

# HUBRIS

by Julia Belian\*

In 2005, John H. Langbein, renowned Yale scholar of estates and trusts, testified before the Connecticut Legislature Committee on *The Scandal of Connecticut's Probate Courts*.<sup>1</sup> Langbein cited five core failings: “wasteful multiplicity,” non-lawyers serving as judges, practicing lawyers serving as part-time judges, a “perverse” fee system, and territorialism among sitting probate judges.<sup>2</sup> Langbein summed up his criticism in one scathing sentence: “Try not to die in Connecticut.”<sup>3</sup>

Although the Texas probate system has earned no particular reputation for corruption and scandal, it is not without problems. In July 2007, the *Houston Chronicle* reported that courts supervising probates routinely ignored a 1994 order by the Texas Supreme Court requiring county clerks to report every judge-awarded fee in excess of \$500.<sup>4</sup> Between 2003 and 2005, an estimated \$1.8 million of court-ordered payments went either entirely or inadequately reported, much of that money going to unidentified persons.<sup>5</sup> Several large counties, including Travis, Hidalgo, and El Paso, made no reports at all.<sup>6</sup> Such problems have plagued probate systems for decades, even centuries. Financial journalist Jane Bryant Quinn warned *Newsweek* readers in 1992 to consider revocable trusts as an estate planning strategy if they live “in a Dickensian probate jurisdiction, where courts are still staffed by political hacks, and lawyers are running riot with fees.”<sup>7</sup>

While every state surely has had its share of probate scandals, New York may hold a special place because the amount and degree of corruption there seems to dwarf that of every other state. Within the past few years, Nora Anderson and Michael Feinberg have gained notoriety for alleged wrongdoings connected with the surrogate's court.<sup>8</sup> Corruption in the New

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1. John H. Langbein, *The Scandal of Connecticut's Probate Courts*, Statement of Prof. John H. Langbein to Conn. Legislature Committee (October 11, 2005), <http://www.law.yale.edu/faculty/1766.htm>.

2. *Id.*

3. *Id.*

4. Lise Olsen, *Fees to Probate Lawyers Unreported*, THE HOUSTON CHRONICLE, July 8, 2007, at A1.

5. *Id.*

6. *Id.*

7. Jane Bryant Quinn, *When Good Trusts Go Bad*, NEWSWEEK, Oct. 5, 1992, at 80.

8. See generally John Eligon, *Manhattan Judge's Trial Raises Thorny Election Law Issues Concerning Gifts*, NEW YORK TIMES, Mar. 20, 2010, at A14 (reporting that Judge Nora Anderson was charged with intentionally falsifying campaign finance reports by stating that \$250,000 in campaign contributions came from her personal finances); Editorial, *Friends of the Court*, N.Y. TIMES, Feb. 27,

York Surrogate's Court dates back decades.<sup>9</sup> But like other forms of judicial corruption in New York, probate corruption arguably had its heyday in the 1930s and '40s. The grindingly efficient operation of Tammany Hall—the quintessential Big Apple bogeyman—and its colorful beneficiaries persuaded many that judicial corruption was inherent to the city.<sup>10</sup> The career of New York Supreme Court Justice Joseph F. Crater, culminating in his disappearance in August 1930, is one of the most famous.<sup>11</sup> More than \$5,000 in cash disappeared with Crater—leaving behind countless questions.<sup>12</sup> Like most of his peers, Crater (according to rumor) stuffed his bank accounts and deposit boxes with fees derived from court appointments.<sup>13</sup>

In estate administration, judges had the power to appoint whomever they liked to supervise certain funds under their jurisdiction.<sup>14</sup> The fees charged for that supervision were (and are) set by statute; thus, providing a flow of cash that remained more or less protected from charges of outright graft.<sup>15</sup> The fees in such cases also had the distinct advantage of being determined as a percentage of the amount of money involved, rather than being limited by such “irrelevancies” as the amount of work actually required.<sup>16</sup> Statutory fees for administering a decedent's estate can be huge at times.<sup>17</sup> In the era of “machine politics,” surrogates, like all judges, were expected to distribute such appointments in due political proportion and according to Tammany's preference.<sup>18</sup>

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2005, § 14, at 11 (noting that Judge Michael Feinberg gave lucrative positions to those who had financially contributed to his campaign).

9. See generally NEW YORK TIMES articles cited *infra* (discussing many of the scandals in New York surrogate's courts in the early 1900s).

10. See generally M. R. WERNER, TAMMANY HALL (1928) (explaining the history of Tammany Hall).

11. See generally RICHARD J. TOFEL, VANISHING POINT: THE DISAPPEARANCE OF JUDGE CRATER, AND THE NEW YORK HE LEFT BEHIND 1 (2004) (discussing Crater's disappearance, Tammany Hall, and the political corruption of that time). Crater was the son of Irish immigrants. *Id.* After he worked his way through college and law school, he opened an office in lower Manhattan in the famed Equitable Building. *Id.* He clerked for State Supreme Court Justice Robert F. Wagner, Sr., and served as an adjunct professor at both Fordham and NYU law schools. *Id.* He made a lot of money, he was involved in many front-page deals, he befriended many powerful people, he got his own appointment to the bench in time, and he met an untimely end under mysterious circumstances surrounded by rumor and innuendo. *Id.*

12. *Id.*; see also *Wide Hunt Is Begun for Justice Crater, Missing Four Weeks*, N.Y. TIMES, Sept. 4, 1930, at 1.

13. See RICHARD J. TOFEL, *supra* note 11, at 128–32.

14. See, e.g., Jan Hoffman, *A Court for Family Drama*, N.Y. TIMES, May 23, 1995, at B2.

15. N.Y. Surr. Ct. Proc. Act Law § 2402 (McKinney 2003).

16. *Id.* If the estate is of modest size or larger, multiple executors can each garner the full statutory amount. *Id.*

17. See, e.g., Carol Vogel, *Value Put On Estate of Warhol Declines*, N.Y. TIMES, July 21, 1993, at C13. Frederick W. Hughes, executor of the estate of pop art icon Andy Warhol, was awarded \$5.2 million in fees despite a bitter dispute over the correct valuation of Warhol's estate. *Id.*

18. See, e.g., M. R. WERNER, *supra* note 10, at 39.

In addition to the power to appoint allies to serve as administrators of large estates, surrogates also had the power to appoint whom they liked to work for them in their courts.<sup>19</sup> The court itself has always been a money machine, and requiring excess fees for filings and similar services to be paid in cash has traditionally ensured that those who administered the surrogates' offices profited along with those who administered the estates.<sup>20</sup> Property has also been known to disappear during "supervised" inventories, leveraging additional riches out of the surrogate system.<sup>21</sup>

One of the most colorful tales from the Tammany-era surrogate's court is the story of John Hetherington of Queens County and his shadow and nemesis John Theofel, one-time boss of the Democratic Party in Queens. Over the course of the early years of the Depression, the fates of these two men became as tangled as characters in a classical Greek tragedy. John Theofel set out to make a name for himself and to gather as much political power as he possibly could.<sup>22</sup> John Hetherington was Theofel's tool in that quest—one of many he used to scramble to the heights of influence and wealth.<sup>23</sup> And Theofel rose from a post on the Queens County Democratic Committee, to appointment as treasurer for that Committee, and on to the Chairmanship itself—with all the power to make and un-make election winners in the county.<sup>24</sup> Then, through a signal act of greed, Theofel appointed himself into the surrogate's court under the tutelage of the judge he helped make; and it was this comparatively small greediness that finally spelled his fall from grace, the loss of his office and power, criminal investigations into his affairs, and perhaps even a desperate attempt to end his own life.<sup>25</sup> Although their story unfolded nearly a century ago, probate practitioners and judges still smothered under "Dickensian" systems would do well to read it closely, lest their own last increment of hubris undo them in the end.

John Hetherington was born in Belfast, Ireland, in 1872 and came to New York with his parents when he was fifteen-years-old.<sup>26</sup> Naturalized in 1894, he attended New York Law School and received his law degree in 1897, when he was also admitted to the bar.<sup>27</sup> After a few years in private practice, he earned a spot in the district attorney's office.<sup>28</sup> In 1909, when

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19. See 1 WILLIS EDGAR HEATON, *PROCEDURE AND LAW OF SURROGATES' COURTS OF THE STATE OF NEW YORK* 37 (MB 1907).

20. See Ralph Blumenthal, *Report Is Critical of Estate System in New York City*, N.Y. TIMES, July 24, 1992, at A1.

21. *Id.*

22. See *infra* notes 36–44 and accompanying text.

23. See *Hetherington Made Queens Surrogate*, N.Y. TIMES, July 10, 1930, at 27.

24. See *Democrats Elect Leader in Queens*, N.Y. TIMES, November 27, 1928, at 20.

25. See *infra* notes 83–91 and accompanying text.

26. *John Hetherington Dead at 96; Lawyer and Ex-Surrogate Here*, N.Y. TIMES, Apr. 6, 1969, at 68.

27. See *Hetherington Made Queens Surrogate*, *supra* note 23, at 27.

28. *Id.*

he was still in his thirties, he was named Chief Assistant D.A. for Queens County, serving under Matthew J. Smith during the earliest days of investigations into borough corruption.<sup>29</sup> Smith retired from office in 1914 after being named in scandal after scandal by his foes, possibly in retaliation for his anti-corruption work.<sup>30</sup>

Richard S. Newcombe, fellow New York Law School alumnus, made most of the real triumphs in those investigations after Hetherington left the district attorney's office.<sup>31</sup> Newcombe served for two years as Commissioner of Public Works in Queens, but after an unsuccessful bid in 1918 for the bench in New York's Second Judicial District, he turned to criminal law and became a perpetual thorn in the side of Queens politics.<sup>32</sup> He won election in 1923 as district attorney and began to pursue corruption cases with a vigilante's zeal, uprooting graft-takers from their positions in everything ranging from milk production and sewer construction to payroll-padding and street-sweeping.<sup>33</sup> Newcombe's pursuit of the sewer scandal in particular forced Borough President Maurice Connolly to resign his office.<sup>34</sup> Connolly's trial, conviction, and imprisonment for his role in the sewer graft scandal left the administration of the borough in shambles and cleared the field for a power struggle in the Queens machine.<sup>35</sup>

Very late in 1928, a deputy county clerk and hotelier by the name of John Theofel made a bold play for leadership of the party, pushing through changes in the rules by which the executive committee ran, and then riding the new rules into an interim chairmanship of that committee.<sup>36</sup> His chief rival, Joseph J. Powers, claimed that Theofel was able to stage this coup by promising the surrogate's bench to William P. Wiener in exchange for votes in favor of his rule changes.<sup>37</sup>

Although it was generally expected that new elections would be held when Theofel's term expired January 1, 1929, he was seen as likely to retain power if he could resolve party in-fighting.<sup>38</sup> Theofel had long been active in borough politics, but his loyalties were hard to determine because he stood neither with the Newcombe-ousted old guard nor with the

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29. *Id.*

30. *See Queens Prosecutor Cleared by Bigham*, N.Y. TIMES, Dec. 22, 1914, at 6.

31. *See Newcombe Defends Milk Graft Action*, N.Y. TIMES, Oct. 31, 1926, at 3; *see also Newcombe Pledges Quick Sewer Action*, N.Y. TIMES, Dec. 4, 1927, at 1.

32. *See Newcombe Pledges Quick Sewer Action*, N.Y. TIMES, Dec. 4, 1927, at 1.

33. *Newcombe Defends Milk Graft Action*, *supra* note 31, at 3; *Newcombe Pledges Quick Sewer Action*, *supra* note 32, at 1; *Harvey to Name 30 in Street Grafting*, N.Y. TIMES, Feb. 21, 1929, at 6; *New Queens Inquiry to Open Wednesday*, N.Y. TIMES, Apr., 29, 1929, at 14.

34. *See Newcombe Pledges Quick Sewer Action*, *supra* note 32, at 1.

35. *See Faction in Queens Take Fight to Court*, N.Y. TIMES, May 3, 1929, at 16.

36. *Denies Curry Will Aid Theofel in Queens*, N.Y. TIMES, Apr. 29, 1929, at 14.

37. *Id.* Wiener appears to have settled eventually for municipal court justice; perhaps Theofel had indeed promised the surrogate's court to someone, but not Wiener. *Queens Democrats Pick Slate for Fall*, N.Y. TIMES, Aug. 11, 1931, at 15.

38. *Democrats Elect Leader in Queens*, N.Y. TIMES, Nov. 27, 1928, at 20.

completely pro-Tammany group headed by Frank X. Sullivan.<sup>39</sup> Theofel might have been able to make peace among the combatants, but instead of working for compromise once he was at the helm of the committee, he simply refused to call any more meetings.<sup>40</sup> No meeting, no new election; no election, no ouster of Theofel.<sup>41</sup> Those who opposed him took the fight to the courts and injunction followed injunction as the factions jockeyed for position.<sup>42</sup> But, it was early in the year; the stock market crash lay beyond imagination; Herbert Hoover had just been inaugurated; songwriter and playboy Jimmy Walker was the very popular mayor of New York City; and Theofel was bound to shine a little longer.

In April that same year, John F. Curry took over leadership of Tammany Hall, a development seen to strengthen Theofel's position.<sup>43</sup> As the year rolled along and litigation over Theofel's power-grab continued, nervous Democrats facing a fall election began to push for peace in Queens.<sup>44</sup> In June that year, a peace plan was proposed that left Theofel in charge of the executive committee, gave various other positions to his rivals, and interestingly, as noted in a small mention near the bottom of the story of that day, gave corruption-fighter Newcombe the nod for the surrogate's bench.<sup>45</sup> A clean primary win for Edward Cox further oiled the wheels, and the machine again rolled along despite continued bickering and even a fist fight at one of the "peace" meetings in August.<sup>46</sup> Theofel looked as if he might be well situated for the future.<sup>47</sup>

Double days of plunging stocks in late October failed to prevent Jimmy Walker from winning re-election as mayor of New York by a "tidal wave" landslide on November 5, 1929.<sup>48</sup> Among those who surfed into office with him were most of the Queens Democrats, including former District Attorney Newcombe, soon to be Judge Newcombe of the Queens County Surrogate's Court.<sup>49</sup> Newcombe had always dreamed of being a judge, and his dreams, at last, had come true.<sup>50</sup>

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39. *Smith and Curry Will Meet Today*, N.Y. TIMES, Apr. 30, 1929, at 11.

40. See *Denies Curry Will Aid Theofel in Queens*, *supra* note 36, at 14; *Factions in Queens Take Fight to Courts*, *supra* note 35, at 16; *Powers Upheld in Queens Dispute*, N.Y. TIMES, Mar. 27, 1929, at 23.

41. *Factions in Queens Take Fight to Courts*, *supra* note 35, at 16.

42. See *id.*; see also *Powers Upheld in Queens Dispute*, *supra* note 40, at 23.

43. *Denies Curry Will Aid Theofel in Queens*, *supra* note 36, at 14.

44. *Queens Democrats United for Walker*, N.Y. TIMES, May 6, 1929, at 22.

45. *Democratic Accord Assured in Queens*, N.Y. TIMES, June 24, 1929, at 11.

46. See generally *Queens Democrats Home to Make Peace*, N.Y. TIMES, Aug. 5, 1929, at 23 (reporting that Queens Democrats would be holding a "harmony" meeting); *Harvey Defeats Karle*, N.Y. TIMES, Sept. 18, 1929, at 1 (reporting that Edward Cox won the democratic nomination for Borough President).

47. *Harvey Lead* 28,325, N.Y. TIMES, Nov. 6, 1929, at 1.

48. *Id.*

49. *Id.*

50. *Id.*

Theofel, however, found his struggles were not over despite the near-sweep of the election by Queens Democrats.<sup>51</sup> The presidency of the borough had gone to a Republican—the only Republican to win in Queens—perhaps due to rumors of “Connollyism” that shadowed Edward Cox and were allegedly started by Theofel’s enemies.<sup>52</sup> Notably, Cox was named in last-minute accusations supposedly made by men whose positions in Queens public works (e.g., the sewer departments) read like a roster of disgruntled underlings—men whose departments were the very ones in which Newcombe uncovered the proof of graft that manifested Connolly’s undoing.<sup>53</sup> In any case, the loss hurt Theofel.<sup>54</sup> The minute the elections were over, his opponents again called for reorganization of Queens politics, most suggesting modes of reorganization that benefited anyone but John Theofel.<sup>55</sup> Theofel suffered additional insult as reelected Mayor Walker made appointments in utter disregard of Theofel’s recommendations—appointing Theofel’s opponents to plum positions and then promptly leaving on vacation without answering Theofel’s complaints.<sup>56</sup> Theofel also faced over 200 charges of “tenement-stuffing” (illegally converting two-family homes into four-family buildings).<sup>57</sup>

In February, a Theofel favorite won appointment to the commission charged with investigating Theofel’s tenements, and on March 10, 1930, that same commission dismissed all charges against him.<sup>58</sup> In April, new plans for making peace among the Democrats emerged, apparently brokered by James T. Hallinan, newly-elected to fill the Queens district attorney position formerly held by Newcombe.<sup>59</sup> The plans earned Theofel’s support, however soft-spoken, even though his grab for power the previous fall never could have succeeded under the new rules.<sup>60</sup> Peace arrived and the Queens Democrats quieted down.<sup>61</sup>

That is not to say that New York Democrats stayed out of the news. Statewide changes were upsetting the old order as many former foes of new Tammany boss, Curry, hit hard times and bad luck.<sup>62</sup> Brooklyn Borough

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51. See *Harvey Lead* 28,325, *supra* note 47, at 1.

52. *Id.*

53. *Fight on Theofel Denied by Patten*, N.Y. TIMES, Nov. 2, 1929, at 3; *Harvey Attacked by a Former Aide*, N.Y. TIMES, Nov. 4, 1929, at 3.

54. *Parties in Queens to Be Reorganized*, N.Y. TIMES, Nov. 7, 1929, at 21.

55. *Id.*

56. See, e.g., *Insist Mayor Give Queens Patronage*, N.Y. TIMES, Feb. 3, 1930, at 17; see also *Hylan Is Reported Slated for Bench*, N.Y. TIMES, Dec. 24, 1929, at 8.

57. *240 Queens Homes Illegally Altered*, N.Y. TIMES, Feb. 6, 1930, at 13; *Theofel Man Wins Post as Deegan’s Aide; Now Must Prosecute Leader Who Backed Him*, N.Y. TIMES, Feb. 8, 1930, at 10.

58. *Theofel Case Dismissed*, N.Y. TIMES, Mar. 11, 1930, at 23.

59. *See Democrats in Queens United*, N.Y. TIMES, Apr. 8, 1930, at 3.

60. *Queens Democrats Adopt Harmony Plan*, N.Y. TIMES, Apr. 10, 1930, at 13.

61. *Id.*

62. See *infra* notes 63–64 and accompanying text.

President, James J. Byrne, died in early March.<sup>63</sup> Randolph White, public administrator of Queens, amid charges that he had not been properly re-appointed to his job, announced in April that he would quit the post in favor of a former state senator, Alfred Kennedy.<sup>64</sup> On and on, one can page through the *New York Times* of 1930 and see the political bodies hitting the floor, sometimes literally.

Meanwhile, Richard Newcombe settled into his new position as judge, charged a jury for the first time, and within hours, he lay dead on his bedroom floor; he was forty-nine years old.<sup>65</sup> By all accounts, Newcombe's death was of natural causes; his "heart disease" first made itself apparent just after the election.<sup>66</sup> His funeral was mobbed by mourners and made national news.<sup>67</sup> In July, Governor Roosevelt announced that Magistrate John Hetherington would succeed the deceased Newcombe.<sup>68</sup>

Protests arose almost immediately since Hetherington was a known supporter of Theofel.<sup>69</sup> Opponents complained that Hetherington's appointment was part of a package deal among Queens Democrats to settle the enmity among them.<sup>70</sup> But Hetherington was not beaten down; he not only took the bench that month, but also filed in August to run for election in the fall.<sup>71</sup> Hetherington also promptly appointed John Theofel as his court clerk.<sup>72</sup>

It was a hot summer for Theofel and Hetherington. The "Ewald Case" broke the news that judgeships in New York were bought and sold as an everyday part of politics, and the response was prompt, furious, and widespread.<sup>73</sup> Judge Joseph F. Crater was said to have paid \$20,000 cash for his position on the state supreme court.<sup>74</sup> Hetherington's decision to appoint Theofel (even to just a modest public office) simply could not pass scrutiny under the atmosphere that prevailed, especially in light of Theofel's questionable qualifications for the post.<sup>75</sup> A congregationalist

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63. *Funeral of Byrne to Be Held Tuesday*, N.Y. TIMES, Mar. 16, 1930, at 29.

64. *White to Quit Queens Job*, N.Y. TIMES, Apr. 29, 1930, at 36.

65. *R.S. Newcombe, Surrogate, Dead*, N.Y. TIMES, May 9, 1930, at 22.

66. *Id.*

67. *Surrogate Newcombe Mourned by Throng*, N.Y. TIMES, May 11, 1930, at 30.

68. *Hetherington Made Queens Surrogat*, *supra* note 23, at 27.

69. *See Tammany Refuses to Renominate Two*, N.Y. TIMES, July 31, 1930, at 2; *Tuttle Warns City of Political Crisis*, N.Y. TIMES, Oct. 25, 1930, at 1, 6.

70. *See Tuttle Warns City of Political Crisis*, *supra* note 69, at 6.

71. *Dowd in 13th Fight Wins Top Ballot*, N.Y. TIMES, Aug. 26, 1930, at 19.

72. *Pastor Asks Inquiry Into Queens Bench*, N.Y. TIMES, Sept. 22, 1930, at 16.

73. *See, e.g., 10 Balking Witnesses Called by Seabury*, N.Y. TIMES, Aug. 29, 1931, at 9; *see also Hint of Payments in Bench Deal Bared at Seabury Hearing*, N.Y. TIMES, Oct. 23, 1931, at 1.; *Wide Hunt Is Begun for Justice Crater, Missing Four Weeks*, N.Y. TIMES, Sept. 4, 1930, at 1.

74. *Governor Tells How Crater and Bertini were Appointed by Him to the Bench; Ward Resents Roosevelt Jury Move*, N.Y. TIMES, Oct. 10, 1930, at 1. Crater disappeared on Aug. 6, 1930, while under subpoena in the investigation. *Wide Hunt Is Begun for Justice Crater, Missing Four Weeks*, N.Y. TIMES, Sept. 4, 1930, at 1.

75. *Pastor Asks Inquiry Into Queens Bench*, *supra* note 72, at 16.

pastor in Flushing, the Reverend George Drew Egbert, immediately demanded an investigation into allegations that the job was just cash for a judgeship, paid in another form.<sup>76</sup> Hetherington retorted that the charges were themselves politically motivated and defended his choice for clerk.<sup>77</sup> Opponents to Hetherington's election lined up, and needless to say, Hetherington did not win the endorsement of the leading citizen watchdogs.

In October, Hetherington fired 1,000 election inspectors who had been appointed by Theofel's enemy, James Butler.<sup>78</sup> In retaliation for this "outrage," citizens called for the ousting of Hetherington and his chief clerk, Theofel, while Hetherington's opponent in the upcoming election called for an investigation of Theofel's handling of party funds in the previous election.<sup>79</sup>

Hetherington won his battle and managed to keep his bench, but Theofel began to lose the war.<sup>80</sup> Governor Franklin D. Roosevelt authorized a wide-open investigation into judicial corruption, including a particular examination of Queens, and appointed Samuel Seabury to head the probe.<sup>81</sup> Dozens were subpoenaed to testify, including Theofel.<sup>82</sup> Among the mysteries under investigation was a previously unreported \$25,000 contribution to Theofel's grab for control of the party in 1928—a contribution made by the late Judge Richard S. Newcombe.<sup>83</sup> Theofel's net worth had increased tenfold between 1924 and 1930, with no apparent explanation.<sup>84</sup> He was also rumored to have colluded with Republicans to divide the New York Supreme Court Justice positions, as well as other judgeships, for cash.<sup>85</sup> Theofel blamed the riches on winnings at the track and on depositing cash he kept in a tin box.<sup>86</sup> He put cash in the bank at a time when most Americans were doing everything they could to get their money out of the collapsing banking industry.<sup>87</sup>

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76. *Id.*; see also *Judge Sees Egbert as Political Tool*, N.Y. TIMES, Sept. 23, 1930, at 52.

77. See *Pastor Asks Inquiry Into Queens Bench*, *supra* note 72, at 16; see also *Judge Sees Egbert as Political Tool*, *supra* note 76, at 52.

78. *To Fight Hetherington*, N.Y. TIMES, Oct. 17, 1930, at 10.

79. *Id.*; *Challenges Theofel on Campaign Outlay*, N.Y. TIMES, Oct. 21, 1930, at 5.

80. See generally *Borough and County Officials Elected Yesterday*, N.Y. TIMES, Nov. 5, 1930, at 10 [add parenthetical]; see also *13 Prosecutors Face Inquiry as Seabury Hunts Queens Fixers*, N.Y. TIMES, Aug. 4, 1931, at 1.

81. See *13 Prosecutors Face Inquiry as Seabury Hunts Queens Fixers*, *supra* note 80, at 1.

82. *Id.*

83. *1,000,000 in Stock Deals By Missing Walker Agents Indicated in His Accounts*, N.Y. TIMES, Oct. 16, 1931, at 1.

84. *Id.*

85. *Hints of Payments in Bench Deal Bared at Seabury Hearing*, N.Y. TIMES, Oct. 23, 1931, at 1.

86. *Magical Chest Again Enriches New York Man*, CHRISTIAN SCI. MONITOR, Oct. 23, 1931, at 2.

87. *Hints of Payments*, *supra* note 85, at 21.



Thus, John Theofel found himself waist-deep in one of the worst scandals ever weathered by New York politics.<sup>88</sup> In 1931, he testified at length before Seabury's investigation, and his tales confirmed the schemes and deals that had parceled out the judgeships of New York in exchange for money and other forms of power.<sup>89</sup> Despite the scandal, the voluble opposition, and the evidence against him, Theofel kept clinging to power—winning reelection as Queens Democratic leader and pushing his favorites into every slot he could, while new allegations of corruption continued to surface and swirl around him.<sup>90</sup> But his fate was sealed, and especially after Fiorello LaGuardia's defeat of Walker in 1932, there was no realistic hope that he could retain his power for long.<sup>91</sup>

In 1934, as the depression continued to deepen, Hetherington voluntarily reduced his own pay as part of a court reform plan.<sup>92</sup> The legislature passed measures empowering surrogates to order refunds of estate administrator fees that exceeded the fair value of the work performed.<sup>93</sup> Curry and his new Tammany grew increasingly isolated from public approval, and his buddies and protégés took serious hits around the five boroughs.<sup>94</sup> Then, in March 1934, Theofel was politically crippled in a move reminiscent of his own 1928 coup.<sup>95</sup> The executive committee was not authorized to elect a new party leader since those powers had been removed during the reforms that preceded Newcombe's death, but the committee used what powers it had to divest Theofel of all authority to conduct business for the committee, thus rendering him politically impotent without actually removing him from office.<sup>96</sup> Theofel turned to the courts, as one probably would have urged him to do in light of his connections there, but his taint was too deep, too widespread, and he lost all appeals to keep his committee power.<sup>97</sup>

Newspapers make virtually no mention of John Theofel for the next few years. He continued to take home his pay as a court clerk under Hetherington.<sup>98</sup> Presumably, he could have lived out the remainder of his

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88. See generally, *13 Prosecutors Face Inquiry*, *supra* note 81, at 1 (reporting that Theofel would be subpoenaed for questioning regarding investigation of the Borough); see also *Hints of Payments*, *supra* note 85, at 21.

89. See, e.g., *Magical Chest Again Enriches New York Man*, *supra* note 88, at 2; *Seabury to Inquire into Bench Posts*, N.Y. TIMES, Sept 25, 1931, at 20; *Seabury Will Ask M'Cooley How Son Got Nomination*, N.Y. TIMES, Sept 28, 1931, at 1; *Bench Deal Protests Rise*, N.Y. TIMES, Sept 28, 1931, at 1.

90. See, e.g., *Roosevelt's Note Caustic*, N.Y. TIMES, Mar. 31, 1932, at 1, 13.

91. See *LaGuardia Sees Victory*, N.Y. TIMES, Nov. 3, 1933, at 1.

92. *Queens Surrogate Cuts Pay to 'Aid City in Crisis'*, N.Y. TIMES, Jan. 11, 1934, at 7.

93. N.Y. Surr. Ct. Proc. Act Law § 2110 (3) (McKinney 2010).

94. See *Oust Curry, End Tammany, Plan of Roosevelt's Aides*, N.Y. TIMES, Jan. 9, 1934, at 1.

95. See *Sheridan Is Voted Leader of Queens*, N.Y. TIMES, Mar. 4, 1934, at 18.

96. *Id.*

97. See *Theofel's Fight Heard by Court*, N.Y. TIMES, Apr. 17, 1934, at 6.

98. *Theofel Found Stabbed in Home in Queens; Friend Believes He Attempted Suicide*, N.Y. TIMES, Mar. 15, 1938, at 1.

life in quiet, but perhaps the heart had gone out of him. In March 1938, at the age of sixty-five, John Theofel was found in his home with multiple stab wounds to his throat, chest, and both wrists.<sup>99</sup> A friend labeled the injuries a suicide attempt, but one can't help but wonder at the ineptitude of the alleged attempt.<sup>100</sup>

Less than a week after Theofel was taken to the hospital, LaGuardia, New York City mayor, publicly decried the presence of "loafers" on the city payroll during such stressful economic times.<sup>101</sup> He said of the "gentleman in Queens": "He is sick now, something happened to him the other day" the Mayor said. "He receives \$12,500 a year. Why? Because he was formerly the chief of his party in Queens County. That costs us \$12,500 a year."<sup>102</sup> Times were hard.<sup>103</sup> Corruption was no longer so affordable.<sup>104</sup>

In July, Theofel retired from the court, and while still in the hospital, he applied for a city pension.<sup>105</sup> John Cassidy was appointed his successor to the clerkship.<sup>106</sup> LaGuardia had trouble trying to strong-arm Hetherington into disclosing Cassidy's qualifications for the post.<sup>107</sup> LaGuardia also continued to battle the pay raise given to Theofel soon after his 1930 appointment.<sup>108</sup> Hetherington defended his right to set pay for his employees, although he stated his willingness to take a reduction himself, on top of reductions already imposed. Eventually, in July 1939, Theofel collected his back pay, but it was hardly a life of triumph thereafter.<sup>109</sup> His son-in-law was charged with two counts of larceny, and in 1942, the Jamaica Savings Bank sold his eight-room home in Flushing.<sup>110</sup>

On December 28, 1947, John Theofel suffered a stroke at his daughter's home in Bayside.<sup>111</sup> He never recovered and died on January 8, 1948, at the age of seventy-five.<sup>112</sup> He was survived by his daughter and his wife.<sup>113</sup>

Theofel's power was short-lived, tied as it was to the machineries of Prohibition and Tammany Hall and doomed to decline once LaGuardia and

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99. *Id.*

100. *Id.*

101. *Mayor Proposes to Dim Streets to Offset Costs of Useless Jobs*, N.Y. TIMES, Mar. 17, 1938, at 1.

102. *Id.*

103. *See id.*

104. *See id.*

105. *Theofel, in Hospital Applies for Pension*, N.Y. TIMES, July 26, 1938, at 9.

106. *Surrogate Picks Cassidy*, N.Y. TIMES, July 30, 1938, at 2.

107. *Mayor Rebuffed Over Court Query*, N.Y. TIMES, July 31, 1938, at 4.

108. *Mayor Denounces Rise in Court Pay*, N.Y. TIMES, Mar. 19, 1939 at 2.

109. *See Theofel Collects Pay*, N.Y. TIMES, July 15, 1939, at 32.

110. *Theofel Relative Seized in Larceny*, N.Y. TIMES, Sept 24, 1938 at 38; *Old Theofel Home Sold*, N.Y. TIMES, May 16, 1942, at 24.

111. *John Theofel, 75, Queens Politician*, N.Y. TIMES, Jan 8, 1948, at 25.

112. *Id.*

113. *Id.*

the Depression took hold of New York politics. He enjoyed not even six years as head of the Queens machine and has since become an obscure footnote to New York City history. Although he was at the heart of the bench-fixing scandals that led to the disappearance of Judge Crater, he is not a man that many remember. There do not appear to have been any photos of the “fleshy but small-voiced man” ever printed in the *New York Times*, so we cannot even know how he looked.<sup>114</sup> Indeed, one of the only mentions of him on the internet—today’s seemingly bottomless pit of information—is on the Political Graveyard, a website cataloging obscure politicians.<sup>115</sup> However, that source does not even confirm that Theofel ever died.<sup>116</sup>

It may seem pointless to reminisce about Theofel when he appears to have been such a minor character in an era of men larger-than-life. But that is the curiosity of the case of John Theofel; he was anything but a minor player when he was in the game. In 1938, the *New York Times* reported Theofel’s alleged suicide attempt and Hitler’s unopposed march into Vienna on the same day.<sup>117</sup> Even in competition with a world-shaking event like the *Anschluss*, Theofel’s purported suicide attempt still made it above the fold on page one. John Theofel was news in his day, however short that day was.

This is the irony of scandals involving the Surrogate’s Court in New York and similar courts across the country. Citizens may go their entire life without ever needing to appear in court; but once dead, many (if not most) will be subject to some judicial proceeding. These proceedings, however, are barely noted and quickly forgotten—regardless of the decedent’s former power, the estate’s size or value, or the depth of corruption following in the wake. Judge Crater’s single purchase of power lives on as legend while John Theofel’s central role in New York’s early 20th-century politics smolders in obscurity.

Theofel himself would surely bristle at his own obscurity, because that was the nature of his personality. The ancient Greeks called it *hubris*, a word now used in English to connote “excessive pride or self-confidence; arrogance”; but *hubris* was much more than overweening pride.<sup>118</sup> It was, in fact, a crime under the laws of ancient Athens, with a nuance that is

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114. See *Hint of Payments in Bench Deal Bared at Seabury Hearing*, N.Y. TIMES, Oct. 23, 1931, at 21 (giving the physical description of Theofel).

115. The Political Graveyard, *Index to Politicians: Thayn to Thoman*, <http://politicalgraveyard.com/bio/theaker-thom.html>, last updated Mar. 10, 2005 (stating that John Theofel is “presumed deceased”).

116. *Id.*

117. *The Austrian Situation*, N.Y. TIMES, Mar. 15, 1938, at 1; *Theofel Found Stabbed in Home*, *supra* note 98, at 1.

118. See, e.g., Douglas M. MacDowell, ‘Hybris’ in Athens, 23 GREECE & ROME (2d Series) 14 (1976) (ὑβρις, often transliterated by scholars as *hybris*); see also THE NEW OXFORD AMERICAN DICTIONARY 823 (2005) (for a modern definition of *hubris*).

scarcely conveyed by the contemporary definition.<sup>119</sup> A charge of *hubris* could be laid in response to many acts, including insult, assault, theft, or—tellingly—desecration of the dead.<sup>120</sup> Any act, even one already punishable under a more particular law, could be prosecuted as *hubris* if it caused shame or dishonor.<sup>121</sup> *Hubris* was not the underlying crime against another person, but a breach of the “strong obligation on men to treat others with respect, to honour people, laws, moral codes, or gods”; it was “an offence against the whole community”; and a “contemptuous and criminal disregard of all others.”<sup>122</sup> *Hubris* “breeds a tyrant,” and when that *hubris* is “indulged to its fullest extent,” the tyrant “reaches the heights of villainy and must fall.”<sup>123</sup>

Hetherington and Theofel were not the first to overreach from positions of power illegitimately gained and, in the end, to fall. Barring deep changes in the remaining “Dickensian” systems “still staffed by political hacks,” they surely will not be the last.<sup>124</sup>

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119. MacDowell, *supra* note 119, at 14.

120. Nick Fisher, ‘*Hybris*’ and *Dishonour: I*, 23 GREECE & ROME (2d Series) 177, 184-85 (1976).

121. *Id.*

122. *Id.* at 185, 188; see also MacDowell, *supra* note 119, at 29.

123. Nick Fisher, ‘*Hybris*’ and *Dishonour: II*, 26 GREECE & ROME (2d Series) 32, 41 (1979).

124. Quinn, *supra* note 7, at 80.