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## Judicial Ethics: Lessons from the Chicago Eight Trial

Laurie L. Levenson

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# Judicial Ethics: Lessons from the Chicago Eight Trial

Laurie L. Levenson\*

*Four things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially. –Socrates<sup>1</sup>*

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## INTRODUCTION

In September of 1969, eight defendants—known widely as the “Chicago Eight”<sup>2</sup>—were charged with conspiracy and, in violation of the federal Anti-Riot Act, “individually crossing state lines and making speeches with intent to ‘incite, organize, promote and encourage’ riots.”<sup>3</sup>

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\* Professor of Law & David W. Burcham Chair in Ethical Advocacy, Loyola Law School, Los Angeles. I am extremely grateful to my research assistant, Daniel Aronsohn, for all of his incredible help on this Article. From researching to drafting, Daniel was very much my partner in this endeavor, and I am extremely grateful. I am also grateful to my other research assistant, Kelly Larocque, and the members of the SEALS discussion group on *Judging: Fifty Years after the Chicago 7 Trial* for their insights on my work.

1. AM. JUDICATURE SOC’Y, HANDBOOK FOR JUDGES 29 (1961).

2. Although Bobby Seale was eventually severed from the case, and thus tried separately from the other defendants, this Article will address all of the defendants as the “Chicago Eight” for the sake of consistency.

3. JOHN SCHULTZ, THE CHICAGO CONSPIRACY TRIAL 9 (rev. ed. 1993).

Though the substantive charges arose from the defendants' protests against the Vietnam War, the trial focused on a different type of contempt—contempt toward the court.<sup>4</sup> The showdown between '60s radicals, their determined attorneys, and an authoritarian judge became a showcase for the critical lesson judges and the country must learn—the quality of justice depends not only on the laws themselves, but on those responsible for implementing the laws, especially our judges.

In the Chicago Eight Trial, the defendants—David Dellinger, Abbie Hoffman, Bobby Seale, Thomas Hayden, Jerry Rubin, Rennard Davis, John Froines, and Lee Weiner—were considered “left-wing radicals” who opposed America’s involvement in the Vietnam War.<sup>5</sup> The charges brought against them resulted from a fervent and violent protest of the 1968 Democratic National Convention.<sup>6</sup> On the first day of trial, seven of the eight defendants—all but Bobby Seale—immediately set the contentious tone when they declined to stand for the judge.<sup>7</sup> At that moment, those defendants previewed how they would transform the courtroom into “a circus”<sup>8</sup> in protest of the judicial and political systems of the United States. From bringing “a birthday cake to court on the judge’s birthday” to displaying the Vietnamese flag,<sup>9</sup> the defendants would make every effort to ensure a boisterous and unforgettable trial. On the other hand, Bobby Seale, National Chairman of the Black Panther Party,<sup>10</sup> quickly stood out from the rest of the group. Though all of the defendants acted contemptuously in their own respects, Bobby Seale served as an especially profound disturbance to the judge. After recurring courtroom outbursts, which led to his being bound and gagged,<sup>11</sup> Seale was severed from the case and sentenced to four years in prison for contempt of court.<sup>12</sup>

Presiding over the case was the controversial Judge Julius J.

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4. See Stephanie B. Goldberg, *Lessons of the '60s: "We'd Do It Again," Say the Chicago Seven's Lawyers*, A.B.A. J., May 15, 1987, at 32, 32–35 (summarizing the defendants' interactions with Judge Julius Hoffman); see also *Judge Julius Hoffman Dies*, WASH. POST, July 2, 1983, at D6 (noting, for instance, that Judge Hoffman “cited defense attorney Kunstler 24 times” for contempt).

5. *Chicago Seven Trial: 1969*, in GREAT AMERICAN TRIALS 586 (Edward W. Knappman ed., 1994).

6. SCHULTZ, *supra* note 3, at 9; see *infra* notes 30–32 and accompanying text.

7. SCHULTZ, *supra* note 3, at 37.

8. Susan Coutin, *The Chicago Seven and the Sanctuary Eleven: Conspiracy and Spectacle in U.S. Courts*, 16 POL. & LEGAL ANTHROPOLOGY REV. 19, 22 (1993).

9. ALAN M. DERSHOWITZ, AMERICA ON TRIAL: INSIDE THE LEGAL BATTLES THAT TRANSFORMED OUR NATION 391 (2004).

10. SCHULTZ, *supra* note 3, at 37.

11. *Id.* at 63.

12. *Id.* at 78.

Hoffman.<sup>13</sup> One commentator, who observed Judge Hoffman's courtroom before and during the Chicago Eight Trial, described the Judge's demeanor: "He was just as ready and salty of tongue and just as domineering and just as enjoying of himself when he felt himself looking good and winning, as he would be in the [Chicago Eight] Trial."<sup>14</sup> Judge Hoffman, embraced by federal prosecutors because of his vehement support for the United States government,<sup>15</sup> portrayed himself as a "keeper of the gate of culture against the counterculture."<sup>16</sup> Moreover, his keen awareness of the public scrutiny of his role, both in previous cases and in the Chicago Eight Trial,<sup>17</sup> ensured that he would maintain the perception of control in his courtroom. However, Judge Hoffman was ill equipped for such a political trial,<sup>18</sup> choosing to adhere to his own code of authoritarianism and admonition rather than the judicially upstanding position with which he was tasked to embody.

Ultimately, Judge Hoffman was criticized by the Seventh Circuit Court of Appeal for several of his actions, which seemed to proliferate once he allowed his personal opinions and biases to invade the courtroom.<sup>19</sup> The Seventh Circuit found that Judge Hoffman's personal entanglement in the trial was so significant that all impartiality had been eroded, ultimately requiring the reversal of all convictions.<sup>20</sup>

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13. *Id.* at 3.

14. *Id.* at 8.

15. *See id.* at 4, 7; *see also* Pnina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion*, 71 U. COLO. L. REV. 1327, 1332 (2000) ("Judge Julius Jennings Hoffman matured to become a strong supporter of and generous contributor to the Republican Party."); *see also* DERSHOWITZ, *supra* note 9, at 392 ("His legal rulings were one-sidedly in favor of the government.").

16. Lahav, *supra* note 15, at 1345.

17. *See id.* at 1340–41 (discussing Judge Hoffman's knowledge of his public figure status in light of statements made before the Chicago Eight Trial).

18. One commentator described Judge Hoffman's errors as found by the Seventh Circuit:

He hauled lawyers halfway across the country and threw them in jail, thus provoking demonstrations by hundreds of other lawyers. He showed poor judgment in not allowing Bobby Seale to be represented by counsel of his choice, who needed a few weeks to recover from surgery. He showed even worse judgment by gagging and chaining the Black Panther leader, thus giving rise to cries of racism. . . . He excluded defense witnesses, such as former attorney general Ramsey Clark and civil rights leader Ralph Abernathy. He demonstrated, better than any lawyer's arguments, his own obvious bias against the defendants and their lawyers.

DERSHOWITZ, *supra* note 9, at 392.

19. *See In re Dellinger*, 461 F.2d 389, 396–97 (7th Cir. 1972) (noting the attorneys' conduct was the "product[] of actual prejudice toward them on the part of the trial judge"); *see also* *United States v. Seale*, 461 F.2d 345, 350 (7th Cir. 1972) (describing Judge Hoffman's assurances after opening statements that, on the sole basis that defense attorney Kunstler had an appearance for all defendants on file, their rights were not abridged); *see also* DERSHOWITZ, *supra* note 9, at 392 (summarizing the effect of Judge Hoffman's opinions and biases on the outcome of the case).

20. *See In re Dellinger*, 461 F.2d at 396–97 ("The record reveals that [the attorneys'] conduct

The Chicago Eight represented nonconformance and individuality. Though often regarded as “disrespectful and contemptuous,”<sup>21</sup> the defendants were adamant that they would not be passive casualties of the American judicial system. In the end, their passion and perseverance led to their success. Simply put, “the personalities overpowered the issues.”<sup>22</sup> Accordingly, Judge Hoffman’s courtroom is best remembered not only for the political issues that were raised, but for Judge Hoffman’s failure to rise to the challenge of ethically and responsibly controlling the trial.

Perhaps no one could have controlled the chaos of the courtroom, but Judge Hoffman failed spectacularly in his efforts to do so. His actions and inactions provide an important case example showing the need for clear codes of judicial conduct. In the heat of the moment, judges, like lawyers, must be guided by standards, not ego.

Sadly, there are still too many judges with Judge Hoffman tendencies. In November 2018, a Pennsylvania judge was removed for her gratuitously sarcastic and disparaging statements about defense counsel.<sup>23</sup> At nearly the same time, a New York judge told a litigant that he “symbolizes everything that’s wrong with the world,”<sup>24</sup> and a Wisconsin judge threatened to hold in contempt and incarcerate an assistant public defender for “acting like [the judge was] some kind of idiot.”<sup>25</sup> Judges acting injudicious does not occur exclusively in high-profile cases. It also happens to everyday litigants and, now, on different platforms. Social media sites have opened the avenues for judges to launch their vitriol.<sup>26</sup>

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tended to be productive of actual prejudice toward them on the part of the trial judge. . . . Accordingly . . . we conclude that all 9 contemnors must be tried before another judge.”); *see also Seale*, 461 F.2d at 350 (“[T]he defendant is entitled to a hearing before a judge other than the one he has reviled.”).

21. DERSHOWITZ, *supra* note 9, at 391.

22. *Id.* at 394.

23. *Commonwealth v. McCauley*, 199 A.3d 947 (Pa. Super. Ct. 2018); *see also* Debra Cassens Weiss, *Court Removes Judge from Child Rape Case, Citing Opinion Sarcasm and ‘Personal Animus’*, A.B.A. J. (Nov. 29, 2018, 12:12 PM), [http://www.abajournal.com/news/article/citing\\_judges\\_opinion\\_sarcasm\\_and\\_personal\\_animus\\_court\\_removes\\_judge\\_from/](http://www.abajournal.com/news/article/citing_judges_opinion_sarcasm_and_personal_animus_court_removes_judge_from/) (noting the judge’s “demonstrated bias and personal animus”).

24. Debra Cassens Weiss, *Judge Who Told Litigant He ‘Symbolizes Everything That’s Wrong with the World’ Is Tossed from Case*, A.B.A. J. (Nov. 20, 2018, 7:30 AM), [http://www.abajournal.com/news/article/judge\\_who\\_told\\_litigant\\_he\\_symbolizes\\_everything\\_thats\\_wrong\\_with\\_the\\_world](http://www.abajournal.com/news/article/judge_who_told_litigant_he_symbolizes_everything_thats_wrong_with_the_world).

25. *See* Debra Cassens Weiss, *Judge Orders Detention of Public Defender for ‘Acting Like I’m Some Kind of Idiot’*, A.B.A. J. (Oct. 30, 2018, 4:11 PM), [http://www.abajournal.com/news/article/judge\\_orders\\_detention\\_of\\_public\\_defender\\_for\\_acting\\_like\\_im\\_some\\_kind\\_of\\_i/](http://www.abajournal.com/news/article/judge_orders_detention_of_public_defender_for_acting_like_im_some_kind_of_i/) (noting this was not the first time the judge had detained an attorney for contempt).

26. *See, e.g.*, Joseph Serna, *State Censures 2 Judicial Officers for Court Conduct, Including One for Online Rants About Immigrants, Gays and Obama*, L.A. TIMES (Aug. 31, 2018, 11:30 AM), <https://www.latimes.com/local/lanow/la-me-ln-cjp-judges-censure-20180831-story.html>

A key reason to revisit Judge Hoffman's behavior in the Chicago Eight Trial is so that we can appreciate why it was critical to establish codes of conduct for judges and to recommit to enforcing those codes. Therefore, after examining the trial and Judge Hoffman's background, this Article focuses on the evolution of ethical standards addressing when a judge should recuse himself for having a bias in a case. Judge Hoffman had an agenda for the trial; the ethical rules require the exact opposite. Judges must remain impartial, and if they cannot, they must not judge a case.

#### I. THE CHICAGO EIGHT TRIAL: "UNPRECEDENTED" COURTROOM CONFLICT

The year was 1968, the height of the Vietnam War.<sup>27</sup> That year, it became evident that the United States government had no intention of retreating from Vietnam after the costly and tragic Tet Offensive.<sup>28</sup> The United States intended to remain in the region until it achieved its objectives, however unclear those may have been to the American public.<sup>29</sup> It was this apparent sense of colonialism and intervention that sparked thousands of protesters to disrupt the 1968 Democratic National Convention in Chicago, Illinois. While government supporters saw the protests as riotous and criminal, a large segment of the public was aghast that the police would silence a crowd that was attempting to combat "the merciless oversights of American political process—war, racism, and poverty."<sup>30</sup> The government's attack on that crowd became a symbolic example of police brutality against those fighting for justice against an unjust government.

Eight men were charged with conspiracy against the United States, unlawful demonstrations of incendiary devices, and crossing state lines to incite a riot.<sup>31</sup> All eight were alleged to have led the violent protests at

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(describing the judge's conduct as "posting far-right memes on Facebook, railing against immigrants, gays and Muslims and claiming that former President Obama was trying to convert the nation to Islam" and noting the judge was banned from seeking election to judicial office for life).

27. Edwin Moise, Opinion, *The Tet Offensive Was Just the Beginning*, N.Y. TIMES (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/opinion/vietnam-war-tet-offensive-start.html>.

28. *Id.*

29. See, e.g., Mark Atwood Lawrence, Opinion, *Was the Vietnam War Necessary?*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com/2018/03/29/opinion/vietnam-war-necessary.html?rref=collection%2Fcolumn%2FVietnam%20%2767&action=click&contentCollection=Opinion&module=Collection&region=Marginalia&src=me&version=column&pgtype=article> (describing countervailing assessments of the decision to remain in Vietnam); see also Christian Appy, *Why Don't Americans Know What Really Happened in Vietnam?*, NATION (Feb. 9, 2015), <https://www.thenation.com/article/why-dont-americans-know-what-really-happened-vietnam> (noting the long-term sanitization of the Vietnam War in Americans' collective memory).

30. SCHULTZ, *supra* note 3, at 10.

31. *Id.* at 9 ("[Defendants] were charged with 'conspiracy' and with individually crossing state

the Democratic National Convention.<sup>32</sup> More notably, these defendants were antigovernment activists. For example, Abbott “Abbie” Hoffman and Jerry Rubin were the cofounders of the Youth International Party, or the “Yippies.”<sup>33</sup> The Yippies were responsible for numerous incidents of civil disobedience, including staged chaos at the New York Stock Exchange<sup>34</sup> and a public exorcism of the Pentagon building.<sup>35</sup> Another defendant, Bobby Seale, was a notable public figure for his role within the Black Panther Party.<sup>36</sup> All of the defendants, though ostensibly fighting for peace and equality, believed that they had to call attention to the issues by bringing their conflict to the forefront. Injustice would be fought with strength and fortitude. As Abbie Hoffman put it, “I always held my flower in a clenched fist.”<sup>37</sup>

The trial amassed a great deal of political controversy, as it pitted “two sides of a deep cultural division”<sup>38</sup> against each other. Each side in the Chicago Eight Trial knew that its success depended upon its portrayal of the other to the jury. On one side, the government downplayed the idea of the “youth movement,” instead focusing on eight adult males running through the streets of Chicago promoting turmoil.<sup>39</sup> On the other hand, the defendants attempted to portray themselves as true patriots in the pursuit of justice.<sup>40</sup> They were, they believed, a collective of impassioned activists coming together for the greater good.<sup>41</sup>

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lines and making speeches with intent to ‘incite, organize, promote and encourage’ riots in Chicago during the Democratic convention in August, 1968.”)

32. *Id.*

33. John T. McQuiston, *Abbie Hoffman, 60’s Icon, Dies; Yippie Movement Founder Was 52*, N.Y. TIMES (Apr. 14, 1989), <https://www.nytimes.com/1989/04/14/obituaries/abbie-hoffman-60-s-icon-dies-yippie-movement-founder-was-52.html>; Eric Pace, *Jerry Rubin, 56, Flashy 60’s Radical, Dies; ‘Yippies’ Founder and Chicago 7 Defendant*, N.Y. TIMES (Nov. 30, 1994), <https://www.nytimes.com/1994/11/30/obituaries/jerry-rubin-56-flashy-60-s-radical-dies-yippies-founder-and-chicago-7-defendant.html>.

34. McQuiston, *supra* note 33 (“[Hoffman was] throwing dollar bills on the floor of the New York Stock Exchange.”).

35. Judy Gumbo, *Celebrating the March and Levitation of the Pentagon*, COUNTERPUNCH (Oct. 26, 2017), <https://www.counterpunch.org/2017/10/26/celebrating-the-march-and-levitation-of-the-pentagon>.

36. See SCHULTZ, *supra* note 3, at 37–38 (noting Bobby Seale’s station in the Black Panther Party).

37. McQuiston, *supra* note 33.

38. SCHULTZ, *supra* note 3, at 399.

39. *Id.* at 198 (“‘He isn’t Abbie,’ Richard Schultz objected, ‘he’s a thirty-three-year-old man who should be called Mr. Hoffman.’”).

40. BRUCE A. RAGSDALE, *THE CHICAGO SEVEN: 1960S RADICALISM IN THE FEDERAL COURTS* 6 (2008) (“The trial became for the defense an opportunity to portray the dissent movement that had converged on Chicago for the Democratic Convention.”).

41. *Id.* at 1 (“The defendants and their lawyers used the courtroom as a platform for a broad critique of American society and an almost anarchic challenge to the legitimacy of governmental

The net result was the politicization of the trial itself. The formalities of courtroom conduct were ignored.<sup>42</sup> The defendants reveled in hijacking the proceedings<sup>43</sup> while their lawyers sat quietly as though they implicitly approved. Jurors laughed at snarky remarks,<sup>44</sup> and observers in the courtroom became participants as the defendants yelled at the judge.<sup>45</sup> As the Seventh Circuit noted on appeal, the courtroom conflict, including verbal attacks on the judge, was “unprecedented.”<sup>46</sup>

Throughout all of these contentious moments during trial, one moment overshadowed the others: the binding and gagging of Bobby Seale. Seale had made continuous efforts to be heard regarding his request for counsel of his choice.<sup>47</sup> However, the judge was unmoved. He warned Seale to remain quiet during the proceedings until, after several warnings, he had the court marshals handcuff Seale to a chair and gag him so that he could no longer speak.<sup>48</sup> The judge’s decision sparked frenzy in the courtroom and in the media.<sup>49</sup> The Chicago Eight Trial continued, however, and the proceedings remained tense. As one commentator remarked,

Only a lawyer examining a witness, or a lawyer objecting to something said or done, or a marshal guarding aisles or entrances, felt the clear right to stand erect. . . . The defendants scurried around their table to confer with one another as if the air above their heads were filled with flying bullets.<sup>50</sup>

The courtroom was not merely the site of a judicial proceeding—it was a battleground for a war of emotion, attacks on character, and declarations of fundamental beliefs.<sup>51</sup>

The judge attempted to issue an emphatic farewell at the conclusion of the proceedings. In a grandiose display of authority, the judge cited over

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authority.”).

42. *See id.* at 37.

43. *Id.* at 134 (“On the morning of October 15, David Dellinger began reading from the list of war dead on both sides, for the Moratorium Against the Viet Nam War. The marshals, in a brief tug-of-war with Abbie Hoffman, removed the Viet Cong flag draped over the defense table.”).

44. *Id.* at 172.

45. *See id.* at 255, 302 (providing a transcript of the proceedings during those events).

46. *In re Dellinger*, 461 F.2d 389, 396 (7th Cir. 1972) (“Here the trial judge was the recipient of numerous and unprecedented attacks and insults by both trial counsel.”).

47. Bobby Seale and the other defendants had planned to be represented by Charles Garry, a renowned defense lawyer. Garry had successfully defended similarly situated defendants on multiple occasions. However, Garry had undergone a surgical procedure for his gallbladder, which his doctor deemed life-threatening, just before the trial. Judge Hoffman denied a six-week continuance so that Garry could represent the defendants. SCHULTZ, *supra* note 3, at 42.

48. *Id.* at 62–63.

49. *See id.* at 63–64.

50. *Id.* at 121.

51. *Id.* at 117 (“People paying a visit to the trial for the first time generally remarked on, and felt, the nightmarish emotional involvement of everyone present . . .”).

150 contempt charges for the defendants and their lawyers, a move which was challenged on appeal to the Seventh Circuit.<sup>52</sup> Ultimately, the contempt convictions made their way to the court of appeal and were set aside, while the case was remanded for trial by a different judge.<sup>53</sup> The appellate court excoriated Judge Hoffman for his handling of the case and for telegraphing his contempt for the defense to the jury.<sup>54</sup> Judge Hoffman had one job to do—provide a fair trial to both sides. He failed to do that. He became an advocate and adversary rather than a fair decision maker.

The Chicago Eight Trial put a spotlight on judicial conduct, and what the public saw was not a pretty picture. It saw a judge who was guided by his own grudges and emotion, not by clear standards of ethical judicial conduct.

## II. WHO WAS JUDGE HOFFMAN?

Judge Hoffman's behavior in the Chicago Eight Trial was not out of character for how he generally conducted his courtroom. Julius Jennings Hoffman was appointed by President Eisenhower in 1953 as a district court judge in the Northern District of Illinois.<sup>55</sup> A traditionalist in the courtroom, seventy-four-year-old Hoffman was known for "forc[ing] cases to conclusion by arm-twisting with technicalities."<sup>56</sup> From behind the bench, he was regarded as bitterly unforgiving,<sup>57</sup> and he was continually scrutinized for his "remarkably lively"<sup>58</sup> yet "arrogant and pompous"<sup>59</sup> demeanor.<sup>60</sup> Judge Hoffman had a tendency to ensure that he had the last word on any matter, often saving the finishing remark as a subtle jab at a defendant's character or an attorney's competence.<sup>61</sup>

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52. *Id.* at 372.

53. *Id.* at 376.

54. RAGSDALE, *supra* note 40 at 7, 9.

55. Pamela Reeves, *Julius Hoffman: On the Bench*, WASH. POST, May 28, 1972, at M8; *Judge Julius J. Hoffman, 87, Dies; President at Trial of the Chicago 7*, N.Y. TIMES (July 2, 1983), <https://www.nytimes.com/1983/07/02/obituaries/judge-julius-j-hoffman-87-dies-president-at-trial-of-the-chicago-7.html>.

56. SCHULTZ, *supra* note 3, at 6.

57. In one anecdote, a law clerk for Judge Hoffman was said to have told the judge that the denial of a motion would be unfair. The judge subsequently fired him. *Id.*

58. *Id.* at 3.

59. DERSHOWITZ, *supra* note 9, at 392.

60. *See* SCHULTZ, *supra* note 3, at 4 ("Judge Hoffman was described by persons both friendly and familiar with him as needing someone to pick on."); *see also* Lahav, *supra* note 15, 1346–47 (noting that Judge Hoffman had authoritarian tendencies and his fear of anarchy made him "progressively more rigid and less flexible in the exercise of his judicial powers").

61. *See* SCHULTZ, *supra* note 3, at 8 ("[Judge Hoffman] showed that his central weakness, his raw nerve, was that he had to have the last word."); *see also id.* at 167 (quoting a conversation between Judge Hoffman and defense lawyer Kunstler).

Most significantly, perhaps, he ran a despotic courtroom, regarding himself as “the governor” of all proceedings in his courtroom<sup>62</sup> and brandishing his authority when overruling attorneys on undemanding and insignificant motions.

To understand Judge Hoffman’s absolute sense of authority, one must understand Judge Hoffman’s perception of his role in society. He believed that he had the right and duty to serve a bigger cause of patriotism, in an effort to fight anti-Semitism, by serving as a judge.<sup>63</sup> Seeing himself as the standard bearer, Judge Hoffman elevated his rulings from mere adjudications in a courtroom to profound lessons for the legal profession and society.<sup>64</sup> Hoffman was also determined to be a loyalist to the American government. He regularly ruled in favor of the United States and had an “unrelenting faith in the Justice Department.”<sup>65</sup> He had no use for parties that challenged the establishment. For example, “[w]hen the American Civil Liberties Union tried to enter an *Amicus* brief in the [Chicago Eight] case, Judge Hoffman declared, ‘I’m not running a school for civil rights.’”<sup>66</sup> For Judge Hoffman, it was important to pick a side in a criminal case and make sure justice was done.

The Chicago Eight Trial provided the ideal platform for Judge Hoffman to demonstrate his abiding commitment to the government. In the midst of a war that challenged the long-established foundations of the American government, he had the opportunity to remind the American public that institutionalism was alive and well. He could silence the activists with one swift ruling, demonstrating that there are consequences for those who challenge the status quo.<sup>67</sup>

While it is unclear whether Judge Hoffman wanted to preside over the Chicago Eight Trial or was randomly assigned to it,<sup>68</sup> one thing is known: He had the opportunity to recuse himself<sup>69</sup> due to a purported conflict of

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62. See Lahav, *supra* note 15, at 1346 n.57.

63. *Id.* at 1341 (quoting Judge Hoffman: “When a Jew administers the law excellently he also administers an antidote to anti-Semitism.”).

64. *Id.* at 1341 n.43 (“Judge Hoffman may have understood the significance of such a trial in the eyes of the public, and yet not have observed the principle in practice.”).

65. SCHULTZ, *supra* note 3, at 6.

66. *Id.* at 5.

67. *Id.* at 370–73.

68. Though Judge Hoffman vehemently reminded the parties throughout the trial that “[he] didn’t ask for this case,” several commentators have insisted that he requested it perhaps because of its notoriety and implications. *Id.* at 4.

69. See, e.g., *Cooke v. United States*, 267 U.S. 517, 539 (1925) (“All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.”).

interest but declined to do so.<sup>70</sup> The trial became his cause, and Judge Hoffman had a mission. By overseeing the government's prosecution of eight antiwar, antigovernment activists, the public would witness Judge Hoffman as the loyal American prepared to quash the revolution.<sup>71</sup>

### III. THE JUDGE'S MISSTEPS AND THE LAW'S INADEQUACIES

Judge Hoffman was criticized on appeal for two principal errors in his handling of the case.<sup>72</sup> First, Judge Hoffman critically misused his powers of contempt. He summarily announced the contempt charges at each of the defendants' (and their lawyers') last respective appearances instead of citing the charges as they arose.<sup>73</sup> Judge Hoffman could have acted instantly by citing immediate contempt charges or removing the disruptive defendants from the courtroom.<sup>74</sup> Instead, he berated the defendants and counsel. Then, he sat in judgment of their alleged contemptuous behavior at the end of trial. As a result, several of those contempt charges were reversed on appeal as a matter of law because they were seemingly motivated by personal animus.<sup>75</sup> Long before the Chicago Eight Trial, it was established law that because "[t]he power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. . . . The judge

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70. Judge Hoffman was a substantial stockholder in the Brunswick Corporation, which profited tremendously from American defense spending. In a prior case, Judge Hoffman had recused himself on these grounds. However, upon a motion by the defense in this case, Hoffman declined to recuse himself. The defendants suggested that there was "a conflict of interest for him in facing defendants whose adult lives had been devoted to antiwar activity." SCHULTZ, *supra* note 3, at 6–7.

71. "[Judge Hoffman] talked more and more in his chambers about the defendants' 'plans' to disrupt the trial, with a tone and attitude as if he already thought they were guilty of contempt." *Id.* at 8.

72. The binding and gagging of Bobby Seale was not considered judicial misconduct on appeal to the Seventh Circuit because of the Supreme Court decision in *Illinois v. Allen*, 397 U.S. 337 (1970). *Seale v. United States*, 461 F.2d 345, 350 (7th Cir. 1972). The decision, however, by Judge Hoffman to physically restrain Seale still had strong repercussions, as it proved to be a source of profound issues of racism during the trial. DERSHOWITZ, *supra* note 9, at 392.

73. "[I]f the conduct of the defendant includes a personal attack on the trial judge carrying such potential for bias that he is not 'likely to maintain that calm detachment necessary for fair adjudication' the trial judge must disqualify himself if he waits to act until the conclusion of the trial. When the trial proceedings have terminated, the need to proceed summarily is not present." *In re Dellinger*, 461 F.2d 389, 395 (7th Cir. 1972) (citation omitted) (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971)).

74. See, e.g., *Seale*, 461 F.2d at 351 (explaining that Judge Hoffman could have cited the contempt charges against Bobby Seale immediately after they occurred).

75. *In re Dellinger*, 461 F.2d at 400 (holding that some of the contempt specifications did not "charge conduct which rises to the level of an 'obstruct[ion] [of] the administration of justice.'" (alteration in original) (quoting 18 U.S.C.A. § 401 (1971)).

must banish the slightest personal impulse to reprisal.”<sup>76</sup> Judge Hoffman abused the power of contempt and, consequently, his role as a judge.

Second, Judge Hoffman erred by refusing to hear Seale’s objections to his counsel, thereby denying Seale his Sixth Amendment right to effective assistance of counsel.<sup>77</sup> Many of Bobby Seale’s outbursts during trial came because of Seale’s frustration in not being able to be represented by counsel of his choice.<sup>78</sup> Seale objected to his forced representation and eventually attempted to appear *pro se*.<sup>79</sup> The Seventh Circuit reasoned that although a defendant is not automatically entitled to alternate counsel, the judge had a duty, at a minimum, to allow Seale to be heard.<sup>80</sup> By prejudging matters, Judge Hoffman violated one of his most basic duties—providing a fair and open forum for a party to present his or her arguments.

It is likely that the trial would have been entirely different “had the trial judge been a dignified, fair, and self-confident jurist”<sup>81</sup> who adhered to the rules relating to contemptuous courtroom behavior. Regardless, legal inadequacies allowed Judge Hoffman to preside over the trial. A principal inadequacy that plagued the judicial system, and likely this case, was the broad “duty to sit.”<sup>82</sup> The federal system required that judges continue to preside over a case except in the rarest of situations: when one of three recusal statutes was satisfied.<sup>83</sup> However, only one of those statutes was relevant to Judge Hoffman.<sup>84</sup> At the time of the trial, as it does today, 28 U.S.C. § 144 read as follows:

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76. *Cooke v. United States*, 267 U.S. 517, 539 (1925).

77. *See Seale*, 461 F.2d at 360 (explaining that “[Judge Hoffman] had a duty to inquire of Seale . . . as to his objections to counsel of record and to take appropriate action to make sure that his Sixth Amendment right to the assistance of counsel and his right to represent himself were appropriately honored”).

78. Charles Garry was expected to be the lead attorney in the representation of all defendants. However, his gallbladder procedure, deemed immediately necessary by his doctor, ensured that he could not represent Seale or the other defendants. This was a huge blow to Seale. Charles Garry was a renowned lawyer who “had successfully defended Panthers in difficult cases in California.” SCHULTZ, *supra* note 3, at 40.

79. *Seale*, 461 F.2d at 359.

80. *Id.* at 356–57.

81. DERSHOWITZ, *supra* note 9, at 393.

82. *See Edwards v. United States*, 334 F.2d 360, 362 n.2 (5th Cir. 1964) (“It is a judge’s duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusation.”); *see also United States v. Ming*, 466 F.2d 1000, 1004 (7th Cir. 1972) (“A trial judge has as much obligation not to recuse himself when there is no occasion for him to do so as there is for him to do so when the converse prevails.”).

83. *See* 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3541 (3d ed. 2008) (listing the three federal recusal statutes as § 455, § 47, and § 144 of Title 28).

84. *Id.* 28 U.S.C. § 455 called for a judge’s recusal only in situations involving conflicts of interest. 28 U.S.C. § 455 (1970). 28 U.S.C. § 47 deals only with a judge recusing himself or herself upon hearing an appeal from a case that he or she already tried. WRIGHT ET AL., *supra* note 83.

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.<sup>85</sup>

In 1966, the United States Supreme Court addressed the mechanics of the statute. The Court held that “[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.”<sup>86</sup> Judge Hoffman’s deep disdain for the defendants was homegrown. It was principally the occurrences in the courtroom that molded Judge Hoffman’s personal opinions. His unwavering biases arose out of a strictly judicial source—the trial which took place before him. Statutory recusal requirements, such as 28 U.S.C. § 144, were no substitute for an explicit ethical code to guide the judge’s behavior.

Also of little guidance at the time were the Canons of Judicial Ethics, promulgated by the Committee on Judicial Ethics in 1924. The Canons simply stated, “A judge’s official conduct should be free from impropriety *and the appearance of impropriety*,”<sup>87</sup> a wholly subjective standard by which the decision to “withdraw in a particular case was in the eyes of the beholder, the judge.”<sup>88</sup> For a jurist like Judge Hoffman, the only impropriety would have been if he had shirked what he saw as his duty to teach the defense a lesson. But one commentator noted the difficulty of self-diagnosing such biases:

Jurists’ perceptions of their own impartiality also suffer from the failure to acknowledge the existence of unconscious motivations. Human psychology complicates assessments of impartiality. Bias is notoriously difficult to recognize within ourselves. Psychological studies have repeatedly confirmed that individuals may harbor unconscious stereotypes, beliefs, biases, and prejudices.<sup>89</sup>

The systemic flaw, then, is evident: Judges are susceptible to personal prejudices, not necessarily because they are unjust, but because they too are human. Yet, as discussed below in Part IV, the law has begun to adapt

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85. 28 U.S.C. § 144 (2012).

86. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

87. Gabriel D. Serbulea, Comment, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1121 n.86 (2011) (citing JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 190 (1974)).

88. M. Margaret McKeown, *Don’t Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. APP. PRAC. & PROCESS 45, 47 (2005).

89. Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 206 (2011) (footnotes omitted).

in accordance with developments in psychology and other fields to incorporate these discreet instincts.

The defendants' behavior during the Chicago Eight Trial was certainly inappropriate for a courtroom.<sup>90</sup> But Judge Hoffman had an "arsenal"<sup>91</sup> available to him in handling the courtroom theatrics.<sup>92</sup> His overarching misstep was in personalizing his role in ensuring justice.<sup>93</sup> At the same time, though, the law failed by allowing it.

#### IV. THE EVOLUTION OF THE LAWS ON CONTEMPT AND RECUSAL

At the time of the Chicago Eight Trial, judges had too narrow of a lens on their ethical responsibilities. The focus was simply on statutory recusal. However, since the time of that trial, the lessons of the Chicago Eight Trial have impacted the evolution of judicial ethics both in case law and ethical codes.

Within a year of the Chicago Eight Trial's conclusion, the Supreme Court confronted a separate incident of disobedient defendants in *Mayberry v. Pennsylvania*.<sup>94</sup> The Court clarified the law regarding the handling of summary contempt charges: "Where . . . [a judge] does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly

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90. *United States v. Seale*, 461 F.2d 345, 362 (7th Cir. 1972) (explaining "the rulings of a trial judge, no matter how sincerely felt to be or in fact indefensible, cannot excuse contumacious protestation").

91. *Mayberry v. Pennsylvania*, 400 U.S. 455, 463 (1971) ("As these separate acts or outbursts took place, the arsenal of authority described in *Allen* was available to the trial judge to keep order in the courtroom.").

92. With regard to judicial demeanor and the handling of difficult situations in court, much can be learned from our foreign colleagues. In their article, *Performing Impartiality: Judicial Demeanor and Legitimacy*, Professors Kathy Mack and Sharyn Roach Anleu offer important observations regarding effective courtroom control. First, judges should be, as required by the ABA Model Code of Judicial Conduct, "patient, dignified and courteous to litigants . . . and others." Kathy Mack & Sharyn Roach Anleu, *Performing Impartiality: Judicial Demeanor and Legitimacy*, 35 L. & SOC. INQUIRY 137, 141 (2010). However, the real challenge is how a judge who is provoked and angry should act. Citing Gregory O'Brien's *Confessions of an Angry Judge*, the article identifies stress points on judges and alternative ways for the court to react to these stressors. *Id.* For example, the article discusses using compliments rather than scolding, or listening more and talking less. *Id.* At the time of the Chicago Eight Trial there were no national studies or monitoring of judicial behavior. The model of the courtroom was that the judge, by virtue of his status, decided how he would interact with the parties and counsel. However, after cases like the Chicago Eight Trial, legal communities nationally and internationally have come to understand how judicial demeanor does not just affect the atmosphere in the courtroom but also interpretations of whether the court reached the right decision or was improperly influenced by a lack of impartiality.

93. *In re Dellinger*, 461 F.2d 389, 396 (7th Cir. 1972) (reasoning "[t]hese attacks would have affected any judge personally. For example, no judge could remain impartial . . . after the judge's honesty and integrity were assailed.").

94. 400 U.S. 455.

conduct have left personal stings to ask a fellow judge to take his place.”<sup>95</sup> The Seventh Circuit’s review of the Chicago Eight Trial occurred just three years after the *Mayberry* decision. The Seventh Circuit acknowledged that the *Mayberry* decision, had it been controlling at the time of the Chicago Eight trial, would have prevented Judge Hoffman from exercising the ample contempt charges at the conclusion of the trial.<sup>96</sup>

Further, in the 1970s, American jurisprudence almost harmoniously shifted to focus on implementing an objective standard of recusal. In 1972, the American Bar Association adopted a comprehensive Model Code of Judicial Conduct.<sup>97</sup> Then, in 1973, the Judicial Conference promulgated the Code of Conduct for United States Judges.<sup>98</sup> Serving as a judiciary guide for federal judges, the Code of Conduct established an objective standard for recusal<sup>99</sup> which mirrored that of the American Bar Association.<sup>100</sup> In 1974, a similar objective standard was adopted under 28 U.S.C. § 455,<sup>101</sup> thereby eliminating the previously imposed “duty to sit.”<sup>102</sup> The statute provided, “Any justice, judge, or magistrate judge of the United States should disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>103</sup> Since then, the

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95. *Id.* at 463–64.

96. *See* *United States v. Seale*, 461 F.2d 345, 352 (7th Cir. 1972) (“We have no doubt that the able trial judge would have asked another judge to preside at Seale’s contempt hearing if *Mayberry* had been handed down before the contempt citation date.”); *see also In re Dellinger*, 461 F.2d at 394–95 (providing a brief analysis of the Chicago Eight trial under *Mayberry* and noting that Judge Hoffman should have been disqualified because there was a high potential for bias).

97. MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS’N 1998).

98. Richard K. Neumann Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 386 & n.66 (2003).

99. Canon 2A provides, “An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge’s honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.” ADMIN. OFFICE OF THE U.S. COURTS, CODE OF CONDUCT FOR UNITED STATES JUDGES, GUIDE TO JUDICIARY POLICIES AND PROCEDURES Canon 2A (2019), [https://www.uscourts.gov/sites/default/files/code\\_of\\_conduct\\_for\\_united\\_states\\_judges\\_effective\\_march\\_12\\_2019.pdf](https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf) [hereinafter CODE OF CONDUCT].

100. Canon 3E(1) read: “A judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” MODEL CODE OF JUDICIAL CONDUCT Canon 3E (AM. BAR ASS’N 1972).

101. *See* WRIGHT ET AL., *supra* note 83, § 3541 (noting that the statute, which was first enacted in 1792, was completely rewritten in 1974, and now serves as the basic provision on disqualification of federal judges).

102. *See* M. Margaret McKeown, *To Judge or Not to Judge: Transparency and Recusal in the Federal System*, 30 REV. LITIG. 653, 661–62 (2011) (“As Justice William Rehnquist noted in a 1972 memorandum decision explaining his determination not to recuse in a particular case, the duty to sit became accepted by all circuit courts.” (citing *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (Rehnquist, J., mem.))).

103. 28 U.S.C. § 455 (2012).

statute has been revised so that a judge “shall,” not “should,” disqualify himself in situations of impropriety.<sup>104</sup> The linguistic shift demonstrates an ongoing emphasis on mandatory recusal, perhaps motivated by an aversion to situations like the one presented in the Chicago Eight Trial. Today, the law has evolved to fully embrace the notion that once a judge can be objectively perceived as having a personal stake in the outcome of a case, he should recuse himself.<sup>105</sup> Ninth Circuit Judge M. Margaret McKeown noted the great advantages of the objective standard:

In addition to promoting public confidence, the appearance standard is a practical solution to the difficult situation that arises when a litigant suspects actual bias or impropriety and accuses the judge of impropriety. Imagine the treacherous situation were litigants forced in every instance to offer evidence of actual impropriety. Refocusing the debate on the appearance of impropriety relieves pressure on all concerned and serves as a useful conflict avoidance principle. . . . [A] litigant can give voice to concerns without going nuclear by accusing the judge of being unethical.<sup>106</sup>

As a result, Section 455 affords protections to defendants like the Chicago Eight because it demands recusal rather than suggests it.

In 1994, the Supreme Court addressed another controversial limitation on recusal: the extrajudicial source doctrine originating from Section 144. Previously, the “personal bias or prejudice” would only demand recusal when the judge had garnered improper motives from a source beyond the walls of the courtroom.<sup>107</sup> In *Liteky v. United States*, the Supreme Court proclaimed that the extrajudicial source, while relevant as a factor, is not dispositive for bias or prejudice.<sup>108</sup> Thus, Judge Hoffman would likely have been under a statutory duty to recuse himself because of the immense bias which was “so extreme as to display clear inability to

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104. *Id.* See McKeown, *supra* note 88, at 47 (“The key change in 1990 was to replace ‘should’ with ‘shall’ to reflect the mandatory nature of the standards.”).

105. CODE OF CONDUCT, *supra* note 99, at Canon 3C(1)(a). See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009) (“The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process” and concluding that the circumstances in the case created a “possible temptation to the average . . . judge.” (omission in original) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986))); *United States v. Tucker*, 78 F.3d 1313, 1324 (8th Cir. 1996) (“[T]he risk of a perception of judicial bias or partiality is sufficiently great so that our proper course is to order reassignment on remand.”); *United States v. Jordan*, 49 F.3d 152, 155–56 (5th Cir. 1995) (“Put simply, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself.”).

106. McKeown, *supra* note 88, at 54–55.

107. *Liteky v. United States*, 510 U.S. 540, 544–45 (1994).

108. *Id.* at 554 (“Since neither the presence of an extrajudicial source necessarily establishes bias, nor the absence of an extrajudicial source necessarily precludes bias, it would be better to speak of the existence of a significant (and often determinative) ‘extrajudicial source’ *factor*, than of an ‘extrajudicial source’ *doctrine*, in recusal jurisprudence.”).

render fair judgment.”<sup>109</sup>

Today’s ethical standards also condemn the manner in which Judge Hoffman responded to Bobby Seale.<sup>110</sup> Canon 3A(4) provides, “A judge should accord to every person who has a legal interest in a proceeding, and that person’s lawyer, the full right to be heard . . . .”<sup>111</sup> Additionally, the Code provides: “A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.”<sup>112</sup> Perhaps it takes a case like the Chicago Eight Trial for judges to understand why there should be explicit ethical rules governing judicial behavior. Deferring to an individual judge’s perception of what might be the right thing to do in a situation will never provide the protection that a clear standard of behavior can promote.

Thus, American jurisprudence has made considerable progress in ensuring that judges cannot exercise unfettered discretion from behind the bench. The law has shifted to highlight, and often mandate, impartiality from a decision maker. Ethical standards have become flexible with factor tests and reasonableness standards that conform to the circumstances. The law has thus aimed to uphold a valuable proposition set forth in *Tumey v. Ohio*:

[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true . . . denies the latter due process of law.<sup>113</sup>

Codifying this proposition into clear terms is something that continues. Yet, even today, the advisory opinions in the Guide to Judiciary Policy

109. *Id.* at 551.

110. Canon 3 of the Code of Conduct for United States Judges provides generally: “A judge should perform the duties of the office fairly, impartially and diligently.” CODE OF CONDUCT, *supra* note 99, at Canon 3.

111. *Id.* at Canon 3A(4). The notion that a litigant has the right to be heard is echoed throughout American jurisprudence. *See, e.g., In re Code of Judicial Conduct*, 643 So. 2d 1037, 1038 n.2 (Fla. 1994) (citing MATTHEW HALE, LORD HALE’S RULES FOR HIS JUDICIAL GUIDANCE: THINGS NECESSARY TO BE CONTINUALLY HAD IN REMEMBRANCE) (advising that a judge avoid prejudging cases and withhold judgment until all parties are heard); CHARLES GARDNER GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 2.07 (5th ed. 2013) [hereinafter JUDICIAL CONDUCT AND ETHICS] (“A litigant’s right to the assistance of counsel has been the subject of numerous disciplinary cases.”); Gordon J. Beggs, *Challenges in Judging: Some Insights from the Writings of Moses*, 44 CLEV. ST. L. REV. 145, 149 (1996) (“The sense that one has been heard is an important aspect of the judicial process.”).

112. CODE OF CONDUCT, *supra* note 99, at Canon 3A(3).

113. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

may still not go far enough in preventing or responding to the types of situations Judge Hoffman's behavior raised in the Chicago Eight Trial. Out of the 115 published advisory opinions, none of them deal with a judge's demeanor on the bench. Moreover, judges who openly express annoyance with a case still do not think that such concerns require them to recuse themselves.<sup>114</sup> They may be correct in that assessment, but the potential that they will act in a biased manner while on the bench is high. The hard decision is knowing when a judge has been so influenced by his or her disdain for a case or a party to realize that, objectively, the judge cannot be impartial in the matter. Equally important, is how the judge must behave in order to ensure that bias does not affect the proceedings if the judge stays on the case. The next step in learning from the Chicago Eight Trial should be to tackle the problem of judicial demeanor by better educating and training judges, and creating effective remedies for when problems arise.<sup>115</sup>

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114. See Debra Cassens Weiss, *Federal Judge Who Said He Wouldn't Wish Case on His Worst Enemy Refuses to Recuse Himself*, A.B.A. J. (Apr. 18, 2017, 3:35 PM), [http://www.abajournal.com/news/article/federal\\_judge\\_who\\_said\\_he\\_wouldnt\\_wish\\_case\\_on\\_his\\_worst\\_enemy\\_refuses\\_to\\_r/](http://www.abajournal.com/news/article/federal_judge_who_said_he_wouldnt_wish_case_on_his_worst_enemy_refuses_to_r/) (quoting the judge as saying his comments, though mistakenly made, "do not demonstrate bias against the plaintiff but rather frustration at irresolution of the action").

115. The topic of judicial demeanor has been increasingly discussed within legal scholarship. See, e.g., Maxine D. Goodman, *Shame, Angry Judges, and the Social Media Effect*, 63 CATH. U. L. REV. 589, 623 (2014) ("[T]he time has come to revolutionize conceptions of judicial discipline, modify past assumptions, and take seriously the task of determining whether public sanctions serve to correct the misbehavior of angry judges."); Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 536 (2009) ("The enforcement of norms governing judges' courtroom demeanor marks a sea change from the early days when judges' personal independence to administer judicial proceedings as they saw fit was taken for granted . . ."); Harold T. Kelly Jr., *Hart Failure: The Supreme Judicial Court's Interpretation of Nonjudicial Demeanor*, 44 ME. L. REV. 175, 177 (1992) ("The judge who holds himself accountable to those who empower him is the judge who is willing to respect not only the law, but other people as well."); Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1205, 1284 (2012) ("We cannot get away with ignoring [judicial anger]."); Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1501 (2011) (summarizing "that judges experience emotions that they must regulate, that such regulation is difficult, and that they are given no guidance on how to carry it out"); Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107, 1108 (2004) (arguing that "[t]he major cause of the loss of public confidence in the American judiciary . . . is the failure of judges to comply with established professional norms, including rules of conduct"); Patrick J. Monahan Jr., *Demeanor and Judicial Ethics*, N.J. LAW., June 1996, at 29, 32 (explaining that a judge's duty requires "conducting oneself in such a way that the participants and onlookers are not only not offended by the judge's conduct but have no reasonable doubt that justice is being done"); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982) ("Many federal judges have departed from their earlier attitudes; they have dropped the relatively disinterested pose to adopt a more active, 'managerial' stance."). Many commentators argue that rules of judicial conduct provide a valuable platform for promoting judicial propriety, and thus the revision of those rules to incorporate developments in the regulation of judicial conduct is necessary. That is, the judicial codes are valuable if they prove applicable for judges. See, e.g., McKeown, *supra* note 88, at 58 ("[I]mposing accountability through rules of judicial ethics that include avoiding the

## V. GUIDING JUDICIAL Demeanor FROM BEHIND THE BENCH

Canon 3A(2) of the Code of Conduct for United States Judges reflects “the judge’s unique role as exemplar and guardian of the dignity of the court.”<sup>116</sup> It reads, “A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.”<sup>117</sup> At the time of the Chicago Eight Trial, few judges had ever been sanctioned for violations relating to courtroom demeanor.<sup>118</sup> The ethical guidelines on courtroom decorum had not yet been developed, so judges were generally given a broad scope of authority. When confronted with contemptuous defendants, for instance, judges were free to allow their emotions to control their remarks. In fact, the Seventh Circuit did not even address Judge Hoffman’s courtroom demeanor as an issue during the Chicago Eight Trial.<sup>119</sup>

Consistent with developments in judicial ethics as a whole, there has been a shift to emphasize proper courtroom demeanor since the 1970s.<sup>120</sup> Judges have been publicly admonished or disciplined for behaviors far less egregious than those of Judge Hoffman in the Chicago Eight Trial.<sup>121</sup> For example, a trial judge in Washington was admonished for playing music in an effort to “relieve the tension.”<sup>122</sup> Despite making an effort to improve the courtroom’s atmosphere, the judge was found to have “disregard[ed] . . . the required solemnity and dignity of the proceeding.”<sup>123</sup>

While some jurisdictions now have mechanisms to report judicial misconduct,<sup>124</sup> including abusive judicial demeanor, the debate continues as to what will be the most effective tools for disciplining abusive judges and altering their behavior. For federal judges like Judge Hoffman, the

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appearance of impropriety is a small price to pay for the honor and responsibility of serving as a judge.”); Nancy L. Sholes, Note, *Judicial Ethics: A Sensitive Subject*, 26 SUFFOLK U. L. REV. 379, 406 (1992) (explaining that clear interpretation of general judicial principles is necessary for “the overall integrity of the court”).

116. JUDICIAL CONDUCT AND ETHICS, *supra* note 111, § 3.02.

117. CODE OF CONDUCT, *supra* note 99, at Canon 3A(2).

118. See JUDICIAL CONDUCT AND ETHICS, *supra* note 111, § 3.02.

119. The opinions referred only to the demeanor of the defendants and their lawyers in relation to their contempt charges. See *In re Dellinger*, 461 F.2d 389, 391 (7th Cir. 1972); see also *United States v. Seale*, 461 F.2d 345, 362–64 (7th Cir. 1972).

120. The ABA Model Code, the Code of Conduct for United States Judges, and many state judicial ethics codes have adopted canons or guidelines based on courtroom decorum and propriety.

121. See JUDICIAL CONDUCT AND ETHICS, *supra* note 111, § 3.02(1) n.5.

122. *Id.* § 3.02.

123. *Id.*

124. Complaints of misconduct by a federal judge may be sent to the relevant office or courthouse, as found on the website for United States Courts. State courts’ websites indicate a variety of methods for filing a complaint, from mailing a letter to filling out an electronic form.

ultimate sanction would be impeachment;<sup>125</sup> but that is not likely,<sup>126</sup> and judges know it.<sup>127</sup> Nor should it take such extreme measures to ensure that judges act respectfully on the bench. As we consider these alternatives, we can consider the question: “What would be the best way to deal with the next Julius Hoffman?”<sup>128</sup>

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125. Article III, § 1 of the United States Constitution reads, “The Judges . . . shall hold their Offices during good Behaviour . . .” U.S. CONST. art. III, § 1. Moreover, federal judges are considered “civil officers” under Article II, meaning they are subject to impeachment. *See* Edward D. Re, *Article III Federal Judges*, 14 ST. JOHN’S J. LEGAL COMMENT. 79, 83 (1999) (explaining that federal judges are subject to the impeachment clause); *see also* Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1993 U. ILL. L. REV. 809, 880 (explaining that the impeachment process commences with the House of Representatives and is then conducted by the Senate).

126. The Federal Judicial Center website indicates just fifteen instances of impeachment which have reached a trial before the Senate. The two most recent proceedings were in 2009 and 2010. In 2009, Samuel B. Kent of the Southern District of Texas was impeached for “sexual assault, obstructing and impeding an official proceeding, and making false and misleading statements.” In 2010, G. Thomas Porteous Jr. of the Eastern District of Louisiana was impeached “on charges of accepting bribes and making false statements under penalty of perjury.” *Impeachments of Federal Judges*, FED. JUD. CTR., <https://www.fjc.gov/node/7496> (last visited June 20, 2019).

127. As noted by the Brennan Center in its primer on impeachment, “impeachment of judges is rare, and removal is rarer still.” Douglas Keith, *Impeachment and Removal of Judges: An Explainer*, BRENNAN CTR. FOR JUST. (Mar. 23, 2018), <https://www.brennancenter.org/print/19434>. No federal judge has ever been removed from his position because of his abusive behavior in the courtroom. State court judges have been removed from office, but it generally takes misconduct beyond being abusive on the bench. *See, e.g.*, Tom Nobile, *Passaic County Judge Removed for Abuse of Office*, N. JERSEY REC. (Sept. 27, 2018, 12:35 PM), <https://www.northjersey.com/story/news/passaic/2018/09/27/passaic-county-judge-removed-abuse-office/1442987002/> (judge removed for improperly aiding a party in a dispute). For an overview of why state court judges have been removed from office, *see generally* CYNTHIA GRAY, AM. JUDICATURE SOC’Y, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 7, 9–10 (2002), <https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Publications/Study-of-State-Judicial-Discipline-Sanctions.ashx> (explaining that nationally, 110 judges or former judges were removed from January 1990 to December 2001; only eight judges were removed for neglect or improper performance of administrative duties; four judges were removed for abuse of contempt powers or other abuse of powers).

128. There have been many judges since Judge Hoffman who conducted their courtrooms in a similar manner. For example, Judge Robert Clive Jones of the United States District Court for the District of Nevada routinely “excoriated and mocked counsel,” “noted his own laughter on the record, repeatedly lobbed accusations of malpractice, described counsel’s comments as ‘mealy-mouthed,’ and suggested that counsel return to law school.” *Black Rock City, LLC v. Pershing Cty. Bd. of Comm’rs*, 637 F. App’x 488, 489 & n.3 (9th Cir. 2016). Judge Sam Sparks of the Western District of Texas was “benchslapped” for a derogatory and condescending order which invited the lawyers to a “kindergarten party” where they could learn “how to telephone and communicate with a lawyer.” David Lat, *Benchslap of the Day: Judge Sparks Gets a Taste of His Own Medicine*, ABOVE L. (Sep. 13, 2011, 10:19 AM), <https://abovethelaw.com/2011/09/benchslap-of-the-day-judge-sparks-gets-a-taste-of-his-own-medicine>. In another case, a federal judge was reprimanded by the Sixth Circuit and asked to undergo a psychiatric evaluation. The judge had threatened contempt charges against magistrate judges on several occasions. Britain Eakin, *Federal Judge Fights Sixth Circuit’s Reprimand*, COURTHOUSE NEWS SERV. (Sep. 15, 2017), <https://www.courthousenews.com/federal-judge-fights-sixth-circuits-reprimand>.

### A. Creating More Transparency

The Chicago Eight Trial was well covered by journalists.<sup>129</sup> Judge Hoffman was in the news, and the public received at least some contemporaneous reporting of his handling of the trial.<sup>130</sup> However, the Chicago Eight Trial was the exception, not the rule. In the United States, there are currently 1,018 federal district judges.<sup>131</sup> It is still relatively rare to have extensive coverage of a federal trial.<sup>132</sup> Thus, the everyday conduct of judges is not seen by most of the public.

In some states, litigants have used social media to expose the demeanor of abusive judges.<sup>133</sup> Seeing is believing. Faced with clear evidence of

129. See, e.g., J. ANTHONY LUKAS, *THE BARNYARD EPITHET AND OTHER OBSCENITIES: NOTES ON THE CHICAGO CONSPIRACY TRIAL* (1970); *Seale's Lawyer to Sue Hoffman*, WASH. AFRO-AM., Nov. 4, 1969, at 3, <https://news.google.com/newspapers/p/afro?nid=BeIT3YV5QzEC&dat=19691104&printsec=frontpage&hl=en>; William E. Farrell, *The Chicago 7*, N.Y. TIMES (Nov. 4, 1973), <https://www.nytimes.com/1973/11/04/archives/once-more-with-decorum-the-chicago-7.html>.

130. See, e.g., Robert Enstad & Robert Davis, *Judge Rejects Mistrial Plea by Kunstler: Lawyer Says Hoffman Prejudiced Riot Trial*, CHI. TRIB., Nov. 20, 1969, at 8; J. Anthony Lukas, *Bobby Seale's Birthday Cake (Oh, Far Out!)*, N.Y. TIMES (Oct. 31, 1971), <https://www.nytimes.com/1971/10/31/archives/bobby-seales-birthday-cake-oh-far-out-bobby-seales-birthday-cake.html>; J. Anthony Lukas, *Chicago 7 Judge Bars Ramsey Clark as Defense Witness*, N.Y. TIMES (Jan. 29, 1970), <https://www.nytimes.com/1970/01/29/archives/chicago-7-judge-bars-ramsey-clark-as-defense-witness-chicago-7.html>.

131. A search of the biographical directory of Article III federal judges shows 1,018 sitting district judges. *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> (filter by “All Sitting Judges”; select all district courts under “Court”) (last visited June 21, 2019).

132. Coverage of federal trials seems to occur when there is a tremendous degree of notoriety or infamy. For example, the trial of former Army Sergeant Maliek Kearney, accused of murdering his wife who was also in the military, garnered substantial coverage. See, e.g., Tim Prudente, *Federal Trial to Begin Monday in Killing of Fort Meade Soldier*, BALT. SUN (July 15, 2018, 3:00 PM), [www.baltimoresun.com/news/maryland/anne-arundel/ac-cn-meade-murder-0714-story.html](http://www.baltimoresun.com/news/maryland/anne-arundel/ac-cn-meade-murder-0714-story.html). In 2017, Dylann Roof was on trial for, among other things, the murder of nine black churchgoers in South Carolina. Media coverage was extensive because, again, the events were notable on a national scale. See, e.g., Khushbu Shah, Martin Savidge & Catherine E. Shoichet, *Dylann Roof Trial: Closing Arguments to Follow Days of Chilling Testimony*, CNN (Jan. 9, 2017, 4:31 PM), <https://www.cnn.com/2017/01/09/us/dylann-roof-trial/index.html> (detailing the trial as it was nearing its end).

133. West Virginia's Putnam Circuit Judge William Watkins was videotaped screaming at Pastor Arthur Hage in court during Hage's divorce proceedings in 2012. In the video, which was posted on YouTube on June 26, 2012, and has since received over 250,000 hits, the judge chastises Hage for speaking to a reporter who wrote an article posted on PutnamLive.com, which apparently showed a picture of the judge's home. The judge claimed his property was vandalized several times as a result of the photo. Judge Watkins started the hearing as follows: “Mr. Hage, if you say one word out of turn, you're going to jail. Do you understand me? . . . Shut up! Don't even speak. . . . You disgusting piece of [inaudible].” He screamed at Hage during most of their exchange. Judge Watkins later recused himself from any other proceedings in Hage's case, admitting he lost his temper. Troyfromwestvirginia, *Putnam County, WV, Family Law Judge, William Watkins, May 23, 2012 MELTDOWN!!!!*, YOUTUBE (June 26, 2012), <http://www.youtube.com/watch?v=APD4a347bPQ>. For more examples of judges whose demeanors are showcased on social media,

their behavior, judges can be confronted to alter their demeanor. However, it is certainly not guaranteed that such exposure would be an effective remedy, especially for judges like Judge Hoffman. There are several reasons for that: (1) federal court proceedings are not broadcast so viewers would not see a judge's behavior firsthand;<sup>134</sup> (2) judges are likely to contend that their behavior is being taken out of context and that the provocation in the courtroom was extreme; and (3) if viewed as a type of shaming, then such posts are not likely to be particularly effective mechanisms for changing behavior.<sup>135</sup> Yet, observations, short of public postings, may be in order. Currently, there are websites on which litigants can report their experiences with judges.<sup>136</sup> The bar and the courts should take responsibility for providing an avenue for public reports. Just like individuals in other professions, including law professors, are subject to regular evaluations, so should be judges. However, to the extent that such websites are used, courts should have the opportunity to correct misinformation on the postings. This can be problematic given that judges are barred from speaking publicly regarding a case while it is still pending, even if on appeal or in another court.<sup>137</sup> Thus, it is imperative that judges create a full and complete record at the time of issuing sanctions or remarking on a case so that the public record is already available when there is a posting on the website. Moreover, the current ethical rules for judges should not bar a judge, or someone on the court's behalf, from posting a response to a website entry so long as that response is simply information already made public in the case.

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see generally Goodman, *supra* note 115.

134. FED. R. CRIM. P. 53. In order to observe a judge's demeanor, some circuits have adopted courtroom watchers to report back to the Chief Judge regarding the judge's behavior. This approach is not particularly effective because it can only provide a limited window into the judge's behavior unless someone is available to sit through all of the court's proceedings. Moreover, aware that there is an observer, even the most caustic judges are likely to alter their behavior when an observer is present.

135. See JUNE PRICE TANGNEY & RONDA L. DEARING, SHAME AND GUILT 137 (2002) (noting that their results demonstrated that "no apparent benefit was derived from the pain of shame [and t]here was no evidence that shame inhibits problematic behaviors"); see also Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 688 (1997) (noting the stigmatizing nature of punitive shame systems).

136. Two websites, The Robing Room and RobeProbe, allow users to rate judges and leave comments. The Robing Room allows for more in-depth reviews, as the user can rate the judge in areas like scholarship, punctuality, and evenhandedness. THE ROBIN ROOM, <http://www.therobingroom.com/> (last visited June 21, 2019); ROBEPROBE.COM, <http://www.robeprobe.com/> (last visited June 21, 2019).

137. See CODE OF CONDUCT, *supra* note 99, at Canon 3A(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control.").

### B. Commissions on Judicial Misconduct

States throughout the nation have various agencies that accept complaints and issue annual reports regarding judicial misconduct. Increasingly, these commissions are focusing on judicial demeanor.<sup>138</sup> A judge who is found to have acted inappropriately is subject to a variety of sanctions, ranging from private reproof to more extreme punishments.<sup>139</sup> Follow-up studies need to be done as to what effect such sanctions have on deterring that judge and others. All too often, the commission finds itself facing undue criticism for its handling of a case.<sup>140</sup> There is a thin line between judicial discipline and political pushback against controversial rulings. Judge Hoffman managed to present both problems, but demeanor should be enough of a concern that it warrants supervision as well.

On the federal side, the practice of reporting judicial misconduct to the circuit's chief judge as provided by the Rules for Judicial-Conduct & Judicial-Disability Proceedings,<sup>141</sup> established to implement The Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–364, has had mixed results. While “misconduct” may include “treating litigants, attorneys, or others in a demonstrably egregious and hostile manner,”<sup>142</sup> it remains unclear whether there is a common understanding of what behavior would meet this standard. Only a change in judicial culture can ensure that a judge's demeanor is appropriate. Thus, it is critical that committees tasked with evaluating judges' behavior pay close attention to the complaints being raised and conduct their own independent investigation into the reputation and conduct of the judge at issue.

Additionally, while commissions are often tasked with deciding on judicial discipline, it is also critical that they, together with other

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138. The Annual Report by the California Commission on Judicial Performance found fourteen instances of judicial discipline in 2017 that were the result of a judge's demeanor or decorum. STATE OF CAL. COMM'N ON JUDICIAL PERFORMANCE, 2017 ANNUAL REPORT 13 (2017), [https://cjp.ca.gov/wp-content/uploads/sites/40/2018/04/2017\\_Annual\\_Report.pdf](https://cjp.ca.gov/wp-content/uploads/sites/40/2018/04/2017_Annual_Report.pdf).

139. *See id.* at 2 (summarizing that the Commission can act confidentially or may engage in public dispositions).

140. *See, e.g.*, Nate Gartrell, *Attorney for Judge Facing Misconduct Fires Back at California Commission*, E. BAY TIMES (Oct. 19, 2017, 10:35 AM), <https://www.eastbaytimes.com/2017/10/19/attorney-for-judge-facing-misconduct-fires-back-at-california-commission/>.

141. 2 GUIDE TO JUDICIARY POLICY (2016), <http://www.uscourts.gov/sites/default/files/guide-vol02e-ch03.pdf> (last updated May 4, 2016). For the history of these rules, see generally Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 325 (2008).

142. *FAQs: Filing a Judicial Conduct or Disability Complaint Against a Federal Judge*, U.S. COURTS (June 2016), <http://www.uscourts.gov/judges-judgeships/judicial-conduct-disability/faqs-filing-judicial-conduct-or-disability-complaint#faq-Who-can-I-complain-about?>.

institutions that focus on judicial behavior,<sup>143</sup> engage in ongoing research on improving judicial behavior. Judicial ethics benefits from the ongoing scrutiny of how trials are conducted. A formal complaint against a judge should not be necessary for a commission to scrutinize highly visible judicial activity. As a body with expertise, commissions are in a unique position to conduct ongoing studies regarding judicial behavior.

### C. Judicial Education

The single most important step to take to confront the problem of judges with poor judicial demeanor is to improve judicial ethics education.<sup>144</sup> The current approach to judicial ethics education is for judges to attend “baby judges school” where a wide variety of ethical issues, including demeanor, are discussed.<sup>145</sup> However, demeanor demands training by role playing.<sup>146</sup> Judges must be forced to confront difficult situations and have their reactions critiqued before they are in a courtroom under high stress and where they will not be able to receive constructive feedback from fellow judges. Judges should be taped during these training sessions and given an opportunity to view how they come

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143. There are an increasing number of law schools that are creating programs to focus on judicial behavior. *See, e.g., About the Judicial Institute*, PACE L. SCH., <https://law.pace.edu/about-judicial-institute> (last visited June 21, 2019); Michael Bazeley, *Closer Collaboration with Courts Is Focus of New Law School Institute*, BERKELEY L. (Mar. 9, 2018), <https://www.law.berkeley.edu/article/closer-collaboration-with-courts-is-focus-of-new-law-school-institute/>.

144. While judicial discipline is often the first focus when there are complaints against a judge, continuing and introductory judicial education is imperative. *See* Goodman, *supra* note 115, at 613–14 (describing the benefits of restorative justice in the context of judicial discipline).

145. The Federal Judicial Center manages judicial education of federal judges. It is tasked with “stimulat[ing], creat[ing], develop[ing], and conduct[ing] programs of continuing education and training for personnel of the judicial branch of the Government.” 28 U.S.C. § 620(a)(3) (2012). Judge Jeremy Fogel, Director of the Federal Judicial Center, remarked that the objective of the “baby judge program is to make sure that people have the fundamentals that they need to be able to do the job.” Associated Press, “Baby Judges School” Is Underway for New Federal Judicial Appointees, CBS NEWS (Feb. 7, 2018, 8:01 AM), <https://www.cbsnews.com/news/baby-judges-school-is-underway-for-new-federal-judicial-appointees/>. The Federal Judicial Center’s 2016 Annual Report indicated that it held a Phase I seminar that focused on “the art of judging, chambers management . . . ethics and codes of conduct.” FEDERAL JUDICIAL CENTER ANNUAL REPORT 2016 5 (2016), [https://www.fjc.gov/sites/default/files/2017/FJC\\_Annual\\_Report\\_2016.pdf](https://www.fjc.gov/sites/default/files/2017/FJC_Annual_Report_2016.pdf). Furthermore, states have established similar programs for judicial education, which deal not only with substantive legal issues but also with issues of demeanor and ethics. *See* Diane E. Cowdrey, *Educating into the Future: Creating an Effective System of Judicial Education*, 51 S. TEX. L. REV. 885, 897 (2010) (explaining that the education model incorporates “skills-based” training on topics “such as on-bench demeanor”).

146. An earlier approach to teaching judicial demeanor was to have judges watch video vignettes and comment on the judicial behavior they observed. *See* Cynthia Gray & Frances Kahn Zemans, *Instructing Judges: Ethical Experience and Educational Technique*, 58 L. & CONTEMP. PROBS. 305, 308 (1995); Stephen M. Simon & Maury S. Landsman, *Judicial Ethics Simulation Based Training*, 58 L. & CONTEMP. PROBS. 323, 326 (1995). While this approach provided an improvement to having judges just read ethical codes, it did not go far enough.

across to a courtroom. They should receive feedback from non-judges as well as judges. It is completely unrealistic to expect judges to learn how to behave by reading about it in a rule or book. Mastering demeanor requires a combination of skills that may not be apparent on a judge's resume, including familiarity with psychological principles, increased empathy, sensitivity to dealing with *pro pers*, and skills for dealing with the Abbie Hoffmans and Bobby Seales of this world.<sup>147</sup> The Chicago Eight Trial should be "Judicial Training 101" for judges today.

Judges can also use modern resources to give guidance to each other. With the advent of judicial blogs,<sup>148</sup> judges can provide, as well as seek, guidance on how to handle difficult situations in the courtroom. While judges must be careful not to discuss details of individual cases, online discussions are excellent avenues for judges to remind each other of the importance of appropriate judicial demeanor and the tools they have to maintain their composure.<sup>149</sup>

Improved training regarding judicial demeanor does not mean that judges should be expected to act without emotion during their proceedings. In fact, as others have noted, there is value in judges being both emotionally and cognitively involved in their cases.<sup>150</sup> However, even if one believes that there is a role for judicial anger, it should not be exercised in the arbitrary and uncontrolled manner that it was in the Chicago Eight Trial. Serious attention and study must be made as to when and what type of judicial emotion is appropriate.<sup>151</sup>

#### D. How to Get Judges Who Care About Judicial Demeanor

Promoting judicial decorum cannot come at the expense of active judges. A 2009 article titled *Regulating Discourtesy on the Bench: A*

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147. The issue of whether judges, including those being selected for the highest court of the land, have an appreciation for the importance of demeanor was raised during the confirmation hearing of Associate Justice Brett Kavanaugh. *See, e.g.,* Ephrat Livni, *The Real Meaning of Judicial Temperament*, QUARTZ (Oct. 1, 2018), <https://qz.com/1408411/brett-kavanaugh-and-the-politics-of-judicial-temperament/>.

148. Active judicial blogs include: Bench and Bar Experiences, AJA Blog, The Magistrates Blog, and 12th Chancery Court District of Mississippi. Robert Ambrogi, *A Quick Survey of Blogs Written by Judges*, LAWSITES, <https://www.lawsitesblog.com/2013/04/a-quick-survey-of-blogs-written-by-judges.html> (last updated May 13, 2013).

149. *See, e.g.,* Mel Dickstein, *Is Judicial Demeanor Important?*, MINNPOST (Aug. 19, 2016), <https://www.minnpost.com/community-voices/2016/08/judicial-demeanor-important/> (admonishing other judges to engage parties before them in a calm manner).

150. *See* Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485 (2011).

151. Terry A. Maroney, (*What We Talk About When We Talk About*) *Judicial Temperament* (Jan. 2018) (unpublished manuscript), <https://www.law.berkeley.edu/wp-content/uploads/2018/01/Paper-Maroney.pdf> (examining various manifestations of judicial emotion and the attendant outcomes).

*Study in the Evolution of Judicial Independence* addressed this ongoing debate<sup>152</sup> between “privileging branch independence” and promoting “judicial personality.”<sup>153</sup>

Those judges and legal scholars who favor strict regulation of judicial conduct value uniformity between judges. They view “discourtesy as a sufficient evil in itself to be regarded as misconduct.”<sup>154</sup> This interpretation emphasizes neutrality through the passive judge, perhaps swiftly eliminating Judge Hoffman-like situations from a top-down approach.

On the other hand, promoting diversity of judicial personalities may be a benefit of the American legal system. The argument invokes a sort of synergy among jurists, suggesting that “something greater than the sum of its parts emerges from the ‘attrition of diverse minds.’”<sup>155</sup> Moreover, the proponents of a wide-ranging set of personalities insist that the literal reading of the judicial standards misunderstands how judges operate. That is, judges are personally involved in almost all decisions they make.<sup>156</sup> Thus, establishing regulatory guidance for jurists may be valuable to improve the judicial system, but overregulation is dangerous. Stripping judges of their individualism creates mindless automatons behind the bench,<sup>157</sup> thereby plaguing the courts with apathy and dispassion. As one commentator suggests, this detachment from the cases would be detrimental because “a more active and colorful judicial style would do more to lend legitimacy to the judicial process.”<sup>158</sup>

It will remain difficult for judicial training and discipline to thrive until the legal community addresses what defines proper judicial demeanor and how it is affected by a wide variety of factors in the courtroom. Those factors include, as in the Chicago Eight Trial, the litigants’ race.<sup>159</sup>

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152. The debate is considered an interpretative disagreement. That is, some judges and legal scholars read “implicit limitations” into the regulation of judicial conduct, while others interpret the canons and guidelines literally. The literal reading suggests that “a single act of impatience will subject a judge to punishment, limited only by the enforcement authorities’ discretion whether to initiate proceedings.” Green & Roiphe, *supra* note 115, at 540–46.

153. *Id.* at 540, 544.

154. *Id.* at 545.

155. *Id.* at 555 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 177 (1921)).

156. *See, e.g., id.* at 551–52 (“Every judicial decision, to some degree or another, reflects the personal views, ideology, and intuition of the judge.”); Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1065 (2006) (explaining that judges may decide their cases “in terms of an emotion or a hunch to one side”).

157. *See* Green & Roiphe, *supra* note 115, at 554 (citing RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 240–42, 262–64 (1999)) (remarking that “formalism promotes a kind of judicial laziness”).

158. *Id.* at 555.

159. *Cf.* Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L.

Effective enforcement of judicial conduct starts with consistency between judicial education and interpretation of the standards of conduct. Judges do not relish judicial education in which they must confront their own personality quirks through role playing. However, such education is crucial if judges will develop the skill sets to handle the most challenging aspects of trial.

### *E. Judges as Public Servants*

Finally, there needs to be a change in the basic culture of federal judges. Judge Hoffman suffered from perhaps the most extreme form of “federal judge-itis,” a condition under which a judge thinks that he or she is the ruler of a fiefdom.<sup>160</sup> There are many challenges today to changing the culture of the courtroom. Some deal with how minorities and women are treated,<sup>161</sup> and some deal with how objective judges are in their rulings.<sup>162</sup> Using the “judge’s demeanor” as an umbrella term to address the variety of problems raised by Judge Hoffman’s behavior can lead to an increased focus on changes that are long overdue.

The courts have an opportunity to change the future by recognizing what went wrong in the past. It is much easier for them to criticize a judge

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REV. 1, 4 (2000).

160. One particular blogger, who goes by the title “Irreverent Lawyer,” described Article III federal judges as believing that they “answer only to themselves and to God.” See *The Irreverent Lawyer, Judge Richard Kopf and Our Unfiltered World*, WORDPRESS (July 8, 2014), available at <https://drive.google.com/drive/u/0/folders/1yfhPJWKvZ8oJPID-W-Sf09UmgfX14siQ>.

161. See, e.g., Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> (“At least 15 women had accused Mr. Kozinski of subjecting them to unwanted sexual comments or physical contact, including kissing, hugging and groping . . . .”); Jared Gilmour, *‘Tainted’ Defendants Get Bad Advice from ‘Rag-Tag’ Black Lives Matter, Texas Judge Says*, FORT WORTH STAR-TELEGRAM (Feb. 27, 2018, 6:08 PM), <https://www.star-telegram.com/news/nation-world/national/article202472444.html> (discussing public outcry for district judge’s recusal following statements that Black Lives Matter had a negative influence on young black people); Kathryn Rubino, *Fifth Circuit Gives Well-Deserved Benchslap to Trial Judge Over Sexist Remarks*, ABOVE L. (July 9, 2018, 3:15 PM), <https://abovethelaw.com/2018/07/fifth-circuit-gives-well-deserved-benchslap-to-trial-judge-over-sexist-remarks> (describing the Fifth Circuit’s reprimand of a district court judge for making gender-based insults); Tommy Witherspoon, *Reprimanded Waco Federal Judge’s Caseload Dwindling*, WACO TRIB.-HERALD (July 26, 2016), [https://www.wacotrib.com/news/courts\\_and\\_trials/reprimanded-waco-federal-judge-s-caseload-dwindling/article\\_7a7c40d7-0493-587e-940d-b3bbfde47475.html](https://www.wacotrib.com/news/courts_and_trials/reprimanded-waco-federal-judge-s-caseload-dwindling/article_7a7c40d7-0493-587e-940d-b3bbfde47475.html) (the judge was “reprimanded and sanctioned for inappropriate sexual conduct with a former court clerk”).

162. See Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 113 (2017) (“[A]utomatic biases and cognitions indeed influence a much broader range of judicial decisions than has ever been considered.”); see also Gregory S. Parks, *Judicial Recusal: Cognitive Biases and Racial Stereotyping*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 681, 696 (2015) (summarizing that judges are “subject to a whole host of cognitive biases”).

from a case in the past than to recognize the same traits in themselves or their colleagues. Thus, just using the Chicago Eight Trial as a starting place for discussions as to how judges should use their power provides a valuable tool for getting judges to recognize the potential for abuse of power.

#### CONCLUSION

*“This is the way my generation was taught.”*<sup>163</sup>

Sometimes it takes a high-profile matter to shine the light on problems in our criminal justice system. Overly authoritarian judges who become personally involved in a case is not a problem that ended with the Chicago Eight Trial. It is a problem that continues to this day.<sup>164</sup> Federal judges may be independent, but having codes of behavior for everyone in a courtroom—including the judge—is not contrary to creating a strong and independent judiciary. In fact, improving standards of conduct is likely to lead to more respect and power for the bench. It is also likely to ensure better protection of individuals’ constitutional rights.<sup>165</sup>

Judge Hoffman was the wrong judge for the wrong case. When a case becomes a spectacle, a judge must know how to take control without becoming an autocrat. The best judges are not those who use their contempt power to show who is boss. The best judges are those who do *not* need to use their contempt power to afford both sides a fair trial.

Arming judges with an explicit code of behavior allows them to choose options other than those used by Judge Hoffman without fear that they will be perceived as weak. This move might be particularly important as the bench becomes more diversified. The angry father figure need not be the current symbol of a good jurist. Men and women from different backgrounds bring a different style of communication.<sup>166</sup> Thank

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163. JUDITH MARTIN, *MISS MANNERS’ GUIDE FOR THE TURN-OF-THE-MILLENNIUM* 9 (1989), quoted in Catherine Thérèse Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 946 (1991).

164. See, e.g., *Sentis Grp., Inc. v. Shell Oil Co.*, 559 F.3d 888, 904–05 (8th Cir. 2009) (“In the course of numerous in-person and telephone conferences and hearings, the [district] court directed profanities at Plaintiffs or Plaintiffs’ counsel over fifteen times. . . . [T]he court [later] denied Plaintiffs a meaningful opportunity to respond . . . and dismissed Plaintiffs’ attempt to explain [the] orders.”); *Lyell v. Renico*, 470 F.3d 1177, 1187 (6th Cir. 2006) (explaining that the district judge’s one-sided antagonism was so severe as to “ma[k]e a fair trial impossible”); *Cobell v. Kempthorne*, 455 F.3d 317, 335 (D.C. Cir. 2006) (noting the district judge’s issuance of sua sponte orders “exceeded the role of impartial arbiter”).

165. See Jona Goldschmidt, “*Order in the Court!*”: *Constitutional Issues in the Law of Courtroom Decorum*, 31 *HAMLIN L. REV.* 1, 5 (2008).

166. Joan Meyers-Levy & Barbara Loken, *Revisiting Gender Differences: What We Know and What Lies Ahead*, 25 *J. CONSUMER PSYCHOL.* 129 (2015); Vinita Mohindra & Samina Azhar, *Gender Communication: A Comparative Analysis of Communicational Approaches of Men and*

goodness that Judge Hoffman showed us how judges should not act. It is now time for the judiciary to create and abide by standards that will guarantee that the madness and injustice of that trial is never repeated.

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*Women at Workplaces*, 2 J. HUMAN. & SOC. SCI. 18 (2012). One benefit of using the Chicago Eight Trial as a historical reference for teaching judicial demeanor is that it poses a model of a male-dominated courtroom and questions can be raised of how more diversity in the courtroom might affect the conduct of the judges and parties. See Elizabeth Langer, *Seizing the Moments: The Beginnings of the Women's Rights Law Reporter and a Personal Journey*, 30 WOMEN'S RTS. L. REP. 592, 598 (2009) (giving a firsthand account of how it was "disconcerting to observe the role of women or, perhaps more accurately, the non-roles of women" through the public showcase of the Chicago Eight Trial); see also Clarke, *supra* note 163 (identifying how courtroom etiquette is a significant component in the movement to improve professionalism); Susie Salmon, *Reconstructing the Voice of Authority*, 51 AKRON L. REV. 143, 146 (2017) (analyzing implicit gender biases in traditional judicial demeanor paradigms).