TULANE LAW REVIEW

VOL. 96 MAY 2022 NO. 5

Race and Disorder: The Chicago Eight Trial Judge and Prosecutors Meet the Constitution and Bobby Seale

Catherine Hancock*

"The expectation that justice is available is indispensable to society's spiritual well-being, and the judiciary is the institutional guarantee that this expectation is being met."[1]

* © 2022 Catherine Hancock, Geoffrey C. Bible & Murray H. Bring Professor of Constitutional Law at Tulane University School of Law. The earliest ideas for this Article were inspired by a Southeastern Association of Law Schools Discussion Group organized by Professor Bruce Green of Fordham Law School. Professors Cynthia Alkon, Laila Hlass, Marjorie Kornhauser, and Ann Lipton provided helpful suggestions regarding an earlier draft. Pari Sitaula, Lucille Dieckhaus, Michael Hawke, Isabella Hancock, Chris Baker, Christopher Hunt, and Christian Jamal provided valuable research assistance and editorial suggestions. Inspiration was provided by *TLR* Editors Kevin Cole, Antonio Milton, Gianluca Cocito-Monoc, and Robert Morris. This Article is dedicated to my colleague George Strickler (1941-2021), a brave and brilliant civil rights lawyer.

1. JOHN F. BANNAN & ROSEMARY S. BANNAN, LAW, MORALITY AND VIETNAM: THE PEACE MILITANTS AND THE COURTS 6 (1974).

I. INTRODUCTION: TRIAL VERSUS APPEAL AND THE TRIAL WITHIN A TRIAL

After Judge Julius Hoffman imposed sentences on the defendants in the "Chicago Conspiracy" trial on February 20, 1970,[2] one scholar declared that "[t]he trial itself is already well on its way to becoming a legend in American law and politics."[3] More than fifty years later, the legendary status of the "Chicago Eight" prosecution remains intact and complicated.[4] The indictment in *United States v. Dellinger* charged the defendants under the 1968 Anti-Riot Act with "substantive" speech crimes and with conspiracy to cross state lines with the intent to incite

2. *See* Harry Kalven, Jr., *Chicago Howler: There Was No Conspiracy*, NEW REPUBLIC, Mar. 7, 1970, at 2 (noting that each substantive or "individual" count charged in the indictment "comes down to the act of making a public speech").

3. Harry Kalven, Jr., *Introduction: Confrontation and Contempt*, *in* CONTEMPT: TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY 10, ix (1970) [hereinafter Kalven, *Confrontation*].

4. Indeed, the legend also remains a popular subject for fictionalized portrayals, such as the film "The Trial of the Chicago 7." *See The Trial of the Chicago 7*, GOLDEN GLOBES, https://.goldenglobes.com/film/trial-chicago-7 (last visited June 19, 2022); *93rd Oscars Nomination Announced*, ACAD. OF MOTION PICTURE, ARTS & SCIS. (Mar. 14, 2021), https://www.oscars.org/news/93rd-oscarsr-nominations-announced (announcing that "The Trial of the Chicago 7" was nominated for both the Best Picture (Drama) at the Golden Globe Award and the Oscar for Best Motion Picture in 2021). This Article will refer to the case as the "Chicago Eight" during the times when there were eight defendants—from the date of the indictment until the severance and mistrial for Bobby Seale—and as the "Chicago Seven" during the subsequent trial proceedings.

a riot at the Democratic National Convention in Chicago.[5] Six of the eight defendants were nationally known political activists and the group collectively represented the "spectrum of dissent" in the 1960s.[6] Two of the retained defense attorneys, Charles Garry and William Kunstler, had national reputations for defending clients who were active in the civil rights movement, the peace movement, and the Black Panther Party.[7] The jury acquitted the defendants of the conspiracy charge,[8] but convicted five of them of substantive offenses, for which Judge Hoffman imposed five-year sentences.[9] He also summarily convicted the defendants and their attorneys of 175 contempt charges, for which the sentences ranged "from two-and-a-half months to over four years."[10] The trial attracted intense nationwide publicity[11] and the

5. 472 F.2d 340, 348 (7th Cir. 1972). For an overview of the federal Anti-Riot Act, see JASON EPSTEIN, THE GREAT CONSPIRACY TRIAL: AN ESSAY ON LAW, LIBERTY AND THE CONSTITUTION 38-52 (1970). For an analysis of events before and during the Convention, see, DAVID FARBER, CHICAGO '68 165-207 (1988); NANCY ZAROULIS & GERALD SULLIVAN, WHO SPOKE UP?: AMERICAN PROTEST AGAINST THE WAR IN VIETNAM 1963-1975 175-200 (1985).

6. JOHN SCHULTZ, THE CHICAGO CONSPIRACY TRIAL 13 (2009) (revised edition) [hereinafter THE TRIAL] (providing a firsthand account of the trial).

7. Charles Garry was chief counsel for the Chicago Eight during pretrial proceedings and his prior clients included Huey P. Newton and the Oakland Seven. Garry was also general counsel for the Black Panther Party and Bobby Seale's personal lawyer. William Kunstler's clients included the Freedom Riders, the Catonsville Nine, and Jamil Abdullah Al-Amin (H. Rap Brown). Leonard Weinglass was the third retained defense counsel; he later gained a national reputation as a civil rights lawyer and represented clients such as Daniel Ellsberg and Angela Davis. *See* David J. Danelski, *The Chicago Conspiracy Trial*, *in* POLITICAL TRIALS 417 n.41, 150 n.48 (Theodore L. Becker ed., 1971). Kunstler represented Abbie Hoffman, John Froines, and Lee Weiner. Weinglass represented Tom Hayden, Rennie Davis, Jerry Rubin, and David Dellinger. *See* DAVID J. LANGUM, WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA 105-06 (1999) (describing how defendants chose counsel and how Seale "insisted that only . . . Garry . . . could represent him").

8. *See Dellinger*, 472 F.2d at 348. At this stage, only seven defendants remained in the case. Kalven, *Confrontation*, *supra* note 3, at x.

9. Kalven, *Confrontation*, *supra* note 3, at x.

10. *Id.* at xii.

11. *See* Harry Kalven, Jr., *The Image of Justice: Reflections on the Chicago Conspiracy Trial*, THE NEW REPUBLIC, Nov. 8, 1969, at 5 [hereinafter *Image of Justice*] (describing the trial as a "phenomenon" producing "a steady flow of anecdote" with every development taking place "under a public spotlight" and becoming "a national news story"); NICK SHARMAN, THE CHICAGO CONSPIRACY TRIAL AND THE PRESS 3 (2016) (highlighting the fact that "celebrity status" of the defendants who were "movement leaders . . . meant that the trial received significant media coverage throughout the case").

episodes of courtroom disorder provoked widespread criticism.[12] A majority of the public supported the convictions.[13]

Yet the image of the trial took on a different look on appeal when the United States Court of Appeals for the Seventh Circuit reversed and remanded the substantive convictions because the court was "unable to approve the trial . . . as fulfilling the standards of our system of justice."[14] The media reports of courtroom disruptions by the defendants receded in significance after the Seventh Circuit condemned the constitutional violations by the judge and prosecutors, as well as the judge's erroneous decisions regarding the exclusion of evidence.[15] A few months after that ruling, the new U.S. Attorney announced that the defendants would not face new trials on the substantive counts.[16] The Seventh Circuit also reversed all the contempt convictions[17] and remanded them for trial before Judge Edward T. Gignoux,[18] who issued only thirteen judgments of conviction and imposed no punishment.[19]

The most unforgettable and "terrifying image" of the trial was that of defendant Bobby Seale at the defense table, chained to a chair and

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12. *See, e.g.*, NORMAN DORSEN & LEON FRIEDMAN, DISORDER IN THE COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COURTROOM CONDUCT (1973) (noting "the concern of the bar and the public over the disorder" in "the Chicago conspiracy case," which received "extraordinary publicity" and provoked fears "for the system of criminal justice in the United States").

13. *See* Carl Brown, *The Whole World Was Watching: Public Opinion in 1968*, ROPER CTR. (June 30, 2016), https://ropercenter.cornell.edu/blog/whole-world-was-watching-public-opinion-1968 (describing Harris Poll results in March 1970 when "most Americans were still not on the [defendants'] side").

14. *See* United States v. Dellinger, 472 F.2d 340, 385 (7th Cir. 1972).

15. *See, e.g.*, *id.* at 369-77, 381-82, 384-91, 409; *see also infra* note 99 (providing examples).

16. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 369.

17. *See* United States v. Seale, 461 F.2d 345, 373 (7th Cir. 1972) (noting the reversal and remand of Seale's contempt convictions); *In re* Dellinger, 461 F.2d 389, 491 (7th Cir. 1972) (noting the reversal and remand of Seale's seven co-defendants and their two defense counsel).

18. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 376 (describing how Chief Justice Burger appointed Judge Gignoux, the U.S. District Judge of Maine, when none of the federal district court judges in the Seventh Circuit wanted to preside over the contempt proceedings and "be responsible for, in effect, trying Judge Hoffman").

19. *See In re* Dellinger, 370 F. Supp. 1304 (N.D. Ill. 1973) (Gignoux, J.), *aff'd* 502 F.2d 813, 815-17 (7th Cir. 1974)**;** Peter A. Joy, *Judges' Misuse of Contempt in Criminal Cases and Limits of Advocacy*, 50 LOY. U. CHI. L.J. 907, 914-15 (2019) (stating that the Government dropped the twelve remanded contempt charges against Seale when Judge Gignoux "ordered the government to produce a log of illegal wiretapping conducted against Seale before proceeding on the remanded contempt charges").

gagged by order of Judge Hoffman after five weeks of trial.[20] One week later, Seale's "trial within a trial" ended in a mistrial and his severance from the case, while the proceedings continued against his co-defendants.[21] He was the only Black defendant, and unlike his seven white co-defendants, he appeared in court without counsel.[22] Seale's mistrial was the culmination of a series of events that began when the two white prosecutors, Thomas Foran and Richard Schultz,[23] objected to the routine defense request by Seale's retained counsel, Charles Garry,[24] for a six-week continuance of the trial due to Garry's necessary gall bladder surgery that would require six weeks of recuperation after his hospitalization.[25] Judge Hoffman denied the continuance and rejected Seale's repeated requests to either reconsider that decision or to allow Seale to represent himself until Garry could return to court.[26] Instead, the judge told Seale that he must accept Kunstler as his counsel.[27] Kunstler had never discussed Seale's defense with him[28] and Seale refused to accept his representation. Instead, Seale repeatedly invoked his right to consult Garry as his retained counsel. Seale also attempted to exercise his right to self-representation by participating in the trial.[29]

Seale's repeated requests and his participation drew contempt citations for disobeying Hoffman's orders to remain silent, and

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20. Kalven, *Confrontation*, *supra* note 3, at xix; *see* Bennett L. Gershman, *Judging Judges Fifty Years After—Was Judge Julius Hoffman's Conduct So Different?*, 50 LOY. U. CHI. L.J. 839, 840 (2019) (noting the "most inflammatory episode [of the trial] was Judge Hoffman's brutal treatment of defendant Bobby Seale").

21. *Seale*, 461 F.2d at 350; *see* TOM HAYDEN, REUNION: A MEMOIR 376 (1988) (referring to Seale's "trial within a trial, that of [him] versus American justice"); *id.* at 354, 362-76, 381-409 (describing the trial); *see, e.g.*, Jon Wiener, *Introduction: The Sixties on Trial in* CONSPIRACY IN THE STREETS: THE EXTRAORDINARY TRIAL OF THE CHICAGO EIGHT 1-41 (Jon Wiener ed., 2006) (providing defendant author's account of the trial and the era).

22. *Seale*, 461 F.2d at 356-57; LANGUM, *supra* note 7, at 105-06 (describing how defendants chose counsel).

23. *See* Danelski, *supra* note 7, at 143 n.24, 144 n.29 (describing the chief prosecutor, U.S. Attorney Thomas Foran, and the assistant prosecutor, Assistant U.S. Attorney Richard Schultz).

24. *See infra* note 165.

25. *Seale*, 461 F.2d at 349, 358 n.23; *see* SHARMAN, *supra* note 11, at 26 (explaining how Garry's request for a continuance was accompanied by medical records describing these needs).

26. *See* Kalven, *Confrontation*, *supra* note 3, at xx-xxi.

27. *See Seale*, 461 F.2d at 379. For Judge Hoffman's reasoning, see *infra* text accompanying notes 237-240.

28. *See Seale*, 461 F.3d at 360. Judge Hoffman did not inquire into Kunstler's preparation or lack of preparation to represent Seale. *See infra* text accompanying notes 35-36.

29. *See Seale*, 461 F.2d at 350; Kalven, *Confrontation*, *supra* note 3, at xx-xxi.

ultimately, Hoffman ordered the marshals to chain and gag Seale.[30] In order to preserve the decorum of the courtroom, Judge Hoffman exposed the jurors to a scene resembling a seated lynching of a Black man by order of a white judge.[31] Hoffman also issued fifty-four contempt charges against Seale and his co-defendants for conduct including their objections to Seale's physical suffering during the period that Seale was chained and gagged.[32] The judge's rulings "sparked frenzy in the courtroom and in the media"[33] and highlighted the power of the connection between racial injustice, violence, and disorder.

Even so, the Seventh Circuit's opinions were virtually silent regarding race.[34] Nor did the court address the legality of Seale's chaining and gagging, since Seale's mistrial ended the trial proceedings from which an appeal might have been taken.[35] The court did find that Judge Hoffman committed one error that required the reversal and remand of Seale's contempt convictions. Since Seale was a "defendant who unexpectedly [found] himself without chosen trial counsel," and since Judge Hoffman was "on notice . . . that Seale was dissatisfied with any counsel except Garry," Hoffman had a Sixth Amendment duty to inquire "into the subject" of Seale's "dissatisfaction" with Kunstler.[36]

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30. *See* Kalven, *Confrontation*, *supra* note 3, at xix-xxii.

31. *See* Janet Moore, *Reviving* Escobedo, 50 LOY. U. CHI. L.J. 1015, 1018-19 (2019) (describing "indelible" courtroom artist's drawings "depict[ing] the court-ordered use of force in silencing Bobby Seale").

32. Kalven, *Confrontation*, *supra* note 3, at xviii; *see, e.g., In re* Dellinger, 461 F.2d 389, 404, 406, 417, 421, 425, 430 (7th Cir. 1972); *infra* note 399 and accompanying text.

33. Laurie L. Levenson, *Judicial Ethics: Lessons from the Chicago Eight Trial*, 50 LOY. U. CHI. L.J. 879, 885 (2019).

34. *See generally* United States v. Seale, 461 F.2d 345, 363 (7th Cir. 1972) (lacking any mention of race except to precedent that condemns defendants who engage in courtroom disruption "irrespective of race [or] color"); *In re* Dellinger, 461 F.2d 389 (7th Cir. 1972) (making no mention of race); United States v. Dellinger, 472 F.2d 340, 367 (7th Cir. 1972) (making no reference of race except for use of peremptory challenge based on race); *In re* Dellinger, 370 F. Supp. 1304 (N.D. Ill. 1973) (Gignoux, J.), *aff'd* 502 F.2d 813 (7th Cir. 1974) (failing to mention race).

35. The question whether the chaining and gagging of Seale was prejudicial to his co-defendants was raised at the time in a defense motion for a mistrial that was denied by Judge Hoffman. Counsel raised the argument again on appeal but the Seventh Circuit did not address the argument. *See* ARTHUR KINOY ET AL., CONSPIRACY ON APPEAL: APPELLATE BRIEF ON BEHALF OF THE CHICAGO EIGHT 453-57 (1971); *Dellinger*, 472 F.2d at 345.

36. *See Seale*, 461 F.2d at 358-59 ("The Government has cited no authority to show that a trial judge may eschew inquiry into the objections of a defendant who unexpectedly finds himself without chosen trial counsel."); *id.* at 360 (stating that the trial judge had "a duty to inquire of Seale" as to "his objections to counsel of record and to take appropriate action to

But the Seventh Circuit noted that even if the district court found on remand that Seale was wrongfully denied his right to Garry's representation or his right to represent himself, such errors "would not justify [Seale's] contumacious conduct" in objecting to Judge Hoffman's denial of his rights.[37]

In the years since the Chicago Eight trial and appeal, the scholarly field of critical race theory has emerged as a source of new insights about the manifestations of white supremacy in America, and more specifically, in American courtrooms.[38] This Article offers reflections on the ways in which the traditional stories of the Chicago Eight prosecution may be viewed through the lens of that scholarship. Given the centrality of the exercise of judicial and prosecutorial discretion in the Chicago Eight pretrial, trial, and appellate phases, it is useful to ask whether that discretion illustrates the findings of social scientists "that race nearly always influences the outcomes of discretionary [decision making] processes, including those in which the [decision maker] relies on criteria thought to be race-neutral."[39]

When undertaking such an inquiry, it is helpful to consider the influence of the phenomenon known as "transparency" in the critical race theory literature.[40] An understanding of this phenomenon begins with the recognition that most white people live in mainly white worlds when it comes to their workplaces, their homes, their schools, and the

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make sure that his Sixth Amendment right to the assistance of counsel and his right to represent himself were appropriately honored.").

37. *Id.* at 361.

38. *See, e.g.*, Denise Lynn, *Silencing Black Women in the White Courtroom*, AFR. AM. INTELL. HIST. SOC'Y. (Feb. 6, 2019), https://www.aaihs.org/silencing-black-women-in-the-white-courtroom/. *See generally* Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243 (2017) (advocating for the application of Critical Race Theory ideas to evidence issues in order to prevent discrimination in the courtroom); Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 459 (2016) ("[T]he courtroom itself is a distinctly white space.").

39. Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 977 (1993).

40. Carlin, *supra* note 38, at 459 (quoting *Flagg, supra* note 39). For accounts of critical race theory scholarship in the popular media, see Jelani Cobb, *The Man Behind Critical Race Theory*, THE NEW YORKER (Sept. 13, 2021), https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory; Janel George, *A Lesson on Critical Race Theory*, ABA JOURNAL (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/.

other environments they experience.[41] Thus, they "rely on primarily white referents" when they form their "norms and expectations that become criteria of decision for white [decision makers]."[42] But when "whiteness" is understood to be the racial norm, white people lose sight of their racial distinctiveness. They see themselves as raceless and view people of color as "racially distinctive."[43] In other words, when white people lose their consciousness of themselves as "raced," their race becomes invisible to themselves—it disappears "from white consciousness into transparency."[44] It might be expected that for white prosecutors, judges, jurors, and defense counsel, the invisible whiteness of the exercise of discretion could be transparent as well. It might be easy for them to forget that "every opinion coloring the development of the judicial system was a white one" originally during slavery times when "[t]he judicial determinations, as well as the legal narrative voice, developed within [the] white space" of the courtroom.[45]

With these insights in mind, it is possible to revisit the legal dramas involved in the Chicago Eight prosecution in order to understand more fully some of the race-based harms that were not discussed in some portrayals of the case by the media, the judiciary, scholars, and members of the legal profession. Parts II, III, and IV of this Article each begin with sections influenced by transparency in their critiques of the trial. Each Part concludes with a section that seeks to present critiques informed by critical race theory. The aim of combining these critiques is to support the attitude of a "deliberate skepticism regarding the race neutrality of facially neutral criteria"

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41. *See* William H. Frey, *Even as Metropolitan Areas Diversify, White Americans Still Live in Mostly White Neighborhoods*, BROOKINGS (Mar. 23, 2020), https://www.brookings.edu/research/even-as-metropolitan-areas-diversify-white-americans-still-live-in-mostly-white-neighborhoods/; Bourree Lam, *The Least Diverse Jobs in America*, ATLANTIC (June 29, 2015), https://www.theatlantic.com/business/archive/2015/06/diversity-jobs-professions-america/396632/ ("Eight out of every [ten] lawyers are white.").

42. Flagg, *supra* note 39, at 973.

43. *Id.* at 970-71.

44. *Id.*; *see id.* at 972-73 (providing examples of the "pervasiveness of the transparency phenomenon" by offering questions to be answered based on the "white reader's . . . experience").

45. Carlin, *supra* note 38, at 459 (2016); *id.* at 460-64 (explaining the evolution of the white courtroom from a space with *de jure* exclusions of people of color to a space with *de facto* exclusions). As Carlin notes, the analysis of critical race theory scholars is "based on the particular understanding that the law has historically taken an active role in defining whiteness," and that "courts have reinscribed the narratives and values of whiteness to determine its exclusionary contours." *Id.* at 458-59.

illustrated by the legal rules governing the judicial and prosecutorial discretion exhibited in the Chicago Eight case.[46]

Subpart II.A of this Article discusses the contending opinions of observers as to who deserved the blame for the courtroom disorder that produced so many contempt charges and so much bad publicity for the legal profession.[47] Even though the Seventh Circuit ultimately reversed the substantive convictions of five defendants on numerous grounds,[48] the media reports of the trial provided the impressions from which public opinion was formed. Those reports tended to emphasize the conflicts between the defense and prosecution rather than the judge's errors.[49] Subpart II.B explains how several bar associations made recommendations for reforms inspired by the disorder at the Chicago Eight trial,[50] including the proposals of the Association of the Bar of the City of New York (CNY Bar Report),[51] whose influential and

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46. Flagg, *supra* note 39, at 977. This skepticism can take account of the way in which notions of courtroom disorder have been influenced by the historical context describe by Carlin and Flagg. *See supra* text accompanying notes 40-45; *see also* Alexis Hoag, *The Color of Justice*, 120 MICH. L. REV. 977, 978-80 (2022) (reviewing SARA MAYEUX, FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA (2020)) [hereinafter *Color*] (noting the value of applying "a critical race lens to get a fuller picture of this nation's legal history," to "understand the role that racism played in the development of laws and policies," to "recognize the extent of racism's entrenchment," and to discover what we can "learn from racism's impact").

47. This Article uses terms such as "disorder," "disorderly," and "disruptive" to refer to conduct that deviates from the rules of court. The legal standards for criminal contempt would reach only some of that conduct. *See, e.g.*, *In re* Dellinger, 370 F. Supp. 1304, 1308-09 (N.D. Ill. 1973), *aff'd* 502 F.2d 813, 815-17 (7th Cir. 1974) (defining contempt for non-lawyers as requiring conduct constituting "misbehavior" in the court's "presence" that is done by "one who knows or should reasonably be aware that his conduct is wrongful," when the conduct amounts to an "'actual material' obstruction of the administration of justice" (citing *Seale*, 461 F.2d 345, 368-69 (7th Cir. 1972)); *id.* at 1315-17 (defining contempt for lawyers to require courts to use "the least possible power adequate to prevent actual obstruction of justice," and to allow attorneys to be "persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf," with "doubts in delineating the line between vigorous advocacy and obstruction" to be "resolved in favor of advocacy") (citing *In re* Dellinger, 461 F.2d 389, 397-98, 400 (7th Cir. 1972)).

48. *See infra* note 99.

49. *See infra* text accompanying notes 98-102.

50. *See infra* text accompanying notes 99, 119-120.

51. DORSEN & FRIEDMAN, *supra* note 12, at xiii, 3 (including the 1973 report of 432 pages produced by a Special Committee on Courtroom Conduct appointed by the president of the Association of the Bar of the City of New York in early 1970 in order to address "the concern of the bar and the public over the disorder" in the Chicago Eight case and the "Panther 21" case in New York). Regarding the Panther 21, see DORSEN & FRIEDMAN, *supra* note 12, at 64-71; Ellen Yaroshefsky, *Judge Damon Keith: The Judicial Antidote to Judge Julius Hoffman Challenging Claims of Unilateral Executive Authority*, 50 LOY. U. CHI. L.J. 989, 991-92 &

comprehensive study included survey responses from over 1,600 judges regarding their experience with courtroom disruption.[52] Those responses revealed how far Judge Hoffman departed from courtroom norms and best trial practices of his contemporaries on the bench who made affirmative efforts to deter disorder during their trials.[53] Subpart II.C focuses on Judge Hoffman's exercise of discretion in denying the continuance for Charles Garry. Although the rule that gave Hoffman this authority might be "racially neutral" in theory, the damaging impact of his decision on the sole Black defendant—and the national leader of the Black Panther Party—also awarded a significant partisan advantage to the white prosecutors who opposed the continuance. Hoffman's hostile treatment of the defense illustrated the unenforceability of the "race-neutral" presumption that he would exercise his discretion impartially.[54] The idealistic advice of the survey judges was similarly unenforceable, as illustrated by Hoffman's disregard of virtually all their strategies for deterring disorder.[55]

Part III turns to the constitutional violations committed by Judge Hoffman and the prosecutors. Subpart III.A. examines the Seventh Circuit's determination that Hoffman violated the defendants' right to an impartial jury and a fair trial in rejecting the defense voir dire requests. In spite of the possibility of juror bias concerning the anti-war protests of the defendants, Judge Hoffman refused to question the prospective jurors regarding their attitudes toward the Vietnam War, the values of the 1960s youth culture, and their opinions about the police. He also failed to question the jurors appropriately about their exposure to prejudicial pretrial publicity regarding the defendants.[56] Subpart III.B. focuses on the Seventh Circuit's finding that Hoffman's anti-defense bias violated the defendants' right to present a defense, as well as their right to a fair trial. This bias was expressed not only through his consistently hostile rulings that disadvantaged the defense,[57] but also his numerous disparaging statements about the credibility of defense counsel, which the prosecutors echoed with similar denigrating insults

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nn.6-13 (2019); Edith Evans Asbury, *Black Panther Party Members Freed After Being Cleared of Charges*, N.Y. TIMES (May 14, 1971), https://www.nytimes.com/1971/05/14/archives/black-panther-party-members-freed-after-being-cleared-of-charges-13.html.

52. *See infra* text accompanying notes 120-136.
53. *See infra* text accompanying notes 137-163.
54. *See infra* text accompanying notes 164-242.
55. *See infra* text accompanying notes 137-162.
56. *See infra* text accompanying notes 243-287.
57. *See infra* text accompanying notes 288-311.

about counsel's competency.[58] Subpart III.C focuses on the impact of the loss of Garry as Seale's courtroom counsel, given Garry's cultural competency and experience in the use of anti-racist trial strategies. Seale followed Garry's advice that he should "stand" on his Sixth Amendment rights, even though that meant standing alone and resisting all of Judge Hoffman's attempts to make Seale accept Kunstler as his counsel. Therefore, Seale played the role of a pro se defendant without Hoffman's approval and used that role relentlessly to call out Judge Hoffman's racism in denying Seale's constitutional rights.[59]

Part IV of the Article focuses on the consequences of Judge Hoffman's decision to make it impossible for Charles Garry to represent Bobby Seale in court. Subpart IV.A examines the dynamics that led to Judge Hoffman's final failure to silence Seale by chaining and gagging him.[60] According to post-trial revelations by Seale's co-defendants and by Charles Garry himself, Seale's resistance to Judge Hoffman's silencing strategies was supported by Garry's out-of-court advice.[61] Yet the effort to provoke a mistrial and free Seale from the prejudice of Hoffman's courtroom came at a high cost, namely the four-year sentence that Judge Hoffman imposed on Seale for contempt charges. Subpart IV.B offers reflections upon the efforts by the white prosecutors to persuade the jurors to connect Seale's race as a Black man—and his politics as a Black Panther Party leader—with the attribute of dangerousness, in order to project that attribute upon Seale's white co-defendants to achieve their convictions.[62] Part V concludes with fleeting glimpses of two jurors and their experiences of the trial.[63]

II. WHEN RACE IS UNSEEN AND ONLY DISORDER IS SEEN

A. Who Was Blamed for the Courtroom Disorder and by Whom?

Almost four years after the jury verdicts, during the retrial of the contempt charges against the Chicago Seven defendants before Judge

58. *See infra* text accompanying notes 312-347.
59. *See infra* text accompanying notes 347-378.
60. *See infra* text accompanying notes 346-359.
61. *See infra* note 210 and accompanying text.
62. *See infra* text accompanying notes 407-437.
63. *See infra* text accompanying notes 438-478.

Gignoux,[64] the government contended that the defendants planned all along to wreck the trial.[65] Judge Gignoux rejected this argument, as well as the government's contention that the defendants and their counsel deserved substantial jail sentences for their contempt crimes.[66] He determined that "the largest portion of the contempts clustered around key incidents"[67] and the conduct of the defendants and their counsel could not "be considered apart from the conduct of the trial judge and prosecutors."[68] Moreover, the contempt charges almost always involved the response of the defendants and their counsel "to peremptory action of the judge."[69]

Judge Gignoux's findings reflected the prior discoveries of Professor Harry Kalven, who detected this pattern by studying the transcript of the original contempt proceeding and plotting the dates of the contempt citations on the trial calendar.[70] Kalven noticed that "[t]here [were] . . . stretches of the trial during which" the defendants received "few, if any, contempts," whereas particular events provoked "a rush of citable conduct,"[71] with over 100 contempts occurring on only "sixteen trial days of the five-month trial."[72] In Kalven's view, the citable conduct was "in no sense random."[73] Thus, "contrary to the impressions" created by the "press coverage" of the trial, Kalven concluded that the "incidence of unrest" was "not easily compatible with the notion that the defendants and counsel . . . pursued a single-minded strategy of disturbing the trial process."[74]

Assuming that the contempt charges may be used as indicators of the most significant disorder at the trial, it is useful to consider why Judge Gignoux ultimately issued only thirteen contempt convictions,[75]

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64. *See In re* Dellinger, 461 F.2d 389, 392, 395, 397 (7th Cir. 1972) (requiring retrial of contempt charges against defendants before a different judge, holding that defendants who were sentenced to more than six months were entitled to a jury trial).

65. *See In re* Dellinger, 370 F. Supp. 1304, 1321 n.22 (N.D. Ill. 1973) (Gignoux, J.).

66. *See id.* at 1321-22.

67. John Schultz, *"The Substance of the Crime Was a State of Mind"—How a Mainstream, Middle Class Jury Came to War with Itself*, 68 UMKC L. REV. 637, 662 (2000).

68. *In re Dellinger*, 370 F. Supp. at 1321.

69. *Id.*

70. *See* Kalven, *Confrontation*, *supra* note 3, at xviii; SCHULTZ, THE TRIAL, *supra* note 6, at 378 (stating that Judge Gignoux "was impressed" with the same patterns that Kalven discovered).

71. Kalven, *Confrontation*, *supra* note 3, at xviii.

72. *Id.*

73. *Id.* at xix.

74. *Id.*

75. *In re* Dellinger, 502 F.2d 813, 815-17, 821 (7th Cir. 1974).

whereas Judge Hoffman issued sixteen contempt convictions for Bobby Seale alone and 159 convictions for Seale's seven co-defendants and their two defense counsel.[76] Notably, the two defense attorneys and the seven co-defendants were retried by Judge Gignoux for only twenty-six of the much reduced number of fifty-four contempt charges sought by the Government. The number of contempt convictions shrank from fourteen to zero convictions for attorney Weinglass and from twenty-four to two convictions for attorney Kunstler. Only three of the defendants shared the remaining eleven contempt convictions.[77]

One reason for these disparities in the findings of Judges Hoffman and Gignoux is that Judge Hoffman issued charges that were unjustified according to contempt doctrine, including many of the charges against Weinglass and Kunstler.[78] First, Judge Hoffman sometimes erroneously issued orders to cut off argument without allowing counsel to explain their objection to one of his rulings, and then issued a contempt citation when they spoke in an attempt to preserve their argument for the record.[79] Second, after issuing an order, Hoffman sometimes added a rejoinder or statement that called for a response from counsel, and then improperly cited counsel for contempt when they uttered lawful "invited responses."[80] Third, Hoffman improperly cited counsel for contempt on some occasions when the order they disobeyed was "ambiguous."[81] Fourth, in order to be valid, a contempt citation must be supported by a showing of actual obstruction of court proceedings, accompanied by proof of the intent to disrupt.[82] Judge Hoffman sometimes ignored these requirements when

76. *See* Joy, *supra* note 19, at 914-15.

77. *See In re* Dellinger, 370 F. Supp. 1304, 1323-24 (N.D. Ill. 1973) (Gignoux, J.), *aff'd* 502 F.2d 813 (7th Cir. 1974) (issuing two contempt convictions for each of two defendants, seven for a third defendant, and two for attorney Kunstler).

78. *See* Joy, *supra* note 19, at 924-31 (using five categories to describe "lessons" regarding contempt rules illustrated by erroneous rulings by Judge Hoffman, according to both the Seventh Circuit's opinion and Judge Gignoux's opinion); *In re* Dellinger, 461 F.2d 389, 398-401 (7th Cir. 1972); *In re Dellinger*, 370 F. Supp. at 1318-20.

79. *See In re Dellinger*, 370 F. Supp. at 1318-19 (explaining that no contempt charge was justified when counsel "persisted in continuing argument" while sincerely believing the judge had not allowed "a reasonable opportunity to be heard," showed no disrespect, and did not disrupt the proceedings).

80. *See In re Dellinger*, 461 F.2d at 399 (finding that an "invited, additional response" following the judge's order to terminate argument "cannot subsequently be viewed as a contemptuous violation of the order").

81. *In re Dellinger*, 370 F. Supp. at 1317.

82. *See In re Dellinger*, 461 F.2d at 397-98, 400.

citing counsel for contempt based on an insulting or disrespectful remark or conduct alone.[83] Finally, the judge erred in imposing contempt charges on counsel for "fail[ure] to aid the court in maintaining order" by not restraining the disruptive conduct of the defendants.[84] As the Seventh Circuit noted, such an obligation cannot be imposed on counsel because it could "destroy the confidence in the attorney-client relationship which is necessary to a proper and adequate defense."[85]

In addition, critics noted that Judge Hoffman engaged in trial practices that contributed to the issuance of contempts that could have been avoided. For example, his "propensity" to "use *direct orders*" resulted in the escalation of "many minor incidents into relatively major ones," since it is grounds for contempt for counsel to disobey a direct order.[86] Additionally, the judge's repeated failure to explain the basis for his rulings, even "when requested to do so" by defense counsel, created the impression of arbitrariness and served as a continuing source of resentment for the defendants.[87] With regard to the contempt charges against Seale's co-defendants, Judge Hoffman convicted them of contempts for making comments that ranged from "one-line jokes" and "countless remarks that [were] simply 'out of order,'" to "caustic" or "insulting" complaints about "the fairness of the trial and the judge."[88] Judge Hoffman imposed other contempts for "gesture[s] of civil disobedience," such as the failure to rise for the judge, or gestures of symbolic protest, such as reading the names of people killed by the armed forces in Vietnam.[89]

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83. *See id.* at 400-01.

84. *See id.* at 399-400; *In re Dellinger*, 370 F. Supp. at 1317 ("An attorney has no obligation to restrain others in the courtroom from disruptive conduct.").

85. *In re Dellinger*, 461 F.2d at 399; *cf. id.* at 399-400 (noting that no immunity from contempt applies where counsel "encourages disruptive behavior by a client or fans the flames of existing frictions").

86. Kalven, *Confrontation*, *supra* note 3, at xxiii (emphasis in original).

87. Danelski, *supra* note 7, at 163. For example, when Kunstler made a motion for a mistrial, the judge declared brusquely that there were no grounds for a mistrial. When Kunstler replied, "[Y]ou haven't even heard the motion [argued yet]," the judge directed Kunstler repeatedly to sit down and then directed one of the marshals to make him sit down. Kunstler responded, "[So] the ruling of the Court [is] that we cannot argue without being thrown in our seats." DORSEN & FRIEDMAN, *supra* note 12, at 204.

88. Kalven, *Confrontation*, *supra* note 3, at xxiii.

89. *Id.*

Yet during the five months of trial and the almost three years before the resolution of the appeal of the substantive convictions,[90] it was the media coverage that established the impressions of the trial for the public and for members of the legal profession. That coverage did not focus on the transcript of roughly 22,000 pages or the almost 2,500 pages of briefs,[91] including the defense brief that raised seventy-six points of appeal.[92] Nor was the media coverage limited to the events that transpired in the courtroom. News stories about the trial included "the theatrical postur[ing] of the defense when outside the trial forum,"[93] as exhibited during the regular press conferences by the defense team.[94] Except for Bobby Seale,[95] the defendants were out on bail, and they received media attention for their many fundraising speeches out of town.[96] When they performed at evening engagements across the country, they faced the challenge of returning to Chicago in time for court the next morning, knowing that the revocation of bail would be the consequence of an untimely arrival.[97]

The incomplete portrayal of the Chicago Eight trial by the press presumably influenced public opinion. After discovering significant differences between the trial transcript and the content of press reports

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90. *See* THE TALES OF HOFFMAN 3, 278 (Mark L. Levine et al. eds., 1970) (showing with excerpts from the official transcript that the trial began with jury selection on September 24, 1969, and ended with sentencing on February 20, 1970); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972) (showing that the appeal of the substantive convictions was decided on November 12, 1972).

91. *Dellinger*, 472 F.2d at 409 (Pell, J., dissenting in part, and concurring in part). The Seventh Circuit brief for the Chicago Seven was 546 pages. KINOY ET AL., *supra* note 35.

92. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 363.

93. Kalven, *Confrontation*, *supra* note 3, at xxiii.

94. Kalven, *Image of Justice*, *supra* note 11, at 8 (referring during the sixth week of trial to a "daily press conference during the noon recess" being held by the "defendants and counsel for several weeks now").

95. *See* BOBBY SEALE, SEIZE THE TIME: THE STORY OF THE BLACK PANTHER PARTY AND HUEY P. NEWTON 314-23 (1970) (explaining that Seale remained in the Cook County jail throughout the trial because of pending charges in Connecticut).

96. *See* J. ANTHONY LUKAS, THE BARNYARD EPITHET AND OTHER OBSCENITIES: NOTES ON THE CHICAGO CONSPIRACY TRIAL 64 (1970) (stating that the defendants, other than Bobby Seale, "spent most of their evenings speaking at colleges, women's clubs and churches" to raise funds for litigation expenses); ZAROULIS & SULLIVAN, *supra* note 5, at 308 n.* (noting that one estimate for the costs of the defense was "close to $500,000, not counting hundreds of thousands more in free legal services from Kunstler, Weinglass, and others"); LANGUM, *supra* note 7, at 124 (stating that Weinglass and Kunstler each received $100 a week in wages).

97. *See* ZAROULIS & SULLIVAN, *supra* note 5, at 307 (describing the hectic pace of air travel to evening speaking engagements outside Chicago and noting one defendant's estimate that the defendants gave more than 500 campus speeches).

in sources such as the *New York Times* and other newspapers,[98] one scholar concluded that several factors could have explained the failure of these news reports to identify the unsupported arguments by the prosecutors and the erroneous rulings by Judge Hoffman. It was their unnewsworthy errors that produced the many grounds for the reversals of the convictions.[99]

One influential factor is "the routines of journalism," which focus on "conflict, not consensus," and "the fact that 'advances the story,' not the one that explains it,'"[100] with "dramatic and personalized actions" viewed as a "key part of what constitutes news."[101] A second factor is the power of media "frames" to exclude certain information or perspectives, as exemplified in the "standard" media frame of "conflict between two sides" in stories about trials,[102] and the framing of protesters "as deviant by focusing on their disruptive and unusual acts

98. *See, e.g.*, SHARMAN, *supra* note 11, at 11-12 (describing "six key incidents" at the trial that the author used for a comparison of the record with press reports from the *New York Times*).

99. The Seventh Circuit's analysis of Judge Hoffman's legal errors illustrated his lack of adherence to the relevant governing legal authorities. *See, e.g.*, United States v. Dellinger, 472 F.2d 340, 366-77, 377-80, 380-82, 382-85, 385-91, 407-09 (7th Cir. 1972) (finding that grounds for reversal included (1) violation of right to impartial jury because of failure to perform voir dire regarding bias and publicity issues, (2) violation of same right because of judge's undisclosed communications to jury during deliberations, (3) erroneous reliance on the definition of "self-serving" evidence to exclude four exhibits with admissible declarations of defendants offered to show state of mind, (4) erroneous exclusion of expert testimony regarding police crowd control techniques that were relevant to "exonerate defendants' speeches" from responsibility for riot; (5) violation of the Sixth Amendment right to present defense to jury without denigrating words and actions of judge and prosecutors, and (6) erroneous exclusion of relevant testimony showing determination of city officials to refuse to negotiate with defendants who sought parade permits for protest activities during convention); United States v. Seale, 461 F.2d 345, 356-60 (7th Cir. 1972) (finding a violation of the Sixth Amendment duty to inquire regarding reasons for defendant's objection to counsel and request for self-representation); *see also Dellinger*, 472 F.2d at 391-92 (finding a violation of Fourth Amendment by denial of inspection and taint hearing regarding logs from government wiretapping performed without judicial authorization, even when justified on grounds of national security); United States v. United States District Court, 407 U.S. 297, 314-21, 323-24 (1972) (establishing Fourth Amendment protection and against wiretapping performed without judicial authorization after the Chicago Eight trial).

100. SHARMAN, *supra* note 11, at 16 (quoting TODD GITLIN, THE WHOLE WORLD IS WATCHING: MASS MEDIA IN THE MAKING AND UNMAKING OF THE NEW LEFT 28 (2003)).

101. *Id.* at 17; *see also id.* at 4 (noting the critique of scholars concerning "tendency of media reporting of trials to ignore the substantive legal and other issues raised by controversial and high-profile cases," so that "sensational reporting focusing on personalities and a simplistic framing of issues dominates the media representation of important trials").

102. *Id.* at 17.

with little reference to the reasons for their protests."[103] Another factor is the "political position" of a media source and the values of its readership.[104] The *Chicago Tribune*, for example, urged its readers to fly the American flag every day of the trial to support the government.[105] After the verdicts, the *Chicago Tribune*'s editorial position was that Kunstler and Weinglass should be in jail serving their contempt sentences, since their "continuing attacks on the law and its administration indicate . . . a determination to keep up a running war against our institutions."[106]

In a nutshell, this scholar concluded that these factors help to explain why reporting of establishment media, such as the *New York Times*, "sought to minimize criticism of the judge's actions" and only "became more critical" late in the trial.[107] Moreover, the Chicago Eight trial occurred during an era when public access to trials was much more limited compared to newsworthy trials today, which typically are the subject of daily commentary by trial lawyers employed by the media to explain the strategies of the advocates and the significance of judicial rulings to the public.[108]

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103. *Id.* at 6; *see also* Juliet Dee, *Constraints on Persuasion in the Chicago Seven Trial*, *in* POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW 110 (Robert Hariman, ed., 1990) (providing examples of "tendency of the mainstream press to focus on the flamboyant rather than the substantive" aspects of the Chicago Eight trial).

104. SHARMAN, *supra* note 11, at 17.

105. *See* ANDREW E. HUNT, DAVID DELLINGER: THE LIFE AND TIMES OF A NONVIOLENT REVOLUTIONARY 224 (2006).

106. Geoffrey Johnson, *Leonard Weinglass, Chicago Seven Lawyer, Dead at 77*, CHI. MAG. (Mar. 29, 2011), https://www.chicagomag.com/city-life/march-2011/leonard-weinglass-chicago-seven-lawyer-dead-at/ [https://perma.cc/36P5-YGR8]; *see* CONTEMPT: TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY 10 211, 243 (1970) [hereinafter CONTEMPT TRANSCRIPT] (observing that Judge Hoffman had stayed the contempt sentences for the attorneys so they could work on the appeals of the defendants).

107. SHARMAN, *supra* note 11, at 5-6 (noting that throughout the trial, the *Times* reporting continued to employ the frame of "conflict between the two sides . . . and suggesting that both were equally blameworthy for the disruption that was occurring"); *see* Dee, *supra* note 103, at 97-100 (describing trial coverage of conservative media).

108. *Compare* Itay Hod, *People v. OJ Simpson: 11 TV Personalities Who Got Their Big Break Covering the Case (Photos)*, WRAP (July 19, 2017), https://www.thewrap.com/oj-simpson-trial-made-famous-nancy-grace-harvey-levin/ [https://perma.cc/A3HN-Z4AV], *with* Harry Kalven, Jr., *Image of Justice*, *supra* note 11, at 1 (noting the difficulties involved in commenting on the Chicago Eight trial "without the benefit of a trial record, relying on newspaper reports, cocktail party insights, and the observations of a few friends who have chanced to visit the trial").

According to one public opinion poll conducted soon after the verdicts, "half of the country" followed the Chicago Eight trial[109] and depended on journalists for access to the facts regarding the conduct of the trial and the courtroom disorder. Of those who followed the trial, 79% "agreed the defendants were trying 'to make a mockery of the legal process,'" and 80% agreed "that the defendants were 'more interested in putting on a side show than in letting justice work.'"[110] As for Judge Hoffman's conduct of the trial, 71% agreed that "the defendants had gotten a fair trial," with 63% saying that "the judge had done an excellent or pretty good job," and 71% agreeing that "he was justified in cracking down on the defendants and their lawyer[s]."[111] In a poll of *Chicago Tribune* readers, 84% "approved of Judge Hoffman's conduct of the trial" and 93% approved of the convictions.[112] Judge Hoffman's ten colleagues on the federal district court bench expressed their appreciation to him "for the excellent manner in which he presided over the lengthy and difficult conspiracy trial."[113] After the verdicts, Judge Hoffman was invited by the Washington press corps to be "an honored guest at the Gridiron Club banquet," with entertainment provided by President Nixon and Vice President Agnew performing in their own minstrel show.[114]

Thus, the majority of observers accepted the media frames of the trial that focused on the defendants and defense counsel as the source of the disorder. Not long after the verdicts, in speaking to a gathering

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109. Brown, *supra* note 13.

110. *Id.*

111. *Id.* Notably, these poll results supporting Judge Hoffman were consistent with opinion polls during the Democratic National Convention finding that "a majority of Americans sympathized with the Chicago police and their treatment of the protesters." HUNT, LIFE AND TIMES, *supra* note 104, at 204; *see* DAVID CUNNINGHAM, THERE'S SOMETHING HAPPENING HERE: THE NEW LEFT, THE KLAN, AND FBI COUNTERINTELLIGENCE 55 (2004).

112. Dee, *supra* note 103, at 99. *But see id.* at 102 (describing report in *Time Magazine* about the demonstrations against the verdicts that occurred in seven cities with "crowds as large as 25,000").

113. RICHARD CAHAN, A COURT THAT SHAPED AMERICA: CHICAGO'S FEDERAL DISTRICT COURT FROM ABE LINCOLN TO ABBIE HOFFMAN 178 (2002) (noting that this appreciation was expressed "by a standing vote of thanks" at the suggestion of the chief judge); *see id.* at 179 (noting that after the verdict, Hoffman's colleagues "petitioned the Court of Appeals to serve as 'friends of the court' during the appeal of [the] contempt convictions," but the Seventh Circuit "denied consideration of the request because '[i]t would be inappropriate for the judges of the District Court to take a position that would advocate or even appear to advocate the interest of any party in the appeals'").

114. EPSTEIN, *supra* note 5, at 431; *see also id.* (noting that the Judge Hoffman was invited to the White House the next day to attend "a breakfast prayer meeting led by the evangelist Billy Graham").

of state governors, the Vice President criticized the counsel for the Chicago Seven, saying that: "Our courts do not need lectures from self-appointed social critics . . . [or] lawyers who confuse themselves with disciples of a new cult."[115] The Chicago Eight trial also provided fodder for speeches and commentary many months after the verdicts. For example, Chief Justice Burger offered his own thoughts about courtroom disorder in an address to the American Law Institute in May 1971:

> [O]verzealous advocates seem to think the zeal and effectiveness of a lawyer depends on how thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters—including the judges . . . At the drop of a hat—or less—we find adrenalin[e]-fueled lawyers cry out that theirs is a "political trial."[116] This seems to mean in today's context . . . that rules of evidence, canons of ethics and codes of professional conduct—the necessity for civility—all become irrelevant.[117]

There is some irony in the fact that one year after the Chief Justice characterized "overzealous" defense counsel as disruptive, ignorant, and unethical, the Seventh Circuit reversed the convictions in the Chicago Eight trial because similar negative characterizations of the defense counsel by the judge and prosecutors violated the defendants' right to a fair trial.[118]

Nonetheless, some of the members of the legal profession shared Chief Justice Burger's view that something needed to be done

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115. Spiro Agnew, *Chicago Defendants Foul Their Nest: 'Violence Breeds Violence Breeds Brutal Counterreaction'*, LIFE LINES, Mar. 27, 1970.

116. DORSEN & FRIEDMAN, *supra* note 12, at 4. Both U.S. Attorney Foran and Judge Hoffman denied that the Chicago Eight trial was a "political trial." *See* LUKAS, *supra* note 96, at 1, 74. For various definitions of a "political trial," see, for example, DORSEN & FRIEDMAN, *supra* note 12, at 79, 81 (opining that the Chicago Eight was a "political trial" because the defendants were indicted "not primarily because of legally objective factors but to make a political point: to demonstrate that the convention disturbances were not the result of police riots," but "were planned by antiwar organizations [and] . . . other dissident groups to undermine the political system and destroy law and order"); Susan R. Klein, *Movements in the Discretionary Authority of Federal District Court Judges Over the Last 50 Years*, 50 LOY. U. CHI. L.J. 933, 939-47 (2019) (discussing considerations that could make a trial "political"); POLITICAL TRIALS xiii, xiv, xv (Theodore L. Becker ed., 1971); Gerald Lefcourt, *An Interview with Gerald Lefcourt*, *in* RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS 312-13 (Jonathan Black, ed., 1971).

117. DORSEN & FRIEDMAN, *supra* note 12, at 4; *see* United States v. Dellinger, 472 F.2d 340, 385-91 (7th Cir. 1972).

118. *See id.* at 385-391; SCHULTZ, THE TRIAL, *supra* note 6, at 376 (noting Chief Justice Burger's explicit public criticism of the defendants and defense counsel in the Chicago Eight trial).

about the danger that "adrenalin[e]-fueled" defense counsel like the Chicago Eight lawyers might continue to violate the professional norms for courtroom conduct.[119] Without waiting for the Seventh Circuit to rule on the appeals of the defendants, various bar associations appointed special committees to study the problem of courtroom disorder and issued postmortem assessments of the need for additional regulations of defense counsel in order to prevent an event like the Chicago Eight trial from happening again.[120]

B. How Other Judges Valued Techniques for Deterring Disorder

When considering potential sources of disorder in the Chicago Eight trial, it is helpful to determine whether Judge Hoffman could have adopted any strategies to avoid or discourage disorder. The CNY Bar Report survey revealed that other judges had experience dealing with courtroom disorder in a small number of cases that included both "political" and nonpolitical prosecutions.[121] On the basis of their experiences, they made recommendations that emphasized the value of holding pretrial meetings with the prosecutor, defense counsel, and defendant, in order to communicate the ground rules that would be enforced regarding potential disorder at trial.[122] The judges also provided illustrations of the appropriate judicial demeanor and courtroom atmosphere that could help to deter disorder.[123]

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119. *See* CAHAN, CHICAGO'S COURT, *supra* note 113, at 178 (noting that the federal district court judges in Chicago decided that Kunstler and Weinglass would "be barred from practicing law in the district"); SCHULTZ, THE TRIAL, *supra* note 7, at 393-394 (describing an effort to disbar Weinglass that failed in New Jersey, as did an effort to disbar Kunstler in New York).

120. *See, e.g.*, ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (1971) [hereinafter ABA STANDARDS FOR TRIAL DISRUPTIONS]; AMERICAN COLLEGE OF TRIAL LAWYERS REPORT AND RECOMMENDATIONS ON DISRUPTION OF THE JUDICIAL PROCESS (1970), *reprinted in* DORSEN & FRIEDMAN, *supra* note 12, at 337-42; NEW YORK STATE APPELLATE DIVISION, RULES OF PRACTICE CONCERNING COURT DECORUM, § 604.1; *see also* DORSEN & FRIEDMAN, *supra* note 12, at 3-5, 338-55 (providing a study that took into account the Seventh Circuit opinions in the Chicago Eight appeals).

121. *See* DORSEN & FRIEDMAN, *supra* note 12, at 267-332 (providing survey questionnaires and results received from 107 judges out of 1,602 who collectively reported only 112 cases of trial disruption during their entire careers on the bench); *id.* at xiii-xiv (stating that the "unexpressed underlying message in the report" is that "the bar as a whole misconstrued . . . the dimensions and causes of courtroom disorders" and the ensuing "panic" by the bar and law professors "exaggerated far out of proportion the problems that had occurred in a few courtrooms, particularly Judge Hoffman's in Chicago").

122. *See id.* at 195.

123. *See id.* at 193, 196-99.

The theme of communicating an impression of fairness—and how to do that—figured repeatedly in the advice of the judges. One comment urged the view that a trial judge "must create the impression that [they are] fair by being fair" and "should try and understand the position of the defendants" and convey that understanding to him.[124] Another comment pointed to the value of showing defendants that a judge is "disposed . . . to make rulings favorable to them, when appropriate, without reluctance."[125] As one judge opined, "[i]f the litigants and the attorneys [are] made to understand clearly and fully that the presiding judge has the disposition, the knowledge, and the ability to conduct the trial in a totally fair, impartial, and unbiased manner, there *should* be far fewer instances" of disruption.[126]

Other themes in the commentary included the benefits of allowing an emotional defendant to vent and the value of disregarding minor violations of rules. One judge emphasized that "all defendants in criminal cases tend to be anxious over the outcome of the trial, and . . . the first thing to do is to listen and let the defendant[s] explode and get it out of [their] system[s] if [they] [want] to talk."[127] Another judge described disturbances in a particular trial as not posing "insurmountable problems" because, "I stopped proceedings, sometimes excused the jury, talked things over in a mild but firm manner and we got along. I tried to be fair [and] made it obvious, I believe, by seldom raising my voice and sometimes overlooking minor violations of rules."[128] One judge stated candidly, "I don't believe that small passive disruption is of any significance . . . . In that kind of situation I believe that it is just better not to see it."[129]

Taking the same philosophy even further, one judge reported that when the defendant referred to each of the trial participants by "every name in the book," the judge responded "by not acknowledging the disruption by word or look" and by "[r]equiring attorneys and witnesses to proceed as though it was not happening."[130] This judge

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124. *Id.* at 193.

125. *Id.*

126. *Id.* at 196 (emphasis in original).

127. *Id.* at 94.

128. *Id.* at 97; *see* Dee, *supra* note 103, at 101 (noting criticism of Judge Hoffman in a *Time Magazine* story that contrasted his conduct with that of the judge presiding in the "Milwaukee 14" trial, who "overlooked minor outbursts" and "quietly and patiently lectured" the defendants "on their behavior").

129. DORSEN & FRIEDMAN, *supra* note 12, at 111.

130. *Id.*

also repeatedly provided the jury with the warning that "they must determine the issue of guilt or innocence on the evidence and the law without regard to the conduct of the defendant."[131] In a similar spirit, one judge noted that when the defendant swore at an appointed attorney, who subsequently informed the judge that the defendant had fired him, "I quietly instructed [the] attorney . . . to remain at the counsel table and protect the constitutional rights of the defendant."[132]

The importance of establishing a calm courtroom atmosphere as a visible symbol of a fair forum was emphasized by the judge who declared that the way to let a defendant know "in a practical way that he will get a fair trial" is by "stressing that the courtroom should be a place of calm and dignity where all . . . can expect justice."[133] This judge's philosophy was reflected at the time in the following provision of the ABA Standards on the Judge's Role in Dealing with Trial Disruptions:

> When it becomes necessary during the trial for [the judge] to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, [the judge] should do so in a firm, dignified and restrained manner, avoiding repartee, limiting [their] comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.[134]

The CNY Bar Report identified two rationales for the ABA's focus on the judicial avoidance of repartee, namely, that "banter and repartee lower the dignity of the court" and that these behaviors "elicit responses from the attorneys that may increase contention during the trial."[135] Or, as one judge put it succinctly, "[t]rial courts should proceed with dignity, rule impartially, and say as little as possible in the trial of criminal cases."[136]

Judge Hoffman did not follow that course. Observers of the Chicago Eight trial reported that he engaged in frequent repartee and "basked in the pleasure" of hearing the spectators laughing at his wit.[137]

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131. *Id.* at 116.

132. *Id.* at 119.

133. *Id.* at 94.

134. *Id.* at 203 (quoting an excerpt from Standard B.1. of the ABA STANDARDS FOR TRIAL DISRUPTIONS, *supra* note 120).

135. *Id.*

136. *Id.* at 203-04 (quoting Kent v. State, 10 P.2d 733, 734 (Okla. Crim. App. 1932)).

137. SCHULTZ, THE TRIAL, *supra* note 6, at 126; *see* LUKAS, *supra* note 96, at 62 (noting that Judge Hoffman "was proud of his cutting wit and enjoyed the laughter he could send," but gave several contempt citations to defendants for laughing).

The marshals were responsible for warning spectators to be silent, but they permitted laughter at the judge's remarks.[138] Judge Hoffman's tolerance of partisan laughter magnified the theatrical and adversarial atmosphere of the trial, since the judge laughed only at the prosecutors' jokes, while the trial participants laughed for one side or the other.[139] Thanks to the prevalence of courtroom laughter, one could predict the likely vote of virtually every juror by observing whether they laughed at the remarks of the defense counsel or the prosecutors.[140]

Given Judge Hoffman's conduct and demeanor at the Chicago Eight trial, starting with the arraignment and including both his pretrial and trial rulings, it was evident that he did not share the values of the judges who made it a priority to address the need for using strategies to avoid potential courtroom disorder. During the arraignment, defense counsel asked for six months to prepare pretrial motions, given "the complexity of the case" and "the large number of defendants and counsel."[141] Judge Hoffman consulted the chief prosecutor and accepted his proposal that thirty days would suffice,[142] which was "only ten more than allowed in the simplest case."[143] Then the judge set a trial date that allowed for "slightly" more than three months to prepare for trial and refused to hear argument from the defense about this decision.[144] Judge Hoffman also denied all of the major pretrial motions of the defense.[145] Most significantly, he rejected their argument that the Anti-Riot Act violated the First Amendment.[146] He also postponed a ruling on the defense request for disclosure of government surveillance

138. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 126.

139. *See id.* at 109-10; *id.* at 109 ("[T]he struggle for the laugh and to suppress the laugh became the principal forms of aggression and unification in [the] courtroom.").

140. *Id.* at 122-23 ("With one notable exception, the jurors voted in the deliberations as their earlier smiles and laughs would indicate.").

141. Danelski, *supra* note 7, at 148 (noting that defense counsel's request for six months was also based on "the fact that the government had already worked on the case for six months" during the time before the March indictment when the prosecution was being assembled before the grand jury); *see* EPSTEIN, *supra* note 5, at 26-37 (describing the work of the grand jury).

142. Danelski, *supra* note 7, at 148.

143. KINOY ET AL., *supra* note 35, at 349 n.24; *see* SHARMAN, *supra* note 11, at 20.

144. Danelski, *supra* note 7, at 148 (noting that Judge Hoffman declared that "I never hear arguments after I rule").

145. KINOY ET AL., *supra* note 35, at 335 & n.6 ("The only thing granted was a limited bill of particulars and limited discovery.").

146. *Compare* United States v. Dellinger, 472 F.2d 340, 409-16 (7th Cir. 1972) (Pell, J., dissenting) (advocating the invalidation of the relevant Anti-Riot Act provision because of its inconsistency with Brandenburg v. Ohio, 395 U.S. 444 (1969)) *with Dellinger*, 472 F.2d at 354-64 (majority opinion) (declining to invalidate the Act).

pursuant to Fourth Amendment precedent—and ultimately rejected the request in a post-trial hearing.[147]

Nor did Judge Hoffman use other preventive techniques recommended in the CNY Bar Report, such as the "relaxation of the [procedural] rules" by allowing defendants to address the jury directly on some occasions.[148] He did not recognize the benefit of ordering an earlier severance of Bobby Seale, despite the evident disruption caused by Seale's continuing objections to his lack of counsel.[149] By deciding to chain and gag Seale instead, Judge Hoffman failed to appreciate the wisdom of the ABA Trial Disruption Standards that "an inappropriately severe sanction may be self-defeating" and provoke "further displays of disrespect or defiance."[150]

It was not surprising that the conduct of Judge Hoffman inspired "feelings of affront [and] resentment" in the defense counsel and the defendants.[151] His "practices and pretrial rulings . . . were streamlined [for] conviction,"[152] and his trial rulings were as well.[153] These rulings were a powerful source of disorder because of their emotional impact on the defendants during the court proceedings. Unlike the "radical pacifists" of an earlier era,[154] the Chicago Eight defendants did not want to be indicted.[155] They were anxious about the likelihood of conviction because they faced the prospect of ten-year prison sentences.[156] This

147. *See* Yaroshefsky, *supra* note 51, at 994-97 (explaining that Judge Hoffman upheld the government's justification for warrantless surveillance based on national security as determined unilaterally by the President; the Supreme Court took the opposite view of the Fourth Amendment and rejected the government's argument two years later in United States v. United States District Court, 407 U.S. 297 (1972)); EPSTEIN, *supra* note 5, at 110-13.

148. DORSEN & FRIEDMAN, *supra* note 12, at 194, 196.

149. *See id.* at 194-96.

150. *Id.* at 199.

151. *Id.* at 205.

152. Yaroshefsky, *supra* note 51, at 1010.

153. *See infra* text accompanying notes 99, 296-319.

154. SCHULTZ, THE TRIAL, *supra* note 6, at 384 (referring to trials of the "Harrisburg Seven," "Gainesville Eight," "Beaver 55," "Minnesota Eight," and "Panther 21"); DORSEN & FRIEDMAN, *supra* note 12, at 75 (referring to trials of the "D.C. Nine" and "Tacoma Seven"). *Compare* BANNAN & BANNAN, *supra* note 1, at 150-87 (providing analysis of trials of the "Boston Five," "Oakland Seven," and "Catonsville Nine"), *with id.* at 4-5, 7 (only defendant Dellinger came from the "radical pacifist" tradition of war protest that called for protest that involved breaking laws and going to jail to serve as a moral witness, thereby relying on an appeal to the conscience of others to inspire reform).

155. *See* EPSTEIN, *supra* note 5, at 103.

156. *See* HUNT, *supra* note 105, at 214 (noting that Dellinger was the only defendant who was willing "to go to jail if necessary"); 18 U.S.C. § 2101 (2018) (declaring that a person convicted of a substantive offense under the Anti-Riot Act may serve a term of five years in

emotional factor was relevant to the risk of disorder, as recognized by the judges in the CNY Bar Report survey. As that report noted, "most disruption is caused by defendants in ordinary criminal cases, who are concerned and fearful about the ordeal they are facing."[157] Moreover, disorder "from whatever source," including the conduct of judges, increases the stress of trials by magnifying the "handicap of an emotion-filled courtroom."[158]

Another risk factor for disorder in the Chicago Eight trial was the status of the defendants as members of "outgroups" who felt both fearful and outraged by their prosecution for "what they view[ed] as their political opposition to the government."[159] The CNY Bar Report noted that a trial judge can "go a long way toward eliminating one of the chief causes of disruption" by addressing the fears of defendants explicitly and assuring them that their right to a fair trial will be protected by the judge.[160]

As the trial date approached, so did a "gathering sense of doom" in the defense camp.[161] By the time the trial began, the defendants and their counsel reached the conclusion that Judge Hoffman would not conduct the trial in a "fair, impartial, and unbiased manner."[162] The fears of the defendants proved to be justified. As their counsel argued in retrospect, two years after their convictions, "no record ever brought before an appellate court has revealed such an incredible pattern of consistent bias in favor of the prosecution."[163]

C. Damaging White Discretion and Unenforceable White Ideals

The stories of how the defense counsel and defendants were blamed for the courtroom disruptions—and how Judge Hoffman

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prison); Grand Jury Indictment at paras. 1-4, United States v. Dellinger, No.69CRI80 (N.D. Ill. 1968) (No. 69-0080) (listing the conspiracy charges for which a person convicted would face an additional five-year sentence if convicted).

157. DORSEN & FRIEDMAN, *supra* note 12, at 194.

158. *See id.* at 16.

159. *Id.* at 89; *id.* at 41 (noting that it is "more likely" that disorder may occur when defendants with this status "feel strongly about highly emotional social issues," because they are "sensitive to . . . the injustices . . . that brought them before the bar"); *see* EPSTEIN, *supra* note 5, at 97-99 (alluding to concerns of Chicago Eight defendants).

160. DORSEN & FRIEDMAN, *supra* note 12, at 194.

161. EPSTEIN, *supra* note 5, at 113.

162. DORSEN & FRIEDMAN, *supra* note 12, at 196; *see, e.g.*, Danelski, *supra* note 7, at 149 (describing the disillusionment of defendants and defense counsel after arraignment and the filing of unsuccessful motion to disqualify Judge Hoffman)**.**

163. KINOY ET AL., *supra* note 35, at 354 n.28.

ignored the techniques for avoiding disorder—set the stage for the recognition of another story. Perhaps the Chicago Eight trial could have turned out differently. If Charles Garry had not needed gall bladder surgery to avoid a life-threatening medical outcome,[164] or if Garry's motion for a continuance had been granted,[165] then in retrospect, a different trial could have been anticipated.[166] In theory, that hypothetical trial would have included no disruptions by the defendants.[167] When they retained Garry, he agreed to represent all of them, not just Bobby Seale, but only if they promised to refrain from "outbursts or disrespectful behavior."[168] In such a trial, Garry would have provided a vigorous defense of Seale as his personal lawyer,[169] and also performed cross-examinations of government witnesses.[170] As chief counsel, he expected to make all the final decisions regarding the

164. *Id.* at 443 (stating that Garry "was taken seriously ill and hospitalized on August 25, 1969 for a gall bladder condition," with the diagnosis that surgery would be required in the near future to remove his gall bladder); United States v. Seale, 461 F.2d 345, 349 (7th Cir. 1972) (noting that two days later, Kunstler advised Judge Hoffman that Garry was chief counsel and "essentially will be representing [Seale] assuming that he [Garry] gets back in time from [a] gall bladder operation," at which time Judge Hoffman denied defense motions for a continuance sought "on the grounds of pretrial publicity and conflicting litigation schedules of counselors Kunstler and Garry").

165. *See* KINOY ET AL., *supra* note 35, at 442 (describing denial of Garry's September 9 motion for continuance, which sought a six-week delay of the trial date so that Garry could participate in the trial after his upcoming surgery and subsequent recuperation, and denial of the pro se September 26 motion by Bobby Seale, who learned of Garry's unavailability on September 25 due to his imminent hospitalization and surgery the next day, and sought a continuance on "the ground that he had been denied the right of counsel of his own choice and specifically repudiating representation by any other counsel"); *Seale*, 461 F.2d at 350 (describing Seale's pro se motion as requesting "a continuance until Garry could . . . represent him" and "requesting dismissal of his attorneys of record in the event no continuance was allowed").

166. *See* HAYDEN, *supra* note 21, at 346-47 (characterizing the September 9 hearing denying Garry's motion for a continuance as the "hearing that changed everything").

167. Without any disruptions, the defendants also would have avoided contempt charges by allowing their counsel to speak on their behalf, instead of engaging in the conduct and speech that produced their many citations. *See generally* CONTEMPT TRANSCRIPT, *supra* note 106, at 1-167 (illustrating the citations issued during the trial).

168. HAYDEN, *supra* note 21, at 347 (noting that Garry told the defendants that if they did engage in disruption, then they could "all 'go to hell'").

169. *See id.* at 346 (explaining that Garry was chosen as chief counsel because he was Bobby Seale's personal lawyer and general counsel for the Black Panther Party, and because he had a "general reputation for brilliance in defending unpopular clients"); *see infra* text accompanying notes 368-376.

170. *See id.* at 347 (describing Garry as the "king of skillful cross-examination and novel defenses").

defense strategies.[171] But when his doctor told him that "his life would be in danger if he did not have his gall bladder removed," it was clear that Garry could not participate in the Chicago Eight trial unless the trial date was delayed to accommodate his need for surgery and for a recuperation period of some weeks thereafter.[172]

The actual trial was held in Garry's absence, however, because Judge Hoffman denied the defense motions for a continuance.[173] First, he decided to ignore the repeated representations by counsel that Garry was Seale's sole trial lawyer, and that Seale would be without counsel if Garry could not represent him because of incapacitation. These explicit assurances began as early as the month before the trial set for September 24. They were provided by Kunstler on August 27, Garry on September 9, Weinglass on September 24, and Seale himself on September 26, after the jury was sworn but before opening statements.[174] Second, Judge Hoffman decided that he could ignore Garry's valid grounds for a continuance. Notably, the incapacity of counsel due to illness is a classic example of good cause for a continuance in federal court, and Garry's need for surgery was an unexpected event. It was not a mere delaying tactic and it reflected no lack of diligence in preparing the case.[175] Third, Judge Hoffman ignored the custom of allowing a first continuance "for a long federal trial," which was "pretty standard," especially since "most cases are not

171. *See id.* (noting that Garry agreed to handle the case on the condition that "he could be chief counsel and make all the final decisions").

172. EPSTEIN, *supra* note 5, at 131.

173. *See* United States v. Seale, 461 F.2d 345, 349 (7th Cir. 1972); SHARMAN, *supra* note 11, at 26 (Garry's request for a trial delay until November 15 was accompanied by medical records showing that he needed gall bladder surgery; he sought a six-week continuance to take account of the necessary recovery period after surgery).

174. *Seale*, 461 F.2d at 349, 356-57; *id.* at 349, 357 (listing Kunstler's assurances made on both August 27 and September 24); *id.* at 349 (referencing Garry's assurance was made on September 9); *id.* at 350, 356, 357 (listing Weinglass's assurances made on August 27 and September 24); *id.* at 350 (describing Seale's assurance was on September 26 after the jury was sworn but before opening statements); *see* Danelski, *supra* note 7, at 150 (stating that Garry's request was accompanied by a plea that his participation "was of the utmost importance to the defendants," since Garry was their "chief counsel" and "the only lawyer who had Bobby Seale's confidence"); *id.* (noting that after his motion for a trial delay was denied, Garry reminded Judge Hoffman that on the first day of trial, Seale "will be without counsel at that time").

175. *See* Janet Portman, *Delaying or Getting a Continuance in a Criminal Case*, LAWYERS.COM, https://www.lawyers.com/legal-info/criminal/criminal-law-basics/delaying-or-getting-a-continuance-in-a-criminal-case.html (last updated June 14, 2022).

tried for 6 months to a year after arraignment."[176] Finally, he also decided that he could ignore the case law rule that when retained counsel becomes unable to serve, the defendant must be allowed the opportunity to "secure other counsel" in their place.[177] Such an opportunity presumably would require a continuance so that this right could be exercised and substitute counsel could be given time to prepare for trial.

The apparent reason for ignoring these four pro-continuance factors was that the Chicago Eight prosecutors were strongly opposed to the defense motions for a continuance.[178] They argued that "there were many other lawyers" involved in the defense who could represent Seale,[179] and Judge Hoffman relied on this justification in denying the continuance.[180] As it happened, however, Judge Hoffman did not have legal authority to support the rulings he issued in order to make the continuance unnecessary.[181] Judge Hoffman first reasoned that since several attorneys had performed pretrial work for the Chicago Eight, they could be required to represent Seale at trial without their consent and without consulting Seale.[182] Moreover, the judge chose to impose this new burden on these attorneys without making any inquiry as to their readiness to mount Seale's defense with only a few weeks to prepare before trial. At the outset of the trial, Judge Hoffman denied Seale's pro se motion to discharge all counsel of record except for Garry, to obtain a continuance until Garry could return to court, or in

176. SHARMAN, *supra* note 11, at 26 (noting the assessment by Gerald Lefcourt, who was initially on the trial team with Kunstler before switching to represent the Panther 21, that the denial of Garry's motion was "outrageous"); *see also* EPSTEIN, *supra* note 5, at 131-32 (stating that Judge Hoffman himself "was known" to have granted similar trial delays "on many less urgent occasions"); LUKAS, *supra* note 96, at 104 (describing how the *New York Times* reporter covering the trial saw Judge Hoffman once grant an attorney's request for a six-week continuance for the purpose of a Caribbean vacation).

177. *Seale*, 461 F.2d at 357.

178. *See* Danelski, *supra* note 7, at 150; Pnina Lahav, *Theater in the Courtroom: The Chicago Conspiracy Trial*, 16 LAW & LITERATURE 381, 406 (2004) (observing that Judge Hoffman and the prosecutors "were convinced that the defense was plotting to sabotage the trial through the manipulation and abuse of the laws of procedure . . . Hence, Judge Hoffman was resolutely determined to deny any motion for continuance" because he and the prosecutors "interpreted Garry's request as a part of that strategy of sabotage").

179. THE "TRIAL" OF BOBBY SEALE 45 (1970) (showing that prosecutor Richard Schultz reminded Judge Hoffman that the September 9 motion was denied "[b]ased on the facts there were many other lawyers").

180. *Seale*, 461 F.2d at 349.

181. *See id.* at 356-61 (discussing Judge Hoffman's actions).

182. *Id.* at 356-58 (describing Judge Hoffman's reasoning and its consequences).

the alternative, to represent himself until Garry's return.[183] Without a continuance, Seale could not use Garry as his counsel when the trial began and Judge Hoffman's discretionary denial of the continuance was based on the erroneous assumption that other counsel could be required to act as last minute substitutes for Garry.[184]

The Seventh Circuit later acknowledged in Seale's appeal from his contempt convictions that the rules of court gave Judge Hoffman no authority either to mandate Seale's representation by the pretrial attorneys or to "determine summarily the attorney-client relationship" for Seale and any attorney.[185] Sixth Amendment case law also gave Seale the right to object to representation by attorneys who were not his chosen counsel.[186] But when the defense sought to have Judge Hoffman's continuance rulings reversed before trial, the Seventh Circuit simply affirmed Hoffman's choices[187] under the "abuse of discretion" standard, thus illustrating the tradition of deference to trial courts on continuance issues.[188]

Judge Hoffman's untouchable invention of his legal authority to strip Bobby Seale of his chosen counsel may be characterized as not racial in principle, but as nevertheless racial in result.[189] Focusing on the outcome of Judge Hoffman's actions, as opposed to searching for evidence of his purpose, leads to the consideration of what it meant for Seale to appear in court as the only Black defendant and the only defendant without counsel, while facing the prospect of a possible prison sentence of ten years.[190] If "[w]hite privilege operates through

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183. *See id.* at 350; SEALE, SEIZE THE TIME, *supra* note 94, at 324-325 (explaining how Seale drafted his pro se motion in the hospital of the Cook County jail).

184. *Seale*, 461 F.2d at 350, 357.

185. *Id.* at 358.

186. *Id.*

187. "TRIAL" OF SEALE, *supra* note 179, at 45 (showing statements by prosecutor Richard Schultz noting that Judge Hoffman's continuance rulings were affirmed by the Seventh Circuit and the U.S. Supreme Court).

188. Portman, *supra* note 175.

189. Nineteenth Judicial Circuit of Va., Fairfax Cty. Courthouse, Opinion Letter on Commonwealth v. Shipp, Case No. FE-2020-8 (Dec. 20, 2020) at 10, https://www.fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdf/opinions/fe-2020-8-cw-v-terrance-shipp-jr.pdf [https://perma.cc/8YZD-HPKT] (referring to the impact of the "racial result" when portraits of judges who are overwhelmingly and "disproportionately white" (forty-five out of forty-seven) adorn the walls of a courtroom in which the defendants are disproportionately Black); Derrick Bryson Taylor, *Virginia Judge Won't Try Black Man in Courtroom Lined With White Portraits*, N.Y. TIMES (Jan. 2, 2021), https://www.nytimes.com/2021/01/01/us/virginia-judge-white-portraits.html.

190. *See infra* text accompanying note 9.

laws barring participation of nonwhites in legal proceedings,"[191] then Seale's *de facto* exclusion from the right to speak through his chosen and prepared counsel implicitly resembles such a ban.

In Seale's case, the consequences of the judge's "white discretion" to deny a continuance[192] included Seale's psychological isolation in addition to the physical closure of the courtroom space to advocacy on his behalf. As one journalist at the trial observed, Seale "sat at the defense table among defendants and lawyers he'd never met, without the lawyer he trusted and admired."[193] The lawless character of that isolation and closure was effectively unchallengeable until the time came for any appeal after conviction, and with it, an opportunity for the Seventh Circuit to enforce the case law rules that were supposed to protect Seale's exercise of his right to retained counsel.[194] Those case law rules turned out to be unenforceable white ideals that Seale, a Black man, could not invoke because of the power of Judge Hoffman's discretion to block Seale's access to them.

As for Seale's understanding of the enforceability of his right to be represented by Garry as his retained counsel, he was apparently not aware of the certainty of the deprivation he was facing until the evening before he filed his pro se motion on September 26.[195] Seale was arrested in San Francisco five weeks before the trial[196] and held in jail for extradition to Connecticut, where he faced unrelated state charges.[197] After Judge Hoffman denied the continuance motion that Garry presented in Chicago on September 9, Garry returned to San Francisco and met with Seale at the jail.[198] Garry told Seale that "it looked like" Garry would have to go to the hospital, that "the judge had denied a postponement," and that "the judge was going to try and choose a lawyer" for Seale.[199] Seale replied that, "when I get to Chicago I am not

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191. Carlin, *supra* note 38, at 462.

192. *See generally* Flagg, *supra* note 39, at 982-85 (describing the meaning of "white discretion").

193. *Schultz*, THE TRIAL, *supra* note 6, at 40.

194. *See infra* text accompanying notes 99, 185-188.

195. *See* United States v. Seale, 461 F.2d 345, 358 n.23 (7th Cir. 1972).

196. SEALE, SEIZE THE TIME, *supra* note 95, at 289-91.

197. *See* DONALD FREED, AGONY IN NEW HAVEN: THE TRIAL OF BOBBY SEALE, ERICKA HUGGINS AND THE BLACK PANTHER PARTY 316 (1973) (describing Seale's later homicide trial in New Haven as ending in a hung jury and mistrial).

198. SEALE, SEIZE THE TIME, *supra* note 95, at 296.

199. *Id.* (describing how a few days before this meeting, one of Garry's partners advised Seale to file a motion to postpone the trial date until Garry could appear and to inform the court that Garry was his lawyer of choice and the only counsel with whom he had conferred); *see Seale*, 461 F.2d at 360.

letting those cats choose a lawyer for me. Someone I've never spoken to . . . I think I'll be better off defending myself if you can't make it there." Seale then declared that the only thing he agreed to let "those other lawyers" do was to "handle my pretrial motions," that Garry was "the only person I'll go into court with," that "I'm going to fire any appointed lawyers," and that, "I'm not going to let the judge choose anybody else for me either." Garry advised Seale that he had "the legal right to do that" and that he had "a right to request the lawyer of [his] choice."[200]

The next day, despite a federal court order that Seale should not be moved from San Francisco to Chicago, federal marshals arrived and drove Seale across the country in custody, ignoring all his requests to make a phone call to Garry.[201] After some days in the Cook County jail,[202] Seale finally met with Kunstler in the courthouse jail on September 24, the day that the jury was selected. Seale informed Kunstler that, "[a]s far as I'm concerned, Garry is going to be my trial lawyer. He's always been my lawyer."[203] When Kunstler said that the judge would appoint a public defender for Seale,[204] Seale replied that he would fire a public defender and would refuse anyone other than Garry. Kunstler agreed that Seale had "a legal right to fire a public defender," and Seale said that he would fire Kunstler or anyone else that Judge Hoffman tried to appoint as Seale's lawyer.[205] Then Seale asked Kunstler to get in contact with Garry on his behalf. The next day, Seale waited for a message from Garry, but received no word. Finally, Seale managed to get in touch with Garry's office in San Francisco by calling from the jail. Seale found out from Garry's law partner that Garry "definitely had to go to the hospital the next day."[206] Seale told Garry's law partner to tell Garry that, "I'm going to ask the judge to postpone my part of the trial so that I can have Garry," that "I can't

200. SEALE, SEIZE THE TIME, *supra* note 95, at 297.

201. *Id.* at 297-309 (detailing Seale's journey from San Francisco to Chicago).

202. *Id.* at 321. When not in court, Seale remained in jail throughout the duration of his trial within a trial.

203. *Id.* at 323.

204. *Id.*

205. *Id.* at 324.

206. *Id.* (according to Garry's partner, now that Garry's current trial was over in California, his doctor "said that he'd better have that gall bladder operation right away because it would be a real danger to his life not to").

function without Garry, and I don't want these other lawyers here," and that "maybe after he gets out of the hospital we can go on."[207]

This portrayal of Seale in his own words presents further evidence of unenforceable white ideals regarding the Sixth Amendment right to effective representation of counsel. It illustrates the failure of counsel to protect the interests of the only Black defendant whose representation needs were greater than the resources that counsel could provide for him and his co-defendants. After the filing of pretrial motions, Garry, Kunstler, and Weinglass had "slightly over three months to prepare for trial,"[208] with over 100 defense witnesses to interview.[209] They also had to prepare to cross-examine over fifty government witnesses.[210] No one except Garry was preparing Seale's defense or, apparently, communicating with Seale after Garry told him about his likely need for hospitalization. Even Garry was not available for consultation when his hospitalization coincided with the first day of testimony. In spite of Seale's lost hopes that he could postpone his part of the trial and "have Garry" back, Judge Hoffman's summary denial of his pro se motion did not weaken Seale's resolve to challenge the loss of Garry. Nor did Garry's recuperation prevent him from providing advice and guidance for Seale "from his hospital bed."[211]

Notably, the legal technicalities involved in Judge Hoffman's continuance rulings made it a complicated business to explain their

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207. *Id.* at 324-25 (noting that after the conversation with Garry's partner about Garry's absence, Seale drafted his pro se motion on the evening of September 25; then, the next morning at the opening of the court, before Seale read his motion to Judge Hoffman, Seale let his co-defendants read it first, while telling them that, "everybody gets fired because Garry's definitely going into the hospital and I'm going to ask for a firing on the basis of my part of the trial being postponed," that "Garry's my lawyer," that "I haven't confirmed any of these other lawyers," and that Judge Hoffman "knows that Garry is my lawyer, my attorney of record").

208. Danelski, *supra* note 7, at 148.

209. *See supra* text accompanying note 177.

210. *See* EPSTEIN, *supra* note 5, at 299 (describing transcript of 9,000 pages for the government's case, which included testimony of fifty-three witnesses as well as video excerpts from fourteen television films).

211. Pnina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion*, 71 COLO. L. REV. 1327, 1347-48 (2000); *see* SHARMAN, *supra* note 11, at 52-53 (noting that Seale "was being coached in his objections by other lawyers and had communications with . . . Garry"); HAYDEN, *supra* note 21, at 348 (noting that Fred Hampton, the Chairman of the Illinois chapter of the Black Panther Party, "brought messages to [Seale] faithfully every morning in court and made calls in his behalf during the day," while a law student kept Seale "supplied with legal citations regarding the constitutional rights of [B]lack Americans, which [Seale] carefully wrote into his yellow pads").

erroneous character and challenge their unfairness in the media.[212] However, a more visible demonstration of the judge's willingness to exceed his authority arose when Kunstler informed the judge on the first day of testimony that "all [the] defendants took the position they were not fully represented" because of Garry's absence.[213] This declaration preserved their right to raise this issue on appeal. But it also alerted the prosecutors to the danger that Judge Hoffman might have committed reversible error by violating the Sixth Amendment rights of Seale and his co-defendants.[214] In response, U.S. Attorney Foran proposed that the defendants should waive their objection to the loss of Garry's assistance, and all of them should accept representation by the two remaining trial counsel. Then if the defendants refused to accept this solution, Judge Hoffman should issue orders for four pretrial defense attorneys, whose withdrawal from the case was imminent,[215] to travel to Chicago and represent Seale.[216] If they refused that assignment, then they should be held in contempt and jailed, with their release made contingent upon the agreement of the defendants to provide the Sixth Amendment waiver.[217]

Judge Hoffman agreed that there was "no question about the correctness" of the prosecutor's position,[218] although in fact, the Seventh Circuit would later conclude that "there appear[ed] [to be] no real justification for the extent to which [Judge Hoffman] exercised [his] power" over the pretrial attorneys.[219] Neither precedent nor court rule supported Hoffman's assertion that the pretrial attorneys could not

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212. *See, e.g.*, "TRIAL" OF SEALE , *supra* note 187, at 45-48 (revealing that prosecutor Richard Schultz advised Judge Hoffman that he possessed the authority to use his discretion not only to deny continuances to Garry, but also to deny the requests of the pretrial attorneys to withdraw from representation and to deny Seale's requests for self-representation).

213. United States v. Seale, 461 F.2d 345, 350 (7th Cir. 1972); KINOY ET AL., *supra* note 35, at 337.

214. KINOY ET AL., *supra* note 35, at 339 n.12; SHARMAN, *supra* note 11, at 27; EPSTEIN, *supra* note 5, at 140.

215. *See* United States v. Dellinger, 472 F.2d 340, 386 n.80 (7th Cir. 1972); Danelski, *supra* note 7, at 150 (noting that three of the pretrial attorneys "had wired Foran stating their desire to withdraw from the case" and Kunstler explained to Judge Hoffman that the fourth pretrial attorney had to serve as counsel in another trial in New York).

216. KINOY ET AL., *supra* note 35, at 337-38; *Dellinger*, 472 F.2d at 386 n.80.

217. *See Dellinger*, 472 F.2d at 386 n.80; KINOY ET AL., *supra* note 35, at 338 & n.11 (stating that Foran offered to "refrain from asking Judge Hoffman" to order pretrial counsel to appear if defendants waived their Sixth Amendment claim); SHARMAN, *supra* note 11, at 27-28.

218. *See* KINOY ET AL., *supra* note 35, at 338.

219. *Dellinger*, 472 F.2d at 386 n.80.

restrict their participation to a "limited appearance" before trial.[220] Nevertheless, when the defendants refused to provide the waiver, the judge issued the necessary orders as well as bench warrants to bring the pretrial attorneys to Chicago.[221] When they refused to represent Seale,[222] Judge Hoffman ordered their jailing, while reminding the other defense counsel that "[y]ou can give them the key to the County Jail."[223] For his part, U.S. Attorney Foran told two of the pretrial attorneys that they would go free if they could "get Seale to waive" his Sixth Amendment claim, but otherwise, they would be locked up in the Cook County jail.[224] One of these attorneys recalled Foran's racist threat that, "we'll see what happens to your white a— over there."[225] Only hours after their jailing, these pretrial attorneys were released "on their own recognizance" by the Seventh Circuit.[226]

When news of these events spread, Judge Hoffman's actions sparked a demonstration of 150 lawyers outside the courthouse.[227] A group of 125 lawyers and law teachers also signed an amicus brief[228] that described the arrest and jailing of the pretrial attorneys as "a travesty of justice [that] threatens to destroy the confidence of the

220. United States v. Seale, 461 F.2d 345, 358 (7th Cir. 1972).

221. *See* SHARMAN, *supra* note 11, at 27-28; MICHAEL E. TIGAR, FIGHTING INJUSTICE 170-71 (2002); EPSTEIN, *supra* note 5, at 140-41 (stating that the defense described the prosecutor's proposal as "blackmail" and "ransom").

222. *See Dellinger*, 472 F.2d at 386 n.80; KINOY ET AL., *supra* note 35, at 338-39; TIGAR, *supra* note 221, at 170-75, 177 (noting that only Michael Tigar and Gerald Lefcourt, the pretrial attorneys from Los Angeles and New York, respectively, could not get their warrants quashed, so they appeared before Judge Hoffman the day after the warrants were issued, refused to represent Seale, and were jailed as a result; the two San Francisco pretrial attorneys obtained the dismissal of their warrants and did not appear in court until the day Judge Hoffman vacated his orders and the contempt proceeding).

223. KINOY ET AL., *supra* note 35, at 338-39; *see Dellinger*, 472 F.2d at 386 n.80 ("[T]he government and court were willing to release [the pretrial attorneys] if the defendants would acknowledge willingness to proceed without Mr. Garry").

224. TIGAR, *supra* note 221, at 174-75; *see id.* at 173 (describing Tigar's view that Judge Hoffman's order was "an effort to deprive Bobby Seale of his right to counsel of his choice," namely Charles Garry, and Tigar did not want to be "part of any such effort, nor contribute to it" in any way).

225. *Id.* at 175 (recounting a conversation in U.S. Attorney Foran's office with prosecutors Foran and Schultz, defense counsel Lefcourt and Tigar, and their lawyer); *see* HAYDEN, *supra* note 21, at 350 (reporting same rape threat made by Foran).

226. TIGAR, *supra* note 221, at 177; EPSTEIN, *supra* note 5, at 176-77.

227. *See* SHARMAN, *supra* note 11, at 36; EPSTEIN, *supra* note 5, at 181; *see also* Kalven, *Image of Justice*, *supra* note 11, at 5 (noting that a member of Congress from Illinois later asked the American Bar Association "to investigate the ethics of the attorney-protesters").

228. SHARMAN, *supra* note 11, at 37.

American people in the entire judicial process."[229] Some members of this group, including thirteen members of the Harvard Law School faculty, sent a letter to the Senate Judiciary Committee, requesting an investigation of Judge Hoffman's conduct.[230] Faced with this public reaction, Judge Hoffman decided to back down on the third day of the trial, by vacating his orders[231] and giving the pretrial attorneys leave to withdraw.[232] The defense then immediately objected to the illegality of the judge's actions by filing a motion seeking a mistrial or, in the alternative, the judge's disqualification because of his coercive interference with the defendants' Sixth Amendment rights.[233]

Judge Hoffman denied that motion and the legal validity of his conduct remained untested, although the Seventh Circuit later treated his actions as providing demeanor evidence of his "antagonistic attitude toward the defense . . . from the very beginning" of the case.[234] Notably, the *New York Times* attributed Judge Hoffman's change of heart to the actions of the protesting attorneys who converged on Chicago from across the country.[235] However, the *New York Times* neither questioned Hoffman's impartiality nor accurately described "the fact that the lawyers' arrest was part of the government's attempt to get the defendants to waive their Sixth Amendment rights."[236]

Moreover, Judge Hoffman never did change his mind about his power to mandate the representation of Seale by any counsel who had

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229. *See* LUKAS, *supra* note 96, at 34; *see also* SCHULTZ, THE TRIAL, *supra* note 6, at 109 (describing Judge Hoffman's reaction to Kunstler's announcement that the protesting lawyers wished to present their amicus brief in person).

230. LUKAS, *supra* note 96, at 34.

231. *See* TALES, *supra* note 90, at 13 (revealing how Judge Hoffman's comments on the record when vacating the contempt proceedings indicated that the pretrial attorneys were charged with contempt and jailed only because they sent telegrams regarding their intent to withdraw instead of filing motions for leave to withdraw); Kalven, *Image of Justice*, *supra* note 11, at 5 (taking the judge's explanation at face value and characterizing his reaction as an overreaction to the absence of the pretrial attorneys because he read "their impoliteness as contempt").

232. *See* TIGAR, *supra* note 221, at 176-77; KINOY ET AL., *supra* note 35, at 340.

233. *See* TALES, *supra* note 90, at 14 (providing a transcript excerpt of Kunstler's summary of motion for mistrial or disqualification of the judge, filed after contempt proceedings vacated, which argued that treatment of pretrial lawyers was unconstitutional because judge "attempted to coerce the defendants" to "waive their Sixth Amendment rights to [counsel] of their choice" by the arrests and imprisonment of pretrial lawyers).

234. United States v. Dellinger, 472 F.2d 340, 386 (7th Cir. 1972).

235. *See* SHARMAN, *supra* note 11, at 45 (noting that a *Washington Post* article accurately described the arrests of the pretrial lawyers and framed "the judge's actions, rather than being judicial" as "motivated by the overriding political agenda of the case").

236. *Id.* at 44-45.

filed an appearance on his behalf.[237] After the pretrial attorneys withdrew from the case with the judge's approval,[238] his attention turned to Kunstler, who had signed two appearance forms for Seale.[239] Even though Seale dismissed all the attorneys of record except Garry before the presentation of opening statements, Judge Hoffman retained an ironclad belief that neither Seale nor Kunstler could reject his dictates as the immovable authority in his own courtroom.[240] This belief provided the fuel for the conflicts between Seale and Judge Hoffman, which set the proceedings "on [a] collision course" whose outcome "quite predictably was almost literally to tear the trial apart."[241] What made that rupture extraordinary was Seale's confidence that he had nothing to lose by "speaking truth to power" in relentless requests and declarations that made the jurors wonder why Hoffman would not let Seale defend himself.[242]

III. THE CONSTITUTION AND CONNECTIONS BETWEEN RACE AND DISORDER HARMS

A. Unexplored Juror Prejudice and the Rights to an Impartial Jury and a Fair Trial

Scholars have likened the Chicago Eight trial to a morality play,[243] no doubt because so much of the trial drama revolved around the clashing portrayals of the defendants and their anti-war activism. Their

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237. Kalven, *Confrontation*, *supra* note 3, at xxi; *see* CONTEMPT: TRANSCRIPT, *supra* note 106, at 30-32 (indicating Seale's contempt charge on November 5, the day of his severance was for advocating his right to represent himself in the absence of his counsel Garry); United States v. Seale, 461 F.2d 345, 357 (7th Cir. 1972) (noting that after denying Seale's motion, Judge Hoffman "consistently adhered to his view that Kunstler's appearance was conclusive on the question of his representation of Seale").

238. *See Dellinger*, 472 F.2d at 386 n.80 (observing that although signing of the four pretrial attorneys' forms "were technically subject" to Judge Hoffman's "direction" until they obtained leave to withdraw from him, "there appears no real justification for the extent to which [he] exercised [his] power").

239. *See Seale*, 461 F.2d at 349-50 & n.2, 357-58 (highlighting the fact that one appearance was filed on the date when trial proceedings commenced and the other appearance "pro tem" form was filed two days earlier, "assertedly to gain access to the incarcerated Seale"); *id.* at 360 (describing Kunstler's failure to obtain Seale's consent to filing these appearances).

240. *Id.* at 350, 357.

241. Kalven, *Confrontation*, *supra* note 3, at xxi.

242. *See infra* note 365.

243. *See* Kalven, *Confrontation*, *supra* note 3, at xii. *See generally* Pnina Lahav, *The Chicago Conspiracy Trial as a Jewish Morality Tale*, *in* LIVES IN THE LAW (Austin Sarat, Lewis Douglas et al. eds., 2002) (referring to the Chicago Eight trial as a "morality tale" and theatre).

counsel defended them as dissenters who dared to condemn the immorality of the Vietnam War[244] and the prosecutors attacked them as "evil men" and "violent anarchists" who wanted "to stand on the rubble of a destroyed system of government."[245] The courtroom debate about "who they were [and] what they advocated politically"[246] was anchored in the time when a majority of the public continued to support the War. The "deep divisions" in American society regarding the War meant that the anti-war activities of the defendants "might have aroused the jurors' prejudices."[247] Yet Judge Hoffman rejected all of the voir dire questions proposed by the defendants for the purpose of ascertaining whether any of the prospective jurors held any such prejudices.[248] He also denied the defense request to ask the jurors whether they had read or heard about the case, and if so, whether they could be impartial after their exposure to potentially prejudicial publicity.[249]

The Seventh Circuit found that Judge Hoffman's denial of the defendants' opportunity for a "testing of their jurors for biased attitudes" constituted a violation of his constitutional duty "to impanel an impartial jury."[250] The court also held that the judge violated the defendants' Due Process right to a fair trial when he denied their request to question the jurors about their exposure to "press, radio [and] TV reporting concerning the facts surrounding this case."[251] Given the "barrage of prejudicial pretrial publicity" reflected in over 200 pages of exhibits in the record—starting with news reports in March 1968 about

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244. *See, e.g.*, EPSTEIN, *supra* note 5, at 156 (describing Kunstler's opening statement as emphasizing that "nothing the [defendants] said or did was beyond the protection of the First Amendment or alien to the American tradition of vigorous political protest"); SCHULTZ, THE TRIAL, *supra* note 6, at 291 (noting how Weinglass's closing argument compared defendants' anti-war statements to Abraham Lincoln's denunciation of Mexican War as immoral).

245. United States v. Dellinger, 472 F.2d 340, 390 (7th Cir. 1972); SCHULTZ, THE TRIAL, *supra* note 6, at 301 (quoting U.S. Attorney Foran's closing argument); *see* Dee, *supra* note 103, at 90-93 (explaining the opposing story models for the prosecution and defense versions of scene, act, agency, and purpose in Chicago Eight trial).

246. Gerald B. Lefcourt, *The Radical Lawyer Under Attack*, *in* LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS 260 (Robert Lefcourt ed., 1971) (noting that one of pretrial attorneys for Chicago Eight opined that "defendants were on trial because of who they were, what they advocated politically, what they wore, how they looked, and the challenge they posed to government policy").

247. *Dellinger*, 472 F.2d at 368.

248. *Id.* at 367-68.

249. *Id.* at 371-72. *Compare Dellinger*, 472 F.2d at 366 ("The voir dire examination took a little over a day."), *with* LUKAS, *supra* note 96, at 26 (describing jury as chosen in "less than three hours").

250. *Dellinger*, 472 F.2d at 369-70 & n.42.

251. *Id.* at 371-77.

the planning of the Convention protests, and lasting until August 1969[252]—the court determined that the judge had a "duty to inquire into pretrial publicity on voir dire" as requested by the defendants.[253] Although different doctrines govern the judicial duties regarding voir dire questions about juror attitudes and pretrial publicity, the Seventh Circuit recognized that these duties share a common function. They allow defendants to obtain answers that will "enable them to exercise intelligently" their rights to challenge jurors.[254] These rights include a challenge for cause, based on the evidence of actual bias in a juror's answer, "admitted or presumed," and a peremptory challenge,[255] based on some bias that is "suspected or implied," which need not be articulated.[256]

In challenging the unconstitutionality of Judge Hoffman's voir dire restrictions on appeal, the defendants argued that his refusal to ask any of their questions about juror attitudes forced Kunstler and Weinglass "to either refrain from exercising" their peremptory challenges or "to exercise them merely on the basis of an emotional reaction to a juror's face."[257] The consequences of unexplored juror

252. *Id.* at 370-72; KINOY ET AL., *supra* note 35, at 516-17 n.9, 521-22 (summarizing publicity).

253. *Dellinger*, 472 F.2d at 375.

254. *Id.* at 368.

255. *Id.* at 367-68 (noting that "although not required in the Constitution," the peremptory challenge is "one of the most important rights secured to the accused," and either the "denial or impairment of the right is reversible error," according to Swain v. Alabama, 380 U.S. 202, 219 (1965)).

256. *Id.* at 367; *see id.* at 370 (finding that Judge Hoffman's "severe restriction of the voir dire" by rejecting all defense questions about juror attitudes "may well have curtailed defendants' challenges for cause" and also "failed to provide them with reasonable guidance in exercising peremptory challenges"). Note that at the time of the Chicago Eight trial, the exercise of a peremptory challenge was immune from scrutiny because the Supreme Court had not yet established the Equal Protection right to require opposing counsel in a criminal case to provide a "race neutral" reason for a peremptory challenge under some circumstances. *See generally* Batson v. Kentucky, 476 U.S. 79 (1986) (governing challenges by prosecutors); Georgia v. McCollum, 505 U.S. 42 (1992) (governing challenges by defense counsel). For recent developments, see Ian Millhiser, *Arizona Launches a Bold New Experiment to Limit Racist Convictions*, VOX (Aug. 31, 2021), https://www.vox.com/22648651/arizona-jury-race-batson-kentucky-peremptory-strikes-challenges-thurgood-marshall (reporting that Arizona is "the first state to eliminate peremptory challenges entirely," with new rules effective in 2022).

257. KINOY ET AL., *supra* note 35, at 526. For example, one white prospective juror was carrying a novel by James Baldwin, *Tell Me How Long the Train's Been Gone*. The defendants wondered whether she was "trying to signal her sympathy," whether U.S. Attorney Foran had noticed the book, and whether the juror favored the prosecution and carried the book as "a trick to get the support of the defense." SCHULTZ, THE TRIAL, *supra* note 6, at 32. After the defendants decided that the book was a good sign, they used only ten of seventeen peremptory

attitudes is illustrated by the voir dire transcript for one of the white jurors, whose questioning by Judge Hoffman revealed only that "she was a Chicago housewife with two children in school and a husband who worked for General Motors for [nineteen] years."[258] After the trial, she admitted that she was offended by the long hair of one of the defendants.[259] But that information was not disclosed during voir dire because Judge Hoffman never asked her the relevant proposed defense question, which was whether she felt any hostility towards men who "have beards or wear their hair long."[260] She was a juror who favored conviction on all counts.[261] After the trial, another white juror, who also favored conviction on all counts,[262] took credit for lobbying the four pro-acquittal jurors to agree to the compromise verdict.[263] She was engaged to a "ranking member" of Mayor Daley's Administration, a fact, which if revealed, would have triggered a peremptory challenge by the defense.[264] But that fact was not disclosed during voir dire because Judge Hoffman never asked the proposed defense question whether this juror "had any close relatives or friends who were employed by a [government] agency."[265]

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challenges and then accepted the jury to ensure that the prosecutors did not exercise a peremptory challenge against the juror with the novel. Many years later, this pro-acquittal juror explained that she brought the novel to court in order to have something "to keep her mind stimulated." HAYDEN, REUNION, *supra* note 21, at 351-52.

258. KINOY ET AL., *supra* note 35, at 525 n.18.

259. *Id.*; *see also id.* at 529 n.25 (according to a Harris survey in October 1969, 62% of respondents over the age of 50 "believed that men with long hair are harmful to American life").

260. CAHAN, *supra* note 113, at 168; *see* KINOY ET AL., APPELLATE BRIEF, *supra* note 35, at 529 n.25 (noting that this was one of three proposed questions regarding juror attitudes toward long hair).

261. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 328.

262. *See* HAYDEN, *supra* note 21, at 354 ("Kay Richards 'was for Foran one hundred percent from the beginning.'").

263. *See* John Kifner, *Chicago 7 Jurors Tell of Compromise*, N.Y. TIMES (Feb. 20, 1970), https://www.nytimes.com/1970/02/20/archives/chicago-7-jurors-tell-of-compromise.html. *But see* SCHULTZ, THE TRIAL, *supra* note 6, at 266-68 (providing aspects of account disputed by two other jurors).

264. KINOY ET AL., *supra* note 35, at 525 n.17 (explaining that "[s]ince an assault on the motives of the Daley administration was 'the crux of the defense,'" the juror's relationship would justify a peremptory challenge); SCHULTZ, THE TRIAL, *supra* note 7, at 32-33 (the defense used peremptory challenges "mostly" to eliminate jurors with admitted government affiliations).

265. *Id.* at 524-25 n.17 (noting that Judge Hoffman did pose this question to the first twelve prospective jurors as a group, five of whom answered in the affirmative and said they would not be influenced by their relationships; the defense challenged all five jurors for cause, and when the judge denied these challenges, the defense used five of their peremptory

If Judge Hoffman had consulted the precedents that governed either of the voir dire issues, he would have recognized that his rulings against the defendants were very likely to be reversed.[266] It was true that there was "no generally accepted formula for determining the appropriate breadth and depth of the voir dire" regarding juror attitudes, which was an issue committed to his "discretion."[267] But that discretion was not exempt from scrutiny or divorced from duties—his exercise of that discretion remained "subject to the essential demands of fairness."[268] It did not escape the Seventh Circuit's attention that Judge Hoffman asked jurors some of the questions proposed by the prosecutors, "at least in substance,"[269] while declaring that none of the forty-four defense questions would be asked, since none were "germane to the issues presented here by the indictment and the pleas of not guilty thereto."[270] This rationale was an erroneous interpretation of the much narrower rule that voir dire questions about "collateral or unrelated issues" are inappropriate.[271] Nor was the Government correct in its assertion that voir dire questions should be limited to "matters that would disqualify the juror for cause."[272]

Instead, Judge Hoffman's duty was to identify the "essential inquiries" about the "elements" of the case that "might have aroused the jurors' prejudices," considering the questions that are "integral to the citizen juror's view of the case," even if they are only "tangential to

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challenges instead; the judge refrained from posing the question to the next group of twelve jurors, and only four of the trial jurors "were subjected to this inquiry"); *see* United States v. Dellinger, 472 F.2d 340, 366-69 (7th Cir. 1972).

266. *See Dellinger*, 472 F.2d at 367-70 (discussing precedents on voir dire about juror attitudes); *id.* at 374-76 (discussing precedents on voir dire about prejudicial pretrial publicity exposure).

267. *Id.* at 367.

268. *Id.* (quoting Aldridge v. United States, 283 U.S. 308, 310 (1931)); *see id.* at 367 (noting that defendants need not show that any trial jurors were actually prejudiced because "[t]he focus is exclusively on whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present").

269. *Id.* at 370.

270. *Id.* at 367.

271. *Id.* at 368.

272. *Id.* at 366-67. During the general questioning of the venire as a group, fifty-eight jurors said they could not be impartial and were excused. This part of the voir dire included these questions: whether the jurors were "acquainted" with the defendants, their counsel and associates, or FBI and DOJ employees; whether they could follow the law, keep an open mind, and treat any government agent's testimony the same way as other witnesses; whether "prior jury service would prevent them from being impartial;" and "whether there was any reason they could not be fair and impartial." *Id.* at 366 (giving examples of proper voir dire questions).

the trial."[273] The Seventh Circuit found that the defense correctly identified the essential inquiries related to "three basic areas."[274] Each area related in some way to the Vietnam War and the Convention protests. First, the subject of the anti-war activism of the defendants was a "central theme" of the case, given their militant challenge to the War as immoral.[275] During the anti-war protests at the 1968 Convention, public support for withdrawal from Vietnam was less than 20%, and the court emphasized that "[t]he extent of the unpopularity of the war in 1972 . . . is not a fair index of the probable opinions on that subject" held by members of the jury venire in September 1969.[276] At that time, Judge Hoffman would not be justified in assuming, "without inquiry," either that the prospective jurors in his courtroom had no "serious prejudice" or that they could recognize their prejudices and set them aside.[277] Second, the court opined that "many" jurors "could not be impartial toward" and would be offended by the defendants' support for the anti-war values of the "youth culture," represented by those individuals who, like some of the defendants, wore "long hair, beards, and bizarre clothing."[278] Third, the court reasoned that jurors could not

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273. *Id.* at 368; *compare id.*, *with* KINOY ET AL., *supra* note 35, at 528 (citing precedents that illustrated "well-accepted practice" of asking jurors about any "personal beliefs" or "personal experience which would color their objectivity in a cause involving a particular *charge*").

274. *Dellinger*, 472 F.2d at 369.

275. *See id.* at 368. For examples of proposed defense questions, see KINOY ET AL., *supra* note 35, at 525 ("Do you believe that persons who protest publicly against the war in Vietnam, racism and economic inequality do their country a disservice?"); CAHAN, CHICAGO'S COURT, *supra* note 113, at 168 ("Do you believe that young men who [refuse to be drafted] are cowards, slackers, or unpatriotic?").

276. *Dellinger*, 472 F.2d at 368. Only six months after the verdicts in February 1970, support for withdrawal rose to 55%. *See* William L. Lunch & Peter W. Sperlich, *American Public Opinion and the War in Vietnam*, 32 WESTERN POL. Q. 21, 25-26, 28, 31 (1979). A few months after the Seventh Circuit's reversal of the convictions in late November 1972, American troops pulled out of Vietnam. *See U.S. Withdraws from Vietnam*, HISTORY.COM, https://www.history.com/this-day-in-history/u-s-withdraws-from-vietnam.

277. *Dellinger*, 472 F.2d at 368-69.

278. *Id.* at 369; *see* LUKAS, *supra* note 96, at 24 (noting that two of the questions proposed by the defense on this topic were: "Do you know who Janis Joplin and Jimi Hendrix are?," and "Would you let your son or daughter marry a Yippie?"); *see also* CAHAN, CHICAGO'S COURTS, *supra* note 113, at 168 (listing some of Kunstler's questions, including: "Would you object if your child smoked marijuana?"). For the potential prejudice to defendants based on juror attitudes toward marijuana use, see JOHN KAPLAN, MARIJUANA—THE NEW PROHIBITION 4-17 (1970) (describing the "life-style" and "set of values" associated with marijuana use as including "irresponsibility, laziness, and a lack of patriotism," "escapism, long hair, dirty clothes, and immoral activity," political "radicalism," "permissiveness," lack of "respect for authority," "defiance" of "parents and the state," opposition to "law and order," and the use of

be impartial if they sympathized with the police rather than the anti-war demonstrators at the Convention, since such sympathy "could easily impair [their] ability to consider alternative views of the case as presented in court."[279] Therefore, given the defense request for voir dire to explore juror attitudes about these subjects, Judge Hoffman had the duty to perform at least "some minimal inquiry" in response.[280]

As for the Due Process right to question jurors about their exposure to publicity, the court first addressed the test for defining the amount of publicity that is necessary to trigger the duty to inquire into the jurors' exposure. The court observed that if the publicity is "of a character and extent to raise a real probability" that jurors have "heard and formed opinions about the events relevant to a case," then the duty to inquire arises.[281] The next step of the court's analysis endorsed the traditional two-part inquiry into the questions whether the juror had read or heard about the facts, and if so, what the impact had been on their ability to serve as an impartial juror.[282] No Seventh Circuit precedent supported the acceptability of replacing these questions with the general question used by Judge Hoffman: "[W]hether there is any reason you can think of now, that would lead you to feel that if you are selected . . . you could not be and fair impartial in this case"?[283] The court took judicial notice of the likelihood that "[n]atural human pride" would lead jurors to answer this general question "negatively in good faith" without considering the potential influence of news reports on their impartiality.[284] Since the press coverage was extensive regarding the Chicago Eight case, Judge Hoffman was obliged to perform the traditional two-step inquiry so that the attorneys could discover the

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"feared illegal drugs such as LSD and heroin," so that marijuana is "the perfect symbol" of "generational conflict" and viewed by the "dominant culture" as a threat to the public health and as a moral evil").

279. *Dellinger*, 472 F.2d at 369; *see* LUKAS, *supra* note 96, at 24 (stating that one of the questions proposed by the defense on this topic was, "Have you or any members of your family ever displayed a placard or bumper sticker reading: 'Support Your Local Police?'"); *see also* JAMES KIRKPATRICK DAVIS, SPYING ON AMERICA: THE FBI'S DOMESTIC COUNTERINTELLIGENCE PROGRAM 139-40 (1992) (describing law enforcement officials at Convention as including "11,900 Chicago police, 7,500 Illinois National Guard, 200 Chicago firemen, and 1,000 FBI and Secret Service agents").

280. *Dellinger*, 472 F.2d at 369.

281. *Id.* at 374.

282. *Id.* at 371-72; *see also* Silverthorne v. United States, 400 F.2d 627, 637-38 (9th Cir. 1968) (outlining a two-step test with "read or heard" and "impact" elements endorsed as language used for publicity inquiry).

283. *See Dellinger*, 472 F.2d at 372-77.

284. *Id.* at 375.

potential impact of the information with which the jurors were familiar.[285]

What is striking about both constitutional strands of voir dire doctrine is that the mening of "duty" is inherently subjective and anchored in the exercise of judicial discretion. The Seventh Circuit's language regarding voir dire inquiries about juror attitudes, for example, is especially tolerant in encouraging appellate courts to defer to the discretion of trial judges. If Judge Hoffman had been willing to perform a minimal inquiry, which minimum was not defined, the Seventh Circuit emphasized that he could have rejected or revised the questions offered by the defense. However, his denial of all their voir dire requests was so extreme that he effectively cut off the ability of the defense counsel to exercise meaningful peremptory challenges.[286] As one critic noted, judicial discretion describes a process of listening to arguments and making informed choices.[287] Judge Hoffman's summary rulings against the defense did not exemplify the exercise of discretion in that sense. Instead, they demonstrated his power to run the trial as he chose, free from the established constitutional limitations on his discretion that would not be enforced except by an appellate court.

B. The Contagion of Hostility and the Rights to Present a Defense and Receive a Fair Trial

Expressions of disorder in the courtroom are dangerous because of the possibility that they may prejudice defendants and deny them a fair trial. More specifically, disorder may be linked to the violation of the constitutional right to present a defense and the right to trial by an impartial jury. The Seventh Circuit reversed the convictions in the Chicago Eight trial on multiple grounds that included the violations of these rights.[288] In describing the violation of the right to present a defense, the court focused on the "demeanor" evidence of the

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285. *Id.* (noting that the local press coverage was frequent and continuing over a six-month period—and that even the government "concede[d] the possibility that the veniremen had formed opinions before they entered the courtroom").

286 *Id.* at 470.

287. *See* Lahav, *Character*, *supra* note 211, at 1350 (noting that "the entire defense team . . . was excluded from a dialogue with the [j]udge, which would allow it to air its reasons and concerns in open court;" since Judge Hoffman "would not listen to arguments" his ability to "exercise meaningful discretion became paralyzed").

288. *See infra* note 99 (listing all grounds for reversal of convictions of Chicago Seven defendants); United States v. Seale, 461 F.2d 345, 356-60 (7th Cir. 1972) (reasoning for reversal of Seale's contempt convictions).

expressions of antagonism and bias toward the defendants by the trial judge and prosecutors.[289] Their conduct required reversal independently of other errors committed by the judge.[290]

The combined effect of antagonistic conduct by both judge and prosecutor is essential to consider in order to appreciate its connection to the production of disorder. Usually it was the prosecutor's advocacy that triggered Judge Hoffman's rulings against the defendants. Even if these two government officials did not act in a premeditated sense as a team, their decisions functioned to create the image of their *de facto* agreement upon the construction of obstacles for the defense. However, the Seventh Circuit analyzed their failings separately and focused most of its criticism on Judge Hoffman,[291] whose biased rhetoric and rulings affected both the temper of Seale's "trial within a trial" and the courtroom atmosphere during the months that followed Seale's mistrial and severance from the case.

The Seventh Circuit began its reasoning by declaring the trial to be a failure in "fulfilling the standards of our system of justice,"[292] and by identifying several obvious manifestations of the disorder associated with that failure. Conflict "erupted with some frequency," numerous "outbursts" occurred among spectators, trial decorum was breached by "emotionally inflammatory episodes," and sometimes trial procedure "disintegrated into uproar."[293] These symptoms of disorder were fueled by the pervasive animating energy of contempt for the defense that was ultimately reciprocated by the defendants and their counsel. The Seventh Circuit's demeanor analysis constructed a factual picture of the

289. *See Dellinger*, 472 F.2d at 386-91.

290. *See id.* at 391.

291. *See id.* 386-90. For Judge Hoffman's experience, see Danelski, *supra* note 7, at 146 & n.37 (Judge Julius J. Hoffman was seventy-three years old at the time of the Chicago Eight trial; he was appointed to the federal bench by President Eisenhower in 1947 after serving for six years on the state trial court). For criticisms, see LUKAS, *supra* note 96, at 45 (providing an account of one lawyer who noted that Judge Hoffman "regarded himself as the embodiment of everything federal" so that he "sees the defense in any criminal case as the enemy, and he thinks it's his duty to help put them away"); EPSTEIN, *supra* note 5, at 95 (Judge Hoffman had a "reputation for handing out harsh sentences and then refusing bail while the defendants appealed"); SCHULTZ, THE TRIAL, *supra* note 6, at 399 (characterizing Judge Hoffman as an "arbitrary, tyrannical, highly involved and emotional judge"); LANGUM, *supra* note 7, at 107 (describing Hoffman as "vain, pompous . . . a perfect martinet" who "could be baited"); Lahav, *Character*, *supra* note 211, at 1342-47 (comparing Judge Hoffman to individuals with an "authoritarian personality").

292. *Dellinger*, 472 F.2d at 385.

293. *Id.* (emphasizing that in assessing the conduct of the trial judge and prosecutor, the Seventh Circuit had taken pains to avoid "holding them responsible for conduct made reasonably necessary by the conditions at the trial arising from the activity of others").

lived experience of antagonism that was absorbed by the defendants, the defense counsel, and the prosecutors during their time spent in the pressure cooker of Judge Hoffman's courtroom.[294]

The Seventh Circuit observed that Judge Hoffman's "deprecatory and often antagonistic attitude toward the defense" appeared in the record "from the very beginning [of the case]" before the trial began and any disruptions occurred.[295] Both the judge's remarks and actions displayed his hostile attitude in the presence of the jury and at other times.[296] The impact of his hostility created advantages for the prosecutors as well as disadvantages for the defendants, which ranged from insulting treatment[297] to damaging rulings on matters such as the exclusion of "whole sections of essential defense testimony."[298] The judge's applications of a double standard to the defense and prosecution[299] supplied the evidence on which the Seventh Circuit relied for its discernment of his antagonistic and biased conduct.[300]

One of the court's three primary criticisms related to the steps taken by Judge Hoffman to reduce the amount of time that the defense counsel could use to investigate and prepare their case. For example, the defense needed to interview more than 100 witnesses before calling

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294. *See* KINOY ET AL., *supra* note 35, at 357 n.29 (describing seats for thirty-seven spectators and presence of as many as twenty-five armed guards); *In re* Dellinger, 370 F. Supp. 1304, 1325 (N.D. Ill. 1973) (indicating that one of the defendants told Judge Hoffman, "[t]his isn't a court. This is a neon oven").

295. *Dellinger*, 472 F.2d 340 at 386 n.80 (noting as example of pretrial hostility towards defense, Judge Hoffman's issuance of bench warrants to arrest four pretrial attorneys for failure to follow court rules when withdrawing from case); *see also* Charles Garry, *Political Lawyers and Their Clients*, *in* THE RELEVANT LAWYERS: CONVERSATIONS OUT OF COURT ON THEIR CLIENTS, THEIR PRACTICE, THEIR POLITICS, THEIR LIFESTYLE 92 (Ann Fagan Ginger ed., 1972) (describing arraignment as proceeding at which Judge Hoffman "was goading and baiting everybody there" and trying "to disrupt" his own courtroom "from the beginning"); Danelski, *supra* note 7, at 147 (noting Judge Hoffman's controlling mannerisms in repeatedly refusing to recognize the pleas of defendants who used any words in addition to the words "not guilty," criticizing defense counsel for saying "for the record," and sarcastically referring to counsel as being from "way out in New York," among other remarks); TIGAR, *supra* note 221, at 78 (describing how defense counsel for only pretrial work saw and heard Judge Hoffman display a "supercilious and mocking attitude" at pretrial proceedings before "any defendant or defense counsel had uttered a single disrespectful word").

296. *Dellinger*, 472 F.2d at 385.

297. *See, e.g.*, KINOY ET AL., *supra* note 35, at 346 n.19 (calling Leonard Weinglass repeatedly by as many as eight different wrong names).

298. *Id.* at 341-42 n.16. (listing multiple examples of excluded witnesses).

299. *See, e.g.*, *id.* at 354-56 n.28 (listing examples of the judge's use of double standard, such as allowing prosecutors but not defense counsel to comment after a ruling, to go back in the record, to ask questions based on representations of future relevancy, and to ask questions based on the production of future witnesses).

300. *See Dellinger*, 472 F.2d 340 at 387 n.82, 388 n.85, 389.

them to testify,[301] and counsel obtained the permission of the seven defendants for one attorney to act on their behalf in the courtroom while the other attorney conducted interviews in the nearby witness room.[302] But Judge Hoffman denied the defense request to interview their witnesses in this way and the Seventh Circuit detected the motive of "hostility toward the defense" in the judge's decision to require both defense counsel to remain in the courtroom throughout the trial.[303] Judge Hoffman also made other unexplained decisions "further restricting the opportunity" of the defense for "out of court efforts."[304] When the defense case began, he extended the court session by half an hour each day and subsequently decided to hold the trial on Saturdays as well as weekdays.[305]

The second primary criticism of the Seventh Circuit focused on the patterns of hostility in the use of double standards illustrated by Judge Hoffman's evidence rulings that fell within his discretion.[306] The appellate court saw no need to "attempt the task of reviewing all the rulings on evidence" in order to find that, "in comparable situations, the judge was more likely to exercise his discretion against the defense than against the government."[307] With regard to "[a]dmonitions against impropriety," for example, the court recognized that they "seem to have been directed at defense counsel for less significant causes than when government counsel offended."[308] A similar pattern appeared in Judge Hoffman's treatment of defense witnesses because he "often went beyond the ordinary admonitions" when warning them against

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301. *See id.* at 387; LARRY SLOMAN, STEAL THIS DREAM: ABBIE HOFFMAN AND THE COUNTERCULTURAL REVOLUTION IN AMERICA 204 (1998) (describing Kunstler's recollection that the defense case included roughly sixty witnesses who were permitted to testify).

302. *Dellinger*, 472 F.2d at 387 n.81 (observing that since each defense attorney was counsel of record for a different group of defendants, the consent of all defendants was necessary for the two attorneys to make this arrangement to trade off their courtroom duties).

303. *Id.* (describing defendants' argument on appeal that the judge's restriction "resulted at times in [the defense] putting on witnesses who had not been interviewed by counsel").

304. *Id.*

305. *Id.* (noting that Saturday sessions began on January 24, 1970); *see* KINOY ET AL., *supra* note 35, at 11-15 (noting that the government case ran from September 26, to December 5, 1969, that the defense case ran from December 8, 1969 until February 2, 1970, that government rebuttal case ran from February 2 to 7 with both sides resting on February 9, and that final summations occurred on February 10 to February 12, with jury instructions on February 14 and the verdicts announced on February 18).

306. *Dellinger*, 472 F.2d at 387.

307. *Id.*

308. *Id.* at 387 n.82.

"unresponsive answers and volunteering."[309] Likewise, he applied a narrow interpretation of the concept of "leading questions" to the defense counsel, which allowed the prosecutor to make successful objections that "should not have been sustained" under "a reasonable interpretation of the evidentiary rule."[310] This narrow interpretation was not applied "equally restrictively applied when the government questioned its witnesses."[311] In addition, Judge Hoffman's rulings during closing arguments "were, comparatively, more restrictive against the defense than the government."[312]

The Seventh Circuit's third primary criticism pertained to the "most significant" evidence of Judge Hoffman's hostility, namely his many sarcastic and denigrating comments directed at the defense attorneys and the defendants throughout the trial.[313] Considering the deference that jurors can be expected to give to a judge's "lightest word or intimation," the court concluded that Judge Hoffman's deprecating remarks could "excite a prejudice which would preclude a fair and dispassionate consideration of the evidence."[314] Indeed, "[o]ut of several hundred readily identifiable comments . . . more than 150 were made in the presence of the jury."[315] Many of these comments implied

309. *Id.* at 388.

310. *Id.* at 389 n.86 (citing MCCORMICK, LAW OF EVIDENCE 9-11 (1954). The patterns mentioned by the Seventh Circuit represented only selected examples, as evidenced by the additional patterns described in the defense brief. These patterns included thirty-three examples of rulings reflecting the judge's use of double standards in a variety of contexts, twelve examples of rulings applying double standards to requests for recesses, and twenty-seven examples of the judge either mistakenly interpreting defense references to the prosecutors as references to himself or otherwise injecting himself into the proceedings. *See* KINOY ET AL., *supra* note 35, at 354-57 n.28, 349-50 n.24, 352-54 n.27. Other patterns are reflected in seventeen examples of the judge's hostile and disrespectful treatment of defense witnesses, eleven examples of the judge's failure to protect defense witnesses from "heavy badgering" by the prosecutors, four examples of the judge protecting government witnesses from impeachment or "penetrating cross" by defense counsel, four examples of the judge denigrating defense witnesses, and nine examples of the judge speaking positively about government witnesses and adding to their credibility. *See id.* at 343-45 n.17.

311. *Dellinger*, 472 F.2d at 389 n.86.

312. *Id.* at 390.

313. *Id.* at 387-389 nn.83-84; *see also In re* Dellinger, 370 F. Supp. 1304, 1321 (N.D. Ill. 1973) (confirming that "[t]he official transcript, the tapes and the eyewitness testimony" presented at retrial of contempts "amply support" all the Seventh Circuit's findings regarding the "judge's manifest hostility toward the defense").

314. *Dellinger*, 472 F.2d at 386 (quoting Quercia v. United States, 289 U.S. 466, 472 (1933)) (referring to the influence of a judge's comments expressed in instructions, which influence the Seventh Circuit equated with "the cumulative effect of a series of judicial remarks deprecating defense counsel and the defense case").

315. *Dellinger*, 472 F.2d at 387 n.83.

that the defense attorneys were "inept, bumptious, or untrustworthy, or that [the defense's] case lacked merit."[316] Taken as a whole, the court determined that these comments "must have telegraphed to the jury the judge's contempt for the defense,"[317] especially considering "the added impact of sarcasm."[318] Therefore, Judge Hoffman violated the right of the defense "to present its case before the jury free from the cumulative implications" of his comments that implied the defense was meritless.[319]

In finding that both prosecutors "fell below the standards applicable to a representative of the United States,"[320] the Seventh Circuit emphasized the same failing that Judge Hoffman exhibited, namely their utterance of unjustified and prejudicial remarks "in considerable number, and before the jury."[321] What is striking about the derogatory comments of the prosecutors is the similarity of their themes and vocabulary to those reflected in Judge Hoffman's remarks about the defense counsel.[322] The impression of *de facto* agreement would have been reinforced by the repetition of hostile concurring opinions held by the judge and both prosecutors. What is more, their collective mockery could carry a powerful charge because of their

316. *Id.* at 387-88 nn.83-84 (quoting fifteen examples of such comments by Judge Hoffman); *id.* at 387 (noting that the sometimes the comments were "not associated with any ruling in ordinary course," that sometimes they were "gratuitously added" to a ruling, and that they were "nearly always unnecessary"); *see also* KINOY ET AL., *supra* note 35, at 342-53 & nn.19-21, 23, 25-27 (providing twenty-five examples of using negative characterizations of defense counsel, twenty-seven examples of calling them by the wrong names, twelve examples of "casting aspersions" on their veracity, nineteen examples of making critical comments about their legal abilities, twenty-one examples of correcting or censoring their word choices, and thirteen examples of denigrating them for being attorneys from New York and New Jersey); LUKAS, *supra* note 96, at 42 (reporting that Judge Hoffman repeatedly called Leonard Weinglass by the wrong name, even though the defendants held up a sign that said, "Mr. Weinglass").

317. *Dellinger*, 472 F.2d at 387.

318. *Id.* at 388.

319. *Id.* at 389.

320. *Id.* at 390-91 (also criticizing U.S. Attorney Foran for two aspects of his closing argument: first, for going "probably beyond" the "outermost boundary of permissible inferences from the evidence in his characterizations of defendants" and second, for contradicting the jury instruction that the courtroom conduct and appearance of defendants was not a basis for conviction).

321. *Id.* at 389.

322. *Compare id.* at 389-90 n.87 (quoting the U.S. Attorney using phrases such as "[w]e are not in some kind of kindergarten" and "crybaby stuff" in an objection) *with id.* at 386-89 nn.83-85 (quoting Judge Hoffman telling defense counsel that "[s]ince you are so tired, we will take a recess and you can go to sleep for the afternoon," after admonishing counsel for his posture).

status as federal government officials, which might be expected to give them greater credibility in the eyes of the jurors[323] than the defense attorneys who served as the "champions" of the dissident defendants.[324]

Through their casually expressed colloquialisms, Judge Hoffman and the prosecutors offered the Chicago Eight jurors intermittent but continual reminders of the untrustworthiness of defense counsel. As the Seventh Circuit observed, "[t]aken individually," any one of Judge Hoffman's comments "was not very significant and might be disregarded as a harmless attempt at humor," but his cumulative message of denigration was unequivocal.[325] The matching message of the prosecutors similarly served to prejudice the presentation of the defense and to "inflame the atmosphere" so as to increase the potential for courtroom disorder harms.[326]

The remarks of the prosecutors and Judge Hoffman conjured four different negative images for the defense counsel, each of which implied that their arguments, along with the testimony upon which those arguments relied,[327] should not be accepted as credible.[328] The image of an actor appeared in the prosecutor's references to defense counsel as "Perry Mason" on "Channel 7" who was "performing" and "making speeches" like a "mouthpiece."[329] Similarly, for the judge,

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323. *See* DORSEN & FRIEDMAN, *supra* note 12, at 185 (quoting Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 632 (1972) (noting that "while a [criminal] defense attorney sometimes suffers from association with [their] client, a prosecutor usually benefits from [their] association with the cause of law enforcement" as well as from the status of a "public official" or government "employee," thereby enjoying "a sense of trust and an expectation of fairness that a defense attorney would find difficult to match"); *see also* Berger v. United States, 295 U.S. 78, 88 (1935) (explaining that since jurors trust prosecutors to observe their obligation to serve justice, "improper suggestions" and "insinuations . . . are apt to carry much weight against the accused when they should properly carry none").

324. DORSEN & FRIEDMAN, *supra* note 12, at 133 (describing the "defense lawyer's primary role" as that of "champion of [their] client").

325. *Dellinger*, 472 F.2d at 387.

326. *See* DORSEN & FRIEDMAN, *supra* note 12, at 181-82 (noting that the statements of prosecutors "can provoke responses by defendants and their lawyers, thereby seriously escalating the level of trial disorder"); *see also* KINOY ET AL., *supra* note 35, at 345 n.18 (noting that Judge Hoffman "categorically refused to admonish the prosecutors" when they made the types of remarks that the Seventh Circuit criticized, except for "[t]he very few times the judge did admonish the prosecutors," but "did so in such a way" that it was equivocal).

327. *Dellinger*, 472 F.2d at 387-88 n.83-85 (quoting examples of Judge Hoffman's comments that denigrated the value of the testimony of defense witnesses).

328. *Id.* at 387 (describing Judge Hoffman's comments as "implying rather than saying outright" that the defense case "lacked merit").

329. KINOY ET AL., *supra* note 35, at 344-45 n.18 (combining selected quotes appearing at different points in the record) (internal quotes omitted).

counsel was a "TV actor" and a "phrasemaker" who gave a "dramatic demonstration" in a "glib manner."[330] A second image was less benign because of its fraudulent attributes. In the prosecutor's view, the "two-faced" and "phony" defense counsel engaged in "making up statements 'out of whole cloth,'" relied on "fiction[s]" and the "usual misrepresentations," and said "whatever comes to mind" or "what was convenient."[331] The judge observed, in his turn, that the defense counsel's representations "don't mean very much," that he "wouldn't take [their] assurances" since they had "violated [those assurances] on so many occasions," that their "credit isn't very good," and that one of their statements was "inaccurate" but he "could use an uglier word."[332]

The third image of defense counsel as juveniles served to reinforce the fourth image that emphasized their ignorance about the law. The prosecutor criticized the "crybaby" attorneys for their "kindergarten" defense, their "comic book" style, and their typical "smart aleck" remarks while "fooling around," "going in circles," and making "'Alice in Wonderland' statements."[333] For the prosecutor, their juvenile attributes overlapped with their ignorance about trial practice, which was revealed when they asked "silly" and "nonsensical" questions, while taking positions that were "absolutely incredible." Since they "didn't care about the rules of evidence," they would "'alter' the rules of evidence" to suit themselves.[334] The judge's references to juvenile attributes included his warning that defense counsel should not "[play] horse" with the court and his criticisms that counsel were not "up on your homework" and "haven't anything to say that is important," even though they may want "a gold star."[335] He referred to their ignorance by complaining that he could not "preside over a class in evidence" for them, by doubting whether they ever heard of "leading

330. *Id.* at 345-46 n.19 (combining selected quotes appearing at different points in the record) (internal quotes omitted).

331. *Id.* at 344-45 n.18 (combining selected quotes appearing at different points in the record) (internal quotes omitted).

332. *Id.* at 346 n.20 (combining selected quotes appearing at different points in the record) (internal quotes omitted).

333. *Id.* at 344-45 n.18 (combining selected quotes appearing at different points in the record) (internal quotes omitted).

334. *Id.*

335. *Id.* at 346 n.21 (combining selected quotes appearing at different points in the record) (internal quotes omitted).

questions," and by advising one attorney that "[y]ou will have to see a lawyer . . . if you don't understand" the relevant evidence rule.[336]

By engaging in his repeated denigration of the defense, Judge Hoffman endangered the impartiality of the jury and elevated the risk of disorder by violating the defense's expectations that he would perform all the traditional roles of a trial judge, including that of an "exemplar of justice."[337] As the CNY Bar Report explained, judges have several important roles to play, including the role of a decision-maker who resolves contested issues[338] and the role of a "traffic policeman" who keeps the trial moving and the jury's attention focused on the evidence.[339] Their third vital role is that of an "exemplar of justice," who "personifies . . . the need for fairness, understanding, and evenhanded application of the law."[340] Since the latter role is the one that is the "most important for ensuring civilized and orderly proceedings,"[341] the abandonment of that role is a harbinger of disorder. Judge Hoffman's hostility and bias toward the defense constituted such an abandonment.

A prosecutor also has multiple roles—"to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public,"[342] and to see that "justice shall be done."[343] In meeting these obligations, a prosecutor "may strike hard blows," but not "foul ones."[344] The Seventh Circuit implicitly viewed both prosecutors as striking foul blows based on the court's finding that they "fell below the standards" expected of them because of their

336. *Id.* at 346-47 n.21 (combining selected quotes appearing at different points in the record) (internal quotes omitted).

337. DORSEN & FRIEDMAN, *supra* note 12, at 193; *see Dellinger*, 472 F.2d at 386 (noting that "special scrutiny" is required for judicial comments heard by a jury, which may "preclude a fair and dispassionate consideration of the evidence").

338. *See* DORSEN & FRIEDMAN, *supra* note 12, at 192-93 (observing that this "passive and deliberative" role requires making decisions about "many procedural disputes concerning the admissibility of evidence, the relevance of certain issues, or the propriety of certain questions asked by the parties").

339. *Id.* at 193 (noting that this role requires the judge to insure "that the government or the parties obtain prompt justice").

340. *Id.* (noting that this role requires judges, by "what [they are] and what [they do]," to "create appropriate conditions so that the parties accept the immediate outcome of a case and the people generally appreciate the need for, and the virtues of, the judicial system").

341. *Id.*

342. *Id.* at 169 (quoting A.B.A. STANDARDS FOR TRIAL DISRUPTIONS at 44).

343. Berger v. United States, 295 U.S. 78, 88 (1935).

344. *Id.*

denigration of the defense as well as other misconduct.[345] The court could have identified additional examples of such blows that went unmentioned in its opinion.[346] Notably, Judge Hoffman imposed no contempt citations on the prosecutors, who suffered "only whatever embarrassment followed from a critical appellate opinion" reversing the convictions.[347] As for Bobby Seale and his co-defendants, the unconstitutional hostility of Judge Hoffman and the prosecutors posed no barrier to another trial.

C. Breaking the Taboo Against Talking About Racism—But Without Courtroom Counsel

On the morning before the attorneys made their opening statements, Judge Hoffman allowed Bobby Seale to read aloud the pro se motion that he had drafted in jail the prior evening after learning of Garry's unavailability.[348] His motion requested "a continuance until Garry could be present to represent him" and the "dismissal of his

345. United States v. Dellinger, 472 F.2d 340, 389 n.87, 390-91 (7th Cir. 1972); *see* Bruce A. Green, *Regulating Prosecutors' Courtroom Misconduct*, 50 LOY. U. CHI. L.J. 797, 802 (2019); *id.* at 805-06 (stating that a mistrial is a "rare response to prosecutorial misconduct" and "trial judges often under-regulate" prosecutorial misconduct for many reasons, including the judge's inability to recognize misconduct because of their lack of knowledge regarding the applicable law, and their assumption that prosecutors know the rules and follow them); *see also infra* text accompanying notes 421-423 (describing two aspects of prosecutor's closing argument as additional grounds for violation of expected standards).

346. One example of a foul blow that went unmentioned in the Seventh Circuit's opinion was the prosecutor's baiting of defense witness Alan Ginsberg in order to encourage the jurors to be prejudiced against him because of his identity as a gay man. *See* Ian Lekus, *Losing Our Kids: Queer Perspectives on the Chicago Seven Conspiracy Trial*, *in* NEW LEFT REVISITED 200-06 (John McMillian & Paul Buhle eds., 2003) (stating that the prosecutor sought "to discredit the homosexual Buddhist-Jewish poet in front of the conservative-seeming jurors"; instead of addressing Ginsberg's testimony about Convention events, U.S. Attorney Foran's cross-examination questioned Ginsberg about the meaning of two of his homoerotic poems, selected "for their shock value," which Judge Hoffman instructed Ginsberg to read aloud; later when Ginsberg left the witness stand, Foran could be heard to say, "damn f——."); *see also id.* at 200 (observing that one week after the verdicts, Foran gave a speech in which he was quoted as saying, "We've lost our kids to the freaking f—— revolution").

347. Green, *supra* note 345, at 802. For examples of the denigration of criminal defense attorneys and worse, see generally VOICES OF CIVIL RIGHTS LAWYERS: REFLECTIONS FROM THE DEEP SOUTH, 1964-1980 (Kent Spriggs ed., 2017); SOUTHERN JUSTICE (Leon Friedman ed., 1965).

348. *See* TALES, *supra* note 90 at 10 (noting that Seale's motion was made and denied on the same day when the judge also held the pretrial attorneys in contempt and denied them bail).

attorneys of record in the event no continuance was allowed."[349] This was the first occasion when the judge charged Seale with contempt because of the language he used at the very end of his motion: "If I am consistently denied this right of legal defense counsel of my choice[,] who is *effective*[,] by the judge of this court, then I can only see the judge as a blatant racist of the United States Court."[350] By referring to the judge as a racist for denying Seale the right to Garry's assistance, Seale not only violated a courtroom taboo. He also protested his personal experience in the white courtroom, as a Black man at the receiving end of four connected forms of non-remediable race-based discrimination by Judge Hoffman. These forms included the closure of the courtroom to Seale's chosen and prepared defense counsel,[351] the substitution of unwanted and unprepared counsel without Seale's consent,[352] the coercive attachment of jail penalties to Seale's objections to both of Hoffman's rulings, and the increased likelihood of Seale's conviction because of this discrimination.[353]

Eighteen days after receiving his first contempt, Seale finally began to receive additional citations during the two weeks preceding Judge Hoffman's order for Seale to be chained and gagged.[354] He and Judge Hoffman participated in a total of fifteen episodes that could be called "contempt colloquies,"[355] including three that occurred during and following Hoffman's use of the chain and the gag.[356] In addition to

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349. United States v. Seale, 461 F.2d 345, 350 (7th Cir. 1972); *see* Julian Bond, *Bobby Seale, the Panthers, and the Future in* THE "TRIAL" OF BOBBY SEALE 7 (1970) (noting that both Seale and Huey P. Newton were former law students); Bobby Seale, *A Personal Statement by Bobby Seale*, *in* THE "TRIAL" OF BOBBY SEALE 121, 126 (1970) (describing Huey P. Newton as his inspiration for drafting his motion, as he reflected on Newton's courtroom confrontations, and realized that he had to prepare himself "to be my own defense counsel," and to "demand the right to defend myself, even if denied, over and over again . . . in order to receive justice, to show that my constitutional rights came first").

350. "TRIAL" OF SEALE, *supra* note 179, at 30 (emphasis added).

351. *See supra* text accompanying notes 173-184.

352. Initially, the unprepared substitute counsel were the pretrial attorneys. After their release from jail and withdrawal from the case, the unprepared substitute counsel was Kunstler, whom Judge Hoffman viewed as obliged to represent Seale because of Kunstler's signature on appearance forms. *See supra* text accompanying notes 215-220. The lack of Kunstler's preparation presumably was not evident to trial observers but should have been known to Judge Hoffman because of counsel's representations that Garry was Seale's only counsel. *See* sources cited *supra* note 174 (describing examples of these representations).

353. *See supra* note 347 (explaining that the pretrial attorneys were unprepared).

354. "TRIAL" OF SEALE, *supra* note 179, at 32.

355. *See generally id.* at 31-110 (chronicling numerous exchanges between Seale and Judge Hoffman).

356. *See generally id.* at 97-110 (detailing the exchanges that immediately preceded the first day of chaining and gagging on October 29, 1969).

Seale's first reference to the judge as a racist after his pro se motion, eleven contempt colloquies included references to racism.[357]

At some point in the trial, Seale received a slip of paper from someone conveying a message from the Court Reporter, which said: "When you speak out, please talk slower, so I can get it all on the record; it's in your defense."[358] To speak on behalf of his "defense," however, was a crime in itself. Each of the sixteen contempt charges ultimately produced the same three-month jail sentence,[359] which "could leave the impression," as the Seventh Circuit cautiously observed, "that no special attempt was made to make the penalty proportionate to the offense."[360] One critic put it more bluntly in interpreting Seale's four-year prison sentence as Judge Hoffman's "implied revenge" against Seale,[361] presumably for calling Hoffman a racist and for Seale's refusal to obey Hoffman's silencing orders.

When Seale spoke about his rights and the racism that suppressed those rights, he interrupted the unraced rhetoric of the traditional courtroom and all present were forced to listen, including the jury on some occasions.[362] Seale's repeated mantras expressed his refusal to be "railroaded" or victimized by racism.[363] They established a public claim to the freedom to defend himself at all costs, rather than submit

357. *Id.* at 30, 34, 56, 62, 65, 71, 74, 80, 83, 88, 90, 91-92, 95 (illustrating references to racism, which included, for example, descriptions of the judge and other government officials as racists; criticisms of slaveholders such as President George Washington and Benjamin Franklin, whose images were displayed in courthouse portraits and whose treatment of slaves was analogized to Judge Hoffman's treatment of Seale; descriptions of thousands of Black men who fought for the Union in the Civil War and died for their constitutional rights; comments about how Black men cannot get a fair trial; and descriptions of how Black people have been "shot and killed and murdered and brutalized and oppressed for four hundred years").

358. SEALE, SEIZE THE TIME, *supra* note 95 at 332.

359. *Id.* at 114-15.

360. United States v. Seale, 461 F.2d 345, 354 (7th Cir. 1972); *id.* at 351-56 (describing reversal of Seale's contempt convictions because he should have been given a hearing by a different judge and his contempt penalties could not be added together).

361. *See* Lahav, *Theatre*, *supra* note 178, at 416, 464.

362. *See* "TRIAL" OF SEALE, *supra* note 179, at 54, 62, 68-69, 73, 75, 77, 102, 107-08. Note that Seale's references to racism may not have been interpreted in identical ways by everyone in the courtroom audience. *See* THOMAS KOCHMAN, BLACK AND WHITE STYLES IN CONFLICT 8 (1981) (noting "the general public failure to recognize that black norms and conventions [in speech and communications may] . . . differ from those of whites"); *id.* at 89-91 (comparing different reactions of whites and Blacks to the assertion by Blacks that, "White people are racists" and to the denial of a white person that they are racist).

363. *Id.* at 32, 56, 60, 81, 108 (indicating the five times Seale referred to being "railroaded" in the colloquies).

to the silence required by Judge Hoffman.[364] Seale consciously played the role of a defendant representing himself pro se when rising to make rejected requests for Judge Hoffman's approval of that role. As one scholar noted, Seale often received his contempts for speaking at times when his counsel would have spoken, as when making requests to cross-examine government witnesses because they mentioned Seale's name in their testimony.[365]

Where Seale departed from the conduct of a lawyer was in his endless repetition of a handful of tag lines about the denial of his constitutional rights. His focus on legal queries and self-representation vocabulary contrasted dramatically with Judge Hoffman's non-responsive orders that Seale should sit down and remain silent because Kunstler was his counsel. For example, during the fifteen contempt colloquies, Seale asked Judge Hoffman fifty-five times in some fashion, "Why can't I defend myself?" He declared nineteen times, that he was speaking to protect his constitutional rights. He complained twenty-eight times that Judge Hoffman was violating his rights. Seale stated seventeen times that he wanted Garry to defend him. He announced twenty-nine times that no other lawyer could speak for him, sometimes also mentioning that he had fired Kunstler before opening statements. Seale also asked to cross-examine a witness twenty-seven times.[366] Ultimately, however, it may have been Seale's use of the terms

364. In every contempt colloquy, Seale ignored every declaration by Hoffman that only Kunstler could speak for Seale. Kunstler himself reminded Judge Hoffman in some of contempt colloquies that Seale had fired Kunstler. *See* "TRIAL" OF SEALE, *supra* note 179, at 38, 70, 73, 86; *see also Seale,* 461 F.2d at 350 (Kunstler's formal motion to withdraw from Seale's representation was denied by Judge Hoffman, and Kunstler's oral rejections of representation were rebuffed by Hoffman's repeated reference to Kunstler's signature on the appearance forms).

365. LANGUM, *supra* note 7, at 112; *see* Kalven, *Confrontation*, *supra* note 3, at xx ("Seale was not interrupting at random . . . [h]e was making a single point throughout, namely, that he wanted to defend himself at least until his lawyer, Charles Garry, was available to represent him. He had raised the point before the trial proper had begun, and it provided each time the content and the occasion for his efforts to speak."). *But see* "TRIAL" OF SEALE, *supra* note 179, at 62-63 (providing examples of Seale directing his anger in episodes involving conflicts with the prosecutor Richard Schultz).

366. *See* "TRIAL" OF SEALE, *supra* note 179, *passim*. Also, Judge Hoffman asked the marshals ten times to tell Seale to sit down and three times to be quiet. Hoffman never explicitly told Seale that he would receive a contempt citation with a jail penalty and the vagueness of his warnings kept the jury in the dark about the punishments that could be received for contempt. The jurors heard ten portions of eight colloquies, which was enough to make some of them curious and concerned about why Judge Hoffman would not let Seale represent himself. But this was never explained to them. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 266-67.

"racist," "fascist," and "pig," as much as his relentless participation in the proceedings, that finally provoked Judge Hoffman to order his chaining and gagging. On the third day of holding Seale in these restraints, Judge Hoffman observed that "[t]here comes a time, . . .when a federal district judge is called a pig . . . in open court before a hundred people, [and this is] publicized throughout the country, that [the chain and gag are] a proper restraint."[367] But in punishing Seale's violations of linguistic courtroom taboos, Judge Hoffman's use of the chain and the gag broke a different taboo, as revealed in courtroom sketches similarly publicized across the country, which depicted the image of a tortured and enslaved Black man in a white courtroom.

It seems likely that if the prosecutors had been given their choice of opponents, Garry would have been one of the very last defense attorneys they would have wished to encounter.[368] Only two years before the Chicago Eight trial, Garry had taken on the defense of Huey Newton, the co-founder of the Black Panther Party with Bobby Seale,[369] when Newton was charged with capital murder in the death of a white police officer in Oakland in a "high-profile, politically charged case."[370] Garry was an Armenian-American and an experienced trial lawyer who had saved clients from execution in over thirty capital cases,[371] and who prepared his defense for Newton by spending as much time as possible learning about his client, his client's family, and the lives of the Black community in Oakland.[372] Garry's devotion to this effort was an example of what might today resemble some level of

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367. SCHULTZ, THE TRIAL, *supra* note 6, at 70. *Compare* "Trial of Seale," *supra* note 178, *passim* (illustrating Seale's use of the terms "racist," "fascist," and "pig" during the contempt colloquies), *with In re* Dellinger, 461 F.2d 389, 407, 408, 415, 429, 432 (7th Cir. 1972) (illustrating contempt citations imposed for statements by three of Seale's co-defendants for use of terms "fascist" or "pig"); IVAN GREENBERG, SURVEILLANCE IN AMERICA: CRITICAL ANALYSIS OF THE FBI, 1920 TO THE PRESENT 208-10 (2012) (discussing origin of the term "pig" being used by Panthers in 1967 to refer to racist police officers by analogy to the term "swine" used for the "German Gestapo"; variations on the term like "[f]acist pig[]" were subsequently "widely adopted" by the anti-war movement).

368. For reflections on Garry's career, see FREED, *supra* note 197, at 43-51; Tucker Carrington, *The Role of Judging 50 Years After the "Chicago Seven" Trial: A Remembrance of Charles R. Garry*, 50 LOY U. CHI. L.J. 969-88 (2019).

369. *See* Danelski, *supra* note 7, at 134-36 (describing the founding of the Black Panther Party for Self Defense on January 1, 1967).

370. JOSHUA BLOOM & WALDO E. MARTIN, JR., BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY 101 (2013).

371. *Id.* Garry obtained a manslaughter verdict in the Newton case; after reversal of the conviction on appeal and two mistrials, the charges against Newton were dismissed.

372. *See* Garry, *supra*, note 294, at 68-69.

"cultural competency" to represent Newton.[373] Garry also had developed a set of voir dire questions to explore the racial prejudice of jurors, which he used in the Newton case, along with expert witnesses on racism.[374] Garry subsequently defended the Oakland Seven protesters against conspiracy charges in a case which, like the Chicago Eight trial, required the defense to mount an effective challenge to the credibility of law enforcement witnesses. Garry portrayed his clients as dissenters in the tradition of the American Revolution, and during his closing argument, he went down on one knee, and recited the New Colossus poem on the Statue of Liberty. He had the jurors in tears and they acquitted.[375] Garry's performance in the Newton and Oakland Seven trials confirmed his reputation for "raw eloquence and brilliant maneuvers,"[376] and the benefit gained by the Chicago Eight prosecutors, thanks to Garry's elimination from the courtroom team for the defense, seems beyond dispute.

When Judge Hoffman repeatedly denied the requested continuance of the Chicago Eight trial, Garry must have realized that Seale's choices were limited and risky. Ultimately, Garry advised Seale to "stand on his right to counsel of his choice" and Seale followed that advice. Both of them presumably hoped that Seale's resistance to Judge Hoffman's demands would provoke a mistrial.[377] Almost twenty years after the trial, one of Seale's co-defendants described his own realization that Garry might have been "hoping for a declaration of mistrial to separate [Seale] from the rest of us, thinking he could vindicate [Seale] more easily in a later trial" as the sole defendant, especially given Seale's brief attendance at the Convention and lack of acquaintance with the other defendants.[378] Unlike Garry, Seale's co-

373. *See* Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1498 (2021) (detailing the benefits of lawyering by "Black and/or culturally competent public defenders who can help to mitigate anti-Black racism when representing Black defendants").

374. *See* Charles R. Garry, *Attacking Racism in Court Before Trial*, in MINIMIZING RACISM IN JURY TRIALS: THE VOIR DIRE CONDUCTED BY CHARLES R. GARRY IN PEOPLE OF CALIFORNIA V. HUEY P. NEWTON 43 (Ann Fagan Ginger ed., 1969); Charles R. Garry, *Minimizing Racism in Jury Trials*, *in* RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS 141-53 (Jonathan Black ed., 1971).

375. *See* Roxanne Makasdjian, *Charles Garry: Streetfighter in the Courtroom*, YOUTUBE (Feb. 6, 2014), https://www.youtube.com/watch?v=cmnY2Wdjaas; Hrag Yedalian, *The People's Advocate: The Life and Times of Charles R. Garry*, YOUTUBE (Sept. 26, 2016), https://www.youtube.com/watch?v=hpvoeOlG5QM; CHARLES R. GARRY & ART GOLDBERG, STREETFIGHTER IN THE COURTROOM: THE PEOPLE'S ADVOCATE (1977).

376. BLOOM & MARTIN, *supra* note 371, at 101.

377. HAYDEN, *supra* note 21, at 349; SCHULTZ, THE TRIAL, *supra* note 7 at 38.

378. HAYDEN, *supra* note 22, at 349.

defendant wanted all the defendants to stick together. He disapproved of what he believed to be Garry's strategy because it "would be dividing the defendants along race lines and against [themselves]."[379] What he failed to recognize was that this division had existed from the moment of indictment, and that there was no escaping the power of white racism to influence the treatment of Seale and his co-defendants in ways that were advantageous to the prosecution.

IV. WHEN RACE IS SEEN: BOBBY SEALE'S TRIAL WITHIN A TRIAL

A. The Chain and the Gag: Seale's Escape from the Forum through Resistance Framed as Disorder

The test of wills between Seale and Judge Hoffman drew all of the other trial participants into their dispute about Seale's right to counsel, as reflected in the transcript passages for the fifteen contempt colloquies. The voices of the marshals appeared repeatedly in these scenes as Judge Hoffman ordered them to tell Seale to stop talking, sit down, and be quiet.[380] Even the prosecutors became involved in the lengthier litanies,[381] along with Seale's co-defendants who found themselves tagged with contempt when they began to speak in his defense.[382]

For this reason, Seale's "contempt colloquies" should be recognized as a source of disorder in provoking reactions from the other trial participants, since those reactions, in turn, sometimes produced additional contempt citations.[383] Judge Hoffman's statements in many of his exchanges with each defendant possessed the same potentially provocative power as his disparaging remarks about defense counsel. Like those remarks, Judge Hoffman's exchanges sparked "resistance dialogues" in which counsel spoke up to counter

379. *Id.*

380. *See, e.g.*, CONTEMPT TRANSCRIPT, *supra* note 106, at 6-7, 11-13 (illustrating how a marshal told Seale twice to be quiet and six times to take a seat during another colloquy).

381. *Id.* at 7, 9, 18, 19, 20, 22, 24, 27, 29 (including two comments by the chief prosecutor and others by the assistant prosecutor).

382. *Id. passim* (illustrating contempts for comments during colloquies between Seale and Judge Hoffman, including four for Dellinger, one for Davis, three for Hayden, two for Abbie Hoffman, one for Rubin, one for Froines, two for Kunstler, and one for Weinglass).

383. *Id. passim* (illustrating how some contempts would not be likely to stimulate responses, such as the contempts routinely imposed upon all defendants who failed to rise at the opening or closing of court, or when a recess was declared).

the criticisms of the judge or prosecutors[384] and even sometimes made mistrial motions.[385] The increasingly heated contempt colloquies between Judge Hoffman and Seale illustrate how any judge's enforcement of contempts can carry the potential for enhancing the risk of disorder.[386] In Judge Hoffman's case, that potential was aggravated by the evidence of his hostility toward the defense and the corresponding hostility of the defendants and their counsel toward the judge's treatment of Seale and of themselves.[387]

When Judge Hoffman established a brick wall of words to avoid the need to act regarding Seale's Sixth Amendment claims, that wall remained in place, in part, because of the judge's failure to inquire into the circumstances under which Kunstler filed his appearances for Seale. As the Seventh Circuit pointed out, an inquiry into Seale's situation would have revealed that Kunstler never obtained Seale's consent to file the appearances on his behalf, nor had Kunstler talked to Seale before trial to discuss his case.[388] With this knowledge would have come the realization that the remedy of severance could constitute an "appropriate action" to protect Seale's Sixth Amendment rights.[389] Moreover, Judge Hoffman also could have chosen the severance option simply as a method for eliminating the disruptions evidenced by Seale's attempts to engage in self-representation. Given the increasing number and length of Seale's colloquies with the judge, Hoffman might

384. *See*, *e.g.*, TALES, *supra* note 90, at 70 (providing a transcript showing that Kunstler asked Judge Hoffman to stop the prosecutor from calling Weinglass "phony" and "two-faced" in the presence of the jury).

385. *See, e.g.*, *id.* at 14 (quoting Kunstler's argument on the defense mistrial motion after the pretrial attorneys withdrew, which motion was based on the grounds, *inter alia*, that Judge Hoffman "degraded, harassed and maligned" the defense counsel, by "stress[ing] in a highly derogative fashion the fact that lead trial counsel are from other states," and "convert[ing] routine courtroom language by these attorneys into criticism of both Chicago and the prospective [jurors]").

386. *See, e.g.*, *id.* at 18, 22, 24, 27.

387. *See, e.g.*, EPSTEIN, *supra* note 5, at 248 (reporting that when none of the defendants rose at the closing of court, Kunstler informed Judge Hoffman that they "are in protest of what you have done in their opinion to Bobby Seale's right to defend himself").

388. *See* United States v. Seale, 461 F.2d 345, 360 (7th Cir. 1972).

389. *See id.* at 358 (observing that severance "and a reasonable continuance to secure substitute counsel" was one feasible alternative, and another was the approval of Seale's self-representation, and that choosing either option "may well have obviated many of the difficulties that later occurred"); Kalven, *Confrontation*, *supra* note 3, at xxii (noting that Judge Hoffman should have used the severance option instead of insisting on "going through the binding and gagging stage," when "[s]urely it was apparent that it would not work and would greatly upset the trial"; therefore, "[i]t was politically reckless and intrinsically unfair to have permitted matters to get to such an impasse").

have recognized that the need for severance might be just a matter of time.

Judge Hoffman also would have realized, however, that the retention of Seale as a defendant provided several benefits to the prosecution team. Given Seale's minor role in the Convention as a late replacement for Eldridge Cleaver and his lack of acquaintance with the other defendants,[390] observers viewed Seale's joinder as "tacked on . . . to bring in the aura of Black Panther violence."[391] The rhetoric in his two Convention speeches included inflammatory expressions that the prosecutors could use to argue that he and his co-defendants advocated violence toward police officers.[392] Seale's verbal jousting with the judge provided similar support for the prosecution's trial narrative regarding the defendants' violent challenges to the Chicago authorities. Finally, the prosecutors would have viewed Seale's continued presence as useful based on their expectations that at least some of the jurors would be frightened of Seale, according to public attitudes toward the members and leaders of the Black Panther Party for Self-Defense.[393] Post-trial statements of some of the jurors confirmed the validity of that expectation.[394] In one 1971 poll, "two out of every three white people

390. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 38.

391. Kalven, *Howler*, *supra* note 2, at 5. *Compare* Hoag, *Color*, *supra* note 46, at 982, 990-91 (describing how "criminality became increasingly racialized as Black" after the Civil War and how, after "over 1,200 Black rebellions [occurred] throughout the country between 1964-1969," the public's "perception of Black people as inherently criminal" became "further cemented").

392. Dee, *supra* note 103, at 92 (noting that Seale's speeches included such lines as, "If the police get in the way of our march, tangle with the blue-helmeted m———f——s, and kill them and send them to the morgue slab"); SEALE, SEIZE THE TIME, *supra* note 95, at 327 (describing the assistant prosecutor's opening statement as characterizing one of Seale's speeches as telling people "to get pistols, rifles, and shotguns," and then telling "them to riot," when actually what Seale really said was "that we have a right to defend ourselves against unjust attacks by pigs, and 'if the pigs attack us in an unjust manner, then we have a right to barbeque some of that pork'").

393. *See* Bond, *supra* note 348, at 9 (serving as the leader of the Black Panther Party for Self-Defense, Seale "represent[ed] the largest, most disciplined, organized group of radical [B]lacks in the country," with a "history of social service to the [B]lack community," and "a willingness to stand up against policemen," whose "purpose is the revolutionary overthrow of oppression and wrong in the United States"); MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1990 109 (2d ed. 1991) (describing the Ten Point Program of the Panthers).

394. Danelski, *supra* note 7, at 158 n.76 (describing jurors who were afraid of Seale as including two white women jurors and a black woman who was an alternate); *see* TALES, *supra* note 90, at 18-21 (providing a transcript describing how, when families of two jurors received notes stating the words, "You are being watched. The Black Panthers.", Judge Hoffman read

in the United States felt that the 'Black Panthers are a serious menace to the country,'"[395] echoing the assertion of FBI Director, Herbert Hoover, that the Black Panthers constituted a grave threat to national security.[396]

Judge Hoffman apparently did not favor the severance remedy as an acceptable option for protecting the rights of all the defendants to a fair trial, given the fact that he ignored this option for so long. Instead, physical violence came to the courtroom in the form of the chaining and gagging of Seale, with additional violence carried out by the marshals who restrained him.[397] He would not sit quietly while chained and gagged.[398] He kept trying to speak through the gag and to loosen

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the notes to the jurors and asked whether they could continue to be fair and impartial; one juror answered yes and said she thought the notes were a hoax, and the other answered no and was replaced with the alternate juror who later acted as the "negotiator" of the compromise verdict); LANGUM, *supra* note 7, at 110-11 (describing how there was a "high probability that the 'Black Panther' notes were forged by the FBI," and how "FBI records indicated that Hoffman promised an investigation" of the notes "but later secretly halted it . . . [w]ithout informing defense counsel").

395. FREED, *supra* note 197, at 327-28 (describing Harris Poll that also found that 57% of white people believed that "the Black Panthers . . . should be put out of existence").

396. CUNNINGHAM, *supra* note 111, at 33, 58-59 (describing FBI's "repression of the Panthers marked the most savage incarnation of COINTELPRO," including murders of four Panthers in 1969, along with program of unsupportable arrests and use of informants "to entrap Panthers in illegal activities"); MARABLE, *supra* note 393, at 111-12 (describing COINTELPRO program as targeting the Panthers in "233 separate actions" by July 1969, and how "[i]n 1969 alone, 27 Panthers were killed by the police and 749 were jailed or arrested"); HUNT, *supra* note 105, at 219 (describing police assassinations of Chicago Panther leaders Fred Hampton and Mark Clark, who were friends of the Chicago Eight defendants; Judge Hoffman denied the request of defense counsel "to postpone the trial for a day of mourning"); Harry Kalven, Jr., *The Grand Jury Panther Report: An Unnerving Story*, 3 CHI. JOURNALISM REV. 4-7 (1970) (describing report of federal grand jury investigation of police raid in which Mark Clark and Fred Hampton were killed by Chicago police officers, which report defended decision to issue no indictments).

397. *See* SLOMAN, *supra* note 298, at 195 (quoting Garry's revelation that he expected that "unless [Seale] took self-action, the railroading would be continuing" so "[w]e forced the situation that gagged Seale," and "expected the gagging and shackling long before it happened"). Seale's autobiography referred to his familiarity with the relevant legal authority that could be invoked by Judge Hoffman to justify the strategy of binding and gagging him. *See* BOBBY SEALE, A LONELY RAGE: THE AUTOBIOGRAPHY OF BOBBY SEALE 182, 190 (1978) (revealing that the morning after Hoffman threatened Seale with a chain and gag, that Seale's "main thought" was, "I've got to force Hoffman to gag me today").

398. For descriptions of Seale's chaining and gagging, see SEALE, SEIZE THE TIME, *supra* note 95, at 337-47; Lahav, *Theater*, *supra* note 178, at 405-30; *see also* Lahav, *Character*, *supra* note 211, at 1333-34 (observing that Judge Hoffman might not have decided to bind and gag Seale but for the opinion in Allen v. Illinois, 413 F.2d 232 (7th Cir. 1969), which disallowed exclusion of a disruptive defendant from the courtroom but allowed binding and gagging on the facts; then, Illinois v. Allen, 397 U.S. 337 (1970) reversed the lower court's

the restraints that cut off his circulation.[399] His co-defendants protested the physical force used against Seale by the marshals who tightened his restraints, kicked him, and landed other blows upon him.[400] The violence toward Seale that was witnessed by the jury and other trial participants "furnish[ed] to America and to the world a terrifying image of American justice."[401]

A measure of the degree to which Judge Hoffman was willing to tolerate disorder is evidenced by his decision to order the removal of Seale's gag and chain, while indulging in the assumption that the trial could continue because he could handle any further protests from Seale by using contempt sanctions again.[402] Initially, Judge Hoffman treated Seale like the pretrial attorneys whom Hoffman jailed and then offered to release them in exchange for their representation of Seale. Judge Hoffman first employed the gag and chain and then offered to remove them in exchange for Seale's acceptance of Kunstler as his counsel of

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holding as a violation of the Sixth Amendment's Confrontation Clause, on exclusion and observed in dicta that "in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle" an individual like the *Allen* defendant who engaged in physical disruption, such as leaping into the jury box).

399. For Seale's vivid recollections regarding his restraints and treatment by the marshals, see Justine Tobiasz, *From the Archives: Black Panther Bobby Seale Reflects on the Trial of the Chicago 8*, WBEZ CHI. (Mar. 5, 2021, 2:45 PM), https://www.wbez.org/stories/from-the-archives-black-panther-bobby-seale-reflects-on-the-trial-of-the-chicago-8/819c7e0e-6f58-42a8-8bc5-034c1277f87e [https://perma.cc/RAR6-FN9H] (recording of a broadcast on November 5, 1999 with Bobby Seale, Gerald Lefcourt, and interviewer Richard Steele).

400. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 62-71; SEALE, LONELY RAGE, *supra* note 396, at 194-97; *id.* at 195-96 (describing loss of blood circulation from restraints and pain from being elbowed in the mouth and the groin by marshals); *see also* In re Dellinger, 370 F. Supp. 1304, 1311 (N.D. Ill. 1973) (noting that the "principal cause of [the] disintegration" of the trial, so that "no judicial proceeding could fairly be said to be in progress," was "the appalling spectacle of a bound and gagged defendant and the marshals' efforts to subdue him" during the second day this occurred); Seale v. Hoffman, 306 F. Supp. 330, 332 n.2 (N.D. Ill. 1969) (noting that only one half hour of testimony could be taken during the first afternoon when Seale was chained and gagged).

401. Kalven, *Confrontation*, *supra* note 3, at xix. *Compare Federal Prosecutor Criticizes the Chicago 7 Defendants and Their Lawyers*, N.Y. TIMES (Feb. 28, 1970), https://www.nytimes.,com/1970/02/28/archives/federal-prosecutor-criticizes-the-chicago-7-defendants-and-their.html) (noting that after the verdicts, the prosecutor described the binding and gagging of Bobby Seale as "the most horrible sight I've ever seen in a courtroom," and advocated that disruptive defendants should be sent to a room where they can observe the trial via television, because "[w]e can't do that [binding and gagging] any more"), *with* SHARMAN, *supra* note 11, at 205 (describing the *New York Times* as treating "Seale's 'outbursts' in the trial [as] ample justification for the decision to chain and gag him").

402. "TRIAL" OF SEALE, *supra* note 178, at 103.

record.[403] But when Seale would not accept that offer and when the binding and chaining did not silence him, Judge Hoffman abandoned his experiment.[404] He appeared to regard his role as "governor" of the trial as giving the authority to control the proceedings without considering how that control might also serve as the cause of disorder. His chief strategies for dealing with the problem of disorder included the use of contempts, the threat of more contempts, and verbal bullying.[405] He treated the disorder crisis as though its prejudicial impact on Seale and the other defendants could be ignored as long as his own exchanges with an unchained and vocal Seale could be managed sufficiently by the threat of more contempts.[406] When Seale continued to present his claims for self-representation after the gag and chain were removed, Judge Hoffman finally chose the severance option and declared a mistrial for Seale, while denying a mistrial for the other defendants.[407]

B. The Adversarial Uses of Disorder and the Connection of Race to Dangerousness

The legal adversaries in the Chicago Eight trial put forward opposing theories of the case for the jury's consumption, and those theories gave both sides incentives to talk about the disorder in the courtroom. From the prosecutor's standpoint, any disorderly courtroom conduct would be advantageous if it encouraged the jurors to find that the defendants shared "the common aim of producing

403. KINOY ET AL., *supra* note 35, at 338 n.11 (noting that Judge Hoffman "told [Seale] he could be untied if he agreed to accept Mr. Kunstler as his lawyer"); *see supra* text accompanying notes 222-225 (regarding treatment of pretrial attorneys).

404. *See* SCHULTZ, THE TRIAL, *supra* note 7, at 70-71 (revealing that on the third day of Seale's physical restraints, Judge Hoffman approved of a weekend trip to San Francisco by some of the defendants to ask Charles Garry to travel to Chicago and represent Seale at trial; when Garry refused, Hoffman ordered the removal of Seale's chain and gag on the next trial day).

405. *Id.* at 60 (noting Hoffman's reference to himself as "governor" of the trial). *See generally* TALES, *supra* note 90 (chronicling Hoffman's consistent use of the threat of contempt citation throughout the trial).

406. SEALE, SEIZE THE TIME, *supra* note 95, at 347-48 (noting in Seale's autobiography that Judge Hoffman told him that "he wouldn't gag me if I would act right" but Seale planned to "continue to demand [his] constitutional rights"; on the day when the restraints were removed, he objected to the testimony of one witness in the late afternoon and attempted to question a witness the next day).

407. *See* CONTEMPT TRANSCRIPT, *supra* note 106, at 35-36.

violence during convention week in Chicago."[408] From the perspective of the defense, opportunities to highlight the disorderly courtroom conduct of the government officials—including the judge, prosecutor, and even the marshals—could provide a helpful reminder for the jurors that "the violence which did occur" during convention week "was the product of police aggression and excessive force."[409] The prosecutors had a special advantage that was more difficult for the defense to defeat, however. They could rely on the association of Blackness with dangerousness and criminality and encourage the jury to project Seale's dangerousness upon his white co-defendants. In their portrayal of the Chicago Eight defendants as violent, the vision of Seale as a chained and gagged defendant could convey the message of his dangerousness to the jury as well as his enslavement.

The trial afforded many battle opportunities for acting out the opposing scripts about violence. For example, on one occasion, the marshals asked Seale to encourage the unusually large number of Black Panther members among the spectators to avoid violence.[410] Seale did so, advising the spectators that they should defend themselves if attacked by a marshal, but otherwise they should "keep cool" and follow any marshal's instructions if they were asked to leave.[411] Then the assistant prosecutor announced to Judge Hoffman that Seale spoke to the Black Panther members in the audience about an "attack by them" on the court.[412] Seale was outraged and called the prosecutor a liar and a "rotten fascist pig."[413] After repeated warnings to Seale later that day regarding the need for silence, Hoffman ordered the marshals to chain and gag Seale for the first time.[414] In front of the jury, the prosecutor and Kunstler responded to this turn of events by blaming each other for the violence used by the marshals when subjecting Seale to these restraints.[415]

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408. United States v. Dellinger, 472 F.2d 340, 353 (7th Cir. 1972); *see* LUKAS, *supra* note 96, at 34 (noting that Judge Hoffman "spoke several times of the defendants' 'violence' in the courtroom," but the only physical violence observed by the author occurred when the "federal marshals used more than necessary force").

409. *Dellinger*, 472 F.2d at 354; *see, e.g.*, Lahav, *Morality Tale*, *supra* note 243, at 38 (noting that the trial record "is replete with references to the Gestapo, to Hitler, and to the Holocaust").

410. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 61.

411. *Id.*

412. *Id.* at 61-62.

413. *Id.* at 62.

414. *See id.* at 62-63.

415. *See* Danelski, *supra* note 7, at 157-58.

The defense narrative called for the portrayal of the defendants as harmless and nonviolent individuals. In order to provide an image of "ordinary" behavior at the defense table, the defendants "read newspapers, books, memos and mail," wrote "speeches and press releases," snacked and napped, and "put their booted feet up" on the chairs "and sometimes even on the table."[416] Some defendants wore "blue jeans and sweat shirts" while "[t]he Yippies" wore "leather pants, sashes, headbands, beads and buttons."[417] Even though the defendants' version of ordinariness conflicted with courtroom convention, it caught the attention of the press. So did their attempt to present a cake to Bobby Seale on his birthday and their antics in blowing kisses and distributing jelly beans to the jury.[418] Nor did the defendants neglect the opportunity for "political theatre," as illustrated by their draping of the defense table with American and Viet Cong flags, while attempting to read the names of the war dead to honor the October 1969 Moratorium against the Vietnam War.[419] For the defense case, "a parade of well-known witnesses, prominent in literature, music, and politics"[420] also testified about the "festival of life" organized by some of the defendants during the Convention Week, as evidence of their intent to promote peaceful, nonviolent activity.[421] Ultimately, however, the jurors who wanted to convict on all counts were not persuaded by the defense portrayal.

The Seventh Circuit recognized that the chief prosecutor's narratives of violence went too far in two respects. First, his closing argument went "at least up to, and probably beyond, the outermost boundary of permissible inferences from the evidence," when he referred to the defendants, among other things, "as 'evil men,' 'liars and obscene haters,' 'profligate extremists,' and 'violent anarchists,'" and when likening defendants to "predators [who] always operate better

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416. LUKAS, *supra* note 96, at 27.

417. *Id.* (reference to "Yippies" is to defendants Abbie Hoffman and Jerry Rubin); s*ee* SCHULTZ, THE TRIAL, *supra* note 7, at 39 (noting how Seale distanced himself from his Yippie co-defendants by wearing "a blue turtleneck sweater and black pants," and by always sitting "apart from the other defendants and their lawyers at the defense table").

418. *See* LUKAS, *supra* note 96, at 34-35; CAHAN, *supra* note 113, at 173; *see also* Dee, *supra* note 103, at 87 (noting that, "without the antics, there was the risk that the press would simply ignore them" and their efforts to create support for the anti-war movement).

419. *See* Danelski, *supra* note 7, at 163-64 (describing how two defendants arrived in court to protest the revocation of bail for another defendant, while "attired in judicial robes," after which "they threw the robes on the floor and wiped their feet on them").

420. United States v. Dellinger, 472 F.2d 340, 354 (7th Cir. 1972).

421. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 183.

when it gets close to dark."[422] Second, the prosecutor improperly used his argument to contradict Judge Hoffman's instruction that the jurors "must not in any way be influenced by any possible antagonism [they] may have toward the defendants or any of them, their dress, hair styles, speech, reputation, courtroom demeanor or quality, personal philosophy or life style."[423] As the Seventh Circuit explained, the prosecutor effectively "urged the jury to consider those things," by telling the jurors that "they need not ignore 'how those people look and act'" or their "outbursts in the courtroom," even going so far as suggesting "similarity between" the defendants' behavior toward the marshals and the behavior they "allegedly used at the time of the convention with the police."[424]

Since defense counsel hoped for a hung jury, the defendants could afford to alienate most of the jurors as long as they could attract some hold-outs.[425] Even so, Kunstler and Weinglass recognized the danger inherent in trying the case in a courtroom filled with as many as twenty-five armed guards, whose presence indicated that the defendants must be dangerous to justify such a high level of security.[426] The defense objections to the courtroom atmosphere of an "armed camp" were unavailing, however.[427] As it turned out, the marshals also posed a different danger to the interests of the defendants, as revealed by two of the jurors in an interview for the *Evergreen Review*, which was

422. *Dellinger*, 472 F.2d at 390; *see* Dee, *supra* note 103, at 90-91 (describing the unsuccessful defense attempts to rebut the prosecution's negative characterizations of individual defendants with evidence such as their educational achievements, civil rights work, seminary experience, conscientious objector status, and beliefs in nonviolence).

423. *Dellinger*, 472 F.2d at 391.

424. *Id.* at 390-91; *compare* SCHULTZ, THE TRIAL, *supra* note 6, at 296-302 (providing excerpts from the U.S. Attorney's closing argument as context for his statement, "You cannot ignore the way people look or act."), *with* LUKAS, *supra* note 96, at 26 (noting that the *Chicago Sun-Times* reported that one juror described another as being "convinced that the defendants should be convicted because of their appearance, their language and their life style").

425. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 347-48 (describing the four pro-acquittal holdouts on the jury and the deliberations); LUKAS, *supra* note 96, at 26 (describing comments of three alienated pro-conviction jurors reported in *Chicago Sun-Times*, including criticisms that the defendants "needed a good bath and to have their hair cut," "had no respect for nobody, not even the marshals," "wouldn't even stand up when the judge walked in," and when told "to get their feet off their chairs, they just put them right back up again").

426. *See* KINOY ET AL., *supra* note 35, at 357 n.29.

427. *See* TALES, *supra* note 90, at 43-44, 59 (providing a transcript reflecting Judge Hoffman's denial of Kunstler's repeated objections to presence of numerous marshals as creating an "armed camp" that would qualify as reversible error under Supreme Court precedents).

published a few months after the convictions.[428] Based on the information presented in that story, the Seventh Circuit granted the defense request for an unprecedented evidentiary hearing while the appeal was pending.[429]

The evidence at this hearing showed that the jurors, who had been sequestered during the entire trial,[430] sent notes to Judge Hoffman during their deliberations to report that they were unable to agree on a verdict.[431] The judge remembered receiving the jury's notes, but he did not report their messages to the attorneys, nor did he keep either their notes or a record of their exchanges.[432] Instead, he sent a marshal to the jury room to instruct the jurors to keep deliberating.[433] Some jurors also remembered the marshal saying something like: "The judge can keep you here as long as he wants."[434] The marshal denied making this statement. The Seventh Circuit determined that it was not possible to resolve the conflict in the testimony regarding the marshal's statement. But Judge Hoffman's failure to share the notes with the attorneys was a different matter. Since the court could not find that the judge's communications with the jury were harmless, this conduct provided additional grounds for reversal.[435]

The court never considered the significance of one juror's receipt of payment from the *Chicago Sun-Times* for the publication of her article about the trial on the day after the jury issued the verdicts.[436] This article described the juror's role as the "negotiator" who succeeded in

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428. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 345-46 (describing his story published in the *Evergreen Review* in September 1970, seven months after the verdicts, based on his post-trial interviews with two jurors).

429. *See Dellinger*, 472 F.2d at 377 (describing the Seventh Circuit's remand to the district court for a hearing to "record the facts" concerning any communications by the marshals "in charge of the jury which may arguably have interfered with the jurors' exercise of impartial judgment").

430. *See* LUKAS, *supra* note 96, at 64 (describing how jurors stayed in Palmer House hotel under 24/7 supervision by marshals; they could not tune in to TV or radio broadcasts or read newspapers or magazines).

431. *See Dellinger*, 472 F.2d at 377-78.

432. *See id.* at 378.

433. *See id.*

434. *Id.*

435. *See id.* at 379.

436. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 351 (the juror denied any "direct communication" with the newspaper and testified that she did not know that her husband had arranged for the publication, but admitted that she "typed voluminous notes throughout the trial" in her hotel room); *id.*; *supra* text accompanying notes 264-265 (regarding the same juror's failure to reveal her engagement to a member of Mayor Daley's Administration); KINOY ET AL., *supra* note 35, at 524-25 n.17.

securing the unanimous vote to reject the conspiracy charge and convict five defendants on the substantive counts.[437] Four jurors gave up on holding out for acquittal, and after the verdicts were read, they wept together in the jury room. One of them told the others, "I just voted five men guilty on speeches I don't even remember."[438]

V. CODA: FLEETING GLIMPSES OF THE JURORS

The reporter for the *New York Times* framed the story of the verdicts in the Chicago Eight trial as a surprise, observing that most of the journalists in the courtroom, along with the defendants and their defense counsel, were "astonished" to learn that the jury had reached a verdict after forty hours of deliberation during four days of apparent deadlock.[439] In order to dramatize the moment of revelation further, after identifying the "foreman" and describing the reactions of each defendant to their convictions, the reporter called attention to the appearance of a single juror with these words: "Mrs. Jean Fritz, a housewife from Des Plaines, Ill., who was widely believed to be sympathetic to the defendants, seemed to have been weeping."[440]

That would not be Jean Fritz's last moment in the spotlight. She was a white juror and one of the four pro-acquittal jurors who believed that the defendants were innocent.[441] It was Mrs. Fritz and another white pro-acquittal juror, Mrs. Shirley Seaholm, who provided the interviews that prompted the Seventh Circuit's hearing to examine Judge Hoffman's communications with the jury during its deliberations.[442] Almost fifty years later, when her daughter decided to

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437. *See* SCHULTZ, THE TRIAL, *supra* note 6, at 326, 349; *see Dellinger*, 472 F.2d at 380 (finding it "difficult to suggest an analysis of the evidence" that "would support conviction of all five defendants on the substantive counts which would not lead equally to a conviction on the conspiracy count," and therefore found that the suggestion of compromise verdict was "plausible").

438. SCHULTZ, THE TRIAL, *supra* note 6, at 332.

439. J. Anthony Lukas, *Chicago 7 Cleared of Plot; 5 Guilty on Second Count*, N.Y. TIMES (Feb. 19, 1970) at 1, https://www.nytimes.com/1970/02/19/archives/chicago-7-cleared-of-plot-5-guilty-on-second-count-dellinger-davis.html.

440. *Id.* at 16.

441. SCHULTZ, THE TRIAL, *supra* note 6, at 318-28 (describing jury deliberations); *see id.* at 264 (reporting that the four pro-acquittal jurors "still believed that the seven defendants were innocent on all counts," while five jurors "still believed" that "all of the defendants including Froines and Weiner were guilty on all counts," and "[t]hree jurors were satisfied with the verdicts").

442. *Id.* at 340, 346 (citing John Schultz, *Like the Last Two People on the Face of the Earth*, EVERGREEN REV., Sept. 1970). For Jean Fritz's rare subsequent interviews, see HAYDEN,

read the journals that her mother kept during the trial, new details about one juror's views again became public.[443]

As recalled in her journals, Jean Fritz's jury service was challenging, not only during the trial, but also in the years that followed. After the trial, Jean Fritz and her husband "received hate mail and death threats" as well as threatening phone calls,[444] and some of her old friends "shunned her."[445] It gave her a "great sense of relief" when the Seventh Circuit reversed the convictions and no retrials occurred.[446]

When selected for the Chicago Eight jury, Jean Fritz was a middle-aged married woman with a high school education and three children. She worked with her husband at their Western Auto store, went bowling every week, taught Sunday school in a Methodist Church, and voted for Richard Nixon in the 1960 election.[447] After she served on the jury for four months, she was diagnosed with phlebitis. Despite the pain in her legs while she sat in the jury box, she decided that it was her duty to continue to serve on the jury.[448]

Jean Fritz was especially troubled by two aspects of the prosecution's case. First, she was skeptical regarding the testimony of law enforcement officials and informants, who "said they either threw away their notes or never even wrote any," but who then took the stand "and 'recite[d]' testimony like it all was yesterday." As she noted mockingly in her journal: "Never heard so many wonderful memories

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supra note 21, at 352 (describing interview with Jean Fritz for his book); EXTENDED INTERVIEW WITH JUROR JEAN FRITZ ON THE CHICAGO 8 TRIAL, PBS (June 22, 2010), http://archive.pov.org/disturbingtheuniverse/extended-interviews/8/ [https://perma.cc/3HEX-9KJ7].

443. Mary Schmich, *The Chicago Seven Put Their Fate in Her Hands. One Juror's Rarely Seen Trial Journals Reveal How That Changed Her Life Forever.*, CHI. TRIB. (Aug. 17, 2018, 8:40 AM), http://www.chicagotribune.com/news/columnists/schmich/ct-met-chicago-7-democratic-national-convention-mary-schmich-20180815-story.html (describing donation of journals to Edgewater Historical Society and exhibit in August 2018); *The Chicago 7 and the Historical Significance of the Jean Fritz Journals*, WOMEN AND LEADERSHIP ARCHIVES, LOY U. OF CHI. (Sept. 11, 2018), https://www.luc.edu/wla/stories/archive/jeanfritzandthe chicagoseventrial.shtml [https://perma.cc/XP2T-AHNL].

444. Schultz, The Trial, *supra* note 6, at 347.

445. Schmich, *supra* note 443.

446. *Id.*

447. *Id.*; *see* LUKAS, *supra* note 96, at 26, 99 (noting that the other eleven jurors included seven white women, two white men, and two [B]lack women; most of the jurors were middle-aged and most of the women were "housewives and widows"; the three other pro-acquittal jurors included one [B]lack woman and two white women).

448. EPSTEIN, *supra* note 5, at 355 (a doctor warned Fritz "that her life might be in danger" if she continued to sit on the jury, given her phlebitis condition); SCHULTZ, THE TRIAL, *supra* note 6, at 275 (Fritz wrote in her journals at night with her legs propped up on pillows).

in my life!!"[449] In addition, she "came to fear our government for the first time" because of the revelations at trial concerning the activities of the undercover agents whose testimony was central to the government's case.[450] In her view, "[n]o decent person" could be an informant and engage in "[b]ecoming friends, listening, joining in and then reporting to the police."[451] As she explained in the *Evergreen Review* interview:

> What was frightening to me . . . was that there are young people who will go to college and let their hair grow long and then report back. What is happening in our country when your roommate in college may be reporting back to the government? When the government can tap anybody's phone?[452]

During the jury deliberations, Jean Fritz also was troubled because she could "feel the hate" that the pro-conviction jurors had for the defendants. She found it was "unbelievable how [those jurors] never heard anything good about these defendants in [five] months."[453] Her own view of the defendants was more positive, although she felt they should have taken more responsibility for helping the

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449. Schmich, *supra* note 443; *cf.* LUKAS, *supra* note 96, at 58 (noting that forty government witnesses were either law enforcement officials, informants, city officials, or city employees; and "[t]hey were nearly perfect witnesses. Perhaps just a shade too perfect").

450. SCHULTZ, THE TRIAL, *supra* note 6, at 264 (noting that Shirley Seaholm shared Jean Fritz's views); *id.* at 265, 275 (noting that both jurors were afraid that their hotel rooms had been bugged during their sequestration in the hotel, and believed that they remained under surveillance after the trial); *id.* at 57 (describing the government's star witnesses who were members of the covert section, or "Red Squad," of the Chicago Police Department and adopted the undercover identities of a veteran member of Veterans for Peace, a student member of Students for a Democratic Society, and the bodyguard for one of the defendants).

451. Schmich, *supra* note 443.

452. SCHULTZ, THE TRIAL, *supra* note 6, at 265; *see* Schmich, *supra* note 443, at 8 ("I know we need police and am all for them. But I don't like people like this and have sure learned not to trust a lot of things . . . Am getting more afraid for our freedom every day that I sit here."); *id.* at 13 ("Many times I have felt that 'Big Brother' is getting too close for comfort . . . If I were in school I think I would be afraid to join any political groups."); *see also* DAVIS, *supra* note 279, at 142 (stating that the FBI "had more than 2,000 agents investigating the New Left movement" and "well over 1,000 paid undercover informants were in operation" in April 1969); *id.* at 129-59 (describing FBI's COINTELPRO activities against the New Left between April 1968 and April 1971); *id.* at 1-24 (describing burglary of FBI office in Media, Pennsylvania, when theft of files in March 1971 led to public revelation of COINTELPRO and to the program's demise); ARTHUR KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER 6 (1983) (explaining how warrantless wiretapping by FBI and DOJ occurred "constantly" between 1950s and early 1970s, but defense lawyers could prove it only rarely, government lawyers "invariably" denied it, and "[n]o federal judge would challenge the veracity and integrity of government lawyers").

453. Schmich, *supra* note 443.

demonstrators to escape Lincoln Park and avoid police beatings.[454] She noted that the jurors "as a whole have not had one half of the education as any of the [defendants],"[455] and she decided that the defendants were "far too intelligent . . . to be acting" as they did without good reason.[456] Instead, she concluded that they wanted "to show the world how in their opinion our courts, lawyers, and judges should be changed."[457] When Bobby Seale was chained and gagged, Jean Fritz wept.[458]

One reason that Jean Fritz and the other pro-acquittal jurors gave up on holding out for a hung jury was because they erroneously believed that a retrial would be inevitable[459] and that the next jury would convict on all counts.[460] Several months after the trial, Jean Fritz recognized how much these false assumptions mattered:

> If we had known that the government would not try this case again, or if we'd known about the contempt proceedings, we would still be in that deliberating room to this day if that was the way Judge Hoffman wanted it.[461]

After the trial, she confided in her journal: "Feel I didn't fight hard enough for what I believed."[462]

During the trial, Jean Fritz recognized how she had changed. She noted, "I used to make remarks about boys with long hair. Since I have been [on the jury], I have learned why some of them have it. Will never judge people again on their appearance."[463] She always regretted not going to college, and during the trial she resolved to "read about the

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454. *Id.*
455. *Id.*
456. *Id.*
457. *Id.*
458. SCHULTZ, THE TRIAL, *supra* note 6, at 63.
459. *Id.* at 322 (observing that Jean Fritz based this assumption on her service as an alternate juror in another case in which there was a hung jury and the defendant had been retried).
460. *Id.* at 318 (explaining that both jurors thought that Judge Hoffman's ambiguous references to contempt citations meant that the defendants would get only a "bawling out" from the judge); *id.* at 327 (noting that all of the pro-acquittal jurors came to believe that they must compromise and "that Judge Hoffman would not accept a hung jury").
461. *Id.* at 318; *see* EPSTEIN, THE GREAT TRIAL, *supra* note 5, at 299-300 (noting that Weinglass advised the defendants that they did not need to put on the costly defense case because the government case was so weak that jurors like Jean Fritz would not convict, but his advice was rejected because two defendants wanted the defense to present political arguments to the jury).
462. Schmich, *supra* note 443; SCHULTZ, THE TRIAL, *supra* note 6, at 327-28 (revealing that as the deliberations wore on, both jurors found it difficult to eat or sleep, felt almost hysterical at times, wept more than once, and wanted the deliberations to end).
463. *Id.*

Panthers when this is over."[464] After the trial, she bought many books and made good on her resolution. She also paid close attention to political candidates and she worked as an election judge.[465] Her politics changed, too. She "never voted Republican again."[466]

It is harder to find fleeting glimpses of the experiences of the two Black women on the jury, and these glimpses are reported only by those who saw them through white eyes. One Black woman was among the eight jurors who would have "convicted on all counts." The other was Mary Butler, a pro-acquittal juror, who felt that Seale "had a reason for" his outbursts and she did not "feel that he should shut up."[467] Mary Butler and the other three pro-acquittal jurors "found each other almost as soon as the trial began" and ate their meals together.[468] All of them had teenage children[469] and the pro-conviction jurors criticized them during deliberations for being pro-acquittal because of their sympathies for young people.[470] In Jean Fritz's view, the pro-conviction jurors "hated" their group of four.[471] Kay Richards, the white juror who sold her story to the *Chicago Sun-Times*, was distrusted by the group; it was only during the deliberations that she revealed her views as a pro-conviction juror.[472] When Richards asked Mary Butler "what she wanted to be called—a Negro? a black woman? a what?" Mary Butler answered, "Call me an American."[473] Like Jean Fritz, Mary Butler was ill during the trial. After the verdict, she was sobbing and weeping, like the other pro-acquittal jurors, who had become her friends.[474]

In one respect, Mary Butler shared common ground with the Black woman juror who would have convicted the defendants on all counts. All the jurors were called upon to testify at the hearing about their "hung jury" messages to Judge Hoffman during their

464. *Id.*

465. *Id.*

466. *Id.*

467. Danelski, *supra* note7, at 158; *see* HAYDEN, *supra* note 21, at 381; EPSTEIN, *supra* note 5, at 421 (describing Mary Butler's view, without attribution, as feeling "that the defendants were probably guilty of something, but not what they had been indicted for").

468. SCHULTZ, THE TRIAL, *supra* note 6, at 275.

469. HAYDEN, REUNION, *supra* note 21, at 370.

470. SCHULTZ, THE TRIAL, *supra* note 6, at 319.

471. Schultz, *The Substance of the Crime*, *supra* note 67 at 654; EPSTEIN, *supra* note 5, at 421 (describing Frieda Robbins's view of the trial as the fourth pro-acquittal juror, without attribution, as reminding her "of the persecution of innocent people by the Nazis," which made her "angry that such injustices were now committed in American Courts").

472. EPSTEIN, *supra* note 5 at 423; SCHULTZ, THE TRIAL, *supra* note 6, at 319.

473. SCHULTZ, THE TRIAL, *supra* note 6, at 275.

474. *Id.* at 332.

deliberations. Since it was Judge Hoffman who was ordered to take their testimony, appellate counsel for the defendants asked him to "read a simple statement" to inform the jurors "that they were not on trial and that the purpose of the hearing was to send the transcript of the testimony" to the appellate court.[475] Judge Hoffman denied the request.[476] The journalist who had authored the *Evergreen Review* interview was present at the hearing. Although these details do not appear in the Seventh Circuit's opinion,[477] he noticed that both of the Black women jurors testified that they did not recall the marshal speaking to the jury about the "hung-jury" messages or about anything else. The journalist also reported that he "found out" later that "one of the black women" told someone before the hearing that "she would never testify about the messages because she feared reprisal."[478] "I'm [B]lack," she reportedly said, "and I know how things happen."[479] If the story is true, it is another sign of the power of the white courtroom.

475. *Id.* at 346.
476. *Id.* at 347.
477. *See* United States v. Dellinger, 472 F.2d 340, 377-78 (7th Cir. 1972).
478. SCHULTZ, *The Trial*, *supra* note 6, at 353.
479. *Id.*