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Contempt: Sacrilege in the Judicial Temple— the Derivative Political Trial

BY DONALD H. J. HERMANN*

"Introibo ad altare. . . ." "Oyez, Oyez, Oyez, All Persons having business. . . ." A hush fills the crowded room as the spectators ritualistically rise from their places in the hardwood pews which are tightly fastened to the floor. The attendants have taken their respective places; the subject of this solemn event stands beside those who will personally minister on his behalf during the performance of the ritual. Suddenly from a door behind an elevated table, much like the altar of Melchizedek, emerges the celebrant garbed distinctively in black robes. The gavel falls; the scene is complete for the start of a political trial.

I. THE POLITICAL TRIAL

There is in the United States a general refusal to recognize the existence of political trials.¹ It is argued that while all trials

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¹ See O. KIRCHHEIMER, *POLITICAL JUSTICE* (1961) [hereinafter referred to as KIRCHHEIMER]. Kirchheimer, late Professor of Government at Columbia University, presented a convincing exposition of the existence of political trials:

[M]any a jurist is likely to deny that there is such a thing as a political trial; to say that the thing exists and often entails consequences of importance is, in the eyes of such men of Law Immaculate, equivalent to questioning the integrity of the courts, the morals of the legal profession. These standard-bearers of innocence are apt to contend that where there is respect for law, only those who have committed offenses punishable under existing statutes are prosecuted; that alleged offenders are tried under specific rules determining how to tell truth from falsehood in the charges preferred; and that intercession of political motivations or aspirations is ruled out by time-honored and generally recognized trial standards which guide administration of justice among civilized or, to use a new more popular term, free nations. *Id.* at 47.

In a political trial all this has a different complexion. The judicial machinery and its trial mechanics are set into motion to attain political objectives which transcend both the bystanders' curiosity and the governmental custodian's satisfaction in the vindication of the political order. Court action is called upon to exert influence on the distribution of politi-

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may be "political" in the sense that the courts and other official agencies are political institutions which function to preserve order, resolve disputes and sanction private actions, there are, nevertheless, no "political trials" in the sense that individuals are tried for political action or belief.² This argument stems from the belief that constitutional freedoms such as freedom of speech and assembly permit full exercise of political freedom and that the courts are precluded from encroachment on political freedom. The immediate response to this is that all constitutional freedoms are subject to judicial restriction and this has been the case even with such "preferred freedoms" as speech and assembly.³ More-

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cal power. The objectives may be to upset—fray, undermine, or destroy—existing power positions, or to strengthen efforts directed at their preservation. Again, efforts to maintain the *status quo* may be essentially symbolic, or they may specifically hit at potential or full-grown existing adversaries. Sometimes it may be doubtful whether such court action really does consolidate the established structure; it may weaken it. Yet that it is in both cases aimed at affecting power relations in one way or another denotes the essence of a political trial. *Id.* at 49.

But see, K. DOLBEARE AND J. GROSSMAN, *LeRoi Jones in Newark: A Political Trial?* in T. BECKER, *POLITICAL TRIALS* 244 (1971):

Perhaps we should modify our definition to say that a "political trial" is merely one which is marked by one or more of the authoritative actors failing to perform the social control ritual within the range of "norms" for such behavior. The difference is in the style and procedure, not in the substance of what is being done, and this is the real distinguishing feature of political justice.

² See J. LUKAS, *THE BARNYARD EPITHET AND OTHER OBSCENITIES: NOTES ON THE CHICAGO CONSPIRACY TRIAL* 74 (1970) citing the record in the Chicago Conspiracy trial:

THE COURT: This is not a political case as far as I am concerned.

MR. KUNSTLER: Well, Your Honor, as far as some of the rest of us are concerned, it is quite a political case.

THE COURT: It is a criminal case. There is an indictment here. I have the indictment right up here. I can't go into politics here in this court.

MR. KUNSTLER: Your Honor, Jesus was accused criminally too, and we understand really that was not truly a criminal case in the sense that it is just an ordinary—

THE COURT: I didn't live back at that time. I don't know. Some people think I go back that far, but I really don't.

MR. KUNSTLER: Well, I was assuming Your Honor had read of the incident.

³ See *Schenck v. United States*, 249 U.S. 47 (1919), where the defendants were indicted under the Espionage Act of 1917 for sending to draftees a pamphlet quoting the thirteenth amendment and urging that readers of the leaflet resist the draft to "Assert Your Rights. . . . If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." Mr. Justice Holmes delivering the opinion of the Court formulated the now famous "clear and present danger test."

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present

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over, it cannot be denied that a crime such as treason is in essence a political crime and that a trial for this crime is of necessity a "political trial."⁴ While political trials usually involve criminal prosecutions, it is possible for a political trial to take on the

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danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. 249 U.S. at 52.

The latitude in degree of danger which might be sufficiently "clear and present" to suppress the exercise of freedom of speech or of the press was revealed in *Frohwerk v. United States*, 249 U.S. 204 (1919), where Mr. Justice Holmes, again delivering the opinion of the Court, did not require that there be any actual interference with the draft nor that literature or speech even reach a draftee or draft eligible man:

[W]e must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out. 249 U.S. at 209.

See also *Abrahams v. United States*, 250 U.S. 616 (1919); *Schaefer v. United States*, 251 U.S. 466 (1920); and *Gitlow v. New York*, 268 U.S. 652 (1925) in which Mr. Justice Holmes dissented in the application of the "clear and present danger test" to specific fact situations. In his dissent in *Gitlow*, Holmes observed:

If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way. 268 U.S. at 673.

See generally F. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. AM. HIST. 24 (1971). But see Mr. Justice Douglas' concurring opinion in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), reversing a conviction of a Ku Klux Klan leader under a state criminal syndicalism statute. Douglas argues against the maintenance of the "clear and present danger" test: "Though I doubt if the 'clear and present danger' test is congenial to the First Amendment in time of declared war, I am certain it is not reconcilable with the First Amendment in days of peace." 395 U.S. at 444.

⁴ See J. W. HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS* (1971). Hurst provides a definition of "treason" which reveals its core political element:

Treason is the betrayal of allegiance owed a political sovereign either because of citizenship or because of acceptance of the protection of laws. . . . The crime is the most serious against the safety of the state; but, by the same token, the stigma it carries, and the vagueness of its reach have made it a notorious instrument of arbitrary power and political faction. *Id.* at 14-15.

See also J. ARCHER, *TREASON IN AMERICA: DISLOYALTY VERSUS DISSENT* (1971).

form of a civil suit.⁵ The derivative political trial taking the form of a civil suit is exemplified by the trial of Alger Hiss who, although accused of espionage and ultimately convicted of perjury was himself the plaintiff in a defamation suit he initiated against Whittaker Chambers for statements made by Chambers outside the immunity granted by Congress.⁶ With treason and espionage, we have clearly recognizable political crimes which are specifically provided for in penal codes; conspiracy and incitement provide examples of broader criminal charges which are used for purposes of political prosecution.⁷ These latter offenses sweep broadly and permit prosecutions where "there is a meeting of the minds" even though there is no substantial activity on the part of those accused.⁸ The exercise of prosecutorial discretion may provide the occasion for a political trial; when a political motive is the compelling factor in the decision to prosecute, an apparently routine criminal prosecution is converted into a political trial.⁹ Finally,

⁵ See KIRCHHEIMER, *supra* note 1, at 46-53.

⁶ *United States v. Hiss*, 185 F.2d 822 (1950). See generally A. COOKE, A GENERATION ON TRIAL: U.S.A. v. ALGER HISS (1950).

⁷ See D.N. PRITT, LAW, CLASS AND SOCIETY—BOOK III: LAW AND POLITICS AND LAW IN THE COLONIES 16-19 (Lawrence and Wishart, London; 1971). Pritt writes generally of political trials in English speaking courts, and observes that the use of "conspiracy" and "riot" are easily adapted to the purposes of the political prosecution:

I will take next the group of offenses called "unlawful assembly, rout, and riot," which were long important in times of industrial trouble, and are still of some importance, and likely to increase in importance, since political demonstrations are growing more frequent and are regularly broken up by the police, with prosecutions to follow. . . .

It is easy to see how almost any joint action, peaceful or violent, by even a small number of people, for a political or any other purpose, can be charged as a conspiracy. Progressive judges, politicians and supporters of civil liberty in all countries applying the principles of English law have long protested against the use of charges of conspiracy to secure the conviction and imprisonment of persons against whom no specific offense could possibly be proved; but governments have continued to use this formidable and easy weapon. . . .

⁸ See generally Wechsler, Jones and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COL. LAW REV. 571-628, 957-1030 (1961):

Putting aside such special grievances as those based on the early condemnation of the labor union as a criminal conspiracy, and the use of the charge against political offenders, the general critique has pointed to the danger of a dragnet in the broad, uncertain ground of liability, the wholesale joinder of defendants, the imposition of vicarious responsibility, the relaxation of the rules of evidence, or some or all of these in combination. *Id.* at 957-58.

⁹ Selective enforcement of any law where discretion is used to achieve a political purpose creates a political trial. The problem of politically motivated enforcement is illustrated in F.H. Heussenstamm, *Bumper Stickers and the Cops*, TRANSACTION 32-33 (February 1971). Fifteen subjects, with exemplary driver (Continued on next page)

perjury and contempt may be the occasion for derivative political trials, where the original indictment theory fails and conviction is obtained on a charge of perjury or contempt growing out of the original trial.¹⁰

In order to obtain an understanding of a political trial, it is useful to examine the basis and objective of the prosecution of such cases. The state initiates such trials in order to punish and deter individuals from certain political acts such as treason or draft evasion which are political crimes and which are considered to be threatening to the existing political authority; or because the state wishes to make an example of the defendant, by selective enforcement of the law, in order to discourage the defendant and others from engaging in political activities.¹¹ It can be argued

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records, participated in an experiment involving the driving of automobiles with "bumper stickers in lurid day-glo orange and black, depicting a menacing panther with large BLACK PANTHER lettering" attached to the rear bumper of each subject car. Heussenstamm reports:

The first student [subject] received a ticket for making an "incorrect lane change" on the freeway less than two hours after heading home in the rush hour traffic. Five more tickets were received by others on the second day for "following too closely", "failing to yield the right of way", "driving too slowly in the high-speed lane of the freeway", "failure to make a proper signal before turning right at an intersection", and "failure to observe proper safety of pedestrians using a crosswalk." On day three, students were cited for "excessive speed", "making unsafe lane changes" and "driving erratically", and so it went every day.

One student was forced to drop out of the study by day four, because he had already received three citations. Three others reached what we had agreed was the maximum limit—three citations within the first week. Altogether, the participants received 33 citations in 17 days, and the violation fund was exhausted.

Heussenstamm concludes:

It is possible, of course, that the subject's bias influenced his driving, making it less circumspect than usual. But it is unlikely that this number of previously "safe" drivers could amass such a collection of tickets without assuming real bias by police against drivers with Black Panther bumper stickers. *Id.* at 33.

¹⁰ See text accompanying notes 39-44, *infra*. This problem is not unique to the United States, see International Herald Tribune, March 25, 1972, at 5, col. 2, where at a meeting of the Madrid Bar Association it is reported:

Lawyers have complained that they have been held in contempt of court for what they considered legitimate defense tactics, and that they were ruled out of order when questioning defendants on details of their arrest or treatment [in political cases].

¹¹ The purposes of the political trial have been categorized by reference to the type of offense charged. See KIRCHHEIMER, *supra* note 1, at 46, where the political trial is analyzed as falling into three principal categories:

- A. The trial involving a *common crime* committed for political purposes and conducted with a view to the political benefits which might ultimately accrue from a successful prosecution;
- B. The *classic political trial*: a regime's attempt to incriminate its foe's

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that all individuals from disadvantaged socio-economic backgrounds suffer unequal treatment before the law and hence are oppressed and victimized by judicial proceedings.¹² However, a

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public behavior with a view to evicting him from the political scene; and

- C. The *derivative political trial*, where the weapons of defamation, perjury and *contempt* are manipulated in an effort to bring disrepute upon a political foe. [emphasis added].

See also T. BECKER, *POLITICAL TRIALS* (1971), where Becker observes that: "In a sense, all trials are political. Since courts are government agencies. . . ."; but finds that the peculiar element which differentiates trials is a "perception of a direct threat to established political power" and this "is a major difference between political trials and other trials." *Id.* at xi. Given the existence of political trials, Becker finds them to be of four types:

1. Those cases where the nature of the crime is clearly political and the impartiality of the judge applying the law is not called into serious question.
2. Cases where the indictment is clearly political but the impartiality and independence of the court is questionable at the very beginning of the proceedings.
3. Cases where a charge is unpolitical or of a political nature but which are a subterfuge to disguise or hide real political motives.
4. Finally, cases which combine "hooked-up charges with a simultaneous implosion of judiciousness in the legal proceeding." *Id.* at xiii-xvi.

See also L. Friedman, *Political Power and Legal Legitimacy: A Short History of Political Trials*, 30 *ANTIOCH REV.* 157 (1970), where political trials are considered to be of three types: "cases which are politically *motivated*, those that are politically *determined*, and those which have substantial political *consequences*." *Id.* at 158.

¹² See C. Darrow, *Address to the Prisoners in the Cook County Jail in ATTORNEY FOR THE DAMNED* 13-15 (A. Weinberg ed. 1957). Where Clarence Darrow urged a view of legal prosecutions which was based on a view of social class and inequality in distribution of wealth:

Most all of the crimes for which we are punished are property crimes.

There are a few personal crimes, like murder—but they are very few. The crimes committed are mostly those against property. If this punishment is right the criminals must have a lot of property. How much money is there in this crowd? And yet you are all here for crimes against property. The people up and down the Lake Shore have not committed crime; still they have so much property they don't know what to do with it. It is perfectly plain why these people have not committed crimes against property; they make the laws and therefore do not need to break them. And in order for you to get some property you are obliged to break the rules of the game. . . .

The only way in the world to abolish crime and criminals is to abolish the big ones and the little ones together. Make fair conditions of life. Give men a chance to live. Abolish the right of private ownership of land, abolish monopoly, make the world partners in production, partners in the good things of life. Nobody would steal if he could get something of his own some easier way. . . .

See also W.E.B. DuBois, *THE AUTOBIOGRAPHY OF W.E.B. DuBois* 390 (1968). While it can be argued that such a cosmic view of the political trial, which would make all crimes political crimes because of social inequality, is justified; such a view necessitates a total social revolution. Even if such a revolution is to occur in the long run, political activists find themselves subject to prosecution and a narrower view of the political trial permits the civil libertarian to struggle for an open society where political dissent is possible. Of course, it may be true that political prosecutions are repressive acts which radicalize the populous and hasten the coming of "the revolution." There is, however, a certain element of faith required for the basic premise that the general citizenry in fact can be "radicalized."

narrower definition of political trials is more functional where one is seeking to isolate certain procedural and substantive aspects of judicial proceedings in efforts to criticize, reform and limit the oppressive effect of certain trials which have political ramifications and are viewed as political by the defendants.

Generally, criminal prosecutions are brought in order to deter, isolate, punish or rehabilitate individuals who threaten the health, safety, and welfare of other citizens and the social community. Crimes against persons and crimes against property provide general characterizations of those acts which serve as the occasion for trials of a nonpolitical character. The decision to prosecute and to sentence is made on an assessment of the impact of the criminal justice system on the defendant and his future conduct as well as the overall efficiency of the criminal justice system itself.¹³ On the other hand, the purpose of the political trial is to discredit and obstruct those who pose a threat to the integrity of the state and to those who hold political power.¹⁴ The state as

¹³ The function and objectives of the "criminal justice system" were described in the final report of the President's Commission on Law Enforcement and Administration of Justice:

Any criminal justice system is an apparatus society uses to enforce the standards of conduct necessary to protect individuals and the community. It operates by apprehending, prosecuting, convicting, and sentencing those members of the community who violate the basic rules of group existence. The action taken against lawbreakers is designed to serve three purposes beyond the immediately punitive one. It removes dangerous people from the community; it deters others from criminal behavior; and it gives society an opportunity to attempt to transform lawbreakers into law-abiding citizens.

U.S. PRESIDENT'S COMMISSION, REPORT ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, at 7 (1967). It may be said that some crimes against persons lack a victim and hence are directed at preserving a moral order [see e.g., DEVLIN, *THE ENFORCEMENT OF MORALS* (1965)] and that crimes against property have as their objective the preservation of an economic order [see e.g., DARROW, *CRIME ITS CAUSE AND TREATMENT* (1922)]. Such an analysis which may in fact be well founded operates to convert many offenses currently prosecuted into political crimes.

¹⁴ See K. Salter, *Book Review*, 58 CAL. LAW REV. 781 (1970), where in reviewing JESSICA MITFORD'S *THE TRIAL OF DR. SPOCK AND MARK LEVIN* et. al. (ed.) *THE TALES OF HOFFMAN*, it is observed:

The government is confronted with a serious ideological and political threat posed by the opposition of increasingly large and disparate groups. . . . The government's resort to the trial forum is a conscious and calculated choice among various alternatives. It is also an expedient and effective *method of discrediting opposition groups and arousing public sentiment against them*. . . .

The second function of the political trial [is] deterrence. . . . The object is to prevent this larger group from participating in demonstrations, from signing petitions, or from appearing on television lest they meet the same fate as the five defendants. Id. at 783. [emphasis added].

it is constituted acts to isolate particular individuals and to make examples of them in order to warn others not to oppose existing power. Under these circumstances harassment, isolation and exemplification seem to be the ends of the political trial.¹⁵

In determining whether a trial is political or not, the most difficult case for analysis is a prosecution in which political and criminal elements are intermixed; such a case occurs where a "demonstration" or "riot" involves both dissent and destruction of property or injury to persons. Here it may be difficult to separate the elements, but one may use the general approach here proposed by asking two questions: (1) Would a prosecution have been brought given different circumstances or objectives? (2) Does the designation "demonstration" versus "riot" hinge on the actor's objectives? For example, given destruction of property and physical injury, would a fraternity "panty raid" be treated the same as a "protest rally?" If not, a prosecution may be deemed political. A second approach requires that one look at the specific charge. Again given destruction of property or physical injury, should the charges be "malicious destruction of property" or "battery" or "trespassing?" Or are the charges "rioting" or "conspiracy to riot" or "traveling interstate with intent to riot?" In

¹⁵ Jessica Mitford in a concluding "postscript" to her account of the trial of Dr. Spock and his fellow defendants for conspiracy to counsel, aid and abet violations of the Selective Service Act [see generally *United States v. Spock*, 416 F.2d 165 (1969)], offers a sweeping condemnation of political trials as devices to silence political opposition:

A look at some of the more celebrated political trials of this century lends support to this view. Eugene Debs, Harry Bridges, Tom Mooney, the Rosenbergs and Sobell, and Alger Hiss all enjoyed every benefit but one of what we call due process of law. Their procedural rights were protected every step of the way: trial by jury, able, often distinguished counsel of their choice, interminable appeals all the way up to the Supreme Court—they were given every conceivable consideration, permitted to avail themselves of every legal remedy known to Anglo-American jurisprudence. In case after case, conviction after conviction, press and public never failed to point out with pride: "See what a marvelously fair trial we gave those scoundrels, those traitors!"

The one right they were denied was, of course, the most basic of all: the right not to be tried for dissent. For no matter how the formal accusation was styled ("perjury" in the case of Alger Hiss, "conspiracy to commit espionage" in the case of the Rosenbergs) behind these prosecutions lay the decision of government to move against what it deemed to be threatening and discordant voice of opposition to the established order.

J. MITFORD, *THE TRIAL OF DR. SPOCK* 239 (1969). But see H. Packer, *The Conspiracy Weapon* in *TRIALS OF RESISTANCE* 170 (1970). While Packer faults Miss Mitford for not distinguishing dissent cases such as Spock's from espionage cases such as Hiss', he concedes that there is no denial of the basic proposition that political trials are aimed at silencing and rendering impotent opposition.

other words, are the charges for typical criminal activity special crimes where the injuries or damages spring from politically motivated behavior and are the penalties for typically criminal behavior more severe where the motives of the defendant's are political? Where special crimes are charged or special penalties sought, there is a political prosecution.¹⁶

An illustration of how a political purpose can motivate official action is found in a poignant passage from Jean Anouilh's drama *Antigone*: Creon, refusing to bury the body of the dead brother of Antigone, argues that political power is the issue:

Creon: . . . God knows, I have things enough to do today without wasting my time on an insect like you. There's plenty to do, I assure you when you've just put down a revolution. . . . For it is a fact that this whole business is politics: the mournful shade of Polynices, the decomposing corpse, the sentimental weeping, and the hysteria that you mistake for heroism—nothing but politics.

Look here. I may not be soft, but I'm fastidious. I like things clean, shipshape, well scrubbed. Don't think that I am not just as offended as you are by the thought of that meat rotting in the sun. In the evening, when the breeze comes in off the sea, you can smell it in the palace, and it nauseates me. But I refuse even to shut my window. It's vile; and I can tell you what I wouldn't tell anybody else: it's stupid, monstrously

¹⁶ The objective here is to show that a choice of alternative charges for a particular act may reveal a prosecutorial intent to label an offense political rather than criminal. Such a choice may reflect a desire to obtain a more serious penalty for the offense in order to maximize the political benefits from the prosecution. Kirchheimer described the particular difficulty with prosecutions where a criminal charge and a political motive are intertwined:

[P]olitical issues may well pervade trials involving common crimes, that is, offenses which may have been committed by any member of the community for any one of a multitude of possible motives. Political coloring would be imparted to such a garden-variety criminal trial by the motives or objectives of the prosecution, or by the political background, affiliation, or standing of the defendant. Depending on political climate, judicial tradition, and general mores, the trial may specifically serve egotistic purposes of the groups in power by eliciting or publically recording information that sheds unfavorable light on political opponents. While giving maximum publicity outside the courtroom to whatever evidence damaging to the political foe should appear at the trial, governmental authorities or influential political groups will also have the chance to advertise strict adherence to the standards of law equally impartial to all, and to play down the political element within the framework of highly regular proceedings deserving of universal recognition.

KIRCHHEIMER, *supra* note 1, at 52. See also S. Krislov, *The Hoffa Case: The Criminal Trial as a Process of Interest Group Leadership Selection* in *POLITICAL TRIALS* 204 (T. Becker ed. 1971).

stupid. But the people of Thebes have got to have their noses rubbed into it a little longer. My God! If it was up to me, I should have had them bury your brother long ago as a matter of public hygiene. I admit that what I am doing is childish. But if the featherheaded rabble I govern are to understand what's what, that stench has to fill the town for a month!¹⁷

It is this symbolic matter of the prosecution which sets the political trial aside from other judicial proceedings. It is not a mere act or man who is tried but an idea, a movement, a political faction. The crime may be a political crime like treason, or it may be a routine criminal prosecution with a political purpose. The defendant will be symbolic and the trial will have ritual significance both to the state and to its opponents. The defendant is more than a personal threat to the state; he represents his faction or the ideology with which he identifies. The trial serves to purify the society of the dissident group and the threat of subversion it presents. Most often, the political trial is not conducted by the prosecutor and tried by a judge in any usual sense; rather, the state through a team effort of prosecutor and judge vindicate the interest of the status quo.¹⁸ The political trial in this context

¹⁷ *Antigone in Five Plays* 34-35 J. Anouilh transl. (1958). Howard Zinn, Professor of Government at Boston University, makes the point that failure to see the various functions of law leads one to see law as a "monolith" and to miss the essentially political objectives of some laws:

Seeing the legal system as a monolith disguises the fact that laws aimed at radicals, while pretending to protect the society at large, really try to preserve the existing political and economic arrangements. The Espionage Act of 1917 (even its title deceives us into thinking its aim is protecting the community) sought to prevent people from communicating certain ideas to soldiers or would-be soldiers which might discourage their carrying on a war. The Act begs the question of whether carrying on the war is a blessing to the society at large or a danger to it.

The Smith Act provision against teaching the violent overthrow of the government assumes the government is not evil enough to deserve being overthrown. The Selective Service Act assumes the draft protects us all when indeed it may take our sons to die for someone else's privileges. This is a small class of laws, but its psychological impact on the right of protest ("Watch your step, or else . . .") can hardly be overestimated. It stands ready for use any time dissidence threatens to become too widespread. The recent Chicago "conspiracy" trial is an example.

H. Zinn, *The Conspiracy of Law* in *THE RULE OF LAW* 27 (R. P. Wolff ed. 1971).

¹⁸ While the prosecutor may alone initiate and prosecute his case as a "political trial" without any assistance from the judge, it appears that where the defendant is viewed as a political threat to established authority, the judge and prosecutor act together to protect the established political authority. See K. Dolbeare and J. Grossman *LeRoi Jones in Newark: A Political Trial* in T. BECKER, *POLITICAL TRIALS* 227-247 (1971) [hereinafter referred to as Dolbeare and Grossman]. Dolbeare and Grossman are critical of Judge Kapp, the Newark, New

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occasions oppression, repression and censorship. The parties in the courtroom are mere puppets of the state whose performance warns dissidents or satisfies the populous.¹⁹ To the defendants

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Jersey trial judge who presided over the trial of LeRoi Jones for illegal possession of firearms following the Newark Riot:

To be sure, Jones himself was extremely provocative and, in the words of the sympathetic *New York Times* correspondent, Walter Wagoner, guilty of "unconscionable behavior" during the trial. But it seemed to many witnesses that Judge Kapp was holding Jones personally responsible for the riots and indeed for everything that was wrong with race relations in Newark.

If this had been just another trial, perhaps the judge would not have accompanied the case to another county. He might have let the prosecutor make his normal incidence of mistakes. He might have charged the jury on the state of the law and not on the state of the city or the veracity and patriotism of the police . . . *Id.* at 235-36.

It is hard to believe that LeRoi Jones was treated exactly like any other defendant charged with the same offense. Even allowing for the highly charged atmosphere and the tensions resulting from the multitude of riot trials, Jones was singled out for particular attention for allegedly committing a minor offense. There was determination to convict in every recorded action of Judge Kapp, and his interpretations of evidence, charge to the jury, and sentencing speech were beyond recognition as fair and impartial judging—notwithstanding the fact that they may have been legally permissible.

The important question is the determination of *why Judge Kapp chose to play the role of judge and prosecutor*. Did he perceive that this was expected of him as a vindication of the established white community and a mark of its refusal to accept any responsibility for the riots? Did he consider LeRoi Jones a threat to the peace and tranquility of the community and himself as the last bastion of defense? Did he think that making an example of LeRoi Jones would deter future rioters? *Id.* at 238 [emphasis added].

See also J. MITFORD, *THE TRIAL OF DR. SPOCK* 123 (1969), where Miss Mitford describes Judge Ford's intervention into the Spock Trial:

The judge is fond and fatherly toward the jury, he leans over them beaming, and sometimes we can tell from the clatter of masculine ha-ha-ha's that he has made a joke or two as he greets them in the morning. His manner toward Mr. Wall [the prosecutor] is hard to determine; we don't think he actually *likes* Mr. Wall, rather he seems to steer him as elder to novice. Often, he does not wait for Mr. Wall to object to a defense question, he anticipates him. "Strike it out! Go forward!" His voice, deeper than graveltoned, has the timbre of a truck shifting gears on a hill.

¹⁹ Dolbeare and Crossman, *supra* note 18, at 239. After examining the trial of LeRoi Jones, the authors conclude:

That LeRoi Jones was the defendant was probably an accident only in the sense that he happened to be arrested at the height of the conflagration. It apparently was no accident that the Newark authorities, realizing the value of the prisoner in their custody, sought to maximize the educational value of such an event.

Whether or not Judge Kapp was a formal and planned participant in the production of the spectacle, or whether he simply played the role he did for personal, perhaps subconscious, reasons, is largely unimportant. Being a man of conservative values, Judge Kapp obviously looked upon the defendant with contempt, as a threat to organized society, as a purveyor of what Judge Kapp thought was obscene literature and as a provocateur.

and their followers, the political prosecution is a vindication of their belief that they are the objects of calculated persecution. The political trial may produce a conviction but it has also produced a political martyr.

In the political trial the prosecution and court are merged into one as an attack on the state is an attack on the court.²⁰ The defendant in turn views the court as an instrument of state oppression and focuses on it his hostility toward the state.²¹ All

²⁰ See Dolbeare and Grossman, *supra* note 18, at 240, where the authors observe the merging of prosecutor and judge in the trial of Le Roi Jones:

In summary of these observations it can be said that both judge and prosecutor operated in the margins of the roles that they could normally have been expected to play, that their behavior was characterized by what seemed to be a single-minded determination to convict and severely punish LeRoi Jones, and this single-mindedness could not be explained with reference to the nature of the offense charged in open Court, but rather only with reference to the defendant's role as a severe critic of white society.

A related observation made by many commentators is that judges may attempt to limit the scope of argument in order to minimize the use of the court as a platform for social criticism. This maximizes the repressive advantages of the political trial to the state and minimizes the opportunity for the defendants to derive "propaganda" benefits. See H. Zinn, *The Conspiracy of Law* in *THE RULE OF LAW* at 85 (R. Wolf ed. 1971):

Not so mythical are the actual cases of political protestors hauled into court on ordinary criminal charges and prevented by the judge from airing the political grounds of their actions. (Theodore Mommsen put it well: "Impartiality in political trials is about on the level with Immaculate Conception: one may wish for it, but one cannot produce it." Quoted in OTTO KIRCHHEIMER, *POLITICAL JUSTICE*). It should make us all pause to know that within the space of a few months similar pronouncements were made in a court in Moscow and a Court in Milwaukee. The Moscow judge refused to let a group arrested for distributing leaflets in Red Square against the Russian invasion of Czechoslovakia discuss anything political; the only issue, he said, was: "Did they or did they not break the law in question?"

The Milwaukee judge similarly refused to let the priests who had burned draft records explain their motivation. The only question, he said, was: "Did the defendants commit arson, burglary and theft?" When one witness began to discuss the idea of civil disobedience, the judge interrupted him with what must be a classic judicial statement: "You can't discuss that. That's getting to the heart of the matter."

See generally J. Sax, *Conscience and Anarchy: The Prosecution of War Resisters* 52 *YALE REV.* 481 (1968).

²¹ See e.g., L. Weiner, *The Political Trial of a People's Insurrection*, in *THE CONSPIRACY* 195 (P. Abel, et al. ed. 1969). Lee Weiner, a defendant in the "Chicago conspiracy" case and a doctoral candidate in sociology at Northwestern University, is clear in his belief that the courts as they are instrumental in the political trial act as repressive institutions:

In political trials, court action may be initiated to influence the distribution of political power or to affirm the public order or, more drastic a move, to upset or destroy individuals or movements which threaten the state. Yet the decision to enlist the court in behalf of the political goals of men in power may not be a matter of necessity, but rather one of choice or mere convenience. *Id.* at 196.

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of this is aptly illustrated by *U.S. v. Marshall*,²² the Seattle conspiracy trial where the subject of the alleged conspiracy was an "attack on the federal courthouse" with the throwing of paint and rocks following the sentencing in the Chicago Seven Conspiracy trial of the demonstration leaders at the National Democratic Convention.²³ The court which was to try the Seattle demonstrators was the very court which had been the symbolic focus of their protest. The court viewed the defendants as a threat to the democratic system while the defendants in turn viewed the court as an agent of repression.²⁴

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Choosing to use the courts for political ends is also something of a convenience for a regime. It allows it to engage in a sanctified style of political warfare which sets restraints on its enemies and yet confirms the state's method of repression. The aura of legitimacy and fairness that is retained by even the most corrupt court can be used by the government to attack the character of political opponents, hamper their activities, and assert the correctness of the state's official interpretation of events. *Id.* at 197.

* * * *

As with the defendants in any political trial, we too recognize that the battle in the courtroom is not just about some specific activity of certain men or women. To appeal exclusively to our civil libertarian rights in the courtroom, or to simply deny our actions had wrongful consequences, would be to accept the political myths and definitions under which the old and sterile men now rule. Instead we must move as best we can to clarify a new political reality. Id. at 199. [emphasis added].

A more extreme statement based on a Marxist ideological view of law and political institutions is offered by Angela Davis and Bettina Aptheker in *A. DAVIS, et. al., IF THEY COME IN THE MORNING* 18 (1971):

A central conclusion we have reached in preparing this book, in fact, is that the entire apparatus of the *bourgeois democratic* state, especially its judicial system and prisons, is disintegrating. The judicial and prison systems are to be increasingly defined as instruments for unbridled repression, institutions which may be successfully resisted but which are more and more impervious to meaningful reform. Rather they must be transformed in the revolutionary sense.

²² *United States v. Marshall*, No. 51942 (W. D. Wash., filed April 16, 1970).

²³ Count I of the indictment in *United States v. Marshall*, *supra* note 22, charged that the defendants conspired:

To wilfully and unlawfully injure, and aid, abet, counsel and procure others to wilfully and unlawfully injure the property of the United States, that is, the United States Court House, Fifth Avenue and Spring Street, Seattle, Washington, and the Federal Office Building, First Avenue and Madison Street, Seattle, Washington, thereby causing damage in excess of \$100.00, in violation of 18 U.S.C. 1361 and 18 U.S.C. 2.

Counts II-VI charge defendants with traveling in interstate commerce "with intent to incite, organize, promote and encourage a riot" in violation of 18 U.S.C. 2101. See generally *L. Weiner, The Seattle Eight: What, Another Conspiracy?*, *THE NATION* 424 (November 2, 1970).

²⁴ See *Weiner, supra* note 23.

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In this setting, *contempt of court* becomes an inevitable consequence of the political trial as well as an instrumental device in its conduct.²⁵ The judge as the symbol of the state becomes the focus of the defendant's frustration and hostility and this antipathy is likely to take the form of scornful conduct. The judge as possessor of political power and an officer of the state views the defendant's attack on the state with alarm and he will be most sensitive to abuse by the defendants. The prosecution, no matter on what theory the case was initiated, must view the great potential for contemptuous conduct as an alternative basis for disposition of the case.

Arthur Niederhoffer and Alexander Smith of the John Jay College of Criminal Justice have provided an excellent analysis of the proud and the profane as they interact in the context of the political trial.²⁶ Here the judge is portrayed as considering himself and being considered as symbolic of the state.²⁷ A great temptation for the judge is succumbing to a pride derived from a sense of power and responsibility. The authors conclude that this temptation: "is stronger in a more serious or a more controversial case than a minor trial. When the charge is a serious crime the judge often drops the facade of objectivity and patience."²⁸ While the judge is viewed as inflated by a sense of power, the

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The warning which the government hopes liberals, radicals and would-be dissidents will read in both their federal charges is: don't get involved; don't participate, don't stick your neck out protesting social injustices or wars, because you never know when you'll be picked up and accused of deeds that could land you in prison for years. . . .

. . . Not all New Leftists in the Pacific Northwest are enamored of the Seattle Eight or the SLF [Seattle Liberation Front, a radical political organization]; yet the government's repressive legal action automatically raises them to positions of "spokesmen," "leaders," perhaps even "martyrs." *Id.* at 426-27.

²⁵ See Lukas, *supra* note 2, at 106, Lukas reporting on the Chicago Conspiracy trial for the *New York Times* offered the following evaluation of that proceeding as a political trial:

[I]t was the government that chose to fight an essentially political battle in court. Too often people ask whether the judge or the defendants were to blame for politicizing the trial. Undoubtedly both must bear substantial blame for other things. But the Justice Department and its allies in Chicago must bear this onus. Once that political prosecution was launched, it was probably inevitable that it should be met by an aggressive political defense and presided over by an openly political judge. *Id.* at 106.

²⁶ A. Niederhoffer and A. Smith, *Power and Personality in the Courtroom*, 3 *CONN. L. REV.* 233 (1971).

²⁷ *Id.* at 237-238.

²⁸ *Id.* at 240.

defendants, feeling weak and alienated, compensate by adopting a stance characterized by gall, brazenness and effrontery—a compensation for lack of power.²⁹ The alienated political defendant views himself as a symbol of the oppressed, and he directs his wrath at the judge who symbolizes the oppressor. While the defendant's wrath does not exceed the profane, it is directed at idiosyncrasies of the judge and attempts to exceed the limits of his tolerance. Conflict with the court is inevitable and always to the defendant's detriment. For the judge, rules of procedure and the contempt power, conclude Niederhoffer and Smith, are "camouflage to cover his conduct [so that it will appear] that his motivation is not neurotic aggression, but is an expression of his commitment to protect the system."³⁰

Tom Hayden, a defendant in the case of the Chicago demonstration leaders,³¹ has portrayed the defendant's attitude toward the court in the political prosecution:

The court in American society is something like a church. There is a widespread conspiracy to hold the court holy, above the world of sin and deals and power. It is to be treated with a special respect; quiet is to be observed by those who enter, and speech is only to follow formal procedure. The judge is a high priest possessed of a wisdom that mere citizens do not have. He wears robes, makes interpretations of obscure scriptures, and holds a gavel (like the cross) representing authority. He is referred to as "Your Honor" or "If the Court please . . .," much as the Pope is "His Holiness." Perhaps more than any other public institution in America, the court system demands an absolute conformity to its rules and its atmosphere. If citizens will only respect this institution, then all their conflicts can be sifted, negotiated, and resolved.³²

The political defendants' rejection of the court and judge follow almost inevitably from this perspective of the court as a vestigial institution perpetuated by and perpetuating the power of the

²⁹ *Id.* at 239.

³⁰ *Id.* at 241.

³¹ *United States v. Dellinger* [No. 69 Crim. 180 S.D. Ill. Sept. 26, 1969] is the case of the leaders of the demonstrations in Chicago following the 1968 Democratic Convention. The defendants were charged with violation of the section of the 1968 Civil Rights Act which prohibits travel in interstate commerce with intent to incite, organize, promote, encourage, participate in or carry on a riot, and with conspiracy to incite a riot. See 18 U.S.C. § 2101.

³² T. HAYDEN, *TRIAL* 97 (1970).

state. Hayden concludes that the ritualized court can be demeaned and its power challenged in the interest of political independence; this means an "attack on the courts."³³ The "attack on the courts" inevitably means citation for contempt.³⁴ Yet, even where the defendants have not so specifically formulated an ideological position, an attack or outburst is almost inevitable. The hostility of the political defendant must be expected.³⁵ This

³³ *Id.* at 97. The characterization of the courts as political instruments, leads to a rejection of their authority and thus to denunciation; Hayden illustrates this position by his plea for de-ritualization of the courts:

At the same time, everyone knows that this concept of the court is a myth. The court is political; the judges are elected or (in most cases) appointed by politicians. Behind those robes are men of political motivation: landlords, underworld figures, partisan manipulators. Nearly all of them are white, middle class, middle aged, conservative males. The laws they administer favor rich against poor, white against black, respectable against non-conformist.

When the courts are turned into a weapon against change, trials must be turned into an attack on the courts. Treating a trial politically means dealing with the courtroom the way it *is*, not the way it is ritualized.

See generally W. Schneir, *Desanctifying the Courts* in RADICAL LAWYERS 297 (J. Black ed. 1971) where the tactic of renunciation and demeaning of the court is exhorted:

By law, a trial is a public event witnessed by spectators and, by a far wider audience, through the press. Defendants in a political trial would be remiss if they did not use such a forum to explicate their political ideas, life styles, values, aspirations, ideas. . . .

Nevertheless, why all the high jinks, the refusals to stand up, sit down, take oaths, the use of four letter words, wearing judicial robes to court, bringing in birthday cakes, protests over bathroom facilities, the interruptions of the judge, calling him a liar, references to his wife's war industry stock holdings, laughing openly at his biased rulings and so on? Wasn't this so much kamikaze tactics, resulting in unnecessary jail terms for contempt and antagonizing some of the *Times'* law professors?

In response, I would submit that it was precisely these and innumerable other bits of theatre that were in fact the most politically significant aspect of the trial—though for some the politics probably was communicated on a subliminal level. For what occurred in Chicago was nothing less than the beginning of the desanctification of that holy of holies of American institutions: the federal courts.

To apply a simple definition, desanctification means to deprive a leader or institution of one of the most useful attributes for the exercise of power—the aura of being free from sin, purified, set apart from the ordinary, consecrated, dedicated, inviolable. It is worth noting that the related word, sanction, embodies concepts involving authority, law, and sacredness. . . .

Desanctification of the courts is a process essential to the building of a mass radical consciousness in America.

³⁴ While the United States Supreme Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of mere criticism of a judge or his decisions, but has held that such punishment can be justified by the application of a "clear and present danger" test of the obstruction of justice. See *Bridges v. California*, 314 U.S. 252 (1941), *Craig v. Harney*, 331 U.S. 367 (1947), and *Wood v. Georgia*, 370 U.S. 375 (1962).

³⁵ Ramsey Clark has attempted to explain the courtroom conflict in the case
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is compounded however by the frustration of the political activist who usually is compelled by court procedure to speak through an attorney who, no matter how competent, can never express fully the passion and outrage of the activist defendant.³⁶ The hostility and frustration of the political defendant who is wary of both attorneys and judges is aptly illustrated by repeated pleas by Bobby Seale, another Chicago conspiracy defendant, who repeatedly demanded the right to address the court and to examine witnesses:

Mr. Seale: If you let me defend myself, you could instruct me on the proceedings that I can act, but I have to just—

The Court: You will have to be quiet.

Mr. Seale: All I have to do is clear the record. I want to de-

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of the Chicago conspirators in terms of their preconceptions and consequent behavior:

Realize the principals came to court with their prejudices. Consider the impact of these on the trial. Suppose the defendants believed the trial was purely political—that there was neither the purpose nor the capability of sifting facts to find truth and applying clear and uniform rules of law to those facts. Suppose the judge, trained in law, religiously committed to respect for the system of law and the court as its highest priest, believed there was a deliberate, preconceived, continuing, and contumacious effort to humiliate by revolutionary forces? Might much of what happened flow from such attitudes? Add the sudden emotionalization from courtroom conduct appearing to confirm such prejudice and you may glimpse why what happened happened.

R. Clark *Preface* to CONTEMPT: TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY 10 at v (1970). [hereinafter referred to as CHICAGO CONTEMPT TRANSCRIPT.]

³⁶ See generally M. Burnham, *Ruchell and Angela Want to Represent Themselves*, in A. DAVIS, *IF THEY COME IN THE MORNING* 222 (1971):

Both Angela Davis and Ruchell Magee are demanding the right to represent themselves. . . . The reasons why Black defendants are increasingly turning to self-representation spring from the nature of an inherently racist, repressive, and class-biased judicial system. Many poor Black defendants feel compelled to represent themselves because they know that no lawyer is available to them who will present their legal case with aggressiveness and sensitivity. At the same time, other Blacks, charged with crime for overtly political reasons are also turning to self-defense in their constant search to find new forms of forcefully and effectively defending themselves and their movement.

Nor is the desire to self-representation in court limited to Black defendants, for instance radicals in the Seattle conspiracy chose to represent themselves and did a credible job. *Id.* at 231. See also Laub, *The Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court*, 2 *Duquesne L. Rev.* 245 (1964).

For authority which suggest that there may be limits on the right to waive counsel, see *Von Moltke v. Gillies*, 332 U.S. 708 (1948), holding in fact that there is a "strong presumption against waiver of the constitutional right to counsel;" and *Singer v. United States*, 380 U.S. 24 (1965), holding that a defendant has no absolute right to waive a jury trial.

fend myself in behalf of my constitutional rights.

The Court: Let the record show that the defendant Seale has refused to be quiet in the face of the admonition and direction of the court.

Mr. Seale: Let the record show that Bobby Seale speaks out in behalf of his constitutional rights, his right to defend himself, his right to speak in behalf of himself in this courtroom.

The Court: Again let the record show that he has disobeyed the order of the Court.³⁷

The exchange gave rise to contempt specification "number seven" with a three month sentence for Bobby Seale.³⁸

The inevitability of the outburst or attack provides the prosecution with an alternative basis for convicting the defendants. It is not without significance that both the Chicago³⁹ and Seattle⁴⁰ conspiracy trials concluded with contempt sentencing. Moreover, it should be noted that such judicial proceedings as the federal grand jury interrogation of Leslie Bacon,⁴¹ allegedly knowledgeable about the bombing of the United States Capitol building, concluded after several days of questioning with a contempt citation. The political defendant's conviction that the courts are agents of repression, the hostility and frustration with authority which characterize his personality, and the very life style of the contemporary political defendant dictate the outcome of any judicial proceeding: contempt of court.⁴² And prosecutors have

³⁷ *Supra* note 31, Trial Transcript at 3642, reprinted in CHICAGO TRANSCRIPT, *supra* note 27, at 11.

³⁸ *Id.*

³⁹ *Id.* See J. Clavir and J. Spitzer, *Contempt Proceedings in THE CONSPIRACY TRIAL* 579 (1970). See generally CHICAGO CONTEMPT TRANSCRIPT, *supra* note 27.

⁴⁰ United States v. Marshall, No. 51942 (W.D. Wash., filed April 16, 1970), contempt order entered in case by United States District Judge George Boldt on December 14, 1970.

⁴¹ See N. Y. Times, May 19, 1971 at 21, col. 5. Leslie Bacon was held in custody and required to give information with regard to the March 1, 1971, bombing of the United States Capitol building to a Federal grand jury in Seattle on the basis that she was granted "limited immunity" from prosecution. After answering questions for a number of days, Miss Bacon refused to give further testimony and was held in contempt of court. See N. Y. Times, June 8, 1971 at 15, col. 7. Miss Bacon was subjected to a second indictment growing out of the grand jury proceedings on March 24, 1972 when she was charged with perjury for her denial that she had been on the capital grounds the day before the bombing, see N.Y. Times, March 30, 1972 at 16, col. 4. Both "contempt" and "perjury" can be regarded as legal theories underlying the "derivative political trial," see note 43 *infra*.

⁴² See RADICAL LAWYERS 11 (J. Black ed. 1971), where the contemporary
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not missed this point. A prosecution theory like conspiracy or inciting to riot is fraught with difficulties; there are problems of proof as well as problems with recognized constitutional protections such as free speech and freedom of association. If the indictment theory fails, there is a good possibility of sentencing for contempt.⁴³ Otto Kirchheimer has suggested that the use of "contempt," provides a legal basis upon which a much broader scoped political trial can be maintained:

When courts are called upon more and more frequently to curb or suppress political conduct deemed harmful to the public order, artificial legal devices acquire special importance. Reprehensible political action is no longer limited to the two traditional types, the criminal offense as a political tool and the political offense proper. More and more, the courts have to deal with offense artifacts. No law can impose sanctions

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political activist's distrust in the courts and his sense of futility as he faces any trial is viewed as necessarily resulting in contemptuous conduct before a court in which he is a defendant:

Among radicals and revolutionaries, there is mounting contempt for the courts and the legal system. The courts, they say, are the courts of the capitalist system. They uphold the law—written and unwritten—of that system. It is futile to hope that a racist society will produce non-racist courts. It is a wishful fantasy to believe that a society that daily, and quite methodically, victimizes its poor will treat them charitably, let alone justly, in its courts. It is a fantasy to place faith in the bright beacon of the Supreme Court, or to invest in the hope that a single judge with "integrity" can check the ineluctable flow of the system.

See also Weiner, *supra* note 21, at 199, who clearly reflects the fact that the political activist's attitude toward the court derives from his underlying attitude toward authority in general; Weiner argues: "What we must fight to achieve in the court and in the streets is the evocation and maintenance of a vision and a reality which legitimizes a new form of struggle that links, and finally integrates an alternative cultural life-style with the systematic restructuring of political and social institutions in America."

⁴³ See Kirchheimer, *supra* note 1, at 44-46, who viewed "contempt" as an available legal device in political prosecutions: "The derivative political trial, where the weapons of defamation, perjury, and *contempt* are manipulated in an effort to bring disrepute upon a political foe" *Id.* at 46. Kirchheimer concurred in the view that difficulties with prosecutions for such crimes as treason and conspiracy compel resort to the use of contempt prosecutions; citing as authority a series of cases including *Watkins v. U. S.*, 354 U.S. 178 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Braden v. U.S.* 365 U.S. 431 (1961); and *Wilkinson v. U.S.*, 365 U.S. 399 (1961), Kirchheimer concluded:

[A]pplication of treason and espionage provisions, especially after settlement of the batch of World War II incidents—among them cases of United States' born propagandists stationed in enemy territory—has been rare. In addition, there is the constitutional twilight zone of sedition legislation of the last decades; *here are the inquisitorial machines for the production of contempt citations against uncooperative political deviants.* Application has depended on the trade winds of domestic political competition and pressures and on the corresponding see-saw battles in the higher federal courts. *Id.* at 44-45. [emphasis added].

upon all types of action which in some future situation may be taken to be criminally harmful. Often enough, the specific act which to the government seems the reprehensible expression of a prejudicial political attitude or action pattern is not punishable under the law, or is technically so elusive that it defies prosecution. Instead of the act itself, then, a substitute act is brought before the bar, viz. the verbalization—pinned down as perjured or defamatory [or contemptuous]—of a suspect pattern of attitude which may or may not have crystallized in a pertinent criminal offense. Action in perjury or defamation [or contempt] brings forth this prototype of the modern political trial. There is also a geographically limited subspecies: through the agency of contempt proceedings the political foe in America today is penalized for nonverbalization.⁴⁴

It is the inevitability of contemptuous conduct in the contemporary political trial which requires that the notion of “contempt of court” be examined to determine if from a judicial point of view it can be defined and limited so as to preserve the probability of an orderly trial without unduly providing the possibility of judicial oppression. Such a restriction on the notion and use of “contempt of court” may prove to be a device for breaking out of the vicious circle that would make the courts an instrument of political repression.

II. CONTEMPT OF COURT

In the introduction to a new edition of a standard work on contempt of court, Ronald Goldfarb observes:

[O]ne new and perhaps to be the hottest contemporary issue of the 1970's, involves the politicalization of the trial process and the challenge provided by contempt, which is as much a means of martyrdom and publicity for the contemnor

⁴⁴ *Id.* at 52-53. Kirchheimer writing in 1961 particularly had in mind the post World War II subversive cases where individuals were brought before legislative committees and the courts and ordered to testify; and where the individual refused, he was found in contempt. Nevertheless, the analytic scheme propounded by Kirchheimer is applicable to the contemporary political radical whose attitude toward authority, including the court, ensures that his required presence at the bar will almost inevitably produce contumacious conduct on his part.

as a way for judges to punish those who excessively demonstrate their feelings that "the system" is unfair or unjust.⁴⁵

The force of the contempt has been variously regarded. One contemporary commentator has labeled the contempt power: "the lifeblood of the judiciary";⁴⁶ while a state supreme court almost a century ago characterized the contempt power as: "perhaps [the] nearest akin to despotic power of any power existing under our form of government."⁴⁷ A definition of contempt which is reflective of that used by most American jurisdictions is provided by the United States Code: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as. . . . (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."⁴⁸

Traditionally contempt of court has been viewed as either civil or criminal and either direct or indirect.⁴⁹ Civil contempt proceedings are remedial and intended to force compliance with a court order that has been disobeyed; criminal contempt proceedings are instituted primarily for the purpose of punishing conduct which is disrespectful of the court and obstructive of the administration of justice.⁵⁰ The latter is the legal theory invoked at con-

⁴⁵ R. GOLDFARB, *THE CONTEMPT POWER* 15 (Anchor ed. 1971). For the common law development of "contempt" see Fox, *The Summary Process to Punish Contempt*, 25 L.Q.R. 238, (1920); Fox, *The Nature of Contempt of Court* 37 L.Q.R. 191 (1921).

⁴⁶ See Cohen, *The Contempt Power—The Lifeblood of the Judiciary*, 2 LOYOLA L.J. 69 (1971).

⁴⁷ State ex. rel. Ashbaugh v. Circuit Court, 72 N.W. 193, 194-5 (Wisc. 1897).

⁴⁸ 18 U.S.C. Sec. 401(1), 62 Stat. 701 (1948). See *Ex Parte Robinson*, 86 U.S. 205 (19 Wall.) (1873). See also 3 WHARTON'S CRIMINAL LAW AND PROCEDURE § 1277, *Interference with the Courts* 623 (1957): "The obstruction of the administration of justice is an indictable offense under the common law and by statute in many jurisdictions."

⁴⁹ See generally Dobbs, *Contempt of Court: A Survey* 56 CORNELL L. REV. 183, 186 (1971) [hereinafter cited as Dobbs].

⁵⁰ See *Gompers v. Buck Stove and Range Co.*, 221 U.S. 418, 441 (1911):

If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he

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tempt proceedings in most political trials; the denomination of contempt as criminal may have, as we shall see, significance in terms of the procedural safeguards that must be satisfied.⁵¹ Direct contempt involves conduct committed in the presence of the court; and indirect contempt arises from conduct which, although not occurring in or near the presence of the court, tends to obstruct the administration of justice.⁵² Contempt in political trials is generally of the direct type due to the general intent of the defendant to communicate his disdain for the court to both the judge and the public.⁵³ In analyzing contemptuous conduct

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had refused to do. . . . On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant . . . cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.

⁵¹ See generally Comment, *Invoking Summary Criminal Contempt Procedures—Use or Abuse?* *United States v. Dellinger—The "Chicago Seven" Contempts*, 69 MICH. L. REV. 1549 (1971). Rule 42 of the Federal Rules of Criminal Procedure exemplifies the authority invoked for conduct condemned as contempt in the political trial; Rule 42 *Criminal Contempt* provides in part:

- (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
- (b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

⁵² An action for direct contempt is provided by *Clark v. United States*, 289 U.S. 1 (1932), involving concealment or misstatement by a juror upon a *voir dire* examination; an action for indirect contempt is provided by *Cooke v. United States*, 267 U.S. 517 (1925), in which conduct involving a denunciation of a judge would have been regarded as contempt if it had taken place in open court was held to be contempt even though the denunciation took the form of a letter sent to the judge's chambers.

⁵³ See generally *Disruption in Our Courts: Why?* TRIAL 12 (January-February 1971).

in the context of the contemporary political trial it may be best to consider conduct from another perspective: that is obstruction versus insult. There is a distinction between conduct which interferes with the orderly administration of justice, and conduct which affords an affront to the dignity of the court.⁵⁴ While obstructive conduct is often offensive conduct, it may be that certain conduct is offensive while not obstructive and if the categories are distinguishable, there may be reason for the court to differentiate conduct for the purpose of deciding the appropriateness of punishment.

The need to preserve courtroom order is essential to the existence of a forum in which disputes may be settled and in which conflict between an individual and the state can be resolved.⁵⁵ Conduct which directly interferes with or prevents the orderly conduct of judicial proceedings strikes at the heart of the legal system.⁵⁶

⁵⁴ See Dobbs, *supra* note 49, at 189 and 192 where a distinction is drawn between "obstruction and disruption" and "insult":

Actual disruption of judicial proceedings by noisemaking, assaults, or other physically disruptive acts is a relatively small problem in the total contempt picture. Probably more common is the challenge presented to the administration of justice through distortion or blocking of its processes—obstruction rather than disruption. The distinguishing characteristic of obstruction cases is that the contemptuous act tends to subvert fairness or efficiency without the direct challenge of disruption. In general, this may include such acts as bribery, interfering with execution of process, and other subversive rather than confrontative acts. *Id.* at 189.

A number of cases, however, seem to assume that the precincts of the court are hallowed, and perhaps that even the judge himself carries an aura of privilege. *Id.* at 192.

⁵⁵ See AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS ON DISRUPTION OF THE JUDICIAL PROCESS 4 (1970) [hereinafter cited as AMERICAN COLLEGE OF TRIAL LAWYERS REPORT]:

In administering justice, courts are required to perform two difficult tasks: discovering where the truth lies between conflicting versions of the facts, and applying to the facts so found the relevant legal principles. These tasks are as demanding and delicate as a surgical operation, and, like such an operation, they cannot be performed in an atmosphere of bedlam.

⁵⁶ See *Rex v. Almon* (1795) (undelivered opinion of Sir John Wilmont, subsequently Lord Chief Justice of King's Bench). J. WILMONT, NOTES OF OPINIONS AND JUDGMENTS 243 (1802) cited in Cohen, *supra* note 38, at 71:

The Power, which the Courts in Westminster Hall have of vindicating their Authority, is coeval with their Foundation and Institution; it is a necessary Incident to every Court of Justice, whether of Record or not, to fine and imprison for a Contempt to the Court, acted in the face of it, 1 Vent. 1. And the issuing of Attachments by the Supreme Court of Justice in Westminster Hall for Contempts out of Court, stands upon the same immemorial usage as supports the whole fabric of the Common Law; it is as much the 'Lex Terrae' and within the exception of the Magna Charta, as the issuing of any other Legal Process whatsoever. . . .

Constant noisemaking, throwing of objects, disrobing, running or moving about the courtroom are disruptive activities which interfere with the orderly administration of justice and which have properly been the subjects of contempt citation.⁵⁷ In the summer of 1631 at the Salisbury assizes: "[a prisoner] threw a brickbat at the said Judge, which narrowly missed; and for this an indictment was immediately drawn by Noy against the prisoner, and his right hand cut off and fixed to the gibbet, upon which he was himself immediately hanged in the presence of the Court."⁵⁸ While the drastic penalty may now seem barbaric, it remains the rule that conduct which interferes with the administration of the courts or threatens their functioning will be punished. A recent United States Supreme Court case involving disruptive conduct at a trial, *United States v. Allen*,⁵⁹ involved a defendant who continued to shout abusive language and throw material about the courtroom. The Court rightfully concluded that such conduct was intolerable and suggested that sentencing for contempt might be one proper remedy for such interference with the orderly administration of the law.⁶⁰ Nevertheless, it is easy to translate the need for order into a requirement of dignity. Courtroom decorum becomes an independent standard as judges impose rules of dress, a mode of address, the requirement of standing for the judge, and the demand that witnesses not use offensive language. In *United States v. Malone*,⁶¹ several members of a religious order of nuns refused to rise when the judge entered. The nuns were held in contempt for while the court lacked the power "to require . . . purely ceremonial or symbolic acts," the requirement of rising for the judge was found to serve

⁵⁷ See generally E. DANGEL, CONTEMPT, § 199, 212 (1939).

⁵⁸ *Anonymous, Dyer 188b* (note) (1688 reprint) cited and translated from law French in 73 Eng. Rep. 416 n (1631) cited in Dobbs, *supra* note 49, at 187.

⁵⁹ *United States v. Allen*, 397 U.S. 337 (1970).

⁶⁰ In *Allen, id.*, the Court held that the right to be present at one's trial is dependent on a willingness of the defendant not to engage in disruptive conduct. The Court specifically recommended: (1) binding and gagging and (2) use of the contempt power as additional methods to be used by judges to maintain courtroom order.

It may be that in cases of disruptive political defendants removal from the courtroom with remote transmission of trial proceedings or placement of the defendant in a soundproof isolation booth with piped in sound may be preferable to use of the contempt power. The latter suggestion saw use in the trial of Adolf Eichman in Israel for his involvement in Nazi atrocities. See H. ARENDT, *EICHMAN IN JERUSALEM* 5 (1965 rev. ed.).

⁶¹ *United States v. Malone*, 412 F.2d 848 (7th Cir. 1969).

the function of reminding "all that attention must be concentrated upon the business before the court, . . . and [that] there must be silence."⁶²

While it is true that certain conduct may be directly related to an orderly trial, conduct required by the court may be so remote as to demonstrate that the court is primarily interested in preserving its dignity and symbolic importance.⁶³ The contempt citations of the defendants in the Chicago conspiracy trial⁶⁴ are replete with instances of citation and sentencing for conduct which afforded effrontery to the court. Defendant Abbie Hoffman was charged with twenty-four specific acts of contempt; many of the specifications were for disrespectful conduct such as blowing a kiss to the jury,⁶⁵ three charges were based on his failing to stand up when the judge entered the courtroom: "Specification 5: At the close of the morning session on October 29, the defendant Hoffman refused to rise in the customary manner;"⁶⁶ "Specification 6: On October 29, when the court was compelled to call a recess during the afternoon session, the defendant Hoffman once

⁶² 412 F.2d 848, 850.

⁶³ See Dobbs, *supra* note 49, at 200-204.

⁶⁴ *United States v. Dellinger*, *supra* note 31. See also Lukas, *supra* note 2, at 34-35:

[I]t ought to be stated clearly that the defendant's contempt when it began was almost exclusively verbal. (No other aspect of the trial aroused such widespread confusion. Afterwards, a friend asked me which of the defendants had defecated in the aisle; I assured him none of them had.) The judge spoke several times of the defendant's "violence" in the courtroom. The only violence I witnessed occurred on several occasions when the federal marshals used more than necessary force to seat or lead away defendants (the defendants responded in kind, interposing a shoulder or hip between the marshals and their prey, but they did not attack anyone.) The only other physical "actions" I recall were theatrical or symbolic: the attempt to bring a birthday cake into the courtroom on Bobby Seale's birthday; the placing of the National Liberation Front and American flags on the defense table, the wearing of judicial robes (unless you include the nonaction of refusing to stand.) The rest of the time the contempt was words—irreverent, disrespectful, harsh and even vulgar—but words.

Finally, as Professor Harry Kalven of the University of Chicago has pointed out, even this verbal contempt (as reflected in the contempt citations) was by no means consistent throughout the trial. It tended to bunch in periods of particular tension or confrontation, triggered by specific events.

⁶⁵ *United States v. Dellinger*, Official Trial Transcript at 9 cited in CHICAGO CONTEMPT TRANSCRIPT, *supra* note 35, at 115:

Specification 1: On September 26, during the opening statement by the Government, defendant Hoffman rose and blew a kiss to the jurors. The contempt sentence for this conduct was one day.

⁶⁶ *United States v. Dellinger*, Official Trial Transcript at 4,728-729 cited in CHICAGO CONTEMPT TRANSCRIPT, *supra* note 35, at 117.

more refused to rise in the customary manner;"⁶⁷ and "Specification 7: On October 30, at the beginning of the court session, the defendant Hoffman refused to rise in response to the marshal's direction."⁶⁸ Hoffman was sentenced to one day in prison for each of these specifications.⁶⁹ To punish a defendant, particularly a defendant in a political trial, for bad manners or offensive speech results in the judge punishing symbolic and ritual conduct which is considered to be a challenge to the dignity of the court but which cannot be viewed as providing a serious impediment to the functioning of the judicial system. While the defendant Hoffman's refusal to stand may appear childish and profane, the conduct hardly merits three days in prison.

There is growing recognition that a distinction must be made between conduct which challenges the dignity of the court and conduct which is obstructive; such recognition was evidenced in the district court opinion in *United States ex rel. Lynch v. Werksman*:⁷⁰

A United States Court . . . is not empowered to punish as contempt any action or statement merely because it may display disrespect for the Court or because it recognizes that judges, notwithstanding their high obligation to administer justice in a fair and impartial manner, have mannerisms, idiosyncracies, predispositions, and predilections that make each judge somewhat unique in his handling of cases. If every disrespectful comment of losing counsel and litigants were to constitute criminal contempt, the prison population in the United States would be substantially increased and the First Amendment would have a substantial new exception to its protection. For an action or statement that displays disrespect for a court to constitute contempt, it must be of such character that a finding can be made that the action in fact obstructs the administration of justice.

At the outer limit, the use of contempt to punish disrespectful statements or critical comments poses First Amendment prob-

⁶⁷ *United States v. Dellinger*, Official Trial Transcript at 4,763 cited in CHICAGO CONTEMPT TRANSCRIPT, *supra* note 35, at 117.

⁶⁸ *United States v. Dellinger*, Official Trail Transcript at 4,801 cited in CHICAGO CONTEMPT TRANSCRIPT, *supra* note 35, at 117.

⁶⁹ CHICAGO CONTEMPT TRANSCRIPT, *supra* note 35, at 117.

⁷⁰ *United States ex. rel. Lynch v. Werksman*, 319 F. Supp. 353, 354 (N.D. Ill. 1970).

lems.⁷¹ Much short of such dangers, there should be concern that contempt not be used as a device to punish political deviancy for it is clear that certain contumacious conduct follows inevitably from the view held by a significant segment of the alienated citizenry that the judiciary and its demand for dignity is repressive.⁷²

There is increasing support for the proposition that a distinction between obstructive and disrespectful conduct should be made, and that the use of the contempt power should be confined to the former type of conduct. There is evidence that the established bar desires contempt proceedings to be confined to those who actually interfere with orderly judicial proceedings. The American College of Trial Lawyers' Committee on the Disruption of the Judicial Process chaired by Whitney North Seymour and including Lewis F. Powell, Jr., Simon H. Rifkind and Edward Bennett Williams as members, recommended a limited use of the contempt power in their 1970 report:⁷³ "The power of a judge to punish contempt committed in his presence is *not designed to protect his own dignity or person*, but to protect the rights of litigants and the public by *ensuring that the administration of justice shall not be thwarted or obstructed*." While the American College of Trial Lawyers did not propose any reform of the procedures for judging contempt, it most certainly favored a limitation on the use of that power in a way which would have great impact in the case of a political trial. The American Bar Association's Advisory Committee on the Judge's Function issued in 1970 an advanced report of recommendations for measures to be employed in dealing with courtroom disorder.⁷⁴ The Advance

⁷¹ See dissenting opinion of Mr. Justice Frankfurter in *Bridges v. California*, 314 U.S. 252, 290 (1941) where comments of Mr. Justice Brewer are cited with approval:

The time is past in the history of the world when any living man or body of men [he was referring to the Supreme Court] can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death.

See also *New York Times v. Sullivan*, 376 U.S. 254, 272-73 (1964).

⁷² See note 42 *supra* and accompanying text. See generally R. LIEBERT, *RADICAL AND MILITANT YOUTH: A PSYCHOANALYTIC INQUIRY* (1971).

⁷³ American College of Trial Lawyer's Report, *supra* note 55, at 11. See generally Hazard, *Book Review*, 80 *YALE L.J.* 433 (1970).

⁷⁴ American Bar Association Advisory Committee on the Judge's Function, *Standards Relating to the Judge's Role in Dealing With Trial Disruptions (An Ad-*
(Continued on next page)

Report in its limited approval of the use of contempt, implicitly distinguished conduct which causes an obstruction from that which effects indignity: "The trial judge has the power to cite, and if necessary, punish summarily anyone who, in his presence in open court, willfully obstructs the course of criminal proceedings."⁷⁵

The A.B.A. report, however, makes an even more significant contribution to reform of the contempt power with its recommendation for increased consideration of procedural safeguards which offers an additional and significant approach to circumvent judicial imposition on those considered to be guilty of effrontery to the court. The report suggests the need for the maintenance of impartiality: "The judge before whom courtroom misconduct occurs may impose appropriate sanctions, including punishment for contempt, *but should refer the matter to another judge if his conduct was so integrated with the contempt that he contributed to it or was otherwise involved, or his objectivity can reasonably be questioned.*"⁷⁶ A first step in the development of procedural safeguards for the contempt defendant is achieved by providing an impartial presiding officer. A hearing by an independent tribunal preserves the appearance of fairness;⁷⁷ and particularly in the case where the trial judge has become involved in "exchanges" with counsel or where the judge is the target of the contemptuous conduct, an uninvolved and independent judge provides some guarantee of an impartial adjudication of the conduct.⁷⁸

The paradigmatic case of the application of the contempt power in the context of the political trial is *Sacher v. United States*⁷⁹ which involved the summary contempt sentencing of

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vance Report of Part of Standards Relating to the Function of the Trial Judge (1971). See generally Hazard, *Book Review*, 80 *YALE L.J.* 433 (1970).

⁷⁵ *Id.* at 18.

⁷⁶ *Id.* at 21.

⁷⁷ See *Offutt v. United States*, 348 U.S. 11, 14 (1954): "[J]ustice must satisfy the appearance of justice."

⁷⁸ See *Offutt v. United States*, 348 U.S. 11, 14 (1954):

. . . The vital point is that in sitting in judgment of [the contempt defendant] the judge should not himself give vent to personal grievance . . . Accordingly, this Court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feeling against the lawyer.

⁷⁹ *Sacher v. United States*, 343 U.S. 1 (1952). See also *Yates v. United States*, 355 U.S. 66 (1957).

defense counsel for eleven Communist Party leaders who were convicted of violating the Smith Act after a nine-month trial.⁸⁰ The presiding judge charged the lawyers and a layman acting as his own lawyer with breaches of decorum and disobedience in the presence of the judge after warnings. Mr. Justice Jackson delivered the opinion of the Court finding that: "[t]he nature of the deportment was not such as merely to offend personal sensitivities of the judge, but it prejudiced the expeditious, orderly and dispassionate conduct of the trial."⁸¹ The Court reasoned that contempt of court inevitably involves offense against the dignity and authority of the judge since at a trial "the Court is so much the judge and the judge so much the court" that contempt of one is contempt of the other; this being the case, the Court ruled the summary power cannot be so restricted that it would be limited to "such minor contempts as leave the judge indifferent and may be evaded by adding heckling, abusive and defiant conduct toward the judge as an individual."⁸² The Court went on to reject the argument of the defendants: "A construction of the Rule [Federal Rule of Criminal Procedure 42] is advocated which would deny a judge power summarily to punish a contempt that is personal to himself except, perhaps, at a moment when it is necessary to forestall abortion of the trial. His only recourse, it is said, is to become an accuser or complaining

⁸⁰ *Dennis v. United States*, 341 U.S. 494 (1951). Defendants were indicted under Sections 2 and 3 of the Smith Act, 54 Stat. 671, 18 U.S.C. (1946 ed.) §§ 10, 11. The defendants were convicted of willfully and knowingly conspiring (1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. On review the United States Supreme Court concluded:

We hold that §§ 2(a)(1), 2(a)(3) and 3 of the Smith Act do not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights, or the First and Fifth Amendments because of indefiniteness. Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created as "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act. The judgments of conviction are affirmed. *Id.* at 516-17.

But see *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); and *Scales v. United States*, 367 U.S. 203 (1961).

⁸¹ 343 U.S. at 3.

⁸² 343 U.S. at 12.

witness before another judge."⁸³ The Court held that Rule 42 permits the trial judge not only to invoke summary power to immediately punish contemptuous conduct where he finds that delay will prejudice the trial; but also to use the summary contempt power where he decides to delay judgment for contemptuous conduct when he finds that postponement of the contempt hearing to the close of the trial is in the best interest of the court.⁸⁴

Sacher, a five to three decision, provided the occasion for notable dissenting opinions by Justices Black and Frankfurter. Mr. Justice Black urged reversals on the ground that (1) the trial judge should not have passed on the contempt charges he preferred; (2) that guilt should not have been summarily decided as it was without notice, without a hearing, and without an opportunity for petitioners to defend themselves, (3) that those charged with contempt are constitutionally entitled to have their guilt or innocence decided by a jury. Black made a significant behavioral observation which is relevant to considering the use of contempt in the context of the political trial and the need to provide procedural safeguards for those accused of contempt:

The root of Judge Medina's charges was that these lawyers followed a concerted course deliberately designed to bring the whole judicial system into public contempt and disgrace. Their clients were Communist leaders. Much of the 13,000 pages of evidence was offered to show that they planned to subvert and destroy all governmental institutions including courts. Unless we are to depart from high traditions of the bar, evil purposes of their clients could not be imputed to these lawyers whose duty it was to represent them with fidelity and zeal. *Yet from the very parts of the record which Judge Medina specifies, it is difficult to escape the impression that his inferences against the lawyers were colored, however unconsciously, by his natural abhorrence for the unpatriotic and treasonable designs attributed to their Communist leader clients.*⁸⁵

Mr. Justice Frankfurter, in his dissent, placed greater emphasis

⁸³ 343 U.S. at 11.

⁸⁴ *Id.*

⁸⁵ *Id.* at 19.

on the necessary personal involvement of the judge who predictably is offended by contemptuous conduct and who must be subject to temptation to involve himself in exchanges with the contemnors. Frankfurter notes with concern the fact that the judge was subjectively affronted by the conduct and that this affront must have had an effect on his disposition of contempt charges. Finding that the theme of personal affrontery "underlies the whole certificate," Frankfurter responded that: "[i]t conveys inescapably what the judge deemed to have been the permeating significance of the behavior of these lawyers."⁸⁶ A review of the record revealed that "the conduct found contemptuous was in the main directed against the trial judge personally and that the judge himself so regarded it;" the trial judge himself regarded the conduct as a personal assault charging in the contempt citation that the defendant's conduct had as its purpose the "impairing [of] my health so that the trial could not continue."⁸⁷ Frankfurter made a

⁸⁶ *Id.* at 34. Frankfurter observes that: ". . . [a]t least seventy-nine of these [specifications] describe conduct directed against the trial judge personally: charges of prejudice and racial bias, of collusion with the prosecution, of headline-seeking."

⁸⁷ *Id.* at 33. Frankfurter cites with concern the acts of the defendants upon which the trial judge concluded that he was the intended victim of the defendant's contempt plan:

b. Suggested that various findings by the Court were made for the purpose of newspaper headlines;

c. Insinuated that there was connivance between the Court and the United States Attorney;

e. Persisted in making long, repetitious, and unsubstantial argument, objections, and protests, working in shifts, accompanied by shouting, sneering and snickering;

f. Urged one another on to badger the Court;

g. Repeatedly made charges against the Court of bias, prejudice, corruption, and partiality;

h. Made a succession of disrespectful, insolent, and sarcastic comments and remarks to the Court;

k. Persisted in asking questions on excluded subject matters, knowing that objections would be sustained, to endeavor to create a false picture of bias and partiality on the part of the Court;

l. Accused the Court of racial prejudice without any foundation; and

m. Generally conducted themselves in a most provocative manner in an endeavor to call forth some intemperate or undignified response from the Court which could then be relied upon as a demonstration of the Court's unfitness to preside over the trial.

For a comparison with the Chicago conspiracy trial, *supra* note 31, contempt specifications. See CHICAGO CONTEMPT TRANSCRIPT, *supra* note 35, at 169-243. See especially the remarks of Judge Hoffman at the sentencing of Mr. Kunstler:

Now, I know you, from some of the things you said here, tie in your own personal beliefs with those of your clients, and you live your client's cases as though they are your own. . . . But a man charged with a crime

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second significant observation, and that was, that the judge himself is tempted to and often succumbs to involvement in exchanges with controversial attorneys and defendants in a way that exacerbates the situation; the record was found to reveal "numerous episodes involving the judge and defense counsel that are more suggestive of an undisciplined debating society than of the hush and solemnity of the court of justice. Too often counsel were encouraged to vie with the court in dialectic, in repartee, and banter, in talk so copious as inevitably to arrest the momentum of the trial and to weaken the restraints that a judge should engender in lawyers."⁸⁸ From these two observations Frankfurter

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has a right only to a defense properly made, and that does not include what has gone on, the sort of thing that has gone on in this courtroom.

. . . I am one of those who believes that crime, if it is on the increase, and I don't have the statistics before me, in any jurisdiction, state or federal, it is due in large part to the fact that waiting in the wings are lawyers who are willing to go beyond, to go beyond professional responsibility, professional rights, and professional duty in their defense of a defendant, and that fact that a defendant or some defendants know that such a lawyer is waiting in the wings, I think, has rather a stimulating effect on the increase in crime. *Id.* at 207.

⁸⁸ *Id.* at 38. For comparison, see Chicago conspiracy trial, *supra* note 31, Trial Transcript for October 15, 1969 at 2431 cited in *THE CONSPIRACY TRIAL*, *supra* note 39, at 93-94:

MR. FORAN [Prosecutor]: Your Honor, that is outrageous. This man is a mouthpiece. Look at him wearing an arm band like his clients, your Honor. Any lawyer [who] comes into a courtroom and has no respect for the Court and acts in conjunction with that kind of conduct before the Court, your Honor, the Government protests his attitude and would like to move the Court to make note of his conduct before this court.

THE COURT: Note has been duly made on the record.

MR. KUNSTLER: Your Honor, I think the temper and tone of voice and the expression on Mr. Foran's face speaks more than any picture could tell.

THE COURT: Mr. Kunstler—

MR. FORAN: Of my contempt for Mr. Kunstler, your Honor.

MR. KUNSTLER: To call me a mouthpiece, and for your Honor not to open his mouth and say that is not to be done in your court, I think that violates the sanctity of this court. This is a word that your Honor knows is contemptuous and contumacious.

THE COURT: Don't tell me what I know.

MR. KUNSTLER: I am wearing an armband in memoriam to the dead, your Honor, which is no disgrace in this country.

I want him admonished, your Honor. I request you to do that. The word "mouthpiece" is a contemptuous term.

THE COURT: Did you say you want to admonish me?

MR. KUNSTLER: No, I want you to admonish him.

THE COURT: Let the record show I do not admonish the United States Attorney because he was properly representing his client, the United States of America.

MR. KUNSTLER: To call another attorney a mouthpiece and a disgrace for wearing a black arm band—

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concluded that severe limits must be put on the use of summary contempt in order to afford the defendant desirable procedural protections and the opportunity for a fair hearing:

[I]t is indubitably established that the judge felt deeply involved personally in the conduct for which he punished the defense lawyers. He was not merely a witness to an occurrence, as would be a judge who observed a fist fight in his courtroom or brutal badgering of a witness or an impropriety towards the jury. The judge acted as the prosecuting witness; he thought of himself as such. His self-concern pervades the record; it could not humanly have been excluded from his judgment of contempt. Judges are human, and it is not suggested that any other judge could have been impervious to the abuse had he been subjected to it. But precisely because a judge is human, and in common frailty or manliness would interpret such conduct of lawyers as an attack on himself personally, he should not subsequently sit in judgment on his assailants, barring only instances where such extraordinary procedure is compellingly necessary in order that the trial may proceed and not be aborted.⁸⁹

The concerns evidenced by Mr. Justice Black and Frankfurter become all the more compelling as the predictable behavior pattern of the political activists and alienated demonstrator are cast in the role of defendants. Moreover, the procedural reforms suggested by Mr. Justice Black and Mr. Justice Douglas in their dissenting opinion are necessary protections if the courts are to avoid the actual danger as well as injurious criticism, no matter

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THE COURT: To place the flag of an enemy country—

MR. KUNSTLER: No, your Honor, there is no declared war.

MR. HAYDEN: Are you at war with Vietnam?

THE COURT: Any country—

Let that appear on the record also. Bring in the jury. I don't want—

MR. KUNSTLER: Are you turning down my request after this disgraceful episode? You are not going to say anything?

THE COURT: I not only turn it down, I ignore it.

MR. KUNSTLER: That speaks louder than words, too, your Honor.

THE COURT: And let that appear of record, the last words of Mr. Kunstler, and Miss Reporter, be very careful to have them in the record.

The last four statements were cited by the judge as contempt specification number 2 in Trial Transcript at 2,435 cited in CHICAGO CONTEMPT TRANSCRIPT, *supra* note 35, at 173. The sentence of Mr. Kunstler for these latter remarks was 14 days in prison.

⁸⁹ 343 U.S. at 35.

how ill-founded, that they play a role as agents of political repression. There is a series of specific procedural reforms which: (a) may confine the use of the contempt power to those cases where the actual functioning of the court is threatened and (b) will insure an impartial determination and the appearance of fairness. These reforms include: (1) a warning to the offender; (2) specificity in the citation of contemptuous conduct; (3) trial by an independent judge; (4) and the provision of a jury trial.

Certainly, a judge should warn that certain conduct may occasion contempt citation. While it may be that some language is to be considered *per se* insolent and contemptuous; in a day of fiery rhetoric and with increasing acceptance of street jargon into common discourse, there should be some hesitancy in citing language as contemptuous without warning. It is notable that during the Chicago conspiracy trial Judge Hoffman did not cite the defendants for contempt during the trial nor did he warn them that their conduct was to provide the basis for a later adjudication; only at the close of the trial did the judge produce a lengthy series of specifications against each defendant and defense counsel. The Seventh Circuit, for example, has been quite explicit in its suggestion for citation and warning at the time of offense; immediate note should be made in the record of what conduct gave rise to the contempt and of the surrounding circumstances: "If there was such obstruction resulting from what respondent said, that should be ascertained from the record of what occurred at the time. Citation for direct contempt should not be delayed for months. It should spring fresh from the alleged obstruction of the court's performance of its judicial duty, although adjudication and punishment might well await the convenience of the court's business."⁹⁰ A warning at the time of the contumacious conduct provides the dual purpose (1) of satisfying the record and (2) of giving notice to the defendant so that he might consider the circumstances as they will be later relevant to his defense and (3) so that he may be warned that his conduct has been considered obstructive so that he might control his conduct or language so as to avoid further citation.

When conduct or language does occasion contempt citation,

⁹⁰ *Parmelee Transportation Co. v. Keeshin*, 292 F.2d 806, 810 (7th Cir., 1961).

the judge should note with specificity what conduct and language occasions the contempt order.⁹¹ This problem is illustrated by the summary contempt proceedings of Daniel Taylor in *Commonwealth of Kentucky v. Tinsley et. al.*⁹² The Court after observing: "It's a shame this court has to do something that the Bar Association of this State should have done a long time ago,"⁹³ ruled on the attorney's contemptuous conduct with no more specificity than the following:

I have you nine counts. First Count, 30 days in jail; Second Count, 60 days in jail; Third Count, 90 days in jail; Fourth Count, six months in jail; Fifth Count, six months in jail; Seventh Count, six months in jail; Eight Count, one year in jail; Ninth Count, one year in jail, all to run consecutive. Take him away.⁹⁴

Generally criminal proceedings are initiated by an indictment or an information which gives notice to the defendant of the offense charge, citing the offense and describing with some particularity the essential facts of the offense charged.⁹⁵ For a con-

⁹¹ See generally, Harper & Haber, *Lawyer Troubles in Political Trials*, 60 YALE L.J. 1 (1951).

⁹² *Commonwealth of Kentucky v. Tinsley*, No. 144805 (Jefferson Circuit, Crim., 2nd Div., filed June 9, 1971. Contempt Order filed October 29, 1971. See also Finley, *Judge Hays lists contempt charges against lawyer Taylor, cuts sentence*, Louisville Courier-Journal, March 7, 1972, at B14, col. 1. The trial judge (in accordance with an order of the Kentucky Court of Appeals) filed a corrected judgment providing specific references to the conduct which occasioned the contempt, reduced all sentences to six months or less, and submitted the entire trial record to the Kentucky Court of Appeals in order to present for review the circumstances which gave rise to the contempt citation. Corrected Judgment and Certificate of Contemptuous Action in the presence of the trial court were filed March 2, 1972.

⁹³ *Id.*, Transcript of Proceedings of Contempt Charges Against Daniel Taylor, October 29, 1971 at 2.

⁹⁴ *Id.* at 3. Compare CHICAGO CONTEMPT TRANSCRIPT, *supra* note 35, where the judge numbers each specification recounting the surrounding circumstances and citing with particularity the language or conduct which gave rise to the contempt. However, Judge Hoffman often did not specify which part of sometimes lengthy exchanges of dialogue gave rise to the contempt.

⁹⁵ See Rule 7(c) of the Federal Rules of Criminal Procedure which provides that:

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the

(Continued on next page)

tempt defendant to answer charges and to prepare a petition for review, more specificity in the charges would provide both notice and a record for review. While a notation in the record may satisfy the need for warning and provide a basis for determining from the surrounding circumstances whether there was actual obstruction, the contempt citation itself should note the contempt charges with sufficient specificity so that the citation amounts to notice on its face. If a contempt citation is to have any deterrent value to others, there is a need to identify precisely what conduct is intolerable in judicial proceedings. While this problem has been somewhat alleviated in the federal system by the adoption of court rules and the exercise of the court's supervisory power,⁹⁶ if the requirement of notice to contempt defendants is to be evenly applied it may be desirable to find this protection within the due process requirements of the Fourteenth Amendment.⁹⁷

The requirement that an impartial judge hear contempt charges was, to a great extent, recognized in *Mayberry v. Pennsylvania*,⁹⁸ where the defendant was charged on eleven counts of contempt. Many of the words leveled at the judge were highly personal aspersions including "dirty sonofabitch," "dirty tyrannical old dog," "stumbling dog" and "fool." The defendant charged the judge with running "a Spanish Inquisition" and told the judge to "Go to Hell" and "Keep your mouth shut." Finding that: "[i]nsults of that kind are apt to strike at the most vulnerable and human qualities of a judge's temperament," the Court held that the Due Process Clause of the Fourteenth Amendment requires

(Footnote continued from preceding page)

official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

See also Rule 6.10 of the Kentucky Rules of Criminal Procedure.

⁹⁶ In the federal system this is a problem somewhat alleviated by the requirement of Fed. R. Crim. P. § 42(a) which requires that specifications of contempt be included in the contempt certificate. In *United States v. Sacher*, 182 F.2d 416, 430-53 (2d Cir. 1950) certain of Judge Medina's specifications were found too vague by the Court of Appeals.

⁹⁷ Once it is recognized that: "[c]onvictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968); then all fundamental due process rights must attach: "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence. . . ." *In re Oliver*, 333 U.S. 257, 273 (1948).

⁹⁸ 400 U.S. 455 (1971).

in criminal contempt cases a trial before a judge other than the one reviled by the contemnor; before a judge "not bearing the sting of these slanderous remarks and having the impersonal authority of the law."⁹⁹

The Supreme Court has extended the requirement that an impartial judge try not only contempt charges where the trial judge has personally involved himself in exchanges with the contemnor but also contempt charges where the judge is simply the victim of a personal attack.¹⁰⁰ It would seem, then, that the value of impartiality and the appearance of fairness should require trial by an independent judge in all cases unless some counter-vailing value can be shown as to why summary proceedings should be permitted.¹⁰¹ Efficiency and immediacy are often cited as the benefits of summary proceedings.¹⁰² This argument, however, is not convincing where the summary contempt proceedings occur at the end of a trial. At best summary proceedings should be limited to those occasions where an order from the bench during a trial is made in order to bring an end to the contemptuous conduct and to facilitate an orderly continuation of the trial. An impartial judge should be required in all but the restricted cases of summary proceedings.

Finally, it would seem that a jury trial should be required in all contempt proceedings if courts are to be free from the charge of being oppressive and self-serving in the use of the contempt power. The requirement of jury trials in contempt proceedings was to some extent established by *Bloom v. Illinois*¹⁰³ where the Court "recognized the potential for abuse in exercising the summary power to imprison for contempt—it is an 'arbitrary' power which is 'liable to abuse.' '[I]ts exercise is a delicate one and

⁹⁹ *Id.* at 466.

¹⁰⁰ See *Offutt v. United States*, 348 U.S. 11, 14 (1954): "The vital point is that in sitting in judgment . . . [of a contempt defendant] the judge should not himself give vent to personal spleen or respond to a personal grievance. . . ."

¹⁰¹ *Id.* "These are subtle matters for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice."

¹⁰² In approving of summary contempt proceedings in *Sacher v. United States*, 343 U.S. 1, 9 (1952) the court observed: "'summary' . . . refers to a procedure which dispenses with the formality, delay and digression that would result from . . . all that goes with a conventional court trial."

¹⁰³ 391 U.S. 194 (1968). See also *Cheff v. Schnackenberg*, 384 U.S. 373 (1966) where the Court, on the basis of its supervisory power over federal courts, held that where a contempt sentence was more than a petty sentence, the federal court was required to grant a jury trial. A six month sentence was suggested as the dividing line between petty and serious offenses.

care is needed to avoid arbitrary or oppressive conclusions.”¹⁰⁴ The Court held that: “serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial.”¹⁰⁵ Nevertheless the requirement of a jury trial is limited to cases of “serious contempts” and the notion of “serious contempt” is one dependent on the penalty assessed for the contemptuous conduct; at the present time, by definitions a serious contempt is one bringing a sentence of six months or more.¹⁰⁶ There is of course an element of arbitrariness in the Supreme Court’s definition of serious crime which hangs on the six month penalty. The problem, however, is exacerbated with the application of the “six month” rule to a series of successive contempts where no one charge exceeds six months but where the cumulative sentence runs into years. This was the case in the Chicago trial¹⁰⁷ where defendant Kunstler received a sentence of over four years but with no single charge exceeding six months.¹⁰⁸ The contempt proceedings in the case of Kunstler were before the trial judge who cited the contempt and were summary and without a jury. The application of the *Bloom* requirement of a jury in “serious” contempt cases seems to be frustrated by an application of the

¹⁰⁴ *Bloom v. Illinois*, 391 U.S. 194, 202 (1968) [citations omitted].

¹⁰⁵ *Id.* at 198.

¹⁰⁶ *Cheff v. Schnackenberg*, 384 U.S. 373 (1966) provides authority for the standard of “petty” sentences for contempt is a sentence of up to six months in jail. In *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968), sentences shorter than six months were under *Cheff*, considered to be “petty.” The standard of “petty” punishment appears to be derived from 18 U.S.C. § 1 (1964), which provides in part: “Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500 or both. . . .”

¹⁰⁷ *United States v. Dellinger*, *supra* note 31.

¹⁰⁸ See *The Conspiracy Trial*, *supra* note 39, at 614-615. Contempt citations and sentences for William Kunstler were as follows:

Specification	Sentence	Specification	Sentence	Specification	Sentence
1	1 month	9	21 days	17	4 months
2	14 days	10	14 days	18	1 month
3	3 months	11	7 days	19	1 month
4	14 days	12	14 days	20	6 months
5	14 days	13	14 days	21	6 months
6	3 month	14	1 month	22	4 months
7	3 months	15	21 days	23	1 month
8	6 months	16	2 months	24	2 months

Total sentence for contempt: 4 years, 13 days.

rule which would permit a judge to cumulate contempt offenses and then to apply a sentence far in excess of the six month limit suggested by *Bloom*. Perhaps, the best rule would be to require a jury trial in all contempt cases. The guarantee of impartiality and freedom from judicial oppression, as well as the appearance of fairness, would all be best served by full recognition of the Sixth Amendment requirement in all criminal contempt proceedings of a trial "by an impartial jury." This could be accomplished within the existing "due process" requirement of jury trial in the case of serious offenses by recognizing that the penalty available in contempt cases may be far in excess of the six month "petty" punishment limit.¹⁰⁹ Criminal contempt should be recognized as a serious offense itself, and where an individual is subject to loss of liberty for such an offense, the full protection trial by jury should be afforded.

Contempt of court as a device to punish those who would prevent the orderly functioning of the courts cannot be denied. Nor can it be denied that there is great potential for abuse in such a powerful legal theory. It is, however, in the context of the political trial that the dangers of misuse and misunderstanding are greatest and hence provide the need for the fullest procedural protections. This point was made by Mr. Justice Douglas in his concurring opinion in *Illinois v. Allen*¹¹⁰ where the contempt power was cited as a legitimate restraining mechanism available to the judiciary. Agreeing that criminal trials cannot take place in bedlam, Douglas observed:

Our real problems of this type lie not with this case but with other kinds of trials. First are the political trials. They fre-

¹⁰⁹ See *Duncan v. Louisiana*, 391 U.S. 145 (1968). Here the Court held that the fact that a six month sentence was imposed for an offense was not dispositive if a greater penalty could have been imposed: "Louisiana's final contention is that even if it must grant jury trials in serious criminal cases, the conviction before us is valid, and constitutional because here the petitioner was sentenced to only 60 days in the parish prison. We are not persuaded. . . . [T]he penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. . . . The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgments. . . ." In the case before us the Legislature of Louisiana has made simple battery a criminal offense punishable by imprisonment for two years and a fine. The question, then is whether a crime carrying such a penalty is an offense which Louisiana may insist on trying without a jury." *Id.* at 159-60.

¹¹⁰ 397 U.S. 337 (1969). See text accompanying notes 59-60.

quently recur in our history and as they take place in federal courts we have broad supervisory powers over them. That is one setting where the question arises whether the accused has rights of confrontation that the law invades at its peril.

In Anglo-American law, great injustices have at times been done to unpopular minorities by judges, as well as by prosecutors. . . . Would we tolerate removal of a defendant from the courtroom during a trial because he was insisting on his constitutional rights, albeit vociferously, no matter how obnoxious his philosophy might have been to the bench that tried him? Would we uphold contempt in that situation?

Problems of political indictments and of political judges raise profound questions going to the heart of the social compact. For that compact is two sided: majorities undertake to press their grievances within limits of the Constitution and in accord with its procedures; minorities agree to abide by constitutional procedures in resisting those claims.

Does the answer to that problem involve defining the procedure for conducting political trials or does it involve the designing of constitutional methods of putting an end to them?¹¹¹

It might be well to put an end to political trials. It may, however, be utopian to believe that political trials can be eliminated from human society. Once men gather together and organize, government is inevitable. Once power is rested in government, opposition is natural. Given opposing political factions, the political trial arises as one device to maintain the status quo.

If political trials are inevitable, then perhaps the most that can be achieved is an opportunity for a fair and impartial trial by a jury. It is in the interest of the courts themselves, moreover, to minimize the recriminations that follow in the wake of a political indictment—to remain a tribunal and to avoid becoming a temple. For this reason, courts should limit the use of contempt to those occasions where their actual functioning is impaired. And once the decision is made to employ the contempt power, it should be done fairly and impartially with all the protections that due process can provide.

¹¹¹ *Id.* at 352-53, 356 (1969).

III. CONCLUSION

The courts have long been called upon to hear prosecutions of persons accused of committing "political" crimes against the state, and to preside over prosecutions which were politically motivated. In recent times, political trials have involved activist and alienated defendants who reject and are hostile to established political power, including the courts. There is an inevitability about the conduct of these defendants which the courts necessarily deem insolent and insulting which creates doubt as to the application of the traditionally recognized contempt power. Disrespectful conduct must be distinguished from obstructive conduct if the courts are to avoid punishing individuals for their ideology and life style. If impartiality and the appearance of fairness are to characterize the courts, procedural safeguards must be provided to those accused of contumacious and obstructive conduct. Due process should require that a contempt defendant be warned of the offense of his conduct, be provided with specific charges where he is to be tried, and to be heard before an impartial judge and tried by a jury. The procedural protections will not bring an end to political trials but they offer some promise of protection to the citizen and some hope that the courts may remain free of the taint of political oppression.

IV. POSTSCRIPT

The Chicago conspiracy case¹¹² has provided the occasion for blending together the various strains of authority which would limit and procedurally confine the use of criminal contempt. The United States Court of Appeals for the Seventh Circuit in two opinions: *United States v. Seale*¹¹³ and *United States v. Dellinger*,¹¹⁴ applied the authority discussed above, to require trial before another judge where the defendant is cited for past con-

¹¹² *United States v. Dellinger* [No. 69 Crim. 180 S.D. Ill., Sept. 26, 1969].

¹¹³ *United States v. Seale* [No. 18246 Seventh Cir., May 11, 1972]. See 11 Cr.L. 2164 (May 24, 1972).

¹¹⁴ *United States v. Dellinger* [No. 18294 Seventh Cir., May 11, 1972]. See 11 Cr.L. 2166 (May 24, 1972). To a large extent the court's opinion is concerned with the conduct of counsel and the limits to be placed on rigorous advocacy. The court does, however, direct itself to the question of symbolic or ceremonial behavior to be required of defendants.

duct¹¹⁵ constituting a personal attack on the judge and to require trial before a jury where a single contempt charge is penalized by a six months sentence or where there are successive contempt citations which when cumulated exceed a six months sentence limitation.¹¹⁶ The Seventh Circuit found the alleged abuse committed by the defendants, if proved, to be by its nature personally offensive to the judge; and therefore, required in such a case that an independent trial judge determine the validity of the contempt citation. The court rejected the argument that summary action could be justified in any situation other than where the instant trial is in progress and the contempt power is utilized to facilitate its continuance.

The Seventh Circuit noted the difficulty of applying the Sixth Amendment requirement of the right to trial by jury to cases of "serious criminal contempts" given the absence of a statutorily authorized maximum penalty. The court concluded that one must look to the penalty imposed to determine whether a jury trial should be required: "[i]f the penalty actually imposed exceeds six months imprisonment, the maximum sentence for 'petty offense' under 18 U.S.C. Sec. 1, the contempt is serious and a jury trial must be afforded."¹¹⁷ The application of this requirement led

¹¹⁵ See *Mayberry v. Pennsylvania*, *supra* notes 98-100 and accompanying text. In the case of *Seale*, the government conceded that the conduct constituted "an insolent, personal attack on the judge." In *Dellinger*, *supra* note 114, however, the court cites *Sacher*, *supra* note 79, for the proposition that a distinction can be made between contumacious conduct generally and conduct which is "apt to strike at the most vulnerable and human qualities of a judges temperament." While *Offutt*, *supra* note 77, holding that trial by another judge is required where the presiding judge has become *embroiled* in conflict with the defendant, and *Mayberry*, *supra* note 98, requiring the same disposition where the judge is the *victim* of an attack, have substantially eroded *Sacher* the court regarded it as retaining some vitality. *But see* note 5 of the courts opinion in *Dellinger* where authority is cited for disqualification in all cases of delayed contempt. Interestingly enough, the court cites conduct by counsel and statement by the presiding judge which are considered the basis for application of *Mayberry*, statement and conduct which are strikingly similar to that discussion in *Sacher* which were not considered a sufficient basis for requiring disqualification. Compare notes 86-87, *supra* with language cited by the court in *Dellinger* at 1: "Throughout this case . . . the behavior of the defendants was aimed at baiting the judge and inciting and harassing the U.S. Attorney in an attempt to stop the trial;" and *Dellinger* at 8; "MR. KUNSTLER: 'I have sat here for four and a half months and watched the objections denied and sustained by your Honor, and I know that this is not a fair trial. I know it in my heart. I have to lose my license to practice law and if I have to go to jail, I can't think of a better cause to go to jail for and to lose my license for . . .'"

¹¹⁶ See *Bloom v. Illinois*, *supra* notes 104-109 and accompanying text. See also *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

¹¹⁷ *United States v. Seale* [No. 18246 Seventh Cir., May 11, 1972] at 6-7.

the court to conclude that successive citations of contempt with a cumulative sentence necessitates the provision of a jury trial. Nevertheless, the court left open the possibility of successive contempts cited and punished summarily during a continuing trial where no one penalty exceeded six months but where the cumulative sentence might be greater than six months: "where contemptuous conduct is cited and punished instantly, we think the punishment assessed for that conduct may be considered separately in determining the right to a jury trial."¹¹⁸ The possibility for judicial abuse of the summary contempt power, then, remains.

Seeking to lay down "neutral principles" for the use of the contempt power, the Seventh Circuit directly rejected the argument that there may be need for special rules of contempt for "political trials": "[T]he standards of proper courtroom decorum are not altered and should not be applied differently because a trial may be characterized as political or because improprieties may be said to spring forth as if a 'natural human response'.¹¹⁹ Nevertheless, the standards for "legally sufficient specifications" go far in providing substantive principles for limiting the use of contempt as a "political crime"; moreover, the utilization of the jury as a device to provide contemporary content for the judicially developed standards offers the political defendant the broadest latitude for vindication short of a direct prohibition on the use of contempt power in special circumstances defined either judicially or legislatively.

The court found necessary a requirement that a defendant be warned that his conduct may be contemptuous; "an absence of any warning that borderline conduct is regarded as contumacious could be fatal to a contempt citation therefor."¹²⁰ In defining the level of intent required for contemptuous conduct to be criminal the court struck middle ground, rejecting both the contention that it be the product of a "vicious will" or a "culpable intent to obstruct justice" and the contention that the actor merely "know

¹¹⁸ *Id.* at 11.

¹¹⁹ *Id.* at 36. In *Dellinger* the court cites with approval a statement of Judge Breitel in *Katz v. Murtagh*, 321 N.Y.S.2d 104, 269 N.E.2d 816, 820 (1971):

[T]he court is not a public hall for the expression of views, nor is it a political arena or a street. It is a place for trial of defense issues in accordance with law and rules of evidence with standards of demeanor for court, jurors, parties, witnesses and counsel.

¹²⁰ *Id.* at 29.

what he is doing so that his misconduct does not occur by accident, inadvertence or other innocent reason.”¹²¹ Rather the court held that: “The minimum requisite intent is better defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful.”¹²² The court left great latitude to the trial judge in defining the standards of conduct to be required in a given court: “The particular standards of demeanor for each participant in a court of law or in connection with judicial proceedings have become solidified in tradition and do not need elaboration here. We leave their articulation to the judge presiding on remand and their application to the conduct in question to the trier of fact.”¹²³ It is in its resort to jury determination of whether conduct or language should be punished by the contempt power that the court introduces the device which may provide protection for the radical and alienated political actor who finds himself in court; the court observed “that language patterns and word choice vary greatly between diverse social, ethnic, economic and *political groups*. It is manifest that words scarcely used by some persons may be every-day language to many people who appear in courts. While these differences are relevant to the inquiry into intent, there can be little doubt that *the jury is best suited to resolve this question.*”¹²⁴

The court accepted the distinction that the contempt power is reserved for conduct which is obstructive and should not be extended to cover conduct which is merely offensive. Nevertheless, the court noted: “Obstruction is an elusive concept which does not lend itself to general statements. The tendency has been for courts to treat each case on its individual facts and there are, therefore, few decisions which aid in the determination of the proper standards for the jury in this case.”¹²⁵ The court again strikes for the middle ground rejecting both a strict standard of “material and substantial” and the broad principle that any interruption be punishable where it “diverts the judge’s attention from the orderly dispatch of the trial.”¹²⁶ Rather, the court requires

¹²¹ *Id.* at 32-33.

¹²² *Id.* at 33.

¹²³ *Id.* at 30.

¹²⁴ *Id.* at 36. [emphasis added].

¹²⁵ *Id.* at 33.

¹²⁶ *Id.* The court finds itself unable to resolve the tension between insult and
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that there be an "actual obstruction of justice" and in effect an "immediate interruption" of the court's business, and that the obstruction be "clearly shown."¹²⁷ In delineating the narrow "line between insult and obstruction" the court cited with approval the recent decision of the United States Supreme Court in *In re Little*¹²⁸ and concluded that: "The Supreme Court seems to have expressed a high degree of tolerance in distinguishing disrespect from obstruction. A showing of imminent prejudice to a fair and dispassionate proceeding is, therefore, necessary to support a contempt based upon mere disrespect or insult."¹²⁹

The court in applying this standard found that as a matter of law certain conduct cited was not sustainable as contempt because "regardless of the intent with which the conduct was engaged in, no actual, material obstruction occurred which would warrant imposition of the contempt sanction."¹³⁰ With regard to

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obstruction even with regard to such symbolic conduct as rising for the judge, see notes 61-69, *supra*. The court draws a meaningless distinction in *Dellinger, supra* note 114 at 17, between rising at the beginning of a session and end of a recess from other times when rising is required:

Brief mention, however, must be made concerning the specifications which deal with the appellant's refusals to stand when the court was convened and recessed. It is our opinion that such symbolic acts, when not coupled with further disturbance or disruption, might not rise to the level of an actual and material obstruction of the judicial process. . . . While the *per curiam* opinion in *Malone* concluded that a court may require such rising and while we reaffirm that conclusion as to rising at the beginning of a session and end of a recess we believe on remand some of the failures to rise here could be found nonobstructive.

¹²⁷ *Id.* at 33-34.

¹²⁸ *Id.* at 34-35 citing *In re Little*, 92 S.Ct. 659, 660 (1972) where the Court evidences reticence in finding language contumacious.

The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil. . . . [T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.

¹²⁹ *Id.* at 35.

¹³⁰ *Id.* at 37. An example of contempt specification found insufficient is charge number 2 in the case of Bobby G. Seale [United States v. Seale, No. 69 CR 180, S.D. Ill. Certificate of Contempt November 5, 1969, Specification No. 2] providing:

During the morning session on October 14, 1969, while the Court, Mr. Schultz and Mr. Weinglass were engaged in a colloquy, the defendant Seale interrupted Mr. Weinglass and the following occurred (Tr. 2206):
MR. SEALE: Hey, you don't speak for me, I would like to speak in behalf of my own self and have my counsel handle my case in behalf of myself.

How come I can't speak in behalf of myself? I am my own legal counsel
I don't want these lawyers to represent me.

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those specifications which are not clearly insufficient, the court remanded the matter for a jury determination of sufficiency: "At the hearing on remand, the jury must consider these elements as the factual setting is unfolded before it. With respect to those specifications remanded, the jury must consider the factual questions bearing on misbehavior, obstruction and on intent."¹³¹ The jury then remains the ultimate arbiter of what conduct shall be punishable under the contempt power.

The Seventh Circuit in the *Seale* and *Dellinger* cases has synthesized recent Supreme Court decisions into a procedural rule requiring an independent judge to preside over cases involving citation for past contempt involving personal attack on the presiding judge and requiring a jury trial where the cumulative penalty arising from citation for contempt exceeds six months. The power to summarily cite and punish contempt remains but is restricted to decisions made in ongoing trials. The legal standard and recent commentary directed at distinguishing obstruction from insult is vitalized in the prospect of the jury bringing contemporary standards of conduct and speech to bear in order to determine whether within in a *given context* the defendant is properly to be held in contempt of court. This *contextual* analysis of conduct offers promise that the contempt power may be utilized in terms of "rules of order" rather than in a "rubric of sacrilege."

(Footnote continued from preceding page)

THE COURT: You have a lawyer of record and he has been of record here since the 24th.

MR. SEALE: I have been arguing that before the jury heard one shred of evidence. I don't want these lawyers because I can take up my own legal defense and my lawyer is Charles Garry.

THE COURT: I direct you, sir, to remain quiet.

MR. SEALE: And just be railroaded?

THE COURT: Will you remain quiet?

MR. SEALE: I want to defend myself, do you mind, please?

THE COURT: Let the record show that the defendant Seale continued to speak after the court courteously requested him to remain quiet.

¹³¹ *Id.* at 37.