COPING WITH THE UNRULY CRIMINAL DEFENDANT: THE OPTIONS OF THE ALLEN CASE

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INTRODUCTION

In a decision handed down on March 31, 1970, the United States Supreme Court ruled that an unruly defendant could be excluded from the courtroom during his trial where his disruptive behavior threatened to make an orderly and proper proceedings difficult or wholly impossible. The vehicle for this decision was the case of *Illinois v. Allen*, 397 U.S. 337 (1970).[1] Allen had been tried in a state court in 1957 for armed robbery of a tavern owner. During his trial, Allen threatened the judge's life, made abusive remarks to the court and announced that under no circumstances would he allow his trial to proceed. The court responded by removing him from the courtroom, after appropriate warning. Allen was later readmitted, but the trial had proceeded during his absence. Allen's conviction was affirmed by the Supreme Court of Illinois.[2]

Allen then filed a habeas corpus petition in the federal district court, collaterally attacking his conviction on the ground that his expulsion from the courtroom during the trial was a denial of his federal constitutional right to be present during the trial. The district court declined to issue the writ but the court of appeals reversed, holding that the misconduct of a defendant could never constitute a waiver of his right to be present at his trial.[3] The Supreme Court granted certiorari and reversed, ruling that Allen's rights to confront witnesses or to be present at his trial had not been violated by his removal from the courtroom.

The opinion of the court (written by Mr. Justice Black) provides a timely answer to certain basic aspects of the problem of coping with the unruly defendant. Thus, the court recognizes three

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1 Subject case has been noted in many Law Reviews, including, Note, 7 CAL. WEST. L. REV. 286 (1970); Note, 42 U. COLO. L. REV. 485 (1970); Note, 19 KAN. L. REV. 305 (1971); Note, 23 VAND. L. REV. 431 (1970); Note, 6 WAKE FOREST INTRA. L. REV. 499 (1970).

2 People v. Allen, 37 Ill. 2d 167, 226 N.E.2d 1 (1967), *cert. denied*, 389 U.S. 907 (1967).

3 413 F.2d 232 (7th Cir. 1969).

constitutionally permissible methods for a trial judge to handle an unruly defendant: (1) physical restraint; (2) removal of the defendant from the courtroom until he promises to behave; and (3) citing the defendant for contempt. This memorandum will try to focus on the historic uses of these methods and to find what permissible boundaries and guidelines are to be found in the cases for the use of the three available measures.

PHYSICAL RESTRAINT OF THE CRIMINAL DEFENDANT

At Common Law when a prisoner was brought into court for trial upon a plea of not guilty to the indictment, he was entitled to appear without shackles or bonds or any other form of restraint.[4] Historically this rule finds support in various grounds. It has been suggested that bonds and shackles may result in the confusion of the defendant or otherwise affect his mental faculties:

> [A]ny order or action of the court which . . . imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense . . . .[5]

Other courts support the rule to avoid prejudice of the accused in the minds of the jury:

> It may be doubted whether any jury, even with the best of cautionary instructions, can ever dismiss from its mind that the accused has appeared before it in handcuffs or chains. His being restrained must carry obvious implications even to the most fair-minded of juries.[6]

Still other courts feel that the rule preventing restraint of the defendant is necessary to preserve human dignity:

> Though biologically speaking, man may be an animal, it was never intended that he be treated as such in the realm of criminal jurisprudence. If we permitted the subjection of man to such treatment before the courts of our land, we have paved the way for him to be tried while tied to a log or in a steel cage, as well as chains and shackles. Barbarism has been abandoned and must never be permitted to creep back through the crevices created by lenient rules of law.[7]

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[4] People v. Harrington, 42 Cal. 165 (1871); Blain v. United States, 136 F.2d 284 (D.C. Cir. 1943); Commonwealth v. Reid, 123 Pa. Super. 459, 187 A. 263 (1936). An interesting question is raised by considerations of what type of restraint, if any, should be used. Handcuffs, at least upon entry of the defendant into the court, may denote guilt whereas a straight jacket could denote insanity. *See,* Cohen, *Violent Misconduct in the Courtroom,* 28 U. PITT. L. REV. 443, 448 (1967).

[5] People v. Harrington, 42 Cal. 165, 168 (1871).

[6] State v. Roberts, 86 N.J. Super. 159, 168, 206 A.2d 200, 205 (1965). *See also* Odell v. Hudspeth, 189 F.2d 300 (10th Cir. 1951).

[7] French v. State, 377 P.2d 501, 504 (Okla. Crim. 1963).

However, since the early days of English Common Law, exceptions to this rule have been recognized and the use of physical restraints has been permitted to prevent escape, to protect the judge or other persons in the courtroom, or to deal with other threats to the administration of criminal justice.[8] Thus, Blackstone qualified the rule by adding: "[U]nless there be evident danger of escape, and then he may be secured by irons."[9]

In Stephens' *Digest of Criminal Procedure* the author observes:

> I have heard from eye-witnesses an account of a trial before Shee, J. (then acting as Commissioner), at Dorchester, where the prisoner, (a convict at Portland, being tried for the murder of a warder) behaved with such desperate violence that it was necessary to fasten him down with chains and straps.[10]

The exception to the rule which allows the courts to act in order to protect themselves and to prevent the trial from being interrupted is also recognized in this country.[11]

Some courts hold that there must be an immediate threat of imminent misconduct before the defendant may be restrained by the use of bonds and gags or other methods.[12] Other courts have ruled that the decision to manacle an accused may be based on such criteria as his reputation, his known criminal record, his character and the nature of the case.[13]

In *People v. Loomis*, 27 Cal. App. 2d 236, 80 P.2d 1012 (1938), the accused screamed obscene expressions at the court and jury, fought with officers who sought to quiet him, kicked the counsel table and threw himself on the floor of the courtroom. The judge ordered the accused restrained. His arms and legs were then strapped together, and his body was strapped into a wheelchair. At

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[8] See, Cohen, *Violent Misconduct in The Courtroom*, 28 U. PITT. L. REV. 443, 446 (1967).

[9] 4 W. BLACKSTONE, COMMENTARIES *322 (Lewis ed. 1898).

[10] STEPHENS, DIGEST OF CRIMINAL PROCEDURE 194 (1883).

[11] Odell v. Hudspeth, 189 F.2d 300 (10th Cir. 1951); People v. Mendola, 159 N.Y.S.2d 473, 140 N.E.2d 353 (1957); Pierpont v. State, 49 Ohio App. 77, 195 N.E. 264 (1934); United States *ex rel.* Long v. Pate, 418 F.2d 1028 (7th Cir. 1969); Dennis v. Dees, 278 F. Supp. 354 (E.D. La. 1968).

[12] Odel v. Hudspeth, 189 F.2d 300 (10th Cir. 1951); Blair v. Commonwealth, 171 Ky. 319, 188 S.W. 390 (1916); Loux v. United States, 389 F.2d 911 (9th Cir. 1968).

[13] State v. Roberts, 86 N.J. Super. 159, 206 A.2d 200 (1965). *See also* Loux v. United States, 389 F.2d 911 (9th Cir. 1968), where the court held that it is discretionary with the court to require the defendant to be shackled, "for the protection of everyone in the courtroom and its vicinity . . . ." However, prior to shackling the defendant, the judge held a hearing on the matter and stated his reasons for the record. The court further reasoned that a defendant may be shackled even though his actual conduct at the trial did not warrant such, where there is a reasonable basis for anticipating that the defendant may attempt to escape. "To require a dangerous act at trial before shackling the prisoner would seriously impair the court's security."

times, a towel was placed over his mouth. In approving the steps taken by the trial court, the appellate court held:

> There can be no doubt as to the right of the court to use *reasonable* restraint in order to conduct the trial in an orderly and dignified manner. *The restraint used was not unreasonable* under the circumstances.[14]

In *United States v. Bentvena*, 319 F.2d 916 (2d Cir. 1963), 14 defendants were being tried for conspiracy to violate federal narcotics laws. The court of appeals described the courtroom antics of the defendants as follows:

> During the polling of jurors on this opening day of trial, the first outburst by Salvatore Panico occurred. This incident was a precursor of events to come. Similar outbursts by Panico and other defendants became commonplace. On one occasion Panico climbed into the jury box, walked along the inside of the rail from one end of the box to the other, pushing the jurors in the front row and screaming vilifications at them, the judge, and the other defendants. On another occasion, while the defendant Mirra was being cross-examined by the Assistant United States Attorney, Mirra picked up the witness chair and hurled it at the Assistant. The chair narrowly missed its target but struck the jury box and shattered. The trial judge responded to these outbursts by having the perpetrators gagged and shackled. We have described only two of the more dramatic disturbances which plagued the trial of this case for we find it neither necessary nor judicious to publicize or preserve the vile language and rebellious conduct that characterized this trial. Suffice it to say that more abhorrent conduct in a federal court and before a federal judge would be difficult to conceive.
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> . . . We find no abuse of discretion in the trial judge's actions taken to preserve the security of the courtroom. If any one distinct impression is gained from a scrutiny of the record here, it is that the trial judge was justified, indeed was forced, to resort to stern measures to obtain order in his courtroom.[15]

In *Seale v. Hoffman*, 306 F. Supp. 330 (N.D. Ill. 1969), the defendant, Bobby Seale, contended that his constitutional rights were violated because he was forcibly gagged and handcuffed during portions of his trial. The record indicates that these measures were invoked only after repeated disruptions by the defendant, which included abusive name calling of the judge. The court, in approving the actions of Judge Hoffman, stated, at 333:

> While a defendant in a criminal case has an absolute right to be present during his trial, he does not have a right to brazenly make a shambles of the criminal judicial process and attempt to force a mistrial. The Seventh Circuit has recently ruled that a trial judge may restrain dis-

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[14] People v. Loomis, 27 Cal. App. 2d 236, 239, 80 P.2d 1012, 1014 (1938) (citation omitted) (emphasis added).

[15] United States v. Bentvena, 319 F.2d 916, 929-31 (2d Cir. 1963) (footnote omitted).

> ruptive and disrespectful conduct by whatever means necessary, *even if those means include physical restraints and gagging.* United States ex rel. Allen v. State of Illinois, 413 F.2d 232, 235 (7th Cir. 1969). . . . This court therefore does not find that physical restraints placed upon a contumacious defendant under the circumstances involved here infringes upon a constitutionally protected right.

Some authorities have sustained the use of physical restraints on the ground that, repugnant as they are, there is no alternative to their use.[16] These courts have stated or intimated that an unruly defendant cannot be removed from the courtroom because to do so would be violative of his right to be present at his trial and to confront his accusers. These courts have believed that a court faced with a persistently disruptive defendant must either physically restrain him or let him succeed in his efforts to avoid being tried. *Allen* seems to answer that argument, and by assuring that there is a more palatable alternative to bonds and gags, *Allen* may foreshadow future decisions limiting the use of physical restraints.

In fact, the court's distaste for the use of physical restraints is an explicit factor in its approval of the removal of an obstructive defendant:

> Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. *But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort.* Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, *but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.*[17]

Answering the argument that a defendant who has been evicted from the courtroom cannot communicate with counsel during trial, the court points out a defendant who has been shackled and gagged is hardly better off:

> Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint. It is in part because of these inherent disadvantages and limitations in this method of dealing with disorderly defendants that we decline to hold with the Court of Appeals that a defendant cannot under any possible circumstances be deprived of his right to be present at trial.[18]

However, the court declined to rule that physical restraints may never be used, saying:

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[16] Seale v. Hoffman, 306 F. Supp. 330 (N.D. Ill. 1969).
[17] Illinois v. Allen, 397 U.S. 337, 344 (1970) (emphasis added).
[18] *Id.*

> However, in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acts as Allen did here.[19]

Justice Brennan is more explicit in suggesting an order of priority for the three remedies now given the trial judge to control an unruly defendant, stating:

> However, I also agree with the Court that these three methods are not equally acceptable. In particular, shackling and gagging a defendant is surely the least acceptable of them. It offends not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law.[20]

Justice Brennan also observes that attorney-client communication can remain open even when the trial judge evicts the defendant during the course of trial, if provision is made for some method whereby he can observe the trial. Thus, he points out:

> Once the court has removed the contumacious defendant, it is not weakness to mitigate the disadvantages of his expulsion as far as technologically possible in the circumstances.[21]

The ample authority which exists for shackling or gagging an unruly defendant to preserve the proper administration of justice where some immediate necessity compels it should be read with caution in view of the language of *Allen*. The Supreme Court's specific approval of the removal of a defendant suggests that physical restraint should be regarded as the least appropriate remedy for disruptive behavior, for *Allen* may be the seminal decision of a rule imposing restrictions of the use of this remedy except as a last resort.

EVICTION OF THE DEFENDANT FROM THE COURTROOM

English Common Law recognized as fundamental, the right of a defendant to be present at his trial. It is from this that the sixth amendment right of confrontation was drawn.[22]

At early Common Law, the rationale of the rule was cast in jurisdictional terms and some cases suggest that the presence of the defendant could not be waived.[23] Having the defendant present at

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19 *Id.*

20 *Id.* at 350 (concurring opinion).

21 *Id.* at 351.

22 Salinger v. United States, 272 U.S. 542, 548 (1926).

23 State v. Greer, 22 W. Va. 800 (1883); Noel v. Commonwealth, 135 Va. 600, 115 S.E. 679, 681 (1923); Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 COLUM. L. REV., 18 (1916); 2 POLLOCK AND MAITLAND, THE HISTORY OF ENGLISH LAW, 580-581 (1923); PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 430-431 (5th ed. 1956).

trial was considered important not only to the accused but also to the public, because it enabled the prosecuting power to identify him and to inflict on him the pronounced punishment.[24]

The right of a defendant to be present at all stages of his trial and to confront his accusers is guaranteed in federal trials by the sixth amendment and in a state trial, by the fourteenth.[25] However, exceptions have been recognized by both American and English courts.[26]

First, of course, are the evidentiary exceptions. These include the many hearsay exceptions from the dying declaration[27] to the right to use affidavits of witnesses whose absence from the trial has been wrongly procured by the defendant.[28]

At English Common Law, although the general right of the defendant to be present at every stage of his prosecution was recognized, it had been held that a court could take steps to exclude a defendant where necessary to protect the administration of justice. In *Regina v. Berry*,[29] the accused was tried for burglary. During his arraignment, he created an extraordinary scene as follows:

> By leaping in an almost miraculous manner over the heads of the barristers seated on the two benches immediately beneath the front bar of the dock. Falling upon his face and hands on the table to which the clerk of the assizes and barristers were seated, he proceeded to divest himself of his clothing, and to utter wild shouts and blasphemies, and, having created the greatest consternation, was, with much difficulty and after a desperate struggle, was [sic] secured and conveyed to the cells.[30]

The trial was continued to the following day whereupon another scene ensued:

> He again created a serious disturbance, struggling with the warders, and making a noise with his heavy boots, at the same time uttering loud cries, which, so far as they were understood, were totally irrelevant to the charge.[31]

The court instructed the chief warder to tell the accused that, "if he did not behave himself, he would be tried in his absence."[32]

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[24] 1 BISHOP, NEW CRIMINAL PROCEDURE, 174 (4th ed. 1895). *See also* Goldin, *Presence of The Defendant at Rendition of The Verdict in Felony Case*, 16 COLUM. L. REV. 18 (1916).

[25] Pointer v. Texas, 380 U.S. 400 (1965).

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

[27] State v. Garver, 190 Ore. 291, 225 P.2d 771 (1950).

[28] Reynolds v. United States, 98 U.S. 145, 158 (1878).

[29] 104 L.T.J. 110 (Northhampton Assizes, 1897).

[30] *Id.*

[31] *Id.*

[32] *Id.*

The disturbance continued and the accused was conveyed to his cell and the trial went on without him. The jury having found in his absence that the accused was mentally sound, the court then entered a plea of not guilty and the jury went on to find him guilty.

In another English case, *Rex v. Browne*,[33] a female defendant was charged with the misdemeanor of obtaining clothing by false pretences. She screamed and shouted and threw herself down in the dock. She was removed and on the following day repeated her misconduct. She was again removed and advised that if she persisted in her misconduct, she would be tried in her absence. On the following day she repeated her conduct, "and made so much noise that it was impossible to proceed with the case."[34] The court entered a plea of not guilty, and, after testimony that she was sane, the defendant was placed on trial, convicted and given a sentence of eighteen months imprisonment. The court cited *Regina v. Berry*,[35] and Stephens, *Digest of Criminal Procedure*, as authority for trying the accused in her absence.[36]

In Stephens, *Digest of Criminal Procedure*, long predating *Allen*, it is stated that "if a prisoner so misconducts himself as to make it impossible to try him with decency, the Court, it seems, may order him to be removed and proceed in his absence."[37]

The rule of presence has not been absolute in this country either.[38] State courts have for some time recognized that a defendant could waive his right to be present at the trial even of a felony case.[39]

Waiver of the defendant's right to be present has also been found in many federal cases: *e.g.*, *Diaz v. United States*,[40] where the reception of evidence in a non-capital homicide trial in the absence of the defendant but with his consent was held not violative of the

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[33] 70 J.P. 472 (London Cent. Crim. Ct., 1906).

[34] *Id.*

[35] 104 L.T.J. 110 (Northhampton Assizes, 1897).

[36] In each of these cases the defendant was warned by the court that he would be evicted if he continued his disruptive conduct and in both cases the disruptive defendants were given additional opportunities to participate in the trial on condition that they behave themselves.

[37] STEPHENS, DIGEST OF CRIMINAL PROCEDURE, 194 (1883).

[38] United States *ex rel.* Long v. Pate, 418 F.2d 1028 (7th Cir. 1969), where the court held that the defendant had not been deprived of a fair trial, where during the pendency of his trial a prisoner escaped from the "bullpen" adjoining the courtroom, thereby causing a serious disturbance and resulting in defendant's being removed from the courtroom until such time as the disturbance was quelled.

[39] Scruggs v. State, 131 Ark. 320, 198 S.W. 694, 696 (1917); People v. Harris, 302 Ill. 590, 135 N.E. 75 (1922); Collins v. State, 12 Md. App. 239, 278 A.2d 311 (1971); State v. Melendez, 244 So. 2d 137 (Fla. 1971).

[40] 223 U.S. 442 (1912).

Philippine Civil Government Act.[41] Similar results have been reached where a prisoner escaped from custody during trial or jumped bail.[42] In discussing the right of confrontation in *Diaz*, the United States Supreme Court stated the rule, well known even before *Allen*, that a defendant could not prevent his trial by voluntarily absenting himself after trial had begun.

> [T]he prevailing rule has been, that if, after the trial has begun in his presence, he [the defendant] voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.[43]

While some old decisions have suggested that the defendant's right to be present at trial may be absolute,[44] it seems likely that the widespread interest in the *Allen* holding reflects a rather generalized concern,[45] prior to *Allen*, that recent decisions of the United States Supreme Court may have so broadened the right of confrontation as to have effectively eroded the authority of earlier cases dealing with the removal of disruptive defendants from the courtroom.

Language in the cases of *Hopt v. Utah*[46] and *Lewis v. United States*[47] formed the basis for the seventh circuit's holding in *Allen*. However, as Mr. Justice Cardozo has pointed out in *Snyder v. Massachusetts*,[48] what was said in *Hopt* on the subject of the presence of the defendant as a requirement imposed by the federal constitution was dictum since there the court construed a territorial statute which declared that the defendant "must be personally present" for jurisdiction.[49] Justice Cardozo also distinguished *Lewis* on the ground that it dealt with the rule at common law and not with constitutional restraints.

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[41] *See also* United States v. McNair, 433 F.2d 1132 (D.C. Cir. 1970).

[42] Noble v. United States, 300 F. 689 (9th Cir. 1924); United States v. Loughery, 26 F. Cas. 998 (No. 15,631) (C.C.E.D.N.Y. 1876); Falk v. United States, 15 App. D.C. 446, (1899); United States v. Tremont, 438 F.2d 1202 (1st Cir. 1971); United States v. Barracota, 45 F. Supp. 38 (S.D.N.Y. 1942); United States v. Parker, 91 F. Supp. 996 (M.D.N.C. 1950), *aff'd.* 184 F.2d 488 (4th Cir. 1950).

[43] Diaz v. United States, 223 U.S. 442, 445 (1912). *See also*, Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963); Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969); United States v. Cureton, 302 F. Supp. 1065 (D.D.C. 1968).

[44] Hopt v. Utah, 110 U.S. 574 (1884); Lewis v. United States, 146 U.S. 370 (1892).

[45] See Fuld, *The Right To Dissent: Protest in The Courtroom*, 44 ST. JOHN'S L. REV. 54 (1969).

[46] 110 U.S. 574 (1884).

[47] 146 U.S. 370 (1892).

[48] 291 U.S. 97 (1934).

[49] *Hopt* was also distinguished in Diaz v. United States, 223 U.S. 442, 458 (1912), on the ground that it was a capital case. Waiver in capital cases where the defendant is in custody may still be governed by different rules than other cases.

In at least two cases prior to the *Allen* case, American courts have approved the expulsion of a defendant from the courtroom for misconduct during his trial.

In *United States v. Davis*[50] the accused was present during the impaneling of the jury and a portion of the opening of the case by the prosecution. However, during the opening, the accused began to interrupt the prosecution by denying in a loud voice statements given by the District Attorney, and despite admonition from the court, he continued his conduct "such as to make it impossible to proceed in the trial."[51] He was then removed from the courtroom by the federal marshall and placed in an adjoining room *"with liberty of access for his counsel."*[52] The prosecution completed the opening of the case and the following day the accused was permitted to return to the courtroom. In sustaining the conviction, the appellate court commented:

> The right of a prisoner to be present at his trial does not include the right to prevent a trial by unseemly disturbance. . . . It does not lie in his mouth to complain of the order which was made necessary by his own misconduct, *and which he could at any time have terminated by signifying his willingness to avoid creating disturbance.*[53]

People v. De Simone[54] was the case upon which the Supreme Court of Illinois relied in upholding the *Allen* conviction. There the defendant "caused disorder in the court by profane outbursts at witnesses and the court, and in one instance seized and tore into shreds an exhibit which had been accepted in evidence."[55] After one such outburst, just prior to the closing arguments, the court ordered the defendant removed from the courtroom. He was returned later, after discussion with the court and his counsel. On appeal, the defendant challenged his conviction on the grounds that his "involuntary absence" was violative of the Illinois Constitution article II, § 9 which gives the accused the right to appear and defend in person. The court upheld the conviction, holding that the right of presence could be waived by voluntary absence or by misconduct.

> It is obvious from the record that defendant's removal was necessary to prevent such misconduct as would obstruct the work of the court; such misconduct was, in turn, effective as a waiver of the defendant's right to be present. The right to appear and defend is not given to a defendant to prevent his trial either by voluntary absence, or by wrongfully obstructing its progress.[56]

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50 25 F. Cas. 773 (No. 14923) (C.C.S.D.N.Y. 1869).
51 *Id.* at 774.
52 *Id.* (emphasis added).
53 *Id.* (emphasis added).
54 9 Ill. 2d 522, 138 N.E.2d 556 (1956).
55 *Id.* at 533, 138 N.E.2d at 562.
56 *Id.*

In *Allen*, the trial judge had warned Allen that he would be removed from the courtroom if he continued in his misconduct. After being first removed, Allen was brought back in before any testimony was taken and told he would be allowed to be present if he would behave himself. After he continued to disrupt the course of the proceedings, he was again removed.[57]

The importance of these facts is emphasized in the Supreme Court's opinion:

> [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 can, of course, be reclaimed* as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.[58]

Justice Brennan in his concurring opinion suggests that another condition[59] be imposed on the trial judge's right to exclude an obstreperous defendant from the courtroom: namely, that an accused be given convenient access to counsel during any period of expulsion:

> 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.[60]

While agreeing with the result, Mr. Justice Douglas, in his separate opinion in *Allen* strongly urged that the court should not speak to the merits of the issues, reserving for a more appropriate case the task of designing methods of coping with the disruptive conduct of a defendant. In his opinion, Justice Douglas quoted at

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[57] Allen was later given another chance to return to the courtroom and when he finally agreed to behave himself, he was allowed to remain in the courtroom during the rest of the trial.

[58] Illinois v. Allen, 397 U.S. 337, 343 (1970) (emphasis added) (footnote omitted).

[59] It is interesting that the *Allen* decision seems not to require, as a condition of the removal of the defendant, that he first be threatened or visited with the sanctions of contempt and that exclusion from the courtroom be thus used as a kind of "penultimate" resort. Something approaching such a priority in the use of the available methods may be argued for by citing the language in Justice Black's opinion that the behavior justifying exclusion must be "of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint." *Quaere*: Whether the court may not have structured a rule inviting first the sobering use of a formal finding of a punishment for *contempt*, in addition to warning and the opportunity for readmission as a condition to the use of the more repugnant remedies of trial *in absentia* or under physical restraint.

[60] Illinois v. Allen, 397 U.S. 337, 351 (1970).

length from the proceedings at the trial of William Penn, in London in 1670, after observing:

> In Anglo-American law, great injustices have at times been done to unpopular minorities by judges, as well as by prosecutors. I refer to London in 1670 when William Penn, the gentle Quaker, was tried for causing a riot when all that he did was to preach a sermon on Grace Church Street, his church having been closed under the Conventicle Act:
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> *Penn.* I affirm I have broken no law, nor am I Guilty of the indictment that is laid to my charge; and to the end the bench, the jury, and myself, with these that hear us, may have a more direct understanding of this procedure, I desire you would let me know by what law it is you prosecute me, and upon what law you ground my indictment.
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> *Rec.* Upon the common-law.
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> *Penn.* Where is that common-law?
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> *Rec.* You must not think that I am able to run up so many years, and over so many adjudged cases, which we call common-law, to answer your curiosity.
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> *Penn.* This answer I am sure is very short of my question, for if it be common, it should not be so hard to produce.
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> *Rec.* Sir, will you plead to your indictment?
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> *Penn.* Shall I plead to an Indictment that hath no foundation in Law? If it contain that law you say I have broken, why should you decline to produce that law, since it will be impossible for the jury to determine, or agree to bring in their verdict, who have not the law produced, by which they should measure the truth of this indictment, and the guilt, or contrary of my fact?
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> *Rec.* You are a saucy fellow, speak to the Indictment.
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> *Penn.* I say, it is my place to speak to matter of law; I am arraigned a prisoner; my liberty, which is next to life itself, is now concerned: you are many mouths and ears against me, and if I must not be allowed to make the best of my case, it is hard, I say again, unless you shew me, and the people, the law you ground your indictment upon, I shall take it for granted your proceedings are merely arbitrary.
>
> *Rec.* The question is, whether you are Guilty of this Indictment?
>
> *Penn.* The question is not, whether I am Guilty of this Indictment, but whether this Indictment be legal. It is too general and imperfect an answer, to say it is the common-law, unless we knew both where and what it is. For where there is no law, there is no transgression; and that law which is not in being, is so far from being common, that it is no law at all.
>
> *Rec.* You are an impertinent fellow, will you teach the court what law is? It is "Lex non scripta" that which many have studied 30 or 40 years to know, and would you have me to tell you in a moment?
>
> *Penn.* Certainly, if the common law be so hard to be understood, it is far from being very common; but if the lord Coke in his Institutes be of any consideration, he tells us, That Common-Law is common right, and that Common Right is the Great Charter-Privileges . . . .

> *Rec.* Sir, you are a troublesome fellow, and it is not for the honour of the court to suffer you to go on.
>
> *Penn.* I have asked but one question, and you have not answered me; though the rights and privileges of every Englishman be concerned in it.
>
> *Rec.* If I should suffer you to ask questions till tomorrow morning, you would be never the wiser.
>
> *Penn.* That is according as the answers are.
>
> *Rec.* Sir, we must not stand to hear you talk all night.
>
> *Penn.* I design no affront to the court, but to be heard in my just plea: and I must plainly tell you, that if you will deny me Oyer of that law, which you suggest I have broken, you do at once deny me an acknowledged right, and evidence to the whole world your resolution to sacrifice the privileges of Englishmen to your sinister and arbitrary designs.
>
> *Rec.* Take him away. My lord, if you take not some course with this pestilent fellow, to stop his mouth, we shall not be able to do anything tonight.
>
> *Mayor.* Take him away, take him away, turn him into the baledock.[61]

Mr. Justice Douglas then posed the question:

> The panel of judges who tried William Penn were sincere, law-and-order men of their day. Though Penn was acquitted by the jury, he was jailed by the court for his contemptuous conduct. Would we tolerate removal of a defendant from the courtroom during a trial because he was insisting on his constitutional rights, albeit vociferously, no matter how obnoxious his philosophy might have been to the bench that tried him? Would we uphold contempt in that situation?[62]

That the jury acquitted William Penn[63] may be a sufficient answer to the concerns voiced by Mr. Justice Douglas. A fair opportunity to make a reasoned appeal to the jury is a political safeguard more compatible with our society's democratic values than would be the right to disrupt the trial, even only by "vociferous" insistence on what the defendant believes to be his constitutional or other legal rights.

However, Justice Douglas' questions invite inquiry into the possible need for broadening the rights of a defendant in such a trial in the areas of *vior dire* examination and peremptory challenges and, indeed, in our basic concepts of what kind of community

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[61] *Id.* at 353-55 quoting from The Trial of William Penn, 6 How. St. Tr. 951, 958-959.

[62] Illinois v. Allen, 397 U.S. 337, 355 (1970).

[63] In the trial of William Penn, the court sent the jury out to deliberate six times before it finally accepted the verdict of not guilty, detaining them all night without any physical comforts, and finally fined them for contempt because they refused to return a verdict of guilty. Eight of the jurors paid their fines, but on appeal by the remaining four, the judgments of contempt were set aside, in an opinion which vindicated the right of the jury, *inter alia*, to resolve what the law is. Nager, *The Jury That Tried William Penn*, 50 A.B.A.J. 168 (1964).

cross-section or "mix" should be represented on the jury. It may also be that we have reached a point in history where dissent (and concomitant concern about it) has risen to such a level that there should be restored to the jury its historical role as a political institution. As suggested by Jon M. Van Dyke, visiting Fellow of the Center for the Study of Democratic Institutions, perhaps the time has come to reconsider the holding of *Sparf v. United States*[64] and to replace our present standard instruction that the jury must follow the law as given to it by the court with an instruction that "although they are a public body bound to give respectful attention to the laws, they have the final authority to decide whether or not to apply a given law to the acts of the defendant on trial before them."[65] Mr. Van Dyke proposes:

> More explicitly, jurors should be told that they represent their communities and that it is appropriate to bring into their deliberations the feelings of the community and their own feelings based on conscience. Finally, they should be told that, despite their respect for the law, nothing would bar them from acquitting the defendant if they feel that the law as applied to the factual situation before them would produce an inequitable or unjust result.[66]

THE SUMMARY CONTEMPT POWER

The power of a trial judge to punish summarily for criminal contempt has been recognized at least since the reign of Edward I. History records that in 1306 a witness was imprisoned for continuous refusal to answer questions and in 1329 the summary contempt power was used by a court to punish an outburst in the courtroom.[67]

A statement of when a trial judge may use the extraordinary power of summary punishment was formulated by the United States Supreme Court in *In Re Oliver*, 333 U.S. 257 (1948):

> Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements

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[64] 156 U.S. 51 (1895).

[65] Some may feel this is a time to preach greater respect for the law, rather than to invite jurors to reject it, but Mr. Van Dyke's suggestion is hardly revolutionary. It is drawn from a common view of the jury's function in the early days of the Republic which is still the ordinary charge in some states, such as Maryland. See: Sparf v. United States, 156 U.S. 51, 64-103, 110-183 (1895).

[66] Van Dyke, *The Jury as a Political Institution*, THE CENTER MAGAZINE, March/April, 1970, at 26.

[67] FOX, CONTEMPT OF COURT, 50-53 (1927); Comment, *Summary Contempt: A Sword or Shield?*, 2 STAN. L. REV., 763, n.1 (1950).

> includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public. . . .
>
> . . . The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of "demoralization of the court's authority."[68]

This narrow view of when a judge can impose summary punishment is now part of the Federal Rules of Criminal Procedure. Rule 42(a) provides that a defendant ". . . may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court."[69] In other contempt proceedings the defendant must be given notice and hearing as provided for in Rule 42(b).[70]

Delay in the use of the power to punish summarily for contempt until the conclusion of the trial was approved in *Sacher v. United States*,[71] where the Supreme Court upheld Judge Medina's sentencing of certain Smith Act defendants and some of their attorneys to terms of from four to six months at the conclusion of the trial. Judge Hoffman's similar use of the summary contempt power at the conclusion of the trial of the so-called "Chicago Seven" (or "Eight") to impose sentences which cumulated to periods as long as four years has generated a storm of controversy[72] and is likely to result in the re-examination of the entire area of the summary contempt power.[73]

Professor Harry Kalven, Jr. in the introduction to *Contempt*, observed:

> Moreover, the contempt power has been summary, permitting the

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[68] In Re Oliver, 333 U.S. 257, 275, 278 (1948).

[69] Groppi v. Leslie, 436 F.2d 326 (7th Cir. 1970).

[70] United States v. Willett, 432 F.2d 202 (4th Cir. 1970).

[71] 343 U.S. 1 (1952).

[72] Clark, *Preface* to CONTEMPT, TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY 10 at viii (1970) (hereinafter cited as CONTEMPT), states:

> [W]e must never value decorum over justice. If the rule of law is to prevail . . . [i]t must never react in emotion. If the system is so frail that it cannot cope with the events in Chicago, the days ahead will be turbulent indeed. . . .
>
> At the very least the summary conviction of the defendants for contempt at the trial's end by the very judge involved and the cumulation of separate citations of contempt to impose sentences up to four years is impermissible by any standard of justice—or so far as I can see—law.

[73] *See* Cheff v. Schnackenberg, 384 U.S. 373 (1966) where the court held that summary criminal contempt can be utilized only if the penalty does not exceed imprisonment for a period of six months; otherwise the defendant is entitled to a jury trial. *See also* Hilts, *The Increasing Use of The Power of Contempt*, 32 MONT. L. REV. 183 (1971).

> trial judge to proceed to adjudge men guilty of crime without any of the elaborate apparatus of the criminal law and procedure. There is no indictment, no time to prepare a defense, no jury; the judge is the witness, the prosecutor, and the judge; and he plays these roles at a time when he may well be vulnerable to anger.
>
> Judge Hoffman did not, of course, invent the procedures he was using so vigorously. The contempt power, with all its anomalies, has a long history and is deeply embedded in Anglo-American legal traditions. Happily, there have not been many occasions for testing it under contemporary circumstances. The Chicago trial, if it does nothing else, may force us to recognize that the contempt power is a major part of our legal structure and as deserving of careful scrutiny in these days of dissent and unrest as are issues of speech and political freedom under the First Amendment.
>
> The appeals of the contempts may pose an acute dilemma for the reviewing courts. The defense tactics may be read as the decisive proof that strong measures of discipline are needed if the trial process is not to be brought to its knees; Judge Hoffman's identifying and punishing 175 "crimes" committed during the trial may be read as equally strong proof that the exercise of the contempt power needs to be brought into line with the basic traditions of the legal system.[74]

With the contempt convictions imposed by Judge Hoffman the subject of impending appellate review, it would be both inappropriate and unproductive to speculate about the present state of the law in this controversial area. Clarification will soon come from a more reliable, authoritative source, re-examining the question of whether punishment for summary contempt may still be delayed until the end of the trial and deciding whether sentences may be so cumulated as to exceed six months.

Regardless of how these questions are settled, however, many factors make it appropriate to consider alternatives to the exercise of such summary powers.

The possible use of conditionally-imposed sentences (as in civil contempt proceedings) before or during the trial is suggested by at least one passage in the *Allen* opinion:

> Another aspect of the contempt remedy is the judge's power, when exercised consistently with state and federal law, to imprison an unruly defendant such as Allen for civil contempt and discontinue the trial until such time as the defendant promises to behave himself. This procedure is consistent with the defendant's right to be present at trial, and yet it avoids the serious shortcomings of the use of shackles and gags.[75]

In *Shillitani v. United States*, 384 U.S. 364 (1966), the Su-

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[74] Kalven, *Introduction* to CONTEMPT, at xiii (1970).

[75] Illinois v. Allen, 397 U.S. 337, 345 (1970). This is similar to the technique being used by Judge Murtagh in the "Black Panther" trial in New York.

preme Court upheld the use of this technique against a witness who refused to answer questions before a grand jury. There, the court's order contained a clause which allowed the contemnor to purge himself, and the Supreme Court pointed out that when purging oneself became impossible (in this case when the grand jury was discharged) further imprisonment would be unlawful.[76]

An inherent limitation in such conditional, coercive use of the contempt power of the court lies in the fact that an obdurate defendant can frustrate the court's purpose. As Justice Black points out in *Allen*:

> *It must be recognized, however, that a defendant might conceivably, as a matter of calculated strategy, elect to spend a prolonged period in confinement for contempt in the hope that adverse witnesses might be unavailable after a lapse of time.* A court must guard against allowing a defendant to profit from his own wrong in this way.[77]

Other innovative ways of coping with disorderly and disruptive tactics have been suggested, some of which involve serious ethical and legal problems. For example, control of a defendant's behavior by the use of drugs which do not affect his mental alertness; barring the press or public from the trial; or, conversely, televising the entire proceedings—presumably to put everyone—including the court and prosecution—on his best behavior; use of "Eichman"-type booths, etc.

This review of present remedies, however, suggests that the existing means of coping with such conduct, if used promptly and vigorously when necessary, but with appropriate restraint, are sufficient to meet the problems which lie ahead.

To quote Mr. Ramsey Clark once again:

> The failures at Chicago were failures of men and emotion. . . . But . . . Chicago offers no substantial evidence that our institutions of justice are inadequate. The principles of our judicial system will suffice if reason can conquer emotion.[78]

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[76] *See* Reina v. United States, 364 U.S. 507 (1960).

[77] Illinois v. Allen, 397 U.S. 337, 345 (1970) (emphasis added).

[78] Clark, *Preface* to CONTEMPT, at viii (1970).