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## Improvising (Il)Legality: Justice and the Irish Diaspora, N.Y.C., 1930-32

Sara Ramshaw\*

The Seabury Commission, 1930-32, probed allegations of corruption made against, amongst others, the Irish-American Mayor of New York City, James J. 'Jimmy' Walker, and the Irish-dominated Tammany Hall, the Democratic political machine that had supported Walker. Taking the Seabury inquiry as its focus, this article explores these allegations from the perspective of Critical Studies in Improvisation (C.S.I.) fused with postcolonial critique. Improvisation, in accordance with C.S.I. principles, is not a lawless or extempore event; it is, instead, lawful, or full of law. The laws of improvisation may appear impenetrable to those unfamiliar with the practice. However, when read through a hibernocentric postcolonial perspective, their meaning and form become more understandable. As will be argued in this article, diasporic communities are inherently improvisatory; that is, they utilise improvisational techniques to help adapt and respond to new situations and social contexts. To be queried is whether the law and politics practiced by Tammany and Walker, taken together, constituted a markedly Irish approach to justice, one that entailed not scripted or planned illegality, as was alleged by Judge Seabury, but improvisations on Anglo-Protestant law as a response to the displacement of and discrimination against the Irish Diaspora in early twentieth century America.

### I - Introduction

This article begins in the final days of what Daniel Patrick Moynihan calls the 'Irish era' in New York City (N.Y.C.),<sup>1</sup> that is, the period of Irish dominance which began in the 1870s<sup>2</sup> and ended in the 1930s. The closing moments of this era were

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<sup>1</sup> According to Daniel Patrick Moynihan: "New York used to be an Irish City. Or so it seemed. There were sixty or seventy years when the Irish were everywhere. *They* felt it was their town": D.P. Moynihan, "The Irish" in J.J. Lee & M.R. Casey, eds., *Making the Irish American: History and Heritage of the Irish in the United States* (New York and London: New York University Press, 2006) 475 at 475 (emphasis in original). See also C. McKnickle, "When New York Was Irish, and After" in R.H. Bayor & T.J. Meagher, *The New York Irish* (Baltimore and London: The Johns Hopkins University Press, 1996) 337.

<sup>2</sup> 'Irish hegemony' in N.Y.C., argues Moynihan,

marked, at least in some measure, by the Seabury Commission, 1930-32, which probed allegations of corruption in N.Y.C. government. Resulting from this inquiry, headed by Judge Samuel Seabury,<sup>3</sup> was the resignation of Irish-American Mayor of N.Y.C., James J. 'Jimmy' Walker,<sup>4</sup> who fled to Europe with his showgirl mistress to escape criminal prosecution.<sup>5</sup> As well, the Irish-dominated Tammany Hall,<sup>6</sup> the Democratic political machine that had supported Walker,<sup>7</sup> fell into disrepute. It went on to lose subsequent mayoral elections in N.Y.C. and, as a result, surrendered substantial power in New York State.<sup>8</sup> According to one commentator: "[Walker's resignation] was a body blow from which the organization [Tammany] never fully recovered."<sup>9</sup>

Taking the Seabury inquiry as its focus, this article examines the allegations of corruption against Walker and Tammany<sup>10</sup> from the perspective of Critical Studies in Improvisation (C.S.I.)<sup>11</sup> fused with postcolonial critique.<sup>12</sup> Improvisation, in accordance

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was established by the famine emigration of 1846-1850. By mid-century there were 133,730 Irish-born inhabitants of the city, 26 percent of the total population. By 1855, 34 percent of the city voters were Irish. By 1890, when 80 percent of the population of New York City was of foreign parentage, a third of these (409,924 persons of 1,215,463) were Irish, making more than a quarter of the total population. With older stock included, over one-third of the population of New York and Brooklyn at the outset of the Gay Nineties was Irish American.

*Ibid.* at 476. For further statistics on the Irish in N.Y.C., see P.A. Gilje, "The Development of an Irish American Community in New York City Before the Great Migration" in R.H. Bayor & T.J. Meagher, *The New York Irish* (Baltimore and London: The Johns Hopkins University Press, 1996) 70 at 90-105.

<sup>3</sup> For more on Seabury, see section II(a) below.

<sup>4</sup> "Samuel Seabury dies on L.I. at 85" *The New York Times* (7 May 1958) at 1, 35.

<sup>5</sup> Moynihan, *supra* note 1 at 475.

<sup>6</sup> According to George Walsh: "...Irishmen controlled Tammany Hall, perhaps because, as a Tammany leader was to explain years later, 'the Irish are natural leaders,' perhaps because they had the advantage of knowing the language": G. Walsh, *Gentleman Jimmy Walker, Mayor of the Jazz Age* (New York and Washington: Praeger, 1974) at 27.

<sup>7</sup> B.W. Peretti, *Nightclub City: Politics and Amusement in Manhattan* (Philadelphia: University of Pennsylvania Press, 2007) at 122.

<sup>8</sup> "Ex-Mayor Walker Succumbs at 65 to Clot on Brain" *The New York Times* (19 November 1946), 1, 21 at 21.

<sup>9</sup> H. Mitgang, *Once Upon a Time in New York: Jimmy Walker, Franklin Roosevelt, and the Last Great Battle of the Jazz Age* (New York: Cooper Square Press, 2003) at 232.

<sup>10</sup> While the limited scope of this article does not permit such, probably the most shocking incidence of corruption uncovered by Seabury was in relation to the Irish-dominated New York Police Department (NYPD), the "Celtic kith and kin" of Tammany Hall: *Ibid.* at 65.

For a more detailed discussion of approaches to justice in relation to Irish police officers in the United States, see S. Ramshaw, "'McNulty' on the Small Screen: Improvised Legality and the Irish-American Cop in H.B.O.'s *The Wire*" in P. Robson & J. Sibley, *Law and Justice on the Small Screen* (Oxford: Hart Publishing, 2012) 361.

<sup>11</sup> Any description of the contemporary shape of Critical Studies in Improvisation (C.S.I.) cannot but draw on the seven-year, \$4-million international community/university research project, entitled

with C.S.I. principles, is not a lawless or extempore event; it is, instead, lawful, or full of law.<sup>13</sup> The laws of improvisation may appear impenetrable to those unfamiliar with the practice. However, when read through a hibernocentric<sup>14</sup> postcolonial<sup>15</sup> perspective, their meaning and form become more understandable. As will be shown below, diasporic<sup>16</sup> communities are inherently improvisatory;<sup>17</sup> that is, they utilise improvisational techniques to help “adapt and respond to the new situations and social contexts they find themselves in”.<sup>18</sup> To be queried in this article is whether the law and politics practiced by Tammany and Walker, taken together, constituted a markedly

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“Improvisation, Community and Social Practice” (I.C.A.S.P.). The I.C.A.S.P. project, funded through the Social Sciences and Humanities Research Council of Canada’s (S.S.H.R.C.) Major Collaborative Research Initiatives (MCRI) program, plays a leading role in defining a new field of interdisciplinary research that explores musical improvisation as a model for social change with a view to shaping political, cultural, and ethical dialogue and action. According to the I.C.A.S.P. website:

[t]his project investigates the ways in which improvised music plays a role in shaping notions of community and “new forms” of social organization, with the goal of developing a new field of interdisciplinary scholarly endeavour, one that promises to place the civic function of improvised artistic practices firmly at the centre of both broad public debate and informed policy decisions about the role of arts in society.

“About I.C.A.S.P.: Research” (available at <[www.improvcommunity.ca/about/research](http://www.improvcommunity.ca/about/research)> (accessed 23 June 2012)).

<sup>12</sup> As will be described below, the merging of critical improvisational studies with postcolonial critique recognises that “conquest and colonial discourses have played a significant role in establishing some of the signally important historical conditions and contingencies from which jazz and its improvisational practices have emerged”: D. Fischlin & A. Heble, “The Other Side of Nowhere: Jazz, Improvisation, and Communities in Dialogue,” in D. Fischlin & A. Heble, eds., *The Other Side of Nowhere: Jazz, Improvisation, and Communities in Dialogue* (Middletown, Connecticut: Wesleyan University Press, 2004) 1 at 14.

<sup>13</sup> For more on the relationship between improvisation and law, see S. Ramshaw, “Deconstructin(g) Jazz Improvisation: Derrida and the Law of the Singular Event” (2006) 2:1 *Critical Studies in Improvisation*, 19. See also S. Ramshaw, *Justice as Improvisation: The Law of the Extempore* (London: Routledge, 2013).

<sup>14</sup> “Hibernocentric”, explains Walter Walsh, “means seen from an Irish standpoint. ... Hibernia, the land of winter, was the Roman name for that far-flung Celtic island in the Atlantic Ocean, where the Roman writ never ran, on the seeming edge of the world”. Walsh adds: “Of alternative voices the postcolonial Irish perspective is among the most interesting, coming from both the earliest of England’s overseas prizes and from the first indigenous population to regain independence from British colonial rule and establish a democratic republican regime”: W.J. Walsh, “The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence” (2005) 80 *Indiana Law Review* 1037 at 1038.

<sup>15</sup> According to Walsh, “a postcolonial perspective is one that identifies and rejects those political, aesthetic, and intellectual structures and canons that are imperialist in origin and form....By definition, colonizers exert power far beyond their numbers”: *Ibid.* at 1038.

<sup>16</sup> Diaspora, from the Greek meaning “to disperse”, involves the “voluntary or forcible movement of peoples from their homelands into new regions”. According to Ashcroft *et al*, “[t]he descendents of the diasporic movements generated by colonialism have developed their own distinctive cultures which both preserve and often extend and develop their originary cultures”: B. Ashcroft, G. Griffiths and H. Tiffin, *Key Concepts in Post-Colonial Studies* (London and New York: Routledge, 1998) at 69-70.

<sup>17</sup> P. Blouw, “Key Terms: Diaspora and Diasporic Imagination” in I.C.A.S.P. Research Collection, 25 May 2010, available for download at <<http://www.improvcommunity.ca/research/diaspora-and-diasporic-imagination>> (accessed 23 June 2012) at 5.

<sup>18</sup> *Ibid.* at 5.

Irish approach to justice, one that entailed not scripted or planned illegality, but improvisations on Anglo-Protestant law as a response to the displacement of and discrimination against the Irish Diaspora in early twentieth century America.

## **II – The Seabury Commission, N.Y.C., 1930-32**

To provide some background to the Seabury Commission, between 1930 and 1932, retired judge Samuel Seabury headed three separate state investigations into suspected corruption in N.Y.C. government. He was first named Referee in charge of examining alleged misconduct by the city's magistrates.<sup>19</sup> Then, he became Commissioner, looking into the actions of the city's District Attorney, T.C. Crain.<sup>20</sup> Finally, Seabury was appointed Counsel<sup>21</sup> for the Joint Legislative Committee to investigate the affairs of the City of New York (also known as Hofstadter's Investigation Committee).<sup>22</sup> It is the third and final investigation, which drives this article. For it was here that Seabury was given "carte blanche to look into every office

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<sup>19</sup> William and John Northrop provide further details:

[p]ublic hearings in this investigation began on September 29, 1930, and continued intermittently until May 14, 1931. At these hearings two hundred and ninety-nine witnesses were examined. The transcript of the testimony covers four thousand five hundred and ninety-six pages.

One thousand and fifty-nine persons were examined at private hearings, whose testimony covers fifteen thousand three hundred and fifty-six pages.

W.B. Northrop & J.B. Northrop, *The Insolence of Office: The Story of the Seabury Investigations* (New York and London: G.P. Putnam's Sons, 1932) at vii. According to *The New York Times*, upon the completion of this inquiry, two magistrates, Jean H. Norris and Jesse Silberman, had been removed from office; three had resigned under fire, i.e., Francis X. McQuade, Henry M.R. Goodman and George W. Simpson; a sixth, Abraham Rosenbluth, had gone into exile: "Seabury Gives Up A \$75,000 City Fee", *The New York Times*, (12 February 1933) at 27. See also "Samuel Seabury dies", *supra* note 4 at 35.

<sup>20</sup> Seabury was appointed Commissioner to investigate Crain on 10 March 1931. Private and public hearings were conducted between 8 April and 29 May 1931. On 31 August 1931, Judge Seabury reported to Governor Roosevelt that, although Crain was not beyond censure, there was insufficient evidence to warrant his removal from Office: Northrop & Northrop, *ibid.* at viii. See also, "Samuel Seabury dies", *ibid.*

<sup>21</sup> For all practical purposes, he was exercising the duties of a 'special prosecutor': Mitgang, *supra* note 9 at 134.

<sup>22</sup> "Seabury's Letter to Roosevelt Calling the Mayor Unfit" *The New York Times* (9 June 1932) at 18. See also Mitgang, *supra* note 9 at 133. This committee was set up on 30 April 1931: "Samuel Seabury dies", *supra* note 4 at 1.

and every official in the city”<sup>23</sup> and here that he used his position to explore “graft and bribery among leading Tammany Hall officeholders, including Mayor Walker”.<sup>24</sup>

It must be noted that Seabury’s authority in each of these investigations and in each of his three capacities – Referee, Commissioner and Counsel – was limited to “eliciting the facts”. As Northrop and Northrop note: “He could indict no one. He could try no one. He could convict no one. He could remove no one”.<sup>25</sup> Despite his limited legal powers, Seabury’s “controversial and highly publicized efforts”<sup>26</sup> led to, as mentioned in the introduction, the resignation of Mayor Walker in September 1932 and the disgrace of Tammany Hall.<sup>27</sup> The following briefly introduces the key figures in the Seabury drama and provides the background upon which to base the ensuing critical study in improvisation.

### A. Judge Samuel Seabury

Against the Irish Catholic Walker and Tammany stood Seabury: Protestant, old-money, anti-Tammany,<sup>28</sup> and reformist with “rich experience in the city’s politics, legal culture, and class structure”.<sup>29</sup> Growing up in the “cloistered enclave”<sup>30</sup> of the General Theological Seminary in Manhattan,<sup>31</sup> Seabury emerged “a product of private schools and private tutelage, a patrician by birth and breeding”.<sup>32</sup> According to Daniell, through the windows of the Seminary, Seabury “looked out upon the gaslit, brawling, knuckledusting, vice-ridden and politically corrupt city he devoted most of his life to

<sup>23</sup> Mitgang, *supra* note 9 at 133. See also “Tammany, Stunned, Plans to Fight Back; Seabury to Get a Free Hand in Inquiry; Roosevelt Won’t Shirk Walker Ruling” *The New York Times* (25 March 1931) at 1.

<sup>24</sup> Peretti, *supra* note 7 at 123.

<sup>25</sup> Northrop & Northrop, *supra* note 19 at viii-ix (emphasis omitted).

<sup>26</sup> Peretti, *supra* note 7 at 123.

<sup>27</sup> *Ibid.* at 123.

<sup>28</sup> According to Mitgang, “[u]nknown to all but his closest friends and family, he harboured a grudge against Tammany for not helping him to become governor”: Mitgang, *supra* note 9 at 100.

<sup>29</sup> Peretti, *supra* note 7 at 126.

<sup>30</sup> R. Daniell, “He Rattled the Skeletons in Tammany’s Little Tin Box” *The New York Times* (14 April 1963) at 6.

<sup>31</sup> Seabury is a descendent of the first Episcopal Bishop in the United States and was himself the son of a clergyman. Throughout his life, he found it extremely difficult to resolve the “conflict within himself between the law and the church”: *Ibid.* (Daniell) at 6. See also L. Acuff, “The Challenge of Samuel Seabury” *The New York Times* (Book Review Section) (27 March 1932) at BR9.

<sup>32</sup> Daniell, *ibid.* at 6.

making a better place in which to live”.<sup>33</sup> His idealism, remarks Chambers, was not “a figment of his imagination. It [was] not a mere abstraction. It [was] a great and fundamental reality”.<sup>34</sup>

Winning a series of elective judgeships, Seabury reached the state’s highest appeals court at forty years of age. He left the bench in 1916 to run for Governor, but lost after a “close and hard-fought race”.<sup>35</sup> He then left politics to focus on his private practice and the N.Y.C. Bar Association.<sup>36</sup>

Seabury is probably best remembered, at least to New Yorkers, for the “dramatic role he played in one of the historic investigations of the early Thirties”.<sup>37</sup> His 1932 obituary in *The New York Times* lauded Seabury as a “tireless investigator, an expert cross-examiner, a relentless hunter for the facts”.<sup>38</sup> He became known as the “scourge of Tammany Hall”,<sup>39</sup> the “scalper of the sachems”.<sup>40</sup> Lending his support to the anti-Tammany mayoral candidate, Fiorello H. La Guardia in 1933, La Guardia won the election and went on to head a “strong reform administration from 1934 to 1945”,<sup>41</sup> with Tammany nowhere in sight.

## B. Tammany Hall

While not a direct target of Judge Seabury’s investigations, as all the District Attorneys in the five counties within N.Y.C. were Tammany men, the Mayor was a

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<sup>33</sup> *Ibid.*

<sup>34</sup> W. Chambers, *Samuel Seabury, A Challenge* (New York: The Century Company, 1932) at 379. See also Acuff, *supra* note 31 at BR9.

<sup>35</sup> According to *The New York Times*, “Many political observers believed at the time that Judge Seabury would have won if he had received Tammany’s enthusiastic backing”. Instead, he only received the “nominal support of Tammany Hall”: “Samuel Seabury dies”, *supra* note 4 at 35. Daniell goes so far as to say Seabury was “knifed by Tammany Hall”: Daniell, *supra* note 30 at 6.

<sup>36</sup> Peretti, *supra* note 7 at 126. Seabury was the President of the Association of the Bar of the City of New York from 1939 to 1941: “Samuel Seabury dies”, *supra* note 4 at 35.

<sup>37</sup> “Samuel Seabury”, *The New York Times* (Editorial Section) (8 May 1958) (no page number available) [Copy of the original article from the *New York Times* online archives with author].

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> G. Fowler, *Beau James: The Life and Times of Jimmy Walker* (New York: The Viking Press, 1949) at 294.

<sup>41</sup> “Samuel Seabury dies”, *supra* note 4 at 35.

Tammany man, and all municipal officers, bar one Alderman, were Tammany men,<sup>42</sup> any investigation into N.Y.C. government would, at least indirectly, also focus on Tammany Hall. Tammany was an organisation that, to Seabury's mind, symbolised "the fountainhead from which corruption flowed [in N.Y.C.]"<sup>43</sup> and he "was sincerely offended by Tammany's practices".<sup>44</sup>

As a 'political machine', Tammany controlled offices throughout New York State through "patronage – either by appointment or by rigging the party nomination process for elected offices, such as judgeships". In N.Y.C., for instance, "the Democratic nomination was a guarantee of election" and nominations were "compromises ironed out by the [Tammany Hall] ward bosses and their patronage demands".<sup>45</sup> First organised in May 1789, Tammany established the New York Democratic Party<sup>46</sup> and dominated N.Y.C. politics in the early 1900s. It "skilfully appealed to the large numbers of new immigrants"<sup>47</sup> by assisting with housing and employment and even with citizenship

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<sup>42</sup> Northrop & Northrop, *supra* note 19 at ix.

<sup>43</sup> Daniell, *supra* note 30 at 6.

<sup>44</sup> N.J. Sullivan, *Diamond in the Bronx: Yankee Stadium and the Politics of New York* (Cary, N.C.: Oxford University Press, 2002) at 65.

<sup>45</sup> J.H. Shugerman, "The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law" (2010) 98 *Georgetown Law Review* 1349 at 1380-1381.

<sup>46</sup> Moynihan, *supra* note 1 at 478. Tammany Hall, according to Mitgang:

was established more than two centuries ago as the Society of St. Tammany, or Columbian Order, by William Mooney, a Continental Army veteran. The name derived from Tamanend, a legendary Indian chief who had a reputation for wisdom and love of liberty. The society's original purpose was pure: to help the cause of American independence.

In the post-Revolutionary War period, Tammany men affected Indian names and titles. Originally, there were thirteen trustees, after the original thirteen states. The president, or leader, was the Grand Sachem. ...

Below the Sachems came the Sagamore (master of ceremonies), the Scribe (secretary), and the Wiskinskie (doorkeeper). The Indian dress gradually became purely ceremonial, but the titles of Grand Sachem, Sachem, and Wiskinskie continued. ... Another carryover from the founding days was the use of the term "Wigwam" for the organization's meeting hall.

Mitgang, *supra* note 9 at 40-41.

<sup>47</sup> R.L. Lerner, "From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed's New York" (2007) 15 *George Mason Law Review* 109 at 118.

Jimmy Walker proudly pronounced of Tammany Hall:

[t]his was the only place where my immigrant father found welcome, help and assistance when he landed in this country ... it is the home of an organization which has done more to fight the fight of the City of New York than any political organization

applications in return for their loyalty and their vote for Tammany candidates in city and state elections.<sup>48</sup> “[T]hrough an unholy alliance with the police and organized crime, [Tammany Hall] exerted corrupt influence over all aspects of life in Manhattan”.<sup>49</sup>

In opposition to the machine politics of the Irish Catholic dominated Tammany Hall were civil service reformers who believed that “democracy [was] best served when the affairs of government [were] administered by the more educated members of the populace”.<sup>50</sup> These reformers tended to be educated Protestants from families that had been in America for several generations (such as Seabury).<sup>51</sup>

Walker’s election as Mayor of N.Y.C. was a victory for Tammany Hall. As the Democratic organisation of Manhattan and the Bronx, Tammany “was plainly in charge of the city government” and “[i]t had regained all of the top city offices in the election of 1917 and controlled almost all of them for the next sixteen years”.<sup>52</sup> The N.Y.C. of the 1920s is often portrayed as “an era of total Tammany dominance”,<sup>53</sup> or, in the words of historian Stephen Erie, the “Irish machine’s heyday”.<sup>54</sup> Mitgang concurs:

it was recognized that Tammany Hall stood at the center of political power in New York City and sometimes could influence legislation in Albany. Almost every well-paid position in a city department was cleared

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that you or I ever heard of. Nearly all the humane measures that have been written into the statute books of the State in recent years emanated from this building.

Walsh, *supra* note 6 cited at 55.

<sup>48</sup> One Tammany appointee, Irish-born Judge John H. McCunn, according to Lerner:

did not disappoint his political masters. He was most noted for conducting fraudulent naturalization proceedings, which not surprisingly took place just before elections. Machine bosses rounded up dozens of immigrants at a time and brought them before Judge McCunn to be hastily naturalized.

Lerner, *ibid.* at 119-120.

<sup>49</sup> R.M. Pitler, “Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals’ Quest for Principled Decision making” (1996) 62 Brooklyn Law Review 1 at 66-67 and fn 149.

<sup>50</sup> M. Glasheen, “Patronage Employment Practices and the First Amendment” (1991) 34 Howard Law Review 663 at 666.

<sup>51</sup> *Ibid.* at 666.

<sup>52</sup> Peretti, *supra* note 7 at 56.

<sup>53</sup> *Ibid.* at 57.

<sup>54</sup> According to Peretti: “By 1925 fully one-sixth of all Tammany voters had a city job”: *ibid.* at 58.

through the borough leaders – and many jobs could be bought. Doing business with the municipal government also carried a price tag. The corrupted were in cahoots with the corrupters. A quick license, a fake billing, a rakeoff, a moneyed handshake, a wink ... and the fix would be in.

The big town's agencies and services were for sale. So were the civil and criminal courts. Nominees for the bench were selected by Tammany chieftains, not by the bar association or judicial reform groups. Payoffs flowed upward to the Hall from the clubhouses. Everyone understood that this was the way the system worked, the way to get things done.<sup>55</sup>

Tammany's practices were perhaps best understood or characterised through the axiom, 'honest graft',<sup>56</sup> that is, "a long tradition of acceptable bribery and official looting",<sup>57</sup> or "lucrative investments made available by those anxious to curry favour with the powerful political boss".<sup>58</sup> During the time of Jimmy Walker's mayoral reign, "Tammany was still considered a benevolent political organization".<sup>59</sup> In fact, one of Tammany's original goals was the "democratization of the ballot box" and it "helped bring about the removal of the property qualification for voting".<sup>60</sup> Of course, this move was as strategic as it was democratic: having more qualified voters at the polls meant an increase in Tammany's following in N.Y.C.<sup>61</sup>

During Seabury's investigations, Tammany became synonymous with what was to become a "source of new phraseology for the American political vocabulary":<sup>62</sup> the 'tin-box brigade'<sup>63</sup> (or 'tin-box battalion'<sup>64</sup>), that is, a 'parade' of Tammany Hall leaders and city officials in front of Seabury whose only explanation for where they obtained

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<sup>55</sup> Mitgang, *supra* note 9 at 37.

<sup>56</sup> Authorship of this phrase is often attributed to Democratic Ward boss George Washington Plunkitt. For more on this saying, see E.H. Lavine, *"Gimme" or How Politicians Get Rich* (New York: Vanguard Press, 1931) at 252-264 (Chapter XVII, "Honest' (and Almost Honest) Graft").

<sup>57</sup> Mitgang, *supra* note 9 at 40.

<sup>58</sup> William H. Manz, "'Tammany Hall had a right to expect proper consideration': The Judicial Nominations controversy of 1898" (2009) 81 New York State Bar Journal 10 at 15.

<sup>59</sup> Mitgang, *supra* note 9 at 40.

<sup>60</sup> *Ibid.* at 41.

<sup>61</sup> *Ibid.* at 41.

<sup>62</sup> H. Mitgang, *The Man Who Rode the Tiger: The Life of Judge Samuel Seabury and the Story of the Greatest Investigation of City Corruption in this Century* (New York and London: W.W. Norton & Company, 1963) at 216.

<sup>63</sup> Mitgang, *supra* note 9 at 107.

<sup>64</sup> Mitgang, *supra* note 62 at 217.

certain monies was from a safe-deposit box kept in their home (or, in the case of Jimmy Walker, kept with his accountant, Richard T. Sherwin, who later absconded to Mexico).<sup>65</sup> The testimony of the Hon. Thomas M. Farley, sheriff of New York County and Tammany sachem, best exemplified the so-called “tin-box” tales’:<sup>66</sup>

SEABURY: Where did you keep these moneys that you had saved?

FARLEY: In a safe-deposit box at home in the house.

...

SEABURY: In a little box in a safe?

FARLEY: A big safe.

Seabury: But a little box in a big safe?

FARLEY: In a big box in a big safe.

...

SEABURY: And, Sheriff, was this big box that was safely kept in the big safe a tin box or a wooden box?

FARLEY: A tin box.

...

SEABURY: Giving you the benefit of every doubt on sums from your official vocation and other gainful pursuits, the eighty-three thousand dollars extra you deposited in 1929 came from the same source that the other money came from?

FARLEY: It did.

SEABURY: Same safe-deposit vault?

FARLEY: Yes.

SEABURY: Same tin box, is that right?

FARLEY: That is right.

SEABURY: Now, in 1930, where did the extra cash come from, Sheriff?

FARLEY: Well, that is – . My salary check is in there.

SEABURY: No, Sheriff, your salary checks are exclusive of the cash deposits which during the year you deposited in those three banks.

FARLEY: Well, that came from the good box I had.

[*Laughter.*]

SEABURY: Kind of a magic box?

FARLEY: It was a wonderful box.

SEABURY: A wonderful box. [*Laughter.*] What did you have to do – rub the lock with a little gold, and open it in order to find more money?

FARLEY: I wish I could.<sup>67</sup>

Due, in part, to the Seabury investigations, by 1933, the so-called Tammany ‘tiger’<sup>68</sup> was said to be “tamed for good”.<sup>69</sup> Peretti explains:

<sup>65</sup> “Ex-Mayor Walker”, *supra* note 8 at 21. For more on Sherwood, see section II(c) below.

<sup>66</sup> Mitgang, *supra* note 62 at 188.

<sup>67</sup> *Ibid.* at 216-217. See also Mitgang, *supra* note 9 at 107-109.

... Seabury's investigations (and the difficulties of the Great Depression) turned enough voters away from Tammany Hall to ensure the victory of a reform "fusion" administration in November 1933. Seabury himself chose Fiorello La Guardia to be the leader of the fusion ticket. Far stronger than any other anti-Tammany mayoralty, La Guardia's administration attempted to reorient the entire moral thrust of government. This, in turn, altered the city's fundamental approach to leisure and "vice." In a kind of secular Reformation in New York City, largely Protestant usurpers displaced a Catholic-dominated governing class.<sup>70</sup>

Prior to that displacement, though, one particular Irish Catholic dominated law and politics in N.Y.C. like no other, one Mayor James J. 'Jimmy' Walker, or 'Beau James'<sup>71</sup>.

### C. James J. 'Jimmy' Walker

Herbert Mitgang perhaps best sums up the appeal of Jimmy Walker: "New York adored Mayor James J. Walker. He was one of them: a hometown boy, part Kilkenny sentimentalist, part Greenwich Village boulevardier, an Irish charmer with the gift of the gab who was good for a laugh at his own expense – and theirs".<sup>72</sup> Elected with Tammany's backing in November 1925, at the age of forty-five, "Tammany Hall, too, admired Jimmy Walker. He was electable, he didn't rock the boat, and he played by their rules".<sup>73</sup>

As his various monikers attest – 'Duke of Jazzland',<sup>74</sup> 'nightclub mayor',<sup>75</sup> 'Night Mayor of New York',<sup>76</sup> and 'Mayor of the Jazz Age'<sup>77</sup> – Walker's workdays were

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<sup>68</sup> The 'Tammany tiger' was created by editorial cartoonist for *Harper's Weekly* Thomas Nast, the idea for which stemmed from the tiger's head, which decorated Tammany leader, Boss Tweed's volunteer fire engine company. Nast is also credited with the creation of the Republican elephant and the Democratic donkey, symbols still used to this day: Mitgang, *supra* note 9 at 43.

<sup>69</sup> Peretti, *supra* note 7 at 57.

<sup>70</sup> *Ibid.* at 124-125.

<sup>71</sup> Fowler *supra* note 40. See also the 1957 film adaptation of Fowler's book, *Beau James*, starring Bob Hope as Jimmy Walker, the "flamboyant and somewhat corrupt Mayor of New York City from 1926-1932": *The Internet Movie Database*, available at <<http://www.imdb.com/title/tt0050175/>> (date accessed: 24 January 2013).

<sup>72</sup> Mitgang, *supra* note 9 at 59.

<sup>73</sup> *Ibid.* at 59 and 60.

<sup>74</sup> Peretti, *supra* note 7 at 52, quoting Charles Kerrigan, the mayor's secretary.

<sup>75</sup> *Ibid.* at 56.

<sup>76</sup> Mitgang, *supra* note 9 at 76.

notoriously short and centred around “nocturnal activity”.<sup>78</sup> In the words of Walsh, “no New Yorker would work so hard at having fun as Gentleman Jimmy”.<sup>79</sup> Walker typically rose at midday and dispatched official business quickly. He presided at political conferences and public hearings at sunset and then began “long nights at the theatre, restaurants, and nightclubs”.<sup>80</sup> Peretti recounts: “In the backrooms of nightclubs he often met and did business with city officials and cemented his relationships with private citizens. Walker blended public and private business in a new and theatrical way”.<sup>81</sup>

On 25 May 1932,<sup>82</sup> Mayor Walker was called to testify before Seabury.<sup>83</sup> According to Fowler, “[t]he Grand Inquisitor [Seabury] had been waiting fourteen months to place Tammany’s golden boy in the witness chair.”<sup>84</sup> From his investigations, Seabury had discovered at least three incriminating charges against Walker:

(1) “that, with the aid of a mysterious brokerage account, myriad bank deposits and checks, and a joint safe-deposit box, he [Walker] had used Russell T. Sherwood, a modestly paid accountant, to amass some \$1 million since 1926”;<sup>85</sup>

(2) “that he had conspired with Senator Hastings, who might have made millions of dollars out of the deal, to push the Equitable bus franchise through the board of estate”;<sup>86</sup> and

(3) “that he had pocketed some \$26,500 in bonds from taxi entrepreneur J. A. Sisto, sent in a sealed envelope via an intermediary, at a time when Sisto was seeking his cooperation in setting up a taxi control board that would protect his investment”.<sup>87</sup>

It is reported that thousands of New Yorkers were present outside the Manhattan County Courthouse the first day of Walker’s testimony and some 700 in the

<sup>77</sup> Walsh, *supra* note 6.

<sup>78</sup> Peretti, *supra* note 7 at 53.

<sup>79</sup> Walsh, *supra* note 6 at 59.

<sup>80</sup> *Ibid.* at 53.

<sup>81</sup> *Ibid.* at 53.

<sup>82</sup> “Samuel Seabury dies”, *supra* note 4 at 1.

<sup>83</sup> When asked by a reporter if he had been advised in respect to his testimony, he remarked: “There are three things a man must do alone. Be born, die, and testify”: Fowler, *supra* note 40 at 302.

<sup>84</sup> *Ibid.* at 304.

<sup>85</sup> Walsh, *supra* note 6 at 301-302.

<sup>86</sup> *Ibid.* at 302. For more on Walker and Equitable Bus Franchise, see Northrop & Northrop, *supra* note 19 at 249-263 (Chapter XXVI, “Walker and the Equitable Bus Franchise”).

<sup>87</sup> Walsh, *ibid.* at 302. For more on Walker, Sisto and Sherwood, see Northrop and Northrop, *supra* note 19 at 264-281 (Chapter XXVII, “The Sisto, Block and Sherwood Stories”).

hearing room, which only seated half that number.<sup>88</sup> Among the audience members were “Tammany’s Irish”.<sup>89</sup> George Walsh, one of Walker’s biographers, writes:

Chairman Hofstadter entered the courtroom unnoticed, and even Seabury elicited no more than polite applause, but the mayor’s arrival, both outside the building and in the hearing room, touched off the crowd’s deepest feelings. Cries of “Good luck, Jimmy,” “Atta Boy,” and “You tell him, Jimmy,” greeted the smiling Walker, encouraging him to clasp his hands over his head in the manner of a prize fighter entering the ring. Even after the proceedings began, and Walker had signed the waiver of immunity, the chairman found it most difficult to keep order.<sup>90</sup>

The public had faith that Mayor Walker would rebut the charges and clear his name. “Aware of Walker’s quick wit, his admirers reassured each other: Wait’ll he gets on the witness stand, he’ll make mincemeat out of the starched Seabury character”.<sup>91</sup> And yet “[a] good deal of Mr. Walker’s glibness deserted him under cross-examination by the imposing, white-haired former judge [Seabury]”.<sup>92</sup>

Northrop and Northrop describe the “turbulent and stormy sessions of the Committee while Mayor Walker was on the witness stand”,<sup>93</sup> complaining that the courtroom “was packed with Tammany adherents, while those who had official passes were kept waiting in the courthouse rotunda and never did get in because the room was already filled”.<sup>94</sup> Walker, they write, “made futile attempts to ‘wisecrack’ away logical inferences from admitted facts”<sup>95</sup> during the first day’s examination. On the second day,

[h]e became exceedingly careful in his answers and took a less self-assured attitude. He left the stand the loser in what the public press characterized as a ‘duel’ between himself and Counsel [Seabury], as an

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<sup>88</sup> Walsh, *ibid.* See also Mitgang, *supra* note 9 at 147 (Mitgang reports that there were 5,000 spectators outside the courtroom that day).

<sup>89</sup> Walsh, *ibid.*

<sup>90</sup> *Ibid.* See also Mitgang, *supra* note 9 at 147.

<sup>91</sup> Mitgang, *ibid.* at 144.

<sup>92</sup> “Samuel Seabury dies” *supra* note 4 at 1. For a copy of the rebuttal sent to Governor Roosevelt by Seabury, see “Counsel Subjects Walker Reply to Point-by-Point Analysis” *The New York Times* (4 August 1932) at 10-12.

<sup>93</sup> Northrop & Northrop, *supra* note 19 at 280.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

analysis of his testimony shows. It was the triumph of cold facts over mere denials, evasions and speeches to a friendly, partisan audience.<sup>96</sup>

On 28 May 1932, the day after Walker's final day on the witness stand, *The New York Times* reported:

Mayor Walker left the witness stand trailing clouds, not of glory, but of mystery after him. Never were there so many explanations which themselves demand explaining, never so many stories or implications quite incredible as they stood, never so many direct invitations to flat contradiction by subsequent witnesses. It can hardly be that the Mayor deliberately falsified his testimony.... Can it be that he has really forgotten all about the suspicious transaction? Has he been all these years so happy-go-lucky about public affairs as well as private, so amazingly careless about money matters, that he could not recall the facts even when they were brought to his attention by Judge Seabury? This is the most charitable assumption that his friends can make. But supposing it to be correct, what a light it throws upon the Mayor's way of doing business! ... One fact has been made to stand out uncontested. It is that a most extraordinary set were constantly in and out of the City Hall and consorting with Mayor Walker. According to their moral standards, anything might happen, even the wildest and most irregular, and appear perfectly normal. It may yet prove to be true that Mayor Walker was betrayed ... by the "gang" that he suffered to be near him. They certainly moved in mysterious ways, though the chief mystery was how they could do what they did and hope to face down the criticism and condemnation when their deeds were finally brought to light.<sup>97</sup>

It was obvious from the above newspaper article that the tide of public sentiment had turned slightly away from Walker (and Tammany Hall, to which the latter half of the article seemingly alludes). Although neither Seabury nor Governor Roosevelt wanted their actions to appear politically motivated, especially with Roosevelt being a candidate for Presidential nomination (and some newspaper reports predicting Seabury's nomination as well),<sup>98</sup> it was obvious that action was needed. With the Democratic presidential convention a week away, Seabury sent Governor Roosevelt a

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<sup>96</sup> *Ibid.*

<sup>97</sup> "The Walker Mystery" *The New York Times* (28 May 1932) (no page number available) [emphasis in original] [Copy of the original article from the *New York Times* online archives with author]. See also, Walsh, *supra* note 6 at 315.

<sup>98</sup> Mitgang, *supra* note 9 at 156 and 160.

copy of Walker's testimony before the committee, along with his analysis of such.<sup>99</sup> According to Mitgang, Seabury was forced to file the report in his own name as the majority of the Joint Legislative Committee members refused to support him in his decision.<sup>100</sup> Seabury formulated fifteen charges against Walker,<sup>101</sup> accusing him of malfeasance, misfeasance and nonfeasance<sup>102</sup> and pronouncing him unfit to continue in office.<sup>103</sup>

Fowler recounts:

[n]o matter what course the Governor decided to steer, he risked losing the support of powerful groups of delegates. Were he to ignore Seabury's demand, Tammany's foes might charge him with condoning the Tiger's sins. Were he to make the opposite decision and bring Walker to trial, an open defiance of Tammany might well cause many resentful delegates to endorse Al Smith's belated move for the nomination.<sup>104</sup>

Once Roosevelt had his nomination in hand (he would go on to be elected President of the United States), he invited Walker and Seabury to the State capital, Albany, to hear their sides of the story. Upon hearing the evidence, Roosevelt was prepared to remove Walker from office, which he had the power to do as governor. However, before he could do so, on 1 September 1932, Walker resigned from his mayoral position. He and his mistress, Betty Compton, left the country for Europe.<sup>105</sup> Anti-Tammany candidate, Fiorello H. La Guardia, went on to be elected mayor of N.Y.C. in November. Walker's resignation, as "Tammany Sachem and symbol of rule from bossdom", along with La Guardia's election, were setbacks from which Tammany never fully recovered.<sup>106</sup>

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<sup>99</sup> *Ibid.* at 161. For a copy of the letter, see "Seabury's Letter to Roosevelt", *supra* note 22 at 18.

<sup>100</sup> Mitgang, *ibid.*

<sup>101</sup> Fowler, *supra* note 40 at 314.

<sup>102</sup> According to the *Black's Law Dictionary*: "'Nonfeasance' means the omission of an act which a person ought to do; 'misfeasance' is the improper doing of an act which the person might lawfully do; and 'malfeasance' is the doing of an act which a person ought not to do at all": H.C. Black, *Black's Law Dictionary*, 6th ed. (St. Paul, Minneapolis: West Publishing Co., 1990) at 1000.

<sup>103</sup> Mitgang, *supra* note 9 at 161. See also "Seabury's Letter to Roosevelt", *supra* note 22 at 18; and Northrop & Northrop, *supra* note 19 at 281.

<sup>104</sup> Fowler, *supra* note 40 at 314. For more on the response of Roosevelt to the charges against Walker, see Fowler, *ibid.* at 314-328 (Chapter 30, In the Hall of Governors).

<sup>105</sup> Peretti, *supra* note 7 at 144. See also Moynihan, *supra* note 1 at 475.

<sup>106</sup> Mitgang, *supra* note 9 at 232.

### **III – “What’s the Constitution between friends?”:<sup>107</sup> Improvised Legality and Irish Justice**

The third Part of this article will explore in more detail the merger of Irish religion and custom with American politics as it pertains to the concept of ‘honest graft’ or the ‘spoils system’ around which machine politics was organised. To be interrogated is whether the patronage-system of politics practiced by Tammany and Walker<sup>108</sup> can be theorised as a specifically Irish approach to justice (as ‘improvised legality’) or whether it is instead ‘scripted illegality’ and thus deliberately crooked and dishonest. It is important to note that in the early 1930s, during the time of the Seabury Commission, patronage-based politics did not violate or offend any laws.<sup>109</sup> Moreover, it was not simply (Irish-Catholic) Democrats,<sup>110</sup> but also (Anglo-Protestant) Republicans who also practiced patronage.<sup>111</sup> However, as is evident from the Seabury Commission, it was the Tammany-style tradition of loyalty-based democracy,<sup>112</sup> which received the full force of public challenge in the early 20<sup>th</sup> century.<sup>113</sup> And it was to the N.Y.C. Democratic political machine that the question was directed of how long would the public’s patience be abused or tested.<sup>114</sup>

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<sup>107</sup> The merger of Irish custom and American politics is typified by the following account of Irish-American Congressman Timothy J Campbell of New York who called on President Grover Cleveland with a request which was refused by the president on the ground that it was unconstitutional. As the story goes, to this Congressman Campbell replied: “Ah, Mr. President, what is the Constitution between friends”: Moynihan, *supra* note 1 at 479.

<sup>108</sup> It was a ‘spoils system’ that “Jimmy Walker inherited but could hardly be blamed for initiating”: Mitgang, *supra* note 9 at 75.

<sup>109</sup> The *Hatch Act 1939* “prohibited coercing votes and promising a government position or withholding government relief funds as compensation or punishment for political activity. Penalties for violation of the criminal provisions of the Act included fines and imprisonment. For violation of the ban on use of authority, however, the penalty was removal from office”: S.J. Bloch, “The Judgment of History: Faction, Political Machines, and the Hatch Act” (2005) 7 *University of Pennsylvania Journal of Labor and Employment Law* 225 at 231.

<sup>110</sup> For more on the Irish as ‘ready-made Democrats’, see G. Potter, *To the Golden Door: The Story of the Irish in Ireland and America* (Westport: Greenwood Press, 1960) at 217-241 (Chapter 29: “The Irish as ‘Ready-Made Democrats’”).

<sup>111</sup> Mitgang, *supra* note 9 at 75.

<sup>112</sup> Walker once commented: “Democracy means loyalty”: Walsh, *supra* note 6 at 51. According to Mitgang, in a ‘spoils system’, political advancement was based on making a sizeable financial contribution to the Party. Successful leaders of Tammany Hall all began as district leaders and worked their way to the top. “There is nothing too big for a Tammany leader that democracy can give”, Walker once said: Mitgang, *ibid.* at 75.

<sup>113</sup> Mitgang, *ibid.* at 232. According to Mitgang, “[u]nder Walker we had perhaps the worse example of the spoils system that could be imagined”: *Ibid.* at 210.

<sup>114</sup> Asks Cicero of Cataline, “how long will you abuse our patience?”: Northrop & Northrop, *supra* note 19 at 292.

### A. Improvised (Il)legality: C.S.I. Meets Postcolonial Critique

In determining the nature of legal improvisation, as either corrupt or just, a postcolonially-informed critical improvisational study offers significant insight. While it must be remembered that improvisation, by its very nature, escapes capture or totalisation and thus any definitive definition or judgment is impossible.<sup>115</sup> For the purposes of this article, though, the intersection of C.S.I. and postcolonial critique provides a valuable framework from which to analyse the justice or corruption of improvisation.

Reading C.S.I. through a postcolonial perspective, improvisation is theorised as a “complex social phenomenon that mediates transcultural inter-artistic exchanges that produce new conceptions of identity, community, history, and the body.”<sup>116</sup> Improvisation, critically-conceived, is a “social practice”<sup>117</sup> that “emerged out of those cultures who most suffered the effects of colonialism (in particular indigenous and African slave populations)”.<sup>118</sup> As such, it possesses a “dissonant relation to hegemony”, to colonialism, which, for Fischlin and Heble, is “predictably manipulative and adaptive, dictated by the self-interested goals of the imperial ideology [it seeks] to enforce”.<sup>119</sup> To be “truly improvisatory in relation to otherness”, they argue, requires “turning away from the predictable acts of imperial greed and destruction to initiate something quite different – like a peaceful and productive alliance with indigenous cultures in the name of forming a transcultural community based on dialogue and ‘true’ improvisation rather than on the monological deployment of European power”.<sup>120</sup>

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<sup>115</sup> Fischlin & Heble, *supra* note 12 at 31.

<sup>116</sup> A. Heble & W. Siemerling, “Voicing the Unforeseeable: Improvisation, Social Practice, Collaborative Research” in D. Brydon & M. Dvořák, *Cross-Talk: Canadian and Global Imaginaries in Dialogue* (Waterloo: Wilfred Laurier University Press, 2012).

<sup>117</sup> Fischlin & Heble, *supra* note 12 at 14.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.* at 15.

<sup>120</sup> *Ibid.*

Applied to the Irish Catholic diaspora in America, postcolonial jurisprudence “explores the relationship between law and imperialist origins”.<sup>121</sup> Much of the dominant law is perceived as “the product of imperialism and thus inherently questionable”.<sup>122</sup> More specifically, hibernocentric postcolonial jurisprudence sees “many dominant legal rules as historically anglocentric and for that reason suspect”.<sup>123</sup> Examining the complexities of colonial law in relation to Ireland, Joseph Brooker writes:

[m]ost laws are contested at one time or another, but law in colonial societies has a particularly fraught status. To the extent that the whole apparatus of the colonial state is regarded as a foreign imposition, it is an object of contention rather than consensus. The law of the colonial state needs to enforce agreement and stability; but in so far as it is viewed as the language of a contested power, that which needs to be the medium of resolving contention is itself highly contentious. Part of the mission of law is to naturalize itself: to seek legitimacy as a given rather than mere convention, and to be in principle timeless rather than a temporary convenience. Yet this legitimacy is likely to be placed in question more powerfully and insistently in a colonial settling than elsewhere. If colonial power is viewed not as benevolent reign but as illegitimate occupation, then colonial law ceases to be a solution and becomes part of the problem. Indeed, the law in such conditions may even be regarded as *illegal*.<sup>124</sup>

A great deal of literature exists regarding the hardship and discrimination faced by Irish Catholic immigrants to the United States, especially after the Potato Famine of 1845. The most common telling of the story relegates the Irish to the “economic bottom”, “an impoverished group trapped on the lowest rung of the class structure”.<sup>125</sup> According to Kenny, “[t]he Irish immigrants of the mid-nineteenth century were certainly the poorest and most disadvantaged the United States had seen”.<sup>126</sup> Life in

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<sup>121</sup> Walsh, *supra* note 14 at 1038.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> J. Brooker, “Estopped by Grand Playsaunce: Flann O’Brien’s Post-colonial Lore” in P. Hanafin, A. Gearey & J. Brooker, eds., *Law and Literature* (Oxford: Blackwell Publishing, 2004) 15 at 17.

<sup>125</sup> Gilje, *supra* note 2 at 94 and 95. See also L.J. McCaffrey, “Looking Forward and Looking Back” in R.H. Bayor & T.J. Meagher, *The New York Irish* (Baltimore and London: The Johns Hopkins University Press, 1996) 213 at 214.

<sup>126</sup> K. Kenny, “Race, Violence, and Anti-Irish Sentiment in the Nineteenth Century” in J.J. Lee & M.R. Casey, eds., *Making the Irish American: History and Heritage of the Irish in the United States* (New York and London: New York University Press, 2006) 364 at 367.

rural, Catholic Ireland did not prepare the immigrants for “urban, industrial, Protestant America”<sup>127</sup> and the Irish Catholic population in N.Y.C. experienced a “slow and painful adaptation,”<sup>128</sup> as McCaffrey explains:

[t]hey [Irish Catholic immigrants] became urban America’s first group social problem. Their crime, filth, alcoholism, mental disorders, violence, and family collapses irritated Anglo-Protestants, but not so much as their religion. Anglo-America inherited its no-poperly bigotry from Anglo-Saxon England as the core of nativism insisting that Catholicism represented an alien, subversive religion that threatened American culture and institutions.<sup>129</sup>

This anti-Irish, anti-Catholic sentiment,<sup>130</sup> often referred to as “hibernophobia”,<sup>131</sup> stemmed, in part, from differences in religious background.<sup>132</sup> However, there also existed “a prevailing racist sentiment that the Irish were by nature an inherently violent people”:<sup>133</sup>

[u]pper- and middle-class New Yorkers still remembered the Irish violence of the Draft Riots of 1863 and the Orange Riots of 1870 and 1871. Those incidents and the heavy Irish involvement in crime and social disorder confirmed nativist opinion that the Irish Catholics were a cancer eating away at the vitals of their city. Inheriting Anglo-Saxon or Scots-Irish ancestral prejudices, they were convinced that Protestantism represented liberty, reason, industry, and order, whereas Catholic authoritarianism nurtured ignorance, irrationality, and superstition.<sup>134</sup>

<sup>127</sup> McCaffrey, *supra* note 125 at 214.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> For more on the discrimination and hardship faced by the Irish in America, see Potter, *supra* note 110 at 161-623 (Part Three: What Befell Them in America).

<sup>131</sup> N. Gotcher, “No Irish Need Apply” *The Observer* (8 February 2010) available at <<http://www.ndsmcobserver.com/viewpoint/no-irish-need-apply-1.1117393#>> (date accessed: 24 January 2013).

<sup>132</sup> For more on anti-Irish sentiment in N.Y.C. in relation to religious freedom, see W. Walsh, “Religion, Ethnicity, and History: Clues to the Cultural Construction of Law” in R.H. Bayor & T.J. Meagher, *The New York Irish* (Baltimore and London: The Johns Hopkins University Press, 1996) 48-69.

<sup>133</sup> K. Kenny, “Race, Violence, and Anti-Irish Sentiment in the Nineteenth Century” in J.J. Lee & M.R. Casey, eds., *Making the Irish American: History and Heritage of the Irish in the United States* (New York and London: New York University Press, 2006) 364 at 370.

<sup>134</sup> McCaffrey, *supra* note 125 at 218. On the Draft and Orange Riots, Gilje elucidates:

[d]uring the Civil War, despite the large numbers of Irish volunteers in all-Irish or mixed regiments, nativists condemned them as disloyal, cowardly, and unpatriotic southern sympathizers. In addition, New York housed a large Irish Protestant population. This group shared with their Catholic countrymen a long history of enmity

Regardless the source of or basis for the prejudice, it was the Irish Diaspora, as “leaders of the Catholic Church in the United States and as influential citizens in urban politics”, who bore the brunt of anti-Catholic prejudice in America during that time.<sup>135</sup>

## B. Application of Improvised (Il)legality to Seabury Investigations

This section explores the improvisational qualities of Walker’s “free-and-easy political philosophy”<sup>136</sup> and Tammany’s loyalty-based democracy to determine whether their actions, deemed corrupt and illegal by Seabury, were, in fact, improvised responses to a law and politics borne out of the religious and cultural persecution of the Irish in the United States. What follows is not an apology for political corruption, but instead questions whether, when read through a postcolonial critical perspective, the patronage politics practiced by Walker and Tammany may be reconceived as ‘improvised legality’ and thus amount to a specifically Irish approach to justice.

Before doing so, it must be noted that there is nothing new or specifically Irish about what Northrop and Northrop call the ‘insolence of office’:

[i]t has been an ever-present parasite on government since the beginning. It was the same in the days of the Greek City States; it was the same in Rome. It was this that led Cicero to ask Cataline, who, after his treachery had become known, had the effrontery to take his place in the Roman Senate, “how long do you abuse our patience?”; it was the

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and conflict that was reinforced by class differences and clashes on this side of the Atlantic. Street fights and outbursts of rioting between the “green” and the “orange” punctuated New York’s urban order. The notorious Orange Riot of 1871 offered just one example of intra-Irish fighting that non-Irish New Yorkers came to consider a major social problem, a serious disruption of the social order.

Gilje, *supra* note 2 at 100. Explaining the Orange Riot of 1871, Gilje writes:

In 1870 and 1871 Orange parades resulted in 76 deaths, no less than 165 injuries, and 92 arrests. Most of the casualties were inflicted in 1871 when the Eighty-fourth Regiment, NYSM, fired indiscriminately on the crowd in what the *Irish World* called “Slaughter on 8th Avenue.” The causes of one of the worst examples of urban violence lay in the turbulent New York City political climate, where nativism and Anglo-centrism polarized issues of race and class, exacerbating ethnic tensions with roots in Ireland.

*Ibid.* at 98.

<sup>135</sup> McCaffery, *ibid.*

<sup>136</sup> “Ex-Mayor Walker”, *supra* note 8 at 1.

same in England in the days of the feudal lords and the absolute monarchs before Magna Carta and the rise of the Commons; it was the same in the days of Louis in France and was one of the causes of that Revolution; it was the same in the days of the Kaisers in Germany and was instrumental in hastening the outbreak of the World War; it was the same under the Romanoffs in Russia and contributed to their overthrow; and it is the same now in our [U.S.A.'s] own Federal, State and Municipal governments where, as in the earlier days, a powerful and relentless political machine has all the agencies of government in its grip.<sup>137</sup>

However, there are some characteristics, when considered through the lens of postcolonial theory, which may deliver an alternative reading to the scripted illegality alleged in Seabury's investigations. Two characteristics in particular will be focused upon below, namely Irish Catholic moralism and Irish Catholic custom, both of which may have influenced the approach to justice taken by Walker and Tammany in early 19<sup>th</sup> century America.

***(i) Irish-Catholic Moralism and Anglo-Protestant Law in America***

When confronted with anti-Catholic prejudice in America, the response by the Irish immigrant population was somewhat surprising. In the face of adversity, such as the Potato Famine, the Catholic Church often experienced a renewal, or what some would call a 'devotional revolution'.<sup>138</sup> In America, though, hostility and aggression against the Irish Catholic population actually "helped hone popular political skills".<sup>139</sup> Writes Lee:

Catholic immigrants who had become politicized during O'Connell's campaigns in Ireland found themselves on familiar territory in America. The emergence of the Catholic Church out of the overwhelmingly Protestant country of the eighteenth century was a highly political affair. Famine immigrants could mesh easily into the political culture of American Catholicism of the time. The big difference with Ireland was

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<sup>137</sup> Northrop & Northrop, *supra* note 19 at 292.

<sup>138</sup> E. Reilly, "Modern Ireland: An Introductory Survey" in J.J. Lee & M.R. Casey, eds., *Making the Irish American: History and Heritage of the Irish in the United States* (New York and London: New York University Press, 2006) 63 at 95.

<sup>139</sup> J.J. Lee, "Introduction: Interpreting Irish America" in J.J. Lee & M.R. Casey, eds., *Making the Irish American: History and Heritage of the Irish in the United States* (New York and London: New York University Press, 2006) 1 at 24.

that America was relatively far more democratic and therefore provided far more opportunity for effective political action.<sup>140</sup>

Thus, while the Catholic Church provided “spiritual, and often enough material, solace”<sup>141</sup> against the ‘common enemy’ of anti-Catholic sentiment, already familiar from Ireland and giving the community “enormous incentive to pull together”,<sup>142</sup> religion actually played a unique role in relation to Irish participation in American politics. As the Irish gained power in N.Y.C. through politics, a particular approach to law and justice emerged, one that was tinged with Irish Catholic moralism and community-based leniency for *certain* transgressions. Legality, in other words, was measured against its congruence with Catholic religious ideals.

The judicial career of Jean H. Norris, the first (and, in 1930, still the only) female magistrate in N.Y.C.’s history, typifies the collision of Irish-Catholic moralism and American law and politics. Her approach to justice, alleges Peretti, entailed a specifically “Irish Catholic brand of public morality”, which “blended leniency within the tribe with harsh condemnation of other’s transgressions”.<sup>143</sup> It was a morality, according to Peretti, that would lead its adherent to “break the law to enforce a rigid sexual morality”.<sup>144</sup>

Judge Norris, one of the targets of Seabury’s initial investigation,<sup>145</sup> was the Assistant Secretary of Tammany Hall<sup>146</sup> and “an Irish American woman with unwarranted pretensions and ambitions”.<sup>147</sup> Appointed to the NY Bench in 1919,<sup>148</sup> her

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<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.* at 25.

<sup>142</sup> *Ibid.*

<sup>143</sup> Peretti, *supra* note 7 at 129.

<sup>144</sup> *Ibid.*

<sup>145</sup> According to Fowler, “[n]umerous Tammany trophies already dangled at his [Seabury’s] belt” as a result of the first two investigations, *i.e.*, the Magistrates Court and N.Y.C. District Attorney Crain: Fowler, *supra* note 40 at 294.

<sup>146</sup> “Mrs Jean H. Norris Appointed to the Bench” *The New York Times* (28 October 1919) (no page number available) [Copy of the original article from the *NYT* online archives with author].

<sup>147</sup> Peretti, *supra* note 7 at 129.

<sup>148</sup> “Woman Sits on Bench” *The New York Times* (29 October 1919) (no page number available). See also, “First Woman Magistrate Judges Fallen Sisters” *The New York Times* (9 November 1919) (no page number available).

Although this was initially a temporary appointment by Mayor Hylan, Mayor Walker reappointed her for a new ten-year term on June 30, 1930: “Walker Renames Two Magistrates” *The New York Times* (1 July

appointment attested to Tammany's egalitarianism – and enterprising spirit (at least in relation to mass voting): “After the women of New York gained the vote, Tammany Hall appointed female co-leaders for each district”.<sup>149</sup> Norris was one of the few female leaders in Tammany to gain a substantial city office. However, like other magistrates, she “indulged in inside business deals, although her investment in a bail bond company that did business in her courtroom was particularly egregious”.<sup>150</sup>

Norris sat, for the most part, on vice cases and had a reputation for “giving stern sentences and granting few acquittals”.<sup>151</sup> The full extent of this reputation is set out in the autobiography<sup>152</sup> of jazz legend, Billie Holiday:

[t]hey booked me [for prostitution] and hustled me off to the Jefferson Market Court. The place was full of what they called “wayward women” in those days, and of course the vice squad fuzz. When I saw who was on the bench I knew I was cooked. It was Magistrate Jean Hortense Norris, the first woman police judge in New York, a tough hard-faced old dame with hair bobbed almost like a man's.

She had made a big name for herself, running around making sweet talk about how it took a woman to understand social problems. But I had heard from the girls who had been in her court that this was all a lot of crud. She was tougher than any judge I ever saw in pants before or since. If the girls had lawyers, they'd move heaven and earth to get their cases put off to some other judge.<sup>153</sup>

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1930) (no page number available). [Copies of the original articles from the *NYT* online archives with author].

<sup>149</sup> Peretti, *supra* note 7 at 127.

<sup>150</sup> *Ibid.* According to Lavine, Norris owned “sixty-five shares of stock in a bail-bonding company which issued bonds for defendants in cases upon which she ruled”. This was considered unscrupulous as “[a] magistrate is disqualified to sit on any judicial procedure in which he or she is personally interested”: Lavine, *supra* note 56 at 201.

<sup>151</sup> Walsh, *supra* note 6 at 259.

<sup>152</sup> It should be noted that an ambivalence exists as to the authorship of Holiday's autobiography, *Lady Sings the Blues* (New York: Penguin Books, 1956). William Dufty, co-author and writer for the *New York Post*, knew Holiday through his wife, long-time friend of Holiday's, Maely Dufty. According to Harlos: “Much of the material of the book was collected from previously published interviews from the liberal-left newspaper *PM* that Dufty pieced together into a single narrative...”: C. Harlos, “Jazz Autobiography: Theory, Practice, Politics,” in Krin Gabbard, ed. *Representing Jazz* (Durham: Duke University Press, 1995) 131 at 146.

It is strongly doubted that Holiday even read anything Dufty showed her, or the actual book once completed: S. Nicholson, *Billie Holiday* (London: Victor Gollancz, 1995) at 233.

<sup>153</sup> B. Holiday (With W. Dufty), *Lady Sings the Blues* (New York: Penguin Books, 1956) at 26.

Norris initially sent Holiday to the city hospital in Brooklyn, but, after an incident with another ‘patient’, Holiday was sent back in front of Norris and sentenced to four months in the Welfare Island jail, a harrowing experience, which Holiday writes about in further detail in her book: *Ibid.* at 26-31.

Judge Norris was put on trial before the Appellate Court on 22nd June 1931 for judicial misconduct with Seabury presenting the evidence.<sup>154</sup> Seabury's investigations revealed that Norris, the most active judge on the Women's Court,

had regularly dealt out excessively harsh sentences for female defendants. In the more than five thousand cases that came before her bench – overwhelmingly related to prostitution and disproportionately involving African American defendants – Norris decreed guilty verdicts 40 percent more often than the other judges in Women's Court, and sentenced a much greater proportion of women to the workhouse.<sup>155</sup>

Seabury concluded his evidence against Norris by declaring that “the acts of the Tammany appointee ‘evinced a course of conduct resulting in injustice to defendants, which must have been followed by tragic consequences’”.<sup>156</sup> According to Peretti, Seabury's investigation into Norris brought out Protestant prejudices against Irish Catholic morality.<sup>157</sup> Norris was never indicted for her business dealings and sentencing irregularities. However, the State Court's Appellate Division removed her from the bench through a unanimous vote.<sup>158</sup>

Much of the same ‘moralistic spirit’ that suffused Judge Norris's rulings also characterised the laws and regulations enacted by Walker while Mayor of N.Y.C. One notable example was his effort to regulate ‘immoral’ stage performances, an endeavour for which he was joined by the Roman Catholic Church and praised by the head of the New York Archdiocese, Patrick Cardinal Hayes. Cardinal Hayes commended Walker

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For more on the consequences of her imprisonment by Norris in relation to Holiday's singing career and life, see S. Ramshaw, “‘He's my man!': Lyrics of Innocence and Betrayal in *The People v. Billie Holiday*” (2004) 16:1 *Canadian Journal of Women and the Law* (Special Issue in Memory of Marlee Kline) 86-105.

<sup>154</sup> Walsh, *supra* note 6 at 260. See also Fowler, *supra* note 40 at 279.

<sup>155</sup> Peretti, *supra* note 7 at 127-128.

<sup>156</sup> Walsh, *supra* note 6 at 260.

<sup>157</sup> Peretti, *supra* note 7 at 129.

<sup>158</sup> *Ibid.* at 131. See also Walsh, *supra* note 6 at 260.

Norris admitted to most of the findings of fact in Seabury's report, but argued that her acts were misconstrued and “the findings did not constitute any a charge of any kind against her”: “Acts Misconstrued, Judge Norris Says, Fighting Removal” *The New York Times* (4 June 1931) at 1 and 12. She unsuccessfully appealed the decision of the Appellate Court to have her removed from the Bench. For details, see “Mrs. Norris Fights to Appeal Removal” *The New York Times* (28 August 1931) (no page number available) [Copy of the original article from the *NYT* online archives with author].

for his commitment to maintaining “a clean, wholesome stage in New York”.<sup>159</sup> What Walker did not gain accolades for from the cardinal was his affair with dancer/showgirl Betty Compton, which began in 1926 while Walker was still married to Janet Allen (‘Allie’) Walker.<sup>160</sup> The attention and criticism his affair garnered from the Catholic Church caused much worry for Tammany leaders, as they were “conscious of the prelate’s power among their Catholic constituents”.<sup>161</sup> Writes Walsh: “Honest graft and a bit of gambling were manly foibles, but fornication and adultery were terrible sins”.<sup>162</sup>

The moralistic manner in which Walker and Tammany approached law and politics is most evident in Walker’s crusade to regulate cabaret clubs, particularly the imposition of, among other imperatives, a 3.00 a.m. closing time.<sup>163</sup> These curfew laws were, argues Peretti, “in accordance with the wider moralistic campaign he led against traditionally objectionable forms of popular and mass culture in the city”.<sup>164</sup> That the Night Mayor of N.Y.C. would head the campaign for cabaret club regulation

reflected the vision of civic life projected by Walker and Tammany Hall. It was a vision that embraced both traditional and modern goals, typical of the so-called New Tammany approach to governing that blended old-fashion cronyism and graft with a new commitment to innovative social legislation. The moralistic cultural crusade helped the political machine to bridge, or at least mask, its own contradictions.<sup>165</sup>

The N.Y.C. Cabaret Laws of 1926<sup>166</sup> mirrored Walker’s and Tammany Hall’s “peculiar brand of moralistic policing, which placated Irish Catholic sensibilities at the

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<sup>159</sup> Peretti, *supra* note 7 at 62.

<sup>160</sup> *Ibid.* at 95.

<sup>161</sup> Walsh, *supra* note 6 at 209-210.

<sup>162</sup> *Ibid.* at 210.

<sup>163</sup> When asked by one owner where people are to go after the clubs close at 3.00 a.m., Walker replied, “Where I’ve learned to go – home”: “3 A.M. Curfew Foes Heckled by Walker” *The New York Times* (30 June 1926) at 1.

<sup>164</sup> Peretti, *supra* note 7 at 56.

<sup>165</sup> *Ibid.*

<sup>166</sup> For more on the N.Y.C. cabaret laws and their impact on N.Y.C. jazz musicians in the 1940s-1960s, see S. Ramshaw, “The Creative Life of Law: Improvisation, Between Tradition and Suspicion” (2010) 6:1 *Critical Studies in Improvisation*. (Special Issue on *Lex Non Scripta, Ars Non Scripta: Law, Justice, and Improvisation*) available at <<http://journal.lib.uoguelph.ca/index.php/C.S.I.eci/article/view/1084>> (Date accessed 24 January 2013).

same time that it continued to provide a haven for the police graft and clubhouse gambling that profited Tammany's members".<sup>167</sup>

In light of the importance of the Catholic religion to the Irish immigrants in America, such undoubtedly played a role in the approach to justice taken by Walker and Tammany. The Irish Americans had a saying about Walker: "One thing about Jimmy, he may steal a dime, but he'll always let you take a penny".<sup>168</sup> Moreover, as Walsh states above, "[h]onest graft and a bit of gambling were manly foibles",<sup>169</sup> tolerated within the Irish American Catholic community. Accordingly, the moralistic approach to law and politics, along with what Peretti calls "leniency within the tribe",<sup>170</sup> symbolised, in early twentieth century N.Y.C., a specifically Irish approach to justice, one that guided the actions of Walker and Tammany and became the subject of the Seabury investigations in 1930-1932.

### ***(ii) Irish-Catholic Custom and American Machine Politics***

A second way in which Walker and Tammany's improvisations on Anglo-American law can be characterised as a distinctly Irish approach to justice, as opposed to a corrupt and scripted defiance of legality, is their relationship to Irish-Catholic culture and custom. The actions of Walker and Tammany, in other words, may have been improvised responses to the discrimination and oppression Irish Catholics encountered in America. However, these improvisations were not, as C.S.I. explains, lawless or without tradition and history. Instead, they were based on the experiences of the diasporic population back in Ireland.

To explain, Moynihan writes that "[t]he Irish role in politics was creative, not imitative"<sup>171</sup> and "[i]n politics, as in religion, the Irish brought many traits from the Old Country".<sup>172</sup> The machine governments, such as Tammany, that they established in

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<sup>167</sup> Peretti, *supra* note 7 at 222.

<sup>168</sup> Mitgang, *supra* note 9 at 58. See also Walsh, *supra* note 6 at 199.

<sup>169</sup> Walsh, *ibid.* at 210.

<sup>170</sup> Peretti, *supra* note 7 at 129.

<sup>171</sup> Moynihan, *supra* note 1 at 478.

<sup>172</sup> *Ibid.* at 479.

New York “show a number of features characteristic of nineteenth-century Ireland”.<sup>173</sup> While the exact nature of the relationship is unclear and much that follows is speculative, the “coincidence”, argues Moynihan, “is clear enough to warrant the proposition that the machine governments resulted from a merger of rural Irish custom with American politics”.<sup>174</sup>

Several features of machine government resulted from the collision between rural Irish custom and American politics.<sup>175</sup> The first of these was an “indifference to Yankee proprieties”, as Moynihan explains: “[t]o the Irish, stealing an election was rascally, not to be approved, but neither quite to be abhorred. It may be they picked up some of this from the English. Eighteenth-century politics in Ireland were – in Yankee terms – thoroughly corrupt.”<sup>176</sup> In his book, *To the Golden Door: The Story of the Irish in Ireland and America*, George Potter writes:

[t]he great and the wealthy ran Ireland politically like Tammany Hall in its worst days. ... A gentleman was thought no less a gentleman because he dealt, like merchandise, with the votes of his tenants or purchased the parliamentary seat as he would a horse or a new wing for his big house.<sup>177</sup>

For the Irish, politics was synonymous with “‘interest,’ not public, but private”.<sup>178</sup> Votes were openly bought and sold and Potter recalls a story of “the landlord who sold his forty-shilling votes first to one candidate and then to the other, and told his tenants, who asked him how to vote, to shop around for the highest offer they could get for themselves”.<sup>179</sup> This ‘interest’ did not end at the polling station, as Conrad M. Arensberg relates:

[a]t first, geese and country produce besieges the new officers and magistrates; a favourable decision or a necessary public work performed was interpreted as a favour given. It demanded

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<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.* at 479.

<sup>177</sup> Potter, *supra* note 110 at 67-68.

<sup>178</sup> *Ibid.* at 67.

<sup>179</sup> *Ibid.*

a direct and personal return. “Influence” to the countryman was and is a direct personal relationship, like the friendship of the countryside along which his own life moves.<sup>180</sup>

A second feature, according to Moynihan, was that: “... the Irish brought to America a settled tradition regarding the formal government as illegitimate and the informal one bearing the true impress of popular sovereignty”.<sup>181</sup> Imposed under British rule, the Penal Laws of eighteenth-century Ireland — labelled by Potter “as vicious and shameful legislation as ever was written by a civilized nation”<sup>182</sup> — “totally proscribed the Catholic religion and reduced the Catholic Irish to a condition of de facto slavery”.<sup>183</sup> Writing in 1960, Potter asserted that the Penal Code left Ireland with “scars ... yet to be healed”.<sup>184</sup> Moreover, Moynihan holds that the “lawlessness, dissimulation, and revenge which followed left the Irish character, above all the character of the peasantry, ‘degraded and debased’”:<sup>185</sup>

[h]is religion made him an outlaw; in the Irish House of Commons he was described as “the common enemy,” and whatever was inflicted on him he must bear, for where can he look for redress? To his landlord? Almost invariably an alien conqueror. To the law? Not when every person connected with the law, from the jailer to the judge, was a Protestant. ...<sup>186</sup>

Quite understandably, such conditions bred “suspicion of the law” and “of the ministers of the law and all of the established authority”.<sup>187</sup> Since the law did not give the Irish peasants justice, they set up their own law: “The secret societies which have been the curse of Ireland became widespread during the Penal period ... dissimulation became a moral necessity and evasion of the law the duty of every God-fearing

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<sup>180</sup> Moynihan, *supra* note 1 at 479 (citing C.M. Arensberg, *The Irish Countryman* (London: Macmillan, 1937) at 178).

As another example of ‘influence’ in Irish law and politics, Niamh Howlin writes that “The Irish jury was infamous for its apparent ability to be bought, persuaded, swayed, packed, or influenced by various political and religious groups. This was particularly true during periods of political unrest”: N. Howlin, “‘The Terror of Their Lives’: Irish Jurors’ Experiences” (2011) 29 *Law and History Review* 703 at 722.

<sup>181</sup> *Ibid.* at 480.

<sup>182</sup> Potter, *supra* note 110 at 25.

<sup>183</sup> Moynihan, *supra* note 1 at 480.

<sup>184</sup> Potter, *supra* note 110 at 25.

<sup>185</sup> Moynihan, *supra* note 1 at 480.

<sup>186</sup> *Ibid.* at 480 (citing C. Woodham-Smith, *The Great Hunger* (New York: Harper and Row, 1962) at 11).

<sup>187</sup> *Ibid.* at 480 (citing Woodham-Smith).

Catholic”.<sup>188</sup> Moynihan writes: “This habit of mind pervaded Tammany at its height. City Hall as such was no more to be trusted than Dublin Castle. Alone one could fight neither. If in trouble it was best to see McManus”.<sup>189</sup>

By 1701, New York had its own Penal Laws, which “emulated their transatlantic counterparts”, writes Walsh, “by forbidding Catholic missionary priests from entering the colony under penalty of life imprisonment and barring Roman Catholics from voting or holding office”.<sup>190</sup> Even after the American Revolution, with the Church of England, while not extinguished, losing power, the anti-Catholic sentiment remained. In debates over religious freedom, John Jay, who would later become the first chief justice of the United States, “fought to deny civil rights to Catholics until they renounced the authority of the Pope and declared ‘false and wicked, the dangerous and damnable doctrine, that the pope [*sic*], or any other earthly authority, have power to absolve men from sins”.<sup>191</sup> Although Jay was unsuccessful in his proposal, through its infamous Test Oath, New York remained one of the four states that barred Catholics from public office and constitutionally forbade Catholic immigration, at least until the new national government pre-empted state naturalisation procedures.<sup>192</sup>

A third feature resulting from the union of rural Ireland and U.S. politics involved the Catholic Emancipation movement in late-eighteenth century and early-nineteenth century Great Britain and Ireland. During this movement, which was led by Daniel O’Connell, “Irish Catholics mobilized for massive and concerted action to achieve political autonomy for Ireland, or political rights for the Irish, within the United Kingdom”.<sup>193</sup> According to Moynihan: “...most of the Irish arrived in America fresh from the momentous experience of the Catholic Emancipation movement”.<sup>194</sup> [O’Connell](#) had begun the campaign for Catholic emancipation in 1823, by establishing the [Catholic Association](#). His Catholic Association was, Moynihan maintains, the “first fully-fledged

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<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> Walsh, *supra* note 132 at 50.

<sup>191</sup> *Ibid.* at 50-51.

<sup>192</sup> *Ibid.* at 51.

<sup>193</sup> N. Onuf, “Humanitarian Intervention: The Early Years” (2004) 16 Florida Journal of International Law 753 at 773.

<sup>194</sup> Moynihan, *supra* note 1 at 480.

democratic political party known to the world”<sup>195</sup> and O’Connell was “the first modern man to use the mass of a people as a democratic instrument for revolutionary changes by peaceful constitutional methods. He anticipated the coming into power of the people as the decisive political element in modern democratic society”.<sup>196</sup> Thus, according to Moynihan, “[t]he Irish peasants, who had taken little part in Gaelic Ireland’s resistance to the English (that had been a matter for the warrior class of an aristocratic society) arrived in America with some feeling at least for the possibilities of politics”.<sup>197</sup>

As a fourth and final point of comparison between rural Irish custom and American machine politics, Moynihan points to the Irish’s “phenomenally effective capacity for political bureaucracy”.<sup>198</sup> Addressing the assertion that the machine government structure of Tammany was a means of covering up or enabling corruption throughout the ranks, Moynihan writes: “Instead of letting politics transform them, the Irish transformed politics, establishing a political system in New York City that, from a distance, seems like the social system of an Irish village writ large”.<sup>199</sup> The connection between the Irish village and the Tammany bureaucracy is described by Moynihan as follows:

[t]he Irish village was a place of stable, predictable social relations in which almost everyone had a role to play, under the surveillance of a stern oligarchy of elders, and in which, on the whole, a person’s position was likely to improve with time. Transferred to Manhattan, these were the essentials of Tammany Hall.

By 1817 the Irish were playing a significant role in Tammany. Working from the original ward committees, they slowly established a vast hierarchy of party positions descending from the county leader at the top to the block captain and beyond, even to building captions. Each position had rights and responsibilities that had to be observed. The result was a massive party bureaucracy. ....<sup>200</sup>

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<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.* at 480–481.

The nature of power under the machine system was hierarchical, but it was diffused in a way similar to an army. “The principle of Boss rule was not tyranny”, asserts Moynihan, “but order”.<sup>201</sup> When asked why there must be a boss when there was already a mayor, city council, *etc.*, Boss Croker replied, “It’s because there’s a mayor *and* a council *and* judges – *and* a hundred other men to deal with”.<sup>202</sup>

In light of the above, it is obvious that many of the instances of scripted illegality alleged by Seabury in his inquiry were, in fact, improvised responses to discrimination encountered by the Irish Diaspora in America based on the past experience of law and politics in Ireland. Accordingly, the simplistic label of corruption, which the actions of Walker and Tammy were deemed to adhere, may not fully account for either the Irish nature or the just elements of these improvisations on Anglo-American law.

## **V – Conclusion: Irish Approaches to Justice**

This article offered not an apology for political corruption, but an alternative reading of the Seabury Commission’s findings to complicate the supposedly clear-cut distinction between legality and illegality in early twentieth century N.Y.C. law and politics. It asked whether the patronage or machine politics practiced by Tammany and Walker could perhaps be characterised as a peculiarly Irish approach to justice, one that entailed not scripted or planned illegality, but, instead, improvisations on Anglo-Protestant laws in response to displacement and discrimination against the Irish Diaspora in America. Improvisation is read above through C.S.I. fused with hibernocentric postcolonial critique to challenge its simplistic conceptualisation as unforeseen and eschewing all law, convention, structure or form.<sup>203</sup> On the contrary, to improvise well requires an attention to discipline, ‘technical knowledge’, as well as ‘background, history, and culture’.<sup>204</sup> The importance of background, history and culture cannot be emphasised enough, especially as it pertains to the improvised

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<sup>201</sup> *Ibid.* at 481.

<sup>202</sup> *Ibid.*

<sup>203</sup> G. Lewis, “Improvised Music after 1950: Afrological and Eurological Perspectives” in D. Fischlin & A. Heble, eds., *The Other Side of Nowhere: Jazz, Improvisation, and Communities in Dialogue* (Middletown, Connecticut: Wesleyan UP, 2004) 131 at 147-148.

<sup>204</sup> *Ibid.* at 153.

responses of diasporic communities to discrimination and displacement in foreign lands. As one final point, if Walker's pleas of innocence<sup>205</sup> are to be believed and his actions were not scripted illegalities, but instead improvisations on colonial law, then, perhaps more importantly, the corruption narrative told by Judge Seabury could be viewed as symptomatic of Anglo-American authority and power over the Irish and therefore simply another instance of colonial domination and oppression. While an extended discussion of such is beyond the scope of this inquiry, it offers further support for the necessity (and justice) of diasporic legal improvisation.

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<sup>205</sup> In his letter to Governor Roosevelt, Walker wrote: "Since the day of my birth I have lived my life in the open. Whatever shortcomings I have are known to everyone – but disloyalty to my native city, official dishonesty, or corruption form no part of those shortcomings": Fowler, *supra* note 40 at 317. George Walsh argues that "Walker was genuinely incapable of understanding the criticism he was beginning to receive": Walsh, *supra* note 6 at 199.