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A Small Slice of the Chicago Eight Trial

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A Small Slice of the Chicago Eight Trial

Ellen S. Podgor*

The Chicago Eight trial was not the typical criminal trial, in part because it occurred at a time of society’s polarization, student demonstrations, and the rise of the House Un-American Activities Committee. Charges were levied against eight defendants, who were individuals that represented leaders in a variety of movements and groups during this time. This Essay examines the opening stages of this trial from the lens of a then relatively new criminal defense attorney, Gerald Lefcourt. It looks at his experiences before Judge Julius Hoffman and highlights how strong, steadfast criminal defense attorneys can make a difference in protecting key constitutional rights and values. Although judicial independence is crucial to a system premised on due process, it is also important that lawyers and law professors stand up to misconduct and improprieties.

INTRODUCTION	821
I. PROXIMITY AND SETTING.....	824
A. <i>The Landscape</i>	824
B. <i>Attorney Gerald Lefcourt’s Role</i>	828
II. ATTORNEY WITHDRAWALS AND SUBSTITUTIONS	834
III. LESSONS LEARNED—RESPONDING TO MISPLACED JUDICIAL CONDUCT	836
CONCLUSION.....	837

INTRODUCTION

Judge Julius Hoffman jailed Attorney Gerald B. Lefcourt in the opening days of the Chicago Eight trial. It was a Friday, and the lunch being served in the lockup was “stinky” fish served on white bread. It had

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black mold spots. Lefcourt was hungry; he had flown in from New York early that morning, as Judge Hoffman had ordered him to return to Chicago to respond to a contempt of court charge. There was no time to stop and eat after the plane ride from New York to the Windy City, and now this alleged “fish” was to be his lunch. But looking at the food being offered, Lefcourt could not help but say, “I can’t eat this! I can’t eat this!”¹

Activist Bobby Seale, a defendant in the Chicago Eight trial, was Lefcourt’s cellmate in the lockup. He responded, saying, “Lefcourt, there’s no menu.”²

Gerry Lefcourt recalls, “It suddenly dawned on me that I was really in jail.”³

This Essay examines Judge Julius Hoffman’s jailing of criminal defense Attorney Gerald Lefcourt at the start of the Chicago Eight trial. Early in his career, Gerald B. Lefcourt, a principled attorney who had been fired from his position at Legal Aid,⁴ captured the interest of Chicago Eight defendant Abbie Hoffman.⁵ Lefcourt had been hired to represent Abbie Hoffman but found it necessary to withdraw at the start of the trial to avoid the conflicting trial timetable for his representation of the Black Panthers. Abbie Hoffman consented to Lefcourt’s withdrawal in this famed Chicago conspiracy trial, and criminal defense attorney Leonard Weinglass was ready and present to proceed to trial representing Hoffman and others. Lefcourt’s withdrawal, along with the withdrawals of Attorneys Dennis Roberts, Michael Tigar, and Michael Kennedy, should have been a routine motion. But it wasn’t—at least not for Judge Hoffman.⁶

The withdrawal of counsel in the Chicago Eight trial became an issue when Bobby Seale, Lefcourt’s cellmate and one of the accused, did not have his lawyer present for trial. That attorney was Charles Garry, a lawyer who had been continually representing Seale. Attorney Garry flew to Chicago and requested the judge provide a trial postponement, as he was scheduled to have gallbladder surgery.⁷ To the shock of everyone,

1. Interview with Gerald Lefcourt, Attorney (June 20, 2018).

2. See WILLIAM M. KUNSTLER WITH SHEILA ISENBERG, MY LIFE AS A RADICAL LAWYER 18 (1994) (looking at different trials that William Kunstler was involved with during his life). According to William Kunstler’s book, Bobby Seale gave him his portion of chocolate cake. *Id.*

3. Lefcourt Interview, *supra* note 1.

4. See *infra* notes 60–65 and accompanying text.

5. See *infra* notes 66–69 and accompanying text.

6. See *infra* notes 82–87 and accompanying text.

7. Attorney Lefcourt states that the judge’s response to Garry’s continuance request was “[t]oo bad, request denied.” Notes of Gerald Lefcourt, at 1 (on file with author); see also Tucker Carrington, *The Role of Judging 50 Years After the “Chicago Seven” Trial: A Remembrance of*

Judge Hoffman denied Attorney Garry's motion to continue the trial pending his surgery. Judge Hoffman's failure to grant a continuance created a situation where Bobby Seal risked going to trial without counsel, or as Judge Hoffman would have preferred, having a lawyer imposed upon him.

Judge Hoffman decided that Lefcourt, formerly Abbie Hoffman's attorney, could represent Bobby Seale. He held the same for the other attorneys who had withdrawn, namely, Dennis Roberts, Michael Tigar, and Michael Kennedy. After all, they all knew something about the case. Lefcourt had previously represented Abbie Hoffman, so Judge Hoffman was saying that Attorney Lefcourt's and other defense counsels' work on pretrial motions for others made him sufficiently knowledgeable to represent Bobby Seale at his trial. But it is important to note here that Lefcourt had not previously represented Bobby Seale in this case. Nor was the accused Bobby Seale requesting that Lefcourt represent him in this trial. Yet for some unexplained reason, Judge Hoffman believed that Attorney Lefcourt and the other three attorneys who withdrew from the case could fill the attorney role for defendant Bobby Seale. And when it did not happen, he issued contempt warrants for Lefcourt and the other three attorneys: Dennis Roberts, Michael Kennedy, and Michael Tigar.⁸

Part I of this Essay examines the facts leading up to this contempt hearing and Judge Hoffman's actual finding that Lefcourt be held in contempt. Context matters here, and understanding what was occurring during this timeframe offers that important setting.⁹ Society's polarization, student demonstrations, the rise of the Black Panther Movement, and the happenings of the House Un-American Activities Committee provide an important component to understanding the Chicago Eight trial and the role of its lawyers. For Lefcourt, the client is the focal point of his representation, and zealously representing that client is a given. Lefcourt has stated, "I truly believe that my responsibility as a lawyer to a client is the same no matter who the defendant and no matter what the crime, and I endeavor to discharge that responsibility as zealously as possible for all."¹⁰ Lefcourt is also someone who straddles the line as a "cause lawyer," but one who represents the cause without

Charles R. Garry, 50 LOY. U. CHI. L.J. 969, 969–71 (2019) (discussing the important role that Garry had with Bobby Seale).

8. Judge Hoffman stated, "I wish to have the four men brought here as expeditiously as possible, bench warrants will be prepared for their arrest." Lefcourt Notes, *supra* note 7, at 2.

9. See BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 17–18 (2014) (discussing the importance of proximity in understanding the surrounding circumstances).

10. See Gerald B. Lefcourt, *Responsibilities of a Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 59, 60 (1996) (discussing the influence legal aid representation had on him).

being the actual activist.¹¹

With this backdrop, Part II looks at the existing law and ethical mandates surrounding Judge Hoffman's action ordering Attorney Lefcourt and others to appear in Chicago. Criminal defense attorneys can be placed in precarious positions when a judge rules beyond the scope of his or her power. On one hand, the defense counsel needs to maintain the record and contest the judge's actions. On the other hand, there is always a concern of possible repercussions a client might face if the attorney contests the judge's actions.

Finally, Part III looks at lessons that can be learned in responding to judicial improprieties. This Essay notes the importance of the academy and the media in speaking out against judicial injustice. Most importantly, it highlights how strong, steadfast criminal defense attorneys can make a difference in protecting key constitutional rights and values. As Attorney Lefcourt noted, "Responsible defense attorneys must take as their obligation the role of champion of constitutional rights."¹²

I. PROXIMITY AND SETTING

A. *The Landscape*

This was a time of protest, especially among the youth. In October 1967, there was a key demonstration at the Pentagon "organized by the National Mobilization to End the War in Vietnam ('the Mobe')." ¹³ The decision to have a Festival of Life during the Democratic Convention was made in December 1967.¹⁴ This was also the start of what was called the "Yippie" Movement.¹⁵

The polarization in society, the rising up of youth movements, and the antiwar sentiment were all at their heights. President Nixon was elected, and two months following his inauguration, these eight individuals were

11. "Cause lawyers" typically use their lawyering skills to serve a specific cause. See generally Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195 (2005) (defining cause lawyering and evaluating whether criminal defense lawyers can be categorized as cause lawyers). Unlike lawyers such as Nelson Mandela, who actually was an activist in the cause, Attorney Lefcourt was representing individuals engaged in a cause and assisting them with legal advice. See Justin Hansford, *The Legal Ethics of Nelson Mandela* 6-7 (2015), <https://ssrn.com/abstract=2556320>; see also Stephen Ellmann, *Two South African Men of the Law*, 28 TEMP. INT'L & COMP. L.J. 431, 433-35 (2014) ("He was a lawbreaker *because of the law*.").

12. Lefcourt, *supra* note 10, at 63.

13. CONSPIRACY IN THE STREETS: THE EXTRAORDINARY TRIAL OF THE CHICAGO EIGHT 43 (Jon Wiener ed., 2006) (providing selected passage from the trial).

14. *Id.* at 43-44.

15. *Id.*

indicted.¹⁶ The charges against these eight defendants were for “conspiracy to travel interstate ‘with the intent to incite, organize, promote, encourage, participate in, and carry out a riot.’”¹⁷ The eight came from varying backgrounds and represented different constituents and groups.¹⁸ They ranged from Abbie Hoffman, a Brandeis University graduate who played a strong game of tennis and had been a clinical psychologist at the Worcester State Hospital in Massachusetts,¹⁹ to Bobby Seale, a cofounder of the Black Panther Party.²⁰ Six of the defendants, Dave Dellinger, Tom Hayden, Rennie Davis, Abbie Hoffman, Jerry Rubin, and Bobby Seale, were also charged with inciting violence.²¹ John Froines and Lee Weiner did not have substantive offenses of inciting violence, but had charges related to “teaching others how to make ‘incendiary devices.’”²² Following the famed Chicago Conspiracy trial, five of the defendants were convicted—receiving five years in prison and a \$5000 fine.²³ Each also was given a sentence on the contempt charge Judge Hoffman levied against them. On appeal, all would be reversed.²⁴

Two key lawyers involved in the case were William Kunstler and Leonard Weinglass. Having represented Martin Luther King, Jr., Stokely Carmichael, and H. Rap Brown, the fifty-year-old Kunstler brought to the table a celebrity reputation.²⁵ Leonard Weinglass, in contrast, was trying his first case in federal court.²⁶ His friendship with Tom Hayden resulted in his being hired.²⁷ Both Kunstler and Weinglass counted on Attorney Charlie Garry being the leader of the team.²⁸

16. *Id.* at 14. It is believed by some that if Hubert H. Humphrey had won the election there would have been no Chicago Conspiracy trial. *Id.* at 22.

17. *Id.* at 14.

18. Different backgrounds and constituencies were brought together by this trial. Abbie Hoffman and Jerry Rubin were considered leaders of the “Yippie” Movement. Dave Dellinger, Tom Hayden, and Rennie Davis were considered the leaders of the National Mobilization to End the War in Vietnam Movement (“Mobe”), and Bobby Seale served as the chair of the Black Panther Party. *Id.* at 3.

19. Gerry Lefcourt notes that “[m]ost adults thought of Abbie Hoffman as a freeloading, anarchist acid freak, or at best, some irresponsible, semi-literate clown. . . . But Abbie intentionally presented an image that was the exact opposite of who he was.” Lefcourt Notes, *supra* note 7, at 10.

20. CONSPIRACY IN THE STREETS, *supra* note 13, at 3.

21. *Id.* at 14.

22. *Id.*

23. *Id.* at 26.

24. *Id.*

25. *Id.* at 14.

26. *Id.* at 15.

27. *Id.*

28. See KUNSTLER WITH ISENBERG, *supra* note 2, at 14 (noting the defendants’ preference for

The judge presiding over the trial was Julius Hoffman,²⁹ who had graduated from law school in 1915.³⁰ Judge Hoffman, initially an Illinois Superior Court judge appointed in 1947, was appointed to the federal bench by President Eisenhower in 1953.³¹ His judicial temperament and rating by local attorneys was not impressive, and he was described in Joseph Goulden's book, *The Benchwarmers*, as "impetuous and rude."³² When the Chicago Eight trial began, Judge Hoffman was seventy-four years old.³³ Attorney Gerald Lefcourt remembers him as "barely catching what people were saying."³⁴ Attorney Lefcourt notes that Julius Hoffman was "pro government on a mission" and the defense was the "enemy from day one."³⁵

The prosecutors on this case were Thomas Foran and Richard Schultz. Author Jon Weiner described these two as playing contrasting roles: "Thomas Foran[] was the calm professional, while his assistant, Richard Schultz, spoke in a voice of perpetual outrage."³⁶

On August 27, 1969, during pretrial proceedings, the court was notified that Charles Garry would lead the team of lawyers that included William Kunstler.³⁷ At this initial pretrial hearing, the court denied a request for a continuance premised on pretrial publicity and "conflicting litigation schedules of counselors Kunstler and Garry."³⁸ On September 9, 1969, Garry requested another continuance, this one premised on an upcoming gallbladder surgery.³⁹ In denying this continuance, Judge Hoffman "noted that Messrs. Michael Tigar, Irving Birnbaum, and Stanley Bass had also entered appearances for Seale, and therefore

Charles Garry as lead counsel). This was not a case they were making money on. *Id.* at 15. All the money went to rent, tapes, food, trial transcripts, subpoenas of tapes, and rental of video equipment. *Id.* They received \$100 a week. *Id.* Kunstler's younger brother, who was in his law firm, was paying his family's tab (wife and children). *Id.*

29. *Id.* at 11.

30. JOSEPH C. GOULDEN, *THE BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES* 141 (1974).

31. *Id.*

32. *Id.* at 117. In a Chicago Council of Lawyers survey, Hoffman had a 24.74 percent favorable rating to a 57.55 percent unfavorable. *Id.* Written responses to the question, "Does he demonstrate patience and a willingness to listen to all sides?" produced "[f]avorable, 10.68 percent; unfavorable, 78.13 percent." *Id.* at 118.

33. William Kunstler, one of the defense attorneys in the case, notes that he shared a July 7th birthday with the judge, although Kunstler was only fifty at the time of the trial. KUNSTLER WITH ISENBERG, *supra* note 2, at 11.

34. Lefcourt Interview, *supra* note 1.

35. *Id.*

36. CONSPIRACY IN THE STREETS, *supra* note 13, at 15.

37. *United States v. Seale*, 461 F.2d 345, 349 (7th Cir. 1972).

38. *Id.*

39. *Id.*

concluded that it was unnecessary to give Seale an opportunity to secure other counsel in place of Garry.”⁴⁰ It should be noted here that at this hearing there was no mention of Attorney Lefcourt or others representing Bobby Seale, and Lefcourt had not been his exclusive counsel during the pretrial matters. Most importantly, as noted by Professor Tucker Carrington, Garry, and Seale had a standing attorney-client relationship.⁴¹

The case itself focused on the First Amendment. Kunstler said that “[o]ne of the major points in the defense’s case was that the defendants had spent months trying to secure permits from the City of Chicago but had met with a complete lack of cooperation.”⁴² His theme was that this was intended as a peaceful demonstration. He also noted that “[w]e also tried to prove that the heavy-handed Chicago police had caused whatever violence that occurred, not the protestors.”⁴³ Throughout the trial, the jury was sequestered at the Palmer House Hotel in Chicago.⁴⁴

At the opening of the trial, the court asked if any other lawyer wished to make an opening statement.⁴⁵ Judge Hoffman asked Bobby Seale who his lawyer was, and Seale repeated that it was Charles R. Garry.⁴⁶ When Attorney Kunstler was asked if he represented Seale, he replied—“No.”⁴⁷ Speaking to Attorney Kunstler, Judge Hoffman stated, “I will permit you to make another opening statement on behalf of Mr. Seale if you like. I will not permit a party to a case to—”⁴⁸ Judge Hoffman further stated, “Mr. Seale, you are not to make an opening statement. I so order you. You are not permitted to in the circumstances of this case.”⁴⁹

Thus, Attorney Kunstler refused to make an opening statement for

40. *Id.* at 349. It should be noted here that this was pre-*Faretta*. In *Faretta v. California*, 422 U.S. 806, 836 (1975), the Supreme Court held that the accused has a “constitutional right to conduct his own defense.” The Court stated that “[t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him.” *Id.* at 834. The Court held that “[t]he right to defend is personal” and that “[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.” *Id.* at 819, 834. The Court noted that “although [the accused] may conduct his own defense ultimately to his own detriment, his choice must be honored out of ‘that respect for the individual which is the lifeblood of the law.’” *Id.* at 834.

41. See Carrington, *supra* note 7, at 970 (discussing Charles Garry’s standing position as counsel for the Black Panther Party).

42. See KUNSTLER WITH ISENBERG, *supra* note 2, at 15 (discussing the strategy of the defense’s case).

43. See *id.* (discussing the same).

44. CONSPIRACY IN THE STREETS, *supra* note 13, at 16.

45. *Id.* at 70.

46. *Id.* at 72.

47. *Id.*

48. *Id.*

49. *Id.*

Bobby Seale, as he did not represent him, and the court refused to allow the accused Bobby Seale to make a statement for himself.⁵⁰ The court also denied Seale's *pro se* motion to represent himself in the absence of his chosen counsel.⁵¹ The clash between the judge and the defense deteriorated further as the trial proceeded.⁵²

It was not until November 5, 1969, after the trial had been ongoing for six weeks, that Judge Hoffman "*sua sponte* declared a mistrial as to Seale, and his trial was severed from that of his co-defendants."⁵³ This resulted in many calling this case the *Chicago Seven* as opposed to *Chicago Eight* trial.

But at the same time that Judge Julius Hoffman declared a mistrial and severed Seale from the rest of the defendants, he also found Seale "guilty of sixteen acts of contempt," and sentenced him to three months for each act, totaling four years of imprisonment.⁵⁴ In addition to Seale being initially held in contempt, both Attorneys Kunstler and Weinglass were held in contempt of court during the trial.⁵⁵ Kunstler was sentenced at the end of the trial to four years and thirteen days,⁵⁶ and Weinglass received a sentence of one year, eight months, and five days.⁵⁷ On appeal, those contempt convictions were reversed.⁵⁸ Contempt charges of this nature required a hearing in front of a "new hearing judge," which had not occurred here.⁵⁹

B. Attorney Gerald Lefcourt's Role

Gerry Lefcourt graduated from New York University with a BA in political science in 1964 and from Brooklyn Law School with a JD in

50. United States v. Seale, 461 F.2d 345, 350 (7th Cir. 1972).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 350–51. The court

found that each of the 16 specified acts of contempt "constituted a deliberate and willful attack upon the administration of justice in an attempt to sabotage the functioning of the Federal judicial system; that the misconduct was of so grave a character as to continually disrupt the orderly administration of justice."

Id. at 351 (quoting the trial court's certificate of contempt).

55. *In re* Dellinger, 461 F.2d 389, 391–92 (7th Cir. 1972).

56. *Id.* at 392.

57. *Id.* at 403.

58. *Id.* at 401.

59. *Id.* The Seventh Circuit held "that under *Mayberry* [*v. Pennsylvania*, 400 U.S. 455 (1971)], the trial judge was disqualified from passing upon the contempt specifications against these lawyers because their attack upon him did carry 'such potential for bias as to require disqualification.'" *Id.* at 395. There were also other issues including one related to whether he was entitled to a jury trial because of the aggregation of the sentence. The court ruled in the appellants favor on this issue. *Id.* at 397. See also KUNSTLER WITH ISENBERG, *supra* note 2, at 15.

1968. Upon graduation from law school and passage of the bar, he joined the Legal Aid Society full time, “handling as many as 250 cases per daily calendar call.”⁶⁰ In most cases he had not met his client when the case was called in court. He was a player in a system dominated by pleas in an “assembly-line process.”⁶¹

Early on as a Legal Aid attorney, he realized that there were two systems of justice, “one for the wealthy who had the resources to seek vindication of their rights and one for the rest of society, left haphazardly to lawyers who could ensure entirely less predictable results.”⁶² As a young attorney, he realized that he was trial ready and not “susceptible to intimidation by judges.”⁶³

This façade of a “right to counsel” angered Lefcourt, and he became a force in organizing a union among legal aid attorneys.⁶⁴ Other lawyers were receptive to his organization meetings for a union, but the upper echelon in the office was not amused, and he was sent off to the Manhattan Office and fired a week later.⁶⁵

Attorney Lefcourt did not go quietly, and with the encouragement of Attorney William Kunstler, he filed a civil action against the Legal Aid Society.⁶⁶ Although the lawsuit was dismissed, Lefcourt was not discouraged. In fact, his filing the lawsuit received press that caught the eye of Abbie Hoffman, later accused in the Chicago Eight trial.⁶⁷ Abbie Hoffman read that story and called Lefcourt. “I have a dentist,” said Hoffman. “What I really need is a lawyer.”⁶⁸ And that was the start of Lefcourt’s representation of Abbie Hoffman.⁶⁹

60. Lefcourt Interview, *supra* note 1.

61. Lefcourt Notes, *supra* note 7, at 3.

62. *See* Lefcourt, *supra* note 10, at 60 (discussing his days as a Legal Aid attorney).

63. Lefcourt Notes, *supra* note 7, at 2.

64. *Id.* at 4.

65. Lefcourt Notes, *supra* note 7, at 5. *See also* James M. Naughton, *Activist Lawyer Sues to Get Job Back*, N.Y. TIMES, Nov. 6, 1969, at 54 (discussing the filing of a lawsuit to reinstate Lefcourt’s job at Legal Aid). Lefcourt’s lawyer on this action, David G. Lubell, described Lefcourt as

one of the new breed of young lawyers, committed to social justice, unwilling to accept the inadequacies of the institutions which have failed to give indigent defendants the full quality of justice, and whose consistent efforts and prodding have caused increased concern by both bar and bench with the crisis in the criminal courts and the beginnings of a movement to obtain real change.

Id.

66. Lefcourt Interview, *supra* note 1. Attorney Lefcourt greatly admired William Kunstler who by then had authored five books, had a Fifth Avenue New York office, and had gone to the South to defend blacks in the civil rights movement. *Id.*

67. Lefcourt Notes, *supra* note 7, at 6.

68. *Id.*

69. An interesting corollary between Abbie Hoffman’s trial and Lefcourt’s suit against Legal

Abbie Hoffman wrote that he “was not asking that Kunstler become my lawyer. He was much too busy to handle the piles of cases I saw coming after Chicago. What I needed was some young blood anxious to form a partnership whose purpose was to create havoc in the legal system”⁷⁰ After hearing Hoffman’s strategy, Kunstler replied almost instinctually, “Gerry Lefcourt. He’s the lawyer you’re looking for You’ll make a good team.”⁷¹

Abbie Hoffman’s admiration for Attorney Lefcourt is expressed best when noting his autobiography statement that:

Gerry Lefcourt didn’t smoke dope. Then again, he was not a boozier. He was not a fellow prone to letting his emotions run amok in public (à la myself and Kunstler). Carefully groomed, a serious workaholic, betrayed only occasionally by the most mischievous of grins, Gerry answered my questions with remarkable patience.⁷²

Lefcourt handled several matters for Abbie Hoffman, and Hoffman later noted that Lefcourt “had just been involved in an important case attacking the house rules. He had done exactly what I would have done had I been holding his briefcase.”⁷³

Abbie Hoffman said that Lefcourt was “[a] young activist lawyer, one who had jeopardized his slot in the system by placing ideals above career, [which] was just what the doctor ordered.”⁷⁴ Hoffman told Lefcourt,

I have no money. I wouldn’t pay even if I did. There’s one law for the rich and another for the poor, and I’m out to fuck that system. I work twenty hours a day at screwing around. You’re the only one who’s to know I’m serious. You keep me on the street. Is it a deal?⁷⁵

Aid is that both were premised on the First Amendment. *See also* Sidney E. Zion, *Lawyer Sues Legal Aid Society Over Loss of Job*, N.Y. TIMES, July 9, 1968, at 78.

70. ABBIE HOFFMAN, *THE AUTOBIOGRAPHY OF ABBIE HOFFMAN* 162 (1980).

71. *Id.*

72. *Id.*

73. *Id.* Abbie Hoffman also noted:

As a Legal Aid attorney assigned by the court to handle defendants unable to afford lawyers, he soon realized that Legal Aid functioned less for the protection of its indigent clients and more as a cover-up for yet another glaring fault of the system: no big money, no big defense. Even the most idealistic of Legal Aid lawyers would quickly be trapped by the overload of cases, trapped on the endless treadmill of securing the best deal regardless of justice or truth. Gerry decided to change things by organizing a lawyer’s union and publicly making critical statements about the agency. A professional code demands no washing of the dirty linen in public. He was promptly fired. He counterattacked by instituting a court suit and was now just emerging from his own seven-month trial. The judge decided against Lefcourt, but within a year his efforts were bearing fruit through badly needed reforms.

Id. at 162–63.

74. *Id.* at 163.

75. *Id.*

Hoffman and Lefcourt embraced, and the representation was set.⁷⁶

At the time of the Chicago Eight trial, Lefcourt worked on cases with William Kunstler in what was called the Law Commune.⁷⁷ Lefcourt became a part of this group following his Legal Aid position erupting.⁷⁸ Kunstler claims that since both the Panther Twenty-One and Chicago Eight cases were beginning to intensify and he could not decide which case to work on, a coin was tossed between him and Lefcourt “to determine who would take which one.”⁷⁹ Kunstler chose the Chicago case and Lefcourt represented the Panthers.⁸⁰ Lefcourt’s memory is that there was no coin toss and that he deferred to William Kunstler’s choice, as this was his mentor and Kunstler really wanted to be part of the Chicago Eight trial.⁸¹

On Wednesday, September 24, 1969, Hon. Julius Hoffman held Attorney Gerald Lefcourt, who was twenty-seven years old at the time and recently fired from his position at the Legal Aid Society, in contempt of court. Lefcourt’s role in the Chicago Eight trial might be seen as minimal, but the events surrounding his departure from the case set a tone that started the case moving from the railway tracks of a normal trial into uncharted territory. It all happened at the beginning of the trial, and it spoke volumes about the judicial officer handling the case.

Attorneys Michael Tigar, Gerald Lefcourt, Michael Kennedy, and Dennis Roberts filed a routine motion to withdraw from the case. But the court’s response, like the response in failing to grant Bobby Seale’s attorney a continuance for surgery, was not routine. The court held a hearing, and Mr. Sullivan, representing the four lawyers, stated to the court that the defendants other than Bobby Seale were fine with their withdrawal. He stated, “They are, as I understand it, satisfied to be represented in the trial of this case by Messrs. Garry, Kunstler and Weinglass”⁸² Lefcourt had appropriately discussed his motion to withdraw from the trial of Abbie Hoffman, who agreed to be represented by Attorney Weinglass.⁸³

76. *Id.*

77. Lefcourt Interview, *supra* note 1.

78. *Id.*

79. *See* KUNSTLER WITH ISENBERG, *supra* note 2, at 14.

80. *Id.* The Panther trial, according to Kunstler, became “the longest criminal trial in New York’s history. All twenty-one defendants, including even those who had jumped bail, were acquitted of every charge.” *Id.*

81. Lefcourt Interview, *supra* note 1.

82. THE TALES OF HOFFMAN 12 (Mark L. Levine, George C. McNamee & Daniel Greenberg eds., 1970).

83. *Id.* Lefcourt did represent Abbie Hoffman on an appeal following a conviction in the Cook County Circuit Court for resisting arrest. *See* *People v. Hoffman*, 258 N.E.2d 326, 326 (Ill. 1970).

Judge Julius Hoffman's response was, "I don't care to participate in negotiations."⁸⁴ He later stated,

First of all, before I consider that motion there will be a finding that the respondents Michael E. Tigar and Gerald B. Lefcourt are in contempt of this Court. I direct the United States Attorney to prepare the same kind of order that was submitted in connection with Michael J. Kennedy and Dennis J. Roberts.⁸⁵

The following colloquy occurred:

Mr. Sullivan:^[86] May I be heard?

The Court: I deny the motion, the other motion, in its entirety, the motion submitted here. Mr. Sullivan, I am not going to have lawyers flaunt the authority of this Court and not have the other lawyers be fair with the Court and try to intimate or suggest that while they filed appearances, they don't really represent them. . . .

. . .

The Court: I commit them without bail. I deny the motion for bail.

Mr. Sullivan: If the Court please—

The Court: I don't bail a lawyer contemner.

Mr. Sullivan: Your Honor, are they to remain in custody for—

The Court: Yes.

Mr. Sullivan: —for the rest of their lives?

The Court: For when?

Mr. Sullivan: For the rest of their lives? Is there no term?

The Court: I will determine on the disposition of this case Monday morning at ten o'clock.

Mr. Sullivan: Your Honor—

The Court: That will be the disposition. They are now held in contempt. I didn't say—don't put words in my mouth, Mr. Sullivan. I didn't intend and you know you were talking foolishly when you said the rest of their lives. . . .⁸⁷

So, Lefcourt, now in New York, was forced to return by plane to appear in court on the contempt charge.⁸⁸ Arriving on Friday, September 26, he was sent off to the jail to remain over the weekend without bail

In that case, arguments were made that the accused was deprived of due process by pretrial publicity and that the arrest itself was unlawful. *Id.* at 327. The court found the evidence supported the conviction and affirmed. *Id.* at 329.

84. THE TALES OF HOFFMAN, *supra* note 82, at 12.

85. *Id.*

86. "Mr. Sullivan" was Attorney Tom Sullivan who represented the four pretrial lawyers who withdrew. KUNSTLER WITH ISENBURG, *supra* note 2, at 18. He later became the United States Attorney for the Northern District of Illinois, replacing Thomas Foran, one of the attorneys presenting the Chicago Eight case for the government. *Id.*

87. THE TALES OF HOFFMAN, *supra* note 82, at 12–13.

88. Lefcourt Interview, *supra* note 1.

and without being sentenced.⁸⁹ In contrast to Lefcourt's voluntary return from New York to the Chicago courtroom, Attorney Tigar was arrested in Southern California and returned in chains to the Chicago courtroom.⁹⁰ The jailing of Attorneys Tigar⁹¹ and Lefcourt was considered so outrageous that "a hastily convened appellate panel put the matter to rest by ruling that the pretrial lawyers did not have to obey the judge's order to appear in court."⁹² But that took several hours and during that time, Lefcourt sat in the jail with Michael Tigar and Bobby Seale. Upon release, Lefcourt immediately left Chicago to return to New York. During this weekend reprieve, a strong showing of attorneys, press, and others came to support Lefcourt and the other lawyers, with Abbie Hoffman rallying the troops to highlight the issues.

Lefcourt still needed to return to the Chicago courtroom on Monday, and this time he was not alone. Three professors from Harvard Law School⁹³ came with a petition to assist. Judge Hoffman then vacated the contempt allegations against Lefcourt and Tigar. Shortly thereafter, the Chicago Eight trial became the Chicago Seven trial.⁹⁴

One might wonder why Judge Hoffman issued bench warrants for the arrest of these four attorneys, all who would have voluntarily returned to the courtroom. But keep in mind that Judge Hoffman offered their release if Bobby Seale would waive his right to being represented by Attorney Charles Garry.⁹⁵ Bobby Seale, however, maintained his desire to be

89. *Id.*

90. Attorneys Michael Kennedy and Dennis Roberts were fortunate that their U.S. Attorney from San Francisco rescinded the warrants for their arrest. *See* Notes of Gerald Lefcourt II, at 2 (on file with author).

91. Tigar was picked up "lounging on the deck of the Smothers Brothers' boat docked in Sausalito, California." KUNSTLER WITH ISENBURG, *supra* note 2, at 18.

92. *Id.* It is stated that the same day that Sullivan argued, "the National Lawyers Guild, an organization of progressive attorneys, held a demonstration which filled the first floor of the courthouse." *Id.* Seventh Circuit Judge Walter J. Cummings signed the order releasing them on appellate bail, despite the fact that there had not been a sentencing or conviction that would warrant appellate judicial review. Lefcourt Notes II, *supra* note 90, at 4.

93. *See* Deborah B. Johnson, *13 at Law School Protest Judge's Action in Chicago*, HARV. CRIMSON (Oct. 1, 1969), <https://www.thecrimson.com/article/1969/10/1/13-at-law-school-protest-judges/>.

94. *See* Lefcourt Notes II, *supra* note 90, at 4. The continuation of this trial after Attorney Lefcourt and the others were released from custody did not stop this trial from being unusual in many respects. The evidence included witness singer Judy Collins singing *Where Have All the Flowers Gone* and witness poet Allen Ginsberg chanting "O-o-m-m-m-m" in the courtroom. *See* Douglas O. Linder, *Testimony of Judy Collins*, FAMOUS TRIALS, <https://www.famous-trials.com/chicago8/1320-collins> (last visited July 24, 2019); Douglas O. Linder, *Testimony of Allen Ginsberg*, FAMOUS TRIALS, <https://www.famous-trials.com/chicago8/1324-ginsberg> (last visited July 24, 2019).

95. *See* Lefcourt Notes II, *supra* note 90, at 2.

represented by this attorney.⁹⁶

II. ATTORNEY WITHDRAWALS AND SUBSTITUTIONS

There are many instances in criminal cases when attorneys find it necessary to withdraw. Typically, the ethics mandates preclude representation when there is a direct conflict of interest. Likewise, withdrawal may occur when there is client perjury,⁹⁷ if the client engages in criminal activity,⁹⁸ and if there is a total breakdown in the attorney-client relation.⁹⁹ The American Bar Association (ABA) Model Rules of Professional Conduct, and specifically Rule 1.16, provide the rubric for attorney withdrawal, setting forth those areas of mandatory withdrawal (shall), permissive withdrawal (may), and the procedural mechanisms for the withdrawal.¹⁰⁰

With some exceptions,

a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged.¹⁰¹

With some exceptions, there are seven areas of permissive withdrawal allowed under the Rules of Professional Conduct. These allow the attorney to withdraw when:

96. Bobby Seale issued a written statement that these attorneys "[d]o not speak for me or represent me as of this date. I fire them now, until Charles Garry can be made available as chief Counsel." See Lefcourt Notes II, *supra* note 90, at 23.

97. MODEL RULES OF PROF'L CONDUCT r. 1.16 (AM. BAR ASS'N 2018).

98. *Id.* r. 1.16(b)(2), (3).

99. *Id.* r. 1.16(b)(4), (5).

100. *Id.* r. 1.16.

101. *Id.* r. 1.16(a). The comments to the rules note the following:

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Id. r. 1.16 cmts. 4–6.

(1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or fraud;^{102]} (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists.¹⁰³

From a procedural perspective, "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation."¹⁰⁴ A lawyer can be "ordered" by a tribunal, to "continue representation notwithstanding good cause for terminating the representation."¹⁰⁵ There are also obligations of an attorney who withdraws to secure and pass along the paperwork and monies of his or her former client.¹⁰⁶

102. *Id.* r. 1.16(b). Comment 2 to Rule 1.16 states:

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

103. *Id.* r. 1.16(b).

104. *Id.* r. 1.16(c). *See also* comment 3 to Rule 1.16, which states:

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. *See also* Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

105. *Id.* r. 1.16(c).

106. Rule 1.16(d) states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Id. r. 1.16(d). The accompanying comment to this provision of the rules states, "Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the

At first blush one may say that Judge Julius Hoffman's order for Attorney Lefcourt to remain in this case mandated the attorney's continuation. And if the judge were mandating his continued representation for his prior client, that might be within the applicable ethical standards. But there is one major stumbling block to this analysis, and that is that Lefcourt did not represent accused Bobby Seale, the individual that Judge Hoffman wanted represented. Furthermore, Lefcourt's leaving the case was not affecting the representation of Abbie Hoffman, as Abbie Hoffman consented to Lefcourt's withdrawal and was satisfied with the counsel in the room.¹⁰⁷ Thus, Judge Julius Hoffman's jailing of the four lawyers, including Lefcourt, had no basis and was rightfully rectified by an appellate court within hours of the issuance of the order.¹⁰⁸

III. LESSONS LEARNED—RESPONDING TO MISPLACED JUDICIAL CONDUCT

Was Judge Julius Hoffman the norm when it came to judging? Looking back, Lefcourt thinks not. Fifty years after the Chicago Eight trial, he remarks that he has not come across another judge like Judge Hoffman in his practice.¹⁰⁹ This judge was *sui generis*, and this trial had a uniqueness like none other.

One has to ask, how does one deal with a judge who fails to grant a continuance when a legitimate medical reason arises, fails to allow withdrawal of attorneys who are justified to withdraw, fails to allow a defendant to represent himself, gags a defendant in the courtroom, bullies attorneys and defendants pretrial and during trial, and lacks the ability to control a trial? Others will examine the improprieties of the judge brought

consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15." *Id.* r. 1.16 cmt. 9.

107. Comment 7 to Model Rule 1.16 states:

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

Id. r. 1.16 cmt. 7.

108. See generally Lindsay R. Goldstein, Note, *A View from the Bench: Why Judges Fail to Protect Trust and Confidence in the Lawyer-Client Relationship—An Analysis and Proposal for Reform*, 73 *FORDHAM L. REV.* 2665 (2005) (discussing the problems with having judicial officers ruling on attorney motions to withdraw).

109. Lefcourt Interview, *supra* note 1.

forth in the later appellate decisions, but the focus here is on how a criminal defense attorney should respond to a judge whose conduct is inexplicable.

Several externalities are apparent here. First is the role of other attorneys. A long list of counsel came to assist Lefcourt and others. On Lefcourt's trip back to Chicago to turn himself in on the contempt charge, he was met with a petition signed by some on the Harvard Law faculty who believed that he should not be jailed.

Law professors have long served in roles of explaining the law to the public, providing guidance to lawyers, and serving as educators to the next generation of lawyers. But coming forward during turbulent times carries greater risks to academics, especially ones that may be untenured. Yet the backing of the academy can be influential in demonstrating the propriety or impropriety of certain actions.¹¹⁰

The rallying of attorneys prior to returning to Chicago heightened the media attention on what was occurring inside and outside this Chicago courtroom. Lefcourt noted the importance of the academy and the press in speaking out against judicial injustice.¹¹¹ Most importantly, it highlights how strong, steadfast criminal defense attorneys can make a difference in protecting key constitutional rights and values.

CONCLUSION

On one level, independence of the judiciary should never be compromised as it is crucial to a system premised on due process.¹¹² The judiciary should not be influenced by the political process or its parties. In that regard, it is rare that a judge or justice responds to criticism or public outcry in their decision-making process.¹¹³ But it is also important that those within the judicial system pay attention to misconduct and

110. In some instances, law professors' signatories can be helpful in assisting a view as many have signed onto amici briefs in support of different positions before the U.S. Supreme Court. In other instances, it may provide a recognized pronouncement in the media but have little effect in the ultimate decision. See Opinion, *The Senate Should Not Confirm Kavanaugh: Signed, 2,400+ Law Professors*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/interactive/2018/10/03/opinion/kavanaugh-law-professors-letter.html>.

111. Lefcourt Interview, *supra* note 1.

112. See Statement, Bob Carlson, President, Am. Bar Ass'n, Being Thankful for Judicial Independence (Nov. 27, 2018), <https://www.americanbar.org/news/abanews/aba-news-archives/2018/11/statement-of-bob-carlson--aba-president-re--being-thankful-for-j/>.

113. See Justin Lo, Opinion, *Chief Justice Roberts Right to Defend Independence of the Judiciary*, THE HILL (Dec. 22, 2018, 2:00 PM), <https://thehill.com/opinion/judiciary/422521-chief-justice-roberts-right-to-defend-independence-of-the-judiciary> (arguing Chief Justice Roberts "should be commended for stepping off the sidelines and fulfilling his duty in coming to the defense of judicial independence" in response to President Trump's attempt to discredit a district court judge by calling him an "Obama judge").

improprieties by those who are given the authority to administer justice. And when a lawyer, such as Gerald Lefcourt and others, are the subjects of judicial actions that need correction, it is up to all of us, especially law professors, to stand up to call for change.

Gerald Lefcourt was a small slice of the Chicago Eight trial, but one who represents the importance of the criminal defense role in our judicial system. Today Lefcourt is a past president of the National Association of Criminal Defense Lawyers (NACDL),¹¹⁴ a winner of NACDL's highest award (the Heeney Award),¹¹⁵ a past president of the New York Criminal Bar Association,¹¹⁶ and a top white-collar attorney who represents a wide spectrum of clientele.¹¹⁷ But as a young attorney starting his career, being jailed might make one reconsider his or her actions and reevaluate his role in the practice of law. The importance of having the support of other lawyers and law professors should not be understated. Standing up to a judicial officer is not easy, but when justified as here, it is a crucial component of our criminal justice process.

114. He served as president for the 1997–98 term. *See Past Presidents*, NAT'L ASS'N CRIM. DEF. LAW., https://www.nacdl.org/past_presidents/ (last visited July 24, 2019).

115. "The prestigious Robert C. Heeney Memorial Award is given annually to the one criminal defense attorney who best exemplifies the goals and values of the Association and the legal profession. The award was established in 1981 to honor NACDL's 18th President, the late Robert C. Heeney, of Rockville, MD." *See Robert C. Heeney Memorial Award*, NAT'L ASS'N CRIM. DEF. LAW., <https://www.nacdl.org/awards/heeney/> (last visited July 24, 2019). Attorney Lefcourt won this award in 1993. *Id.*

116. *See Past Presidents*, N.Y. CRIM. BAR ASS'N, <https://www.nycrimbar.org/past-presidents/> (last visited July 24, 2019).

117. Gerald B. Lefcourt's biography demonstrates the breadth of his practice throughout the years. *See Firm Overview*, GERALD B. LEFCOURT, <https://www.lefcourtlaw.com/Firm-Overview.shtml> (last visited July 24, 2019); *see also Recent and Notable Decisions*, GERALD B. LEFCOURT, <https://www.lefcourtlaw.com/Recent-and-Notable-Decisions/> (last visited July 24, 2019).