during the Manhattan Project for the Soviet Union).

¹⁴¹ See, HENRY DE BRACON, BRACON ON THE LAWS AND CUSTOMS OF ENGLAND, VOLUME TWO 334-337 (Samuel E. Thorne, Trans., 1997) (c. 1265) (describing the crime of lese-majesty, or contemplating the death of the King).

unless his liability is based on conduct that includes a voluntary act....”¹⁴² 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.¹⁴³

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 1798.¹⁴⁴ As in this early example, witch-hunts often seem to simply involve the targeting of foreigners or those who seem different from the imagined mainstream of American society.¹⁴⁵ Witch-hunts may even seem to be linked to suspect classifications—to target individuals based on their race, sex, or national origin.¹⁴⁶

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.¹⁴⁷ 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.¹⁴⁸ While there are clear parallels between racially motivated laws or legal campaigns and witch-hunts—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—there are salient differences.¹⁴⁹

¹⁴² MODEL PENAL CODE, §2.01 (AM. LAW INST., Proposed Official Draft 1962).

¹⁴³ See, Gitlow, 268 US 673 (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.”).

¹⁴⁴ JAMES MORTON SMITH, FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 22-23 and 95-96 (Cornell Paperbacks, 1966).

¹⁴⁵ See, DAVID LIVINGSTON SMITH, LESS THAN HUMAN: WHY WE Demean, ENslave, AND EXTERMINATE OTHERS 130-131(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 *Community Dignity*) (providing the example of the dehumanization of criminals in contemporary America as a way to justify increased punishments).

¹⁴⁶ *Caroline Products*, 404 U.S. 144, 153 footnote 4 (1934) (first articulating the belief that laws that target discrete and insular minorities may need to be subjected to heightened scrutiny).

¹⁴⁷ See e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, REVISED EDITION 52-54 (2011) (discussing the passing of new laws to battle the crack epidemic of the mid-1980s).

¹⁴⁸ KAREN E. FIELDS AND BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUITY IN AMERICAN LIFE 5-6 (Verso, 2014).

¹⁴⁹ See e.g., ZINN, *supra* note 83, 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 AND ALFRED A. MOSS JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS, SEVENTH EDITION 312-313 (1994) (describing the illegal killings of African

Racial campaigns target individuals on the basis of what is (widely perceived in the United States to be)¹⁵⁰ an immutable and self-evident characteristic.¹⁵¹ Witch-hunts target the unseen: ideological positions. The Supreme Court has been hesitant to provide protections for laws that target unpopular ideological groups.¹⁵² 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 it widely seen as less in need of legal protection.¹⁵³ Conversely, the Court has extended heightened scrutiny to race,¹⁵⁴ national origin,¹⁵⁵ alienage at the state level,¹⁵⁶ legitimacy,¹⁵⁷ and gender.¹⁵⁸

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.¹⁵⁹ The perpetuation of slavery by the Constitution ensured that race has continued to be a defining issue of America.¹⁶⁰ Institutional

American persons of both genders and all ages as part of the system of punishment of the United States).

¹⁵⁰ *But see*, FRANZ BOAS, ANTHROPOLOGY AND MODERN LIFE 20-24 (Dover, 1986) (1928) (asserting that there are not certain biological differences between races sufficient to accurately classify and thus race is a social construction).

¹⁵¹ *See*, JODY DAVID 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).

¹⁵² *US Dept. of Ag v. Moreno*, 413 U.S. 528 (1973).

¹⁵³ *But see*, *Caroline Products*, 404 U.S., at 153 footnote 4 (Justice Stone included both political organizations and religious groups among the list of discrete and insular minorities).

¹⁵⁴ *See generally*, *Korematsu*, 323 U.S. (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).

¹⁵⁵ *See e.g.*, *San Antonio Independent School Dist v. Rodriguez* 411 U.S. 1, 61 (Stewart, J., concurring) (citing *Oyama v. California*, 332 U.S. 633 (1948)) (The law was held not to target a particular racial or national origin group, but rather income level which does not receive heightened scrutiny).

¹⁵⁶ *See*, *Graham v. Richardson*, 403 U.S. 365 (1971) (Applying strict scrutiny review to invalidated an Arizona law that limited welfare benefits to persons who had been citizenship for 15 years).

¹⁵⁷ *See e.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972) (Applying heightened scrutiny to invalidate an Illinois law that assumed fathers were not fit caregivers of children born out of wedlock).

¹⁵⁸ *See*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (The Court held 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 (1996) (the Court applied 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).

¹⁵⁹ *See*, ERIC FONER, THE STORY OF AMERICAN FREEDOM 35-37 (1998) (hereinafter 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).

¹⁶⁰ *See*, PETER N. CARROLL AND DAVID W. NOBBLE, THE FREE AND THE UNFREE: A NEW HISTORY OF THE UNITED STATES, SECOND EDITION, 129 (asserting that by perpetuating slavery and leaving

racism was not only upheld by the Court, but actually expanded from slaves to freemen.¹⁶¹ Indeed even after the abolition of slavery segregation laws were passed to perpetuate inequality and racism and again supported by the Court.¹⁶² Even though the Court has repudiated *de jure* segregation,¹⁶³ the legacy of its past legal sanctioning is still felt today and makes race a uniquely difficult issue in American law and society.¹⁶⁴

For these reasons, racial campaigns, although they often appear to be *witch-hunts* because of the manifest sense of unfairness that characterizes them, are distinct. Perhaps the best and most difficult example of this difference is the Japanese internment during World War II and the Supreme Court's decision in *Korematsu* that affirmed its constitutionality.¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ 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 that group being unfairly targeted by the government.¹⁶⁸

suffrage limitations in state hands the Constitution ensured the continuation of white male political power).

¹⁶¹ See, *Dredd Scott v. Sandford*, 19 How. 393, 407 (1857) (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.").

¹⁶² 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).

¹⁶³ See e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that separate is inherently unequal).

¹⁶⁴ ARMOUR, *supra* note 151, at 19-20.

¹⁶⁵ See, ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 115 (1997); see also generally, *Korematsu*, 323 U.S., 214.

¹⁶⁶ *Id.*, at 117-121 (describing the hysteria against Japanese-Americans in California and other western states in the months after the Pearl Harbor attack).

¹⁶⁷ GORDON W. PRANGE, *AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR*, 50TH ANNIVERSARY EDITION 70-77 and 309-312 (Penguin, 1991) (providing a brief history of Japanese and German spying in Pearl Harbor in the period before the Japanese air raid).

¹⁶⁸ 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).

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.¹⁶⁹ In this event racism and witch-hunting merged—and approximately 110,000 persons were incarcerated without trial.¹⁷⁰ The interplay between race and ideology can be seen in *Korematsu*, the Court equated internment with the imposition of a curfew seeing both as justified because the loyalty of Japanese Americans could not be easily established.¹⁷¹ In contrast the dissent saw no ideology at play, just racism.¹⁷² 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 obfuscates the deep history of race discord in America. The role of race in connection to crime panics will be discussed in Section III(d).

III. Crime Panics

Fortunately, true witch-hunts are rare occurrences, but there are numerous incidents throughout American history where the public becomes fixated on a particular type of criminal activity, eventually leading to a crime panic. As Part I noted, a crime panic is defined as a fixation on one type of existing criminal behavior started by a person or persons with influence that resulted in unfair trials because of existing flaws in criminal procedure, or new flaws that are introduced in an attempt to reach the targeted criminal action. In essence in a crime panic the defendant may be guilty of the underlying legitimately criminalized activity, but there are flaws in the procedural process used. Two instances of crime panics will be examined: the Salem witchcraft trials and the Satanic Panic centered on child sex abuse. Finally, this section will also explain why the ongoing investigation by Special Prosecutor Robert Mueller is *neither* a witch-hunt nor a crime panic.

¹⁶⁹ PRANGE, *supra* note 167, at 309-312 (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 164, 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).

¹⁷⁰ 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 the 113,000 lived on the West Coast).

¹⁷¹ *Korematsu*, 323 U.S. 214, 218-219.

¹⁷² *Id.*, at 240 (Murphy Dissenting) (“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.”).

a. Salem

The Salem witchcraft trials occupy a unique place in American legal history. The trials are synonymous with wrongful prosecution.¹⁷³ Implicated in this interpretation is the belief that witchcraft was simply a cover to promote other social ends or vent community prejudices.¹⁷⁴ 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.¹⁷⁵

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.¹⁷⁶ It was furthered by persons of influence—the ministers Samuel Parris and, later, Cotton Mather. Finally, it resulted in 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.¹⁷⁷ 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 for gain.¹⁷⁸ More importantly there was no separate religion of witches; instead they were persons who “hath conference with

¹⁷³ 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).

¹⁷⁴ See e.g., LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* 61 (2006).

¹⁷⁵ 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 and Stuart Clark eds., 1999); see also, LORRAINE DASTON AND 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).

¹⁷⁶ See, Acevedo, *supra* note 41, at 208-209 and 344 (describing that very few trials were conducted in the wake of the Glorious Revolution and focused on piracy in addition to witchcraft).

¹⁷⁷ The actions that were criminalized as witchcraft can still be performed today. It is just we no longer believe that 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, SECOND EDITION, REVISED & EXPANDED* (2007) (providing an introductory book on the casting of spells and other witchcraft related activities for modern practitioners).

¹⁷⁸ But see, GERALD B. GARDNER, *WITCHCRAFT TODAY*, 35-36 (Margaret A. Murray *Intro.*, 1954) (In her introduction Murray approvingly writes of Gardner's belief that the witchcraft rituals he discovered being practiced in the early twentieth century were ruminants of medieval practices that had been suppressed; see also, 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).

the devil, to consult with him or to do some act.”¹⁷⁹ The belief that Salem was a witch-hunt is heightened by the emergence of Wicca and other witchcraft based religions, which claim both a heritage to older European folk practices and the events of Salem as a persecution of themselves.¹⁸⁰ 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.”¹⁸¹ To be clear if laws were passed today that explicitly targeted the practitioners of witchcraft, wicca, they would of course violate the Free Exercise Clause.¹⁸²

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.¹⁸³ Early in his reign James I 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.¹⁸⁴ 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.¹⁸⁵ In other

¹⁷⁹ EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONCERNING HIGHT TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES*, EIGHTEENTH EDITION 43 (Law Book Exchange 2012) (1817); *see*, MIRCEA ELIADE, *Some Observations on European Witchcraft*, in *OCCULTISM, WITCHCRAFT, AND CULTURAL FASHIONS: ESSAYS IN COMPARATIVE RELIGIONS*, 71-2 (1976) (asserting that forms of witchcraft have always been practiced in Europe, but denying it was a coherent religion); *but see*, MARGARET ALICE MURRAY, *THE GOD OF THE WITCHES* (Oxford University 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).

¹⁸⁰ *See*, MURRAY, *supra* note 179, at 21.

¹⁸¹ BARBARA J. SHAPIRO, *A CULTURE OF FACT: ENGLAND, 1550-1720*, at 179 (2000).

¹⁸² *See generally*, Lukumi Babalu Aye, 508 U.S. (In the case the Supreme Court recognized Santaria as a religion within the scope of the First Amendment).

¹⁸³ *The Bill Agenst Conuracions & Wicbecraftes and Sorcery and Enchantments*, 33 Hen. VIII c8 and 9; *see also*, JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND IN THREE VOLUMES*, VOLUME II 410 (MacMillan and Co., 1883); *but see*, FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, SECOND EDITION, VOLUME II, at 555 (Lawyers’ Literary Club, 1959) (they state that 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).

¹⁸⁴ G.M. TREVELYAN, *ENGLAND UNDER THE STUARTS 28-31* (Routledge Press, 2002) (Trevelyan attributes this interest the influence of continental thought that permeated Scotland and thus James); *see also*, GEORGE LYMAN KITTREDGE, *WITCHCRAFT IN OLD AND NEW ENGLAND 276-279* (New York: Russell and Russell, 1956); *see e.g.*, William Shakespeare, *Macbeth*, in *THE ARDEN SHAKESPEARE*, REVISED EDITION 773 (Kenneth Muir ed., 2001) (In his introduction Muir links the play to King James I due to James’ 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) (she states 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)..

¹⁸⁵ 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)

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.”¹⁸⁶ There seems to have been little controversy in witchcraft being a capital offense.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹ 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 feel.¹⁹⁰ In January 1692, Abigail Williams and her cousin Betty Parris fell ill with strange fits and convulsions.¹⁹¹ Betty’s father, the minister Samuel Parris called doctor William Griggs to determine what illness the girls had. Finding no physical illness with the girls, Parris decided on fasting and prayer as the best remedies. A neighbor believed that there might be witchcraft afoot so she instructed the Parris’ slaves to make a witches cake and feed it to the family dog to discover the identity of the witches.¹⁹² The girls cried out that it was Tituba, the family’s Amerindian slave, who was bewitching them.¹⁹³ In a few weeks’ time the number of

¹⁸⁶ Coke, *supra* note 179, at 43.

¹⁸⁷ 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 181-184 (1610) (the pagination is misprinted in this edition so that the page referred to reads 168, but is the 181st 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).

¹⁸⁸ 1 Jac. I. c. 12 (1603-4).

¹⁸⁹ *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).

¹⁹⁰ See, KEITH THOMAS, RELIGION AND THE DECLINE OF MAGIC 469-471 (1971) (asserting that the belief in witchcraft was dependent on a personal devil, which was promoted by Christianity both before and after the Reformation).

¹⁹¹ MARY BETH NORTON, IN THE DEVIL’S SNARE: THE SALEM WITCHCRAFT CRISIS OF 1692, at 18 (2002).

¹⁹² *Id.*, at 19-20 (a witches cake is made by combine 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).

¹⁹³ *Id.*, at 20.

afflicted women would grow to seven, adding Ann Putnam, Mercy Lewis, Elizabeth Harris, Mary Walcott, and Mary Warren.¹⁹⁴

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.¹⁹⁵ 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.¹⁹⁶ The girls continued to implicate other people.¹⁹⁷ 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 27th 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.¹⁹⁸ By the time the trials were over 156 persons were accused, 30 convicted, and 19 executed.¹⁹⁹

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.²⁰⁰ In addition, they were initially substantiated by a member of the least powerful group, Tituba, an Amer-Indian slave.²⁰¹ However, their accusations were approved of and spread by the colony's leaders, indeed the town's minister was the first afflicted girls' father.²⁰²

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.²⁰³ 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.²⁰⁴ The colonists of Massachusetts

¹⁹⁴ HOFFER, *supra* note 173, at 48.

¹⁹⁵ NORTON, *supra* note 191, at 22.

¹⁹⁶ *Id.*, at 28.

¹⁹⁷ HOFFER, *supra* note 173, at 51-3.

¹⁹⁸ *Id.*, at 71; *see also*, EMORY WASHBURN, SKETCHES OF THE JUDICIAL HISTORY OF MASSACHUSETTS: FROM 1630 TO THE REVOLUTION IN 1776, at 141 (1840) (The court was composed of seven judges Stoughton, John Richards, Bartholomew Gedney, Wait Winthrop, Samuel Sewall, Peter Sergeant, and Nathaniel Saltonstal replaced by Jonathan Curwin after the first case).

¹⁹⁹ RICHARD GODBEER, THE DEVIL'S DOMINION: MAGIC AND RELIGION IN EARLY NEW ENGLAND 238-242 (1994).

²⁰⁰ *See*, NANCY WOLOCH, WOMEN AND THE AMERICAN EXPERIENCE, SECOND EDITION 44 (1994) (Woloch's take is that the trials themselves gave these women the opportunity to assert power).

²⁰¹ ELAINE G. BRESLAW, TITUBA RELUCTANT WITCH OF SALEM: DEVILISH INDIANS AND PURITAN FANTASIES 58 (1996) (describing Tituba's enslavement and treatment in New England).

²⁰² EMERSON W. BAKER, A STORM OF WITCHCRAFT: THE SALEM TRIALS AND THE AMERICAN EXPERIENCE 22 (2015) (hereinafter STORM OF WITCHCRAFT).

²⁰³ WILLIAM HAWKINS, PLEAS OF THE CROWN, VOLUME 2, at 352-353 (1978).

²⁰⁴ COKE, *supra* note 179, at 137.

experimented with allowing defense counsel, but it was never widely used.²⁰⁵ 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.²⁰⁶ Therefore the accused at Salem, like all other felony defendants in Massachusetts and England, were denied access to defense counsel.

Some scholars have suggested that torture was used to extract confessions from the accused at Salem.²⁰⁷ But these accusations are questionable as they are not supported by the colonial records and confessions did not necessarily lead to convictions.²⁰⁸ 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.²⁰⁹ The colonists made a considerable effort to follow the Common Law procedures—for example they did not engage in *witch-ducking* (the dunking of suspects in water to determine guilt), which was not within the normal procedure of the Common Law.²¹⁰

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, simply to induce him to enter a plea.²¹¹ Pressing, or *peine forte et dure*, was not used to extract information or even a confession, but simply to induce the defendant to enter a plea.²¹² Pressing became a feature of the Common Law because of the unusual adoption of the jury trial, which was never formally mandated, but required the defendant to put themselves before the jury.²¹³ If the defendant refused to plea, or stood-mute, then they could not be tried and could not be convicted.²¹⁴ The pressing

²⁰⁵ John Felipe Acevedo, *Ideological Origins of the Right to Counsel*, 68 S. CAR. L. REV. 87, 111-114 (2017) (hereinafter *Ideological Origins*) (describing the colony's law and the case of James Ward who appears to have received the advice of counsel).

²⁰⁶ FRANCIS J. BREMER, *THE PURITAN EXPERIMENT: NEW ENGLAND SOCIETY FROM BRADFORD TO EDWARDS*, REVISED EDITION 174-175 (1995).

²⁰⁷ ROBERT CALEF, *MORE WONDERS OF THE INVISIBLE WORLD*, 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).

²⁰⁸ See e.g., *RECORDS OF THE SALEM WITCH-HUNT*, at 826-7 (Bernard Rosenthal ed., 2009) (Describing the cases of Mary and William Baker both of who confessed but were found not guilty).

²⁰⁹ See, JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME*, WITH A NEW PREFACE 81-4 (2006).

²¹⁰ See cf., *NARRATIVES OF THE WITCHCRAFT CASES, 1648-1706*, at 435-438 (George Lincoln Burr ed., 1914) (introducing the 1706 case of Grace Sherwood in Norfolk County, Virginia during which Sherwood was ducked in an attempt to ascertain her guilt)(hereinafter *Narratives of Witchcraft*).

²¹¹ See, LANGBEIN, *supra* note 209 at 74-77 (describing the general confusion of *peine forte et dure* with torture).

²¹² See, J.H. BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY*, FOURTH EDITION 508-9 (2002) (the term is law French for strong and hard punishment).

²¹³ *Id.*, at 71-74 (describing the origin of the jury system).

²¹⁴ See, LANGBEIN, *supra* note 209, at 75-6 (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

of Cory clearly demonstrates the overzealousness of the magistrates during the Salem trials as no one, not even Quakers who stood mute,²¹⁵ was previously pressed in Massachusetts Bay.²¹⁶ 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 the problematic procedures employed during the Salem trials there were evidentiary deficiencies. The only universally agreed upon proofs for the conviction of a witch were either the accused's confession or the testimony of two eyewitnesses.²¹⁷ 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.²¹⁸ During the Salem trials hearsay—including rumors, gossip, surmises and tales—were all admitted as evidence to be considered by the judges.²¹⁹ Hearsay was routinely admitted in English criminal cases until the eighteenth century and therefore its use during Salem demonstrates its general unreliability.²²⁰ For example, in the case against Dorcas Hoar a witness gave testimony about what her soon had witnessed nine years before.²²¹ Spectral evidence was more controversial at the time, several commentators warned against its use, but it was not unheard of.²²² The evidentiary flaws seen during Salem were systemic to the Common Law but as with pressing they were heightened by the zeal of prosecution which led the magistrates to ignore warning signs.²²³

The Salem trials thus fit into all aspects of the *crime panic* model: there was a fixation on the criminal behavior (witchcraft) furthered by persons with influence

also, DAVID THOMAS KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS, ESSEX COUNTY 1629-1692, at 174 (1979) (he asserts that Cory's refusal to plead was an act of rebellion against the unjust proceedings of the court against him).

²¹⁵ See, RCMB v. IV p. ii, *supra* note 48, at 20 and 24 (describing the IV cases of Peter Pierson and Judah Broune who both refused to enter a guilty plea, but were tried anyway).

²¹⁶ See generally, Acevedo, *supra* note 41 (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).

²¹⁷ 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).

²¹⁸ STORM OF WITCHCRAFT, *supra* note 202, at 27 (describing spectral evidence).

²¹⁹ HOFFER, *supra* note 173, at 75.

²²⁰ BAKER, Introduction, *supra* note 212, at 510 (noting that there were virtually no rules of evidence until the 18th century).

²²¹ RECORDS OF THE SALEM WITCH-HUNT *supra* note 208, at 592-593 (Providing a transcript of the deposition provided by Mary Gage against Dorcas Hoar and other accused persons).

²²² 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 (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).

²²³ KONIG, *supra* note 214, at 171-173 (1979) (Konig asserts that the admission of spectral evidence can be attributed to the colonist use of the Common Law during the Salem trials as it had not been previously used in witchcraft trials in Massachusetts Bay).

(Parris and Mather) that revealed 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.²²⁴ The Treason Trials Act of 1696 would allow criminal defendants the right to the assistance of counsel for the first time in England.²²⁵ Similarly, hearsay began to be disallowed in criminal trials by the early eighteenth century and spectral evidence would never be used again.²²⁶ The unfairness that is felt around the Salem trials is thus explainable by the fact that we no longer believe in the crime and that the trials were zealously conducted 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.²²⁷ 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 equate pornography with incest and abuse;²²⁸ the rise, in the 1970s, of new religious movements and cult activities;²²⁹ and a change in psychological analysis toward taking patient narratives at face value.²³⁰ Whatever its cause, the Panic was enthusiastically spread by enterprising

²²⁴ *Ideological Origins*, *supra* note 205, at 94 (discussing the Bloody Assizes following Monmouth’s Rebellion as an example of the unfairness of the defendant lacking access to counsel).

²²⁵ *See*, JOHN H. LANGBEIN, *ORIGINS OF ADVERSARY CRIMINAL TRIAL* 67-68 (A.W. Brian Simpson ed., 2003) (hereinafter *ORIGINS OF ADVERSARY*); *see also*, JOHN BEATTIE, *CRIME AND COURTS IN ENGLAND 1600-1800*, at 356-362 (1986).

²²⁶ *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).

²²⁷ 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).

²²⁸ *See*, DEBBIE NATHAN AND MICHAEL SNEDEKER, *SATAN’S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT* 39-41 (1995).

²²⁹ *See*, JEFFREY S. VICTOR, *SATANIC PANIC: THE CREATION OF A CONTEMPORARY LEGEND* 8-10 (1993).

²³⁰ *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).

tabloid TV hosts looking for a ratings boost—Geraldo Rivera alone claimed there were one million Satanists in America.²³¹

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.²³² The case began with just one accusation of sexual abuse involving one child and one daycare employee, but it soon mushroomed to include numerous children accusing multiple pre-school staff.²³³ 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 who were referred to the authorities by other victims denied that any abuse had occurred, but after persistent questioning by police and their parents they declared they were abused and began to embellish their stories.²³⁴ McMartin defendants were all acquitted or not retried after mistrials where the juries deadlocked.²³⁵

In fact, very little of the activity that was targeted during the Satanic Panic involved anything satanic at all: much of the claims were imagined, and what was not imagined was usually a kernel of already criminalized activity like child abuse.²³⁶ 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 American Satanic Panic, only three had any evidence of actual ritual activity—that is, they involved masks, robes, or altars—and that in these instances the items had been used to frighten children into not reporting the abuse rather than as part of any satanic ritual.²³⁷ Similarly, a comprehensive FBI investigation of the period 1981-1989 found that no murders

²³¹ VICTOR, *supra* note 229, at 24-25 and 32-33 (providing a timeline of events surrounding the Satanic Panic in both the United States and Jamestown, New Jersey).

²³² *Id.*, at 15-16.

²³³ *See*, NATHAN, *supra* note 228, at 71-90 (providing a brief account of the McMartin case).

²³⁴ *See*, Debbie Nathan, *Satanism and Child Molestation: Constructing the Ritual Abuse Scare*, in THE SATANISM SCARE 75 (James T. Richardson, Joel Best, and David G. Bromley eds., 1991) (hereinafter *Satanism*) (describing some of the allegations made during the McMartin case); *see also*, VICTOR, *supra* note 229, at 116-117 (describing the news media's publication of accounts).

²³⁵ ROSS E. CHEIT, THE WITCH-HUNT NARRATIVE: POLITICS, PSYCHOLOGY, AND THE SEXUAL ABUSE OF CHILDREN 83-86 (2014).

²³⁶ *Id.*, at 115-117.

²³⁷ British Medical Journal, *Ritual Abuse Dismissed as Mythical in Britain*, 308 BRIT. MED. J. 1527, 1527 (1994).

that could be attributed to satanic cults.²³⁸ Indeed, even the claims of ritual abuse and animal sacrifices that were widespread during this period were completely unsubstantiated.²³⁹ 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.²⁴⁰ 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.²⁴¹ That is three instances too many.

The primary failing of the Satanic Panic cases was their reliance on the unreliable testimony of children.²⁴² 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.²⁴³ Shockingly, therapists, police, and prosecutors all ignored the preternatural elements of the stories while still trying to assert that the core allegations were true.²⁴⁴ Even more surprising is that cases were advanced to trial when the available physical evidence did not support the core claims of the purported victims. Perhaps most startling of all is the fact that 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 beyond the scope of this Article, but they certainly makes for bad witnesses.²⁴⁵

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) that was led by persons of influence (medical and therapy professionals) and, in this particular case, it resulted in trials that were markedly unfair because of existing flaws in criminal procedure law (the use of child testimony). Part IV will take up 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

²³⁸ Wright, *supra* 227, at 121; *see also*, Daniel Coleman, *Proof Lacking for Ritual Abuse by Satanists*, N.Y. TIMES, October 31, 1994, at 13 (citing a study by University of California at Davis researches that found there was no evidence of satanic ritual abuse in 12,000 accusations of such abuse).

²³⁹ *Satanism*, *supra* note 234, at 75.

²⁴⁰ CHEIT, *supra* note 235, at 115-117 (challenging the work of earlier scholars who claimed that virtually all of the cases of ritual sexual abuse reported were fabrications).

²⁴¹ *Id.* at 116.

²⁴² *See e.g.*, NATHAN, *supra* note 228, at 140-141 (describing the leading questions posed to children during sessions with therapists).

²⁴³ Wright, *supra* note 227, at 123-124

²⁴⁴ *See*, Robert D. Hicks, *The Police Model of Satanic Crime*, in THE SATANISM SCARE 176-177 (James T. Richardson, Joel Best, and 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).

²⁴⁵ Sherrill Mulhern, *Satanism and Psychotherapy: A Rumor in Search of an Inquisition*, in THE SATANISM SCARE 165 (James T. Richardson, Joel Best, and David G. Bromley eds., 1991).

Panic was not actually concerned with criminalizing beliefs or, more specifically, with creating new laws in order to targeting 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....”²⁴⁶ There are, in fact, several ongoing investigations concerning President Trump, including one regarding campaign finance violations in relation to payments to Stormy Daniels²⁴⁷ and another concerning irregularities with the Inauguration Committee,²⁴⁸ but the focus of this section will be on the Special Prosecutor’s actions. At a time when Mueller’s initial report is expected almost daily, it is especially important to understand exactly what kind of investigation he has conducted and what, if any, implications that investigation has for our criminal legal system more broadly.²⁴⁹

Mueller’s investigation has focused on possible coordination between Russian operatives and members of the Trump campaign to release Democratic emails via Wikileaks.²⁵⁰ 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.²⁵¹ By the end of 2018, the investigation had resulted in four individuals being sentenced to prison, one trial conviction, seven guilty pleas, and thirty-seven indictments.²⁵² One of these indictments—that of Roger Stone,

²⁴⁶ Dep’t of Just., *Appointment of Special Counsel*, Order No. 3915-2017 (2017).

²⁴⁷ Rick Newman, *Trump Struggled to Pay Stormy Daniels Hush Money*, YAHOO! FINANCE (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).

²⁴⁸ Eliza Newlin Carney, *Trump’s Inaugural Was a Hot Mess from the Start, and Now it Puts Him in Legal Peril*, THE AMERICAN 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).

²⁴⁹ See, Andrew Prokop, *Reports say Robert Mueller Could Conclude His Trump-Russia Investigation Next Week*, VOX (Feb. 20, 2019), <https://www.vox.com/2019/2/20/18233483/mueller-report-release-trump-russia-investigation-next-week>.

²⁵⁰ Aaron Blakc, *What Roger Stone’s Indictment Means for Collusion*, WASHINGTON POST (Jan. 25, 2019), https://www.washingtonpost.com/politics/2019/01/25/roger-stones-indictment-thickens-russia-collusion-plot/?utm_term=.b80fa421b7a4 ().

²⁵¹ Abigail Simon, *What we Know about the Controversial 2016 Trump Tower Meeting with Russian Officials*, TIME MAGAZINE (Jan. 27, 2018), <http://time.com/5351648/2016-trump-tower-meeting-facts/>

²⁵² Marshall Cohen and 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).

President Trump’s campaign chairman—suggests that there is direct evidence that Stone coordinated the release of the emails, although it is still unclear what the President knew or when he knew it.²⁵³

President Trump has frequently used the term “witch-hunt” to characterize the Mueller investigation.²⁵⁴ 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 President²⁵⁵—seems to be an almost weekly occurrence.²⁵⁶ There is more than some irony in the fact that the President cries “witch-hunt” even as he attempts to instigate a crime panic surrounding undocumented immigrants in America.²⁵⁷

However, this does not mean that *all* of the complaints he has raised about the Special Prosecutor’s process are without merit.²⁵⁸ The primary criticism raised by President Trump or his administration more generally concern the valid and generalizable problems with our criminal law system; the flipping of co-conspirators as part of striking a plea bargain.²⁵⁹ This defect parallels some of the procedural flaws revealed by the Salem trials and Satanic Panic but, as the end of this section demonstrates, they do 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

²⁵³ 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>.

²⁵⁴ 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).

²⁵⁵ 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).

²⁵⁶ 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).

²⁵⁷ Janell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, WASHINGTON 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).

²⁵⁸ 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).

²⁵⁹ Jack Shafer, *Week 27: Did Flynn Flip and Did Trump Flip Out?*, POLITICO (Nov. 25, 2017), <https://www.politico.com/magazine/story/2017/11/25/week-27-did-flynn-flip-and-did-trump-flip-out-215864> (discussing Michael Flynn’s search for a plea deal in exchange for a plea agreement and President Trump’s reaction).

American system are under immense pressure to reach plea agreements and they pass on some of that pressure to co-conspirators, which often leads to pleas that impose unusual or illegal punishments.²⁶⁰ 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.²⁶¹ 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.²⁶² 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.²⁶³ Even more strikingly, the Court has held that that co-conspirator testimony need not be corroborated by other evidence in order to be the basis for conviction.²⁶⁴

Given all this, President Trump is right to critique the Mueller investigation's reliance on co-conspirator testimony.²⁶⁵ 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 is implicated too.²⁶⁶ This aspect of the investigation is certainly a flaw, and it is a flaw of the type that frequently contributes to the development of crime panics.²⁶⁷

²⁶⁰ Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 696-698 (2001).

²⁶¹ BAKER, *supra* note 212, at 504.

²⁶² H. Lloyd King Jr., *Why Prosecutors are Permitted to Offer Witness Inducements: A Matter of Constitutional Authority*, 29 STETSON L.REV. 155,160-161 (1999).

²⁶³ *Lisenba v. People of State of California*, 314 US 219, 226-228 (1941) (holding that promise of leniency to the testifying co-conspirator did not violate the defendant's rights or make the testimony suspect).

²⁶⁴ J. Arthur L. Alarcon, *Suspect Evidence: Admissibility of Co-Conspirator Statements and Uncorroborated Accomplice Testimony*, 25 LOYOLA OF LOS ANGELES 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).

²⁶⁵ 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).

²⁶⁶ 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).

²⁶⁷ 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, 563-566 (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 260, at 711-712 (describing what he terms "ad Hoc Plea

Despite this procedural flaw and the potentially compromising effect it may have on the overall endeavor, the Mueller investigation does not qualify as a crime panic. To begin with, the “fixation” 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.²⁶⁸ 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. 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 severity of the defects at issue in the cases of Salem and the Satanic Panic.²⁶⁹

At the same time, the Mueller investigation clearly does not represent a witch-hunt. There is simply no ideological system or belief at issue. Seventeenth-century Quakers were targeted for their heterodox religion, labor radicals during the First Red Scare were targeted for their belief that capitalist industry was antithetical to worker welfare, and a wide range of individuals—from civil servants to film industry workers—were targeted during the Second Red Scare for their supposed belief in communist governance. President Trump and the Trump administration more generally cannot point to any similar belief for which they are being investigated.²⁷⁰ 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 involving a select group of

Bargaining,” which results in non-legislatively approved punishments being implemented as part of plea agreements).

²⁶⁸ 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/>.

²⁶⁹ *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*, *See e.g.*, ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* 61-67 (Picador, 2015) (describing the destructive behavior of police plus threats made by police against inhabitants of a home they are searching for a wanted person).

²⁷⁰ *But see*, SAVAGE, *supra* note 7, at 10 (asserting the interesting thesis that the attacks on President Trump are a left-wing media conspiracy).

potential wrongdoers.²⁷¹ 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.²⁷² 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, hysteria *alone* does not a crime panic make.²⁷³ In a crime panic the criminal behavior has been previously defined, not created for the purposes of targeting a group of persons. Conversely, 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.²⁷⁴ 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 of the type discussed earlier in this Part.²⁷⁵ 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 in general.

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 involved practices that are now

²⁷¹ 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).

²⁷² See, MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 294-295 (Vintage Press, 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).

²⁷³ LORRAINE K. BANNI, ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE 21-22 (2015).

²⁷⁴ See, DANIELS, *supra* note 170, at 61 (describing Fred Korematsu’s continuing to work under an assumed name rather than reporting to be interned and his arrest).

²⁷⁵ Trump v. Hawaii, 585 U.S. ___, 38 (2018) (page citation is to the slip opinion) (condemning the Court’s earlier decision in *Korematsu*).

widely recognized as unfair.²⁷⁶ President Reagan and the popular media repeatedly used terms like “welfare queen” to describe African-American women who, among other things, lived on welfare while buying drugs, and to justify calls to be tougher on crime.²⁷⁷ 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.²⁷⁸ Unsurprisingly, these practices as well as the “us versus them” mentality promoted by authority figures during the War on Drugs has led minorities, and especially African-Americans, to harbor a deep mistrust of the criminal system because they sense they are being unfairly targeted.²⁷⁹

However, and notwithstanding its deeply flawed premises and execution, the War on Drugs, was not a crime *panic*. The targeting of racial minorities in America—and in particular, of African Americans—has been going on for decades.²⁸⁰ 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.²⁸¹ 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 gained traction with Richard Nixon’s successful 1968 campaign.²⁸²

IV. Lessons from Witch-Hunts and Crime Panics

As Parts II and III made clear, there are similarities between witch-hunts and crime panics, but 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

²⁷⁶ BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN THE ACTUARIAL AGE* 213-214 (2007), at 213-214 (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).

²⁷⁷ ALEXANDER, *supra* note 147, at 48-49.

²⁷⁸ *Id.*, at 53-54.

²⁷⁹ GOFFMAN, *supra* note 269, at 61-67.

²⁸⁰ *See*, JOHN HAGAN, *WHO ARE THE CRIMINALS?: THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN* 149-157 (2010) (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).

²⁸¹ *See e.g.*, ALEXANDER, *supra* note 147, at 236-240 (calling for a radical rethinking of how criminals are described and American’s think about race in general and in particular with regard to crimes, especially drugs).

²⁸² IAN HANEY LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS* 21-24 (2014).

Clause of the Fourteenth Amendment. Conversely, it is unreasonable to expect that panics can be avoided altogether because societies will always marginalize some individuals and target them for behaviors that are perceived to be unacceptable.²⁸³ Nevertheless, the damage that crime panics cause can be mitigated by increasing procedural safeguards for defendants.²⁸⁴ 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.

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,²⁸⁵ national origin,²⁸⁶ alienage at the state level,²⁸⁷ legitimacy,²⁸⁸ and gender.²⁸⁹ However, the Court has declined to clearly apply heightened scrutiny to disfavored political groups, and has preferred instead to rigorously apply the rational basis test when assessing laws that target such groups, which are minorities because of their beliefs.²⁹⁰ Consequently, the Court has left open the possibility that witch-hunts will continue to occur.

For instance in *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

²⁸³ MONOD, *supra* note 20, at 45.

²⁸⁴ COHEN, *supra* note 20, at 232-233 (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.”)

²⁸⁵ *See generally*, *Korematsu*, 323 U.S. (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).

²⁸⁶ *See e.g.*, *San Antonio Independent School Dist v. Rodriguez* 411 U.S. 61 (Stewart, J., concurring).

²⁸⁷ *See*, *Graham v. Richardson*, 403 U.S. 365 (1971) (Applying strict scrutiny review to invalidate an Arizona law that limited welfare benefits to persons who had been citizenship for 15 years).

²⁸⁸ *See e.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972) (Applying heightened scrutiny to invalidate an Illinois law that assumed fathers were not fit caregivers of children born out of wedlock).

²⁸⁹ *See*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (The Court held 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 (1996) (the Court applied 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).

²⁹⁰ *U.S. Dept. of Ag v. Moreno*, 413 U.S. 528 (1973).

went so far as to warn about the dangers of targeting disfavored ideological groups.²⁹¹ Nevertheless, instead of analyzing the dispute using strict scrutiny, the *Moreno* Court applied *rational basis* analysis to strike down the law.²⁹² 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 engage in "forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race..."²⁹³ 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."²⁹⁴ 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 diminished the Constitution's ability to prevent future witch-hunts.²⁹⁵ 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.²⁹⁶

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.²⁹⁷ Similarly, the Court has found that the Free Exercise Clause prohibits laws that were passed simply to target a particular religious group²⁹⁸ and prohibits the *implementation* of laws in a manner hostile to religion.²⁹⁹

Nevertheless, these efforts are neither broad enough nor deep enough. The Court's Free Exercise jurisprudence since *Smith* has left open the possibility that unpopular religious groups may be targeted via generally applicable laws, which

²⁹¹ *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).

²⁹² *Id.* at 538.

²⁹³ *Trump v. Hawaii*, 585 U.S. ___, 38 (2018) (page citation is to the slip opinion).

²⁹⁴ *Id.*, at 27. (Trump)

²⁹⁵ *See e.g., Id.*, at 26-28 (Sotomayor dissenting).

²⁹⁶ *See e.g., Sherbert v. Verner*, 374 U.S. 398 (1963) (requiring strict scrutiny for laws, which inhibit religious practice); *but see, Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1999) (lowering scrutiny requirements for laws that are generally applicable).

²⁹⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Board of Education v. Allen*, 392 U.S. 236 (1968)).

²⁹⁸ *See generally, Lukumi Babalu Aye*, 508 U.S. (the Court struck down a town ordinance prohibiting the killing of animals for ritual purposes as targeting the Santeria Religion).

²⁹⁹ *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ____ (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).

remain subject to rational basis analysis.³⁰⁰ *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.³⁰¹ 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.³⁰²

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 persons based on their views,³⁰³ providing heightened scrutiny for laws that target individuals with politically unpopular views,³⁰⁴ 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.³⁰⁵ 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, the 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 were used against the accused and, furthermore, they 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.³⁰⁶

³⁰⁰ *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

³⁰¹ *See generally*, *Employment Division*, 494 U.S.

³⁰² *See e.g.*, *Dunn v. Ray*, 586 U.S. ___ (2019) (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).

³⁰³ *See*, *Trump*, 585 U.S. at 28 (Sotomayor dissenting).

³⁰⁴ *See*, *Moreno*, 413 U.S. at 543 (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).

³⁰⁵ *See*, *Sherbert*, 374 U.S. at 403

³⁰⁶ *See e.g.*, *ORIGINS OF ADVERSARY*, *supra* note 225, at 92-95 (describing the adoption of defense counsel).

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.³⁰⁷ Although the backlash against children’s stories may have gone too far, it did prompt debate over how to accurately measure testimonial reliability.³⁰⁸ One reform that has already been proposed in response to the Satanic Panic is the mandatory videotaping of interviews with child sex abuse victims.³⁰⁹ This would partially solve the problem, since indeed it was videotapes that revealed leading interview tactics that led many jurors to acquit adult defendants.³¹⁰

A second potential area of reform involves the establishment of a mandatory minimum age for witness testimony. Most American courts States simply require witnesses, including children, 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.³¹¹ 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.³¹² However, even under the Common Law there were exceptions: children under twelve could testify in cases of rape, sometimes even without swearing an oath (although their testimony would then be discounted).³¹³ Certain American cases in the 1980s pushed this to the extreme, with children as young as three years old testifying.³¹⁴ 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.³¹⁵ While all age limits are arbitrary by nature, and despite the fact that the Common Law has countenanced the

³⁰⁷ See, VICTOR, *supra* note 229, at 112-114 (noting that child protection workers and therapists are not impartial but advocates for children and therefore not suited to criminal investigation)

³⁰⁸ See e.g., Elliott, *Sexual Abuse, Memory, and the Law*, 26 OFF OUR BACKS 10, 11 (providing a description of a conference on the subject held at the University of Pennsylvania).

³⁰⁹ See, Frank E. Vanervort, *Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community’s Approach*, 96 J. CRIM. LAW AND CRIMINOLOGY 1353, 1355 (2006) (describing the debate between prosecutors who are opposed to videotaping and defense attorneys who favor videotaping).

³¹⁰ NATHAN, *supra* note 228, at 224-225.

³¹¹ Thomas D. Lyon, *Child Witnesses and the Oath*, in CHILDREN’S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 245 (Helen L. Westcott, Graham M. Davies, and Ray H.C. Bull eds., 2002).

³¹² WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK IV OF PUBLIC WRONGS 141 (Ruth Paley ed., Oxford Univ. Press, 2016) (1769).

³¹³ *Id.* (citing to Hale).

³¹⁴ See e.g., *State v. Hussey*, 521 A.2d 278 (1987) (upholding the validity of a three year old’s testimony during a criminal case against her father for molesting her).

³¹⁵ CHEIT, *supra* note 235, at 275-276 (citing to a 1993 study by Ceci and Bruck, “Child Witnesses: Translating Research into Policy,” the study concluded that young children were susceptible to leading questions).

testimony of children under the age of twelve,³¹⁶ a possible solution to the issue would be a prohibition testimony from children under the age of five.³¹⁷

Like Salem and the Satanic Panic, the Mueller investigation has highlighted a particular kind of evidentiary flaw—the reliability of co-conspirator testimony—as well as threats to the attorney-client privilege as factors contributing to the rise of crime panics.³¹⁸ 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.³¹⁹ India, for instance, has gone one step further by not only limiting a co-conspirator testimony to the secondary task of lending support to the prosecution’s case, but by also requiring that the testifying co-conspirator be granted a pardon *before* testifying.³²⁰ 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.³²¹

V. Conclusion

Witch-hunts and crime panics share a flavor of overreaction by authorities. In *witch-hunts*, authorities target an entire group of believers—religious (Quakers) or political (labor radicals or communists)—because of the wrongdoings of a few members. Conversely, in *crime panics* the public becomes fixated on a particular type of criminal activity—witchcraft (Salem), sexual abuse (Satanic Panic), or collusion (Mueller)—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.

³¹⁶ BLACKSTONE, *supra* note 313, at 141.

³¹⁷ *But see generally*, Gail S. Goodman and 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 (Helen Dent and 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 better able they are to understand events).

³¹⁸ *See*, Alan Dershowitz, *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>; *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).

³¹⁹ *See*, S.K. SINHA RAY, CRIMINAL TRIAL, SECOND EDITION 371-372 (2014) (describing India’s requirements for co-conspirator testimony).

³²⁰ *Id.*; *see also*, P.S. NARAYANA, PLEA BARGAINING, 105-111 (2013) (describing the process of applying for a plea bargain, which must be made jointly by the defendant and prosecutor).

³²¹ *See*, Colquitt, *supra* note 260, at 773 (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).

Witch-hunts have been partially addressed via case law and legal reform, but there is still much room 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.³²² Despite the progress that has been made the problems leading to witch-hunts are far from completely behind us—many consider the War on Terror to be a war against ideology—even though they could be.³²³

Similarly, although the most egregious abuses of Salem appear to have been dealt with and there are minimal measures in place to vet children’s testimony, the procedural flaws that fuel crime panics remain widespread. Although invocations of “witch-hunt” partially recall the pressing of Giles Cory, 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.³²⁴ While we may never be able to completely avoid crime panics, with increased defendant safeguards, we could minimize the extent to which the next panic results in wrongful convictions.

³²² *But see*, Trump v. Hawaii, 585 US ___ (upholding the “Muslim” ban to challenges that it targeted a religious groups).

³²³ DUDZIAK, *supra* note 168, at 114 (describing the war on terror as a war on tactics and ideology).

³²⁴ Daniel Kanstroom, *On “Waterboarding”*: *Legal Interpretation and the Continuing Struggle for Human Rights*, 32 BC. 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).