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Dealing with Unruly Persons in the Courtroom

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vention alone when an individual prisoner asserts one of the many legal remedies that are available to him will satisfactorily solve the problem.

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Dealing with Unruly Persons in the Courtroom

Courtroom disruptions are nothing new.[1] Throughout the course of English and American judicial history, both defendants and prosecutors have found it necessary from time to time to balk at established procedures or even to use the courtroom as a stage from which to publicize social or political positions through their histrionics. From the Stuart Star Chamber to the trial of Peter Zenger,[2] from the Massachusetts trial of accused "anarchists" Sacco and Vanzetti[3] to trials such as *Dennis v. United States*[4] in the McCarthy era of the late 1940's and early 1950's and, finally, to the Black Panther and leftist "conspiracy" trials of today,[5] litigating parties have come to court as interested in publicizing their causes as in seeking justice.[6] Indeed, some have come expecting injustice[7] and, thus, have been further influenced to disrupt their trials to point out unfairness. Treasured publicity inheres in courtroom disruption precisely because of the shock value of actions that flaunt the procedures and authority of the judiciary and the sensitivities of most citizens, who traditionally regard the courts as chambers of practiced decorum presided over by figureheads of wisdom and justice.

Disruptive actions surprise no students of judicial or political history;

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by the Prison Department only if we can secure sufficient support from the general public to obtain resources required for the task.
Bounds, *The Seriousness of Our Prison Problems: Why the Next Two Articles are Important to You*, 32 POPULAR GOVERNMENT 1 (Apr. 1966).

[1] Thomas of Chartham v. Benet of Stamford, 24 Seld. Soc. (Eyre of Kent, 6 & 7 Edw. II, 1313-14, vol. 1); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821); *Ex parte* Terry, 128 U.S. 289 (1888); State v. Woodfin, 27 N.C. 199 (1844).

[2] *See* RUTHERFORD, JOHN PETER ZENGER (reprint 1941). The trial of Zenger in 1735 is one of the earliest known in the New World in which the issue was freedom of the press.

[3] F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI (1927).

[4] 339 U.S. 162 (1950).

[5] *See* TIME, March 2, 1970, vol. 95, at 8-11; TIME, March 9, 1970, vol. 95, at 31.

[6] *See generally* D. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969).

[7] P. & D. BABCOCK & B. ABEL, THE CONSPIRACY 70 (1969).

but they do raise considerable concern among proponents of the judiciary who want the process of trial to be molded so that it can deal with such occurrences and still render justice. This comment will deal with methods courts have adopted to meet disruptive courtroom conduct. The responses of the courts fall easily into four categories: securing and muffling the disruptive defendant; posting armed guards in and around the courtroom; excluding the disruptive defendant or spectator from the courtroom; and adjudicating the disruptive defendant, spectator, or attorney to be in criminal contempt of court.

VARIOUS METHODS OF RESTRAINT IN THE COURTROOM

While freedom from handcuffs, shackles, manacles, or gags is a very important part of a fair and impartial trial,[8] the use of such restraining devices is clearly within the discretion of the trial judge.[9] Both shackling defendants in the presence of a jury and having the defendant seen by the jury while he is in shackles are ordinarily thought to be of great prejudice to a fair trial because either action introduces extraneous indicia of guilt into the minds of presumably impartial jurors.[10] However, the defendant's privilege to be free from confining devices during trial may be lost as a result of his disruptive conduct[11] or of the belief of the presiding judge that the defendant will disrupt the proceedings or attack the court's officers.[12]

When the defendant is shackled during transport to and from jail, but is unshackled during trial, the burden of proof is upon him to establish that he was prejudiced by having been seen by a juror before the shackles were removed.[13] A trial judge's admonition to the jurors to banish from their minds having seen the defendant in handcuffs has been held to have

[8] Way v. United States, 285 F.2d 253, 254 (10th Cir. 1960); Blaine v. United States, 136 F.2d 284 (D.C. Cir. 1943).

[9] Loux v. United States, 389 F.2d 911 (9th Cir.), *cert. denied*, 393 U.S. 867 (1968); DeWolf v. Waters, 205 F.2d 234 (10th Cir.), *cert. denied*, 346 U.S. 837 (1953); Odell v. Hudspeth, 189 F.2d 300 (10th Cir.), *cert. denied*, 342 U.S. 873 (1951); Hilton v. Peyton, 267 F. Supp. 719, (W.D. Va. 1967).

[10] *See* McCoy v. Wainwright, 396 F.2d 818 (5th Cir. 1968); Gregory v. United States, 365 F.2d 203 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967).

[11] Illinois v. Allen, 38 U.S.L.W. 4247 (U.S. Mar. 31, 1970) (while binding may be used, it inheres with prejudice and ought to be used sparingly).

[12] United States v. Bentvena, 319 F.2d 916 (2d Cir.), *cert. denied*, Ormento v. United States, 375 U.S. 940 (1963), *rehearing denied*, Galante v. United States, 377 U.S. 913 (1964).

[13] Gregory v. United States, 365 F.2d 203 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967).

cured whatever prejudice might have resulted from such a view.[14] It has been held not erroneous to permit the handcuffing of a defendant who was represented by his attorney to be emotionally disturbed[15] even though the defendant remained calm throughout the trial. Restraining a defendant when there is a danger of his attempting to escape has also been sustained.[16] Failure to remove the handcuffs at the entry of a guilty plea was held not to have been shown to be prejudicial to the defendant.[17] Finally, if his disturbance is vocal, the defendant may be gagged.[18] Thus, when any danger of escape, disruptive clamor, or injury to person can be shown, the defendant may be bound and, if necessary, gagged.[19]

A less prejudicial method of restraint is illustrated by cases in which courts have permitted placing armed guards around the courtroom[20] or around the courthouse.[21] In a case in which there were twenty defendants on trial at the same time, the trial court's action in placing extra marshals around the courtroom and at the doors was held to have been reasonable.[22] And a trial judge's action in ordering more marshals to duty after the defendants had climbed into the jury box and assaulted several jurors and had thrown furniture at the District Attorney was sustained as a reasonable exercise of discretion to maintain order in the courtroom.[23] Stationing an armed guard outside the courtoom after a defendant had smuggled out a note containing an escape plot was sustained as a reasonable measure for preventing his flight.[24] In order to minimize possible

[14] Sawyer v. Rhay, 340 F.2d 990 (9th Cir. 1964), *cert. denied*, 382 U.S. 861 (1965).

[15] Harbold v. Myers, 367 F.2d 53 (3d Cir. 1966), *cert. denied*, Harbold v. Rundle, 386 U.S. 920 (1967).

[16] Odell v. Hudspeth, 189 F.2d 300 (10th Cir.), *cert. denied*, 342 U.S. 873 (1951); Blaine v. United States, 136 F.2d 284 (D.C. Cir. 1943).

[17] Rigby v. Russell, 287 F. Supp. 325 (E.D. Tenn. 1968).

[18] Illinois v. Allen, 38 U.S.L.W. 4247 (U.S. March 31, 1970).

[19] The Eichmann-type box used by the Israeli prosecutors of the former Nazi has been suggested as one technique for controlling the defendant without the need for shackles or gags. Denying the defendant the right to leave his cell during the trial has also been propounded. TIME, March 9, 1970, vol. 95, at 33.

[20] Dennis v. Dees, 278 F. Supp. 354 (D. La. 1968). *See* Leyvas v. United States, 264 F.2d 272 (9th Cir. 1959); Burwell v. Teets, 245 F.2d 154 (9th Cir.), *cert. denied*, 355 U.S. 896, *rehearing denied*, 355 U.S. 927 (1957).

[21] State v. Mansell, 192 N.C. 20, 133 S.E. 190 (1926).

[22] Leyvas v. United States, 264 F.2d 272 (9th Cir. 1958).

[23] United States v. Bentvena, 319 F.2d 916, *cert. denied*, Ormento v. United States, 375 U.S. 940, *rehearing denied*, 377 U.S. 913 (1963).

[24] Burwell v. Teets, 245 F.2d 154 (9th Cir.), *cert. denied*, 355 U.S. 896, *rehearing denied*, 355 U.S. 927 (1957).

prejudice to the defendant, courts still require that no more force than is necessary be used to avoid disruptions of the trial or escape.

Little doubt exists that binding and even gagging a defendant when reasonably necessary to prevent his escape or his disorderly disturbance of the court are within the power of the trial judge. Likewise, there is no doubt that a judge is permitted to have armed guards present in the courtroom when a defendant is unruly. However, until very recently,[25] the power to exclude the defendant from the courtroom to prevent him from disturbing the court has rested on less certain grounds.

EXCLUSION OF THE DEFENDANT FROM THE COURTROOM

The right of the defendant to be present during his trial is recognized in both federal[26] and the North Carolina case law.[27] The right to be present as applied by the North Carolina court is not of constitutional derivation,[28] but it does buttress the constitutional rights of the defendant to confront his accusers[29] and to be convicted only in open court.[30] In the federal courts, the right to be present has been held to afford the defendant an opportunity to offer matters in mitigation of punishment once the verdict has been rendered.[31] Insofar as the defendant's presence supports his constitutional right to confront his accusers, the right to be present is not unique to either the federal or the North Carolina law; for Saint Paul wrote of the existence of such a privilege in the body of Roman law: "[I]t is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him."[32]

The courts have repeatedly affirmed the existence of the right to be

[25] Pearson v. United States, 325 F.2d 625 (D.C. Cir. 1963); Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963).

[26] Illinois v. Allen, 38 U.S.L.W. 4247 (U.S. Mar. 31, 1970). In addition, see FED. R. CRIM. P. 43 (requires presence of the defendant, but excepts voluntary absence once trial begins).

[27] State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969); State v. Ferebee, 266 N.C. 606, 146 S.E.2d 666 (1966); State v. Kelly, 97 N.C. 404, 2 S.E. 185 (1887).

[28] State v. Bazemore, 193 N.C. 336, 137 S.E. 172 (1927); State v. Kelley, 97 N.C. 404, 2 S.E. 185 (1887).

[29] State v. Hartsfield, 188 N.C. 357, 360, 124 S.E. 629, 631 (1924).

[30] State v. Bazemore, 193 N.C. 336, 137 S.E. 172 (1927).

[31] Green v. United States, 365 U.S. 301 (1961); Ball v. United States, 140 U.S. 118 (1891); Walsh v. United States, 374 F.2d 421 (9th Cir. 1967).

[32] *Acts* 25:16.

present at trial in cases involving the absence of defendants at various stages of the proceedings. In *Deschenes v. United States*,[33] the court held that the defendant's presence is not required at stages involving the mere discussion among attorneys and the judge of principles that the defendant could not have understood had he been there.[34] Numerous cases have been remanded because the judge sent instructions to the jury without the absent defendant's having had an opportunity to object to them.[35] The presence of the defendant has also been said to be essential when the verdict is returned in capital cases[36] and when the sentence is imposed.[37] Construing a Utah statute, the United States Supreme Court held the defendant's presence to be necessary at the examination of jurors challenged for cause.[38]

Despite the strong judicial support for requiring the defendant's presence at trial, the courts have nevertheless found that a defendant may waive his right to be present.[39] The courts are split as to the kinds of cases wherein such a waiver may be made.[40] One line of authority permits such a waiver in all non-felony cases;[41] the other permits waivers in all non-capital felony cases.[42] One judge has attacked the latter rule on the basis that the privilege and effect of mitigating punishment is peculiar to all felony trials, not just to capital ones.[43] However, capital cases do involve the possibility of ultimately peculiar punishment, and so the distinction

[33] 224 F.2d 688 (10th Cir. 1955).

[34] *But cf.* Near v. Cunningham, 313 F.2d 929 (4th Cir. 1963).

[35] *E.g.*, Walker v. United States, 322 F.2d 434 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 976 (1964). *See* Fina v. United States, 46 F.2d 643, 644 (10th Cir. 1931). *See also*, United States v. Compagna, 146 F.2d 524 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945).

[36] State v. Austin, 108 N.C. 780, 13 S.E. 219 (1891) (dictum).

[37] Ball v. United States, 140 U.S. 118, 129-31 (1891); Walsh v. United States, 374 F.2d 421 (9th Cir. 1967); Powers v. United States, 325 F.2d 666 (1st Cir. 1963).

[38] Hopt v. Utah, 110 U.S. 574 (1884).

[39] Illinois v. Allen, 38 U.S.L.W. 4247 (U.S. Mar. 31, 1970); United States v. Davis, 25 F. Cas. 773 (No. 14,923) (C.C.S.D.N.Y. 1869); People v. DeSimone, 9 Ill. 2d 522, 138 N.E.2d 556 (1956).

[40] Murray, *Trial: A Comparative View, The Power to Expel a Criminal Defendant from His Own Trial*, 36 U. COLO. L. REV. 171 (1964).

[41] Davidson v. State, 108 Ark. 191, 158 S.W. 1103 (1913); Frank v. State, 142 Ga. 741, 83 S.E. 645 (1914); State v. McCrary, 365 Mo. 799, 287 S.W.2d 785 (1956).

[42] Glouser v. United States, 296 F.2d 853 (8th Cir. 1961), *cert. denied*, 369 U.S. 825 (1962). State v. Ferebee, 266 N.C. 606, 146 S.E.2d 666 (1966).

[43] Prine v. Commonwealth, 18 Pa. 103 (1851).

between capital and non-capital felony trials is entirely justifiable as being, in the words of Judge Merrimon, *"in favorem vitae."*[44]

Both the federal and the North Carolina courts have adopted the distinction.[45] The rule in North Carolina is, "In all cases not capital the defendant may waive his right to be present either expressly[46] or by voluntarily withdrawing from the jurisdiction of the court,[47] though his counsel cannot waive it[48] for him."[49] The federal cases indicate that waivers may be effected in non-capital[50] cases if the defendant has fled after the jury has been impanelled,[51] has absented himself following a recess,[52] or has insisted that he did not want to "sit and listen through it all again."[53]

The trial judge must carefully determine that the waiver is a voluntary and intentional one, however.[54] Both the federal and the North Carolina courts require that this waiver be made by the defendant and not by his attorney.[55] In *Cross v. United States*,[56] a federal case, no intelligent waiver was evidenced by the record because there was no showing that the trial judge had questioned the defendant concerning the waiver.[57] In North Carolina, the defendant may waive his right to be present; "but the waiver should appear to the satisfaction of the Court, either expressly, or by reasonable implication from what he says, or by his conduct."[58] Several federal cases have involved the absence of the

[44] State v. Kelly, 97 N.C. 404, 406, 2 S.E. 185, 186 (1887). *See also* Reid v. Covert, 354 U.S. 1, 78 (1957) (Clark, J. dissenting.)

[45] Glouser v. United States, 296 F.2d 853 (8th Cir. 1961), *cert. denied*, 369 U.S. 825 (1962); State v. Kelly, 97 N.C. 404, 2 S.E. 185 (1887). *But cf.* Hopt v. Utah, 110 U.S. 574 (1884).

[46] State v. Epps, 76 N.C. 55 (1877).

[47] State v. Kelly, 97 N.C. 404, 2 S.E. 185 (1887).

[48] State v. Jenkins, 84 N.C. 813 (1881). *See also* State v. Hardee, 192 N.C. 533, 135 S.E. 345 (1926); State v. Cherry, 154 N.C. 624, 70 S.E. 294 (1911) (can waive right to be present through counsel at misdemeanor prosecutions).

[49] State v. Bazemore, 193 N.C. 336, 339, 137 S.E. 172, 173-74 (1927) (citations omitted in text appear in notes 46-48).

[50] Glouser v. United States, 296 F.2d 853 (8th Cir. 1961), *cert. denied*, 369 U.S. 825 (1962); United States v. Parker, 184 F.2d 488 (4th Cir. 1950).

[51] United States v. Ard, 359 F.2d 484 (4th Cir.), *cert. denied*, 385 U.S. 863 (1966).

[52] Parker v. United States, 184 F.2d 488 (4th Cir. 1950).

[53] Pearson v. United States, 325 F.2d 625, 626-27 (D.C. Cir. 1963).

[54] Hopt v. Utah, 110 U.S. 574, 584-86 (1884).

[55] United States v. Crutcher, 405 F.2d 239, 243 (2d Cir. 1968); State v. Jenkins, 84 N.C. 812 (1881).

[56] 325 F.2d 629 (D.C. Cir. 1963).

[57] *But see* Parker v. United States, 184 F.2d 488 (4th Cir. 1950).

[58] State v. Kelly, 97 N.C. 404, 407, 2 S.E. 185, 186 (1887). *Cf.* State v. Paylor, 89 N.C. 539 (1883); State v. Epps, 76 N.C. 55 (1877). *See* Price v. State, 36 Miss.

defendant when the judge gave supplemental instructions to the jury.[59] In *State v. Hardee*[60] the North Carolina Supreme Court held that if the defendant's attorney declines to accompany the judge to the jury room to hear the supplemental instructions, the defendant thereby waives his right to be present. Curiously, the record in that case did not show any examination of the defendant as to the waiver.

Given the defendant's right to be present, the power to exclude the *unruly* defendant must be developed from the theory that he has, *by his conduct*, waived that right.[61] An early decision, without even mentioning that the defendant was accused of a capital crime, held misconduct to effect a waiver[62] of his right to be present during the trial.[63] However, making only passing mention of the strict requisites of waiver,[64] the United States Supreme Court in *Illinois v. Allen*[65] held early in 1970, that "[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he . . . [continues to misbehave so that] . . . his trial, cannot be carried on with him in the courtroom."[66] Throughout the opinion the Court carefully avoided denominating the extinction of the unruly defendant's right a "waiver," and it cited as authority for the peculiar ability of a defendant to *"lose"* a constitutional right the statement by Justice Cardozo in *Snyder v. Massachusetts* that "[n]o doubt the privilege may be lost by consent or at times even by misconduct."[67]

The Court of Appeals for the Seventh Circuit, which was reversed in *Allen*, had held that misconduct could not constitute a waiver of a defendant's right to be present in the courtroom.[68] By contrast to earlier

531 (1958); Fight v. State, 7 Ohio 181 (1835). *But see* State v. Bazemore, 193 N.C. 336, 137 S.E. 172 (1927).

[59] *E.g.*, United States *ex rel.* Auld v. Warden of N.J. State Penit., 187 F.2d 615 (3d Cir. 1951) (judge, with consent of defendant's attorney, wrote out answers to questions from deliberating jury, held no violation of due process).

[60] 192 N.C. 553, 135 S.E. 345 (1926).

[61] Comment, *Violent Misconduct in the Courtroom—Physical Restraint and Eviction of the Criminal Defendant*, 28 U. PITT L. REV. 443, 452 (1967).

[62] United States v. Davis, 25 F. Cas. 773 (No. 14923) (C.C.S.D.N.Y. 1869) (no mention of waiver of right to be present; court held that right to be present does not include right to prevent trial by disrupting it).

[63] *Accord* People v. De Simone, 9 Ill. 2d 522, 138 N.E.2d 556 (1956).

[64] Delineated in Johnson v. Zerbst, 304 U.S. 458 (1938).

[65] 38 U.S.L.W. 4247 (U.S. Mar. 31, 1970).

[66] *Id.* at 4249.

[67] 291 U.S. 97, 106 (1934).

[68] United States *ex rel.* Allen v. Illinois, 413 F.2d 232 (7th Cir. 1969).

cases holding escapes to effect waivers, the holding of the Seventh Circuit may seem curious, but it was designed to meet the rigid requirements of *Johnson v. Zerbst*[69] for finding a waiver of a personal right: the waiver must be a completely unilateral decision of the defendant, and not one compelled by an election of choices. A unilateral decision seems more obviously present in the choice of a defendant to flee than in misconduct whereby he might be attempting to defend himself from some threatened, unfair procedure.

Although excluding unruly defendants now has the sanction of the Supreme Court, either the contempt procedure or the technique of binding and gagging seems the better solution. When binding, used as judiciously as possible to prevent prejudicing the jury, fails to quell the disturbance, then the power of a judge to declare a mistrial and to sentence for criminal contempt remains as a second step.[70] These procedures seem constitutionally preferable to excluding the defendant, for they are not based upon the judicial conjuration of a waiver of rights when there is in fact no such waiver. The protection that should be offered a defendant who might protest procedural unfairness but for his possible exclusion from the courtroom by an unfriendly or biased judge is another factor that supports their use.[71]

Exclusion of Unruly Spectators and the Right to Public Trial

Unruly spectators present similar problems, but the trial judge is restricted by a somewhat different consideration—the right to public trial—in dealing with those persons. The right to public trial[72] serves to prevent the defendant from being subjected to Star-Chamber techniques, and it also protects the public's interest in reviewing the efficiency of its judicial officials.[73] The right is not absolute, however. It has been

[69] 304 U.S. 458 (1938).

[70] *See* United States *ex rel.* Allen v. Illinois, 413 F.2d 232, 235 n.1 (7th Cir. 1969).

[71] See Illinois v. Allen, 38 U.S.L.W. 4247, 4253 (U.S. Mar. 31, 1970) (Douglas, J., dissenting).

[72] State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967); State v. Pope, 257 N.C. 326, 126 S.E.2d 126 (1962).

[73] U.S. v. Kobli, 172 F.2d 919 (3d Cir. 1949); Scripps Co. v. Fulton, 125 N.E.2d 896 (Ohio 1955) (right of press to report public business held to override need for excluding spectators in emotionally spectacular trial). *But see* People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954) (press has no standing to challenge its exclusion).

overridden by considerations of public decency and morals[74] and by the necessity for maintaining order in the courtroom.[75]

Since there is no requirement that *certain* spectators or members of the public be present at trials, the most obvious remedy for an unruly courtroom is to exclude boisterous persons.[76] Indeed, it is widely recognized that in order to maintain decorum,[77] to prevent overcrowding,[78] or to prevent the emotional disturbance of a witness,[79] the judge can remove spectators[80] without infringing upon the defendant's right to a public trial. In addition, if evidence of a possible escape attempt merits the precaution, stationing police at the door of the courtroom to maintain order or even to search entering spectators has been upheld.[81] Use of the summary-contempt power,[82] suggested above and discussed below, is an additional effective weapon against unruly spectators.

Criminal Contempt

In early American cases[83] the courts assumed that the summary power to punish for direct or criminal contempt was of "immemorial usage"[84] and that it had been derived from the duty of the trial judge to maintain the decorum of his court.[85] The Judiciary Act of 1789[86] vested power in the federal trial judge to punish unruly parties by fine or imprisonment for any contempt committed before him. This power was re-examined by

[74] People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).

[75] Minnesota *ex rel.* Baker v. Utrecht, 221 Minn. 145, 21 N.W.2d 328, *cert. denied*, 327 U.S. 810 (1946).

[76] People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).

[77] United States v. Kobli, 172 F.2d 919 (3d Cir. 1949).

[78] People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).

[79] United States v. Kobli, 172 F.2d 919 (3d Cir. 1949).

[80] *Id.*

[81] Leyvas v. United States, 264 F.2d 272 (9th Cir. 1958); People v. Santo, 43 Cal. 2d 319, 273 P.2d 249 (1954), *cert. denied*, Graham v. California, 348 U.S. 959 (1955).

[82] See generally Fox, *The Practice in Contempt of Court Cases*, 38 L.Q. Rev. 185 (1922).

[83] *In re* Debs, 158 U.S. 564, 594-95 (1895); State v. Morrill, 16 Ark. 384, 400 (1855); *In re* Brown, 168 N.C. 417, 84 S.E. 690 (1915).

[84] 4 W. Blackstone, Commentaries *283. Some scholars have suggested that Blackstone was misled by an officially unreported case later published among Judge Wilmot's writings. *See* Thomas, Problems of Contempt of Court 8-9 (1934); Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1042-47 & n.128 (1924) [hereinafter cited as Frankfurter & Landis].

[85] Nelles & King, *Contempt by Publication in the United States*, 28 Colum. L. Rev. 525, 548 & n.95 (1928) [hereinafter cited as Nelles & King].

[86] Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83.

Congress after Judge James Peck had summarily imposed a fine upon an unsuccessful litigant who had published an unbecoming tirade about the judge after the trial was concluded.[87] The episode led to impeachment proceedings in which William Wirt argued on behalf of the judge that the great weight of the common law stood behind his client's exercise of the summary power against a distant contemner and that if the exercise of that power was to be disapproved, "it [was] in the power of Congress to change it."[88]

Responding to the public outcry against the actions of Peck, Congress in 1831 restricted the summary power so that a judge could use it only to punish the misbehavior "of any person in the presence of the court or so near thereto as to obstruct the administration of justice."[89] Eighty years later, the Supreme Court, struck with what one commentator has denominated "historical solecism,"[90] decided in the case of *Toledo Newspaper Co. v. United States*[91] that the proximity of action subject to the 1831 statute was causal rather than geographic. In *Nye v. United States*,[92] decided in 1941, the Court found it necessary to overrule *Toledo Newspaper*; and, returning to the historical perspective of the legislation, it held that geographic proximity to the court was a prerequisite to the exercise of the summary contempt power. Rule 42(a) of the Federal Rules of Criminal Procedure includes the power of a federal judge to punish summarily any contempt that he sees or hears or that is committed in the actual presence of the court.[93]

The existence of a summary power that dispenses with the usual requirements of due process—notice, opportunity to defend, jury trial, etc.—has been justified on several grounds. Perhaps the earliest of these grounds was that, without the power, courts would be contemptible.[94] The expedience[95] of such a power was explained by one commentator to be that the "danger of harshness on the part of a judge is less evil than

[87] See STANSBURY, REPORT OF THE TRIAL OF JUDGE PECK (1833), *cited in* Frankfurter & Landis 1024 n.68.

[88] Frankfurter & Landis 1025.

[89] Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487.

[90] Frankfurter & Landis 1030.

[91] 247 U.S. 402 (1918).

[92] 313 U.S. 33 (1941).

[93] FED. R. CRIM. P. 42(a). For a discussion of other federal statutes concerning punishment for contempt, see Smith, *Jury Trials in Contempt Cases*, 20 GA. B.J. 297 (1958); Comment, *Summary Proceedings in Direct Contempt Cases*, 15 VAND. L. REV. 241, 248-50 (1961).

[94] Respublica v. Oswald, 1 U.S. (1 Dall.) 318, 329 (1788).

[95] See NELLES & KING 548.

the danger of complete suppression of the functions of justice by permitting an uproar to continue unchecked."[96] Citing the deterrent effect of summary proceedings, another commentator has suggested that "the *quick committment* of a contemner in a prior case would have a greater . . . effect than other methods on persons contemplating such conduct in later cases."[97] A judge in more ancient times wrote that the power was necessary to keep the "blaze of glory shining round the court."[98]

Mention of the existence of an opposing school of thought on the necessity of summary procedures cannot be omitted because its endeavors have been responsible for important restrictions in recent years on the exercise of the summary power to hold in contempt. Careful research by recent legal historians[99] has shown that before the fifteenth century contempts committed before the court by strangers were punished, like other trespasses, only after trial in the ordinary course. It was only with the institution of the Star Chamber that summary proceedings began to be used against contemners.[100] Any conduct that could in the least be construed as rebellious against the Restoration Parliament or its courts was prosecuted under this new, more arbitrary procedure. Thus, the common law, which protected Judge Peck and which was cited by Blackstone as the "immemorial usage,"[101] developed not from the bosom of English jurisprudence, but rather from the repression and political turmoil that tolerated a Star Chamber and gave birth to a revolution.[102] The great liberal attorney of the nineteenth century, Edward Livingston, argued eloquently against the use of summary procedures:

> In the present improved state of the human intellect, people do not so readily submit to the force of this word (necessity) as they formerly did. They inquire—they investigate—and in more instances than one, the result has been, that attributes heretofore deemed necessary for the exercise of legal power, were found to be only engines of its abuse.

[96] Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161, 172 (1908).

[97] Comment, *Summary Proceedings in Direct Contempt Cases*, 15 VAND. L. REV. 241, 257 (1961).

[98] J. WILMOT, NOTES OF OPINIONS AND JUDGEMENTS (1802), *quoted in* Frankfurter & Landis 1048 n.8.

[99] Fox, *The King v. Almon*, 24 L.Q. REV. 184 (1908); Fox, *The Summary Process to Punish Contempt*, 25 L.Q. REV. 238, 242-44 (1909); Fox, *The Writ of Attachment*, 40 L.Q. REV. 43, 57 (1924). *See also*, THOMAS, PROBLEMS OF CONTEMPT OF COURT (1934); Frankfurter & Landis, 1042-49.

[100] Frankfurter & Landis 1045-47.

[101] 4 W. BLACKSTONE, COMMENTARIES *283-84.

[102] Fox, *The King v. Almon*, 24 L.Q. REV. 266, 271-78 (1908).

> Not one of the oppressive prerogatives of which the crown has been successively stripped, in England, but was in its day defended on the plea of necessity.[103]

To Livingston, the power of the judge to remove the offender from the courtroom was sufficient protection.[104] In one of the few searching, judicial examinations of the contempt power, Judge Cameron argued that trial by jury should be retained in any event because, "It transcends recognized frailties of human nature to suppose that a judge can be free from the inclinations arising from natural pique which would be engendered by a direct refusal to obey an order freshly made by him, and the temptation to strike back which inevitably accompanies ruffled pride."[105]

The possibility of such judicial abuse was recognized and feared by many legislatures after the widely publicized Judge Peck scandal.[106] As a result, most of them attempted to limit the summary contempt power by statute.[107] Many of the state courts promptly threw out such legislation,[108] usually on the ground that such laws were in effect an unjustifiable and unconstitutional violation of the principle of separation of powers.[109] One commentator suggests that, even today, only two categories of state legislation on contempt would be held valid if challenged—statutes mainly affecting procedural matters and statutes fixing maximum punishments.[110]

In North Carolina, sections 5-1 to -9 of the General Statutes[111] describe the contempt powers of the courts. While North Carolina courts

[103] E. LIVINGSTON, COMPLETE WORKS 264 (1873), *quoted in* NELLES & KING 419 n.102.

[104] Frankfurter & Landis at 1044 n.117. If the offender returned to the courtroom and further disturbed it, he would be imprisoned to the end of the day's session and charged with a misdemeanor. Finally, Livingston suggested making the offensive conduct itself a crime triable by jury. In any event, the offense would be tried by indictment and information rather than by summary procedure.

[105] Ballantyne v. United States, 237 F.2d 657, 669 (5th Cir. 1956). *And see,* Rhinehart v. Lance, 43 N.J.L. 311, 320 (Sup. Ct. 1881).

[106] THOMAS, PROBLEMS OF CONTEMPT OF COURT 49 (1934).

[107] *Id.*

[108] *E.g.,* State v. Morrill, 16 ARK. 384 (1855). *See also* Ford v. State, 69 Ark. 550, 64 S.W. 879 (1901); *In re* Fite, 11 Ga. App. 665, 76 S.E. 397 (1912).

[109] Comment, *Summary Proceedings in Direct Contempt Cases,* 15 VAND. L. REV. 241, 251 (1961).

[110] THOMAS, PROBLEMS OF CONTEMPT OF COURT 50-52 (1934). *See also In re* Brown, 168 N.C. 417, 84 S.E. 690 (1915); *In re* Robinson, 117 N.C. 533, 23 S.E. 453 (1895); *In re* Oldham, 89 N.C. 23 (1883).

[111] N.C. GEN. STAT. §§ 5-1 to -9 (1969).

have recognized that a legislative interference to the extent of depriving the judiciary of the means of self-preservation cannot be constitutionally justified,[112] these contempt statutes have been held regulatory and, thus, not assailable as unconstitutional.[113] Section 5-5 provides for use of the summary procedure against perpetrators of contempts committed in the immediate view and presence of the court and requires only that the particulars of the offense be specified on the record and on any process of execution founded on a judgment of contempt. The statute does not contemplate a trial at which the accused is represented by counsel,[114] nor does it include a right to jury trial on the issues of fact.[115] In addition, no appeal lies from an order of direct contempt.[116] The order may be attacked collaterally by petition for a writ of habeas corpus.[117] But even in the habeas corpus proceeding, "It is not permitted that the testimony or rulings [in the trial court] should be examined into, nor that matters fairly in the discretion of the presiding judge should be reviewed, [n]or that judgments erroneous in the ordinary acceptation of that term should be questioned."[118] The review on habeas corpus extends only to the record to determine whether the court below had jurisdiction and whether the facts as recorded are sufficient to support the imposition of sentence.[119]

While the summary nature of the power to punish for direct contempt does give the judge a strong weapon with which to maintain a decorous courtroom, it also puts into his hands a device that is easy to abuse and hard to supervise. While North Carolina has refused to make inquiries *de novo* into the circumstances surrounding contempt citations, the federal courts, recognizing that miscarriages of justice have been and still are perpetrated under the authority of the direct-contempt citation,[120] have shown an increasing willingness to re-examine the facts. *Fisher v. Pace*[121] offers an example of such an inquiry. A Texas judge had en-

[112] *Ex parte* McCown, 139 N.C. 95, 51 S.E. 957 (1905).

[113] *In re* Brown, 168 N.C. 417, 84 S.E. 690 (1915); *In re* Oldham, 89 N.C. 23 (1883).

[114] *In re* Williams, 269 N.C. 68, 152 S.E.2d 317 (1967).

[115] *In re* Deaton, 105 N.C. 59, 11 S.E. 244 (1890).

[116] Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951).

[117] *In re* Palmer, 265 N.C. 485, 144 S.E.2d 413 (1965).

[118] *In re* Croom, 175 N.C. 455, 457, 95 S.E. 903, 904 (1918).

[119] *In re* Palmer, 265 N.C. 485, 486, 144 S.E.2d 413, 415 (1965).

[120] Harris v. United States, 382 U.S. 162 (1965); Holt v. Virginia, 381 U.S. 131 (1965); Fleming v. United States, 279 F. 613 (9th Cir. 1922).

[121] 336 U.S. 155 (1949). Note the following excerpt:

> "By the Court: I will declare a mistrial if you mess with me two minutes and a half, and fine you besides.

gaged in heated argument with an attorney and then summarily fined and committed the lawyer for contempt. Mr. Justice Douglas dissented from the reluctant affirmance by the Supreme Court on the ground that, "This lawyer was the victim of pique and hotheadedness of a judicial officer who is supposed to have a serenity that keeps him above the battle and the crowd."[122]

Due to the recognition of the possibility for abuse of prerogative, the history of summary contempt since *Nye v. United States*[123] has been one involving further limitation on the exercise of that power by the Supreme Court. The challenge of the summary power has usually been based on the due process clause and the sixth amendment. *Levine v. United States*[124] held that while criminal-contempt proceedings are not criminal proceedings within the sixth amendment, regard must still be had for the requirements of a fair proceeding.[125]

Subsequent decisions have lessened the possibility that human frailties, which Livingston so feared, will influence the judge to hand down excessive punishments following heated exchanges with litigants or attorneys. In *Cooke v. United States*[126] the Supreme Court suggested as early as 1925 that judges who have been personally attacked by contemners should disqualify themselves in favor of having the contempt proceeding conducted by a neutral, impartial judge. Later, in *Offutt v. United States*,[127] the Court exercised its supervisory powers over the administration of the lower federal courts to reverse a contempt conviction on the ground that the sentencing judge "permitted himself to become personally embroiled with the petitioner."[128] The Court added that, "where the misconduct charged is entangled with the judge's personal feeling against the lawyer,"[129] he should disqualify himself and ask the chief district judge to sit in the second hearing on remand. However, it seems clear from *Cooke* that attacks intended to provoke the judge into a mistrial will not succeed if the judge maintains his composure.[130]

"By Mr. Fisher: That is all right. We take exception to the conduct of the Court.

"By the Court: That is all right. I will fine you $25.00."

[122] *Id.* at 166 (Douglas, J., dissenting).

[123] 313 U.S. 33 (1941).

[124] 362 U.S. 610 (1960).

[125] *Id.* at 616. *See also In re* Murchison, 349 U.S. 133 (1955).

[126] 267 U.S. 517 (1925).

[127] 348 U.S. 11 (1954).

[128] *Id.* at 17.

[129] *Id.* at 14.

[130] *See* Cooke v. United States, 267 U.S. 517, 539 (1925).

It has been pointed out that hostilities between the judge and the contemner are especially likely when the trial is held under politically disturbed circumstances, especially if the political philosophies of those on trial are abhorrent to the judge.[131] Dissenting from the Court's affirmance of the summary conviction for contempt of one Sacher, a lawyer in the communist-conspiracy case of *Dennis v. United States*,[132] Mr. Justice Black suggested:

> Yet from the very parts of the record that Judge Medina specified, it is difficult to escape the impression that his inferences against the lawyers were colored, however unconsciously, by his natural abhorrence for the unpatriotic and treasonable designs attributable to their Communist leader clients. It appears to me that if there have ever been or can ever be cases in which lawyers are entitled to a full hearing before their liberty is forfeited and their professional hopes blighted, these are such cases.[133]

While *Cooke* and *Offutt* seem to have incorporated the underlying tenets of that suggestion, recent events imply either that this incorporation is not widely known or that the tenets themselves are not universally accepted.

The fight waged by Justices Douglas and Black against summary commitment for contempt has usually centered around the deprivation of jury trial effected by such procedure.[134] As Mr. Justice Black wrote in *Green v. United States*,[135] the doctrine that a judge has "inherent" power to make himself prosecutor, judge, and jury seriously encroaches upon the constitutional right to trial by jury and should be repudiated.[136] The principles supported by Mr. Justice Black and others[137] finally won majority support in *Cheff v. Schnackenburg*[138] when the Supreme Court,

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[131] Sacher v. United States, 343 U.S. 1, 18 (1952) (Black, J., dissenting).

[132] 339 U.S. 162 (1950).

[133] Sacher v. United States, 343 U.S. 1, 19 (1952) (Black, J., dissenting).

[134] United States v. Bennett, 376 U.S. 681, 725-26 (1964) (Black, J., dissenting); Green v. United States, 356 U.S. 165, 195 (1953) (Black, J., dissenting); Sacher v. United States, 343 U.S. 1, 20 (1952) (Black, J., dissenting); Fisher v. Pace, 336 U.S. 155, 163 (1949) (Douglas, J., dissenting).

[135] 356 U.S. 165 (1958).

[136] *Id.* at 193. *But cf.* Illinois v. Allen, 38 U.S.L.W. 4247, 4249 (U.S., Mar. 31, 1970) (Black, J.).

[137] *See* Toledo Newspaper Co. v. United States, 247 U.S. 402, 425 (1917) (Holmes, J., dissenting); E. LIVINGSTON, COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 264 (1873); Fox, *The Summary Power to Punish Contempt*, 25 L.Q. REV. 238 (1909).

[138] 384 U.S. 373 (1966).

again exercising its supervisory power over the administration of the lower federal court, ruled that sentences exceeding six months for criminal contempt may not be imposed by federal courts unless a jury trial has been received or waived.[139] Justices Black and Douglas dissented and expressed the view that irrespective of length of sentence imposed, one charged with criminal contempt was entitled to a jury trial.[140]

Exercise of the contempt power to summarily punish a defendant whose contemptuous conduct was less than violent or boisterous has also been restricted. *Ex parte Terry*[141] made it clear that violent misconduct occurring before the judge could be punished by commitment of the offender immediately and without notice, testimony, or hearing. Yet the Supreme Court in *Terry* cited *Anderson v. Dunn*,[142] which in 1821 had established the principle limiting the exercise of the summary contempt power to "the least possible [use of] power adequate to the end proposed."[143] That *Terry* was not to be relied on without reference to the limitations imposed by *Anderson* was made clear in *Cooke v. United States*,[144] which involved a defendant-attorney who had written a letter to the trial judge asking him to disqualify himself. Reversing the contempt citation, the Court in *Cooke* made clear that *Terry* reached only such conduct as constituted "an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public" that if "not instantly suppressed and punished, demoralization of the court's authority will follow."[145] The Court in *In re Oliver*,[146] reversing a conviction and summary commitment by a one-judge secret grand jury of a defendant whose answers the judge thought evasive, re-emphasized,

> The narrow exception to these due process requirements [advice to defendant of charges against him, reasonable opportunity to make an explanation or defense, right to counsel, right to question witnesses] includes only charges of misconduct, in open court, in the presence of

[139] *Id.* at 380.

[140] *Id.* at 384 (Black & Douglas, J.J., dissenting). Strangely enough, Cheff, whose case established the principle, was not benefited by it; his sentence was for only six months.

[141] 128 U.S. 289 (1888).

[142] 19 U.S. (6 Wheat.) 204 (1821). Although *Anderson* involved a contempt of Congress, it has long been relied on as authority in cases involving contempt of court.

[143] *Id.* at 231.

[144] 267 U.S. 517 (1925).

[145] *Id.* at 536.

[146] 333 U.S. 257 (1948).

> the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public.[147]

Another example of the sort of conduct against which summary proceedings should not be used was illustrated in *Harris v. United States*,[148] in which the Court ruled that the summary power cannot be used against defendants who refuse to answer questions on grounds of self-incrimination.

The necessity for use of summary procedures once the trial has concluded has also come under heavy criticism. *Sacher v. United States*[149] held that the judge may wait until the end of trial to exericse the summary contempt power to punish persons for acts done during its course if he feels that the exigencies of the proceedings are such that the use of his power during trial would unduly prejudice a defendant or interfere with the efficient administration of justice. The Court in *Sacher* remarked, "Reasons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise."[150] However, such a statement does not comport with the historical justification for the summary power—the necessity to maintain a decorous court.[151]

If the contemner is only warned during the trial[152] and the judge does not cite him for contempt until its end, the actual exercise of the summary power bears no relation to the maintenance of an orderly court. Justification for exercise of the power has ceased when the misconduct subsides; and with the disappearance of the justification, every reason for denying the defendant a trial wherein he is guaranteed full procedural rights also ceases to exist. Justice Black argued in *Sacher*: "[T]he trial was over and the danger of obstructing it was passed. For the same reason there was no longer need, so far as that trial was concerned, to try petitioners for their courtroom conduct without benefit of their Bill of Rights procedural safeguards."[153] Justice Frankfurter suggested:

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[147] *Id.* at 275.

[148] 382 U.S. 162 (1965). *See also* Illinois v. Allen, 38 U.S.L.W. 4247, 4253 (U.S. Mar. 31, 1970) (Douglas, J., dissenting).

[149] 343 U.S. 1 (1952).

[150] *Id.* at 9-10.

[151] Illinois v. Allen, 38 U.S.L.W. 4247 (U.S. Mar. 31, 1970).

[152] "As in the case of parental warnings to children, feckless repetition deprived them of authority." Sacher v. United States, 343 U.S. 1, 38 (1952) (Frankfurter, J., dissenting).

[153] *Id.* at 21 (Black, J., dissenting).

> [L]awyers who might be tempted to try similar tactics are amply deterred, by the assurance that punishment will be certain and severe regardless of the tribunal that imposes it. It is a disservice to the law to sanction the imposition of punishment by a judge personally involved and therefore not unreasonably to be deemed to be seeking retribution, however unconsciously, at a time when a hearing before a judge undisturbed by any personal relation is equally convenient.[154]

Finally, punishments imposed under contempt citations may be limited by constitution or by statute. Constitutional prohibitions against the imposition of excessive fines or cruel or unusual punishments have been held to apply to punishments for contempt.[155] Some state decisions have held that legislative restrictions permitting punishment at hard labor only for certain crimes effect a prohibition against imprisonment at hard labor for contempt.[156] While there is no statutory limit on the power of the federal district judge to sentence for contempt, such sentences may be reviewed in a manner similar to the review of the discretion exercised by the trial judge.[157]

CONCLUSION

The history, statutes, and cases in which contemptuous courtroom conduct has been treated form the basis for a system affording efficient protection for the administration of justice. Present cases and statutes indicate that unruly defendants may be bound and gagged in order to permit the trial to continue in their presence. Armed guards may be used to maintain order. The defendant may be excluded from the courtroom when, by his disruptive behavior, he is deemed to have "lost" his right to be present. Finally, the trial judge may summarily convict the defendant of contempt. However, judges should exercise the strictest caution in the application of these extraordinary powers.

Binding seems to be one effective but not totally satisfactory remedy for dealing with the unruly defendant; however much his bonds may prejudice the opinion of the jurors as to his guilt, the defendant is still

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[154] *Id.* at 37 (Frankfurter, J., dissenting).

[155] Brown v. United States, 359 U.S. 41 (1959) (fine found not excessive); *Ex parte* Keeler, 45 S.C. 537, 23 S.E. 865 (1895). However, this limitation is diluted by the judicial technique of citing for separate acts of contempt.

[156] *E.g.*, Flannagan v. Jepson, 177 Iowa 393, 158 N.W. 641 (1916).

[157] Brown v. United States, 359 U.S. 41, 52 n.15 (1959) (suggesting that in a review of the trial judge's discretion to determine length of sentence for contempt, a relevant comparison might be made with punishments for statutory offenses involving obstruction of justice).