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Judging Judges Fifty Years After—Was Judge Julius Hoffman’s Conduct So Different?

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Judging Judges Fifty Years After—Was Judge Julius Hoffman’s Conduct So Different?

*Bennett L. Gershman**

In Chicago, Illinois—and in courtrooms across the United States—judicial misconduct has affected trial outcomes as long as there have been trials. While Judge Julius Hoffman’s conduct in the “Chicago Eight” trial is an egregious example of judicial behavior toward criminal defendants, this piece’s examination of at least ten different categories of misconduct in dozens of cases makes the argument that misbehavior by judges is less of an exception to the rule of impartiality than the thinking public might know. In considering these brazen examples, practitioners and academics alike can evaluate how to best confront the extent to which conduct like Judge Hoffman’s permeates our justice system.

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INTRODUCTION

It began as the “Chicago Eight” trial, ended as the “Chicago Seven”

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trial, and for five months in between became the most spectacular, uproarious, and dysfunctional criminal trial in U.S. history.¹ Daily, it resembled a courtroom carnival—a bizarre amalgam of law, revelry, politics, mischief, and an erratic judge who was unable to control the courtroom or himself. The fiftieth anniversary of that trial is the catalyst for the Southeastern Conference of Law Schools’s panel discussion on judges and trials. The Chicago Eight trial was unique in tone, context, and performance. Whether it provides any meaningful basis to study judges and trials is unclear. For as this Essay shows, Judge Julius Hoffman’s egregious conduct was not that different from hundreds of other judges, before and since.

Judge Hoffman’s conduct was heavily criticized by the Seventh Circuit for numerous deficiencies: (1) failing to conduct a more extensive voir dire into the attitudes of prospective jurors given the extraordinary setting involving nation-wide protests against the Vietnam War, the extensive attention in the media to the youth culture, and the aggressive actions of the Chicago police;² (2) communicating privately with jurors during their deliberations without making a record or alerting the defense;³ (3) preventing the defense from presenting expert witnesses to testify on crowd dynamics and police tactics relating to crowd control;⁴ and (4) excluding exculpatory statements by some of the defendants relating to their state of mind while traveling to Chicago.⁵

But by far the most enduring image from that trial was Judge Hoffman’s antagonistic and abusive conduct toward the defendants, their lawyers, and courtroom spectators.⁶ As the Seventh Circuit remarked, “Trial decorum often fell victim to dramatic and emotionally inflammatory episodes.”⁷ The most inflammatory episode was Judge Hoffman’s brutal treatment of defendant Bobby Seale, whose insistence on representing himself incited Judge Hoffman to order him bound and

1. See generally CONSPIRACY IN THE STREETS: THE EXTRAORDINARY TRIAL OF THE CHICAGO EIGHT (Jon Wiener ed. 2006); JOHN SCHULTZ, THE CHICAGO CONSPIRACY TRIAL (1993); see also *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972) (Seven defendants were convicted of violating the 1968 federal Anti-Riot Act for their alleged violent encounters with police in streets and parks during the Democratic party’s national convention in Chicago in the last week of August of 1968.).

2. *Dellinger*, 472 F.2d at 368–69.

3. *Id.* at 377–80.

4. *Id.* at 383–85.

5. *Id.* at 380–82.

6. *Id.* at 385–91 (“[W]e are unable to approve the trial in this case as fulfilling the standards of our system of justice.”). The appellate court also found that the prosecutors engaged in serious and reversible misconduct. See *id.* at 389–91.

7. *Id.* at 385.

gagged.⁸ Stoking fear of a breakdown in the proceedings, Judge Hoffman commanded nineteen marshals to be stationed around the courtroom, which gave the trial an aura of military-like repression. Judge Hoffman displayed throughout the trial an unremitting hostility toward the defendants and their lawyers.⁹ He repeatedly and gratuitously demeaned defense counsel, often in the presence of the jury, insinuating sarcastically and without justification that they were inept and untrustworthy.¹⁰ His evidentiary rulings almost always favored the prosecution. As the Seventh Circuit observed, Judge Hoffman's conduct "must have telegraphed to the jury the judge's contempt for the defense."¹¹

Some of us on this panel undoubtedly have appeared before soulmates of Julius Hoffman; I know I have. As Professor Abbe Smith notes wryly, "Too many [judges] are mean-spirited and arrogant, going out of their way to insult, ridicule, and demean those who come before them."¹² Professor Smith's grim account of bad judges exemplifies the toxic environment that exists in many courtrooms in America where the conduct of judges is not very different from Judge Hoffman's—they abuse litigants, intervene in the trial to skew the fairness of proceedings, and undermine the public's trust in the integrity of trials.¹³ But unlike Judge Hoffman, most of these judges are anonymities, their misconduct lying buried in the vast flotsam of Westlaw reports, much like the misconduct of prosecutors.¹⁴

The foundation of any rational system of justice requires judges to be fair and impartial.¹⁵ Judges must conduct themselves with dignity and

8. Seale's case was later severed from the other defendants, hence the change in the popular designation of the trial from "Chicago 8" to "Chicago 7." *Id.*

9. *Id.* at 385–86. The Seventh Circuit noted: "[I]n considering complaints concerning the conduct of the trial judge and prosecuting attorneys we have avoided holding them responsible for conduct made reasonably necessary by the conditions at the trial arising from the activity of others." *Id.* at 385.

10. *Id.* at 387–88.

11. *Id.* at 387. Judge Hoffman also held several of the defendants and lawyers in contempt. The charges were later vacated. *See In re Dellinger*, 461 F.2d 389 (7th Cir. 1972); *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972).

12. Abbe Smith, *Judges as Bullies*, 46 HOFSTRA L. REV. 253, 253 (2017).

13. *See* Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 431 (2004) (describing "incompetent, self-indulgent, abusive, or corrupt [judges who] terrorize courtrooms, impair the functioning of the legal system, and undermine public confidence in the law").

14. The same debate over whether prosecutors engage in "misconduct" or "error" also appears in commentaries about judges. *See, e.g.*, Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245 (2004).

15. MODEL CODE OF JUDICIAL CONDUCT rr. 2.2–2.3 (AM. BAR ASS'N 2007); *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

patience and not demean, harass, or denigrate persons who appear before them. Although a judge is a central figure in U.S. legal justice and has the duty to take an active role in a trial (and even comment on the evidence),¹⁶ the judge must use this power carefully and responsibly. Although a judge at a trial is allowed to question witnesses to elicit facts, clarify issues, and facilitate the orderly and expeditious progress of the proceedings,¹⁷ the judge should never assume the role of an advocate, or impair the ability of the lawyers to represent their clients diligently and effectively. Judicial neutrality is a paramount feature of a rational legal system; it promotes a fair trial and engenders public confidence in the integrity of the justice system.¹⁸

Despite these lofty goals, trial judges too often engage in conduct quite similar to that of Judge Hoffman. Too often they display bias, flout the dignity and decorum of the courtroom, demean and insult counsel, and thereby impair a defendant's right to a fair trial.¹⁹ Appellate review, as occurred after the Chicago Eight trial, occasionally corrects the most flagrant abuses. But judicial review is a limited and uncertain remedy; too often criminal convictions are upheld despite serious abuses by the trial judge.

The cases below illustrate how trial judges in various ways assumed the role of an advocate, interfered aggressively in the proceedings, and skewed the delicate courtroom balance that the adversarial system seeks to promote. Judges can do this by interrogating witnesses, especially the defendant, with questions and comments that demonstrate hostility, skepticism, and disparagement;²⁰ bolstering the credibility of prosecution witnesses with leading, reinforcing, and reassuring questions that in

16. *See* *Quercia v. United States*, 289 U.S. 466, 469 (1933) (stating that a judge “may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination”).

17. FED. R. EVID. 614(b).

18. According to the ABA Criminal Justice Standards:

The trial judge should be a model of dignity and impartiality. The judge should exercise restraint over his or her conduct and utterances. The judge should remain neutral regarding the proceedings at all times, suppress personal predilections, control his or her temper and emotions, and be patient, respectful, and courteous to defendants, jurors, witnesses, victims, lawyers, and others with whom the judge deals in an official capacity. The judge should not permit any person in the courtroom to embroil him or her in conflict, and should otherwise avoid personal conduct which tends to demean the proceedings or to undermine judicial authority in the courtroom.

ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE 7 (3d ed. 2000) (Standard 6-3.4: Courtroom Demeanor).

19. *See, e.g.*, BENNETT L. GERSHMAN, *CRIMINAL TRIAL ERROR AND MISCONDUCT* (3d ed. 2015).

20. *Id.* §§ 1-2(a)-(b), at 6-16.

effect vouch for the witness's truthfulness;²¹ employing strong-arm tactics that denigrate a defendant or his witness's character and credibility;²² coercing witnesses into giving certain answers;²³ intimidating witnesses to decline to testify;²⁴ making gratuitous comments that display hostility, disbelief, disparagement, ridicule, and favoritism;²⁵ undermining a defendant's constitutional rights by commenting on the defendant's failure to testify and the presumption of innocence;²⁶ and impairing the ability of defense counsel to defend her client by engaging in criticism, abuse, and threats—often in the jury's presence—that disparage counsel's integrity and competence.²⁷

I. RANDOM ACCOUNTS OF POST-CHICAGO EIGHT MISCONDUCT BY TRIAL JUDGES

Judicial misconduct that taints the fairness of the trial and corrodes the integrity of the justice system occurs with disturbing frequency, and corrective remedies are limited.²⁸ Consider the following cases, selected from many hundreds of cases, involving misconduct by judges which prejudiced the defendant's right to a fair trial.²⁹

A. *Forcibly Restraining Defense Counsel*

After a defense lawyer engaged in a heated exchange with the judge over an evidentiary ruling, the judge, feeling insulted by a lawyer who

21. *Id.* § 1-2(c), at 18–21.

22. *Id.* § 1-2(b)(4), at 17.

23. *Id.* § 1-2(d), at 22–23.

24. *Id.*

25. *Id.* §§ 1-3(a)–(f), at 27–35.

26. *Id.* § 1-3(g), at 35–36.

27. *Id.* §§ 1-4(a)–(b), at 37–41.

28. This is not to suggest that judges are never accountable for their misconduct. They are reversed occasionally, and disciplined. But judges are almost never disciplined for misconduct that arises during a trial. *See, e.g., In re Stevens*, 645 P.2d 99 (Cal. 1982) (racial remarks during conferences in chambers); *In re Agresta*, 476 N.E.2d 285 (N.Y. 1985) (racial comments during sentencing); *In re Waltemade*, 409 N.Y.S.2d 989 (Ct. Judiciary 1975) (rude and insulting remarks during court appearances); *In re Judicial Disciplinary Proceedings Against Gorenstein*, 434 N.W.2d 603 (Wis. 1989) (abusive remarks during probation and other non-trial proceedings).

29. The identity of the trial judge is usually apparent from the synopsis of the case, which appears at the beginning of the appellate court's written decision, and which identifies the court of original jurisdiction in which the defendant was convicted, the nature of the conviction, the identity of the trial judge, and the holding by the appellate court. Curiously, however, there are occasions when the identity of the trial judge, whose conduct is criticized by the appellate court, is omitted from the synopsis, possibly to shield the judge from being identified and embarrassed. *See, e.g., United States v. Mazzilli*, 848 F.2d 384 (2d Cir. 1988); *United States v. Victoria*, 837 F.2d 50 (2d Cir. 1988); *United States v. Robinson*, 635 F.2d 981 (2d Cir. 1980); *United States v. Hickman*, 592 F.2d 931 (6th Cir. 1979).

had a long history of trying to bait judges, ordered the U.S. marshals, in the jury's presence, to handcuff the lawyer behind her back and remove her from the courtroom, and then in the presence of the jury stated:

Well, she doesn't know how to behave herself in a courtroom. It's like having a bunch of children, screaming and crying and yelling at the top of her voice in total disrespect for the Court. She doesn't—I won't have it in my court. She's trashing the United States, and that doesn't happen in my Court.³⁰

B. *Becoming a Surrogate Prosecutor*

A judge, renowned as a combative prosecutor before he ascended to the bench, apparently forgot that he was a judge and continued his prosecutorial advocacy after his ascension to the bench. In one murder trial, he interrupted and undermined defense counsel's attempt to impeach a police expert witness by asking leading questions to prove that gun residue evidence almost never can be discovered from a suspect; that lifting fingerprints from a gun almost never can be found; that a gun could not accidentally discharge by falling to the ground; that the gun was possessed by the defendant; and that a hat described by witnesses as worn by the shooter was owned by the defendant.³¹ By asking hundreds of continuous and uninterrupted questions of the defendant, his witnesses, and prosecution witnesses, the judge destroyed the credibility of the defendant and bolstered the prosecution's case far better than the prosecutor did.³²

C. *Undermining Defense Counsel's Ability to Defend*

In a federal prosecution of a state senator, the trial judge displayed overt hostility to the defendant and his counsel. The judge ordered defense counsel to write out his objections, thereby allowing the witness's testimony to be heard before defense counsel could intervene; interfered multiple times in the questioning of defendant and his witnesses; criticized defense counsel's questions as "'improper' and

30. *United States v. Elder*, 309 F.3d 519, 523 (9th Cir. 2002) (Ferguson, J., dissenting) (quoting transcript of trial proceedings).

31. *People v. Ellis*, 404 N.Y.S.2d 862, 863 (N.Y. App. Div. 1978).

32. *Id.* For more examples of this judge's similar conduct, see *People v. Yut Wai Tom*, 422 N.E.2d 556 (N.Y. 1981) (conviction reversed for same judge's excessive participation in examination of witnesses); *People v. Tartaglia*, 324 N.E.2d 368 (N.Y. 1974) (conviction reversed for same judge's unnecessary questions of witnesses and altercations with defense counsel); *People v. Tucker*, 455 N.Y.S.2d 1 (N.Y. App. Div. 1982) (conviction reversed for same judge's improper intervention in defense counsel's questioning of witnesses); *People v. Ohlstein*, 387 N.Y.S.2d 860 (N.Y. App. Div. 1976) (conviction reversed for same judge's undue advocacy on behalf of prosecution).

‘completely without merit’”; ordered defense counsel to “stop mumbling” and indicated that his questions were “a bore and a waste of time”; and implied “several times that counsel was ‘misleading’ the jury.”³³

D. Destroying Defendant’s Credibility

Defendant, charged with carrying a drug-filled briefcase into the United States, testified that he had assisted an elderly passenger at the airport baggage terminal by carrying the passenger’s briefcase, which he believed belonged to that passenger on a baggage trolley.³⁴ The court interrupted his testimony:

The Court: Did you have a trolley?

The Defendant: Yes, I do.

The Court: Did you have the trolley when you went through Immigration?

The Defendant: Yes, I do.

The Court: If I told you [that] you can’t take the trolley when you go through Immigration, would you believe me?

The Defendant: (No response.)

The Court: You only get the trolley when you go to the customs area, don’t you?³⁵

The court contradicted the defendant on the details of his trip:

The Court: You said you went [to Nigeria] the latter part of October?

The Defendant: Yes.

The Court: How long did you stay?

The Defendant: Just about a week.

The Court: Two weeks?

The Defendant: A week.

The Court: Then you came back?

The Defendant: I came back, yes.

The Court: How come you came back November 30, if it was only a week, and you went in October?

...

The Defendant: I do make a mistake.

The Court: Okay. I just want to make sure.³⁶

After defense counsel elicited helpful testimony from the government’s narcotics agent that sometimes “drug lords . . . hide the narcotics with unsuspecting travelers,” the court intervened:

33. *United States v. Pisani*, 773 F.2d 397, 403 (2d Cir. 1985).

34. *United States v. Filani*, 74 F.3d 378, 381 (2d Cir. 1996).

35. *Id.*

36. *Id.* at 382.

The Court: Is it often?

The Witness: Based on my experience I would have to answer that no. But it has happened.

The Court: Would you say no because a drug lord wouldn't want to lose the drugs[?]

The Witness: Yes.

The Court: If you don't know the person you give it to it could be lost and you may never get it back?

The Witness: That's correct.

The Court: A lot of money is involved.

The Witness: Yes. They have a vest[ed] interest for one purpose. That is to make money. They are interested in seeing the narcotics delivered.³⁷

E. Sarcasm and Comedy

A defendant seeking to establish an alibi was subjected to the judge's sarcastic and demeaning interrogation:

The Court: Was that the Tommy Hunt—The Tommy Hunt that was on the stand, is that the Tommy Hunt you say you met in Chock Full O' Nuts?

The Witness: That's the Tommy Hunt.

The Court: That Tommy Hunt?

The Witness: That Tommy Hunt.

The Court: All right.

....

The Court: You saw him in Chock Full O' Nuts on February 8th?

The Witness: February 8th.

The Court: 1977?

The Witness: Right.

The Court: Chock Full O' Nuts, 50th Street and Broadway?

The Witness: Right.

The Court: City of New York?

The Witness: Right.

The Court: Right here in the city?

The Witness: Manhattan.³⁸

37. *Id.* (second brackets in original).

38. *People v. Tucker*, 455 N.Y.S.2d 1, 3 (N.Y. App. Div. 1982). The judge clearly was making an effort to be funny. Judges often like to appear as comedians before a jury. Judge Hoffman occasionally made attempts to be funny. *See United States v. Dellinger*, 472 F.2d 340, 387 (7th Cir. 1972) ("Taken individually any one [of Judge Hoffman's comments] was not very significant and might be disregarded as a harmless attempt at humor. But cumulatively, they must have telegraphed to the jury the judge's contempt for the defense."). For commentary on judicial humor, see Marshall Rudolph, Note, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175 (1989).

F. Benevolent Treatment of Prosecution Witness

In a prosecution for sexual assault of a young girl, the trial judge offered the child ice cream if she promised to tell “real things” and not “pretend things,” at the conclusion of her direct examination in which she identified the defendant as the perpetrator.³⁹ He rewarded her with ice cream in the presence of the jury, stating reassuringly: “I told you . . . if you told real things and not pretend things, I would give you an ice cream, right?”⁴⁰ Then, after cross examination during which the child ate her ice cream while repeating her identification of the defendant, the judge remarked:

The Court: Did you tell us everything that was real?

The Witness: Yeah.

The Court: Are you sure?

The Witness: Yeah.

The Court: For sure?

The Witness: Uh-huh.

The Court: You didn’t tell us no pretend stuff, right?

The Witness: No.

The Court: Okay. Here, wait a minute. Take those. Goodbye.

The judge, then in the presence of the jury, then gave the [child] a lollipop and two cookies.⁴¹

G. Insults and Abuse

A judge in a murder trial urged the prosecutor to ask the witness a question even though the prosecutor believed that the answer would be hearsay:

The Court: Is there any reason why you don’t ask [the witness] what [another witness, Miss Reiland,] said to her?

[The Prosecutor]: Because technically it is hearsay.

Court: It is admissible.

[Defense Counsel]: Judge, with all due respect, I would rather just fight [The Prosecutor] and not—

The Court: You know what, you’re not acting like[] a lawyer. We are talking about—at least it has been established that this is an exciting event, and it makes a whole lot more sense if the witness tells us what was said to her. Now, don’t object anymore, [defense counsel], when things are so obvious. Now, would you please ask her what Miss Reiland said.⁴²

39. *State v. R.W.*, 491 A.2d 1304, 1306 (N.J. Super. Ct. App. Div. 1985).

40. *Id.*

41. *Id.*

42. *Lyell v. Renico*, 470 F.3d 1177, 1180 (6th Cir. 2006).

The judge's repeated interruptions of defense counsel's questioning often came in the form of insults in the jury's presence. For instance, the judge admonished defense counsel by stating: "You want to be an actor. Be a lawyer."⁴³ Shortly thereafter, the judge added: "Don't act like a child You're a lawyer"⁴⁴ and "Would you please position yourself and act like [a lawyer]."⁴⁵ The judge accused defense counsel "of being 'a smart aleck,' of being 'silly,' and of 'trying to create a furor.'"⁴⁶ When defense counsel appeared, at least in the judge's mind, to be engaging in a forbidden line of questioning, the following exchange resulted:

The Court: Mr. Hart, you know you're exhausting all of us. Mr. Hart, do you have any more questions for this witness before he is excused?

Mr. Hart: Yes, I do, Judge.

The Court: I don't know why you keep doing these things over, and over again. That was a terrible thing, terrible thing for you to do.

Mr. Hart: I disagree.

Court: Doesn't make any difference whether you agree or not.⁴⁷

H. Racial Remarks

Derogatory remarks by judges can infect the trial. During a trial of a Haitian defendant, the trial judge remarked about the defendant:

I think it's a shame people come here and do not try to learn our language. However, they might learn something if they sit here for awhile.

It is important to make an effort so you can be able to understand. It is incumbent upon all of you to go ahead and make an attempt to learn English.⁴⁸

In a federal drug trafficking trial, the same judge said the following about Colombians:

They don't have too much regard for judges. They only killed 32 Chief Judges in that nation. Their regard for the judicial system, the men who run their laws, I'm glad I'm in America. That's why I pledge allegiance to the flag. My mother and father came from Italy.

. . . .

. . . [These defendants] should have stayed where they were. Nobody told them to come here. I'm one of the fellows who makes United States citizens. Nobody tells them to come and get involved in cocaine. Don't

43. *Id.*

44. *Id.*

45. *Id.* (alteration in original).

46. *Id.* (citations omitted).

47. *Id.* at 1180–81.

48. *Saintjour v. State*, 534 So. 2d 874, 874 (Fla. Dist. Ct. App. 1988).

give me that theory. My father came over with \$3 in his pocket. He has a Federal Judge as a son.⁴⁹

I. Gratuitous Interventions

Consider the following remarks by judges in the jury's presence:

All right. I don't believe I want to hear any more testimony from this [defense] witness. I want to certify in the record that the Court wouldn't believe him on oath, and I don't want to waste the jury's time taking any more testimony from him.⁵⁰

* * *

[To the prosecutor]: Step over here with the knife, don't leave that there. Look, I don't want that exhibit left anywhere where [the defendant] can get to it.⁵¹

* * *

[S]it down and relax. . . . You're a victim. [To the jury]: He's a victim of a crime who came here to describe as best he could. [The jury] can realize if they were in his place they may be could not do so well.⁵²

J. Violating Rights

Judges have made comments in the jury's presence that impair defendants' constitutional rights in various ways: interrupting defense counsel's attempt to impeach a witness by stating that counsel could put "your people" on the stand to contradict the witness;⁵³ admonishing a defendant who had been gesturing toward the jury by stating that "[i]f you wanted to testify you could have taken the stand;"⁵⁴ and admonishing a smiling defendant that "[i]f you disagree with something you can take the stand and testify yourself."⁵⁵ A judge stated in the presence of the jury that he knew that a defense witness who was associated with the defendant was a convicted drug dealer.⁵⁶ Judges have implied that the defendant has the burden of proof,⁵⁷ and asserted that the defendant's silence at the time of arrest could be used to discredit his exculpatory testimony.⁵⁸

49. *United States v. Edwardo-Franco*, 885 F.2d 1002, 1005 (2d Cir. 1989).

50. *Stevens v. United States*, 306 F.2d 834, 838 (5th Cir. 1962).

51. *State v. Wendel*, 532 S.W.2d 838, 839 (Mo. Ct. App. 1975).

52. *Minor v. Harris*, 556 F. Supp. 1371, 1381 (S.D.N.Y. 1983) (third alteration in original), *aff'd*, 742 F.2d 1430 (2d Cir. 1983).

53. *Davis v. United States*, 357 F.2d 438, 440 (5th Cir. 1966).

54. *United States v. Wing*, 104 F.3d 986, 988 (7th Cir. 1997).

55. *People v. Crabtree*, 515 N.E.2d 1323, 1325 (Ill. App. Ct. 1987).

56. *United States v. Pritchett*, 699 F.2d 317, 320 (6th Cir. 1983).

57. *People v. Iskandar*, 426 N.Y.S.2d 24, 25 (N.Y. App. Div. 1980).

58. *Hawkins v. LeFevre*, 758 F.2d 866, 870 (2d Cir. 1985).

II. DISCUSSION

The above cases describe serious misconduct by judges that undermined the fairness of the trial. Several of the cases resulted in reversals, and others in strong reprimands. But these cases are not isolated deviations. The conduct described in these examples occurs often in courtrooms throughout the country. And although a judge's misconduct occasionally results in a reversal or appellate rebuke, as in the Chicago Eight trial, a judge's misbehavior almost never results in discipline of the judge.

The rare appellate reversal based on a judge's misconduct requires the conduct to be "so prejudicial" that it denies the defendant a fair trial.⁵⁹ However, determining whether a judge's misconduct reaches that high level of prejudice is rarely a simple or straightforward task. In all of the above examples the judge's misconduct, as in the Chicago Eight trial, almost certainly contributed to the jury's guilty verdict. Still, when proof of a defendant's guilt is strong, an appellate court will almost always defer to the trial judge and conclude that the judge's misconduct did not substantially affect the result.

The Constitution,⁶⁰ statutes,⁶¹ case law,⁶² and ethical codes⁶³ mandate that trial judges conduct themselves fairly and impartially. The excesses by Judge Hoffman in the Chicago Eight trial, and the conduct of the judges described in the above examples, are plainly at variance with a judge's legal and ethical duty to ensure that a criminal defendant receives a fair trial. To be sure, a judge is not simply a moderator or umpire of the trial. A judge has a duty to take an active role in the proceedings to ensure that trials are conducted in a fair, orderly, and expeditious manner. But it is well recognized that a judge has an enormous influence over the jury,⁶⁴ and must be exceedingly careful not to engage in conduct that could

59. *United States v. Pisani*, 773 F.2d 397, 402 (2d Cir. 1985).

60. *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (Due process is violated when a judge presides in a case that would "offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant," or would "lead him not to hold the balance nice, clear, and true between the State and the accused.").

61. FED. R. CRIM. P. 23 (trial by jury or by judge); FED. R. EVID. 611 (court should exercise reasonable control over and mode of examining witnesses and presenting evidence).

62. *Quercia v. United States*, 289 U.S. 466, 471-72 (1933) (criticizing a judge's remarks to a jury).

63. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B) (AM. BAR ASS'N 1990) (judge should maintain professional competence, require order and decorum in proceedings, and should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others).

64. *Quercia*, 289 U.S. at 470 ("The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'").

significantly influence the jury's determination.

A criminal trial is a complex event that puts a heavy burden on a judge. Administering a trial, especially a lengthy trial, demands considerable intellectual, physical, and emotional skills. The judge must supervise many diverse and often competing factions: prosecutors, defense lawyers, witnesses, jurors, media, spectators, and the public. Courts and disciplinary bodies recognize "the enormous pressures placed upon our trial judges by their ever-expanding dockets and the increasing complexity of modern trials."⁶⁵ A judge facing these pressures must ensure that trial procedures are followed correctly, that evidence is received properly according to the rules, that prosecutors and defense lawyers conduct themselves competently and respectfully, that spectators in the courtroom behave, that time is not wasted, and that the jury is properly empaneled, attended to, and instructed correctly on the law. It is therefore not surprising that appellate courts and disciplinary bodies treat trial judges with considerable deference and are reluctant to second-guess or criticize the judge's conduct when it reasonably appears to have been occasioned by the pressures of a difficult trial or precipitated by the behavior of the participants.

As noted above, as supervisor of the trial, the judge has a duty to take an active role in the proceedings, which may include the questioning of witnesses when necessary to elicit facts, clarify issues, or facilitate the orderly and expeditious progress of the trial.⁶⁶ Given that a judge is authorized to intervene in the proceedings, reviewing courts typically consider the nature of the intervention, the reason the judge intervened, the extent and aggressiveness of the intervention, whether the judge's involvement was isolated or recurring, whether the judge's intervention was evenhanded or favored one party, and whether the reviewing body is able to detect, even at a distance and from reviewing the trial transcript, the manner and tone of the judge's intervention, and whether it conveyed skepticism, hostility, or favoritism.

But given that the judge's intervention can slant the proceedings in favor of one party, the judge must be extremely careful when deciding whether to intervene. Even if the judge decides to participate in the fact-finding process, he should avoid conduct or remarks that suggest an opinion of the facts or the credibility of witnesses.⁶⁷ Thus, as in Case B,⁶⁸

65. *United States v. Pisani*, 773 F.2d 397, 403 (2d Cir. 1985).

66. FED. R. EVID. 614(b) ("The court may examine a witness regardless of who calls the witness.")

67. *Quercia*, 289 U.S. at 470 ("The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'").

68. *See supra* Part I.B.

the judge throughout the trial assumed the role of the prosecutor and in hundreds of unnecessary, repetitive, and uninterrupted questions virtually destroyed the credibility of the defendant and his witnesses as well as thwarted defense counsel's efforts to impeach the prosecution's expert witness. Although the judge previously was a renowned prosecutor famous for his cross-examination skills, when he assumed the role of judge, he shed the role of a prosecutor and was required to resist the impulse to intervene for the prosecution, which, regrettably, he was unable to do.

Similarly, in Case D,⁶⁹ the judge apparently believed that the defendant was giving contrived and fabricated testimony and was not content to allow the adversary system to expose the defendant's falsehoods. Perhaps believing that the adversary system was not operating properly to flush out the truth, the judge took it upon himself to perform that role. But this is not the judge's role.

Contrasting with these cases involving a judge's aggressive efforts to discredit the defense, the judge in Case F intruded into the proceedings to bolster the testimony of the prosecution's key witness.⁷⁰ The judge gratuitously and beneficently reassured the child sexual assault victim of her ability to give truthful testimony and then praised and rewarded her for her truthful testimony. It is inconceivable that the jury did not view the judge's interaction with this witness as anything other than the judge's pronouncement that she was telling the truth about being sexually assaulted by the defendant. In all of these cases it was clear that the judge's intervention displayed prominently the judge's attitude toward the witnesses—ridicule, disbelief, disparagement, or favoritism.

Even though the judge has some leeway to intervene in the fact-finding process, and even to comment on the evidence,⁷¹ there is no comparable allowance for the judge to make gratuitous, disparaging, and partisan comments—especially in the jury's presence—that expressly or impliedly reveal the judge's opinion about the witnesses or the evidence. To be sure, judges are not automatons, and they occasionally make inappropriate remarks. Indeed, reviewing courts regularly observe that given the pressures on the trial judge, especially when the trial is long, participants are many, and the issues are complex, "even conscientious members of the bench . . . [will] vent to their frustrations by displaying anger and partisanship, when ordinarily they are able to suppress these

69. See *supra* Part I.D.

70. See *supra* Part I.F.

71. *Quercia*, 289 U.S. at 469 ("[A judge] may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination.").

characteristics.”⁷² And appellate courts routinely point out that there is a “modicum of quick temper that must be allowed even [to] judges.”⁷³ However, reviewing bodies extend no tolerance, nor should they, to a judge’s remarks that plainly disparage a witness’s credibility, or are belittling, denigrating, and humiliating of witnesses or lawyers.

The Chicago Eight trial is a pristine example of how inflammatory remarks by the judge “telegraphed to the jury the judge’s contempt for the defense.”⁷⁴ Case E, noted above, also reveals how a judge’s attempt at comedy in reality constituted a scathing ridicule of a defendant’s alibi and showed the judge’s undisguised contempt for the defense.⁷⁵ Case H captures a judge’s racially derogatory remarks,⁷⁶ and Case I describes gratuitous remarks by judges that vilify a defense witness, demonize the defendant, and laud the crime victim.⁷⁷ And Case J describes remarks that eroded the defendant’s constitutional right to remain silent and to the presumption of innocence.⁷⁸

Probably the most common ground for reversal is bias by the judge. A judge’s remarks, particularly when the jury is present, can clearly reveal the judge’s bias. This was evident in the Chicago Eight trial and in many of the cases described above. Why some judges expose their bias so openly is not entirely clear. Most judges are able to keep their emotions in check, or at least have the good sense to excuse the jury before venting their feelings. But many judges are simply unable to control their emotions, and, as the above cases demonstrate, gratuitously intervene in the proceedings with sarcasm, ridicule, hostility, and abuse. The fact that a judge may have been an aggressive litigator should not prevent the judge from maintaining objectivity. Many judges have been prosecutors and criminal defense lawyers, but when they become judges they must become neutral participants. And although aggressive lawyers frequently try to bait judges to lose control, as in the Chicago Eight trial, the judge must not take the bait.

A judge’s mistreatment of defense counsel may have the greatest capacity to destroy a defendant’s due process right to a fair trial and his

72. *United States v. Nazzaro*, 472 F.2d 302, 304 (2d Cir. 1973).

73. *Offutt v. United States*, 348 U.S. 11, 17 (1954). *See also* *Liteky v. United States*, 510 U.S. 540, 555–56 (1994) (“[E]xpressions of impatience, dissatisfaction, annoyance, and even anger . . . are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.”).

74. *United States v. Dellinger*, 472 F.2d 340, 387 (7th Cir. 1972).

75. *See supra* Part I.E.

76. *See supra* Part I.H.

77. *See supra* Part I.I.

78. *See supra* Part I.J.

Sixth Amendment right to the assistance of counsel. Although judges must display patience and respect toward counsel, judges are only human, and as noted above, the pressures of a trial and the conduct of the attorneys may cause even the most temperate judge to vent irritation and annoyance.⁷⁹ But some judges are simply unable to control their emotions. Judge Hoffman's harsh abuse and humiliation of the defense lawyers in the Chicago Eight trial is probably the most indelible image of a judge crossing the line. But Judge Hoffman's conduct is not unique. Of course, ordering the defense lawyer to be arrested and forcibly removed from the courtroom, as shown in Case A,⁸⁰ is an extraordinary example of a judge's crossing the line, especially when done in the jury's presence. Thwarting counsel's ability to effectively defend his client, and harshly criticizing counsel's competence, as described in Cases C⁸¹ and G,⁸² severely damaged these lawyers' ability to defend their clients effectively.

CONCLUSION

The fiftieth anniversary of the Chicago Eight trial is the impetus for thinking about the conduct of judges. Judge Hoffman's conduct, while egregious, is not unique. As shown above, many judges engage in serious misconduct. This Essay has described and critiqued various types of judicial misconduct that may jeopardize the fairness of the trial, and the fitness of the judge to continue to serve. A judge's intemperate conduct, while never condoned, will likely be reviewed with considerable deference to the judge because of the perceived difficulties in the judge's administration of the trial and the pressures on the judge to control the conduct of highly competitive adversaries. An appellate court, familiar with trial proceedings, will more likely be able to infer from the context of a trial a judge's hostility, disbelief, sarcasm, inquisitorialness, and bias than a disciplinary body. And while an appellate court is focused on the impact of the judge's conduct on the fairness of a trial, the disciplinary body is more likely to focus on the judge's fitness to continue to serve as a judge. Conduct by a judge that is clearly unwarranted might appear to an appellate court not to have had an undue impact on a jury. However, that same conduct might be viewed by a disciplinary body, not as an isolated deviation or a regrettable lapse, but as conduct that calls into question the judge's ability, fitness, and character to be a judge. But since an appellate reversal for misconduct by the judge is rare, and discipline

79. *United States v. Nazzaro*, 472 F.2d 302, 304 (2d Cir. 1973).

80. *See supra* Part I.A.

81. *See supra* Part I.C.

82. *See supra* Part I.G.

almost never happens, the misconduct of the judge at a criminal trial will continue to be memorialized by the trial of the Chicago Eight.