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The Contempt Power—The Lifeblood of the Judiciary

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The so-called "new morality" and the unrest it has generated has placed the American system of jurisprudence on trial. The heart of the judicial process, particularly in criminal justice, is the conduct of the trial. The trial must be so conducted that there is full opportunity for the selection of an impartial jury which must not be affected in its duty to hear and weigh the evidence by bizarre behavior of the litigants or counsel. The courts are clothed with the power to prevent frustration of the purposes of the trial. This article is intended to treat, in a fairly comprehensive manner, with the exercise of that power—the power to punish for contempt of court. Obedience to orders of the court in civil matters is likewise necessary to the life of an orderly, peaceful society. The employment of the contempt power is frequently the only, if not the most effective, instrument to insure that the orders of the court are fulfilled.

History of the Contempt Power

Historically we find the earliest exercise of the contempt power reported both in Shakespeare's "Henry IV", and in "The Lives of the Chief Justices of England." When ruddy Prince Hal was the Prince of Wales, one of his servants was arrested for committing a felony. Upon the servant's arraignment at the King's Bench the Prince appeared in a rage demanding that his man be set free. Chief Justice Gascoigne ruled that the laws of the realm must be met and if the Prince wished his servant pardoned he should secure this from the King, his father. The Prince tried to physically take the servant away and Gascoigne ordered him again to behave. When the Prince raged—some say he even struck Gascoigne—the Judge reminded his Prince

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that he, the Judge, kept the peace of the King to whom even Prince Hal owed allegiance and suggested that Hal set a good example. When Hal refused, Chief Justice Gascoigne sentenced him for contempt and committed him to the King's Bench Prison until the King's pleasure could be known. Instead of ending Gascoigne's career, the King was pleased and rejoiced that he had a Judge who dared to administer justice to the King's son. Thus, the contempt power found its origin in the early days of England as a natural vehicle for assuring the efficiency and dignity of the Court and respect for the governing sovereign. The Court's power to punish for contempt is a legal doctrine articulated and immersed in the common law and is generally a product of Anglo-American society. There is some evidence that earlier societies employed methods akin to contempt for the writings of Emperor Justinian refer to certain judicial punishing powers which were conceded to be necessary means of official force and which resembled contempt. Similar methods are found in the Code of Canon Law.

Thus, we see that the law of contempt may be said to be the law of Kings rather than the law of man. It is not law which respective legislators, reflecting the voice of the people, originally wrote but it is rather derived from the "divine law" of Kings and the companion aspects of obedience, cooperation and respect. The theory of the contempt power at its very birth is traceable to religious concepts. In enjoining obedience to civil government, resort was often had to the Scriptures. Early in English history, the King was called the Vicar of God. Thus, the contempt power in its inception came to birth in an age of allegedly ordained monarchs, ruled by a King totally invested with all sovereign legal powers and accountable only to God; in an age when resistance to the King was believed to be a sin which would bring damnation. As society became more diverse and extensive, powers of the English Kings were exercised through the courts, and their exercise of contempt powers derived from the presumed contempt of a King's authority.

Under the Norman Kings, an offender's personal property was forfeited to the King's mercy. Later this was changed to a fine which in turn was later refined in a procedure whereby an offender was imprisoned until the fine was paid. This was not unlike current civil contempt practices.

Blackstone wrote:

> Contempts against the king's palaces or courts of justice have always been looked upon as high misprisons; and by the ancient

> law, before the conquest, fighting . . . before the king's judges, was punishable with death . . .
>
> But firing in the king's superior courts of justice, in Westminster-hall, or at the assisses, is made still more penal than even in the king's palace. The reason seems to be, that those courts being anciently held in the king's palace, and before the king himself, striking there included the former contempt against the king's palace, and something more: viz., the disturbance of public justice. For this reason, by the ancient common law before the conquest, striking in the king's court of justice or drawing a sword therein, was a *capital felony*: and our modern law retains so much of the ancient severity, as only to exchange the loss of life for the loss of the offending limb.[1]

The most difficult and delicate type of contempt—constructive contempt or contempt by publication—finds its origin in *Rex v. Almon*[2] which involved an application for an attachment against *Almon* for publishing and selling a pamphlet traducing Lord Mansfield. Since the prosecution had been dropped, the opinion was not delivered in Court, "but it was thought to contain so much legal knowledge on an important subject, as to be worthy of being preserved." In his opinion, Lord Chief Justice Wilmot said:

> The Power, which the Courts in Westminster Hall have of vindicating their own Authority, is coeval with their Foundation and Institution; it is a necessary Incident to every Court of Justice, whether of Record or not, to fine and imprison for a Contempt to the Court, acted in the face of it, 1 Vent. 1. And the issuing of Attachments by the Supreme Court of Justice in Westminster Hall for Contempts out of Court, stands upon the same immemorial usage as supports the whole fabric of the Common Law; it is as much the 'Lex Terrae' and within the exception of the Magna Charta, as the issuing of any other Legal Process whatsoever. . . .
>
> The Arraignment of the Justice of the Judges, is arraigning the King's justice; it is an Impeachment of his wisdom and goodness in the choice of his Judges, and excites in the Minds of the People a general dissatisfaction with all judicial determination, and indisposes their minds to obey them; and whenever man's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of Justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is

1. 4 BLACKSTONE COMMENTARIES 124-126 (Lewis ed. 1898).
2. Rex v. Almon (1765) (undelivered opinion of Sir John Wilmot, subsequently Lord Chief Justice of King's Bench). J. Wilmot, Notes of Opinions and Judgments 243 (1802).

> conveyed to the People. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open and uninterrupted current, which it has, for ages, found all over this Kingdom, and which so eminently distinguishes and exalts it above all Nations upon the earth.[3]

DIFFERENT TYPES OF CONTEMPT—DIRECT AND INDIRECT CONTEMPT

All contempts of courts may be classified as either direct or indirect. Generally a direct contempt of court is committed in the presence of the court while it is in session; such conduct that tends to embarrass or obstruct the court in its administration of justice or tends to bring the administration of law into disrepute.[4] Upon the commission of a direct contempt in open court, the trial judge may act upon his personal knowledge of the facts and punish the offender summarily without the filing of an information or the entry of a rule to show cause and without any hearing.[5] Moreover, it is settled that a summary proceeding for the punishment of a direct contempt does not constitute a violation of constitutional guarantees of due process of law.[6]

However, it is not always necessary that a direct contempt occur in the occular view of the judge. In the case of *In re Estate of Kelly*,[7] a lawyer knowingly submitted a spurious will to probate. Finding this to constitute a direct contempt, the court stated:

> Misbehavior . . . committed in any place set apart for the use of any constituent part of the court when it is in session is deemed to have been committed in the presence of the court, and, if contemptuous, constitutes and is a direct contempt.[8]

In cases where the contumacious act does not occur within the occular view of the court, extrinsic evidence is essential to prove the charge.[9]

An indirect contempt is one committed out of the presence of the court.[10] In cases of this character, an information notice, citation or

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3. *Id.*
4. People v. Sherwin, 334 Ill. 609, 166 N.E. 513 (1929); People v. Cochrane, 307 Ill. 126, 138 N.E. 291 (1923).
5. In re Estate of Kelly, 365 Ill. 174, 6 N.E.2d 113 (1936); People v. Andelman, 346 Ill. 149, 178 N.E. 412 (1931); People v. Cochrane, *supra*, note 4.
6. Ex Parte Terry, 128 U.S. 289 (1888); People v. Siegel, 400 Ill. 208, 79 N.E.2d 616 (1948).
7. 365 Ill. 174, 6 N.E.2d 113.
8. *Id.* at 179, 6 N.E.2d at 115. *See also* People v. Sheridan, 349 Ill. 202, 18 N.E. 617 (1932); People v. Andelman, 346 Ill. 149, 178 N.E. 412 (1931); Dahnke v. People, 168 Ill. 102, 48 N.E. 137 (1897). In re Estate of Kelly, *supra*, note 5.
9. People v. Whitlow, 357 Ill. 34, 191 N.E. 222 (1934); People v. McDonald, 314 Ill. 548, 145 N.E. 636 (1924).

rule to show cause must be served upon the alleged contemnor and he is entitled to a hearing. The distinction between direct and indirect contempts is that an essential part of the contempt occurs out of the presence of the judge and therefore the contempt is dependent for its proof on evidence of some kind.[11] However, as has been previously noted, any contempt technically out of the presence of the judge, but within an integral part of the court will be deemed a direct contempt.[12] If the contemnor admits to his indirect contempt in open court, it will always be held as a direct contempt for purposes of procedure.[13]

There also exists a subdivision of indirect contempt, most frequently called constructive contempt. These cases do not involve actual physical disobedience or disturbance of the court but are a hybrid of indirect contempt. Here we treat acts which by implication affect the administration of justice through criticism, pressure and interference with participants in the judicial process. The indignity or obstruction suffered by the administration of justice is frequently, if not entirely, speculative in these cases which may be referred to, generally, as the "press" cases. Included, of course, are radio and television broadcasts and all news media.

The constructive contempt doctrine is directly traceable to 18th Century England and the famous *Rex v. Almon*, unrecorded opinion of Lord Justice Wilmot, referred to earlier.[14] The rule was imported into American law but the treatment accorded the power by the American Courts is a world apart from that employed by the English Courts.

The most recent Illinois Supreme Court opinion discussing constructive contempt is found in *People v. Goss*.[15] This cause arose out of hearings on child custody held from July 26th until July 29th, 1955, at which time the court entered an order awarding temporary child custody to the paternal grandparents, and continuing the case until September 12. On July 28th, a private detective testified that Mrs. Champagne had on June 3rd spent the hours from 2:30 A.M. until 6:00 A.M. in the apartment of Thomas Duggan Goss, and that on June 11, she had spent the hours from 2:00 A.M. until 5:45 A.M. in said

10. People v. Pomeroy, 405 Ill. 175, 90 N.E.2d 102 (1950); People v. Whitlow, *supra*, note 9.
11. People ex rel. Chicago Bar Ass'n v. Barasch, 406 Ill. 253, 94 N.E.2d 148 (1950); People v. Howarth, 415 Ill. 499, 114 N.E.2d 785 (1953).
12. People v. Howarth, *supra*, note 11. In re Estate of Kelly, *supra*, note 5.
13. People v. Pomeroy, 405 Ill. 175, 90 N.E.2d 102 (1950); People v. Berof, 367 Ill. 454, 11 N.E.2d 936 (1937).
14. *See* note 2, *supra*.
15. 10 Ill. 2d 533, 141 N.E.2d 385 (1957); *rehearing* 20 Ill. 2d 224, 170 N.E.2d 113 (1960); *cert. denied*, 365 U.S. 881 (1961).

apartment. Mrs. Champagne was the defendant-mother who contested her husband's petition for custody of their child. Goss, a television broadcaster, in his broadcast on the evening of July 28th, called the detective (who had not completed his testimony) a "professional sneak and liar." In subsequent television broadcasts, Goss repeatedly referred to the same witness in such terms. On August 1st, in his broadcast, Goss said, among other things, that he had promised the wife to do everything in his power "to prevent the legal kidnapping of her child." On November 1, 1955, the judge issued a rule against Goss to show cause why he should not be held in contempt. Goss appeared, admitted making the statements, denied any motive to influence or intimidate the judges, stated that his motive was to defend himself before his television audience against the charges of adultery. The court found Goss in contempt, fined him $100 and sentenced him to ten days in the County jail. Goss sued a writ of error from the Supreme Court.

The Illinois Supreme Court in an opinion, per curiam, said:

> The general principles governing contempt by publication have long been settled in this State. Under our decisions a publication is contemptuous only if it is 'calculated to impede, embarrass or obstruct the due administration of justice.' (*People v. Gilbert*, 281 Ill. 619, 628, 118 N.E. 196). The publication of scandalous or libelous matter concerning a court or a judge is not, without more, contemptuous. The publication must tend to affect the outcome of a pending case. (*Storey v. People*, 79 Ill. 45; *People v. Gilbert*, 281 Ill. 619, 628-29, 118 N.E. 196). On the other hand, it is not necessary to show that an interference with the administration of justice has actually occurred, nor is it a defense for the contemnor to disclaim any subjective intention of producing that result. *People v. Wilson*, 64 Ill. 195; *People v. Gilbert*, 281 Ill. 619, 118 N.E. 196; *People v. Doss*, 382, Ill. 307, 314, 46 N.E. 2d 984.[16]

The Supreme Court held further that "the remarks by plaintiff in error constituted an interference with the administration of justice."[17]

The Supreme Court also reviewed Goss' contention that his conviction violated his rights under the First Amendment to the Constitution of the United States. In support of this contention Goss cited the three outstanding U.S. Supreme Court decisions on the subject: *Bridges v. California*,[18] *Pennekamp v. Florida*,[19] *Craig v. Harney*.[20]

16. *Id.* at 538, 539; 141 N.E.2d at 387, 388.
17. *Id.* at 540, 141 N.E.2d at 388.
18. 314 U.S. 252 (1941).
19. 328 U.S. 331 (1946).
20. 331 U.S. 367 (1947).

Our Supreme Court pointed out that in the *Bridges* case the United States Supreme Court enunciated the "clear and present danger" test which must be met before the contempt sanctions may be imposed to restrict speech. The U.S. Supreme Court described the test as a "working principle that the substantive evil must be extremely high before utterances can be punished."[21] In the *Pennekamp* case the Court held that the test was not met because the publication merely criticized a judge for having displayed partiality.

In 1925 the Supreme Court had asserted its jurisdiction over restraints on public expression imposed by state law and decided that the 14th Amendment to the Federal Constitution required that it apply the standard of the First Amendment to state cases restraining the press. We may note that since *Mapp v. Ohio*,[22] constitutes a like decision with respect to the Fourth Amendment to the Constitution of the United States, it is highly probable that the federal decisions are to become controlling upon the states whenever the issue of the violation of the first ten Amendments of the Federal Constitution is raised in a state court. Therefore, all state courts must pay particular need to the opinions of their federal brethren in the area of the abridgement of the freedom of speech or press in the exercise of the contempt power.

There have been no Illinois decisions treating with punishment for contempt by publication since *People v. Goss*. There have been United States Supreme Court decisions during this period which will be discussed later. During the interim, however, the American Bar Association and the American Newspaper Publishers Association and other publishers and leaders of news media have engaged in a nationwide debate which has become universally recognized under the title "Free Press v. Fair Trial."

This constantly used caption implies that there is a conflict between these two cornerstones of a democratic system and that there is a battle which must be won by either the press or the courts. This is misleading, indeed, and constitutes a danger to freedom of the press and to fair trial. It behooves both the bench and the bar to continue the channels of communication which this debate has produced and to attempt to formulate "ground rules" to be followed by both the bench and press whenever unbridled freedom of the press creates a feeling in a community which precludes the possibility of obtaining a fair and impartial jury; or which is designed to, and may so intimidate a judge

21. *Supra*, note 18 at 263.
22. 367 U.S. 643 (1961).

who is about to render an important decision that the empiric of judicial integrity may be diluted in the face of the public scorn which the judge must face if he renders a decision not pleasing to the news media.

The United States Supreme Court appears to have designated Mr. Justice Black its spokesman in this area. His philosophy and that of the majority of the Court tends to virtually eradicate contempt by publication cases; Mr. Justice Black, writing for the majority in *Bridges v. California* said:

> We must . . . turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence and, whether the degree of likelihood was sufficient to justify the punishment . . .[23]

A different approach was taken by the late Mr. Justice Frankfurter, who dissented in *Bridges*. He wrote that:

> rights must be judged in their context and not *in vacuo*.[24]

Noteworthy, Justice Frankfurter was sensitive to the position of "elected judges with short tenure,"—especially that they may be susceptible to "bludgeoning or poisonous comment."

The advocates of fair trial, if they must be aligned in an adversary position autipodal to free press, may resort to the following expressions of Mr. Justice Frankfurter from his dissents in *Bridges v. California*, and in *Stroble v. California*.[25] In *Bridges*, he said:

> The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Charta. . . . (It is) the means for effective protection of all the freedoms secured by the Bill of Rights. . . . The (contempt) power should be invoked only where the adjudicatory process may be hampered or hindered in its calm, detached, and fearless discharge of its duty on the basis of what has been submitted in court. The belief that decisions are so reached is the source of the confidence on which law ultimately rests. . . .[26]

From *Stroble*:

> Such passion as the newspapers stirred in this case can be explained (apart from mere commercial exploitation of revolting crime) only as want of confidence in the orderly course of justice. To allow such use of the press by the prosecution as the California

23. *Supra*, note 18 at 271.
24. *Id.* at 303.
25. 343 U.S. 181 (1961).
26. *Supra*, note 18, at 282, 292.

> court here left undisciplined, implies either that the ascertainment of guilt cannot be left to the established processes of law or impatience with those calmer aspects of the judicial process which may not satisfy the natural, primitive, popular revulsion against horrible crime but do vindicate the sober second thoughts of a community. If guilt here is clear, the dignity of the law would be best enhanced by establishing that guilt wholly through the processes of law unaided by the infusion of extraneous passion. The moral health of the community is strengthened by according even the most miserable and pathetic criminal those rights which the Constitution has designed for all.[27]

Justice Frankfurter's philosophy is perhaps summed up in his opinion in *Irvin v. Dowd*,[28] where he said:

> This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.[29]

It must be remembered, however, that Mr. Justice Frankfurter's philosophy has rarely been accepted by the court.

It is feared that the conflict will forever remain and will be calmed or intensified depending upon the courage of the courts and the fairness of the press.

THE DIFFERENT CATEGORIES OF CONTEMPT POWER

Contempt, whether indirect or direct, may also be categorized as criminal or civil. However, in many instances the court may not designate which kind of contempt was committed. While in many instances this labelling may be of slight consequence, it may be very significant for the purposes of due process, as will be seen later.

Civil contempt has been defined as "those quasi-contempts which consist of failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceedings before the court."[30] In *People v. Gholson*,[31] the Illinois Supreme Court substantially followed this definition stating, ". . . civil contempt ordinarily consists in failing to do something ordered to be

27. *Supra*, note 25, at 201, 202.
28. 366 U.S. 717 (1961).
29. *Id.*, at 730.
30. RAPALIE, A TREATISE ON CONTEMPT, § 21 at 25 (1884).
31. 412 Ill. 294, 106 N.E.2d 333 (1952).

done by a court in a civil action for the benefit of another party therein."[32] The *Gholson* case also pointed out that in civil contempt the People of the State will act for the benefit of the party, while in criminal contempt the People is the prosecution, acting primarily to preserve the dignity of its courts and to punish the wrongdoer.

Criminal contempt is normally confined to those acts which constitute disrespect for the court or its processes, or which obstruct the administration of justice. Such instances include disorderly conduct, insulting behavior in the presence or immediate vicinity of the court, or acts of violence which interrupt its proceedings.[33]

However, does not the violation of an injunction order entered for the benefit of a litigant constitute disrespect for the process of the court by failing to do or failing not to do something ordered by the court for the benefit or advantage of a party-litigant? If this is the case, then the demarcation between civil and criminal contempt often may be blurred. In the recent case of *Board of Junior College District No. 508 v. Cook County College Teachers Union, Local 1600,*[34] the following test was offered:

> When punishment is purely punitive: imprisonment for a definite term, fine for a certain sum of money, the contempt is said to be criminal. When punishment is a remedial or coercive measure: commitment of a contumacious party until he complies with the mandate of the court, a fine until there is obedience to the courts' order, the contempt is said to be civil.[35]

Truly, the contumacious act frequently is criminal and civil, especially when a party stubbornly refuses to do something ordered by the court, obviously impedes its progress and by his cavalier disregard of the court's order demonstrates his disrespect for the court.

Thus, the contemptuous act cannot always be defined as purely *civil* or strictly *criminal.* Nor can it be fitted into one category or another according to the proceedings employed to punish the contemnor. In Illinois, unlike many other states, "statutory contempt" does not exist. The Illinois Revised Criminal Code, provides:

> Section 1-3 APPLICABILITY OF COMMON LAW
>
> No conduct constitutes an offense unless it is described as an offense in this Code or in another statute of this State. However,

32. *Id.* at 298, 106 N.E.2d at 336. *See also,* People v. Redlich, 402 Ill. 270, 83 N.E.2d 723 (1948).
33. Rapalje, *supra,* note 30 at 28.
34. 126 Ill. App. 2d 418, 262 N.E.2d 125 (1970).
35. *Id.* at 428, 262 N.E.2d at 129.

this provision does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order, civil judgment, or decree.

Section 1-7 JUDGMENT, SENTENCE AND RELATED PROVISIONS

(j) Penalty where not Otherwise Provided
The Court in imposing sentence upon an offender convicted of an offense for which no penalty is otherwise provided may sentence the offender to a term of imprisonment not to exceed one year or a fine not to exceed $1,000 or both.[36]

It had been thought by many that this latter penalty provision applied to cases of criminal contempt; however, in *People v. Stollar*,[37] the court rejected the respondent's contention that her sentence of imprisonment of 18 months exceeded the permissible statutory maximum and pointed out that Section 1-7 "relates only to those offenses defined in the Code and does not apply to contempt of court . . ."[38] It was held that the trial court did not abuse its discretion and the jail sentence of 18 months was confirmed. If a similar case arose today the defendant would be entitled to a jury trial, since her contempt conviction was in excess of six months.[39]

As will appear later, the type of proceedings employed depend upon whether the contempt is *direct* or *indirect* not whether it is "civil" or criminal". True, indirect contempt may be civil or criminal while, except in a most unusual circumstance, direct contempt is criminal. Yet one may conceive of defiance, expressed in open court, toward an order commanding performance of, or refraining from, an act for the benefit or advantage of a party litigant constituting a direct contempt. May we not, therefore, find a way out of this overlapping, hazy classification by simply stating that the determinative factor is the primary purpose sought to be achieved by the punishment of the contemnor? If the contemnor may purge himself of contempt by performing or refraining from performing the act for the benefit or advantage of another party—the contempt is civil. If the contemnor must pay a fine and/or serve a term in jail and cannot obtain his release by doing or ceasing to do some act, the contempt is criminal.

SANCTIONS

Ordinarily we think of sanctions as the penalties imposed by a court

36. Ill. Rev. Stat. Ch. 38, § 1-3, 1-7 (1969).
37. 31 Ill. 2d 154, 201 N.E.2d 97 (1964).
38. *Id.* at 159, 201 N.E.2d at 99.
39. *See*, Bloom v. Illinois, 391 U.S. 194 (1968).

in enforcement of its contempt power. Most frequently, therefore, we do find the terms "Sanctions" and "Punishment for Contempt" used interchangeably. Punishment for criminal contempt was prior to *People v. Stollar*, thought to be limited to a maximum fine of $1,000 and/or imprisonment for not more than one year by Section 1-7 of Chapter 38. But since *Stollar*, the extent of punishment is delimited only by the reviewing court's determination that the trial court abused its discretion in imposing punishment, subject of course to the contemnor's request for a jury trial if the punishment is to exceed six months in jail. Punishment for civil contempt is limited to enforcement by imprisonment or the imposition of a periodic, continuing fine until respondent complies with an order within the reach of respondent's physical or financial ability. Thus, punishments for contempt, either criminal or civil, have decided limitations. In *Oak Park National Bank v. Peoples Gas Light and Coke Company,*[40] Mr. Justice McCormick stated: "When a party disobeys an order of the court the court may punish him for contempt, but may not deprive him of his civil rights or take his property and give it to another."[41]

The Justice added:

> . . . it is a principal of fundamental justice that, however plenary may be the power to punish for contempt, no court, having obtained jurisdiction of a defendant, may refuse to allow him to answer, refuse to consider his evidence and condemn him without a hearing because he is in contempt of court.[42]

Appropriate sanctions are those prescribed by Supreme Court Rule 219(c) which provides:

> *Failure to Comply with Order or Rules*—if a party, or any person at the instance of or by collusion with a party, unreasonably refuses to comply with any provision of Rules 201 through 218, or fails to comply with any order entered under these rules, the court may, on motion, enter in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following . . . . In lieu of or in addition to the foregoing, the court may . . . by contempt proceedings compel obedience by any party or person to any subpoena issued or order entered under said rules.[43]

The use of the contempt power has always been in the area of judi-

40. 46 Ill. App. 2d 385, 197 N.E.2d 73 (1964).
41. *Id.* at 385, 197 N.E.2d at 75, citing, Walter Cabinet Co. v. Russell, 250 Ill. 416, 95 N.E. 462 (1911).
42. *Id.*
43. ILL. REV. STAT. ch. 110A § 219(c) (1969).

cial discretion. Since *Illinois v. Allen*,[44] it seems that the Supreme Court may increasingly be called upon to settle issues of discretionary use of the contempt power. However, that case in no way altered the general provision that a court may impose any sanction upon a contemnor which does not constitute an abuse of the court's discretion.

Contempt for Failure to Comply with Discovery Orders

While to this writer's knowledge no statistical studies have been conducted on the use of the contempt power, it would seem that civil contempt is employed more frequently than criminal contempt. The use of coercion is often needed to prod attorneys and clients into appropriate action preceding a trial. Most frequently the discovery order is the source of such a resort to a contempt citation. Because of this frequent application of the laws of contempt, and its general applicability in other areas, the failure to comply with a discovery order justifies further analysis.

Contempt of discovery orders rests within the sound discretion of the court. In *Bee Chemical Company v. Service Coatings, Inc.*[45] the Illinois Appellate Court held:

> . . . Supreme Court Rule 219 vests the trial court with broad discretionary powers including the power to compel obedience to its orders by contempt proceedings. *People ex rel General Motors v. Bua*, 37 Ill. 2d 180, 226 N.E. 2d 6. Its orders, as with other discretionary matters, should not be disturbed, unless a reviewing court can say that its discretion has been abused.[46]

The court, upholding the contempt order, complimented the trial judge upon his extreme patience and urged counsel to adopt a spirit of cooperation with regard to further discovery so that the truth-seeking purposes of the rules would be served. The judge had fined the defendants upon their refusal to produce certain formulas which he had ordered produced under certain safeguards.

A most interesting Illinois decision in the area of sanctions is the well-known case of *People ex rel General Motors v. Bua*,[47] where the lower court ordered General Motors to show cause why it should not be held in contempt, its Answer to the Amended Complaint stricken and a default order entered against it for its willful refusal to comply with disclosure orders. The court, after hearing, found that General

44. 397 U.S. 337 (1970).
45. 116 Ill. App. 2d 217, 253 N.E.2d 512 (1969).
46. *Id.*, at 223, 253 N.E.2d at 516.
47. 37 Ill. 2d 180, 226 N.E.2d 6, (1967).

Motors had failed to show cause why its answer to its Amended Complaint should not be stricken or why it should not be held in default and ordered that: (1) General Motors be adjudicated to be in contempt of court; (2) its answer to the Amended Complaint be stricken; (3) judgment be entered against General Motors on the issue of liability, and; (4) trial on the issue of damages be deferred until disposition of General Motors' petition for writ of mandamus or prohibition attacking these orders be finally determined. The Illinois Supreme Court stated:

> We must concede that the June 29 order is cast in terms of a contempt proceeding, and that ordinarily such an adjudication is a final and appealable order, and an appropriate method of testing pretrial discovery orders . . .
>
> However, in the foregoing cases the punishment for the contempt consisted of the traditional fine or imprisonment. Indeed, we have not heretofore recognized the inherent power of a court to strike pleadings and enter defaults as punishment for contempt. Rather we have aligned ourselves with the doctrine of *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct 841, 42 L.Ed. 215, that a court possessing plenary power to punish for contempt, may not, on the theory of punishing for contempt, summarily deprive a party of all right to defend an action . . .
>
> In *Walter Cabinet Co. v. Russell*, 250 Ill. 416, 421, 95 N.E. 462, 464, the court suggested: 'It is a principle of fundamental justice that, however plenary may be the power to punish for contempt, no court having obtained jurisdiction of a defendant may refuse to allow him to answer, refuse to consider his evidence and condemn him without a hearing because he is in contempt of court.[48]

However, not in all instances will a contempt citation for failure to comply with discovery orders be forthwith appealable. In the case of *In re Estate of Atwood*,[49] it was held that a finding that one Fisher was in contempt of court for failing to comply with the court's order of discovery for the production of certain documents was not a final order for purposes of appeal though a capias had been issued for the attachment of Fisher. The court dismissed the appeal, "For the reason that the Magistrate imposed no penalty upon Fisher in the way of a fine or imprisonment . . ."[50]

Criminal Discovery Orders

The use of the power to punish for contempt to compel discovery in

48. *Id.*, at 189, 226 N.E.2d at 12.
49. 97 Ill. App. 2d 311, 240 N.E.2d 451 (1968).
50. *Id.* at 320, 240 N.E.2d at 455.

criminal cases were reviewed by the Illinois Appellate Court for the Fourth District in *People v. Endress*,[51] where defendants moved for pre-trial discovery. The motion was granted by the trial court. The State's Attorney, however, refused to comply. The trial court granted the defendant's motion to suppress the evidence and fined the state's attorney $100 for contempt of court in refusing to comply with the court's order. On appeal, the order was upheld, the court saying:

> Sanctions to be imposed for noncompliance with valid orders promulgated by the trial court present an issue for determination by the trial court. This court, in order to interfere with the sanctions imposed, would have to find an abuse of discretion or arbitrary and capricious use of sanctions.[52]

The court observed, however:

> In *People v. Ryan*, . . . and *Monier v. Chamberlain*, . . . the court considered similar issues, although in civil, not criminal proceedings. There it was determined that upon compliance, orders imposing sanctions would be vacated. Such result is likewise appropriate here.[53]

In *People v. Crawford*,[54] the same court held that an order finding the State's Attorney guilty of contempt would be vacated upon compliance with order for discovery in criminal prosecution where refusal to obey was a good faith condition precedent to ascertain the nature and scope of permissible pretrial discovery in criminal cases, and therefore, could not be characterized as willful contempt.

The comparatively recent development of discovery rules in criminal cases has likewise given rise to the exercise of the power to punish for contempt by the federal courts. In *Cantillon v. Superior Court*,[55] a habeas corpus proceeding by an attorney held in contempt for refusing to disclose names of client's alibi witnesses to prosecution before trial, the court held that to require defendant or his attorney to reveal names of alibi witnesses to prosecution before trial, would be a violation of defendant's Fifth Amendment right to stand silent; that an attorney may assert such rights for his client and that requiring attorney to give names to prosecution would constitute invasion of client's right to effective assistance of counsel and would be a violation of the attorney-client privilege.[56]

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51. 106 Ill. App. 2d 217, 245 N.E.2d 26 (1969).
52. *Id.*, at 223, 224, 245 N.E.2d at 29.
53. *Id.* at 224, 245 N.E.2d at 29.
54. 114 Ill. App. 2d 230, 252 N.E.2d 483 (1969).
55. 305 F. Supp. 304 (C.D. Calif. 1969).
56. *Cf.*, Proposed Rules for Discovery in Criminal Cases.

In *United States v. Hammond*,[57] the prosecutor attempted to have Hammond appear in a lineup with his counsel present, but Hammond refused. Thereafter, the District Judge signed an order requiring Hammond to participate in any lineups scheduled by the government at reasonable times and places and "to wear any clothing or items, such as a false goatee; to speak any words; to walk in any manner; or to take any physical stance that may be required" to aid the witnesses in comparing him with persons who participated in the bank robberies.

Hammond contended that the order violated his constitutional rights and that he would be denied due process and his privilege against self-incrimination; that the order was thus invalid and incapable of supporting his conviction for criminal contempt. The court held:

> There is ample authority for the proposition that if a court had jurisdiction, disobedience of that court subjects one to penalties for criminal contempt even though the order may subsequently be found to have been invalid. Irrespective of the validity of the order, Hammond could properly be found guilty of criminal contempt upon his refusal to obey it.[58]

The case of *Shelton v. United States*,[59] while involving contempt of Congress, contains language that provides guidance for the court in enforcing its subpoena power and in compelling compliance with orders for discovery. Shelton refused to comply with the subpoena served upon him by a properly deputized representative of the House Committee on Un-American Activities. His refusal, he contended, was based upon his claim that the subpoena violated his rights under the First Amendment to the Constitution and the Fourth Amendment to the Constitution. He also asserted that the information sought was not relevant to the investigation.

At the hearing on the rule to show cause, the constitutional objections which were advanced for the first time were solely in support of his claim of possible incrimination. The court held:

> Contempt which might be avoided if valid and timely objection is made and denied is not avoided by refusing to produce what one lawfully could not be required to produce if such objection had been made and denied.[60]

In *Hanley v. James McHugh Const. Co.*,[61] the United States Court of Appeals for the Seventh Circuit held that judgment of criminal con-

57. 419 F.2d 166 (4th Cir. 1969).
58. *Id.*, at 168.
59. 404 F.2d 1292 (App. D.C. 1968).
60. *Id.*, at 1300.
61. 419 F.2d 955 (7th Cir. 1969).

tempt for refusal to comply with a discovery order is a final judgment and immediately reviewable. Under such circumstances, the courts need not limit their review to the criminal contempt order itself but may test the validity of the underlying discovery order. In the *Hanley* case the court found that the underlying discovery order was invalid and did not support the criminal contempt order based upon it.

Contempt citations arising out of refusal to comply with discovery orders vary little from contempts arising from failure to follow any other court decree. The following general principles enunciated in *Eberle v. Green*,[62] therefore can be applicable to both: (1) where resort is had to contempt proceedings to secure obedience to a court decree, the merits of the original controversy cannot be relitigated; (2) the court should hear, however, evidence concerning respondent's conduct and the circumstances surrounding it to determine whether he complied with the decree; (3) the enforcement of a court's decree by civil contempt is not the enforcement of a private right but rather the process of the court to secure obedience to its decrees, the benefit to the party invoking the aid of the court being merely incidental; (4) contrary to the federal rule the established rule in Illinois is that the court may imprison or fine for contempt of its orders, but is without authority to recompense plaintiff for his damages.[63]

It should be noted that Illinois Supreme Court Rule 219 specifically provides for compensation for reasonable expense and attorneys fees under certain circumstances.

Contempt by Recalcitrant Witnesses

When witnesses refuse to testify, the citation of contempt can usually be termed civil, since in effect an order of the court is being disobeyed. However, it is possible that refusal to testify would constitute criminal contempt. It is at this point that such a situation raises difficult and exacting questions. Whether a witness is acting in a contemptuous manner requires a much finer analysis than when a typical discovery order is disobeyed. And even when a witness is openly uncooperative it may become very difficult to ascertain when this behavior becomes contempt.

How Does the Court Treat the Witness Who Conveniently "Forgets"?

In *Second Additional Grand Jury v. Cirillo*,[64] it was clear from the

62. 71 Ill. App. 2d 85, 217 N.E.2d 6 (1966).
63. *Id.*, at 92, 217 N.E.2d at 9, 10.
64. 12 N.Y.2d 206, 237 N.Y.S.2d 709, 188 N.E.2d 138 (1963).

evidence that Cirillo had a detailed recollection of many events on the day concerning which he was being questioned and his "I don't remember" was a mere sham and constituted a refusal to testify. He was sentenced for 30 days for his refusal to answer. More than a month later he was asked the same question and in a like manner refused to answer. It was held that "he could be kept in jail for repeated refusal to answer."[65]

Treatment of the Witness Whose Refusal to Answer Is Groundless.

In *Shillitani v. United States*,[66] it was held that the contemnor was not entitled to trial by jury for civil contempt. This was an indirect contempt based upon contemnor's refusal to answer questions before the Grand Jury after being granted immunity. The court held that the sentence, although termed criminal, was clearly civil as its purpose was to coerce the contemnor into testifying rather than to punish him and that he had the power to escape further punishment at any time by electing to testify. Upon the Grand Jury's being dissolved, he was released. The case is strikingly similar to *In re Grand Jury Investigation of Giancana*,[67] which involved Giancana's refusal to answer questions put to him after he was offered immunity pursuant to the Federal Communications Act.[68] While the opinion does not treat with the contempt aspect of this case, it is the contempt power which is at the very basis of it. The court held, in anwser to the contention that of the questions put to him were irrelevant, that some of the questions so considered by appellant's counsel were, in fact, relevant. The court found, from its perusal of the record, that the petitioner "was determined not to answer *any* questions after he stated his name and address and name of his lawyer."[69] Apparently, being conscious of an important point not pressed by the appellant, the court stated, "Significantly the only purpose of his imprisonment has been to coerce him to answer questions—not to punish him for his failure to answer at the times he had been before the Grand Jury."[70]

In *Harris v. United States*,[71] the United States Supreme Court held

65. *Id.* at 211, 237 N.Y.S.2d at 713, 188 N.E.2d, 141.
66. 384 U.S. 364 (1966).
67. 352 F.2d 921 (7th Cir. 1965). *Cert. denied*, 382 U.S. 959 (1965).
68. 47 U.S.C. § 409(1) (1964).
69. *Supra*, note 67 at 924.
70. *Id.*, at 925.
71. 382 U.S. 162 (1965).

that summary contempt proceedings properly applied to actions which disrupt or obstruct court proceedings, that is "misbehavior . . . in the actual presence of the court."[72] Citing *Ex parte Terry*,[73] the Court held in *Harris* that the refusal to answer questions on the ground of self-incrimination before a Grand Jury after being promised immunity did not constitute an act which could be punished summarily and that *Harris* was entitled to notice and a hearing. While the case involved an interpretation of Rule 42(a) and (b) of the Federal Rules of Criminal Procedure, the basic principles involved apply generally to the law of contempt.

In the recent case of *Illinois Crime Investigating Commission v. Sarno*,[74] the defendants were sentenced to six months imprisonment for refusing to answer questions regarding "juice" operations, after being granted immunity from prosecution. The Illinois Supreme Court dismissed the argument that the questions were improper because they were based on records which a court has previously suppressed. Recognizing that the Commission is an arm of the legislature and therefore its hearings do not constitute criminal proceedings the court found no reason to reverse the contempt conviction on this ground nor was the court persuaded by the contention that the State failed to demonstrate affirmatively to the defendant that immunity from prosecution was available to him.

A Single Contempt or Several?

Frequently a perplexing problem is distinguishing a single contempt from several contempts. In the Louisiana case of *Gautreaux v. Gautreaux*,[75] the contemnor made an outburst in court and was summarily ordered to be confined. After the order and before he could be removed from the courtroom, he repeated the outburst. This was held to be but a single contempt. It was held that the test is not whether there has been a previous adjudication for contempt but whether the subsequent contemptuous act is so interwoven with the previous conduct that it is inseparable therefrom.[76] A comparison with *Cirillo*, does not help to clarify the problem.

If this is the test, the continuous outburst and tirade can only be stopped by the physical restraint of the contemnor, or by excluding him

72. *Id.*, at 164.
73. 128 U.S. 289 (1888).
74. 45 Ill. 2d 473, 259 N.E.2d 267 (1970).
75. 220 La. 564, 57 So. 2d 188 (1952).
76. *See also*, 94 A.L.R.2d 1246 (1964).

from the trial proceedings.[77] We can easily conceive of situations where a series of violations of an injunctive order, some of them continuing after a Rule to Show Cause has been issued and even after a fine for contempt has been imposed, could be said to be several of a series of the same transactions and, therefore, inseparable from the first. Also the question has now been raised that if multiple contempts do occur may the judge give less than six month sentences for each and thereby not come within the rule requiring a jury trial? In this situation the contemnor may be faced with multiple consecutive prison terms for contempt totally in excess of six months, but without the benefit of a jury trial. The Supreme Court has never been squarely presented with this problem, although in *Frank v. United States,*[78] it upheld probation of three years for contempt without a jury trial. However, this question may shortly come before the Court.[79]

It is suggested, therefore, that no rule of thumb can be used. The nature of the repeated contemptuous acts must be weighed against the available method for ending such acts other than repeated additional fines or consecutive periods of imprisonment for contempt.

RIGHT TO TRIAL BY JURY

Trial by jury in contempt cases was virtually unthought of and practically non-existent until recent years. *United States v. Barnett,*[80] appears to be the original thought. Right to trial by jury was denied. Further, deeper thought was given to the constitutional right to trial by jury in *Cheff v. Schnackenberg.*[81]

In *Cheff*, which involved a prison term of six months for contempt, the court rejected the claim that the constitution guaranteed a right to jury trial in all criminal contempt cases. In effect, the court said the contempt did not "of itself" warrant treatment as other than a petty offense, which, under the court's previous decisions did not require a jury trial.[82] The contempt was that of a federal court and followed *United States v. Barnett.* The Court in *Barnett* did not treat the question whether a severe punishment would bring into play the right to a jury trial. When *Cheff v. Schnackenberg* two years later rejected the claim

77. *See,* discussion of Allen v. Illinois, *infra* p. 99.
78. 395 U.S. 147 (1969).
79. On a related issue of multiple contempt *see,* Mayberry v. Pennsylvania discussed *infra* pg. 91.
80. 376 U.S. 681 (1964).
81. 384 U.S. 373 (1966).
82. *Id.,* at 379, 380.

of a guaranteed right to trial by jury where six months punishment was imposed, the Court was bound to be confronted again with the problem, after holding in *Duncan v. Louisiana*[83] that the right to jury trial extends to the states. The issue arose in *Bloom v. Illinois*.[84] Bloom's conviction of criminal contempt and his sentence of imprisonment for 24 months were reversed and remanded and the Court's not quite definitive guidance for the future was expressed in the majority opinion written by Mr. Justice White as follows:

> Our analysis of *Barnett*, and *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523, makes it clear that criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved. Under the rule in *Cheff*, when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the penalty actually imposed as the best evidence of the seriousness of the offense . . . Under this rule it is clear that Bloom was entitled to the right to trial by jury, and it was constitutional error to deny him that right.[85]

If the Illinois Criminal Code prescribed a punishment "not to exceed two years" for minor or petty offenses, would Bloom's sentence have been upheld by the Supreme Court? I doubt it; rationale for reversal would have been found.

It appears that the six-month maximum prison sentence fixed by Congress for "petty offenses" which was the guideline used in *Cheff* and implied in *Bloom* remains as the boundary line between non-jury and jury contempt proceedings. This is the reasonable inference to be drawn from *Frank v. United States*,[86] where petitioner was charged with criminal contempt for violating an injunction. He demanded a jury trial which was denied. The district court found him guilty, the imposition of sentence was suspended and he was placed on probation for a period of three years. In his appeal, he contended that he should have been afforded a jury trial because of the three year probation penalty. The Court held:

> In *Cheff*, this Court undertook to categorize criminal contempts for purposes of the right to trial by jury. In the exercise of its supervisory power over the lower federal courts, the Court decided . . . that penalties not exceeding those authorized for petty offenses could be imposed in criminal contempt cases without affording the right to a jury trial. We think the analogy used in *Cheff*

83. 391 U.S. 145 (1968).
84. 391 U.S. 194 (1968).
85. *Id.*, at 211.
86. *Supra*, note 78.

> should apply equally here. Penatlies presently authorized by Congress for petty offenses, including a term on probation, may be imposed in federal criminal contempt cases without a jury trial . . . In non-contempt cases, Congress has not viewed the possibility of five years' probation as onerous enough to make an otherwise petty offense 'serious.' This Court is ill-equipped to make a contrary determination for contempt cases.[87]

Inevitably, retroactive application of *Bloom* was sought. In *DeStefano v. Woods*,[88] the Court held that retroactive application of *Bloom v. Illinois*, was not warranted. The Court stated:

> Both *Duncan* and *Bloom* left open the question whether a contempt punishment by imprisonment for one year is, by virtue of that sentence, a sufficiently serious matter to require that a request for jury trial be honored. These two issues . . . must be considered at this time only if the decisions in *Duncan* and *Bloom* apply retroactively.[89]

The Court concluded that the effect of applying *Duncan* retroactively could place all convictions for serious crimes in certain states other than Louisiana in jeopardy as well as in that state and that retroactive application of *Bloom* would result in invalidating all serious contempt convictions, both results having an adverse effect upon the administration of justice. The Court concluded, therefore, that they would "not reverse state convictions for failure to grant jury trial where trials began prior to May 20, 1968, the date of this Court's decision in *Duncan v. Louisiana* and *Bloom v. Illinois*."[90]

It appears that if before the hearing in a matter involving a criminal contempt, direct or indirect, the court has determined that if a contemnor is found guilty the punishment will be no longer than six months, the court may deny the contemnor's demand for a trial by jury. If the court feels disposed to confine the contemnor for a longer period, it must grant the demand for trial by jury. The anomalous feature here is that the court must make this decision before hearing the evidence.

If, however, the contempt is civil in nature and the contemnor may purge himself of contempt at any time and thereby obtain his release from imprisonment, he may not demand trial by jury.

I make bold to predict the Supreme Court will depart from this principle as soon as there is presented to it the case of a strongwilled civil contemnor who has spent considerably longer than six months in jail

87. *Id.*, at 151, 152.
88. 392 U.S. 631 (1968).
89. *Id.*, at 632.
90. *Id.* at 635.

in a persistent refusal to obey a court order determined by the reviewing courts to be valid; notwithstanding *Giancana.*

An interesting disregard of the *DeStefano* decision, is found in *Mirra v. United States,*[91] where the court held that *Cheff v. Schnackenberg,* should be applied retroactively since to do so will not unduly interrupt the administration of justice. The court, however, did not invalidate the conviction, but reduced the one-year sentence for contempt to six months. Did the Second Circuit Court of Appeals ignore the High Court or has that Court imprecisely said that reduction of sentence is the appropriate remedy when *Bloom* is overlooked or ignored in the future?

The Illinois Supreme Court, demonstrating its fine sense of justice and fairplay did give *Bloom* retroactive application in In re Estate of Melody.[92] The court held that the contemnor Pauline Owens' trial was virtually intermingled with that of *Bloom* and stated:

> The contempts both arose out of one concerted plan, instigated by defendant Pauline Owens to probate a spurious will. But for the speed with which *Bloom* perfected his various appeals, and the speed with which the courts ruled thereon, defendant Owens might have been the first to reach the United States Supreme Court. It would be inherently unjust to confer greater constitutional rights on *Bloom* merely because of the fortuitous circumstances that he perfected his appeal to the United States Supreme Court first.[93]

The recent case of *Mayberry v. Pennsylvania,*[94] decided by the Supreme Court of the United States on January 20, 1971, raises some intriguing questions in the light of the Court's opinions in *Cheff v. Schnackenberg, Duncan v. Louisiana* and *Bloom v. Illinois.*

In the *Mayberry* case, the trial judge found that the petitioner had committed one or more contempts on eleven of the twenty-one days of trial and sentenced him to not less than one nor more than two years for each of the eleven contempts, thus clearly exceeding the "petty offense" or six months prison sentence limitation established by *Cheff* and made obligatory upon the states by virtue of *Duncan* and so expressed in *Bloom.*

It should be noted that Mr. Justice Douglas filed a separate opinion in *Illinois v. Allen,*[95] which does not state whether it is a concurring or dissenting opinion. He chose to concern himself with the problems of

91. 402 F.2d 888 (2d Cir. 1968).
92. 42 Ill. 2d 451, 248 N.E.2d 104 (1969).
93. *Id.* at 456, 248 N.E.2d at 107, 108.
94. — U.S. —, 39 U.S.L.W. 4133 (U.S. Jan. 20, 1971).
95. 397 U.S. at 351.

trials other than the criminal proceeding in the *Allen* case which he categorized as "*First* are the political trials . . . *Second*, trials used by minorities to destroy the existing constitutional system and bring on repressive measures."[96]

Justice Douglas urges in *Allen* that the Court should not provide "guidelines for those two strikingly different types of cases. The case presented here is the classic criminal case without any political or subversive overtones."[97]

In Justice Douglas's opinion in the *Mayberry* case, he states, "Petitioner's conduct at the trial comes as a shock to those raised in the western tradition that considers a courtroom a hallowed place of quiet dignity as far removed as possible from the emotions of the street."[98]

In *Mayberry* the majority opinion concludes that the trial judge should have asked one of his fellow judges to sit "in judgment on the conduct of petitioner as shown by the record."[99]

In this writer's opinion, the judge should have acted instantly each time Mayberry acted contemptuously. The majority opinion, however, does state:

> Generalizations are difficult. Instant treatment of contempt where lawyers are involved may greatly prejudice their clients but it may be the only wise course where others are involved. Moreover, we do say that the more vicious the attack on the judge, the less qualified he is to act. A judge cannot be driven out of a case. Where, however, he does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place.[100]

Justice Black did not concur in this expression.

The majority then uses rather broad, sweeping language:

> Our conclusion is that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor. See *In Re Oliver*, 333 U.S. 257.[101]

The last five words of the majority opinion—"as shown by the record"—may lend some comfort to the judge who would seek to exercise

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96. *Id.* at 352, 356.
97. *Id.* at 356.
98. *Supra*, note 94 at 4133.
99. *Id.* at 4136.
100. *Id.*
101. *Id.*

authority and control of the trial, if it is clear that a judge need not conduct a separate trial to determine whether the acts were contumacious, but may do so upon a review of the record. It is patently far less effective than permitting the judge who has been reviled to punish the contempt instantly. Moreover, this expression appears to contradict the suggestion of a "public trial" which also appears in the opinion.

No mention is made in the majority opinion of the fact that the sentences imposed exceeded the six months maximum established in *Cheff*, *Duncan* and *Bloom*. The concurring opinion of Mr. Chief Justice Burger suggests that Mayberry, though he was acting *pro se*, should have been removed from the courtroom and that the standby counsel should have participated in the defense at the judge's order even though such counsel was rejected by Mayberry. The Chief Justice then makes this interesting observation:

> Our holding that contempt cases with penalties of the magnitude imposed here should be heard by another judge does not reflect on his performance; it relates rather to a question of procedure.[102]

The Chief Justice thus took note of the magnitude of the penalties. The separate concurring opinion of Mr. Justice Harlan also noted the length of the sentence:

> I concur in the judgment of reversal solely on the ground that these contempt convictions must be regarded as infected by the fact that the *unprecedented long sentence of 22 years* which they carried was imposed by a judge who himself had been the victim of petitioner's shockingly abusive conduct.[103] (emphasis supplied)

Although Justice Harlan also recognizes the unusual length of the sentences, he does not refer to *Cheff*, *Duncan* or *Bloom*. It appears to this writer that the Supreme Court in *Mayberry* could have reduced the sentences for the blatant and flagrant contempt which the Court found shocking and thus preserved the integrity of the trial judge's authority.[104] In *Cheff v. Schnackenberg*, the Court said:

> Therefore, in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by a federal court absent a jury trial or waiver thereof. Nothing we have said, however, restricts the power of a reviewing court in appropriate

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102. *Id.* at 4137.
103. *Id.* at 4136, 37.
104. *See e.g.* Robson v. Malone, 412 F.2d 848 (7th Cir. 1969); Mirra v. United States, 402 F.2d 888 (2nd Cir. 1968); United States v. Maragas, 390 F.2d 88 (6th Cir. 1968).

> circumstances to revise sentences in contempt cases tried with or without juries.[105]

In a state court case of contempt such as in *Mayberry* or *Bloom* the Supreme Court could have directed such reduction by the state court in its mandate and thus protected the trial judge against outrages designed to engender disrespect for the most important foundation stone of our democracy, the administration of justice.

The Court in *Mayberry* has paved the way for the contemnor bent on making a mockery of our judicial process to do the following: heap vituperation upon, and hurl opprobrious epithets at each fellow judge to whom the contempt hearing is assigned, thus delaying determination and punishment *ad nauseaum*. In consonance with the Court's reasoning in *Mayberry*, must each such judge disqualify himself upon hearing such remarks and pass it on to a fellow judge, or may he act instantly and punish the defendant for such contempt; and if he does so, is he then possessed of that detached and objective judgment devoid of personal feelings which render him fit to sit in judgment on the contempt charge transferred to him for hearing from his fellow judge? Will he then have "the impersonal authority of the law," as required by *Mayberry*?

The Court in *Mayberry* has invaded the judicial discretion historically vested in the trial judge in treating with contempt. Eleven to twenty-two years was an unreasonable, cruel sentence. The Supreme Court had the power to treat the matter without emotion by reducing the entire sentence to six months. It should have done so, thus affording clarity in this vital area of the law and preserving the trial court's authority.

Reduction of Excessive Sentences for Contempt

The federal courts have not hesitated to reduce punishment for contempt without invalidating convictions where the court felt that the sentences were excessive. In *U.S. v. Maragas*,[106] the Maragas brothers Frank and Aristotle were sentenced to sixty days and ten days in prison respectively after being found guilty of criminal contempt by reason of their interference with the court-appointed receiver for motel property owned and operated by a corporation of which the brothers were the principal shareholders. The court reduced Frank's sentence from sixty days to ten days and Aristotle's from ten to five days. While the Court of Appeals for the Sixth Circuit did not supply any criteria for determin-

105. *Supra*, note 81 at 380.
106. 390 F.2d 88 (6th Cir. 1968).

ing when a sentence is excessive, it does seem that it was guided by the fact that if the contempt had occurred in an Ohio court the maximum possible sentence could have been ten days imprisonment under applicable state law.[107] However, both original sentences were within the permissible limits of federal law.[108]

In *U.S. ex rel Robson v. Malone*,[109] Judge Robson, now Chief Judge of U.S. District Court for the Northern District of Illinois, directed the Marshal to take Miss Malone into custody when she did not rise when the bailiff asked everyone to stand when court opened at 10:00 A.M. Miss Malone remained in the Marshal's custody in another part of the building until Judge Robson went back to court at 2:00 P.M. Miss Patricia Kennedy left the court room after the arraignment but returned at about 11 o'clock during the pending trial. When recess was called at 11:30, Miss Kennedy did not rise. Judge Robson ordered the Marshal to take her into custody also.

At 2:00 P.M., the court proceeded summarily under Rule 42(a) of the Federal Rules of Criminal Procedure and the certification included findings based upon the court's observation of the events of the morning and the appellant's reponses to the court's questions of the afternoon. The court found that appellants' refusal to stand was willful and was intended to express their disapproval of the manner in which courts administer justice. Miss Malone was sentenced to ten days and Miss Kennedy to thirty days. The Court of Appeals stated that the proceedings "support the findings."

However, the court went on to say:

> But we conclude that the traditional rising in unison of persons present in a court can reasonably be thought to contribute to the functioning of the court. It is a way of marking the beginning and the end of the session, and probably serves to remind all that attention must be concentrated upon the business before the court, the judge's control of the courtroom must be maintained with as little burden on him as possible, and there must be silence, except as the orderly conduct of business calls for speech. We think that a court may require such rising, in the interest of facilitating its

107. *Id.* at 91. *See,* United States v. United Mine Workers of America, 330 U.S. 258 (1947), where the Court said: "In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendants' defiance as required by the public interest, and the importance of deterring such acts in the future." *Id.* at 303. It seems that the Court was also applying this criterion while reviewing a complaint of an excessive sentence for contempt.

108. 390 F.2d at 91.

109. 412 F.2d 848 (7th Cir. 1969).

> functions, although the functional virtue of rising at the close of a session is less readily apparent than at the beginning.
>
> Since the requirement is proper, it follows that it can be enforced. We are inclined to the thought that the requirement is sufficiently related to maintaining order in the actual presence of the court, so that an infraction can be dealt with summarily under Rule 42(a), although we recognize that there is a real question how a refusal to rise should be classified under the test laid down in *Harris v. United States* (1965) 382 U.S. 162, 86 S.Ct. 352, 15 L.E.2d 240, See also *In re McConnell* (1962), 370 U.S. 230. . . . We find it unnecessary to decide the question in view of our disposition of this case.
>
> It is a general principle that contempt power is to be limited to 'the least possible power adequate to the end proposed.' In re Michael (1945), 326 U.S. 224, 227 . . .[110]

The court concluded that the holding of the appellants in custody for four hours and two and one-half hours respectively and their removal from the courtroom was all that was required under the circumstances of the case and vacated the sentences of confinement. The contempt convictions were not reversed; thus the sentences were, in effect, reduced.

In *In re Van Meter,*[111] the United States Court of Appeals for the Eighth Circuit stated:

> In imposing a penalty for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future.[112]

For emphasis, it is here repeated that in *Cheff v. Schnackenberg,* the Court held that:

> Therefore, in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences "exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof. Nothing we have said, however, restricts the power of a reviewing court, in appropriate circumstances, to revise sentences in contempt cases tried with or without juries.[113]

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110. *Id.,* at 850.
111. 412 F.2d 536 (8th Cir. 1969).
112. *Id.* at 538.
113. *Supra,* note 81 at 380.

This may be the solution to sentences for contempt by the state courts, with or without juries. That is, the reviewing court, without impinging upon the trial court's power to deal summarily with direct contempt, can, where it concludes that the lower court has been heavy-handed, reduce the sentence without eroding the necessary deterrent effect of punishment for contempt. Illinois Supreme Court Rule 615(b) (4) specifically grants the reviewing Court the power to reduce the punishment imposed by the trial court.[114]

ORDER IN THE COURTROOM

Chief Judge Robson's decision in *Malone,* has preserved the judicial right to open court in an atmosphere of dignity and respect. Equally, if not more important, is the exercise of the power to conduct the trial in an orderly and dignified manner. The reviewing courts seldom plagued with contumacious conduct of counsel, litigants, or courtroom spectators, have frequently restricted the exercise of the trial court's power to punish for such conduct. There are, however, hopeful harbingers of the re-awakening of a sensitivity among some of the judicial "higher-ups" to the trial judges' problems in maintaining "order in the courtroom."

In *Kasson v. Hughes,*[115] the court vacated the fine imposed upon counsel at the conclusion of a trial because of contumacious conduct "evidenced by numerous occurrences during seven days of trial." In

114. But what of the situation where a litigant in a divorce case appears without his counsel. His wife's counsel appears alone. The judge is on the bench and court is in session but there is no other business before the court and the court clerk is engrossed in making entries in the Minute Book. The judge, who is about to have the clerk call the divorce matter, looks up from his perusal of the file to see the litigant fell the attorney with a devastating karate chop which renders the latter speechless and a hopeless cripple.

The judge is of the opinion that the attack committed in open Court amounts to attempted murder—maximum penalty 20 years; Ill. Rev. Stat. Ch. 38 § 9-1, 8-4 (1969) and includes the lesser offense of aggravated battery—maximum penalty ten years. Ill. Rev. Stat. Ch. 38 § 12-4 (1969). The litigant is advised by the judge that he has committed a direct, criminal contempt of court; the court advises him that he is going to sentence him to not less than eight years and not more than ten years in the penitentiary. The litigant demands a jury trial. The judge must reassign the case for trial for *Cheff* and *Bloom* and *Frank,* do not narrow the issues to be tried by jury to the measure of punishment and the trial judge is the sole witness to defendant's act. The judge must testify. Assume that the clerk and bailiff were present and saw the blow struck. The testimony of the judge is not needed, but he has determined that the sentence shall be substantial and has, therefore, granted the demand for a trial by jury. Can he preside over such a jury trial with that empiric of impartiality which must prevail at every trial in an American Court? In decades past these gnawing questions could be dismissed as more imaginative than real. Today's courtroom violence is too prevalent and too serious in nature to discard such questions as "remotus non curat lex." Whether the judge must testify or not in the foregoing situation he should disqualify himself.

115. 390 F.2d 183 (3rd Cir. 1968).

a per curiam decision, the court in *Kasson* stated that the circumstances were sufficiently similar to those in *Offutt v. U.S.*,[116] to require that the judgment of contempt be vacated and that the cause be remanded for whatever procedure may be appropriate to provide a hearing upon the specifications of contemptuous conduct and disposition of the charge by another judge.

In *Offutt v. U.S.*, the trial court became embroiled in clashes with the petitioner who was trial counsel for the defendant in an abortion case. The clashes were heated and with personal overtones.

The United States Supreme Court observed, however, that "these interchanges between court and counsel were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor."[117] The conviction of the defendant had been reversed by the Court of Appeals because it found that the judge's behavior barred the court from "sustaining the judgment as the product of a fair and impartial trial."[118] The Court of Appeals, at the same time, reduced the sentence for contempt imposed upon *Offutt* from ten days to 48 hours, thus presenting a picture to the Supreme Court of a trial judge who was not entirely without fault.

The Supreme Court in *Offut* held only that counsel must be protected in the right of an accused to "fearless, vigorous and effective advocacy," and that the court must at the same time "protect the processes of orderly trial which is the supreme object of the lawyer's calling."[119] The Court also applied the rule in *Cooke v. United States*[120] which demands that the ruling for contempt should be made by a judge who was not subjected to the personal attack by the alleged contemnor.

In *Phelan v. People of Territory of Guam*,[121] Phelan was adjudged guilty of criminal contempt of court for allegedly contemptuous remarks made to the judge in the presence of the jury during a colloquy which interrupted Phelan's cross-examination of a witness. He was fined $50, and the court ordered that his name be "stricken from those counsel who may be appointed in this court to represent indigent defendants." The United States Court of Appeals for the Ninth Circuit found that counsel's remarks were not contemptuous. It noted, however:

116. 348 U.S. 11 (1954).
117. *Id.*, at 12.
118. Peckham v. United States, 210 F.2d 683, 702 (App. D.C. 1953). The Offut case arose out of a trial of Peckham for abortion. Offut was Peckham's trial counsel.
119. *Supra*, note 116 at 13, quoting from Sacher v. U.S., 343 U.S. 1 (1952).
120. 267 U.S. 517 (1925).
121. 394 F.2d 293 (9th Cir. 1968).

> Although not raised by appellant nor mentioned by appellee, the only power of the court in contempt proceedings is to punish by fine or imprisonment.
>
> The court's order that Phelan's name be stricken from the indigent panel was beyond the power of the court to impose as punishment in a criminal contempt proceeding and was a nullity.[122]

In *Spencer v. Dixon*,[123] the court stated:

> Complainant also relies on *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed. 2d 569. He claims that the constitutional protection of free speech supports any language used before a court unless that language presents a 'clear and present danger' to the administration of justice. Complainant ignores the inescapable fact that *Wood v. Georgia* dealt solely with an 'utterance out of the presence of the court.' Neither the opinion of the Supreme Court in *Wood v. Georgia* nor any opinion to which we have been referred, or which our research discloses, has suggested that the 'clear and present danger' test has any application to contempt proceedings resulting from the content of pleadings directly filed by an attorney in the public records of a duly constituted court. The historical development of a 'direct' contempt compels the opposite conclusion.[124]

However, it seems that the problem of the overzealous or even disrespectful lawyer have little in common with the defendant who consciously intends to disrupt a trial proceeding. This brings us to what must now be considered the current authority on defendant misconduct treatment, *Illinois v. Allen*.[125] The facts are not difficult in this case. Briefly, William Allen began trial on September 9, 1956 for armed robbery. The trial judge allowed Allen to conduct his own defense, but had court appointed counsel sit in on the case as a safeguard. Halfway through the voir dire examination the judge interrupted Allen, reqesting him to confine his questions to relevant matters of the prospective jurors qualifications. At this point, Allen began to argue with the judge in a most abrasive manner. Shortly after the judge asked appointed counsel to continue the voir dire, Allen terminated his remarks by saying: When I go out for lunchtime, you're (the judge) going to be a corpse here.[126] "At that point he tore the file which his attorney had and threw the papers on the floor." From here on, the record is replete with similar courtroom outbursts by the defendant.

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122. *Id.*, at 297.
123. 290 F. Supp. 531 (W.D. La. 1968).
124. *Id.* at 541.
125. 397 U.S. 337 (1970).
126. 413 F.2d at 233.

Finally, the trial judge stated to the petitioner, "One more outbreak of that sort and I'll remove you from the courtroom."[127] Subsequently Allen was removed from the courtroom throughout the presentation of the prosecution's case, except to be identified. He was present during the presentation of his defense conducted by counsel.

On appeal to the Illinois Supreme Court, the case was affirmed, and the United States District Court for the Northern District of Illinois dismissed a petition for writ of habeas corpus. However, the Circuit Court of Appeals for the Seventh Circuit reversed the Illinois decision.[128]

The basis for the decision of the Court of Appeals was that under the Sixth Amendment a defendant in criminal proceeding has the unqualified right to be present at all stages of his trial. The court specifically sanctioned the use of shackles and gag if necessary to contain a defendant while on trial.

The dissent of senior Circuit Judge John Hastings pointed the way for reversal by the Supreme Court. Among the poignant observations made by Judge Hastings are the following:

> My reading of the undisputed facts indicates to me that the defendant was brazenly determined to make a shambles of the criminal judicial process, unless he was permitted to dictate the rules of the game.[129]

In response to the majority's conclusion that "no conditions may be imposed on the unqualified right of a criminal defendant to be present at all stages of the proceedings," Judge Hastings said:

> I cannot accept the thesis that such an unconditional, unqualified right in all criminal cases flows from the constitutional mandate of the Sixth Amendment.[130]

With respect to the after-the-fact suggestion of the majority that the defendant may have been shackled and gagged as a means of preserving order and his presence at the trial, Judge Hastings states:

> I further suggest that if the majority holding becomes a prevailing constitutional precedent, then imagine the result that may occur in a criminal trial of multiple defendants who determined to 'raise hell' and disrupt the trial to the point of no return. Shackles, chains, gags and a courtroom full of deputy marshals engaged in trying to keep the defendants off the floor may prove to be the climax in following the 'proper course.' I cannot believe the federal constitution requires that any such farce take place . . . Thus, the ma-

127. *Id.* at 233, 234.
128. 413 F.2d 232 (7th Cir. 1969).
129. *Id.* at 235.
130. *Id.* at 236.

> jority in effect said that a defendant has a right to be present at his trial and at the same time rules that the bedeviled judge must enforce this right upon the defendant by violent physical means if necessary.[131]

With respect to the majority suggestion that the trial judge control defendant's behavior by the use of the court's contempt power, Judge Hastings states:

> I fail to see how the threat of punishment for contempt would restrain those determined to destroy the trial proceeding in progress. Defendant and his kind could care less.[132]

The United States Supreme Court granted certiorari[133] and reversed the Court of Appeals, essentially following the Illinois Supreme Court holding and Senior Circuit Judge Hastings' dissenting opinion. Mr. Justice Black writing the majority opinion states the question as being:

> [W]hether an accused can claim the benefit of this constitutional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial.[134]

The Court enunciated its holding as follows:

> [W]e explicitly hold today 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 nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present, of course, can be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of court and judicial proceedings.[135]

The Court then went on to analyze and criticize the use of the other two of the three solutions which it stated are constitutionally permissible for a trial judge to utilize in handling an obstreperous defendant. The other two solutions being: (1) to bind and gag the defendant, keeping him present in the courtroom, (2) citing him for contempt. Though the Court did approve of binding and gagging a defendant, it did so most reluctantly, stating:

> But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged

131. *Id.*
132. *Id.*
133. 396 U.S. 955 (1969).
134. *Supra*, note 125 at 338.
135. *Id.*, at 343.

> except as a last resort . . . . this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.[136]

The Court considered punishment for direct contempt as inadequate under the circumstances, even if accompanied by imprisonment for the contempt and recess of the trial until such time as the defendant behaves himself. Mr. Justice Black pointed out that a criminal contempt punishment might not serve as an effective deterrent to one facing possible life imprisonment or death; and that civil contempt providing continuous confinement until the defendant had resolved to behave would permit a defendant facing a serious charge to bide his time in jail, "in hope that adverse witnesses might become unavailable after a lapse of time."[137] In this connection Justice Black said, "A court must guard against allowing a defendant to profit from his own wrong in this way."[138]

Justice Brennan concurring observed that, "Thus there can be no doubt whatever that governmental prerogatives to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward." Justice Brennan also stated, "The Constitution would protect none of us if it prevented the courts from acting to preserve the very processes which the Constitution itself prescribes."[139]

Justice Brennan concluded;

> I would add only that when a defendant is excluded from his trial, the court should make reasonable efforts to enable him to communicate with his attorney and if possible, to keep apprised of the progress of his trial. Once the court has removed the contumacious defendant, it is not weakness to mitigate the disadvantage of his expulsion as far as technologically possible in the circumstances.[140]

Thus, closed circuit television and a direct telephonic connection could become part of the standard equipment in the courtrooms of a few years hence. This would permit not only the removal from the trial of the defendant bent upon obfuscating and obstructing the conduct and progress of the trial, but would prevent as well the overflow and outbursts of expressive spectators at a celebrated trial from making the conduct of the trial a difficult one for the trial judge.

Contempt Cannot Be Compromised

The exercise of the contempt power has been upheld in a recent de-

136. *Id.*, at 344.
137. *Id.* at 345.
138. *Id.*
139. *Id.*, at 350.
140. *Id.*

cision which reflects that litigants will not be permitted to bargain away this awesome power and that contumacious acts are not the subject of "forgive and forget" after the litigants have composed their differences. In *Board of Junior College District 508 v. Cook County College Teachers Union, Local 1600*[141] the defendant union and its president were found guilty of contempt of court for having violated the court's temporary injunction. The union was fined and its president was fined and sentenced to thirty days in jail.

The court had issued a temporary injunction upon the Board's application, which restrained the union

> from participating in, or causing, inducing or encouraging, any strike or other concerted withholding of service, or interference with the performance of service, by any employee of plaintiff, or from picketing, parading or patrolling at or in the vicinity of the Junior College campuses maintained and operated by plaintiff for the purposes of inducing such strike or other concerted withholding of services.[142]

The defendant Swenson knew of the injunction order the day it issued though he did not receive or see a copy of it. He spoke at a meeting of the union that same evening attended by more than 400 of the Board's faculty. On that same date the members of the union, who were employees of the Board, went on strike and picketed the Board's campuses for two days thereafter. Then again on January 6, 1967, six days later, the President of the union, Swenson, was seen either picketing or at the scene of the picketing of the Board's offices or the campuses.

On December 20, 1966, the attorney who represented the Board moved to dissolve the temporary injunction. He presented with his motion a written stipulation between the Board and the union purporting to settle their dispute. The trial judge refused to grant the Board's motion; instead he directed the Board's attorney to prepare and file a petition for a rule on the union, its President Swenson, and its other officers to show cause why they failed to comply with the temporary injunction. The petition was filed December 21, 1966, and a rule issued that day. On January 3, 1967, the attorney for the Board filed a petition alleging that because the Board had requested dissolution of the temporary injunction and the trial judge had ordered the petition for a rule on the union and its officers, he was placed, "in a position of potential conflict of interest,"[143] which required appointment by the court

141. 126 Ill. App. 2d 418, 262 N.E.2d 125 (1970).
142. *Id.*, at 424, 262 N.E.2d at 127.
143. *Id.*, at 435, 262 N.E.2d at 128.

of special counsel to present evidence in support of the rule. The court took the petition under advisement until January 9th; in the meantime, the trial judge requested the States Attorney to proceed but the latter declined, saying it was a civil matter. Then on January 9, 1967, the trial judge appointed an amicus curiae to investigate and report the facts and circumstances surrounding the conduct of the union and its officers. The amicus curiae was directed to make a recommendation to dismiss the rule to show cause or for leave to file such amendments thereto as he believes necessary.

On April 3, 1967, the amicus curiae filed a written report in which he recommended that an amended rule issue only against the union and Swenson, ordering and directing that they, and each of them, answer the Amended Rule to Show Cause within a date to be fixed by the court. On May 27, 1967, the court heard the testimony of four witnesses called by the amicus curiae, who also offered ten exhibits which were admitted. The defendants did not present any evidence. At the conclusion of the hearing, the union and Swenson were found guilty of contempt.

The defendants contended that the finding must be reversed because it was based on an unconstitutional and void temporary injunction. They urged, with great vigor, various constitutional questions arising under the Illinois and United States Constitutions. The court held that these questions were not before it; that the trial court had jurisdiction over the cause because the complaint alleged facts which presented a justiciable matter:

> In this day the Illinois Anti-Injunction Act cannot be construed to take away the jurisdiction of a circuit court to decide whether a temporary injunction shall issue. Whether the trial court rightfully or erroneously granted the temporary injunction and whether the injunction order was constitutionally permissible are questions that cannot be litigated in a contempt proceeding.[144]

Both the amicus curiae and the defendants urged that the trial court erred in denying the Board's motion to dissolve the temporary injunction. The argument was grounded on the theory that when the Board returned to the trial court to obtain dissolution of the injunction order, defendant's contemptuous conduct had ceased. For the purpose of this argument, the amicus says, that the court may assume that "(1) Swenson and the union knowingly violated the trial court's temporary injunc-

144. *Id.*, at 426, 262 N.E.2d at 128.

tion; and (2) the picketing violated Illinois law."[145] The effect of these arguments is that the contempt was moot at the time of its prosecution in that the contempt was strictly civil in nature. The appellate court, speaking through Mr. Justice Leighton, stated "This is a concession with which we do not agree."[146] The court held that the contempt proceedings were not civil in nature because the punishment was purely punitive and was not remedial or coercive. The court stated:

> Under no theory can a party that obtains an injunction bind the issuing court with condonation of contemptuous or illegal acts of those who violate the court's order. To give effect to such a theory would usurp the highest function of our courts.[147]

The court upheld the punishment for contempt, and in so doing quoted the following from *Walker v. City of Birmingham*:[148]

> The rule of law . . . reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This court cannot hold that the [defendants] were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the [defendant's] impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.[149]

And then stated:

> We are aware of the contemporary social problems presented by questions concerning the right of public employees to unionize . . . However, as judges we must remind teachers and public employees that the interests of unionism do not justify standing in defiance of law. If we do not do this, and if contemptuous and illegal conduct by teachers were condoned, either by school boards or by courts meekly acceding to requests made under pressure, there would be erosion and ultimately destruction of the high place in public esteem that unions enjoy in our society. Therefore, we conclude that the trial judge did not err in issuing the rule to show cause and appointing the Amicus Curiae. People v. Goss 10 Ill. 2d 533, 141 N.E. 2d 384.[150]

A most recent case, that of *The Board of Education v. Kankakee Federation of Teachers Local No. 886*,[151] was decided by the Illinois Supreme Court in an opinion delivered by Mr. Justice Culbertson. The

145. *Id.* at 427, 262 N.E.2d at 129.
146. *Id.*
147. *Id.*, at 428, 262 N.E.2d at 129, 130.
148. 388 U.S. 307 (1967).
149. *Supra*, note 141 at 429, 262 N.E.2d at 130.
150. *Id.*
151. 46 Ill. 2d 433, 264 N.E.2d 18 (1970).

president of the Board received a wire from the Teacher's Union advising him that the membership had voted to withhold teaching services beginning Friday, April 25, 1969, until satisfactory agreements on a new contract and other matters were reached. The wire was dispatched to the Board president shortly after midnight, April 25th. The statute requiring 24-hour public notice prior to a special meeting of the Board prevented the Board from taking official action until Saturday, April 26th, when it held a meeting; after the meeting was concluded late that afternoon, an attorney for the Board presented a complaint to a judge of the Circuit Court properly supported by affidavit praying for temporary injunction without notice or bond, restraining defendants from striking and picketing and from inducing or encouraging others to do so. No prior notice was given the defendants nor was there an attempt to do so and on Saturday, April 26, at 5:45 P.M. a temporary restraining order was entered granting the relief prayed. By 8:30 P.M. of the same date, the Sheriff had served the temporary restraining order on all but one of the defendants who was served the following day, Sunday, April 27th.

On Monday, April 28th, the teachers continued to strike and picket; no effort was made by the defendants to vacate or dissolve the restraining order or to otherwise seek judicial relief with respect thereto. On the same day, the Board filed a motion for preliminary injunction which was set for hearing on Friday, May 2. Defendants appeared at the hearing but filed no pleadings, presented no evidence, and in no manner sought to attack the legal basis for either the temporary order or the preliminary injunction. The preliminary injunction was issued but again, defendants ignored it. The strike continued and the school remained closed until May 12th, the date upon which the trial court ruled upon the evidence and found the defendant in contempt. A fine of $12,000 was levied on the union and lesser fines, and in some instances jail sentences of 60-days, were meted out against the individual defendants. The fines and jail sentences were imposed after a show cause hearing held pursuant to a petition filed by the Board on April 29th. The hearing was held on Monday, May 5th, and at this time defendants filed a motion to dismiss the contempt proceedings alleging that the issuance of the temporary restraining order without notice or hearing deprived the defendants of due process of law and that the petition for Rule to Show Cause to the order entered thereon was so vague, indefinite and uncertain as to violate the requirements of due process. The motion was denied and the court, after hearing evidence,

imposed the fines and jail sentences. As to two of the individual defendants, the evidence was found to be insufficient to show that they had violated the restraining order and the Rule to Show Cause was dismissed as to them. The defendants, appealing, did not challenge the sufficiency of the evidence to support their convictions.

After disposing of defendant's contention that the action of the trial court in issuing the temporary injunction was a prior restraint of free speech and, therefore, governed by the United States Supreme Court's opinion in *Carroll v. President and Commissioners of Princess Anne,*[152] the court held that, "Picketing, while a mode of communicating ideas, is not dogmatically equated with constitutionally protected speech."[153] It held that the case before it was governed more appropriately by "the teachings of *Howat v. Kansas*, and its progeny, one of the latest of which is *Walker v. City of Birmingham.*"[154] The court went on to say,

> The simple and logical rationale of these decisions is that where a court of equity issues an injunction, with jurisdiction of the subject matter and the persons and upon pleadings properly invoking its action, the injunction must be obeyed, however erroneous the action of the court may be, until it is reversed for error by orderly review, either by the court itself or a higher court. Disobedience of such an injunction is contempt of the lawful authority of the court, and punishable as such."[155]

Other interesting and vital issues concerning the scope of the constitutional guarantee of "Freedom of Speech" are treated by the opinion but involve the vast area of contempt only tangentially.

Conclusion

It appears that the reviewing courts are becoming sensitive to the fact that the trial court must be clothed with power to exercise within appropriate bounds but with vigor and determination the power to punish for contempt if the judiciary is to command respect for the conduct of the court's business. Some reviewing courts, it appears, recognize more than ever before that while the power to punish for contempt should be employed sparingly, it is necessary to the functioning of the judicial process and is absolutely essential to the performance of the duties imposed upon the courts by law. Without this power, the courts would become mere boards of arbitration whose judgments and decrees would

152. 393 U.S. 175 (1968).
153. *Supra,* note 151 at 438, 264 N.E.2d at 21.
154. *Id.* at 439, 264 N.E.2d at 21.
155. *Id.*

have only an advisory effect. The power to punish for contempt of court is awesome, yet it behooves all courts to rigidly enforce obedience to their orders; at the same time, all jurists must meticulously safeguard the constitutional rights of the alleged contemnor and be certain to employ the American fundamentals of fairness in every contempt proceeding.

It requires but a moment's reflection to realize that, without the power to punish for contempt, law and justice would become emasculated and meaningless; mere concepts, lifeless abstractions. The ready, but discreet, application of the contempt power will preserve law and justice as the heart of our great democracy.

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