

# THE CHICAGO CONSPIRACY TRIAL: CHARACTER AND JUDICIAL DISCRETION

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## PREFACE

On October 29, 1969, sometime after two o'clock in the afternoon, following yet another heated exchange with defendant Bobby Seale in a courtroom full of spectators, reporters, and armed guards, Judge Julius Jennings Hoffman turned to a marshal and ordered: "Take that defendant into the room in there and deal with him as he should be dealt with in this circumstance."<sup>1</sup> Judge Hoffman described the aftermath:

In an attempt to maintain order in the courtroom, the Court thereupon ordered the defendant Seale removed from the courtroom at which time he was forcibly restrained by binding and gagging. The defendant Seale was then returned to the courtroom, but continued to shout through the gag. The Court then ordered the marshal to reinforce the gag. The gag was then reinforced and the defendant Seale was returned to the courtroom. Eventually the jury was allowed in the courtroom for the afternoon session.<sup>2</sup>

This spectacle lasted for three full days. Seale continued to shout through his gag, while trying to loosen his chains so as to regain blood circulation. Marshals, at the Judge's order, struggled to tie Seale more tightly to his chair and to increase the efficiency of the gag. One of the anguished defense attorneys denounced the sight as "medieval torture," and protested the fact that the courtroom had been turned into an "armed

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1. *United States v. Seale*, 461 F.2d 345, 385 (7th Cir. 1972) (quoting from the contempt citations listed in the appendix to the opinion).

2. *Id.* at 386; see also *In re Dellinger*, 370 F. Supp. 1304, 1310 (N.D. Ill. 1973).

camp."<sup>3</sup> Every hour the situation grew more grotesque and more alarming.

Overnight, the decision to bind and gag came to symbolize all that was wrong with the American justice system. It was widely publicized, served as the subject of endless drawings from the trial, and eventually inspired a scene in Woody Allen's film *BANANAS*.<sup>4</sup> Woody Allen, then a budding commentator on American popular culture, was clearly pointing to some similarities between the United States and certain regimes south of the border.

How should a judge exercise discretion under circumstances of extreme stress? How do other members of the professional community, before and after the event, assess that exercise of discretion? How does character interact with law, and how do both interact with context to provide for the particular exercise of judicial discretion? I wish to explore these issues through the lens of the Chicago Conspiracy Trial, and in particular, the decision to bind and gag Bobby Seale, chairman of the Black Panther Party, after he had repeatedly defied orders to let William M. Kunstler act as his defense lawyer in order to allow the trial to proceed.

Part I presents the facts and describes the way in which Federal District Court Judge Julius Hoffman exercised judicial discretion. Part II discusses his decision to bind and gag. Part III explores the question of character and examines how members of the professional community, law professors, judges of the Court of Appeals for the Seventh Circuit, and Justices of the Supreme Court reflected on law and character in the context of the exercise of judicial discretion of such magnitude.

## I. BACKGROUND

### A. *The Chicago Conspiracy Trial*

The year 1968 sent shock waves throughout the western world. In Prague, in Paris, in Berlin, and in Rome, young people were rising up against established government and the

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3. See Trial Transcript at 4,815, *United States v. Dellinger* (N.D. Ill. 1973) (69 CR 180) (hereinafter "Trial Transcript"); see also *Seale*, 461 F.2d at 386; JASON EPSTEIN, *THE GREAT CONSPIRACY TRIAL* 260 (1970).

4. *BANANAS* (United Artists 1971).

powers that be, demanding change and a more meaningful sense of liberty.<sup>5</sup> 1968 was also a traumatic year in American history. Martin Luther King, Jr. and Robert F. Kennedy were assassinated. Riots swept the inner cities. In Chicago, Mayor Richard Daley, alarmed and frustrated by the breakdown in law and order, instructed his police to "shoot to kill."<sup>6</sup> At the same time, the antiwar movement and the counterculture were gaining momentum and visibility. President Lyndon B. Johnson, devastated by his loss of political support, announced that he would not run for a second term.

In the summer of 1968, the Democratic Party held its national convention to choose a presidential nominee to replace Lyndon Johnson. The city became the site of shocking violence as forces of "the establishment" collided with "the protest movements." It was probably one of the nadirs of American politics, and perhaps a fitting metaphor for the political and civil strife that overwhelmed the country as the Sixties were coming to a close.

November 1968 saw Richard M. Nixon elected President of the United States. In Washington, D.C., a decision was made to put on trial leaders of the protest movements who were involved in the violent events in Chicago. Which federal crime would fit activities that at first glance looked like no more than a breach of the peace on the state level?<sup>7</sup> In 1968, Congress passed an anti-riot statute, shortly after the assassination of Martin Luther King, in response to riots in previous years.

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5. See generally ARTHUR MARWICK, *THE SIXTIES* (1998).

6. See ROGER BILES, *RICHARD J. DALEY: POLITICS, RACE, AND THE GOVERNING OF CHICAGO* 146 (1995). Following the assassination of Martin Luther King, Jr. and the riots in Chicago, Mayor Daley announced:

I have conferred with the Superintendent of Police [James Conlisk] this morning . . . I said to him very emphatically and very definitely that an order be issued by him immediately . . . to shoot to kill any arsonist . . . because they're potential murderers, and to issue a police order to shoot to maim or cripple anyone looting any stores in our city.

*Id.*; see also DAVID FARBER, *CHICAGO '68* 145 (1988). "The struggle between protesters and protectors of the social order at the 1968 Democratic Convention in Chicago framed the breakdown of both social order and political discourse in the 1960s. . . . Chicago '68 marked a crisis in the nation's political and cultural order." FARBER, *supra*, at xiii.

7. One might argue the violations of law and order in Chicago fell strictly within the state police powers to retain law and order, not within federal law enforcement jurisdiction.

The freshly enacted statute gave the government the federal crime it was looking for.<sup>8</sup>

Eight people were indicted of a conspiracy to cross state lines with the intent to incite a riot, as well as with individual counts of crossing state lines with similar intent.<sup>9</sup> Six of the alleged conspirators were prominent leaders of protest groups: David Dellinger of the National Mobilization Committee to End the War in Vietnam ("MOBE"), Rennie Davis and Tom Hayden of the MOBE and the Students for a Democratic Society ("SDS"), Abbie Hoffman and Jerry Rubin of the Youth International Movement (Yippies), and Bobby Seale of the Black Panther Party.<sup>10</sup>

From the beginning, the trial served as an arena for a showdown between the government and the protest movements. Electronic surveillance, speeches by the highest officials, and police presence around the defendants underscored the government's judgment that the defendants were dangerous enemies of the people and the state. For example, on March 22, 1969, two days after a federal grand jury in Chicago indicted the eight, President Nixon denounced the student re-

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8. See Allan L. Schwartz, Annotation, *Validity, Construction, and Application of Federal Anti-Riot Act of 1968 (18 U.S.C.A §§ 2101, 2102)*, 22 A.L.R. FED. 256 (1975). The statutory language is broadly crafted. Interstate travel, which is the trigger for congressional authority, is defined as "travell[ing] in interstate or foreign commerce or us[ing] any facility of interstate or foreign commerce including but not limited to, the mail, telegraph, telephone, radio, or television . . ." 18 U.S.C. § 2101(a) (1976). The offense is defined by the *intent* to commit any number of "overt acts" which include:

- (A) to incite a riot; or (B) to organize, promote, encourage, participate in, or carry on a riot; or (C) to commit any act of violence in furtherance of a riot; or (D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot . . . .

*Id.* Further, the statute provided for joint jurisdiction with the states in prosecuting offenders. See 18 U.S.C. § 2101(f) (1976).

9. The defendants Lee Weiner and John Froines were Chicago based. They were charged with building and teaching others to build incendiary devices to be used in a riot and disrupt interstate commerce.

10. The remaining two, Froines and Weiner, were Chicago-based academics who at the time were hardly known beyond their small circle of activists. If it is correct to theorize that the government put the leadership of the protest movements on trial, then the addition of these two may bear one of two explanations. It could be seen as an effort to target members of the young academic community, most of whom were sympathetic to the protest movements. Or it could be a clever plan to balance expected convictions with acquittals, thereby emphasizing that "justice" was done.

bellion and warned that, “[i]t is not too strong a statement to declare that this is the way civilizations begin to die.”<sup>11</sup> In a June speech in South Dakota, President Nixon said, “[o]ur fundamental values are under a bitter and even violent attack . . . . We live in a deeply troubled and profoundly unsettled time. Drugs, crime, campus revolts, racial discord, draft resistance—on every hand we find old standards violated, old values discarded.”<sup>12</sup> On June 13, in Chicago, the Justice Department admitted that it was conducting electronic surveillance of the defendants without a court order because they were threatening national security.<sup>13</sup>

The defendants, some of whom believed that a revolution was imminent and some of whom were masterful manipulators of the techniques of news management, were determined to turn this trial into yet another version of the classic American western where the little good guys fight the powerful bad guys.

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11. JONATHAN SCHELL, *THE TIME OF ILLUSION* 36–37 (1976).

12. *Id.* He continued to say that “[f]orce can be contained. We have the power to strike back if need be, and to prevail . . . . It has not been a lack of civil power, but the reluctance of a free people to employ it that so often has stayed the hand of authorities faced with such confrontations.” *Id.*

13. See EPSTEIN, *supra* note 3, at 108–13. The author discusses the impact of the then recent passage of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (codified at 18 U.S.C. § 2511(3) (1994)) which permitted electronic surveillance by state and federal authorities upon issuance of a warrant based on probable cause that criminal activity might be found. The most problematic feature of Title III was the exemption from the warrant requirement of “emergency situations . . . with respect to conspiratorial activities threatening the national security interest.” EPSTEIN, *supra* note 3, at 109 (internal quotation marks omitted). In the Chicago Conspiracy Trial, the government argued in a pre-trial motion that wiretaps that had been obtained by the government of the defendants’ conversations were protected under the national security exception, and that furthermore, “in matters of national security the executive branch, not the courts, makes the necessary interpretation of law, at least where electronic surveillance is concerned . . . .” *Id.* at 112. The Seventh Circuit, on appeal, did not pass judgment on this argument, claiming that the result would depend on how the Supreme Court ruled. See *United States v. Seale*, 461 F.2d 345, 365 (7th Cir. 1972). Indeed, the Supreme Court invalidated this rationale stating that the executive branch and law enforcement agents of the United States were subject to limitations of the Fourth Amendment, requiring a warrant even in cases of internal security. See *United States v. United States Dist. Ct.*, 444 F.2d 651, 664 (6th Cir. 1971). In August 1967 the FBI, under instructions of Director J. Edgar Hoover, established COINTELPRO—Black Nationalist/Hate Groups to “neutralize” prominent African-American activist groups. See WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS* 106 (1990). Hoover himself is quoted by the *New York Times* as saying that the Black Panther Party was “the greatest [single] threat to the internal security of the country.” *Id.* at 123.

Presiding over this explosive scene was seventy-four year-old Federal District Court Judge Julius Jennings Hoffman.

*B. Judge Julius Jennings Hoffman—A Brief Biographical Sketch*

Who was Judge Hoffman and how did he come to decide to bind and gag defendant Bobby Seale?

Born in 1895 Chicago to German Jewish immigrants,<sup>14</sup> Julius Hoffman earned his law degree in 1915 from Northwestern University Law School. After law school, he engaged in corporate legal practice until 1947, when he became a superior court judge in Cook County, Illinois. At the age of thirty-three, he married Eleanor Greenbaum, a wealthy divorcée with two sons. He remained devoted to her for the rest of his life (fondly addressing her as “my Supreme Court”), and while he could not be described as a doting father, he was certainly loyal to and caring toward his stepsons.<sup>15</sup>

Named after William Jennings Bryan, Judge Julius Jennings Hoffman matured to become a strong supporter of and generous contributor to the Republican Party. The Republican Party rewarded him with an appointment to the federal bench in May 1953, shortly after General Eisenhower was elected President of the United States. By 1969, Judge Hoffman was an experienced judge who had presided over a good number of criminal trials.<sup>16</sup> He had an intense interest in the law, writing book reviews and short articles, and he also taught periodically at his alma mater, Northwestern University Law School.

It is not clear why, out of all the federal judges at the Chicago District Court, Judge Hoffman was selected to preside over the Chicago Conspiracy Trial. Jason Epstein, in his book *The Great Conspiracy Trial*, writes that Hoffman was chosen

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14. I do think that Hoffman's Jewishness was relevant to his behavior at trial. I am exploring this issue in Pnina Lahav, *The Chicago Seven Trial and the Role of Law in Shaping American Jewish Identity* (work in progress) (on file with author).

15. Telephone interview with William Gardner, stepson of Judge Hoffman (July 9, 1998).

16. Judge Hoffman gained fame when he presided over the Krebiozen trial as well as several trials involving Chicago mobsters. *Hoffman, Julius Jennings*, in *POLITICAL PROFILES, THE NIXON/FORD YEARS* 303, 304 (Eleanora W. Schoenebaum ed., 1979).

"by lot, which is the normal procedure."<sup>17</sup> Epstein adds that "according to the courthouse gossips, he was chosen by [Chief Judge] Campbell, himself, especially for his notorious ferocity."<sup>18</sup>

What was it in Judge Hoffman's character that led him to the decision to bind and gag Bobby Seale in front of a jury in open court?

## II. THE DECISION TO BIND AND GAG

It is obvious, yet worth emphasizing, that the decision to bind and gag was not mandated by the law. Judge Hoffman had discretion to bind and gag, and one may ponder the various factors that go into decisions governed by judicial discretion in general, and into Judge Hoffman's decision in particular. One factor is whether the decision is fair or morally justified. Yet another factor is psychological: why did he choose that particular option out of all available options? I take the question of the relationship of law and character to involve a peculiar interaction between these questions: the inclination towards a particular legal option, as well as consideration of whether the option is fair, are shaped by the judge's character or psychological profile. At the same time, it is important to recognize that these factors do not operate in a vacuum, and that they are affected and influenced by the particular circumstances at the time.

The power to bind and gag an unruly defendant is indeed a part of the American justice system. Through a bizarre coincidence, the question of whether to bind and gag an unruly defendant came before the Federal Court of Appeals for the Seventh Circuit shortly before The Conspiracy Trial began. By yet another bizarre coincidence, that decision, without which Judge Hoffman presumably may not have decided to bind and gag Seale, was delivered on Judge Hoffman's seventy-fourth birthday. It is quite likely that without this "birthday gift," Judge Hoffman would not have thought of binding and gag-

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17. EPSTEIN, *supra* note 3, at 95.

18. *Id.* Campbell's decision, if indeed true, invites reflection on judicial discretion. When the situation is quite volatile, is a judge reputed to be a "hanging judge" the best choice for the task?

ging, or at least would have had serious misgivings about applying it. In *Allen v. Illinois*,<sup>19</sup> the Seventh Circuit held:

[W]e are of the view that the defendant should not have been excluded from the courtroom during his trial despite his disruptive and disrespectful conduct. The proper course of the trial judge was to have restrained the defendant by whatever means necessary, even if those means included his being shackled and gagged.<sup>20</sup>

A footnote to this paragraph added that the trial judge could use the power of contempt as well.<sup>21</sup> The power of a judge to order binding and gagging, then, was very clear and fresh in Judge Hoffman's mind. That brings us to a more profound level—the relationship between character and judicial discretion: if an action is perfectly legal, yet optional, how should a judge go about it?

The Seventh Circuit's *Allen v. Illinois* opinion was not unanimous. A dissent by senior Circuit Judge Hastings sounded an almost prophetic warning against the technique. Given the fact that the opinion had been written after the indictments against the Chicago eight were handed down, Hastings may well have had in mind the likelihood that the technique might be employed in the near future:

[I]f the majority holding becomes a prevailing constitutional precedent, then imagine the result that may occur in a criminal trial of multiple defendants who determined to 'raise hell' and disrupt the trial to the point of no return. Shackles, chains, gags and a courtroom full of deputy marshals engaged in trying to keep the defendants off the floor may prove to be the climax in following 'the proper course'. I cannot believe the Federal Constitution requires that any such farce take place.<sup>22</sup>

Thus, while the Seventh Circuit did uphold the power to bind and gag, there was at least one dissenting voice casting it in doubt. Should Hastings's warning have flashed a red light in Judge Hoffman's mind?

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19. 413 F.2d 232 (7th Cir. 1969), *rev'd*, 397 U.S. 337 (1970).

20. *Id.* at 235.

21. *See id.* n.1.

22. *Id.* at 236 (Hastings, J., dissenting).

Hoffman could not have benefited from the Supreme Court's ruling in the case of *Illinois v. Allen*.<sup>23</sup> That opinion, argued and decided less than six months after the Seale incident, upheld the option of binding and gagging of an exceedingly unruly defendant. Could that decision, in hindsight, have vindicated the exercise of discretion under the circumstances?

A careful reading of the Supreme Court opinion in *Illinois v. Allen* shows that it could hardly support Judge Hoffman's exercise of judicial discretion. Justice Black, speaking for the majority, emphasized that, "even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort."<sup>24</sup> Black listed three "inherent disadvantages" in the decision to bind and gag. It may affect the jury's feeling towards the defendants; it is a technique that amounts to "an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold"; and it obstructs the defendants' abilities to communicate with their lawyers.<sup>25</sup> Black then concluded: "However, in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acts as Allen did here."<sup>26</sup>

Despite their ethical reservations, the Justices thought that binding and gagging remained within the constitutional sphere. But the qualification built into this sentence, "in some situations which we need not attempt to foresee," may well give away the majority's judgment about the Seale incident. It does not seem likely that the incident escaped the Justices's attention. After all, Hoffman's restraint of Seale was extensively reported in the media, and it occurred primarily because of the holding by the Seventh Circuit in the very case of *Allen v. Illinois*, the case upon which Judge Hoffman relied in coming to his own decision to bind and gag. One should expect the event to have been fresh on the Justices's minds.<sup>27</sup> The fact that the majority confined the option to bind and gag only to "some

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23. 397 U.S. 337 (1970).

24. *Id.* at 344.

25. *Id.*

26. *Id.*

27. Justice Douglas's opinion in *Illinois v. Allen*, discussing political trials, is another indication that the Supreme Court was mindful of the relationship between this opinion and the Chicago Conspiracy Trial.

situations which we need not attempt to foresee" signals a deliberate judgment that Seale's binding and gagging could not be included in the roster of situations which would justify the technique. Concurring in the judgment, Justice Brennan added: "In particular, shackling and gagging a defendant is surely the least acceptable of [the remedies available to a judge]. It offends not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law."<sup>28</sup>

Two years after the Supreme Court ruling in *Illinois v. Allen*, Judge Edward T. Gignoux, then a Federal District Court Judge in Maine, was called to preside over the appeal of the contempt convictions of the Chicago Seven and their attorneys.<sup>29</sup> Gignoux acquitted defendants Rennie Davis, Tom Hayden, and Abbie Hoffman of the contempt charges imposed upon them because of their disruptive behavior on the morning of the second day of Seale's binding and gagging. He also acquitted Defense Attorney William Kunstler of the charge of contemptuous behavior related to this incident. Referring to the decision to bind and gag as an "authorized but drastic step,"<sup>30</sup> Gignoux observed:

[T]he official transcript, the tapes and the testimony of eyewitnesses demonstrate that the trial proceedings had so disintegrated on the morning of October 30 that no judicial proceeding could fairly be said to be in progress. The record further shows that the principal cause of this disintegration was the appalling spectacle of a bound and gagged defendant and the marshals' efforts to subdue him.<sup>31</sup>

Judges who upheld the legality of binding and gagging referred to the technique as a "measure of last resort," "least acceptable remedy," and "drastic."<sup>32</sup> Furthermore, Judge Gig-

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28. *Allen*, 397 U.S. at 350-51.

29. Following the severance of Bobby Seale's trial, Judge Hoffman continued to preside over the trial of the remaining seven defendants, who came to be known as the "Chicago Seven."

30. See *In re Dellinger*, 370 F. Supp. 1304, 1310 (N.D. Ill. 1973).

31. *Id.* at 1311.

32. To this one might add the silence of the Seventh Circuit remanding the contempt convictions of Bobby Seale for a new trial. The Court neither approved nor disapproved the technique of binding and gagging, referring to it instead only as "authorized by law."

noux explicitly painted a causal relationship between the deterioration of the trial into chaos ("no judicial proceedings could fairly be said to be in progress")<sup>33</sup> and the decision to bind and gag.

Harry Kalven, Jr., one of the most eminent constitutional law scholars in the United States at the time, called the decision "intolerable . . . politically reckless and intrinsically unfair".<sup>34</sup>

[T]here is the puzzle as to why Judge Hoffman resorted to binding and gagging Seale. It is apparent that it was possible to separate him, since in fact that was done. Why, then, did the judge insist on going through the binding and gagging stage? Surely it was apparent it would not work and would greatly upset the trial. Why could he not have stated a few days earlier that it had become necessary to separate Seale since he had no alternatives other than to discontinue the trial or resort to the intolerable one of binding and gagging? . . . It was politically reckless and intrinsically unfair to have permitted matters to get to such an impasse.<sup>35</sup>

If we accept this analysis, and it seems that there is a consensus among legal professionals that indeed this is the correct analysis,<sup>36</sup> then two conclusions follow. First, even though the power to bind and gag was legal, it was morally controversial and judicially problematic prior to the Seale incident. Even those judges who upheld it as valid were trying to distance themselves from it and to build fences around it by listing its "inherent disadvantages." Second, after the Seale incident a consensus developed that while binding and gagging could remain on the books as a technique to rein in an unruly defen-

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33. *Dellinger*, 370 F. Supp. at 1310.

34. Harry Kalven, Jr., *Confrontation and Contempt, Introduction to CONTEMPT: TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY* xiii, xxvi (1970).

35. Kalven, *supra* note 34, at xxvi.

36. See *Supreme Court, 1969 Term*, 84 HARV. L. REV. 90, 90-100 (1970) (discussing physical restraints of defendants in Part C(I): "Maintenance of Courtroom Decorum"); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMM. ON COURTROOM CONDUCT, DISORDER IN THE COURT 100-01 (1973) (concluding that binding and gagging should never be used at trial).

dant, it was a bad exercise of judicial discretion by Judge Hoffman in the context of the Seale case.<sup>37</sup>

### III. CHARACTER AND JUDICIAL DISCRETION

#### A. Character

Let me begin by dwelling on the concept of character. In his book *Judicial Power and American Character*, Robert Nagel took character to mean moral fortitude or rectitude.<sup>38</sup> But one may also understand character as a neutral concept, designating different temperaments or personality types. My own work tends to fall in the second camp and my reflections are rooted in the quest for understanding the various factors that make up the character of the judge and explain his or her decisions. In my study of Judge Hoffman, I explore the dark side of character that I take to be the opposite of what Nagel seeks to identify in his book. I believe that it is an important exercise, if only because it reminds us of the material we have to work against as we seek to enhance moral fortitude in society, whether through law or otherwise. One more caveat is in order. This paper focuses only on Judge Hoffman's character. It does not address the character of other participants in this drama and how their peculiar temperaments interacted with and affected the Judge. Nothing in my analysis below should be read as reflecting favorably on the character of the remaining "characters" in the Chicago Conspiracy Trial.

Abuse of discretion is certainly a mark of bad character. What accounted for such an abuse of discretion by the Judge? It was certainly not because he lacked judicial experience. Having served as a judge for twenty-one years (six years as a state judge and fifteen years as a federal district court judge), he had accumulated as much experience as a judge would need

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37. *But see* Seale v. Hoffman, 306 F. Supp. 330, 333 (N.D. Ill. 1969) (dismissing petition for declaratory judgment for failure to state a basis for jurisdiction: "While resort to such restraints [binding and gagging] is distasteful to all concerned . . . [n]o other remedy was available to the trial judge. This court therefore does not find that physical restraints placed upon a contumacious defendant under the circumstances involved here infringes upon a constitutionally protected right.").

38. See ROBERT F. NAGEL, *JUDICIAL POWER AND AMERICAN CHARACTER, CENSORING OURSELVES IN AN ANXIOUS AGE* 7 (1994).

to preside over any highly complex and controversial trial. Some might suggest that his Republican affiliation could have influenced him, that his instinct led him to side with the Nixon administration in its determination to crush the protest movements in general and the Black Panthers in particular.<sup>39</sup> But even this argument is not persuasive. Other Republican-appointed judges were involved in this case, such as Judges Gignoux and Pell, the latter himself a Nixon appointee, and they did not hesitate to condemn the practice or criticize the Administration's decisions.<sup>40</sup> It is also worth noting that while Judge Hoffman was a loyal member of the Republican Party, he did maintain cordial relationships with Democrats, including, for example, Justice Byron White.<sup>41</sup> It is highly unlikely

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39. Indeed, after the trial ended Judge Hoffman was invited to a public White House breakfast. See EPSTEIN, *supra* note 3, at 431.

40. Judge Pell issued a dissent in the Seventh Circuit Court of Appeals' upholding of the Anti-Riot Act in the trial. See *United States v. Dellinger*, 472 F.2d 340, 409-16 (7th Cir. 1972) (Pell, J., dissenting in part and concurring in part).

41. In May of 1964, Judge Hoffman was chairman of a Judicial Conference held in Chicago. In attendance was Justice Byron White, a Kennedy appointee to the Supreme Court. In a letter dated May 5, 1964, Justice White wrote to Judge Hoffman regarding an invitation to a luncheon that was part of the conference:

Dear Judge:

As far as I can tell at the present time, I will remain in Chicago on Wednesday and would be delighted to come to the luncheon for Nick Katzenbach. I am yet unsure about Wednesday evening, but it is doubtful that I shall remain over the dinner. Mrs. White will not be with me.

Sincerely yours,

Byron White

Letter from Byron White, Associate Justice United States Supreme Court, to Judge Julius J. Hoffman, District Judge Northern District of Illinois (May 5, 1964) (on file with the Chicago Historical Society). In another letter dated May 14, 1964, the day after the luncheon referenced in the above letter, Justice White writes:

Dear Judge:

That was a delightful occasion at lunch yesterday, and I do appreciate your including me. I regret having to leave before it was over, but, after looking at my desk this morning, it is well that I did.

Sincerely yours,

Byron

Letter from Byron White, Associate Justice United States Supreme Court, to Judge Julius J. Hoffman, District Judge Northern District of Illinois (May 14, 1964) (on file with the Chicago Historical Society). Judge Hoffman also maintained friendly relations with the Kennedy family. In a letter, dated January 27, 1961, during a period of convalescence, Joseph Kennedy writes to Judge Hoffman:

My dear Judge:

Thank you very much for your thoughtfulness in sending me your felicitations.

that he would, as a judge and as a politically savvy person, display a coarse, one-sided partisanship. Also, while Judge Hoffman's reputation was that of a "hanging judge," who put law and order above other values, he did not have a reputation of being a highly partisan judge. It is quite unlikely that he developed such opportunism on his seventy-fourth birthday. Some suggested that Judge Hoffman's considerable wealth had something to do with his hostility to defendants, mostly poor, who were quite vocal about their plan to upset the socio-economic status quo, but even this is not especially persuasive. Seventh Circuit Chief Judge Walter J. Cummings, overruling Judge Hoffman's contempt convictions of the Chicago defendants,<sup>42</sup> was equally affluent. Could it possibly be Judge Hoffman's advanced age? Age, the argument would go, breeds conservatism and encourages rigidity. However, Judge Hastings was seventy-one years old when he delivered his dissent in *Allen v. Illinois*. Justice Black was eighty-four years old when he permitted binding and gagging, while distancing the Court from such a method. Finally, one may argue that Judge Hoffman failed to understand that the trial was a major media event, in which he as a judge was playing an important role as a symbol of American justice. And yet, we know that Judge Hoffman was quite aware of his public role as a judge. In a speech a few years before, on the subject of being a Jewish judge in America, Judge Hoffman conceded that:

[A] Jew is always, everywhere, a symbol of his people. Whether or not he represents them officially or acts simply in his capacity as a judge, lawyer, businessman or bus driver, what he does is chalked up for or against the Jews as a whole. When a Jew offends against the law he injures all

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I am looking forward to seeing you on your winter vacation here at the Golf Club, and unless I improve, I will walk with you—I don't dare play with you.

With my warmest personal regards.

Sincerely,

Joseph P. Kennedy

Letter from Joseph P. Kennedy to Judge Julius J. Hoffman, District Judge Northern District of Illinois (Jan. 27, 1961) (on file with the Chicago Historical Society).

42. See *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972).

Jews. When a Jew administers the law excellently he also administers an antidote to anti-Semitism.<sup>43</sup>

In the instant case, it appears, Judge Hoffman was well aware of the intense publicity surrounding the trial and he was worried about his own reputation. For example, on the third day following the binding and gagging of Seale, defendant Tom Hayden filed a motion for adjournment to enable him to fly to California and discuss the crisis with Seale's attorney, Charles R. Garry. Jason Epstein describes what happened next: "[T]he judge granted the adjournment. He did however, propose a condition. He did not want Hayden to appear on television while he was in California and 'vilify' him. Hayden declined to give assurances that he will not speak publicly and yet the judge 'let him go.'"<sup>44</sup>

I am not arguing that judicial experience, political partisanship, social class, age, or awareness of the public aspects of one's job are irrelevant attributes to character formation. I would even add to this checklist ethnic background and the particular position in the judicial hierarchy.<sup>45</sup> Whether one is a trial judge facing events as they unfold, or sitting on appeal reflecting on past events, is also relevant. Any biographer knows that these factors are influential in salient as well as subtle ways. I am arguing that these cannot, by themselves, account for the interaction between character and law. Rather, there must be something deeper at work here, which affects the legal decision-making process, and which in turn may be nourished and shaped by factors such as experience, social class, and so on. One may call this "something else" the essence of character, or personality. Character, interacting with and nurtured by these other factors, as well as life experience, leads to a certain understanding of the situation, a certain interpretation of

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43. Julius Hoffman, Speech before the Jewish Federation Campaign, Dinner in Honor of Jewish Judges (Dec. 12, 1963) (transcript available at the Chicago Historical Society). Of course, one needs to bear in mind the distinction between theory and practice. As Justice Holmes warned us, "[g]eneral propositions do not decide concrete cases." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Not everything one understands as an abstract proposition will translate into actual implementation in practice. Judge Hoffman may have understood the significance of such a trial in the eyes of the public, and yet not have observed the principle in practice.

44. EPSTEIN, *supra* note 3, at 265.

45. See my analysis of the Jewish factor, *supra* note 14.

law and ethics, that encourages a preference for action, and that is what was at stake here.<sup>46</sup>

I suggest that Judge Hoffman possessed what is known as an authoritarian personality and that this propensity led him to his decision, which in fact turned all of his expectations upside down.

### *B. The Authoritarian Personality*

What is an authoritarian personality? Without getting into an elaborate psychological description, one can broadly state that it is a temperament valuing authority and finding comfort in its bosom; a temperament requiring "a simple, firm, often stereotypical, cognitive structure."<sup>47</sup> A "simple, firm, often stereotypical" character implies a heavy measure of rigidity, an aversion to nuance and ambiguity, and a preference for well-defined, fixed, and bright lines. It also implies a disposition towards order and hierarchy, a tendency to defer to the higher-ups, and an expectation of obedience from those below.

An extraordinary poetic rendition of the authoritarian personality, juxtaposed with a liberal type of cognitive personality structure, is found in Justice Brandeis's famous opinion in *Whitney v. California*.<sup>48</sup>

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed . . . that the greatest menace to freedom is an inert people . . . they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government. . . . Believing in the

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46. My reflections on this issue are greatly indebted to Hugh Baxter, *Auto-poiesis and the Relative Autonomy of Law*, 19 CARDOZO L. REV. 1989 (1998); see also DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997); Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 3 (1998).

47. THEODOR W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* 480 (1950).

48. 274 U.S. 357 (1927).

power of reason as applied through public discussion, they eschewed silence. . . .

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. [They were] courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government. . . .<sup>49</sup>

In *Whitney*, the state was arguing that a tough policy towards dissenters was necessary for the purpose of combating anarchy and maintaining order. Justice Brandeis responded with a theory of free speech. His position was that more speech, rather than suppression, would be the appropriate cure for fears of anarchy and instability. While discussing the values embedded in the first amendment, Brandeis offered two contrasting forms of government: the open society built on civic virtue and participation, and the closed society built upon orders delivered from above. Implied in these political forms were the contrasting characters of the persons inhabiting the respective regimes: the ideal citizen on the one hand, and the authoritarian member of society on the other.<sup>50</sup>

According to Brandeis, the ideal citizen was deliberative, thoughtful, hopeful, imaginative, courageous, self-reliant, and rational. The authoritarian character was arbitrary, cowardly, inert, fearful, repressed, full of hatred, silent, and irrational.<sup>51</sup>

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49. *Id.* at 375–77.

50. Vince Blasi, in his exploration of the relationship between character and freedom of expression, has relied on this very text in developing the profile of citizens who integrate the values of free speech into their everyday lives. See Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567, 1569 (1999).

51. Brandeis was a great admirer of the Athens of Pericles. Language he used in his *Whitney* concurrence was drawn from Pericles' funeral oration. See PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 242–44 (1984); see also Blasi, *supra* note 50, at 1582. (“[T]he greatest menace to freedom,” said Justice Brandeis [in his concurrence in *Whitney v. California*], ‘is an inert people.’ He might have added that in a liberal society such a people is also a great menace to order. That is why free speech, the arch-enemy of inertia, is so important.” (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (internal footnotes omitted))); Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451 (Winter 1988).

Brandeis envisioned America to be the fertile soil for the ideal citizen if it adhered to the values of the first amendment. Of course, it should immediately be emphasized that both the liberal and the authoritarian personality are ideal types. No one in real life conforms to such a description. As Laura Kalman points out in her essay, not even Brandeis himself could claim to be the ideal role model for the "perfect" American citizen.<sup>52</sup> Certainly, no one could claim that the founders, fathers of the Alien and Sedition Act of 1798, were models of an open mind.

Yet Brandeis did make an important theoretical observation about the typology of personality and its relationship to government. He thereby captured some important truths about the interaction between authoritarianism and suppression. On balance, and keeping in mind the caveat that Brandeis's description is a theoretical construct, it does appear that Judge Hoffman's character, as it emerges from his behavior during the Chicago Conspiracy trial, belongs to the family of authoritarian personalities.

Before I further discuss the authoritarian aspects of Judge Hoffman's character, let me focus on the circumstances of the trial. The context is essential to our understanding of the decision to bind and gag, as it is a vital part of understanding the interaction between law and character. Character, whether open or authoritarian, is affected by circumstances. The cross-fertilization between character and circumstances in turn shapes the content of the judicial discretion.

The trial was rooted in a massive challenge to the American order. In her biography of Justice Abe Fortas, Laura Kalman ably describes the extraordinary social unrest of the late Sixties.<sup>53</sup> Indeed, the summer of 1968 in Chicago made many fear for the stability and resilience of the American political system. The perception that anarchy and chaos were looming came to dominate the pre-trial proceedings. Electronic surveillance of the defendants and the FBI judgment that the defendants were dangerous subversives whose sparks may cause a conflagration were forcefully communicated to Judge Hoffman.<sup>54</sup> As the trial approached, rumors about plans by the

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52. See Laura Kalman, *Does Character Affect Judicial Performance?*, 71 U. COLO. L. REV. 1385 (2000).

53. See LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 277-318 (1990).

54. See *United States v. Dellinger*, 657 F.2d 140 (7th Cir. 1981); see also discussion *supra* note 13. Tom Wicker notes:

defendants and their attorneys to sabotage the trial and prevent a verdict were spreading. The defendants themselves did not help matters much. Their speeches and activities prior to and during the initial phases of the trial must have fed the expectation that they would attempt to undermine the trial just as they allegedly attempted to disrupt the 1968 Convention. For example, upon landing in Chicago, the defendants distributed a fund-raising program for the trial, called "the official pogrom," portraying the defendants and the prosecutors as opposing baseball teams—the Chicago Conspiracy and the Washington Kangaroos—in the "World Series of Injustice."<sup>55</sup>

It stands to reason that Judge Hoffman was worried about the trial and terrified of the possibility that it would slide into chaos. Like many Americans, particularly of his generation—and here age would be relevant—he must have been astounded and perplexed by the rage that gushed out of these young defendants and their supporters in the "movement." He must have been worried about the state of law and order. He must have felt enormous responsibility as a judge to make sure that the trial progressed forward smoothly, that no one succeeded in subverting it. He could have conceived himself as keeper of the gate of culture against the counterculture. If rumors that he was particularly chosen for the task were true, and if he were aware of being so chosen, then he must have felt immense pride and even more determination to prove that, in his courtroom, order and efficiency would not be compromised.<sup>56</sup>

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In its earliest weeks, the Nixon administration also moved to exploit new wiretap authority Congress had granted in 1968. With a judge's approval, anyone who had committed, was committing or was believed to be *about to commit* a crime punishable by a year or more in prison could be tapped or bugged. To protect 'national security,' that vaguest of grab-bag concepts, the president was also authorized to wiretap—*without* the concurrence of a judge—anyone or any group he believed to pose a threat.

TOM WICKER, *RICHARD NIXON AND THE AMERICAN DREAM*, 623–24 (1994)

55. See MARTY JEZER, *ABBIE HOFFMAN: AMERICAN REBEL* 199 (1992).

56. After the trial, Judge Hoffman complained, at least in family circles, that he was "set up" for this trial by his brethren. It is conceivable that he did not feel that way in the beginning of the trial. See Interview with William Gardner, *supra* note 15.

Judge Hoffman's fear of chaos, particularly chaos at the trial of which he conceived himself as "governor,"<sup>57</sup> exacerbated and underscored his authoritarian tendencies. In his first inaugural address, President Lincoln observed that anarchy was the opposite extreme of despotism.<sup>58</sup> An effort to combat anar-

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57. Judge Hoffman set the tenor of the trial very early in the proceedings. Several incidents reveal his authoritarian sense of governorship. First, at the arraignment on April 9, 1969, Charles R. Garry requested six months to prepare pretrial motions. The theory was that the prosecution had nearly six months to do their investigations and research and prepare the indictments, and the defense should be entitled to as much time especially in light of the number of defendants and lawyers. Judge Hoffman was disinclined to grant the request. In response to Garry's entreaties for more time, Hoffman responded, "Mr. Garry, the United States Supreme Court has said, if you don't know, that in the trials in the United States District Court, the District Judge is the governor of the trial." Trial Transcript, *supra* note 3, at A99-A100.

Another incident occurred in early October, during the cross-examination of a witness. Weinglass instructed the witness to answer "yes or no," prompting the following exchange:

The Court: The lawyer didn't like the answer. He instructed the witness to answer yes or no.

Mr. Weinglass: Yes, I felt the answer was not responsive. It isn't that I didn't like it.

The Court: That really is for me to determine, isn't it, or do you want to perform my functions, too?

*Id.* at 539. Then, in mid-October, when the trial was in its fourth week, one of the government's witnesses stumbled as he spoke, resulting in the following exchange: "there would be violence of the—what do you call it—of the blacks in Chicago." Kunstler interjected, soliciting comment from the judge who stated: "There are two persons. One is the lawyer, one is the witness. The witness is just as important as the lawyer in this courtroom. . . . You are not running this courtroom yet, Mr. Kunstler. Please bear that in mind." *Id.* at 3848.

Finally, when Bobby Seale first appeared in the courtroom bound and gagged, Judge Hoffman made the following statement to the jury:

Ladies and gentlemen of the jury, I must tell you that in a trial by jury in a federal court in the United States, the judge is not a mere moderator under the law, but is the governor of the trial for purpose of assuring its proper conduct, and fairness, and for the purpose of determining questions of law. Federal judges are not referees of prize fights [sic] but, rather, functionaries of justice. It is necessary on occasions to resort to stern measures in the trial of a case to maintain order in the courtroom. The law requires that the judge maintain order and to take such steps as in the discretion of the judge are warranted, and accordingly, the marshals have endeavored to maintain order in the manner that you see here in the courtroom.

*Id.* at 4770.

58. As Abraham Lincoln observed:

chy, he warned, is likely to result in despotism unless the governors are willing to act with flexibility and open-mindedness. Lincoln was talking about the governments of the states and the government of the Union, but one may well apply his insight to Judge Hoffman, the “governor” of the trial. Hoffman’s fear of anarchy made him progressively more rigid and less flexible in the exercise of his judicial powers. As a result, he came to make a series of decisions that gradually shrank his horizon and propelled him to the decision to bind and gag.

### *C. The Chain of Judicial Decisions*

The most obvious threat to the orderly progression of the trial was its starting date. The trial was set to start on September 24, 1969, with attorney Charles R. Garry as chief defense counsel and William M. Kunstler and Leonard Weinglass as co-counsel. At first, Garry asked for a continuance in order to complete other obligations he was carrying at the time. Judge Hoffman denied that request. Two weeks later, Garry requested another continuance, this time because he needed to undergo emergency gall bladder surgery. Judge Hoffman suspected that request to be yet another excuse designed to sabotage the trial. He denied it instantly and rather arbitrarily. Garry was indeed ill and in need of surgery. Upon Garry’s advice, Seale asked the Judge to let him exercise his Constitutional right to represent himself. Again, Judge Hoffman did not inquire why Seale did not feel confident in letting another attorney represent him, and denied Seale’s request summarily. Seale’s disruptive behavior during the trial (supervised and guided by Garry from his hospital bed), which eventually led to his binding and gagging, was directly caused by Hoffman’s re-

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Plainly the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or to despotism. Unanimity is impossible. The rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.

Abraham Lincoln, Inaugural Address (Mar. 4, 1861) (visited Mar. 30, 2000) (transcript available at <http://www.yale.edu/lawweb/avalon/presiden/inaug/lincoln1.htm>).

fusal to grant Garry a continuance and his insistence, despite Seale's protests, that Kunstler was Seale's lawyer.<sup>59</sup>

Judge Hoffman's determination to handle the trial with an iron fist, as if he were a coach leading a group of joggers through a tunnel, sternly forbidding any pauses or delays, was informed by the interaction between his authoritarian tendencies on the one hand, and the peculiar circumstances on the other hand. The more time passed and the more obstructive Seale became, the more Judge Hoffman must have felt, as a coach, that he should impose harsher disciplinary measures to coerce the unruly jogger into submission. He believed that with enough force he would make this defendant obey and accept Kunstler as his lawyer. As we know, this did not come to pass.

Here is the sequence of events leading to the binding and gagging:

April 9, 1969, Bobby Seale is arraigned in Chicago. Garry informs Judge Hoffman that he will represent Seale and others. Judge Hoffman schedules the trial to start on September 24, 1969.

August 27, 1969, during pretrial proceedings, Kunstler advises Judge Hoffman that Garry will be chief counsel. Request for continuance (so that Garry can complete other trials of dissidents) is denied.

September 9, 1969, Garry requests postponement until November 15 as he must undergo a gall bladder operation. Request denied. Judge Hoffman holds that other defense attorneys (Tigar, Birnbaum, and Bass) are available. To the argument that Tigar, et al., were only engaged in pre-trial motions and had filed only for a limited appearance, Judge Hoffman responds that "we don't have limited appearances in criminal cases."<sup>60</sup>

September 22, 1969, Kunstler files an appearance *pro tem* in order to gain access to the incarcerated Seale.

September 24, 1969, Kunstler files appearance on behalf of Seale but qualifies it by stating that defendants' view is that they are not fully represented in Garry's absence. Motion to allow defendants to make statements with regard to this point

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59. See *infra* notes 72-73 and accompanying text.

60. Trial Transcript, *supra* note 3, at 657; see also *United States v. Seale*, 461 F.2d 345, 349 (7th Cir. 1972).

is denied. Weinglass informs the court that Seale is without counsel. Judge repeats that Tigar, et al., as well as Kunstler, will be acting as counsel.

September 25, 1969, Seale learns that Garry is hospitalized for surgery and will not be at the trial.

September 26, 1969, Seale files a motion for continuance. Motion is denied. Seale decides to represent himself and unsuccessfully attempts to make an opening statement.

September 29 and 30, 1969, Attorneys Kennedy, Lefcourt, Roberts, Tigar, and Bass are granted leave to withdraw (as they had earlier filed limited appearance while working on pre-trial motions) after each defendant gives consent for these attorneys to withdraw.

October 20, 1969, Seale makes a pro se motion to represent himself. The motion is denied. Birnbaum (designated local counsel as required in the local rules of court) is excused from daily trial attendance. Judge Hoffman treats the motion as a motion to withdraw, but states that he will allow Birnbaum to rejoin the case at a later time if he so desires.

October 22, 1969, Kunstler presents a motion to withdraw as counsel for Seale. The motion is denied. Seale vehemently protests and attempts to represent himself. His efforts to act as his own lawyer repeatedly disrupt the trial. Judge Hoffman warns Seale that if he continues interrupting the proceedings strong measures will have to be taken.

October 29, 1969, Seale is bound and gagged. Defense Counsel points out that the courtroom is full of armed guards.

October 30, 1969, Judge Hoffman instructs marshals to tighten Seale's gag so as to ensure his complete silence during proceedings. Seale, displaying visible signs of discomfort, continues to protest through his gag.

November 3, 1969, A mistrial is declared. Judge Hoffman finds Seale guilty of criminal contempt and sentences him to four years imprisonment.

This chain of events proves that it is a mistake to focus on only one instance of judicial discretion. A review of the events leading to the decision to bind and gag, most of which occurred in rapid succession from the end of September to the beginning of November, discloses a complex web. These decisions, like dominoes, were building upon each other. What they all had in common was Judge Hoffman's steady determination not to seek explanations or clarifications from the defendants and their at-

torneys. Thus, the entire defense team to the trial was excluded from a dialogue with the Judge, which would allow it to air its reasons and concerns in open court. Judge Hoffman would not listen to arguments, whether they came from Seale, Kunstler, or any of the other individuals involved with the defense team. He had already made up his mind, knew what they were up to, and was not about to allow their "ploys" to interfere with the orderly progress of the trial. It would seem that Judge Hoffman increasingly bound himself up in his own decisions, until his own voice of reason was completely gagged and his ability to exercise meaningful discretion became paralyzed.

#### *D. Instances of Authoritarian Behavior*

A review of the trial transcript reveals numerous aspects of Judge Hoffman's heavy-handed approach towards the defendants, supporting my contention that his authoritarian character came to dominate his better judgment. For example, the transcript reveals several instances in which the judge admonished the defendants and their counsel to stop laughing. Because he himself had a sense of humor and enjoyed engaging the defense counsel in repartees (where he always insisted on having the last word), his prohibition on laughing may only be interpreted as an effort to keep the trial in a rigid and austere framework, excluding any spontaneity. At one point during the second week of trial, the following dialogue took place:

The Court: I have already admonished the marshal to see to it that order is maintained.

Mr. Kunstler: Your Honor, a bit of laughter is not disorder, and I think sometimes—

The Court: It is in this courtroom. This is either a serious case or it isn't. I don't waste my time.

Mr. Kunstler: I know but when your Honor makes a quip and people laugh, there is no such statement [objection] by the U.S. Attorney.

The Court: It is not intended to provoke laughter.

Mr. Kunstler: But it does your Honor, and we all know that it does.

The Court: I am not a humorist.<sup>61</sup>

After Bobby Seale had been severed from the trial, Judge Hoffman still attempted to maintain tight order in the courtroom despite his own attempts at levity:

The Court: I have done that [instructed that there be no laughing] often during the trial, and I have been told by counsel that they want to laugh. I do direct him again not to laugh in a manner that is loud. I don't object to a smile if something humorous, in the opinion of one who smiles, occurs, but I think in a trial, loud laughter is not indicated.

Mr. Kunstler: Your Honor, I just want to correct one impression. I didn't say people want to laugh. I said laughter is irrepressible sometimes when some testimony came from the witness stand. I happen not to have heard Mr. Dellinger at all today.

The Court: I don't remember your using that word.

Mr. Kunstler: Well, irrepressible laughter, your Honor, is known to all of us. It happens to human beings.

The Court: I wouldn't say irrepressible laughter is known to all of us. Don't count me in on everything. Just confine your opinions to yourself.

Mr. Kunstler: But I have seen your Honor laugh.

The Court: Laughter is not irrepressible to me if I don't want to laugh. I don't laugh out loud in a trial being conducted in the United States District Court.

Mr. Kunstler: But, your Honor, you have in this case. I have heard you.

The Court: No you haven't.

Mr. Kunstler: Your Honor—

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61. *Id.* at 657.

The Court: Oh, but you haven't.<sup>62</sup>

Another episode shows his tendency to infantilize members of the defense team. He lectured William Kunstler several times on the proper way the defense attorney was supposed to stand before the lectern. The tone of the rebuke was more that of a stiff schoolteacher than of an adult judge speaking to an adult attorney:

The Court: Mr. Kunstler, there is a great architect, Mies van der Rohe, who lately left us. He designed that lectern as well as this building and it was a lectern, not a leaning post. I have asked you to stand behind it when you question the witness.

Mr. Kunstler: Your Honor, I think the U.S. Attorney questions from this table here—

The Court: I don't permit lawyers to lean on that thing. I don't want you to do it. I have asked you before. That was put there by the government, designed by Mr. Van der Rohe, and I want you to use it for that purpose.

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Mr. Kunstler: Perhaps I am tired, Your Honor. What is wrong with leaning on it?

The Court: If you are tired then let Mr.—

Mr. Kunstler: Weinglass.

The Court:— Weinglass take over. Maybe I am tired, but I am sitting up here —

Mr. Kunstler: You are sitting in a comfortable chair.

The Court: I sit in the place where I should sit.

Mr. Kunstler: While I am standing up.

The Court: I will not permit you to lean on that.

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62. *Id.* at 7008.

Mr. Kunstler: May I place my hands like this, your Honor?

The Court: Yes. Yes. That is not leaning. Since you are tired, we will take a recess and you can go to sleep for the afternoon.<sup>63</sup>

Another characteristic of an authoritarian personality is the tendency to divide the world into “us” and “them,” to perceive the world in terms of a chauvinistic division between members of the tribe or the locality and the outsiders—one may call it lack of tolerance. Even though he was a federal judge applying universal United States law, Judge Hoffman repeatedly emphasized the “foreignness” of defense counsel William Kunstler. The following dialogue took place in the presence of the bound and gagged Seale:

The Court: He [Seale] is being treated in accordance with the law.

Mr. Kunstler: Not the Constitution of the United States, your Honor, which is the supreme law. He has a right to defend himself.

The Court: I don't need someone to come here from New York or wherever you come from to tell me that there is a Constitution in the United States.

Mr. Kunstler: I feel someone needs to tell someone, your Honor. It is not being observed in this Court, if that is the treatment a man gets for wanting to defend himself.

The Court: Read the books. You will find that the Court has the authority to do what is being done and I will not let this trial be broken up by his conduct.<sup>64</sup>

According to Judge Hoffman, the legality of the decision to bind and gag was itself a sufficient justification to order Seale bound and gagged. The facts that it could be perceived as constitutionally controversial, or that it might be morally objectionable, were not “relevant” in this context. Seale refused to

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63. *Id.*

64. *Id.* at 4939; see also DAVID T. DELLINGER, *THE TALES OF HOFFMAN* 67 (Mark L. Levine et al. eds., 1970).

accept the court's decisions that he could not represent himself and that Kunstler should act as his lawyer. Seale's insistence on his rights did not allow the trial to progress properly. These circumstances, Judge Hoffman believed, called for a drastic means, and that drastic means, approved by *Allen v. Illinois*, was binding and gagging.

At this point, we may return to Justice Brandeis's poetic defense of freedom in *Whitney v. California*.<sup>65</sup> The secret of freedom, said Brandeis, was the open mind. Deliberation, consideration, a willingness to re-evaluate time-honored principles, a readiness to engage with those we distrust and dislike—these were the guarantees of a robust society capable of growth and change. Transferred to the context of the trial, the Brandeis theorem would mean a more intense judicial attention to defendants' rights despite the distaste the judge was feeling towards the defendants and his suspicion of their motives.

Judge Hoffman could have made an effort to understand why Seale felt that only Garry could represent him faithfully. Had he been less concerned about the efficient progress of the trial and more concerned about the meaning of justice as integral to the concept of law, he might have made a different choice. Had he understood this particular trial as a showcase for the great debate then raging about whether the American justice system is bankrupt or whether it still has enough vitality to engage, learn, change, and overcome, he might have thought it expedient, even prudent, to award Seale as much dignity as possible. Had he been more attuned to the spirit of the time, he might have had more understanding for Seale's defiance. He could have turned the case into an example of how a federal court could bend over backwards to give a black rebel the recognition he was yearning for.

The interaction between his authoritarian character and the immense stress that Judge Hoffman was experiencing led him to believe that only he was representing reason and that all the irrationality was concentrated in the defense. Trapped within his own understanding of what was going on and unable or unwilling to open windows to other explanations, he made a bad initial mistake, and compounded it thereafter until he reached the point of no return in the binding and gagging episode. Put simply, he understood matters in black and white.

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65. 274 U.S. 357 (1927); see also *supra* note 51 and accompanying text.

Indeed, to exploit the pun, black and white was quite relevant in this situation. Could Judge Hoffman afford to ignore the fact that he was binding and gagging a black man? Could any judge in 1969 avert his eyes to the fact that Seale was the only black defendant on trial; that Seale was a man with high political awareness and a clear political message about the suppression of the black minority in America; that African-Americans had been engaged in an intense struggle to achieve civil rights throughout Hoffman's two-decade career as a federal judge?

Again, Justice Brandeis's admonition in *Whitney v. California* is germane: "men feared witches and burned women."<sup>66</sup> To paraphrase, men feared panthers and harassed African-Americans.

Judge Hoffman had good reason to fear the Panthers. As the trial was about to begin, the Vice President of the United States, Spiro Agnew, declared that the Panthers were a "completely irresponsible, anarchistic group of criminals," and the Justice Department announced that its "special Panther unit had spent the spring and early summer traveling from city to city to assist the police in preparing indictments against them."<sup>67</sup> The media was full of stories about the group, and several trials were then pending for Black Panther domestic terrorism.<sup>68</sup> A week after the beginning of the trial, two jurors

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66. *Whitney*, 274 U.S. at 376 (Brandeis, J. concurring).

67. See EPSTEIN, *supra* note 3, at 125.

68. See *id.*; see also MURRAY KEMPTON, *THE BRIAR PATCH: THE PEOPLE OF THE STATE OF NEW YORK V. LUMUMBA SHAKUR*, (1973) (chronicling the trial of the Black Panther 21). The indictment in this case:

declared that they [the defendants] had executed dynamite attacks on four police stations in the fall of 1968 and winter of 1969 and had thereafter planned to bomb a commuter railroad's Queens right of way, the Bronx Botanical Gardens, and the shopping crowds in five department stores on the day after the one on which they had been taken.

*Id.* at 14. All defendants were acquitted. See generally SARA BLACKBURN, *WHITE JUSTICE: BLACK EXPERIENCE TODAY IN AMERICA'S COURTROOMS* (1971). Blackburn records the following trials against members of the Black Panther Party across the United States for violent crimes: *Illinois v. Brenda Harris*; *California v. Huey P. Newton*; *California v. Charles Bursey*; *California v. Warren Wells*; *New York v. Alfred E. Cain*; *Connecticut v. Bobby G. Seale*. The threats felt by the Black Panthers permeated throughout local and federal governments. In 1970, when the Black Panthers requested use of the Washington, D.C. armory for their constitutional convention, access was denied by the District of Columbia Armory Board. The District Court did not find any violation of civil rights in the denial, and the Court of Appeals for the DC Circuit affirmed *per curiam*, stating:

received letters reading, "You are being watched, The Black Panthers."<sup>69</sup> While Seale denied any Black Panther involvement, and implied that the FBI must have been behind the letters, it is quite likely that Judge Hoffman perceived this as yet another terrorist menace. At that moment he no longer relied on his ability to handle the situation, and filled the courtroom with marshals instead. The number of marshals indicates that he felt physically threatened and that he did not experience himself as the self-reliant Brandesian man.

Seale, of course, did not help matters much. On the morning of October 29, the day he was bound and gagged, he addressed the audience before the session started. Anticipating that he might be bound and gagged, Seale advised his followers that if they were attacked they should attempt to defend themselves. The prosecution understood this as a threat to the state. A heated argument followed. Judge Hoffman then described the developments:

The defendant Seale then continued to speak after the jury entered the courtroom and the Court then excused them. After the jury left, the defendant Seale made the following comment to the Court: "Mr. Seale: If a witness is on the stand and testifies against me and I stand up and speak out in behalf of my right to have my lawyer and to defend myself and you deny me that, I have a right to make those requests . . . I have a constitutional right to speak and if you try to suppress my . . . right I can only see you as a bigot, a racist, and a fascist, as I have said before and clearly indicated on the record."<sup>70</sup>

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[i]ndeed, the very holding of a convention to draft a revised constitution is in itself an implicit acceptance of the rule of law and renunciation of extra-legal methods. But, as the District Court put it, 'The argument is if the Black Panthers are here, there will be trouble in Washington; not that they won't be peaceful, but somebody else may not.' Quite honestly on oral argument, counsel for appellants recognized that the authorities responsible for public order would mobilize the Guard as a precautionary measure when the Black Panthers and their allied organizations come to town to hold their constitutional convention, and that this would not be an unreasonable precaution, since the Black Panthers are a 'controversial' organization.

Jones v. Armory Board, 438 F.2d 138, 139 (D.C. Cir. 1970).

69. DELLINGER, *supra* note 64, at 20.

70. United States v. Seale, 461 F.2d 345, 383 (7th Cir. 1972).

Somewhat later that same morning, after a re-direct examination of a witness, Seale demanded to cross-examine. Judge Hoffman refused and tried to send the jury to lunch. Before the jury had a chance to leave, Seale said: "You have George Washington and Benjamin Franklin sitting in a picture behind you, and they was slave owners. That's what they were. They owned slaves. You are acting in the same manner, denying me my constitutional rights. . . ." <sup>71</sup>

The following exchange then ensued among Seale, Attorney Kunstler, and Judge Hoffman:

The Court: Well, I have been called a racist, a fascist—he has pointed to the picture of George Washington behind me and called him a slave owner and —

Mr. Seale: They were slave owners. Look at history.

The Court: As though I had anything to do with that.

Mr. Seale: They were slave owners. You got them up there.

The Court: He has been known as the father of this country, and I would think that it is a pretty good picture to have in the United States District Court.

Mr. Kunstler: We all share a common guilt, your Honor.

The Court: I didn't think I would ever live to sit on a bench or be in a courtroom where George Washington was assailed by a defendant in a criminal case and a judge was criticized for having his portrait on the wall. <sup>72</sup>

Seale forced the racial issue into the courtroom. He was pointing to the continuity between the contemporary judge and the Founding Fathers in his effort to explain why America failed to take the rights of Blacks seriously. By accusing Judge Hoffman of being a racist, he raised the stakes of the trial, portraying it as another step in the long history of abuse.

Based on what I know of Judge Hoffman, I doubt that he was a racist, at least not a racist in the way one understood ra-

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71. *Id.*

72. Trial Transcript, *supra* note 3, at 4758–60; see also DELLINGER, *supra* note 64, at 64.

cism then. He was a conventional man with the conventional consciousness of his time. He probably never socialized with Blacks, but he did grant them formal equality in his courtroom. In all likelihood, he never gave much thought to the relationships between whites and African-Americans, or to the chasm between slavery on the one hand and the ringing affirmation of equality in the Declaration of Independence on the other.

It is quite likely that it never occurred to him that there could be an alternative version of American history, where suppression replaced freedom as a dominant theme of the narrative. Unlike Kunstler, he could not process the notion that "we all share a common guilt." He must have been shocked to his foundations as a black man called him a racist and bigot in open court. His entire life experience was with Blacks who were polite and deferential, lacking in any chutzpah whatsoever. He must have been doubly shocked by the more general assault on the integrity of the founding fathers and their inspiring presence in the courtroom. This assault was the last straw. The black defendant who refused to obey his orders and insisted on assaulting decorum was now defiling the most sacred—the founding fathers of the Republic. He now came to see Seale as a wild, even demonic figure, who ought to be treated in the only language such people understand, or else civilization as we have known it would come to an end.

From this perspective, binding and gagging was designed to silence Seale in order to keep the voice of the old authoritative narrative of the American story intact. It was a mutation of the larger theme of defending conventional culture against the counterculture. To accomplish this, Judge Hoffman acted in the manner that all authoritarian personalities do—in silence and without consultation. No one except for the marshals knew that he was planning to have Seale bound and gagged that afternoon.<sup>73</sup> An authoritarian personality, as Brandeis had told us, needs neither consultation nor open processes.

Judge Hoffman was deeply wounded by the fact that his approach failed to keep the trial intact. For this he was planning to have Seale pay dearly. The separation of Seale from the rest of the defendants defeated his effort to try all eight

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73. Foran testified that he did not know that Judge Hoffman was planning to bind and gag that afternoon. See *In re Dellinger*, Trial Transcript at 3779-85 (N.D. Ill. 1972) (72 CR 925) (describing the retrial of the contempt charges).

“conspirators.” He harbored resentment and was determined to have his revenge. Judge Hoffman was also an experienced judge who knew how to skirt or interpret rulings that put obstacles in his path. In *Bloom v. Illinois*, Justice White, speaking for the majority of the Supreme Court, held that when the punishment for contempt exceeds six months, a jury trial of the contempt citations was required.<sup>74</sup> Hoffman decided to break Seale’s contumacious behavior into small pieces. For each piece Seale received a prison sentence of three months. Altogether, Seale was sentenced to four years in prison for a series of incidents amounting to contempt of court.

The Court of Appeals for the Seventh Circuit found that Judge Hoffman repeatedly abused his discretion in the Seale case. From the beginning, he should have engaged Seale, tried to find out what his reasons for rejecting the lawyers for the defense team were, and why he was insisting on his right to represent himself. Had he given Seale his constitutional right to be heard, he would have saved himself the notoriety associated with this trial.

If the Sixth Amendment right to the effective assistance of counsel means anything, it certainly means that it is the actual choice of the defendant which deserves consideration. This is not to say that Seale was unequivocally entitled to a continuance until Garry could be present. But if an inquiry disclosed that this defendant had never consented to be represented at trial by the other record attorneys in Garry’s absence, was unwilling to proceed with any counsel except Garry and was sincere in his position, other alternatives were available to the trial court. The grant of severance and a reasonable continuance to secure substitute counsel or leave to Seale to represent himself would have permitted the trial to continue promptly and may well have obviated many of the difficulties that later occurred.<sup>75</sup>

The Court of Appeals also held that the retaliatory nature of the contempt sentences was transparent and remanded the case for a new trial. The contempt sentences, all identical and

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74. See *Bloom v. Illinois*, 391 U.S. 194, 201–02 (1968) (stating that “the question is whether [criminal contempt] is a crime to which the jury trial provisions of the Constitution apply. We hold that it is, primarily because . . . there is no substantial difference between serious contempts and other serious crimes.”).

75. *Seale*, 461 F.2d at 358.

evidently arbitrary, again testified to Judge Hoffman's authoritarian character in this trial.

If a judge may wait until the termination of a trial to cite a contemnor with numerous specifications of contempt, penalizing each specified instance with a sentence of six months or less and thereby avoid impaneling a jury, the potential for abuse is obvious. Utilizing this procedure, any judge could review the record to single out "discrete" instances of contempt, impose up to six-month consecutive sentences for each instance and thereby imprison the contemnor for a theoretically unlimited term. He would, in effect, have the power to decide whether the safeguard of a jury should be interposed wholly apart from the total punishment he metes out.<sup>76</sup>

### *E. Men and Women of Fortitude?*

Judge Hoffman must have been too distressed and disoriented by the trial to give Justice White's opinion in *Bloom v. Illinois* a careful reading. In footnote four of the opinion, Justice White quoted approvingly: "That contempt power . . . is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir."<sup>77</sup>

This warning takes us to another great debate in American jurisprudence concerning the character of judges. In *Craig v. Harney*, another Supreme Court opinion about the contempt power, Justice Douglas, speaking for the Court, stated that "Judges are supposed to be men of fortitude, able to thrive in a hardy climate."<sup>78</sup> Justice Jackson, in dissent, was quick to observe that Douglas was engaged in wishful thinking:

But even worse is that this Court appears to sponsor the myth that judges are not as other men are. . . . I do not know whether it is the view of the Court that a judge must be thick-skinned or just thickheaded, but nothing in my ex-

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76. *Id.* at 353 (internal citations omitted).

77. *Bloom*, 391 U.S. at 202 n.4 (quoting *Sacher v. United States*, 343 U.S. 1, 12 (1952)). Justice White is referring to the contempt power over counsel, but his words are equally applicable to a defendant.

78. *Craig v. Harney*, 331 U.S. 367, 376 (1947).

perience or observation confirms the idea that he is insensitive to publicity. Who does not prefer good to ill report of his work? And if fame—a good public name—is, as Milton said, the ‘last infirmity of noble mind,’ it is frequently the first infirmity of a mediocre one.<sup>79</sup>

Douglas’ own history disproved his axiomatic theory. In his last year on the Supreme Court he

suffered a severe stroke, which . . . left him partially paralyzed, unable to control his bodily functions, and teetering on the edge of mental incompetence. As spring approached, . . . Douglas often fell asleep at oral argument or had to excuse himself from the chamber to recover from bouts of pain.<sup>80</sup>

Douglas was so eager to remain on the Court that he abused the constitutional guarantee of tenure for life. He did not possess the character to recognize that even he was dispensable.

There is no doubt that there are judges who are “men and women of fortitude,” but Judge Hoffman clearly was not one of them. Furthermore, the climate provided by both the government and the defense, was too hardy for him to handle. Instead of thriving, he became overexcited, almost manic, unable to exercise judicial discretion in a common-sensical and reasonable way. Ideally, he would have arisen to the occasion. One would have wished for him to have had enough rectitude and magnanimity so as to induce the defendants and their lawyers into cooperation and mutual respect. But he was the wrong man in the wrong place.

What then can one learn from this episode about character and the law? Evidently one cannot leave character to the art of idealization. Along with Justice Douglas we would all wish for judges to be men and women of fortitude. But we all must adhere to Justice Jackson’s warning that some are and some are not. Simon Agranat, the American-born Israeli Chief Justice whose biography I have written, presided over many criminal trials. He once told me that in order to do criminal law one

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79. *Id.* at 396 (Jackson, J., dissenting).

80. EDWARD P. LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 113 (1998).

must be a *mentsh* (a yiddish word meaning a human being in the moral and ethical sense). Many times, in interviews, Agranat repeated that in every criminal trial he would say to himself: "There, but for the grace of God, go I."<sup>81</sup> This approach seems more appealing than Douglas' rhetoric about "men of fortitude." Douglas elevated the judge to a position superior to that of mere mortals. Agranat advised humility, based upon a deep recognition of the powerlessness of the human will to shape circumstances or control the subconscious. Both the Douglas and the Agranat approaches are very different from the Hoffman approach as it appears from my description of his behavior during the trial. Hoffman possessed neither fortitude nor humility.

One lesson we should be careful not to draw is that Judge Hoffman was an exception among judges. Richard Polenberg, in his book *Fighting Faiths*, has described Judge Henry DeLamar Clayton, Jr., who presided over the *Abrams* case with as much authoritarianism; there are other examples as well.<sup>82</sup>

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81. PNINA LAHAV, *JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY* 74 (1997).

82. See RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT AND FREE SPEECH* (1987). Other authoritarian judges had speckled the landscape of both state and federal judiciaries. For example, Samuel Chase who was an associate justice of the United States Supreme Court was impeached for his behavior in 1805. Evidence adduced at the trial before the Senate revealed that "Chase was impatient, overbearing, and at times arrogant." WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 88 (1992). The articles of impeachment included such offenses as incorrectly applying the proper law, failure to grant litigants a continuance in order to prepare their cases, seating a juror who had voiced his predisposition against the defendant, requiring defense counsel to submit their questions in writing, and interrupting and harassing defense counsel. See *id.* at 76-77. Another example is Judge Francis J.W. Ford, District Judge in the District of Massachusetts, who oversaw the *Spock* trial. See *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969). Judge Ford's behavior raised such an uproar that he was condemned on the floor of the Senate by Senator Stephen M. Young of Ohio, who:

denounced the original convictions [after they had been overturned on appeal] "by a hand-picked all-male jury" and the "merciless severity" of the trial judge whom he [Sen. Young] likened to Hanging Judge Jeffries of the Star Chamber Assizes: "Judge Ford . . . takes a rating in my considered judgment as a tyrannical judge determined he would supplant the prosecution."

Even in a liberal regime committed to justice, such as the United States, one encounters the authoritarian judge. Experience, ethnic and social class, political sympathies, and age may mitigate or exacerbate the authoritarian tendency. More importantly, a hardy climate—a feeling that the republic is at risk, a fear of anarchy and chaos—may stiffen the judge and invigorate the authoritarian juices. We have seen it before and we may yet see it again.

The issue of the power to bind and gag could be easily resolved. Justice Holmes once advised that “can’t help[s].” In other words, it helps to know that a certain judicial option is not available and “can’t” be deployed. If the power exists, the temptation to use and abuse it follows. Depriving the judge of certain powers is helpful.<sup>83</sup> Had the Seventh Circuit adhered to the dissenting Judge Hastings and banned binding and gagging, American legal history would have been spared the traumatic Seale spectacle. However, this would be a cure of the symptom, not of the disease. Law can never escape the need to vest discretion in judges, and character is a crucial factor in the exercise of any discretion. Because of his authoritarian temperament, Judge Hoffman failed to understand that “in a hardy climate,” neither the law nor the power of coercion would en-

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JESSICA MITFORD, THE TRIAL OF DR. SPOCK, THE REV. WILLIAM SLOANE COFFIN, JR., MICHAEL FERBER, MITCHELL GOODMAN, AND MARCUS RASKIN, xi–xii (1969). He “runs a very tight ship indeed, a Charles Laughton commanding his *Bounty*.” *Id.* Another example is Judge Harold Medina, the presiding judge in the *Dennis* trial. See *United States v. Foster*, 9 F.R.D. 367 (S.D.N.Y. 1949). In that trial, Judge Medina cited each defendant and lawyer for between six and twenty-three counts of contempt, resulting in jail terms of six months per attorney. See STANLEY I. KUTLER, THE AMERICAN INQUISITION, JUSTICE AND INJUSTICE IN THE COLD WAR 158 (1982). Medina called the attorneys “liars,” “mealy-mouthed,” and “brazen.” See *id.* at 163. Justice Frankfurter, dissenting from the decision to uphold the contempt charges stated:

Throughout the proceedings, even after the trial judge had indicated that he thought defense counsel were in conspiracy against him and were seeking thereby to subvert the trial, he failed to exercise the moral authority of a court possessed of a great tradition. He indulged them, sometimes resignedly, sometimes playfully, in lengthy speeches. These incontinent wrangles between court and counsel were punctuated by occasional minatory intimations from the Bench. As in the case of parental warnings to children, feckless repetition deprived them of authority.

*Sacher v. United States*, 343 U.S. 1, 38 (1952).

83. See Paul A. Freund, *Social Justice*, in JAY KATZ ET AL., PSYCHOANALYSIS, PSYCHIATRY AND LAW 28 (1967). I am grateful to Alan Stone for directing me to this source.

dow him with authority. He was mistaken in thinking that law, with the help of the marshals, would assure his position as "governor of the trial." Authority had to be earned, through strict observance of impartiality, fierce loyalty to the principle of the separation of the judiciary from the executive branch, and firm recognition of the humanity and dignity of the defendants and their attorneys. In other words, he could have earned the respect for judicial authority through the careful use of discretion, but he did not have the character to do so.

What is the cure? There really is none that can be found in the law as we know it. Justice Brandeis's appeal in *Whitney v. California* is again pertinent: only a robust democratic culture can hope to produce persons of open character, civic responsibility, and a judicious temperament.<sup>84</sup> And yet the authoritarian character can never be eliminated, even in a flourishing Brandeisian culture. The only hope is that enough barriers may be created to prevent authoritarian judges from causing too much harm, and this, in turn, depends partly on the system of justice and partly on the culture itself. I couldn't put it better than Robert Nagel: "there is no shortcut through the judiciary that can substitute for self-respecting personal morality and vigorous political life."<sup>85</sup>

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84. See *supra* note 51 and accompanying text.

85. NAGEL, *supra* note 38, at 7.