Political Trials

Thomas Emerson

What is a political trial? There have not been many attempts to explain or define the concept. By far the best treatment of the subject is by Otto Kirchheimer in a book titled Political Justice. Yet even Kirchheimer is not entirely clear about what a political trial is: he defines it as a judicial trial which is directly involved with the struggle for political power. That is rather vague. Several weeks ago, Justice Douglas, in a concurring opinion, referred to political trials—one of the first justices ever to mention the term—but he did not explain what they were. Instead, he gave five examples from American history of what he considered to be political trials. Those were: the Haymarket trial; the Debs trial in Connecticut with the Pullman strike; the Mooney-Billings case; the Sacco-Vanzetti trial; and the Smith Act prosecution of Dennis. I think that we would probably all agree that those were political trials. Let me, however, go a little beyond the examples and indicate some of the situations in which a political trial occurs.

I will be speaking here only in the context of the criminal law, because criminal indictments are the tools most often used by the government to counter political opposition. The clearest case is a trial for treason or conspiracy to overthrow the government. We haven't had one of those in American history since the trial of Aaron Burr. In modern times, prosecution for opposition to the government is more likely to take the form of a trial for political expression—a prosecution of the members of a radical political movement, based not upon their actions but upon the expression of their position. The Debs seditious libel case and the Smith Act cases are good examples. The Coffin-Spock prosecution rested almost entirely upon political speech, as did the trial of the Chicago Seven.

Another situation in which a political trial might occur is where a common crime—an orthodox crime—is committed for political purposes and the attempt to punish that crime involves an attempt to injure or harass the political movement that is involved. I think an example might be the Debs Pullman case, where Debs engaged in certain acts which were in pursuit of a basic political effort to organize labor. Other examples might be the accusation against Alger Hiss for engaging in espionage for political purposes and the Rosenberg-Sobell prosecution.

A third situation involves an ordinary crime which on its face is not connected with political issues or committed for political purposes. Its political implications derive from the facts that the person charged with the crime is prominent in a political movement and that one of the objectives of the prosecution is to destroy or injure that movement. The issue becomes not only what was done but also the political motivation behind the prosecution. In the Mooney-Billings case, the crime was bombing, but the prosecution of two members of a radical political movement raised serious issues concerning the motivation and merits of the prosecution. In the Sacco-Vanzetti case, the crime was simple armed robbery, but the prosecution and conviction of two radicals living in a period of considerable popular hostility to their views raised serious questions about the validity of the prosecution and the fairness of the trial.

Thus, the fact that the defendants in the New Haven Panther trial are charged with murder is not decisive on the question whether it is a political trial. The basic question is whether there are issues in the case which, whether the prosecution desires it or not, go beyond the narrow judicial issues of the relation of the individual person to the events and raise controversial political questions. For example, the Panther case has to be placed in the context of a consistent attack on a political party made, over a period of time, by police departments throughout the country and perhaps with the aid of federal agencies—an attack which has resulted in the deaths of over twenty Panthers and a number of policemen. The case has to be viewed in the context of harassment and raids conducted in an effort to wipe out a party which has challenged the status quo in this country. Given this context, it is clear that there are issues in this case, whether or not anyone wants to recognize them, which go beyond the traditional legal issues of who did what to whom under what circumstances.

Moreover, in the Panther case, we have charges of a most heinous nature brought against a group of people who are outside the affluent society. Add to that the fact that the defendants are black. Everyone who knows the situation knows that justice for black and for poor people in our courts is not the same as justice for white and for well-to-do people. In addition, the defendants are engaged in a militant political operation, are actively challenging police control of the ghetto and are actively presenting a radical view of society that is threatening to many people in our society. Add to that the fact that for almost a year, the prosecution's case has been presented to the people of this community day after day, while the defense case has not been and cannot be so presented. Given all these factors, this case must be considered a political trial.
Let me now say something about the characteristics of a political trial. First, the government does not acknowledge the political nature of the trial. Under no circumstances will government officials admit that a trial is political. They insist on its conventionality: this is a murder; they have to find out who committed the murder; the case will be handled by the usual legal process; and that process will arrive at the correct result. They assume, indeed insist, that the normal operation of the judicial system will continue in conventional fashion.

There are reasons why the government will not recognize openly those aspects of a judicial proceeding which transcend the narrow legal issues as visualized by the legal system and which involve the play of political forces. Usually, the government is interested in maintaining the status quo and therefore insists upon everybody playing the game according to the established rules. Furthermore, if the government is in fact using the judicial process for illegitimate purposes, it has no inclination to admit such a departure from its obligations.

Secondly, if in actuality the government does attempt to use the proceeding as a political weapon against a political movement, it may do that in various ways. It may appeal to the popular hostility against the movement, as in the Smith Act cases. It may exploit the association of particular defendants with an unpopular cause. It may attempt to establish an historical record to justify its own position. It may try to win popular support either by demonstrating the unsavory character of the opposition or by arousing fears in the public mind about the aims of the opposition. And it uses special methods and applies special pressures to do these things. It does not approach the case in a "run-of-the-mill" fashion but rather undertakes special efforts towards political ends.

Thirdly, what is the defense reaction to such a situation? Frequently, the defendants attempt to use the judicial proceedings to raise political issues. In a sense, they have no other choice, since, in their view, the real issues extend to the political questions. The objective of the defense may be merely to set the historical record straight, but more often it undertakes to force public consideration of what it sees as the major issues in the case. In the Coffin-Spock case, for example, the defendants were very interested in raising the issue of the legality and morality of the Vietnam War. They were largely unsuccessful in their efforts, but the attempt was made. In the Chicago conspiracy case, I would say that one of the aims of the defense was to expose the corruption, incompetence and stupidity of our whole society, and they did a pretty good job of doing it.

In the New Haven case, the Panthers are certainly interested in exposing the defects in our system of justice, especially as it applies to the poor and the black; in exposing the political basis of police attacks upon them; and in making their own program of political action clear to the rest of the country.

What methods are available to the defense to raise these issues? By definition, the issues are not part of an ordinary legal defense; they must be dragged in, one way or another. This can be done inside the courtroom or outside of it. Inside the courtroom, the defense may attempt to raise the issues within the confines of strict legal procedure, though opportunities to do so are limited. The very nature of the judicial system restricts a case to the narrow legal issues, and this precludes those issues which the defense may feel are most important. What can be done inside the courtroom is quite circumscribed, and therefore much of the defense activity must take place outside the courtroom. I'll get to that shortly. But let me add two more important characteristics of a political case.

Fourthly, and of special interest to law students, the defense lawyers are often caught in a very difficult position. An immediate tension arises between the legitimate interests of their clients and their professional responsibility to conduct the trial in accordance with traditional modes of legal procedure. In effect, the Canons of Ethics places an obligation on the attorney to make every effort to keep the defense within established boundaries—to present the defense and play the game by what are, in essence, the government's rules. The defense lawyer is supposed to be the spokesman for the legal system as well as the spokesman for the defense. He is, therefore, inevitably in a very unenviable position, as Bill Kunstler can tell you.

Finally, a political case is not likely to be resolved with the end of the trial. Political trials characteristically keep on going. The Mooney case continued for years; the Debs case continued as long as he was jailed; the Rosenberg and Sacco-Vanzetti cases are still going. A legal conviction simply does not settle the political issues, and these issues remain as long as the situation which gave rise to them remains. In a non-political case, on the other hand, the legal decision usually settles the case, for the legal system is established for that purpose and can ordinarily accomplish it.
What, then, does all this imply with respect to political activity surrounding the trial? Since the political issues can seldom be addressed inside the courtroom, political activity outside of it is almost inevitable, unless, of course, it is suppressed. Such activity may or may not be effective in advancing the cause of the defense either legally or politically. For example, the attempts by the Communist Party to arouse political support in the Smith Act cases did not help very much. On the other hand, the support for the Chicago defendants probably had some significant impact.

In any event, political activity in connection with a trial of this sort is clearly within the general system of freedom of expression and within the democratic process. The courts are not entitled to be isolated from public criticism. The legislature is not so isolated; the executive is not so isolated; and the courts should not claim the privilege to operate in isolation. To a certain extent, of course, the judicial system is intended to remain outside of the mainstream of political activity, and this creates a tension between the function of the judicial system and the function of the political system. Yet, however this tension is resolved, the courts are not entitled to immunity from public scrutiny.

The Supreme Court has recognized this. In the Harry Bridges case, for instance, the Court said that in spite of the fact that political expression might operate to cast disrespect upon the judicial system or result in criticism of the courts, the government had no power to regulate such expression.

Furthermore, in a broad sense the impact of public response on the courts is crucial. The courts do not weigh all the facts—only those that are recognized as relevant under the strict judicial rules. They tend to rely on assumptions, on traditions and on methods built up over the years without fully considering their actions or the new issues that arise. It is therefore healthy and effective to hold them to account by public scrutiny of their activities.

There are limits to such public scrutiny, of course. The limits are those imposed by a democratic system. As far as activity outside the courtroom is concerned, it seems to me that the limits are essentially those of non-violence and non-coercion. None of us wants a judicial system that is dominated by force. None of us wants a judicial system that is coerced or mob-dominated. Clearly, in regard to the New Haven Panther trial, political activity should stay within the democratic process and not extend to violence or coercion. That leaves, I believe, a certain amount of room for civil disobedience—which I construe to be non-violent.

If you consider yourself outside the democratic system, then your activity is, of course, limited only by political considerations. In such a case as this, however, it seems to me that the immediate effect of political violence is likely to be repression. I think that an abandonment of the judicial system through violence or coercion and an abandonment of the system of free expression would simply result, at least for the time being, in the advent of a police state. On the other hand, a demonstration within the democratic tradition is a legitimate, healthy form of political activity and might, I should hope, be substantially effective.

To call the New Haven Panther trial a political trial does not mean to me that the trial should be called off and the indictments dropped. Since there are legal issues involved as well as political ones, the legal issues have to be settled by the judicial process. It is the only process which we have which can settle them, and the alternative is that the issue be decided in the streets. That, from my point of view, would be worse than the dangers of an unfair trial.

Yet the implications of the factors which make this trial a political trial are, in my mind, clear. Given these facts, there is serious doubt that a fair trial can be secured. The only possible way for that to happen is for the people of the community to be constantly aware of what is going on in the courtroom, to understand as much of it as possible, to scrutinize the proceedings with particular care and to insist loudly and repeatedly upon justice in the courtroom. That is not only the obligation of the defense but our obligation as well.
Rather than comment directly on Professor Emerson's speech, I think I will talk about the problem in my own way for a little while. It seems to me that the underlying problem could be called "the politicization of law"—the use of law and the legal system as an instrument in political warfare. Needless to say, law is always a choice of values. When you choose to protect free speech, you are making a choice of political values. In dealing with the controversies that come into court, the law embraces many kinds of political issues—from segregation cases to the regulation of corporations. When those controversies take place within a framework of agreed values, then it seems to me that the law has not been politicized. For example, we all agree that people in this country should be treated equally by the government. Within that consensus, there is room for disagreement as to what constitutes 'equal,' but the controversy can take place within the system of law. Or, we make certain agreements about what a corporation may or may not do, and the law can deal with the question of what fits within that. The argument takes place within the agreed structure of law and values; the law is not, in my definition, politicized thereby.

The politicization of the law occurs when some of the people involved do not agree with the other people about the framework itself, when some people are outsiders to the system. A good indication that the law is politicized is that the lawyers themselves are placed in professional jeopardy for presenting a particular side of a case. When people who undertake to present one side are condemned for it, one can see that the system no longer embraces all points of view.

Professor Emerson has provided some examples of politicized law; I'll add a few more. One clear example arises when a trial takes place in a forum which is not empowered to hold one. When a Congressional investigation, for example, turns into a trial of the investigated, you have the politicized use of law. The most famous instances of this occurred, of course, during the McCarthy years.

A second example occurs when ideas are suppressed regardless of the nature of the over-riding law involved. For example, if people are thrown out of public housing or cut off from welfare because of their beliefs—because they are communists or they are this or that—you have a politicized use of the law, since such factors are not ordinarily relevant criteria for such decisions. The political use of non-political law—selective traffic enforcements or selective income tax enforcement, for instance—is a very important type of politicized law. It is the essence of what I call 'politicized law' that ordinary day-to-day
laws suddenly get used for political ends. That is a greater threat to the legal system than a law which provides that no communist shall make a speech. At least the latter has emerged out of the system, is the result of the democratic process. Under my definition, it is still a politicized use of the law, but is not as great a distortion of the system as applying a so-called neutral law selectively to politically unpopular persons.

A final clear-cut example seems to me to be the use of the law to suppress culture in one way or another. A rock festival is denied a permit, a commune is driven out of town because of various building requirements and so forth. These represent assaults not merely on ideas but on a whole culture.

If we look at this in a broader context, we might agree that the politicization of the law comes about, in part, because law is used in our society for every conceivable purpose, while other societies employ different instrumentalities to effect diverse ends. In other words, every time we want to establish any kind of policy in this country—great, small or trivial—we use laws. When we do that, we push law toward being an instrument of whatever policy prevails at the moment. Before I discuss the implications of this in today’s society, let me provide two basic characteristics about the use of politicized law.

First, as Professor Emerson mentioned, a hallmark of the political use of the law is the rigid insistence of all those involved that nothing unusual is going on. During the McCarthy era, this willful blindness occurred at several levels. First, the people who participated, a Congressman or a prosecutor, insisted that everything was normal. Second, the judges, particularly the justices of the appellate courts, insisted that you could not look behind the face of the law or the face of the prosecution. The rhetoric of the time was that we cannot question the intent of Congress in this matter: it looks normal on its face; we cannot go behind that; we will not look to motives. There was a kind of high-blown, self-righteous rhetoric, during this period, which maintained that everyone must stay within his function. And so the whole nature of the thing—which was obvious to everyone—was denied by all. Third, legal scholarship agreed that such issues must be ignored. The system had to be considered legitimate. No one dared to question the proceedings, because the form and appearance was normal. A great deal of scholarship was devoted to trying to maintain that myth.

Second, when the law is used for political ends, the make-up of the judicial system becomes crucial. The judicial system has always been considered a patron and branch of our political system. Whoever the ‘ins’ are appoint their men as judges—and so all our judges are Democrats or Republicans. Indeed in New York City, for example, the judiciary has become a part of the club-house system, and one of the qualifications for being a state Supreme Court justice is that a man must have been political leader of his district, a district captain say. One of the oddest things in New York State practice is that the law clerks turn out to be district captains. They don’t know a thing about being a clerk in the practical sense; they are law clerks for political reasons. Back in the good old days of Tammany, that was all fun and games; it was the ‘ins’ against the ‘outs’ and turkey at Thanksgiving. But when society begins to be deeply divided about political questions, it loses its quaint humor.

That brings me to my basic point. The problem which is now straining the legal system—perhaps beyond its capacity to respond—is that we have become in a profoundly sense two nations, two cultures, as a result of the social revolution which is now taking place. In part, it is a revolution of those who have been left out of the system and who are challenging that system. In part, it is a revolution of those who have had enough of the system and want out—or want to change it. We are no longer a society in which there is much agreement about basic values. When you have two nations, the simplest case, such as the coffee house case in South Carolina, becomes intensely political. That was a trial of some operators of a GI coffee house who allegedly were creating a nuisance. If they were creating a nuisance, they should have gotten 30 days in jail or an order to cease and desist. But instead, they got six years in prison—practically a death sentence as far as their development is concerned. At a point like this, law becomes simply an arsenal in a war between one group and another in our society.

In response to this trend, it seems to me that there are two alternatives. Either everything at issue must be an issue in the trial, or extraneous issues cannot be allowed to have any influence on the proceedings. For example, in the coffee house case, the judge said that the defendants were an evil influence on youth. Now if that is going to be a factor in his decision, it should be at issue in the trial. What we cannot allow is for the courts to follow the pattern of the 1950’s and refuse to admit that this kind of question exists when, in fact, it influences the proceedings. We cannot say that since the trial was regular on its face, its legitimacy cannot be questioned.

I believe that if, ultimately, there is to be a system of law, all the issues that divide us have to be brought within a system which represents some kind of agreement among all. Perhaps that is not an obtainable ideal any more. At present, the most important issues have been pushed outside of the system; we must attempt to refashion that system so that those issues can be considered. In the Panther trial, I take it, there is to be an attempt both inside and outside the courtroom to make the legal system recognize the realities which surround us.
Question: Professor Emerson, would you care to comment on Professor Reich's comments?

Mr. Emerson: First, I think that the concept of politicized law is somewhat broader than the concept which I was advancing of the political trial. At this time, I hesitate to define a political trial precisely. But for the purposes of the present discussion, I think that the term should at least be limited to Kirchheimer's definition of the political trial as a direct struggle or confrontation between the government and defendants over political power or the existence of a political movement. The concept of politicized law extends somewhat beyond that.

Second, I noted that the defendants could attempt to restrict the issues in the trial to the narrow legal questions; Professor Reich states that their other choice is to demand that the court consider all of the issues. I find that questionable, because it does not seem to me that many of such issues are of the kind which can be considered by the judicial system. Therefore, I am not certain that the defendants have such a choice or that, if they do have it, the court will let them exercise it. Thus, I see the problem more in terms of a choice between restricting the issues to the narrow legal issues and raising the broader issues outside of the courtroom.

Finally, I completely agree that the problem of politicized law becomes acute in the present type of situation with the development of what are, in effect, two cultures or nations. Obviously, as common understanding or a common value system becomes less widespread or cohesive, more and more political issues are raised, and the legal system is less and less able to handle them effectively.

Question: Professor Reich, would you illustrate how you would bring within the rule of law the issues which you see affecting the Panther case.

Mr. Reich: Since we are limited to information in the newspaper, that is rather difficult. One thing that has come out is the process by which the grand jury was selected. If the paper is to be believed, there is something terribly friendly about the way in which the sheriff selected the grand jury. That kind of thing stops being funny small-town politics in a case like this and becomes instead a highly political thing. So there is at least the opportunity to insist that different standards be applied and that the grand jury have some degree of representativeness.

We do not know what evidence will be offered or what comments the prosecutor or judge might make. What I would emphasize, with Professor Emerson, is the necessity for a kind of awareness and scrutiny, a willingness to watch out for things which in ordinary trials are taken for granted but which will have political significance in this trial.

Personally, I do not think that this is a good opportunity for the lawyers to defend the Panther way of life, unless the prosecution puts it in issue. This is a difficult case, because the charge is murder, and murder is one of the things which we still tend to agree upon as a total society. Generally, then, the issues in this case are issues basic to a fair trial—if you believe such a thing is possible. If you think that no fair trial for a murder can take place, then, I guess, you have to reject the system.

Question: Could you elaborate on your two-nation concept. You are not talking about a racially bifurcated country are you?

Mr. Reich: We are not talking about two nations, one black and one white. The split might more accurately be described, I guess, as between those over thirty and those under thirty. Essentially, the concept assumes that there is a substantial group in the society that is convinced of the dishonesty, corruption and inefficiency of the present system, and is so alienated that it is prepared to seek something entirely new. Thus, the split is based upon the search for a whole new value structure. The two nations simply do not share the same value system—and even if their basic values are the same, they do not share them as they are reflected in the present institutional arrangements.

Question: Wouldn't you say that to some extent, the law is always used as an instrument for political coercion, and is always 'political'?

Mr. Emerson: I think so. I think that any legal system will tend to enforce the views and interests of the dominant group in the society. After a revolution, that is quite clear; as time passes, structures and rules become assumed and it is more difficult to determine whether they are 'political' or 'legal.' That is one of the problems which I have with Professor Reich's concept of the politicization of law. The law is not an abstract thing. It is bound up closely with the community and the exercise of power; inevitably, it is part of the general political process. Thus, it is very difficult to decide at what point the legal system is operating on its own, as it were, and at what point it is simply an arbitrary instrument of political power.
Mr. Reich: The difference, I believe, is between controversy within the defined framework and controversy outside of it. Going back to the coffee house, for example, a disagreement about the standards of acceptable noise or cleanliness can be adjudicated. Moreover, the legal system can easily embrace the concept that people have different ideas and that all have a right to express those ideas peaceably. If that were true in the coffee house case, then you would not have a political use of the law. Six years in prison is not the normal consequence of dirty coffee cups.

Question: I am not clear on how it is possible to say that murder can be considered non-political. It seems to me that our ideas about murder are very political. It is deemed perfectly acceptable for the police to shoot the Panthers or to shoot looters. It is all right, in a normal situation, for someone to defend himself. It is considered laudable that soldiers shoot the 'enemy' in Vietnam, or drop bombs on 'enemy' civilian populations. All of these are very political concepts.

Mr. Reich: I would not say that the prevailing value system in this country condones a policeman's act of shooting a Panther. Basically, it seems to me that there is general agreement that you ought not murder someone else. The question of killing in a war is somewhat different and is becoming more and more a question of controversy. Still, it seems to me that a judicial system can handle a question of who killed whom.

Questioner: I am not certain that I agree with that fact. I don't think that such a consensus exists in this country. Otherwise, there would be a greater outcry when police shoot looters or protesters, and police would be tried in the legal system also.

Mr. Reich: If there is no agreement on the question of murder, then we are outside the legal system entirely. You may be in a position where you must repudiate the entire structure; then you are practically at the barricades.
Otis Cochran

On several occasions during the past few months, I have spoken before groups here and in other cities, giving my own views and the views of the Black American Law Students Association on the broad questions of reform of the judicial process and on the more specific questions concerning the procedures used in the arrests and trials of the Black Panthers. On some of those issues, our opinions have been shared by many of the students and faculty members of this institution. Most of us, for example, have deplored what seemed to be efforts by President Nixon to demean the Supreme Court and to undermine respect for the entire judicial system by his appointments to the Court and by comments he and his Attorney General have made concerning certain cases pending in the courts.

I do not intend to review the evidence on these matters—it is familiar enough to all of us. I mention it only because I believe that it cannot be emphasized too strongly that what has been going on here in New Haven during this spring of 1970 is not an isolated event, an accidental aberration from the general course that American society has taken during the late 1960's and early 1970's. This trial is part of a much larger tale of repression and intimidation, and, while we applaud the concern that many people at Yale University have demonstrated in recent weeks, we would remind you that this is not the first time that the fundamental civil rights of black Americans have been violated in the name of a so-called 'fair' and 'impartial' judicial process. I want to emphasize that I am talking about the civil rights of American citizens. We hear so much talk about the Black Panthers that it is easy to forget that we are dealing with a group of American citizens—supposedly guaranteed the same privileges and immunities, the same equal protection of the laws, as any other group of citizens in this country. I hope that with all the talk about the political dimensions of these events, none of us will lose sight of the human dimension. They are our fellow citizens, born in those same ghettos that agitate all good liberals, educated in the same segregated and inferior schools that bother the Yale community, and subjected to the same kinds of massive and systematic exploitation and oppression that seared the consciences of right-thinking Americans when it was Martin Luther King or Medgar Evers or Fannie Lou Hamer who were doing the complaining and making the appeals for fairness and justice. Now it is the Black Panthers who are making the plea for fairness and justice, and it is imperative that we listen to them as American citizens and not simply as people who wear the easily applied label of the Black Panthers.

With this background, then, let me say a few words about this trial in particular. There has been a good deal of debate as to whether this is a political trial. Those who say it is not are simply taking too narrow a view of the matter. It would take a person of remarkable naivete to contend that there has been no pattern of police harassment of the Panthers in the last two years; it would take extraordinary gullibility to believe that every arrest made has been justified, that every charge brought has been grounded on reasonable evidence, that every pre-trial detention or every bail figure set has been the product of a fair and impartial inquiry. And it would take a person of surpassing faith in our police departments to believe that there has never been manufactured evidence, that no agents have ever been planted as provocateurs or that no dummy informers have ever been created out of thin air.

That Alex Rackley was murdered is not open to doubt; and whether some of those charged with participating in the crime may have been involved is a matter yet to be settled. But it is also indisputable that the police and prosecution have cast their nets so widely in this case, have used evidence of such dubious constitutionality, have relied on witnesses of such questionable reliability, and have levelled their charges so indiscriminately that the political nature of the trial stands out clearly. For one must ask the very fundamental question: are the law enforcement agencies of this state more interested in solving the murder of Alex Rackley and bringing the guilty to justice, or are they more interested in taking part in what has become a nation-wide campaign to wreck the Black Panther party, to decimate its leadership and to exterminate once and for all its influence among the black people—and among many white people—of this country? Perhaps this trial will be conducted with such impeccable fairness and impartiality that those questions can be answered definitely and satisfactorily. But there is very little in the history of the past few months to lead anyone to believe the American courts are capable of giving controversial defendants full, fair, impartial and just hearings. Let us hope that New Haven will prove an exception. But let us also recognize that those who deny altogether the political aspects of this trial are living in a dreamland of their own creation—a dreamland that bears little resemblance to the United States of America.

So the fact of the trial has confronted us, and we have been forced to respond. The president of Yale University has voiced his skepticism that the Panthers can get a fair trial anywhere in this nation. When a man known above all for his prudence and caution, a man who heads a conservative and tradition-bound institution like Yale, can make such a statement, then all of us are forced to face the unpleasant possibility that this is in fact a political trial and that fairness is not possible.
Our courts, after all, are human institutions, and the men who preside in them are subject to the same human frailties that beset us all. The danger comes, therefore, not from those who criticize the courts but from those who assert that the courtroom is a sacred place and that no words of reproach or reprimand can properly be directed toward it—especially not from within the courtroom itself. For if our courts are viewed as sacrosanct and untouchable, then they are free to go their own way; they are free to disregard the moral sense of the community at large. Whenever this happens, the liberties of all of us are in grave danger. The moral sense of the community is what creates the law and sustains respect for the law; and if our courts and prosecutors pursue paths of injustice that flout too openly the moral sensitivities of the people, there can be no respect for law, and the ultimate result can only be anarchy.

We have been asked, therefore, to make a response to this situation—to express clearly to the courts the deeply held feeling of the community and of the university that this trial must be fair. We have been asked to warn them that—from the various signs we have seen—this may not be a fair trial. But some in the law school have resisted the call to make a response, to take what is after all a moral position on these events. Some among us have said—“Don’t disturb our routine—don’t disturb our classes—don’t disturb our study time—don’t let politics interfere with our scholarly pursuits.” And some were shocked and dismayed when a group of undergraduates held teach-ins here yesterday morning and caused short interruptions in the classroom routine. Some have said that we must have peace above all and that there is no justification for interrupting business as usual. What they do not understand is that there can be no business as usual until the business is right; what they do not understand is that there can be no peace until there is peace for everyone. For peace is not merely the absence of violence. If that is the kind of peace you want, a Hitler can give it to you, or a Mussolini—they were experts, after all, at providing order. But far from the mere absence of violence, peace is the attainment of justice for all people. Gentlemen may cry “Peace, Peace”—but there is no peace; and there will not be, to borrow one of Dr. King’s favorite phrases, “till justice flows down like water, and righteousness like an everlasting stream.”

So our routine has been interrupted, and some of us are disturbed. But I invite you to consider just what the routine has been for black people in this country—not a century ago under slavery, not a half century ago under Jim Crow, not a decade ago under Bull Connor—but what that routine has been in our own time, right now, and what it continues to be in nearly every corner of this nation. Is justice part of the routine for the average black citizen in Watts or Mississippi or Harlem or Dixwell? Is peace part of his daily routine? Answer those questions, and then decide how much value you put on maintaining the routine.

Now the weekend that we’ve been talking about for months is upon us, and we are about to witness what many believe will be a tragic confrontation. Many predict violence, and there very well may be violence. But the more we dwell on violence—the more we talk about its possibility—the more inflamed our own conversations become and the greater the chance that there will be violence. Many of you are talking about leaving town this weekend, but I believe that that would be a mistake. If people who believe in rational discourse—who are committed to non-violence, who stand for stability and order—leave, then the field is wide open to those who seek to follow a violent path. If the influence of the responsible is removed, then we abandon the field to the irresponsible. To leave New Haven this weekend would not be an act of prudence or an act of cowardice. It would be an act of moral abdication. You would be saying, ‘This is no affair of mine; I have no interest here; my presence here would make no difference.’ On the contrary, your presence here might make all the difference in the world. We can, by the example we set, help to set the tone of the weekend. We can see to it that it will be a time of honest and responsible demonstration of sincerely-held opinions; or we can—by abandoning leadership to the wielders of inflammatory rhetoric—insure that the confrontation will be ugly and that the violence will be widespread. That frightens me perhaps more than it frightens you. For I know that in any such confrontation, it will be black people who will bear the brunt of the police reaction.

So I close with a quotation that is appropriate both to our response to the trial of black American citizens and to our conduct during the mass demonstrations of the coming weekend. It is a quotation from Martin Niemoller, the German Lutheran pastor who helped lead the resistance against the Nazi cancer during Hitler’s years in power. He spoke about a simple concept, guilt: ‘First they came after the Jews.’ ‘I wasn’t a Jew, and I said nothing. Then they came after the Roman Catholics. I was not a Catholic, and I said nothing. Then they came for the labor union leaders. I was not a union member, and I said nothing. They attacked the liberal lawyers, the writers, the heads of universities. I was none of these, and I remained silent. Then they came for the Protestant clergy, and there was no one left to say anything.’

Speaking for myself, I can only say that now is not the time to remain silent; now is not the time to leave New Haven.