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In addition, it is ironic that the *Jones* court should say that in lieu of applying the *New York Times* standard, it would apply the "constitutionally well-balanced" rule applicable to reports of judicial proceedings.[36] The *New York Times* opinion explicitly states that a rule requiring publishers to guarantee the truth of their publications is inconsistent with the first and fourteenth amendments.[37] In the light of such a statement and in the absence of any express exceptions, it appears that the rule applied in *Jones*, a rule requiring a guarantee of accuracy, is contrary to the Constitution.

IV. CONCLUSION

It was once written of the law of defamation: "[P]erhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomolies [*sic*]. It is, as a whole, absurd in theory, and very often mischievous in its practical operation."[38] Sixty-seven years later the law of defamation, although somewhat altered through time, still operates mischievously. The holding in *Jones* is supported by the broad reach of pre-*New York Times* precedent, but it is difficult to understand how such precedent can now stand.

It appears that the separate standard will remain until this particular point is brought before the Supreme Court, at which time the Court may wish to bring this exception within the realm of the *New York Times* decision. This would mean that at least with respect to reports of judicial proceedings that are very much in the public eye, or proceedings that involve public officials or figures, the plaintiff would have to allege and prove actual malice in order to recover for libel—regardless of the inaccuracy, unfairness, or impartiality of the report. Such a decision is called for in order to eradicate yet another anomaly that has arisen in the law of defamation.

Wayne A. Johnson

Mayberry v. Pennsylvania: Due Process Limitation in Summary Punishments for Contempt of Court

Mayberry and two codefendants were tried in a state court for prison break[1] and holding hostages in a penal institution.[2] Although court-appointed counsel was available, the defendants represented themselves.[3] During the course of the trial and in open court Mayberry referred to the trial judge as a "dirty sonofabitch," "dirty, tyrannical old dog," "bum," "stumbling dog," "nut," and "fool." Mayberry also told the trial judge to "go to Hell" and to "keep his

[36] *Id.*
[37] 76 U.S. at 279.
[38] Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

[1] The law allegedly violated was PA. STAT. ANN. tit. 18, § 4315 (1963).
[2] *Id.* § 4723.1.
[3] PA. CONST. art. I, § 9 authorizes defendants in criminal cases to represent themselves.

mouth shut," and further charged the judge with attempting to run a "Spanish Inquisition." At the conclusion of the trial, which resulted in a verdict of guilty, the judge also found the defendants guilty of contempt.[4] Mayberry received one to two years for each of eleven instances of contemptuous conduct, or a total of eleven to twenty-two years. The Supreme Court of Pennsylvania affirmed,[5] and the United States Supreme Court granted a writ of certiorari.[6] *Held, vacated and remanded*: The due process clause of the fourteenth amendment requires that a defendant in state criminal contempt proceedings be given a public trial before another judge when the judge who was the personal target of the contemptuous acts waits until the end of the trial to act. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

I. THE SCOPE OF THE CONTEMPT POWER

Contempt of court is any act which is intended to obstruct, disrupt, or hinder the judicial process, or which is calculated to lessen the authority of the court or its dignity.[7] Contempts of court are usually classified as either direct or indirect contempts. Generally speaking, a contempt is direct if it is committed in the presence of the judge during the course of the trial,[8] and it is indirect if committed out of the presence of the court.[9]

Inherent power to punish for contempt and to punish summarily those contempts committed in the presence of the court has long been recognized as essential to the preservation of order in judicial proceedings.[10] The sentence for contempt committed in the court's presence is within the court's discretion, and is open to reversal only for abuse of discretion.[11]

In several instances, the Supreme Court has limited the power of the judge to assess punishment for direct contempts. In *Cheff v. Schnackenberg*[12] the Court held that federal judges may not impose sentences exceeding six months

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[4] PA. STAT. ANN. tit. 17, § 2041 (1963) authorizes Pennsylvania courts to inflict summary punishments for contempts of court "[t]o the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice."

[5] Commonwealth v. Langnes, 434 Pa. 478, 255 A.2d 131 (1969).

[6] 397 U.S. 1020 (1969).

[7] Contempts are also classified as civil or criminal. As distinguished from criminal contempts, civil contempts involve acts of disobedience consisting solely of refusing to do what has been ordered, not of doing what has been prohibited. Thus, the punishment for civil contempt is coercive or remedial, rather than punitive. Shillitani v. United States, 384 U.S. 364, 369-70 (1966). *See also* Ong Hing v. Thurston, 101 Ariz. 92, 416 P.2d 416 (1966).

[8] A direct contempt is one committed in open court in the ocular presence of the judge or in any place set apart for the use of any constituent part of the court. *In re* Estate of Melody, 42 Ill. 2d 451, 248 N.E.2d 104 (1969).

[9] *Ex parte* Ratliff, 117 Tex. 325, 3 S.W.2d 406 (1928). *See also* Ong Hing v. Thurston, 101 Ariz. 92, 416 P.2d 416 (1966).

[10] The Supreme Court has said:

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

Ex parte Robinson, 86 U.S. (20 Wall.) 505, 510 (1873).

[11] United States v. Galante, 298 F.2d 72 (2d Cir. 1962).

[12] 384 U.S. 373 (1966).

for criminal contempts without a jury trial.[13] Later, in *Bloom v. Illinois*[14] the Court provided the contemnor with the same constitutional right to a jury trial as any other criminal defendant. Since the constitutional guarantees of jury trial in article III[15] and the sixth amendment[16] are limited to offenses that are not "petty" offenses, a judge can assess punishment for "petty" contempts without a jury.[17] Conversely, punishments for "serious" contempts must necessarily be imposed by a jury.[18] In *Duncan v. Louisiana*[19] the Supreme Court extended the right of jury trial to defendants in state criminal cases that, were they to be brought in federal court, would come within the sixth amendment guarantee. Thus, state court judges may impose sentences for serious contempts only with the aid of a jury. Finally, in *Frank v. United States*[20] the Court held that judges could impose sentences for criminal contempts of up to six months imprisonment and up to five years probation without a jury trial. Thus, the distinction between petty and serious contempts is the length of the sentence imposed.

If a person is cited for separate and distinct acts of contempt as they are committed, at the end of the trial the judge may add together cumulatively penalties for those different contempts committed at varying stages of the trial.[21] However, if a series of acts constitutes but one contempt, or the same contempt is permitted to continue for several days, there cannot be separate punishment for each separate act or delay.[22] In *Bloom* the Court gave implicit approval to cumulative sentences by holding that a judge must be able to punish all petty contempts as incident to the power to preserve order in the courtroom. If cumulative sanctions were not available as a restraint, the first contempt would effectively offer immunity for further violations.[23]

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[13] The Court subsequently held in Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968), that sentences under six months are considered to be petty.

[14] "We accept the judgment of *Barnett* and *Cheff* that criminal contempt is a petty offense unless the punishment makes it a serious one; but, in our view, dispensing with the jury in the trial of contempts subjected to severe punishment represents an unacceptable construction of the Constitution . . . ." Bloom v. Illinois, 391 U.S. 194, 198 (1968).

[15] "The trial of all crimes . . . shall be by jury." U.S. CONST. art. III, § 2.

[16] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and be informed of the nature and cause of the accusation . . . ." U.S. CONST. amend. 6.

[17] Criminal contempts are not subject to jury trial as a matter of constitutional right. Except when specifically precluded by statute, courts have the power to proceed summarily in contempt matters, regardless of the flagrancy of the offense. The severity of the sentence imposed, however, may, irrespective of the flagrancy of the offense, entitle an alleged contemnor to the benefit of a jury trial. United States v. Barnett, 376 U.S. 681 (1964).

[18] *See* Cheff v. Schnackenberg, 384 U.S. 373 (1966), in which the Court held that federal courts are required to grant a jury trial when the contempt punishment is something more than a petty offense.

[19] 391 U.S. 145 (1968).

[20] 397 U.S. 147 (1969).

[21] *See* Bullock v. United States, 265 F.2d 683 (6th Cir. 1959).

[22] A perplexing problem is distinguishing a single contempt from several contempts. In Gautreaux v. Gautreaux, 220 La. 564, 57 So. 2d 188 (1952), 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 indistinguishable therefrom.

[23] *See* Henderson v. James, 52 Ohio St. 242, 39 N.E. 805 (1895). The constitutionality of cumulative sentences for contempts will likely be determined by the Supreme Court in the appeal of the "Chicago Seven."

In *Illinois v.Allen*[24] the Supreme Court held that a defendant who continued to disrupt his trial could be removed from the courtroom and his trial continued in his absence.[25] The disruptive defendant can, however, regain the right to be present in the courtroom as soon as he is willing to conduct himself properly. The Court in *Allen* found two other constitutionally permissible methods of commanding order in the courtroom: (1) physical restraint; and (2) citation of the defendant for contempt of court.[26] In addition, the Court indicated that a judge may, acting consistently with state and federal law, imprison an unruly defendant until he promises to behave.[27]

II. CONTEMPT AND DUE PROCESS REQUIREMENTS

The Supreme Court has traditionally held that the power of courts to punish contempts in the face of the court without further proof of facts and without the aid of a jury is not violative of due process of law.[28] The sixth amendment rights of notice, hearing, confrontation and counsel, as well as the due process process clause of the fourteenth amendment, have traditionally been held inapplicable to contempts committed in the presence of the court.[29] If the contempt is not committed in the presence of the court, the Supreme Court has stated: "Due process of law, therefore, in the prosecution of contempt . . . requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense . . . ."[30] In *Sacher*, although the trial judge waited until the end of the trial to impose punishment for contempt, the Court reasoned that if they were to hold that summary punishment can be imposed only if the judge acts the instant of the contempt, it would be an incentive to pronounce, while smarting under the irritation of the personal attack, what should be a well-considered judgment.[31]

When a defendant insults or ridicules a particular judge, that judge's decision on contempt charges may well be dictated by emotion. In a dissenting opinion in *Green v. United States*[32] Justice Black reasoned that in such a situation a judge is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused—thus denying the defendant an indispensable element of due process of law.[33] The sixth amendment does not specify that the judge must be unbiased, but the principle is fundamental to our idea of a fair trial, and support for it has been found

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[24] 397 U.S. 337 (1970). *See* Note, *The Power of the Judge To Command Order in the Courtroom: The Options of Illinois v. Allen*, 65 NW. U.L. REV. 671 (1970).

[25] 397 U.S. at 343-44.

[26] *Id.* at 345.

[27] *Id.* at 344.

[28] The power of the courts to punish contempts in the face of the court without further proof and without the aid of a jury is in accord with due process of law. MacInnis v. United States, 191 F.2d 157 (9th Cir.), *cert. denied*, 342 U.S. 953 (1951).

[29] *See* Note, *Summary Punishment for Contempt: A Suggestion That Due Process Requires Notice and Hearing Before an Independent Tribunal*, 39 S. CALIF. L. REV. 463 (1966).

[30] Cooke v. United States, 267 U.S. 517, 537 (1925). *See also Ex parte* Terry, 128 U.S. 289 (1888).

[31] Sacher v. United States, 343 U.S. 1, 11 (1952).

[32] 356 U.S. 165 (1958).

[33] *Id.* at 199 (dissenting opinion).

in the requirements of due process in the fifth and fourteenth amendments.[34] In *Cooke v. United States* Chief Justice Taft stated:

> The power of contempt which a judge must have and exercise . . . is important and indispensable. But its exercise is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend over backward and injure the authority of the court by too great leniency . . . a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.[35]

A judge may be disqualified from sitting at the trial of a case for various reasons, such as interest,[36] relationship,[37] bias or prejudice,[38] and prior participation in or in connection with the cause.[39] In several cases the Supreme Court has considered the question of whether a judge should be disqualified from hearing contempt proceedings because the contempt was committed against him and he waited until the end of the trial to assess punishment. Although it is well settled that a judge is not disqualified solely on account of the fact that the contempt was committed against himself,[40] it is not clear whether a judge is disqualified solely because he waits until the end of the trial to assess punishment.

The Court has generally looked to the facts of each case to determine the extent of the involvement of the trial judge. Early Supreme Court cases suggested that the judge would not be disqualified regardless of the intensity of his involvement with the contemnor. In *Fisher v. Pace*[41] the Court held that the judge's personal involvement did not justify a substitution of judges, even though the judge was embroiled in a heated argument with the contemnor.[42] The Court later adopted the view that a presiding judge's strong emotional bias might be a sufficient basis for disqualification. In *Offutt v. United States* the Court set aside a summary citation of contempt in which the judge had been involved in an "intermittently continuous wrangle" with the contemnor, the Court stating that the judge had become so "personally embroiled" with the contemptuous attorney as to make the judge unfit to sit in judgment on the contempt charge.[43] More recently the Court modified its position in *Offutt* by holding in *Ungar v. Sarafite*[44] that merely a strong emotional involvement on

[34] In *In re* Murchinson, 349 U.S. 133, 136 (1955), the Court said: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases."

[35] 267 U.S. 517, 539 (1925).

[36] American Cyanamid Co. v. Federal Trade Comm'n, 363 F.2d 757 (6th Cir. 1966); Roberson v. United States, 249 F.2d 737 (5th Cir. 1957).

[37] MacNeil Bros. v. Cohen, 264 F.2d 186 (1st Cir. 1959).

[38] Knapp v. Kinsey, 232 F.2d 458 (6th Cir. 1956); Garden Homes, Inc. v. United States, 210 F.2d 281 (1st Cir. 1954); Mitchell v. United States, 126 F.2d 550 (10th Cir. 1942); United States v. Thomas, 299 F. Supp. 494 (E.D. Mo. 1968).

[39] *In re* Murchinson, 349 U.S. 133 (1955); United States v. Vasilich, 160 F.2d 631 (3d Cir. 1947); United States v. Maher, 88 F. Supp. 1007 (N.D. Me. 1950).

[40] *See* Sacher v. United States, 343 U.S. 1 (1952); Cooke v. United States, 267 U.S. 517 (1925); United States v. Shipp, 203 U.S. 563 (1906).

[41] 336 U.S. 155 (1949).

[42] *Id.* at 163.

[43] 348 U.S. 11, 17 (1954).

[44] 376 U.S. 575 (1964).

the part of the judge did not require disqualification. In *Ungar* the Court held that a lawyer's challenge, though "disruptive, recalcitrant, and disagreeable commentary," was still not "an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification."[45] On the other hand, it seems well settled that a judge is not disqualified from punishing as contempt an attack upon him personally when he acts immediately and without delay.[46]

III. MAYBERRY V. PENNSYLVANIA

In *Mayberry v. Pennsylvania*[47] the Supreme Court held that the due process clause of the fourteenth amendment requires that the contempt be tried before another judge when the judge who was personally the target of the contemptuous acts waits until the end of the trial to act. The majority stated that such a holding was appropriate because: (1) marked personal feelings were present on both sides; and (2) "[w]hether the trial be federal or state, the concern of due process is with the fair administration of justice."[48] Declining to follow the reasoning of the Court in *Sacher* that summary punishment for contempt is an exception to the requirements of due process even when all punishment is assessed at the end of the trial,[49] the majority stated that "[due process] can be satisfied only if the judgment of contempt is vacated so that on remand another judge, not bearing the sting of these slanderous remarks and having the impersonal authority of the law, sits in judgment on the conduct of petitioner as shown by the record."[50]

Thus, the Court avoided any problem of reconciling its prior interpretation of the trial by jury limitation on summary contempt sentences exceeding six months,[51] concentrating instead on the *Fisher*, *Offutt*, and *Ungar* line of reasoning that a judge may in some instances be disqualified from sitting in judgment on the contempt charge.[52] In so doing, the Court departed from its reasoning in *Sacher* that punishment for contempt should be a well-considered judgment rather than an act at the instant of the contempt,[53] and adopted instead a test that will likely encourage the prompt handling of the contempt. While recognizing that a judge cannot be driven out of a case, the Court stated: "[W]here, however, [the judge] does not act the instant the contempt is committed, but waits until the end of the trial, it is generally wise . . . to ask a fellow judge to take his place."[54] Thus, the Court adopted the reasoning of Chief Justice Taft in *Cooke*, but extended it to include a requirement based on due process that the contempt be tried before another judge.

The Court said that "[w]hether the trial be federal or state, the concern of

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[45] *Id.* at 584.
[46] *See* Cooke v. United States, 267 U.S. 517 (1925); Toledo Newspaper Co. v. United States, 237 F. 986 (6th Cir. 1916), *aff'd*, 247 U.S. 402 (1918).
[47] 400 U.S. 455 (1971).
[48] *Id.* at 465.
[49] *See* note 31 *supra*, and accompanying text.
[50] 400 U.S. at 466.
[51] *See* notes 13-21 *supra*, and accompanying text.
[52] *See* notes 36-46 *supra*, and accompanying text.
[53] Sacher v. United States, 343 U.S. 1, 11 (1952).
[54] 400 U.S. at 463-64.