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## Confrontation Comes to the Courtroom

Harry Kalven, Jr.\*

THE GESTURES and places of protest are becoming increasingly interesting these days, and increasingly difficult to analyze and evaluate. The decade that began with the sit-in has ended with the Chicago Conspiracy trial. We are developing a new vocabulary with words like politicizing, and confrontation replacing older words like civil disobedience and revolution. The Chicago trial in particular, because of its enormous publicity, and perhaps also the abortive start of the Panther trial in New York, have generated a concern about the place, and indeed the viability, of the courtroom amidst the new styles of protest.

There is in all this a novel but elusive topic to examine. Having broded about it over several weeks now as the Chicago trial wound its way to a conclusion, I remain unsure as to just how to put the issue. We can perhaps ask whether the tactics of protest, which in the case of the civil rights movement went from the courts to the streets, are now going from the streets to the courts. We can ask about the resiliency of the trial process in the face of confrontation tactics. We can ask whether the trial process itself can be politicized. We can ask whether in the American scheme of things it can ever make sense to talk about "political trials." We can ask whether there are any circumstances under which political realities entitle participants in the trial forum to certain privileges relieving them of customary obligations to etiquette and relevance.

The problem is that there is at present no single tactic, no single rationale of protest to describe, analyze and evaluate. The Chicago trial, as we shall see, proves to have been an ambivalent instance of confrontation in operation. For the present the report

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of the birth of the new tactics in the courtroom may have much in common with that report of Mark Twain's death.

In any event the challenge, whatever its precise forms, seems to reside in a denial that the trial forum and the political forum are as sharply separate and distinct as Anglo-American legal tradition has always made them. We are at least being asked to re-examine our assumptions that the trial forum is hermetically sealed off from political currents with standards of etiquette and relevance that are all its own.

With a topic so difficult to pin down, I propose to look first at the Scopes trial of 1925 and then at the Chicago trial; and perhaps in the end pull together a few preliminary reflections on the anatomy, the effectiveness, the propriety, and the possible counter measures.

## I

In locating ourselves with respect to the topic, it is inviting to go back to a very different place and a very different time—to Dayton, Tennessee, and the trial in 1925 of John Thomas Scopes, a young school teacher, for violating the Tennessee statute entitled “An Act Prohibiting the Teaching of the Evolution Theory . . . ,” and making it a misdemeanor “to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.” The Tennessee Monkey Trial has become a firm part of American legend, and its dramatic possibilities were within recent memory realized in the successful play “Inherit the Wind.”

At the end of a trial before a jury, Scopes was convicted and fined \$100 by the court. On appeal the Tennessee Supreme Court upheld the statute, but upset the conviction on the technicality that fines over \$50 were required under Tennessee law to be set by the jury. The court did not, however, send the case back. “We are informed,” the court pointedly observed, “that the plaintiff in error is no longer in the service of the state. We see nothing to be gained by prolonging the life of this bizarre case. On the con-

trary, we think the peace and dignity of the state, which all criminal prosecutions are brought to redress, will be the better conserved by the entry of a nolle prosequi herein." It is not hard to hear the court uttering a deep sigh of relief as it dismissed the case.

On paper the Scope case resulted in a test of the statute which was won by the statute. The law remained on the books for decades and may still be there. Yet the case, as we all know, is celebrated as marking a milestone in the fight for intellectual freedom. The trial was a great victory for the defense because by using a kind of confrontation tactic they appealed over the heads of the Dayton court and jury to the public outside the courtroom and literally ridiculed the law into oblivion. And the men who did it—Clarence Darrow, Dudley Field Malone, Arthur Garfield Hays—have always been regarded by us as heroes.

The defendants in the Chicago trial have been widely accused of attempting, and succeeding, in turning it into a circus. The defense in the Scopes case have always been acclaimed for attempting, and succeeding, in turning it into a circus.

If the Scopes record is read against the backdrop of the Chicago trial, there are arresting echoes. The defense offers an array of distinguished witnesses, this time scientists, who are not allowed to testify. The trial is moved from the courthouse to the lawn outside to accommodate the audience and the members of the press who are in attendance. Since it is unbearably hot, permission is given to remove coats and to participate in shirt sleeves. At numerous points the record shows applause or "prolonged applause" and laughter from the audience. At one point, William Jennings Bryan having stated vigorously that the members of the jury were better experts on the Bible than any of the scholars the defense was hoping to put on the stand, the record reads: "Voices in Audience: Amen." And Darrow is quick to add, "I hope the reporters got the Amens in the record . . ." At another point there is a fuss about a ten-foot sign placed so that it will be near the jury in the outside courtroom. It reads "Read Your Bible." Darrow objects that it is prejudicial in this case, and after some controversy, the court orders the sign down. At yet another point during his famous cross-examination of Bryan, there is applause

for Bryan, and he notes to Darrow: "Those are the people whom you insult." Darrow rejoins: "You insult every man of science and learning in the world because he does not believe in your fool religion." The judge interposes, "I will not stand for that," but Darrow does not withdraw the remark, and a little later refers to "your fool ideas that no intelligent Christian on earth believes." Indeed, there is even a moment when Darrow is cited for contempt, although he apologizes the next morning and the matter is dropped. (The judge had said: "I hope you do not mean to reflect upon the court?" And Darrow had replied: "Well, your Honor has the right to hope.")

In the end there are two major differences which perhaps account for the great difference in public response to the two trial confrontations. Whenever the intent to ridicule the law, and with it the religion of the local community, that was the dominating strategy of the Scopes defense, there is no resistance to the trial procedures, no disrespect for the judge or government counsel, and, we would note, no disrespect from them. Everyone is exceedingly cordial and polite and in the end the visitors thank the court and the bar for their splendid hospitality. The trial judge, John T. Raulston, in turn makes a little speech that seems incredibly remote from the tone of today. He concludes:

"I am glad to have had these gentlemen with us. This little talk of mine comes from my heart gentlemen. I have had some difficult problems to decide in this lawsuit, and I only pray to God that I have decided them right. If I have not the higher court will find the mistake. But if I failed to decide them right, it was for want of legal learning and legal attainments, and not for want of a disposition to do everybody justice."

"We are glad to have you with us."

The second difference is, I think, more interesting. The factor that made the Scopes case so memorable and so theatrical was, of course, the appearance of William Jennings Bryan for the prosecution as the counter-poise to Clarence Darrow. The casting was perfect on both sides. The factor, however, that made the

trial viable was, I suspect, the fluke that Bryan was willing to be cross-examined by Darrow as an expert on the Bible and that the court was willing to permit it, as it put it, as an informal and somewhat irregular procedure outside the presence of the jury. The result was to provide in the course of the trial a forum for debate over what were the essentially political issues of the trial without interfering unduly with the trial proper. It was almost as though the trial adjourned for awhile to permit debate of the political issues that surrounded it. Thus, the pressure to enlarge the standard of relevance which was a visible strain in Chicago was greatly reduced in Dayton. The trouble with this insight about the Scopes case is that it is hard to see how it could work again. Imagine adjourning the Chicago trial for a few days while defendant Dellinger and, say, prosecutor Foran debated publicly such matters as racism, poverty, and the war in Vietnam.

## II

We turn then to the Chicago trial. A special circumstance makes it possible, I think, to gain an overview of the tactics without attempting to digest the monstrously prolix transcript of the five-month trial. At the conclusion of the trial while the jury was deliberating, Judge Julius Hoffman, who had issued several prior warnings, called the defendants and their lawyers before him one at a time and read off a series of contempt specifications to them, adjudged them guilty of contempt, and sentenced them to periods ranging from four years to two months. He was elaborate and detailed in his specifications and there are in all 175 specific acts of contempt cited. The transcript of that part of the trial is now available and I have just had occasion to review it carefully. It provides, I think, a rational sample of the tactics deemed most offensive and disturbing to the trial process; surely the judge can be taken to have harvested the strongest examples.

It leaves two important impressions. First, that the tactics of the defense vary widely and are complex to catalogue; second, that there was no systematic strategy pursued steadily throughout the trial.

I begin with the second point.

The judge's particularization of contempts provides a perspective on the ebb and flow of disruptions during the trial. That is, one can plot the 175 citations on a calendar. I found the results interesting and surprising although reading them is an avowedly subjective matter.

There were, for example, stretches of the trial during which few, if any, contempts arise. Thus, the five weeks from November 6 to December 10, showed 9 citations in all, 6 with penalties of less than 7 days; they fell on five of the days; and none of them involved Kunstler, Rubin, Hayden, or Froines. Conversely, certain events precipitated a rush of citable conduct. Thus, the troubles with Bobby Seale peaked from October 28 to October 30 and during this 3-day interval no less than 54 of all the contempts took place. Again, the 13-trial-day span between January 23 and February 7 accounted for another 48 contempts. Thus, 100 of the contempts occurred within 16 trial days of the five-month trial. Indeed if we abstract the Seale episode, the trial proceeded from September 24 to January 8 in a relatively uneventful fashion; and there were some 50 trial days on which the judge found no conduct worth citing.

Moreover, somewhat the same impression holds if we trace the individual participants. Hayden and Rubin each went through November and December without engaging in any conduct which Judge Hoffman cited as contumacious. Weinglass went from October 30 to January 13 without a contempt, and Kunstler had a five-week span from October 30 to December 9.

One could possibly extract a different message by playing further with the numbers, and it may be enough that during the five months there were the horrendous total of 175 contempts. Nevertheless I was impressed, contrary to the impressions I had gotten from the press coverage, by the sense that the interruptions were in no sense random events and that two or three triggering events, such as the handling of Seale and the revocation of Delinger's bond, accounted for the major part of the troubles. I am impressed because the incidence of unrest seems not easily com-

patible with the notion that the defendants and counsel relentlessly and steadily pursued a single-minded strategy of disturbing the trial process.

Looking at the record qualitatively, the tactics, as we have said, are varied. It is not clear that they ever reach the level of literal heckling, making it impossible to proceed. At one extreme they consist of one-line jokes interjected quickly at the expense of the judge, the witness, or the prosecutors. At the other extreme, they involve an effort to turn the trial forum into a political forum at least momentarily as when they seek to stop the trial to read the names of the war dead. Occasionally, there is a gesture of sheer civil disobedience as where in protest over Seale they refuse for those four days to rise for the judge. Ranging in between are two kinds of conduct: countless instances of caustic and at time insulting comments about the fairness of the trial and the judge, and countless remarks that are simply "out of order" in the sense of Roberts' Rules of Order.

The heightened sense of interruption that these tactics seem to have engendered is perhaps attributable to five factors. First, the gloss that the press, delighted with a new art form, insisted on placing on the events at the trial; second, the theatrical posturing of the defense when outside the trial forum; third, the presence of the jury and the frequency with which the judge found it necessary to have the jury withdrawn thus producing a sense of crisis after crisis; fourth, the presence of "a studio audience" which often interacted with the defense producing applause, or occasions on which spectators were ordered removed from the courtroom; and, finally, the propensity of Judge Hoffman to use *direct orders* in his effort to control the flow of the proceedings which had the consequence of escalating many minor incidents into relatively major ones.

### III

Interestingly enough the defendants appear to see themselves as having been more strategically disruptive. David Dellinger's contempt "history" is instructive. He is given 32 citations, the largest number of any of the participants, and receives sentences



totaling over 25 months. Only 6 of his citations call for penalties of over 7 days; the remaining 26 were apparently regarded by Judge Hoffman as relatively minor and for 12 of these the sentence is 3 days or less. And while he is more steadily disruptive from the judge's point of view than the others, he collects 9 of his citations in the four days of October when the Seale problem is at its height; he goes through December and the first part of January with just 3 citations.

Dellinger's actions are of several kinds. On at least five occasions the controversy is over whether he has engaged in certain conduct in the courtroom; it has nothing to do with issues of the trial or with larger issues outside the trial. On two occasions dispute is over the revocation of his bail. On another four occasions the citation is for not rising for the judge as part of the Seale protest; and on at least three other occasions the event is directly connected with the Seale episode. Several times it is for laughing. Several times it is an angry brief outburst about a witness as in his widely publicized use of the barnyard epithet "bullshit" which caused the judge to revoke his bail, precipitating one of the principal crises of the trial. Several other instances involve a caustic remark about the fairness of a ruling by the judge. And once it is for rising to propose on behalf of the defense that the jury which had been sequestered almost since the start of the trial be allowed to go home for the Thanksgiving holiday. His tactics are never surreptitious; his stance is one of open defiance: "It was the defendant David Dellinger who made that statement," he says repeatedly.

This is, of course, not quite all the whole story. And it is from the remainder that the sense of "politicizing" arises. Thus, his first contempt in October 15 is for attempting, just prior to the resumption of the trial after the lunch recess, to read the names of the Vietnamese war dead as part of the Moratorium Day celebration, and to ask for a moment of silence before the witness takes the stand.

The incident is worth pondering. Dellinger's move seems to me clearly out of order; the trial forum should not be enlarged to accommodate political protests. Conduct which would have

been altogether unexceptionable almost anywhere else is inappropriate and irrelevant in the court. But the reaction of Judge Hoffman and the prosecution to the gesture are to my mind equally inappropriate. Foran asks that the marshal take "that man" into custody, the court has the jury withdrawn, and orders Dellinger not to disrupt the proceedings. The judge turns to the court reporter: "I note for the record that his name is . . ." Dellinger interrupts: "David Dellinger is my name."

What then is the tactic? If Dellinger's move was made in cool anticipation that the judge and prosecution would overreact and furnish them with an incident, it is what we call confrontation. The move, however, is made modestly before the trial has resumed and the request for a moment of silence is made politely. We are only into the third week of the trial and there have been virtually no disturbances thus far. One cannot but feel that with a little resiliency and prudence on the part of court and prosecutor this could not have been built into "an incident." In any event if the objective was to make the court and prosecution look arbitrary and foolish, it is hard to say Dellinger did not succeed.

On several other occasions, perhaps a half dozen in all, Dellinger intrudes a brief political speech. Here are a few examples; they always arise after some initial triggering event.

On December 15 (note how far into the trial we are) a dispute arises over whether Stuart Ball has laughed in court and the judge orders him removed. Dellinger interrupts to argue that Ball had not in fact laughed. And at the end of a lively exchange, this occurs:

The Court (to Dellinger): Will you sit down?

Dellinger: And you are very prejudiced and unfair and I state that in open court. It is not a fair trial and you have no intention of giving us a fair trial and you have no intention of giving us a fair trial and when I speak throughout the country, I say that you are the assistant prosecutor or maybe the chief prosecutor and it is true and the people of this country will come to learn that about you and about some

other judges in this court. [There was disorder in the courtroom.]

Spectator: Right on, boys.

On January 12 after the court made an evidentiary ruling, Dellinger interrupts to say: "Oh, ridiculous," thereby generating another heated exchange which includes the following:

The Court (to the reporter): Did you get all those remarks?

Dellinger: I stand by them, too. You earned them. It really brings the whole system of justice under discredit when you act that way. What Mayor Daley and the police did for the electoral process in its present form you are now doing for the judicial process.

On January 23 after the judge has once more found it necessary to remove disorderly spectators from the courtroom following an extended controversy over a ruling by the court, the prosecutor Foran addresses a little speech to the court in defense of the traditional methods of trial which "have worked very well for two hundred years," and which we are "not going to change now for these people."

Dellinger rises to reply: Yes, kept the black people in slavery for two hundred years, and wiped out the Indians and kept the poor people in problems and started the war in Viet Nam which is killing off at least a hundred Americans and a thousand Vietnamese every week and we are trying to stop it.

He is ordered to sit down and interjects: And that judge won't let that issue come into the trial, that's why we are here.

Foran replies: Your Honor, in the American system there is a proper way to raise such issues and to correct them.

These are to be sure three vivid examples and they indicate a passionate refusal to abide by the traditional notions of what is relevant to the legal forum. They are simply speeches in the

wrong place, and they pose interesting issues about maintaining legal rather than political standards of etiquette and relevance. But I am impressed by the circumstance that these are brief examples buried in the long five-month trial.

Ironically, the most interesting instance occurs only after the trial proper has concluded and the judge is proceeding with the contempt citations. Dellinger is speaking on his own behalf just after being sentenced for contempt:

“Now I want to point out first of all that the first two contempts cited against me concerned one, the moratorium action and, secondly, support of Bobby Seale, the war against Vietnam, the aggression against Vietnam, and racism in this country, the two issues that this country refuses to solve, refuses to take seriously.”

Judge Hoffman admonishes him to talk to the point, adding “I don’t want you to talk politics.”

Dellinger replies: “You see that’s one of the reasons I have needed to stand up and speak anyway, because you have tried to keep what you call politics, which means the truth, out of this courtroom, just as the prosecution has.”

Judge Hoffman requests Dellinger to sit down and Dellinger replies with an eloquent speech about “good Germans” and “good Jews” and “the new generation of Americans who will not put up with tyranny.” There is applause from the audience and efforts to remove some spectators, including interestingly enough, Dellinger’s daughter. In a moment, the transcript tells us, there is “complete disorder in the courtroom,” and the curtain comes down on cries of “Tyrants, tyrants” and “Justice in America.”

This episode invites a rush of competing reactions. On the one hand it can be viewed as a model of the new tactics in action. The speech goes outside trial relevance. As it escalates in rhetoric, predictably the spectators react and coercive moves are made by the court with the final result being, in the reporter’s phrase, “Complete disorder in the courtroom.” It all seems like the execution of a complex football play. On the other hand, it is

striking that it does not come until the trial itself is over, after five long months of interaction and the judge is delivering his contempt punishments. And, again, I am impressed that at the end of the trial Dellinger seems himself as having spoken out repeatedly to introduce political truth into the trial, although the contempt transcript would suggest that he did so only very infrequently and that the conduct which so frequently upset the judge was of a quite different order.

#### IV

The phenomenon, then, because it remains so difficult to specify remains difficult to evaluate. The line between literal obstruction of the trial process and disrespect for it is not easy to draw when one looks at concrete instances. Nor can we be certain that we are observing a calculated strategy at work rather than spontaneous anger, or a misunderstanding about the kind of forum a court provides, or, conceivably, a chemical interaction of very different life styles. One strong impression from the Chicago transcript is that we are watching a domestic comedy where the two parties can't stand each other, can't escape each other and, above all, can't let each other alone.

Perhaps we have insisted on more etiquette in the trial process than is indispensably necessary if it is to function. A trial may be the last citadel of etiquette in a society that has lost some of its taste for etiquette; the Chicago trial may evidence not so much revolution as wretched manners.

Perhaps, too, our sons have become more impatient than their fathers. The tradition, which I deeply admire, has been that a political trial was not readily possible in the United States, that we have had in the First Amendment and the Fifth and Fourteenth Amendments built-in protections against it; norms of political freedom and freedom for dissent, and standards of decency in criminal procedures that could be appealed to powerfully. The trial was never, therefore, a final confrontation. Perhaps this apparatus of appeal is seen as too slow now for the tempo of contemporary protest.

There remain so many issues to sort out and reflect on further. The concept of a political trial strikes me as most unhelpful. When is a trial brought by the state, as are all criminal trials, political? The effort to disrupt a trial perceived as unfair seems to me no more the exercise of a privilege to protest and combat injustice than sustained heckling in order to disrupt a speech or meeting is an exercise of the privilege of free speech. On the other hand, the utilization of the contempt sanction on the scale and with the severity shown in Chicago in order to police the trial decorum seems to me an ugly and self-defeating ceremony.

A few simple counter measures come to mind beyond the bland advice to have better judges, better prosecutors and better laws. It is fairly clear now that conspiracy charges invite disturbances; it remains to be seen whether a single defendant tried alone could have the audience, the resourcefulness and the stamina. Further, absent a conspiracy charge, it is not likely that the system will have to risk trials anywhere near as long as Chicago's.<sup>1</sup> Obviously a five-month trial invites troubles that a shorter trial would easily avoid. It might be remembered that over 90% of all criminal trials last 4 days or less.

Although there may be questions about the constitutional right to a *public* trial, I am not persuaded that it always has to be *so* public. At least, we might explore a format which included the press, and a limited number of spectators but which excluded the "studio audience." It is a fascinating puzzle to wonder how the Chicago trial would have gone had the audience not been there in the courtroom.

Then, too, one might ask the judge to play a somewhat different role in trials of this sort. The point is not so much that he heroically control his temper as that he realize that what is at stake is the image of justice being flashed to the world outside the courtroom, that his "opponents" are trying to trap him into looking bad. This may require that, like a good university president, he avoid unnecessary confrontations and that he season his legal

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1. This text was prepared prior to the Supreme Court decision in *Illinois v. Allen*, 397 U. S. 337 (March 31, 1970), in which the Court held that a disruptive defendant can be physically controlled as necessary to permit an orderly trial.

responses with some political realism, and perhaps, finally, that he pause from time to time to explain to the outside world the rationale for the rulings he is making.

I am not convinced as yet that the new tactics, if such they be, endanger any considerable segment of the legal world. To work at any level, there must be some resonance to them in the public generally. Otherwise the defense will appear simply obstructive, and perhaps mad. I am sanguine enough about the condition of the society, even at the moment, to suggest that there will not be many such occasions forthcoming. Not the least idiosyncrasy of the Chicago trial was, it should always be remembered, that the conspiracy was predicated on the misadventures of Convention Week.

Perhaps the best question the Chicago trial and events like it bring to mind is why defendants in criminal trials, threatened as they are by serious harm from the state, in general have over time continued to behave. Maybe it was patriotism or fear of the contempt sanction or due to the professional discipline of their counsel, but I suspect it was their perception of their own self-interest. The achievement of Anglo-American procedures slowly won over the centuries has resided in the limitations a civilized society thus imposes on its own use of power. It must be in the interest of the defendant who is now within the grasp of the state to cooperate in the exploiting of those limitations.