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COMMENTS

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CAPITAL PUNISHMENT AFTER FURMAN

In June, 1972, the Supreme Court in *Furman v. Georgia* ruled "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[1] This ruling was the only point of agreement among the majority Justices in this five to four decision. All nine Justices wrote separate opinions.[2] What is the effect of this decision, and what avenues are open to mitigate its impact?

Justices Brennan and Marshall were the only members of the *Furman* majority to rule that the imposition of capital punishment under all circumstances violates the eighth amendment.[3] Both Justices adopted the test enunciated by the Supreme Court previously in *Trop v. Dulles*:[4] a punishment is cruel and unusual if it violates the dignity of man, as measured by evolving standards of decency that mark the progress of a maturing society.[5] Brennan considered four factors in determining that capital punishment did not comport with human dignity. Capital punishment is so severe as to be degrading to human dignity;[6] it is arbitrarily inflicted;[7] it offends contemporary society;[8] and it is excessive.[9] Justice Marshall agreed that capital punishment violated human dignity because it is excessive[10] and is unacceptable to contemporary society.[11]

The remaining majority opinions ruled more narrowly that the sentences of death in *Furman* violated the eighth amendment.[12] These opinions focused on the procedures under which the penalty was imposed and the constitutional problems created by those procedures,[13] not the constitu-

[1] 408 U.S. 238 (1972). Three separate cases were consolidated for this appeal. Defendant Furman was convicted of murder committed during an armed robbery, and sentenced to death. The Georgia supreme court affirmed this conviction. Furman v. Georgia, 225 Ga. 253, 167 S.E.2d 628 (1969). Defendant Jackson raped a woman while holding a pair of scissors to her throat. His conviction and death sentence was affirmed by the Georgia supreme court. Jackson v. Georgia, 225 Ga. 790, 171 S.E.2d 501 (1969). Defendant Branch was found guilty and sentenced to death for the rape of a woman during a robbery attempt. His conviction was similarly affirmed. Branch v. State, 447 S.W.2d 932 (Tex. Crim. App. 1969).

[2] Each dissenter joined in all dissenting opinions.

[3] U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The eighth amendment applies to the states. Robinson v. California, 370 U.S. 660 (1962).

[4] 356 U.S. 86, 100–01 (1958).

[5] 408 U.S. at 270 (Brennan, J., concurring); *Id.* at 329 (Marshall, J., concurring). The use of an evolving standard to determine whether a punishment violated the eighth amendment was first enunciated in Weems v. United States: "What is cruel and unusual may acquire meaning as public opinion becomes enlightened by humane justice." 217 U.S. 349, 378 (1910).

[6] 408 U.S. at 271 (Brennan, J., concurring). In comparison with all other punishments, death is uniquely degrading to human dignity. Only death involves the conscious infliction of physical suffering, in addition to the psychological suffering which precedes its imposition. By its very nature, it is a denial of the prisoner's humanity. *Id.* at 287–88.

[7] *Id.* at 274. Brennan employed statistics to show that capital punishment is applied only in a trivial number of cases. When a punishment is inflicted so rarely, the conclusion that it is being inflicted arbitrarily is inescapable. *Id.* at 291–95.

[8] *Id.* at 277. Brennan inferred contemporary disapproval of capital punishment from the progressive decline in the imposition of the death penalty and the current rarity of any executions. *Id.* at 299.

[9] *Id.* at 279. A punishment is considered excessive when a less severe penalty would achieve the social and penal purposes for which the punishment is inflicted. Justice Brennan concluded that a lesser penalty could achieve deterrence, retribution, and the protection of society as effectively as death. *Id.* at 301–05.

[10] *Id.* at 358–59 (Marshall, J., concurring). Like Justice Brennan, Marshall defines excessive in terms of whether a lesser penalty would achieve the purposes that capital punishment is purported to achieve. *Id.* at 342.

[11] *Id.* at 369. While evidence of public opinion is inconclusive and contradictory, Justice Marshall declared that if the average citizen was fully informed as to the purposes of the penalty and its liabilities, he would find the death penalty unacceptable. *Id.* at 361.

[12] "I do not at all intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would comport with the Eighth Amendment." 408 U.S. 238, 311 (White, J., concurring). "The constitutionality of capital punishment in the abstract is not, however, before us in these cases." 408 U.S. 238, 309 (Stewart, J., concurring).

[13] The White opinion is specifically limited to a state statute which authorizes but does not mandate the im-

tionality of the death penalty itself. Justices White and Stewart ruled that the death penalty was excessive in the instant cases, and therefore violated the eighth amendment. White ruled that under a system which permits most capital offenders to escape death, the penalty can have only minimal deterrent or retributive effect.[14] Justice Stewart also noted that lesser penalties were authorized for these capital offenses,[15] which indicated that the legislatures believed death was excessive for these crimes.[16] Further, the rarity of jury imposed death sentences evidenced that the public considered the death penalty to be excessive for capital crimes.[17] Justice Douglas attacked a system which allows the discriminatory imposition of death, claiming such discrimination violated the ban against cruel and unusual punishments.[18]

The dissenters unanimously agreed that the decision to abolish the death penalty was a matter peculiarly suited for legislative rather than judicial action.[19] Although admitting the eighth amendment compels judicial review, they counseled judicial non-involvment,[20] reasoning that it is a legislative duty to determine appropriate penalties. When the legislatures of forty-one states adopt the death penalty for certain crimes, the Court should defer to their judgment.[21] Both Justices Burger and Powell ruled there is insufficient proof that capital punishment violates basic human dignity to justify judicial abolition of capital punishment in all cases.[22]

The dissenting Justices also rejected the majority ruling that a punishment which is excessive violates the eighth amendment. They asserted the eighth amendment does not encompass an inquiry into whether a punishment is excessive.[23] Nevertheless, Justice Powell concluded that the imposition of capital punishment for rape and murder would not be excessive under all circumstances.[24]

Similarly, the dissenters asserted that arbitrary, infrequent, and discriminatory applications of capital statutes do not fall within the proscription against cruel and unusual punishments.[25] Chief Justice Burger concluded that no empirical data reveals arbitrary or discriminatory sentencing practices.[26]

Thus, in *Furman* only two Justices ruled that capital punishment is unconstitutional under all circumstances, a position specifically rejected by three of the dissenters. The narrow holding of the majority is that the imposition of capital punishment under the procedures of the instant cases violates the eighth amendment. The penalty is so infrequently imposed that it is excessive and is discriminatorily and arbitrarily applied. It is likely that the dissenters will accept this holding as precedent.[27] The tendency of the Burger court has

position of death for murder and rape, and where death has been only infrequently imposed. *Id.* at 311.

[14] *Id.* at 312. A lesser penalty would be just as effective in achieving retributive and deterrent aims.

[15] Under Texas law, murder is punishable by death or imprisonment over two years. TEX. PEN. CODE ANN. art. 1257 (1925). The sentence for rape is death or imprisonment of at least five years. *Id.* at art. 1189. In Georgia, a convicted murderer faces death or life imprisonment. GA. CODE ANN. § 26-1101 (1971). A rapist faces death, life imprisonment, or a prison term of 1–20 years. *Id.* at § 26-2001.

[16] 408 U.S. at 309 (Stewart, J., concurring).

[17] *Id.*

[18] *Id.* at 257. Justices Stewart and White referred to this phenomenon of discriminatory and arbitrary application. "[T]he petitioners are among a capriciously selected random handful upon whom the sentence has in fact been imposed. *Id.* at 309. "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring).

[19] *Id.* at 432 (Burger, C.J., dissenting); *Id.* at 410 (Blackmun, J., dissenting); *Id.* at 418 (Powell, J., dissenting); *Id.* at 465 (Rehnquist, J., dissenting).

[20] *Id.* at 384 (Burger, C. J., dissenting); *Id.* at 433 (Powell, J., dissenting). The dissenters accepted the validity of the evolving standards of decency test. *See* note 5 *supra*. *Id.* at 383 (Burger, C.J., dissenting); *Id.* at 409 (Blackmun, J., dissenting); *Id.* at 430 (Powell, J., dissenting).

[21] *Id.* at 384 (Burger, C.J., dissenting); *Id.* at 410 (Blackmun, J., dissenting); *Id.* at 432 (Powell, J., dissenting). Chief Justice Burger stated that in a democracy, it is the legislature which responds to changes in public opinion and mirrors public opinion. Since forty-one states have approved some form of capital punishment, its acceptance by contemporary society may be presumed. *Id.* at 384.

[22] *Id.* at 384 (Burger, C.J., dissenting); *Id.* at 431 (Powell, J., dissenting). Both Justices advocated placing a heavy burden of proof on anyone attempting to prove that capital punishment violates basic human dignity. Legislative approval of capital punishment creates a presumption of validity. *Id.* at 384. This presumption is further strengthened by prior Supreme Court decisions which support the constitutionality of the death penalty. *Id.* at 380; *Id.* at 421–27 (Powell, J., dissenting).

[23] *Id.* at 394 (Burger, C.J., dissenting); *Id.* at 451 (Powell, J., dissenting). Burger stated that earlier Supreme Court decisions have considered excessiveness only in terms of the disproportionality of the punishment to the crime. *Id.* at 392–94. Further, this issue involves questions of the validity of penal purposes, and the effectiveness of punishments to achieve these purposes. Burger declared these questions to be beyond the scope of judicial inquiry. *Id.* at 396.

[24] *Id.* at 456.

[25] *Id.* at 397 (Burger, C.J., dissenting).

[26] *Id.* at 399.

[27] Justice Harlan was a good example of a Justice

been to follow the precedents of the Warren era.[28] In an opinion written by Justice Blackmun, the Court overturned the Illinois capital punishment statute, citing the *Furman* decision.[29] Any future capital statutes must correct those procedures which allow the infrequent and discriminatory application of capital punishment.

Reactions of State Courts and Legislatures

No lower court has yet ruled that any existing state procedures comply with the standards established in *Furman*.[30] State courts have focused on the existence of jury discretion to sentence a capital offender to a lesser penalty.[31] This focus is evident in recent decisions of the Delaware and North Carolina supreme courts.[32] In Delaware, the punishment for first-degree murder is death.[33] Under a separate statute, however, the jury can recommend mercy, and the judge may then sentence the accused to life imprisonment.[34] The Delaware supreme court struck down only the mercy statute: death remains as the mandatory sentence for murder in the first degree.[35] In North Carolina, the punishment for rape is death, but the statute allows the jury to recommend life imprisonment.[36] The North Carolina supreme court severed the mercy section from the rest of the statute, ruling that in light of *Furman* it violated the eighth amendment.[37] Death is now mandatory for rape in North Carolina. Both courts have ruled that *Furman* demands the elimination of discretion in sentencing in capital cases.

The reactions in several state legislatures have also been concerned primarily with the elimination or restriction of the discretionary sentencing power. Three states, Illinois,[38] Indiana[39] and Colorado[40] have proposed mandatory death penalties for the conviction of certain specified crimes. This approach eliminates any discretion to select between death or imprisonment.

Florida has approved a new capital punishment statute which seeks to restrict the amount of discretion the jury and judge have, rather than eliminating it.[41] The statute reduces the number of capital crimes.[42] After a separate sentencing hearing, the jury can only *recommend* death or imprisonment, based on the existence of certain specified aggravating or mitigating circumstances.[43] The judge, if

dissenting in one opinion, and subsequently accepting the majority holding in later cases. *See* Orozco v. Texas, 394 U.S. 324, 327–28 (1969) (Harlan, J., concurring); Griffin v. California, 380 U.S. 609, 615–17 (1965) (Harlan, J., concurring); Aguilar v. Texas, 378 U.S. 108, 116 (1964) (Harlan, J., concurring).

[28] Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, SUPREME COURT REV. 265 (1971); Kalven, *Foreword, The Supreme Court, 1970*, 85 HARV. L. REV. 3, 5 (1971).

[29] Moore v. Illinois, 408 U.S. 786 (1972). All nine judges agreed that the Illinois capital punishment statute violated the standards established in *Furman*.

[30] *See* Eaton v. Capps, 348 F. Supp. 237 (N.D. Ala. 1972); State v. Speck, 52 Ill. 2d 284, 237 N.E.2d 699 (1972); Capler v. State, 268 So.2d 338 (Miss. 1972); State v. Bellue, 193 S.E.2d 121 (S.C. 1972); Huggins v. Commonwealth, 213 Va. 327, 191 S.E.2d 734 (1972). *See also* Moore v. Illinois, 408 U.S. 786 (1972).

[31] State v. Dickerson, 298 A.2d 761 (Del. 1972); Huggins v. Commonwealth, 213 Va. 327, 191 S.E.2d 734 1972).

[32] State v. Dickerson, 298 A.2d 761 (Del. 1972); State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1972).

[33] DEL. CODE ANN. tit. 11, § 571 (1953).

[34] *Id.* at § 3901.

[35] State v. Dickerson, — Del. —, — A.2d — (1972).

[36] N.C. GEN. STAT. § 14–21 (1966). The jury recommendation of mercy is binding on the trial judge.

[37] State v. Waddell, — N.C. —, — S.E.2d — (1972). The court reasoned that the ability of the jury to determine life or death violated the standards of *Furman v. Georgia*.

[38] The Illinois bill provides for mandatory death in cases of murder of elected officials or candidates for elected office; murder of policemen, firemen or prison guards; murder of two or more individuals; murder resulting from intentional destruction or disruption of community facilities or contamination of food products; killings resulting from airline or other hi-jackings; murders by contract; murders accompanying robberies, aggravated kidnaping or arson. Chicago Daily News, Dec. 12, 1972, at 15, col. 1.

[39] The Indiana proposal would make death mandatory in the following cases: killing a police, fire or corrections official; murder for hire; murder by detonation of an explosive; assassination; murder by a person previously convicted of first or second degree murder; murder by a person under life sentence; murder committed in a rape, arson, robbery or burglary attempt by a person previously convicted of any such offense; murder committed during a kidnapping; murder during the hi-jacking of any commercial vehicle. Chicago Sun-Times, Apr. 20, 1973, at 11, col. 1.

[40] The Colorado bill mandates death for felony murder, and the murder by a prisoner of a guard, fellow prisoner, hostage or bystander during an escape. N.Y. Times, Sept. 7, 1972, at 14, col. 4.

[41] *See* Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. CRIM. L. & C. 10 (1973), for an analysis of the new Florida capital punishment statute.

[42] The capital offenses are: Unlawful killing of a person by an individual engaged in arson, robbery, rape, burglary, kidnaping and air piracy; premeditated murder; unlawful throwing, placing or discharging of a destructive device or bomb; killing resulting from unlawful distribution of heroin by a person over 17, when use of heroin is a proximate cause of death. *Id.* at 17.

[43] The aggravating circumstances are limited as follows: (a) The capital felony was committed by a person under sentence of imprisonment; (b) The defendant was previously convicted of another capital felony involving the use or threat of violence to the person; (c) The defendant knowingly created a great risk of death to many

he determines death is appropriate, must state in a written opinion that aggravating circumstances outweigh mitigating circumstances.[44] Finally, there is an automatic right of appeal to the state supreme court as to both the conviction and the sentence.[45] Such an approach attempts to restrict the amount of discretion in deciding between death and a lesser punishment. Thus, reaction to *Furman* in both the courts and the legislatures has concentrated on the elimination or restriction of the discretion within the capital sentencing process.

Validity of post-Furman Reactions

This legislative and judicial concern with the existence of discretion in the procedures which lead to the death penalty is well-founded. The arguments of three of the majority Justices rest in part on the existence of discretion within the sentencing process. Justice White asserted that the death penalty was excessive, since its deterrent and retributive effect was greatly minimized by the infrequent utilization of the penalty.[46] Discretion contributes greatly to that infrequency. Justice Stewart noted that alternative penalties were available for the capital crimes in the instant cases. This indicated a legislative belief that capital punishment may be excessive even for capital crimes.[47] Finally, discretion allows the discriminatory sentencing practices which Justice Douglas ruled violated the eighth amendment.[48]

However, both remedies, the proposed mandatory death statutes and the Florida statute, rest on an assumption that the discretion proscribed in *Furman* is limited to the discretion of a judge or jury to impose death or not. Discretion may exist at other stages. The procedures of Texas and Georgia, involved in the instant case, reveal discretion at other than the sentencing stage.

Besides providing for alternative lesser penalties for capital crimes,[49] Texas law allows the exercise of discretion in its pardon and parole system. The governor, with the signed majority recommendation of the Board of Pardons and Parole, can commute the sentence or pardon a prisoner facing death.[50] Both parties then have absolute discretion in determining whether to carry out the death penalty. This discretion in sentencing and pardoning is not necessarily subject to judicial review. The Texas appellate court may not review the appropriateness of a death sentence.[51] The Texas supreme court may review the sentence, but no automatic right of appeal exists in capital cases.

In Georgia, the jury has the sole power to impose death[52] or a lesser penalty.[53] Both the governor and the Board of Pardons and Parole have discretion over the commutation of the death penalty.[54] There appears to be no automatic right of appeal in capital cases.

Further, in many jurisdictions the prosecutor may exercise his discretion prior to trial. The prosecutor may decide not to bring charges under the capital statute, but under a lesser-included offense. Also, he may accept a guilty plea to a lesser offense.

If *Furman* demands the elimination of all the discretion within the criminal system, then both the Florida law and the proposed mandatory death statutes will not pass the scrutiny of the courts. Both plans focus solely on the discretion in sentenc-

persons; (d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb; (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (f) The capital felony was committed for pecuniary gain; (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; (h) The capital felony was especially heinous, atrocious or cruel.

The mitigating circumstances are limited as follows: (a) The defendant has no significant history of prior criminal activity; (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (c) The victim was a participant in the defendant's conduct or consented to the act; (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor; (e) The defendant acted under extreme duress or under the substantial domination of another person; (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (g) The age of the defendant at the time of the crime.

The jury recommendation is to be by majority vote. *Id.* at 16.

[44] *Id.*

[45] *Id.*

[46] *See* note 14 *supra*. Justice Brennan also pointed to the infrequency of executions as an indicator of contemporary disapproval of capital punishment.

[47] *See* note 16 *supra*.

[48] *See* note 18 *supra*.

[49] *See* note 15 *supra*.

[50] TEX. CODE CRIM. PROC. ANN. art. 48.01 (1966).

[51] *Id.* at 42.04.

[52] GA. CODE ANN. § 26-3201 (1971).

[53] *See* note 15 *supra*.

[54] GA. CODE ANN. § 27-2701 (1971). The Board can commute the death sentence by unanimous vote only if the governor agrees to suspend the sentence. The governor can insure the execution, only the Board can prevent it.

ing, without dealing with any other inherent discretionary power.

The *Furman* opinions suggest a primary concern with the discretion of judge and jury to decide on life or death. In defining the scope of his opinion, Justice White spoke of a system which delegates to judge and jury absolute discretion to impose death.[55] Justice Douglas criticized the system where "the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied.... "[56] Justice Brennan also spoke of the discretion which abides in the judge and jury.[57] Similarly, the dissenters considered only the discretion of the jury in determining sentence.[58] Chief Justice Burger stated that jury discretion must be eliminated according to the majority opinions.[59]

There is no indication in any opinion of concern about other discretionary power over the execution of the death sentence. No evidence is offered concerning the abuse of such discretion or the harmful consequences thereof. Nonetheless, the rationale of the majority opinions could extend to all discretion within the criminal process. Although such an interpretation is possible, it is likely that the Court will restrict any inquiry into future laws to their effect on jury discretion in sentencing.

The various proposals for mandatory sentences[60] would completely eliminate the sentencing discretion of the judge and jury. But the inquiry into the validity of mandatory sentences does not end here. Further investigation is required, to discern whether the elimination of this discretion also eliminates the reasons for which the majority declared capital punishment to be cruel and unusual. Clearly, the problems raised by Justices White and Stewart are cured.[61] Mandatory death sentences would increase the number of capital offenders executed. Therefore, it would no longer be valid to argue that death is an excessive punishment because its infrequent imposition greatly reduces its deterrent and retributive effects. Also, legislative enactment of mandatory death statutes destroys the argument of Justice Stewart, since it would indicate a legislative decision that capital punishment is not excessive for certain crimes.

Justice Douglas, however, criticized discretion because it resulted in the discriminatory imposition of capital punishment.[62] Mandatory sentences may not eliminate this problem. Douglas recognized this by noting that a statute may be non-discriminatory on its face, yet be applied in a discriminatory manner.[63] The mandatory sentence could be restrictively applied to categories of crimes which are committed primarily by minority groups. Often the prosecutor can decide to charge the accused with a lesser, non-capital offense. Finally, the jury may refuse to convict.[64] Although only Justice Douglas ruled that discriminatory sentencing violated the eighth amendment, the fact of discimination was referred to in other opinions.[65] One result of *Furman* is that discriminatory application of death sentences may violate the eighth amendment. Notwithstanding the statements of personal distaste for mandatory sentences,[66] the Court will approve them if not discriminatorily applied.

The Florida statute, and other similar proposals,[67] may not be judicially approved. Besides the greater risks of discriminatory imposition, the Florida statute does not eliminate the problems raised by Justices White and Stewart. The jury use of standards to determine whether an accused

[55] 408 U.S. at 314.

[56] *Id.* at 255.

[57] After referring to the ruling in McGautha v. California, 402 U.S. 183 (1971) that juries may impose death without guidelines of any kind, he stated: "In other words, our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death." 408 U.S. at 295.

[58] In rejecting the majority argument that discriminatory imposition violates the eighth amendment, Justice Powell limited his opinion to the discretion inherent in sentencing. *Id.* at 449.

[59] *Id.* at 397.

[60] *See* notes 39–41 *supra.*

[61] *See* notes 14 & 16 *supra.*

[62] *See* note 18 *supra.*

[63] 408 U.S. at 257.

[64] The states and the federal government abandoned earlier mandatory sentences because of jury nullification. Juries, faced with the prospect that conviction meant death, often refused to convict. *See* McGautha v. California, 402 U.S. 183, 197–203 (1971).

[65] Justices Stewart and White referred to the phenomenon of discriminatory application of the death penalty. "[T]he petitioners are among a capriciously selected random handful upon whom the sentence has in fact been imposed. 408 U.S. at 309 (Stewart, J., concurring). "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring). But neither Justice based the constitutionality question on this fact.

Both Justices Brennan and Marshall cited the fact of arbitrary imposition to support their belief that capital punishment is unconstitutional in all cases because it does not comport with the dignity of man. *See* notes 7 & 11 *supra.*

Also, Justice Powell referred to the fact that the sanction of death falls more heavily on the relatively impoverished and underprivileged elements of society. 408 U.S. at 447.

[66] 408 U.S. at 401 (Burger, C.J., dissenting); 408 U.S. at 413 (Powell, J., dissenting).

[67] *See* note 44 *supra.*

should die may not increase the frequency of death sufficiently to defeat the inference of Justice White that the death penalty has only minimal deterrent and retributive effect.[68] Also, the legislative authorization of restricted discretion indicates a belief that capital punishment is not required for all capital crimes.[69] Statutes such as the one passed in Florida may not restrict discretion sufficiently to meet the requirements laid down in *Furman*.[70]

Another hurdle such laws face is the Court ruling in *McGautha v. California:*

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to *anything* in the Constitution.[71]

McGautha ruled that absolute jury discretion in sentencing was not unconstitutional; *Furman* ruled that jury discretion violated the eighth amendment. Although Chief Justice Burger claimed that *McGautha* was overruled,[72] it is possible to distinguish the two cases. The *Furman* decision did not rule that the mere presence of discretion in the jury violated the eighth amendment. Rather, discretion is unacceptable because it results in discrimination and makes the death penalty excessive. *Furman* proscribes discrimination and excessive penalties, not discretion.

If *McGautha* is not overruled, does it prevent the use of jury standards such as those contained in the new Florida statute? The *McGautha* Court cited several factors in upholding the constitutionality of jury discretion. The origin of jury discretion was in response to the problem of jury nullification. Faced with mandatory sentences, juries refused to convict.[73] A federal statute allowing jury discretion was tacitly upheld in *Winston v. United States*.[74] In recent years, no court has upheld a constitutional challenge against jury discretion.[75] Also, the Court in *McGautha* stated that standards to aid juries in determining the appropriate punishment are impossible to fashion. Even the draftsmen of the Model Penal Code agreed: "[T]he factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula. . . . "[76] Other than the Court's view that such standards are impossible to construct, these factors do not prevent the use of such standards if legislatively established.

But the *McGautha* opinion also cited language from *Witherspoon v. Illinois*[77] which emphasized the duty of the jury to reflect public opinion.

> The Court noted that one of the most important functions any jury can perform in making a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect the evolving standards of decency which mark the progress of a maturing society.[78]

If such language means that discretion can not be taken from the jury then the Florida statute is unconstitutional under *McGautha*.

Neither *Witherspoon* nor *McGautha* dealt with the constitutionality of legislatively enacted standards. The former case was concerned with whether the Illinois law effectively deprived the petitioner of trial by jury. In order to determine the effect of such a statute, it was necessary to define the

[68] *See* note 14 *supra*.

[69] *See* note 16 *supra*.

[70] Neither the Florida statute nor the Model Penal Code requires the jurors to follow these standards. Florida provides no check to insure that jurors actually used the standards in deciding whether to impose death or not. The Code draftsmen intend the Code only to help the jury in their determination.

[71] 402 U.S. 183, 207 (1971). *McGautha* involved two defendants, convicted of murder in California and Ohio, and sentenced to death. Both states allowed the jury to exercise absolute discretion as to whether the accused should live or die. Petitioners claimed that to allow such absolute discretion to impose or withhold death violated fourteenth amendment due process requirements.

[72] 408 U.S. at 400.

[73] 402 U.S. at 199.

[74] 172 U.S. 303 (1899). The Court reversed a conviction where the judge instructed the jury that a recommendation of mercy could be made only if mitigating circumstances were present. Such an instruction was ruled improper in light of the discretion placed in the jury by the federal statute in question.

[75] *See, e.g.*, Sims v. Eyman, 405 F.2d 439 (9th Cir. 1969); Segeura v. Patterson, 402 F.2d 249 (10th Cir. 1968); *In re* Ernst, 294 F.2d 566 (3rd Cir. 1961); Florida *ex rel.* Thomas v. Culver, 253 F.2d 507 (5th Cir. 1958). Furthermore, no state courts have ever upheld such a challenge.

[76] 408 U.S. at 205 (Justice Harlan quoting from Report 498, MODEL PENAL CODE § 201.6, comment 3, p. 71 (Tent. Draft No. 9, 1959)).

[77] 391 U.S. 510. This case concerned the constitutionality of the Illinois statute which allowed challenges for cause in murder trials of any juror who has scruples against or is opposed to capital punishment. The Court ruled the statute violated the sixth and fourteenth amendments.

[78] 402 U.S. at 202 (Harlan citing Witherspoon v. Illinois, 391 U.S. at 519).

role of the jury. Naturally that role was defined in terms of the prevailing practice of entrusting jurors with the discretion to choose between life and death.

> Guided by neither rule nor standard, *free to select or reject as it [sees] fit*, a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.[79]

However, such a role was not mandated by the Court.

Likewise in *McGautha*, the Court was not concerned with the permissability of such standards, but whether such standards were required. The language quoted from *Witherspoon* supported the claim that standards were not mandated, that certain considerations counsel against fashioning a judicial requirement of jury standards. Though not constitutionally mandated, the legislative adoption of standards, as in the Florida statute, was not constitutionally proscribed. The Florida statute, and others like it, should withstand constitutional challenges brought under *McGautha*.

The enactment of mandatory sentences and standards which significantly reduce jury discretion can correct the immediate reasons cited by Justices Stewart and White for declaring capital punishment excessive. Yet, if death is excessive for other reasons, capital punishment will still violate the eighth amendment. Whether future death statutes survive the test of excessiveness will depend on the interpretation of excessiveness adopted and the standard employed.

Historically, the Supreme Court has interpreted excessiveness in several ways. One interpretation was based on the reasoning that certain punishments were disproportionate to the crime. Before ruling that 15 years in chains at hard labor for falsifying a public document was cruel and unusual, the Court in *Weems v. United States* spoke of proportionality: "[T]hat imprisonment in the State prison for a long term of years might be so disproportionate to the offense as to constitute cruel and unusual punishment."[80] Both *Trop v. Dulles*[81] and *Robinson v. California*[82] held punishments unconstitutional because they were disproportionate to the crime. Although one dissenter would limit this proportionality test to a case by case investigation,[83] the rationale of this approach could make future death statutes unconstitutional by demonstrating that capital punishment is disproportionate for all crimes.

Another approach defined excessiveness in terms of the severity of the punishment. In *Wilkerson v. Utah*,[84] the Court noted that punishments of torture, such as being beheaded and quartered, public dissection, and burning, and all others in the same line of unnecessary cruelty violate the eighth amendment. A later decision declared that burning at the stake, crucifixion, and breaking on the wheel, or the like was cruel and unusual.[85] Despite this early concern with physical pain, *Trop v. Dulles* extended this test to include mental and emotional pain.[86]

Using this criteria, capital punishment may be unconstitutional. Justice Brennan concluded that only the death penalty involves the conscious infliction of physical pain and suffering: "[I]t appears that there is no method available that guarantees immediate and painless death.[87] He also noted the mental and emotional pain an accused endures while awaiting death.[88] Although the Court had never ruled a punishment to be cruel and unusual under all circumstances before *Furman*,[89] this ap-

[79] 391 U.S. at 519. The Court ruled that jury, from which all people with scruples against the death penalty had been eliminated, could not perform that task.

[80] 217 U.S. 349, 368 (1910) (McKenna citing McDonald v. Commonwealth, 173 Mass. 322, 53 N.E. 874 (1899). Later the Court stated "the provision [against cruel and unusual punishment] was not obsolete except as an admonition to the courts against the infliction of punishments so severe as to not fit the crime." *Id.* at 376 (McKenna citing Hobbs v. State, 133 Ind. 404, 32 N.E 1019 (1893).

[81] 356 U.S. 86 (1958). In ruling that loss of citizenship for a one day desertion during World War II was cruel and unusual, the Court declared: "Fines, imprisonment, and even execution may be imposed depending upon the enormity of the crime. . . ." *Id.* at 100.

[82] 370 U.S. 660 (1962). The Court held six months imprisonment for the crime of addiction was cruel and unusual.

[83] 408 U.S. at 461. Justice Powell declared it impossible to find that capital punishment was disproportionate in every case of rape.

[84] 99 U.S. 130, 135–36 (1878). The Court ruled that execution by shooting was not unnecessarily cruel. The Court tacitly assumed the constitutionality of death itself.

[85] *In re* Kemmler, 136 U.S. 436, 446 (1890). The Court held electrocution was not cruel and unusual, claiming it was a more humane means of execution. Again the permissibility of death was assumed.

[86] 356 U.S. at 102.

[87] 408 U.S. at 287.

[88] *Id.* at 288.

[89] This is due in part to the fact that legislatures have repealed unnecessarily severe penalties in response to public demand. *See* 408 U.S. at 384 (Burger, C.J., dissenting).

proach does allow for a ruling that capital punishment is unnecessarily severe in all cases.

Future statutes will also have to withstand constitutional attack under the evolving standards of decency test.[90] A majority of the *Furman* Court accepted the validity of this test.[91] Under this approach, if the public considers capital punishment to be cruel and unusual, it violates the eighth amendment. Two problems will plague advocates attempting to prove that public opinion disapproves of capital punishment: the type of evidence admissible and the heavy burden of proof.

Earlier Supreme Court decisions employed objective criteria to determine the constitutionality of capital punishment under the evolving standards of decency test. Whether a punishment has been traditionally imposed,[92] is accepted in other jurisdictions,[93] or is comparable to punishments for other similar crimes,[94] are indicators used to determine the permissibility of a particular punishment. Under such criteria, the death penalty does not violate the eighth amendment.[95]

Similarly, Justice Brennan employed objective analysis to determine whether the public approved of the death penalty. He characterized the history of capital punishment in the United States as filled with continuing restrictions upon the use of the death penalty.[96] Today, juries rarely authorize death.[97] From these factors, Brennan concluded that society disapproves of the death penalty. But objective indicators of public opinion are not conclusive. Public opinion polls indicate at least majority approval of capital punishment.[98] Prior to *Furman*, forty-one states had capital statutes.

Another problem with the Brennan approach is the requirement of almost unanimous rejection of capital punishment.[99] Brennan himself reflects the demand for unanimity when he characterizes executions as a rarity today.[100] No objective indicators have yet demonstrated unanimous public disapproval.

Opponents of future capital statutes, which meet the narrow requirements of *Furman*, must urge the adoption of a standard of enlightened public opinion. *Robinson v. California* has already sanctioned the use of such a test. In ruling that six months imprisonment for addiction to narcotics was cruel and unusual, the Court stated:

> But in light of contemporary human knowledge, a law which made a criminal offense of such a disease *would doubtless be universally thought to be an* infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[101]

The opinion did not say society considered such a punishment cruel and unusual. Rather, if the public were fully informed, they would believe that penalty violated the eighth amendment.

Justice Marshall also employed a similar standard in *Furman:* would the public, if fully informed as to the purposes of the death penalty and its liabilities, find the penalty shocking, unjust and unacceptable?[102] He concluded that if the public knew of the discriminatory use of capital punishment,[103] that innocent people had been executed,[104] and the deleterious effect a capital trial has on our criminal system,[105] they would disapprove of capital punishment. The Marshall standard is, however, wholly speculative.[106]

[90] *See* note 5 *supra.*

[91] Five of the Justices explicitly accepted the appropriateness of this test: 408 U.S. at 382 (Burger, C.J., dissenting); *Id.* at 420 (Powell, J., dissenting); *Id.* at 410 (Blackmun, J., dissenting); *Id.* at 269 (Brennan, J., concurring); *Id.* at 327 (Marshall, J., concurring).

Since they were not dealing with the constitutionality of capital punishment under all cases, Justices Douglas, White, Stewart, and Rehnquist did not deal with this question. However, Justice Douglas did concur with the plurality opinion in Trop v. Dulles which reaffirmed this standard. 356 U.S. 86 (1958).

[92] 356 U.S. at 100. *See* Wilkerson v. Utah, 99 U.S. 130 (1910), where shooting was ruled permissible after establishing its historical use.

[93] In Trop v. Dulles, the plurality opinion noted that only two countries still used loss of citizenship as a criminal penalty. 356 U.S. at 101.

[94] In Weems v. United States, the court stated that more serious penalties are not punished so severely. 217 U.S. at 380.

[95] Capital punishment would pass two of these tests. First, it has traditionally been imposed. Second, it is employed in other jurisdictions.

[96] 408 U.S. at 297. Among these restrictions are the changes in the method of executions to humane techniques, the reduced number of crimes for which death is available, and the elimination of mandatory death sentences. *Id.* at 296–98.

[97] *Id.* at 299.

[98] A 1969 poll indicated that 51% favored capital punishment, with 40% opposed. This reflects a growth in approval of the death penalty from 1966 when only 42% approved. Erskine, *The Polls: Capital Punishment.* 34 PUB. OPINION Q. REV. 290 (1970). A 1972 California poll indicated 66% favored capital punishment, with only 24% opposed. N.Y. Times, Sept. 8, 1972, at 67, col. 3.

[99] *See* note 22 *supra.*

[100] 408 U.S. at 299.

[101] 370 U.S. at 666.

[102] 408 U.S. at 361.

[103] *Id.* at 364.

[104] *Id.* at 366.

[105] *Id.* at 368.

[106] The dissenters complained that Marshall's test was too speculative, resulting in judicial legislation. 408 U.S. at 466 (Powell, J., dissenting).

Another measure of enlightened public opinion is possible which would not be wholly speculative. Public sentiment could be inferred from the decisions of the jury in capital cases.[107] Few capital offenders are sentenced to death. If the majority of Americans served witnessed a capital trial, they too would reject capital punishment.[108]

Without an enlightened standard, the eighth amendment has no independent meaning. Reliance on objective factors and a requirement of unanimous condemnation make the amendment only a rubber stamp approval of changes already made. There is nothing in the constitutional debates or in past decisions which requires the use of such restrictive criteria. Although full weight must be given any legislatively approved penalty,[109] the eighth amendment has imposed an affirmative duty on the Court to pass on the constitutionality of punishment.

> When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accomodate the challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgement can't be shirked.[110]

The study of jury verdicts to define public sentiment about capital punishment does not infringe upon the legislative function. As suggested by former Justice Goldberg, public approval of death may be dependent upon the concealment of the truth about this penalty.[111] Only through the use of a standard of enlightened public opinion can public sentiment be validly judged. The use of this standard would infuse the eighth amendment with the vitality it was meant to possess. Judicial review under the eighth amendment would once again become a meaningful process.

[107] Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1783 (1970).
[108] *Id.* at 1784.
[109] Weems v. United States, 217 U.S. 349, 379 (1910).
[110] Trop v. Dulles, 356 U.S. 86, 104 (1958).
[111] Goldberg & Dershowitz, *supra* note 109, at 1783.

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ARGERSINGER V. HAMLIN: FOR BETTER OR FOR WORSE?

In its recent decision in *Argersinger v. Hamilin*,[1] the United States Supreme Court purported to resolve part of the ambiguity surrounding the right of indigents to appointed counsel that had existed in the state courts ever since the landmark decision in *Gideon v. Wainwright*.[2] Consistent with its chain of recent decisions,[3] the Court extended the right to counsel to include misdemeanants. It nevertheless failed to make the guarantee absolute. In so doing, the Court may have precipitated more problems than it solved.

The basis for the right to counsel is found in the sixth amendment to the Constitution.[4] The language of the sixth amendment can be interpreted in a variety of ways: 1) as guaranteeing all accused persons the right to employ counsel if they so desire; 2) as guaranteeing all accused persons the right to have the court assign counsel upon request if the accused cannot afford to hire their own; and 3) requiring that counsel be assigned to anyone without means to employ his own whether or not requested by the accused.[5] The first interpretation seems clearly secured by the sixth amendment.[6] It is the second and third which have caused disagreement.

On the federal level, the issue has been resolved. In 1938, the Supreme Court, in *Johnson v. Zerbst*,[7] guaranteed the right to counsel to all felony defendants in the federal courts. In so doing, the Court emphasized the fundamental nature of the sixth amendment guarantee:

> Since the sixth amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential prerequisite to a federal court's authority to deprive an accused of his life or liberty.[8]

Evans v. Rives,[9] a federal district court decision, considered the question of whether this right was to be limited to felony situations. In guaranteeing a misdemeanant the right to counsel, the court used strong language:

> The purpose of the guarantee is to give assurance against deprivation of life or liberty except strictly according to the law .... And so far as the right to assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period or a long one.[10]

In 1966, rule 44 of the Federal Rules of Criminal Procedure was amended to guarantee the assignment of counsel to any defendant without the means to procure his own.[11] One might argue

[1] 407 U.S. 25 (1972).
[2] 372 U.S. 335 (1963).
[3] *See, e.g.*, Mempa v. Rhay, 389 U.S. 128 (1967) (probation revokee); United States v. Wade, 388 U.S. 218 (1967) (suspect at an identification line-up); *In re* Gault, 387 U.S. 1 (1967) (the juvenile); Miranda v. Arizona, 384 U.S. 436 (1966) (the "in-custody" suspect); Escobedo v. Illinois, 378 U.S. 478 (1964) (suspected offender); Massiah v. United States, 377 U.S. 201 (1964) (the indicted suspect subject to surreptitious interrogation).
[4] U.S. CONST. amend. VI:
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining the witnesses in his favor, and to have the Assistance of Counsel for his defence.

[5] Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 S.W.L.J. 488, 489 (1969).
[6] "With us it is a universal principal of constitutional law that the prisoner shall be allowed a defense by counsel." 1 COOLEY'S CONST. LIM. 700 (8th ed. 1927). "The right to counsel is permissive and conditional upon the pleasure of the accused." *Id.* at n.2.
[7] 304 U.S. 458 (1938).
[8] *Id.* at 467. The court went on to say the following:
> A court's jurisdiction at the beginning of trial may be lost in the course of the proceedings due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused.... If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void.

Id. at 468.
[9] 126 F.2d 633 (D.C. Cir. 1942). *See also* Beck v. Winters, 407 F.2d 125 (8th Cir. 1969); James v. Headley, 410 F.2d 325 (5th Cir. 1969). In *James*, Judge Wisdom felt the goal should be to "extend rather than limit the right to counsel." He advocated appointing counsel if an offense "may result in the loss of liberty for any period of time." He also advocated appointment whenever "moral turpitude" attaches to the offense, and even to cases without any jail sentence or moral turpitude where the issues so justify.
[10] 126 F.2d 633, 638 (D.C. Cir. 1942).
[11] FED. R. CRIM. P. 44. Pursuant to Act of June 29, 1940, c.445, 54 Stat. 688, the Supreme Court is authorized to appoint an advisory committee to make rules of pleadings, practice, and procedure in the federal

that the sixth amendment does not implicitly guarantee the right to counsel in all cases, and that the Congress has gone beyond what is required by the Constitution. The Notes of the Advisory Committee on Rules[12] undermines this argument. The Committee states that there is an absolute right on the federal level of indigent defendants to counsel. The Committee goes on to state that the ". . . rule is a restatement of the principles enumerated in [Supreme Court] cases."[13] Congress appears to have gone no further than to codify the rulings of the Supreme Court. Thus, the right to counsel at the time of trial—a right which on its face appears warranted by the sixth amendment—has been secured on the federal level.

The Supreme Court has hesitated, however, to insure these same rights on the state level. While professing its confidence that the nation's legal resources are sufficient to supply all indigents with legal aid,[14] the Court in *Argersinger* nevertheless hedged the issue. This result appears to be a retreat from the position established in *Powell v. Alabama*[15] and *Gideon v. Wainwright*.[16] In *Powell*, the Court for the first time made the sixth amendment applicable to the states via the fourteenth amendment.[17] While restricting its decision to capital cases, the Court firmly asserted the fundamental nature of the sixth amendment guarantee:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law .... He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.[18]

Unlike *Powell*, *Gideon* did not specifically restrict its holding to the particular fact situation of the case. In broad language, the Court held that the sixth amendment guarantee was a fundamental right required by the due process guarantee of the fourteenth amendment.[19] Nevertheless, the decision was subsequently interpreted in a variety of ways by the state courts.[20] The divisive issue was

courts. Those rules of which the Court approves become law within 90 days unless there is adverse action by Congress. Rule 44 reads as follows:

> If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is unable to obtain counsel.

[12] Notes of the Advisory Committee on Rules, *Id.*

[13] *Id.* *See* Glasser v. United States, 315 U.S. 60, *rehear. den.*, 315 U.S. 527 (1942); Walker v. Johnston, 312 U.S. 275 (1941); Johnson v. Zerbst, 304 U.S. 458 (1938).

[14] 407 U.S. at 37 n.7.

[15] 287 U.S. 45 (1932).

[16] 372 U.S. 335 (1963).

[17] U.S. CONST. amend. XIV:

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[18] 287 U.S. at 68-69.

[19] In so deciding, the Court overruled the decision in Betts v. Brady, 316 U.S. 455 (1942). *Betts* had concluded that the appointment of counsel was not such a fundamental right essential to a fair trial as to require it be made obligatory on the states through the fourteenth amendment. The *Gideon* court, speaking through Justice Black, felt that *Betts* was an anachronism. "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him." 287 U.S. at 344.

[20] The *Gideon* decision did not clearly state whether or not the guarantee to counsel for indigent defendants was to cover all cases, or was to be restricted to the fact situation in *Gideon*—a defendant accused of a felony. As a result, the lower courts developed their own criteria. Some courts did limit the right to those individuals charged with a felony. *See, e.g.*, Cableton v. State, 243 Ark. 351, 420 S.W.2d 534 (1967); State v. Rockeymore, 253 La. 101, 216 So. 2d 828 (1968); People v. Litterio, 16 N.Y.2d 307, 312, 213 N.E.2d 670, 672, 266 N.Y.S.2d 368, 370 (Ct. of App. 1965); Hendrix v. City of Seattle, 76 Wash. 2d 142, 256 P.2d 696 (1969).

Others extended the right to counsel to include those defendants charged with serious offenses. *See, e.g.*, Brinson v. Florida, 273 F. Supp. 840 (S.D.Fla. 1967); Burrazi v. Superior Court, 105 Ariz. 53, 459 P.2d 313 (1969); State v. Anderson, 96 Ariz. 123, 392 P.2d 784 (1964); Williams v. Commonwealth, 350 Mass. 732, 216 N.E.2d 799 (1966); State v. McClain, 7 N.C. 477, 173 S.E.2d 53 (1970); State v. Morris, 275 N.C. 50, 165 S.E.2d 245 (1969); State v. Best, 5 N.C. App. 379, 168 S.E.2d 433 (1969); State *ex. rel.* Plutshack v. State Dept. of Health and Social Service, 37 Wis. 2d 713, 155 N.W.2d 549 (1968).

Others granted the right where there was a potential loss of liberty. *See, e.g., In re* Lopez, 2 Cal. 3d 141, 465 P.2d 257 (1970); *In re* Johnson, 62 Cal. 2d 325, 398 P.2d 420 (1965); *Ex parte* Masching, 41 Cal. 2d 530, 261 P.2d 251 (1953); People v. Mallory, 378 Mich. 538, 147 N.W.2d 66 (1967); State v. Borst, 278 Minn. 288, 154 N.W.2d 888 (1967); Application of Stevenson, 254 Ore. 94, 458 P.2d 414 (1969).

Some courts talked about "special circumstances" which warranted appointment. *See, e.g.*, Arlo v. Hegstrom, 261 F. Supp. 397 (D. Conn. 1966).

Some gave the right to counsel in all cases. *See, e.g.*, Phillips v. Cole, 298 F. Supp. 1049 (N.D. 1968); *In re* Garafone, 80 N.J. Sup., 259, 193 A.2d 398 (1963).

See Dunaj, *Will the Trumpet of Gideon Be Heard in all the Halls of Justice?*, 25 U. MIAMI L. REV. 450 (1971); Dyer, *Gideon v. Wainwright: Echoes of the Trumpet*, 36 Mo. L. REV. 216 (1971); Laughlin, *The Indigent Misdemeanant's Right to Counsel: An Extension of Gideon v. Wainwright*, 18 DRAKE L. REV. 109 (1968); Poore, *The Right to Counsel: The Impact of Gideon v.*

whether the *Gideon* decision was to be restricted to felony prosecutions—the fact situation in *Gideon*—or interpreted as guaranteeing the right to counsel to all indigents. *Argersinger* offered a partial answer. The Court held that

> [A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.[21]

The felony-misdemeanor, petty offense, and similar categorical distinctions have fallen to a new broad guarantee of the right to counsel in any case where one's liberty is denied. It must be noted that the criterion is not the *possibility* of imprisonment, but rather the actual imprisonment of the individual.[22] It should be noted also that the guarantee only affects imprisonable offenses. In light of the language in *Powell*, *Gideon*, *Johnson*, and *Evans*, the decision of the Court to settle for less than an absolute right to counsel is difficult to justify. Rather than clarifying the decision in *Gideon*, the Court has compounded the problem.

In many states a lawyer must be appointed in all criminal cases regardless of whether a person is accused of a felony or misdemeanor and regardless of whether his liberty is threatened.[23] The sole test is the indigency of the defendant. The *Argersinger* decision has no effect in these states, except to insure that the right to counsel cannot be taken away in most situations.[24] Other states restrict the right to counsel to felonies[25] or crimes with labels such as "gross misdemeanors."[26] The effect on these states may be substantial.

Under *Argersinger* no person can be sent to jail who was not afforded the benefit of counsel at the time of trial. This presents a trial judge in a state where counsel need not be appointed in all cases with a set of options: 1) he may appoint lawyers in all cases; 2) he may designate those categories of offenders to which he will assign counsel; or 3) he may determine on a case by case method those defendants for whom he will appoint counsel.

Should the judge decide to appoint counsel in all cases, he will effectively avoid any problems of due process or equal protection. Indigents will receive the same opportunity to be represented by counsel as defendants able to afford their own lawyers. Furthermore, all indigents will be receiving the same treatment. The right to counsel, seen as so essential to an adequate defense in *Powell* and *Gideon*, will insure the indigents due process. Appointment in all cases may be the only viable alternative under the *Argersinger* decision. Given the strong language in *Gideon*,[27] it is uncertain why the Court chose to make this result implicit rather than explicit.

Should the trial judge decide not to appoint counsel in every case, he opens the door to a host of potential difficulties. Because no individual may be imprisoned unless he is represented by counsel at his trial, the judge will be faced with the task of determining prior to trial the likelihood that the defendant, if convicted, will be sent to jail.[28] As Justice Powell stated in his concurring opinion in *Argersinger*:

Wainwright in the Fifty States, 3 CREIGHTON L. REV. 103 (1969); and Comment, *Criminal Law—Indigent Petty Offenders Accorded the Right to Counsel*, 3 SETON HALL L. REV. 214 (1971).

[21] 407 U.S. at 37.

[22] *See* Note, *Sixth Amendment—Right to Counsel, Misdemeanor Prosecutions: Argersinger v. Hamlin*, 407 U.S. 25 (1972), J. CRIM. L., C. & P.S. 473, 476 (1972).

[23] *See, e.g.*, ARIZ. REV. STAT. Rules of Crim. Proc. Rule 16(B) (Supp. 1972); CAL. PENAL CODE § 141 (West Supp. 1973); CONN. GEN. STAT. ANN. § 54-80 (1958); IDAHO CODE § 19-1512 (Supp. 1972); ILL. ANN. STAT. ch. 38, § 113-3 (1970); IOWA CODE ANN. § 775.4 (1950); N.Y. CODE CRIM. PROC. § 188 (Supp. 1969); N.D. CENT. CODE § 29-01-27 (1960); OHIO REV. CODE ANN. § 2941.50 (1972); OKLA. STAT. ANN. tit. 22, § 462 (1969); TEX. CRIM. PROC. ANN. art. 26.04 (1966); WASH. REV. CODE ANN. § 10.40.030 (1962); WYO. STAT. ANN. § 183.1 (1957).

[24] Under *Argersinger*, persons subject only to fines conceivably could subsequently be denied lawyers in these states.

[25] *See, e.g.*, FLA. STAT. ANN. § 3.160 (Supp. 1973); GA. CODE ANN. § 27-3001 (Supp. 1968); HAWAII REV. STAT. § 705-5 (1968); KAN. STAT. ANN. § 22-4503 (Supp. 1972); NEB. REV. STAT. § 29-1804.07 (1972); VA. CODE ANN. § 19.1-241.1 (Supp. 1966).

[26] *See, e.g.*, ALA. CODE tit. 15, § 318 (1958); NEV. REV. STAT. § 171.188 (1968); N.M. STAT. ANN. § 41-22-3 (1953); N.C. GEN. STAT. § 7A-451 (1969); S.C. CODE ANN. § 17.507 (1962); S.D. COMPILED LAWS ANN. § 23-2-1 (1967); UTAH CODE ANN. § 77-64-2 (1953); VT. STAT. ANN. tit. 13, §§ 5201, 5234, 5272 (1972).

[27]

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some other countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to insure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer.

372 U.S. at 344.

[28] Justice Burger points out that it will be necessary for the prosecutor to advise the judge of "any prior record of the accused, including any use of violence, the severity of harm to the victim, the impact on the

> The judge will therefore be forced to decide in advance of trial and without hearing the evidence whether he will forego entirely his judicial discretion to impose some sentence of imprisonment and abandon his responsibility to consider the full range of punishments established by the legislature.[29]

In his determination as to whether counsel should be appointed, the trial judge is, in effect, determining sentence prior to trial. In so doing, he must bring into play all the rules and protections inherent in the sentencing process. A failure to do so may mean disregard for both statutory and common law, as well as the fourteenth amendment. Both the state's and the defendant's interests could be compromised.

In most states the legislatures have specified the forms of punishment for individual crimes,[30] and discretion is often left to the judge to choose among alternative dispositions.[31] Should a judge adopt a policy of discretionary appointment of counsel, he may be eliminating the possibility of employing some of these options. The danger with this procedure is that the judge will create arbitrary categories—those for which sentences of imprisonment will be imposed and those for which such sentences will not be imposed. The judge would become a super-legislature. As Justice Powell points out:

> [I]n creating categories of offenses which by law are imprisonable but for which he would not impose jail sentences, a judge will be overruling *de facto* the legislative range of punishment for the particular offense.[32]

By setting up these categories, the judge will be limiting the right to appointed counsel to certain groups. On its face, such discrimination would appear to violate the fourteenth amendment guarantees of due process and equal protection.[33]

community, and other factors relevant to the sentencing process." 407 U.S. at 42 (Burger, J., concurring).

[29] 407 U.S. at 53 (Powell, J., concurring).

[30] *See* Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960); text accompanying notes 19–29.

[31] *See, e.g.*, IOWA CODE ANN. § 789.15 (1950); MICH. STAT. ANN. § 28.1077 (1958); N.H. REV. STAT. ANN. §§ 607:14, 607:14-a, 607:15; N.Y. PENAL LAW § 60.10 (McKinney's 1972–73); OKLA. STAT. ANN. tit. 22, § 991a (1969); ORE. REV. STAT. §§ 161.605–161.735 (1971); R.I. GEN. LAWS ANN. § 12-19-2 (1969); S.C. CODE ANN. §§ 17.551–17.559 (1962). The new Illinois law, ILL. REV. STAT. ch. 38, § 1005-5-3 (1973), reads as follows:

> (a) Every person convicted of an offense shall be sentenced as provided in this Section.
>
> (b) When a defendant is found guilty by a jury of a Class 1 felony which may be punishable by death, the court may sentence the defendant to death or to imprisonment. Where such recommendation is not returned by the jury, the court shall sentence the defendant under paragraph (d) of this Section. Where the court finds a defendant guilty of murder or of a Class 1 felony which may be punishable by death, the court may sentence to death or under paragraph (d) of this Section. No one shall be sentenced to death unless convicted of an offense which expressly provides that such offender may be sentenced to death.
>
> (c) In any case in which a sentence originally imposed or recommended by a jury is vacated, the case shall be remanded to the trial court. The trial court shall hold a hearing under Section 5-4-1 which may include evidence of the defendant's life, moral character and occupation during the time since the original sentence was passed. The trial court shall then impose sentence upon the defendant. The court may impose any sentence which the jury could have imposed or recommended at the original trial subject to Section 5-5-4.
>
> (d) When a defendant is convicted of a felony or misdemeanor, the court may sentence such defendant to:
>
> (1) a period of probation or conditional discharge except in cases of murder, rape, armed robbery, violation of Sections 401(1), 402(a), 405(a) or 407 of the Illinois Controlled Substances Act or violation of Section 9 of the Cannabis Control Act:
>
> (2) a term of periodic imprisonment;
>
> (3) a term of imprisonment;
>
> (4) a fine. However, a fine shall not be the sole disposition in felony cases but may be imposed in such cases only in addition to another disposition under paragraph (d) of this Section.
>
> (e) When a defendant is convicted of a business offense or a petty offense, the court may sentence such defendant to:
>
> (1) a period of conditional discharge;
>
> (2) a fine.
>
> (f) When a corporation or an unincorporated association is convicted of an offense, the court may sentence it to:
>
> (1) a period of conditional discharge;
>
> (2) a fine.
>
> (g) In no case shall an offender be eligible for a disposition of probation or conditional discharge for a Class 1 felony committed while he was serving a term of probation or conditional discharge for a felony.
>
> (h) This Article shall not deprive a court in other proceedings to decree a forfeiture of property, to suspend or cancel a license, to remove a person from office, or to impose any other civil penalty.

[32] 407 U.S. at 53 (Powell, J., concurring).

[33] The fourteenth amendment would seem to guarantee that every defendant is entitled to have counsel regardless of his alleged offense. Only in this way would every defendant stand equally before the law. The range of penalties for different offenses may well be the same. While sentences within that range may vary from individual to individual without being discriminatory, such is not true with respect to the insurance of procedural rights. The arbitrary denial of counsel to certain categories of offenses is far different from an individualized sentencing procedure which metes out different punishments within the same category.

Language in earlier cases supports the conclusion that counsel is necessary in *all* cases if the accused is to obtain full protection of due process.[34] *Argersinger* holds that at least in cases of actual imprisonment, it is necessary. An arbitrary classification by a judge, however, denies persons in certain classes the right to counsel. And, in fact, *Argersinger* itself is an arbitrary classification. It restricts appointed counsel to those misdemeanants the court has determined may be imprisoned. Yet, persons not subject to imprisonment are subject to other penalties. Failure to appoint a lawyer for these persons may still be a denial of due process.[35] Furthermore, by limiting the right to counsel, *Argersinger* implies that the right to counsel is a less fundamental right than other sixth amendment guarantees.[36] Professor John M. Junker has suggested that there is no basis for such a distinction:

> It is simply not arguable, nor has any court ever held, that the trial of a petty offense may be held in secret, or without notice to the accused of the charges, or that in such cases the defendant has no right to confront his accusers or to compel the attendance of witnesses on his own behalf.[37]

The right to counsel should not be permitted to be made by a judge arbitrarily. As Junker, in arguing for the creation of classes, admits:

> The standard assumes that we know, or can discover those classes of misdemeanor offenses which, although in law punishable by imprisonment, in actuality never or rarely result in imprisonment .... The imprisonable class standard is more easily described than justified.[38]

Junker nevertheless argues that in certain classes, such as traffic tickets, if it can be shown that no one hires a lawyer even if he can afford it, then a poor person is receiving equal protection.[39] This makes two tenuous assumptions: 1) that persons in a class such as traffic ticket holders who can afford to do so never hire a lawyer, an unlikely assumption; and 2) that indigents would make the same choice. That persons who can afford to do so do not hire a lawyer may mean only that they do not feel it is worth the bother and expense to exonerate themselves; they would prefer to suffer whatever loss is involved. The

[34] *See* text accompanying notes 7–28 *supra*.

[35] The argument has been made that deprivation of property is no less a violation of due process than deprivation of life or liberty. *See* Argersinger v. Hamlin, 407 U.S. 25, 48 n.11 (1972). *See also* Dunaway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966); Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IA. L. REV. 223 (1970); Comment, *Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 n.3 (1966); Comment, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L. J. 545 (1966–67).

Justice Powell points out that the majority suggested no basis "for distinguishing between deprivations of liberty and property." 407 U.S. at 51 (Powell, J., concurring). On the civil side, 28 U.S.C. 1915 gives the trial judge discretion to appoint counsel for indigents. Most cases, however, have involved requests by indigent plaintiffs. The cause of indigent defendants seems largely undealt with. Courts and commentators have nevertheless discussed the necessity for counsel in civil litigation. As one author said:

> . . . the inability of the unskilled litigant to prepare his pleadings, conduct adequate investigation, familiarize himself with the rules of evidence, research decisional law, or persuasively argue his case seems no less debilitating in most civil litigation.

66 COLUM. L. REV. at 1331.

In Brotherhood of Trainmen v. Virginia, 377 U.S. 1 (1964), the court noted:

> [C]ivil cases undoubtedly arise in which a deprivation of 'property' causes consequences as grave as a loss of liberty. The struggling employee, for example, may well find a wage attachment or confiscation of his tools as onerous in securing employment as a criminal conviction. Moreover, the citizen who permanently loses his home, a government job, a required license, or unemployment benefits may, in many circumstances, receive a more crippling blow than the criminal who receives a jail sentence.

377 U.S. at 7.

Pointing to the fact that the right to counsel as secured by the sixth amendment relates only to criminal prosecutions, the judge in *Ex parte* Chin Loy You, 223 F. 833 (D. Mass. 1915), a deportation case, said:

> . . . but it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner.

Id. at 838.

The relevance of discussing the right of indigent civil litigants to appointed counsel is that here, as with many criminal cases, only a deprivation of property may be involved. If one cannot be deprived of property without counsel in civil litigation, he should be entitled to the same protection in criminal litigation.

New York is one of the few states where indigent civil defendants are appointed counsel. *See* Brounsky v. Brounsky, 308 N.Y.S.2d 73 (1970) and Hotel Martha Washington Management Co. v. Simmich, 322 N.Y.S. 2d 139 (1971). In these cases, the defendant was given a lawyer when in danger of losing property rights, in one case alimony, in the other his domicile. A fine imposed upon an indigent is no less serious a deprivation. Yet, *Argersinger* would not guarantee the defendant counsel in such a case.

[36] U.S. CONST. amend. VI, *supra* note 4.

[37] Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 705 (1967).

[38] *Id.* at 709.

[39] *Id.* at 713.

indigent may not be equally able to bear such a loss. The result is unequal protection.

The fourteenth amendment problems are not the only difficulties inherent in the creation of categories. There is another. A judge is often given wide discretion in imposing sentence.[40] It would be unlikely that a legislature would question the decision of a judge in imposing sentence in a normal post-trial sentencing procedure. The assumption is that a judge, having considered the evidence as presented at trial, and the background of the individual, is in the best position to determine proper sentence. However, where pretrial categories are created, the judge is not in the same position to consider all the facts as he would be in a sentencing proceeding. The danger here is that individuals will not be given individualized treatment.[41] Courts have generally held that punishment is supposed to fit not only the crime, but also the criminal.[42] By creating categories, the court will immunize certain persons from imprisonment regardless of their past records, while requiring others to face the full spectrum of penalties. Aside from fourteenth amendment considerations,[43] this result violates the long-established interest of the state in seeing that certain persons are imprisoned. Such interest is especially evident in those states which have statutes requiring a hearing to be held prior to sentencing to consider evidence in mitigation and aggravation of the offense. At least seven states presently have such a requirement.[44] Strongest of these is the Illinois law.[45] As the commentary points out, "Section 1005-4-1 clears up any ambiguity in case law and makes this hearing mandatory whether requested by the defendant or not."[46] No distinction is made between felons and misdemeanants. The obvious purpose of such statutes is to insure a careful and just consideration of all factors involved in sentencing.[47]

Since the decision by a trial judge prior to trial to appoint or not appoint counsel is the practical equivalent of a sentencing,[48] it follows that a sentencing hearing must be held prior to trial to determine whether counsel is to be appointed. This procedure would protect the state's right to ask for imprisonment should there be a conviction. There is a very real danger here, should such interest be ignored. It is quite likely that a defendant charged with a crime and facing a possible jail sentence and/or fine will view the prospect of a fine with less trepidation than the possibility of imprisonment. It is possible that he might prefer to forego the appointment of a lawyer in return for the assurance that he cannot be sent to jail. This choice acquires added appeal in light of the recent Supreme Court decision in *Tate v. Short*.[49] There the Court held that no indigent can be sent to jail for failure to pay a fine. If he cannot be sent to jail because no lawyer was appointed and he has no money to pay a fine, the indigent may escape any penalty.[50] This raises a serious question of equal protection between indigents and non-indigents. While the intent of *Gideon* and *Arsgersinger* was to extend the benefit of sixth amendment protection to more people, thus removing another obstacle to the enjoyment of equal protection, the result may actually be a reverse

[40] *See* note 32 *supra*.

[41] *See* AMERICAN BAR ASSOCIATION ON STANDARDS FOR CRIMINAL JUSTICE—SENTENCING ALTERNATIVES AND PROCEDURES, § 2.1(b), p. 13 (1967).

[42] *See, e.g.*, Petersen v. Dunbar, 335 F.2d 800 (9th Cir. 1966); Abernathy v. People, 123 Ill. App. 2d 263, 259 N.E.2d 363 (1970). In *Abernathy*, the court held:

> [T]he legislature of this State has provided that when sentences are imposed by courts they should be proportionate to the offense and should recognize the philosophy of rehabilitation and should not be arbitrary or oppressive.... Sentencing must be tailored to fit the individual as well as the offense.

123 Ill. App. 2d at 270, 259 N.E.2d at 368.

[43] *See* notes 34 & 36 *supra*.

[44] *See, e.g.*, ARIZ. REV. STAT. Rules of Crim. Proc. 336 (1956); FLA. STAT. ANN. § 1.780 (1964); ILL. REV. STAT. ch. 38, § 1005-4-1 (1973); NEB. REV. STAT. § 29-2217 (Supp. 1972); NEV. REV. STAT. § 176.135 (1968); N.Y. CODE OF CRIM. PROC. § 482 (McKinney's 1968); S.C. CODE ANN. Circuit Court Rules 61 (1962); WYO. STAT. ANN. § 7-271 (1957). *See also* State v. Cupples, 260 Iowa 1192, 152 N.W.2d 277 (1972).

[45] (a) After a determination of guilt,] a hearing shall be held to impose the sentence. At the hearing, the court shall:

(1) consider the evidence, if any, received upon the trial;
(2) consider any presentence reports;
(3) consider evidence and information offered by the parties in aggravation and mitigation;
(4) hear arguments as to sentencing alternatives; and
(5) afford the defendant the opportunity to make a statement in his own behalf.

ILL. REV. STAT. ch. 38, § 1005-4-1 (1973).

[46] Council Commentary, Illinois Unified Code of Corrections, ILL. REV. STAT. ch. 38, § 1005-4-1 (1973).

[47] *See* AMERICAN BAR ASSOCIATION ON STANDARDS FOR CRIMINAL JUSTICE—SENTENCING ALTERNATIVES AND PROCEDURES § 5.1, (1967).

[48] While it is true that the amount of a fine, if any, is still left up to the court, no imprisonment is possible.

[49] 401 U.S. 395 (1971).

[50] One solution to this problem is the enactment of statutes to permit time payments and garnishment of wages. The court in *Tate* felt it was incumbent upon the states to enact such statutes if there is to be an equal administration of justice.

discrimination. The non-indigent will be subject to the full range of punishment, whereas the indigent may be subject to no penalty.

Though often overshadowed in the present-day concern for the rights of the indigent, our society too has a valid and important interest in the sentencing process. The American Bar Association recognized this interest in its approved draft of sentencing procedure when it said:

> The Advisory Committee holds no sympathy for the offender who poses a significant public danger, and is just as anxious as anyone else to get him off the streets for a time sufficient to neutralize the danger.[51]

In *United States v. Chandler*,[52] the Court said:

> The criminal law exists for the protection of society. Without undue harm to the interests of the society it protects . . . [i]t can afford the ultimate isolation from society of those individuals who have no capacity for the adjustments necessary to conform their conduct as active members of a free society to the requirements of the law.[53]

A sentencing procedure has various objectives. These include retribution, deterrence, restraint and rehabilitation.[54] The deterrence factor is the one heavily emphasized by the courts.[55] Many cases reflect the restraint aspect of imprisonment, *i.e.*, imprisonment for the benefit of the public.[56] A good illustration of this is the case of *People v. Haynes*.[57] The defendant was convicted of forging a forty-five dollar check and was sentenced to five to fourteen years in prison. He complained that this sentence was too harsh. However, the record showed that he had been convicted of eight prior offenses within a twenty-two year period. The court recognized the goal of rehabilitation, but suggested that rehabilitation

> presupposes the desire, the ability, and the willingness of the offender to reform and to rehabilitate. The record before us leaves a real cloud of doubt. Society has tried. It would seem that the defendant has not. Society is now entitled to some protection without depriving the defendant of a reasonable opportunity to rehabilitate and return to society if he cares to do so.[58]

The public thus has a definite interest in seeing that certain individuals are imprisoned. *Haynes* accentuates the importance of having the judge aware of a defendant's record prior to the determination of whether to appoint counsel. The sentence in *Haynes*, if viewed alone, and not in the context of the defendant's previous record, was quite severe. Yet, in the face of all the facts, the public interest demanded incarceration.

A failure to appoint counsel in all cases means that the interest of the state in deterring and restraining criminals is subject to the discretion of the trial judge in his pre-trial determination of whether to appoint counsel. While it is true that a trial judge often has the discretion to imprison a convicted defendant, such discretion is normally exercised after the trial, with the judge in possession of most of the relevant facts. Under *Argersinger*, a similar exercise of discretion may necessarily be made before trial and likely without background knowledge. As already pointed out, the pre-sentence statutes refer to post-trial proceedings. However, if the state is to protect its interest, and the sixth amendment is to be fully implemented, then the equivalent of a pre-sentencing hearing is essential at the pre-trial stage as well.

In those states which presently have pre-sentencing statutes, such statutes may be applicable to a pre-trial determination of whether to appoint counsel. This result would follow because of the

[51] STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 1968, at 140.

[52] 393 F.2d 920 (4th Cir. 1968).

[53] *Id.* at 929.

[54] *See* State v. Holland, 103 Ariz. 250, 439 P.2d 821 (1968).

[55] Strong wording in State v. Rinehart, 125 N.W.2d 242 (1963) accentuates this point:

> The Old Testament doctrine of 'an eye for an eye and a tooth for a tooth' without doubt seems harsh to the criminal, who prefers the modern trend toward rehabilitation and 'the humanities'. But the loser of the eye, or the tooth, may well have a different viewpoint, and so should those who have not yet lost any eyes, or teeth, or their lives when they consider the purpose of law enforcement and the punishment of transgressors. It is not so important that the particular offender be punished, or that revenge be had, but that a warning that crime has its penalties should be given.

Id. at 247.

[56] *See, e.g.*, State v. Randall, 21 Conn. Sup. 452, 159 A.2d 179 (1958); People v. Buell, 120 Ill. App. 2d 367, 256 N.E.2d 845 (1970); People v. Brown, 60 Ill. App. 2d 447, 208 N.E.2d 629 (1965); State *ex. rel.* Indiana State Bar Association v. Moritz, 191 N.E.2d 21 (Ind. Sup. Ct. 1963); Louisiana v. Howard, 263 So. 2d 32 (La. 1972); State v. Gridley, 353 S.W.2d 705 (Mo. Sup. Ct. 1962); People v. Burghardt, 233 N.Y.S.2d 60 (Sup. Ct. 1962); Potter v. State, 307 P.2d 551 (Okla. Cir. Ct. 1957); State of Oregon v. Patzer, 493 P.2d 1389 (Or. App. 1972).

[57] 73 Ill. App.2d 85 (1966).

[58] *Id.* at 89.

nature of the pre-trial hearing, that of a constructive imposition of sentence. Thus, in those states which have a mandatory post-trial pre-sentence hearing, it may be that such a hearing should be held prior to the decision to appoint counsel. In some states with a mandatory pre-sentence hearing, appointment of counsel for indigents is required in all cases.[59] In the other mandatory hearing states, and in those states where the hearing is optional,[60] consideration of the above factors makes such a hearing, in light of *Argersinger*, a practical necessity. Those states which have only the option to hold the hearing (usually at the insistance of either party)[61] should exercise the option to protect their interests.

In those states without any statute relating to sentencing hearings, and where counsel need not be appointed in all cases, there is little other than case law[62] to insure any protection of the state interest. This situation presents an open invitation to the state legislatures to require mandatory pre-sentence hearings. The legislatures ought to go further and specifically require a pre-trial hearing to remove any cloud of doubt that such a hearing must be held in determining whether to appoint counsel.

Although the exact wording of the pre-sentence statute varies, each requires that the court hear all relevant information before passing sentence. The question is "What is relevant information?" Some of the statutes outline the appropriate points.[63] Case law further elaborates.

In *State v. Quintana*,[64] an Arizona court held that in determining sentence, the trial court is

> not bound by the strict rules of evidence applying in trials, since such a proceeding is not a trial in the ordinary sense of the word, but it may consider matters not admissible on the issue of guilt or innocence.[65]

What the court should consider is enumerated by a Nebraska court in *State v. Etchison*:[66]

> Factors meriting consideration are the family ties, age, mentality, education, experience, and social and cultural background of the convicted individual; his willingness to work at honest labor; the motivation of the offense, and the amount of violence, if any, involved; the frankness and willingness of the defendant to cooperate; narcotic addiction, if any; circumstances aggravating or mitigating the offense; community attitudes toward the offense; and the individual's potentialities for recidivism.[67]

In its Project on Minimum Standards for Criminal Justice,[68] the American Bar Association points out the following:

> Serious consequences turn on the correct resolution of the sentencing decision, and it is sheer folly to attempt such a hearing without more information than is typically provided by the guilt-determining process.[69]

The importance of this last statement is twofold, with one aspect diametrically opposed to the other. On the one hand, it is implied that information brought out at a hearing held prior to sentencing is more than just advisable: it is necessary. Moreover, the relevant information must extend beyond the fact-finding inquiry surrounding the event in question. It should, in addition, give a total background picture of the defendant, and should include any prior convictions and arrests.[70] In Illinois, for example, the pre-sentence report for those accused of felonies must set forth the history of the defendant with respect to "delinquency and criminality."[71] This information, under the pre-sentence hearing analogy, should

[59] These include Illinois, Arizona, Iowa, and Wyoming.

[60] *See, e.g.*, CAL. PENAL CODE § 1203 (West 1972); IDAHO CODE § 19-2515 (1947); LA. CODE CRIM. PROC. ANN. art. 875 (1967); MINN. STAT. ANN. § 631.20 (1969); MONT. REV. CODE ANN. §§ 95-1201, 95-2201 (1967); N.J. REV. STAT. §§ 2A:164-1, 164-2 (1937); N.D. CENT. CODE §§ 29-26-17, 29-26-18 (1960); OHIO REV. CODE ANN. § 2947.060 (1972); OKLA. STAT. ANN. tit. 22, §§ 973-975.1 (1969); ORE. REV. STAT. §§ 137.080-137.100 (1971); S.D. COMPILED LAWS ANN. § 23-48-16 (1967); and UTAH CODE ANN. § 77-35-12 (1953).

[61] An example is IDAHO CODE § 19-2515 (1947):
> After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.

[62] *See* note 57 *supra*.

[63] *See* laws for Illinois, Nebraska and Nevada, *supra* note 45.

[64] 92 Ariz. 308, 376 P.2d 773 (1963).

[65] *Id.* at 775–76.

[66] 188 Neb. 134, 195 N.W.2d 498 (1972).

[67] *Id.* at 501.

[68] AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (1967).

[69] *Id.* at 101.

[70] *See* AMERICAN BAR ASSOCIATION ON STANDARDS FOR CRIMINAL JUSTICE—SENTENCING ALTERNATIVES AND PROCEDURES 201–204 (1967).

[71] ILL. REV. STAT. ch. 38, § 1005-3-2 (1973).

be made available to the court prior to any decision on the appointment of counsel. This brings us to the other aspect of the problem. While such information is essential to a determination of whether to appoint counsel, it may be highly prejudicial:

> The disfavor for receiving proof of the character of a person is strongly felt when the state seeks to show that the accused is a bad man and thus more likely to have committed the crime. The long established rule, accordingly, forbids the prosecution, unless and until the accused gives evidence of his good character, to introduce initially evidence of the bad character of the accused . . . The prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show probability that he committed the crime on trial because he is a man of criminal character.[72]

Such evidence is not irrelevant, but in the setting of a jury trial, is so prejudicial as to outweigh the probative value.[73] The fear is that the jury would place too much weight on these collateral issues, and that the defendant would be forced to defend all the alleged misdoings of his life. Furthermore, there may also be a tendency of a jury to convict not because the defendant is guilty of the present offense, but because they might feel he escaped punishment for other offenses.[74]

Consistent with this theory is rule 4-04(b) of the Proposed Rules of Evidence for the federal courts which permits evidence of prior crimes to be admitted only in special circumstances.[75] The Advisory Committee's Note[76] points out that no mechanical solution is offered for the determination of undue prejudice, that the solution is to be made on a case by case basis by the judge. The purpose is to exclude from the jury evidence which could prejudicially affect its decision as to the guilt or innocence of an individual.

There is no jury present when a court makes a determination as to whether or not to appoint counsel. This is generally done by the judge at the preliminary hearing or arraignment.[77] Only the judge will be aware of such information. If the subsequent trial is by jury, the chances of any prejudicial effect are remote. The jury will make an independent determination of guilt based only upon evidence brought out at the trial. The result is not the same, however, in non-jury trials. Professor Wigmore[78] notes that

> the natural and inevitable tendency of the tribunal—whether *judge* or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.[79]

If different judges preside at the hearing and the trial, then the effect of the first judge having heard the evidence of prior record reduces, but does not eliminate, potential prejudice at the trial. If one assumes that the first judge is not basing his determination as to whether to appoint counsel on the basis of categories of crime,[80] but rather on information brought out at a pre-trial sentencing hearing, and if counsel is appointed only for those persons with substantial records, the basis is laid for prejudice. A trial judge, knowing that only "criminal types" are being given counsel, may be unfairly prejudiced.[81] Certainly, where the hearing and trial judges are the same person, the inference is strong that the judge will be unduly influenced. While perhaps less susceptible than a jury to influence by evidence of prior convictions, a judge is nevertheless susceptible. In spite of all his training and experience, he is still human, and subject to human frailties in judgment.

The courts do not necessarily agree with this position. Particularly on point is *United States v.*

[72] McCormick, Handbook of the Law of Evidence § 157, at 327 (1954). The rule is firmly founded in most jurisdictions. *See* J. Wigmore, Evidence § 194, at 641 (3rd ed. 1940).

[73] McCormick, Handbook of the Law of Evidence, *supra* note 73.

[74] Note, *Admissability of Prior Crime: 1901–1951*, 18 Brooklyn L. Rev. 80 (1951); Summers, *Admissability of Prior Criminal Acts as Substantive Evidence in Criminal Prosecutions*, 36 Tenn. L. Rev. 515 (1969); J. Wigmore, *supra* note 72, at 650.

[75] Rule 4-04(b) of the Proposed Rules of Evidence reads as follows:

> Evidence of other crimes, wrongs, or acts is not admissable to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissable for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[76] *Id.* at 34.

[77] *See* notes 24, 26, & 27 *supra*.

[78] J. Wigmore, *supra* note 72, at 646.

[79] *Id.* (emphasis added).

[80] *See* text accompanying notes 25–32 *supra*.

[81] It is conceivable that a jury may be equally aware of this situation, but the unfamiliarity of the jurors with criminal procedure makes this unlikely.

Brooks.[82] The court held the following:

> Our jurisprudence postulates the ability of judges to dismiss from their minds, in reaching decisions, offers of evidence excluded by rulings after hearing arguments on admissibility of that evidence.[83]

The court argued that such decisions were a common function of trial judges, and that to hold otherwise would work an undue and unwarranted burden on district courts, "especially in cases like this, where the issue . . . does not arise until after the trial has commenced."[84]

It is one thing to attribute to the trial judge the ability to discriminate in his own mind inadmissible evidence which arises during the course of the trial. It is quite another to allow the same judge to hear prejudicial evidence brought out prior to trial. In both cases, there is substantial prejudice. In the first situation, the practicality of trial without jury may necessitate such a rule. No such necessity exists with respect to the second case. In *Bohachef v. Wisconsin*,[85] the court emphasized the goal of "reasonable dispatch" of criminal cases.[86] This is no justification for unnecessary prejudice. The Report of the President's Commission on Law Enforcement and Administration of Justice[87] states that "speed is often substituted for care."[88] This is regrettable and unnecessary. Different judges could be appointed to hear evidence at pre-trial hearings to determine whether counsel is to be appointed. Because of *Argersinger*, such an arrangement, whereby special judges hear background information about defendants, is imperative.

The defendant is entitled to protection from unfair prejudice whether trial is by a jury or a judge. Yet, under *Argersinger*, he may not receive it. It is difficult to reconcile a decision the result of which implicitly requires a judge at the same time to both consider and refuse to consider evidence of an individual's background. Such a result is absurd on its face. Faced with a contrariety of demands, the judges may simply decide to appoint counsel in all cases. This is a result that the Supreme Court could have and should have achieved all along.

Conclusion

While indicating that the burden is on the states to find ways to furnish indigents with counsel,[89] the Supreme Court failed in *Argersinger* to take the last step to insure indigents the right to counsel in all cases. By limiting its decision to the facts of the case, the Court effectively hedged the issue. Presumably, more indigent individuals will receive the benefit of counsel,[90] but the difficulties in the mechanics of administration may undo much of the good. If the trial judges adopt the blanket rule of appointing lawyers in all cases where the defendant proves he is an indigent, then most of the problems discussed in this comment will never materialize. There will be a great burden on the states to find the means to furnish adequate representation, but the sixth amendment guarantee of the right to counsel, and the fourteenth amendment guarantees of due process and equal protection will have been more perfectly met. As it stands now, *Argersinger* is a thorn in the side of the sixth amendment. It may be that the Supreme Court wished to extend *Gideon* gradually in order to gauge the ramifications. However, the cries that went up after the issuance of the *Gideon* opinion for a clarification and extension of the principles stated are undoubtedly going to be heard again.

[82] 355 F.2d 540 (7th Cir. 1966). Defendant here was convicted by a federal district court sitting without a jury. The court first admitted into evidence a confession obtained from the defendant, but later held it to be inadmissible. Defendant argued that the judge, knowing the substance of the confession, could not reasonably have dismissed it from his mind in arriving at a judgement.

[83] *Id.* at 542.

[84] *Id.*

[85] 50 Wis. 2d 698, 185 N.W.2d 339 (1971).

[86] *Id.* at 341.

[87] President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 128 (1967).

[88] *Id.*

[89] "We do not sit as an ombudsman to direct state courts how to manage their affairs, but only to make clear the federal constitutional requirement." 407 U.S. at 38.

[90] *But see* an article by Gerald C. Moton, student at the Northwestern University School of Law, in a forthcoming study done by the Law Enforcement Study Group. No attempt was made in this comment to actually study the extent to which judges hold pre-trial before deciding whether to appoint counsel. Moton's article suggests that even where indigent defendants are being sentenced to jail, in some cases no attorney is present at the time of trial.

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THE APPLICATION OF CRIMINAL CONTEMPT PROCEDURES TO ATTORNEYS

Recent decisions expanding the protections of due process to attorneys[1] cited for contempt have created friction between the attorney, who is accorded these due process safeguards, and the attorney's client, who is entitled to an impartial and speedy trial.[2] These decisions require that an attorney charged with contumacious conduct be given notice and hearing before an impartial magistrate.

While these expansions of due process protection may seem laudable initially, the effect of granting greater protections to an attorney may prejudice his client's sixth amendment rights. Courts have paid scant attention to the attorney's client in cases which have dealt with the lawyer's right to be protected from summary contempt citations.[3] Serious problems may arise from a failure to consider the possible adverse effects on a client's rights caused by awarding an attorney constitutional safeguards. This comment will contain both a critical analysis of cases which have broadened an attorney's right to due process protections in contempt proceedings and an examination of the possible repercussions which the granting of protections have on the client's right to a fair and impartial trial.

DEVELOPMENT OF THE CONTEMPT POWER

Historically, courts viewed the power to summarily punish contempt as inherent in all courts, derived not from statute but from the nature of the judicial function.[4] The rationale which supported the summary contempt power was that a court would be unable to preserve order in judicial proceedings or to bring about the administration of justice without the power to punish those who declined to obey its rulings and orders.[5]

Blackstone's *Commentaries*[6] is the primary source for this view. Blackstone relied on a statement of Mr. Justice Wilmot in *The King v. Almon*,[7] which asserted that the summary contempt power had existed by "immemorial usage." Subsequent courts seized upon this statement as support for the summary exercise of the contempt power in instances when contumacious conduct occurred outside the court's presence.[8] While Blackstone granted that the wide use of the contempt power was a marked departure from normal common law principles of due process, he found that it was necessary to the very enforcement of laws, "for laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory." [9] According to Blackstone, the common law concept of contempt power permitted the immediate apprehension and imprisonment of those who acted contumaciously, either within or outside the presence of the court.

Twentieth century scholarship challenged the historical validity of Blackstone's justification of the contempt power when exercised against actions committed outside of a court's presence. Sir John Fox took exception to the view that a broad summary contempt power had existed from early times.[10] Fox's inspection of the Rolls of the English

[1] Hereinafter, reference to "attorneys" will mean "defense attorneys in criminal proceedings."

[2] U.S. CONST. amend. VI:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[3] *See* Mayberry v. Pennsylvania, 400 U.S. 455, 463 (1971); Sacher v. United States, 343 U.S. 1, 10 (1951); *In re* Dellinger, 461 F.2d 389, 395 (7th Cir. 1972).
A court summarily adjudicates contempt by witnessing contumacious conduct in open court and then punishing the contemnor without affording him due process safeguards. A court may also punish contempt in a non-summary, or plenary, manner. In a non-summary proceeding, a court punishes a contemnor after a hearing in which the court provides the contemnor with due process protections.

[4] Myers v. United States, 264 U.S. 95, 103 (1923); Bessette v. W. B. Conkey Co., 194 U.S. 324, 326 (1903).

[5] *Ex parte* Terry, 128 U.S. 289, 303 (1888).

[6] 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND★ 282–88.

[7] The King v. Almon (1765) is an undelivered opinion appearing in WILMOT, NOTES 243.

[8] 4 W. BLACKSTONE, *supra* note 6, at ★ 286–87.

[9] *Id.*

[10] *See* Fox, *The King v. Almon*, (pts. 1 & 2), 24 L.Q. REV. 184, 266 (1908); Fox, *The Summary Process to Punish Contempt*, (pts. 1 & 2), 25 L.Q. REV. 238, 354 (1909). For brief summaries of the conflict concerning the foundation of the contempt power, see Bloom v. Illinois, 391 U.S. 194 (1968); Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation*

Courts indicated that until the seventeenth or early eighteenth century, apart from extraordinary proceedings in the Court of the Star Chamber, English courts neither had nor claimed broad powers to summarily punish contempt committed outside the court.[11] In disproving Blackstone's assertion, Fox established that the summary contempt power existed only when a party resisted a lawful order of the court or when an officer of the court behaved in a contumacious manner in the court's presence.[12]

With the common law foundations of the summary contempt power being questioned by modern scholarship, courts were reminded that "the power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law." [13] The Supreme Court embraced the revised position concerning the summary contempt power in *Bloom v. Illinois*,[14] where it established the right to trial by jury when the sentence imposed for contempt would be longer than six months.[15] The Court recognized that the power of courts to summarily punish serious contempts must be balanced against the contemnor's due process rights.

The Supreme Court has not been the only branch of government to limit the exercise of the summary contempt power. Congress has gradually limited the federal courts' authority to summarily punish contempts. The Judiciary Act of 1789 provided that all federal courts had the power "to punish . . . by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before same." [16] Not long after its enactment, the Supreme Court viewed this provision of the Judiciary Act as an exercise of extreme legislative caution because it believed that courts had an inherent right to punish contempts which was in no way dependent upon statutory authorization.[17]

Congress soon became dissatisfied with the federal courts' open-ended authority to deal with contempts, an authority limited only by the type of punishment which the courts could impose.[18] The incident which caused Congress to revise the federal courts' power to punish contempt was the disbarment and imprisonment of an attorney by a federal district judge because the attorney had published an article critical of one of the judge's decisions.[19] In the Act of 1831,[20] Congress limited the federal courts' power to summarily convict and punish contempts to situations involving misbehavior in the presence of the court or so near the court's presence as to obstruct justice; misbehavior of court officers in their official transactions; and disobedience to lawful court orders.[21] The present contempt statute[22] basically preserves to federal courts the same authority to punish contempt as was provided by earlier statutes.

Contempts are generally classified as either criminal or civil, although some contumacious acts may be considered to be both.[23] In a criminal contempt, the contempt sentence, which is usually for a fixed period of time, is punishment for completed conduct. In a civil contempt, the court imprisons the contemnor until he agrees to comply with an order of the court. The Supreme Court, in distinguishing civil and criminal contempt, an-

of Powers, 37 HARV. L. REV. 1010, 1042–52 (1924); Comment, *Invoking Summary Criminal Contempt Procedures—Use or Abuse—United States v. Dellinger*, 69 MICH. L. REV. 1549 (1971).

[11] FOX, *The Summary Process to Punish Contempt*, *supra* note 10, at 357–62.

[12] *Id.*

[13] Green v. United States, 356 U.S. 165, 193 (1958) (Black, J., dissenting).

[14] 391 U.S. 194 (1968).

[15] *Id.* at 210–11. The Court provided:

> [I]n terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantive difference between serious contempts and other serious crimes.

Id. at 202.

[16] Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83.

[17] Anderson v. Dunn, 19 U.S. (6 Wheat.) 224, 227–28 (1821).

[18] Bloom v. Illinois, 391 U.S. 194, 202–03 (1968).

[19] Congress instituted impeachment proceedings against Judge Peck, the jurist involved, but it failed by a single vote to remove him from the bench. A. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833). *See also* Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 423–30 (1928).

[20] Act of March 2, 1831, ch. 98, 4 Stat. 487.

[21] Supreme Court decisions recognized and supported the limitations imposed by the Act of 1831. *See, e.g.*, Nye v. United States, 313 U.S. 33, 47–48 (1941); *In re* Savin, 131 U.S. 267, 275–76 (1889); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510–11 (1874).

[22] Contempts, 18 U.S.C. § 401 (1970):

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as—
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> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

[23] *See generally* R. GOLDFARB, THE CONTEMPT POWER 54–64 (1963); Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 235–49 (1971).

nounced the "punishment" test in *Gompers v. Buck Stove and Range Co.*:[24]

> It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt, the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt, the sentence is punitive, to vindicate the authority of the court.[25]

Direct and indirect contempts are also distinguishable. A direct contempt occurs so near the presence of the court as to actually obstruct the administration of justice.[26] Indirect contempts arise from conduct which obstructs justice but is not committed in or near the court's presence.[27]

Rule 42 of the Federal Rules of Criminal Procedure[28] states the procedures for the exercise of the contempt power in both summary and non-summary proceedings. Summary disposition, as contained in rule 42(a), permits the punishment of contempt without due process safeguards when the judge certifies that he witnessed the contumacious conduct. Non-summary disposition, as set forth in rule 42(b), requires that due process protections, such as the right to notice of the charge and a hearing, be provided an accused contemnor. In addition, rule 42(b) requires that a judge who becomes personally involved in an alleged contumacious act cannot preside over the contempt hearing. Recent contempt litigation has resulted in an expansion of the application of rule 42(b) procedures with a concomitant lessening of the availability of rule 42(a) summary dispositions.

Contempts by Attorneys and Due Process

The Supreme Court, in deciding cases which involve contempts by attorneys or by those acting *pro se*,[29] has weighed competing considerations in formulating principles which determine whether summary or non-summary procedures should be employed against a contumacious attorney. *Cooke v. United States*[30] was the first Supreme Court decision to detail the factors which would permit the summary punishment of an attorney cited for contempt.

The threshold requirement which supported summary disposition was that the contempt be committed in the presence of the court.[31] The Court in *Cooke* believed that summary procedure

[24] 221 U.S. 418 (1911). See McCrone v. United States, 307 U.S. 61, 64 (1938), for further distinctions between civil and criminal contempt.

[25] Gompers v. Buck Stove and Range Co., 221 U.S. 418, 441 (1911).

[26] *See, e.g.*, Fed. R. Crim. P. 42(a), which states that only direct contempts, contumacious acts committed in the presence of the court, may be punished summarily.

[27] *E.g.*, Nye v. United States, 313 U.S. 33 (1941). In *Nye*, the conduct held to be an indirect contempt of court was the exercise of undue influence by the contemnors, who forced the administrator of an estate to terminate a wrongful death suit. The contempt was indirect since it occurred one hundred miles from the probate court. *See also* Nilva v. United States, 352 U.S. 385 (1957).

[28] Fed. R. Crim. P. 42:

> (a) Summary Disposition. A criminal contempt 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. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

[29] Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Offutt v. United States, 348 U.S. 11 (1954); Sacher v. United States, 343 U.S. 1 (1951); Cooke v. United States, 267 U.S. 517 (1924).

[30] 267 U.S. 517 (1924).

[31] *Id.* at 535–37. In *Cooke*, the Court reversed an attorney's contempt conviction. The attorney had sent a contemptuous letter to a judge before whom the attorney was handling a bankruptcy case. The judge questioned the attorney about the letter in open court before convicting and sentencing him. A unanimous Supreme Court held that the summary procedures used by the trial judge were improper because the lawyer committed contempt outside the court's presence. *Cf. In re* Oliver, 333 U.S. 257 (1947), in which a judge acting as a one-man grand jury pursuant to state law convicted and sentenced for contempt a witness who refused to testify. While agreeing that contempts committed in open court might be punished summarily, the Court asserted that summary procedures were justified only when there existed an open threat to orderly court proceedings. Since the contempt occurred during a secret grand jury hearing, the Court reversed the conviction based on the secret procedures of the trial judge and remanded the case for a hearing with due process guarantees.

was proper in punishing open-court contempts because of the necessity to preserve order in the courtroom. A second justification posited by the Court was the absence of the necessity for a hearing. The Court believed a hearing would serve no useful purpose because the trial judge personally witnessed the contumacious act, thus obviating the need of a second determination that the act occurred.[32]

The Court also alluded to a circumstance which might prevent the exercise of summary procedure. That situation was personal criticism of the trial judge by the contemnor.[33] The Court indicated that a judge who interjected his personal feelings into a contempt proceeding would destroy the calm and considered adjudication of the contemnor's conduct which due process required.[34] However, Chief Justice Taft, the author of the opinion, did not assert that an embroiled trial judge could never punish contempt summarily, but, instead, posited situations in which he need not be disqualified.[35]

The Supreme Court further developed the rationale supporting the summary exercise of the contempt power against attorneys in *Sacher v. United States*,[36] the first decision which considered rule 42(a) of the Federal Rules of Criminal Procedure.[37] Affirming the contempt convictions of the attorneys, the Court held that summary procedures exercised pursuant to rule 42(a) were proper even though the trial judge issued the contempt citations after the trial.[38]

Justice Jackson, writing for the Court, asserted that the use of "summary" in rule 42 referred to procedures to be employed by the magistrate finding contempt, not to the timing of the citations.[39] He stated that delaying summary contempt citations did not prejudice the contemnors because the trial judge could have imposed citations immediately after the commission of the offenses. Furthermore, immediate citation of the attorneys would prejudice the interests of their clients.[40]

The Court also rejected the argument that the nature of the criticism directed toward the bench during the trial prejudiced the judge and disqualified him from charging and sentencing the contemnors. Justice Jackson indicated that rule 42(a) placed no such limitation on the use of summary procedures. In addition, he argued that since all contempts insult a court's authority, to permit disqualification of a trial judge when a contemnor insulted him would logically eliminate the summary contempt power in all cases.[41]

By narrowly applying rule 42(a) to the facts in *Sacher*, the Court rejected two of the three considerations relating to the use of summary contempt procedures explored in *Cooke*. The Court held, in affirming the summary punishment of the attorneys after the trial, that a judge could punish contempt in a summary manner even though summary proceedings were unrelated to restoring order in the courtroom. This holding disregarded the language in *Cooke* which allowed summary procedures only when there existed a need to maintain order in the court.[42] The Court in *Sacher* refused to consider the embroilment of the trial judge as a factor in its decision, although language in *Cooke* suggested that a trial judge's conduct might negate all justifications for summary procedures.[43] The Court in *Sacher* did agree with one

[32] 267 U.S. at 534–35.

[33] *Id.* at 539.

[34] *Id.*

[35] *Id.* at 539. Chief Justice Taft suggested that a judge who was the object of contumacious conduct could punish such conduct when substitution of another judge was impractical and when delaying punishment might injure a public or a private right. Cooke v. United States.

[36] 343 U.S. 1 (1951). In *Sacher*, the judge imposed, at the trial's conclusion, contempt convictions on the attorneys who represented eleven Communist Party leaders convicted of violating the Smith Act, 18 U.S.C. §§ 2385, 2387 (1970).

[37] *See* note 28 *supra*.

[38] 343 U.S. at 11.

[39] *Id.* at 9.

[40] To summon a lawyer before the bench and pronounce him guilty of contempt is not unlikely to prejudice his client. It might be done out of the presence of the jury, but we have held that a contempt judgment must be public. Only the naive and inexperienced would assume that news of such action will not reach the jurors. If the court were required also then to pronounce sentence, a construction quite as consistent with the text of the Rule [42] as petitioners' present contention, it would add to the prejudice. It might also have the additional consequence of depriving defendant of his counsel unless execution of prison sentence were suspended or stayed as speedily as it had been imposed. The procedure on which petitioners now insist is just the procedure most likely to achieve the only discernible purpose of the contemptuous conduct. Had the trial judge here pursued that course, they could have made a formidable assertion that it was unfair to them or to their clients and that a new trial was required on account of it. *Id.* at 10.

[41] *Id.* at 12.

[42] 267 U.S. at 535–37.

[43] *Id.* at 539; United States v. Meyer, 462 F.2d 827, 835–36 (D.C. Cir. 1972).

aspect of the *Cooke* decision: the Court found that summary procedures were necessary in preventing the waste of judicial resources with time consuming hearings when the trial judge had witnessed the contumacious conduct.[44]

In subsequent decisions,[45] the Supreme Court retreated from the implication in *Sacher* that due process safeguards were unnecessary when contempts were committed in open court, regardless of whether pressures were brought to bear against the trial judge's impartiality or whether there was delay in the use of plenary procedures. The Court in *Offutt v. United States*[46] reviewed the conduct of a judge who became embroiled in arguments with an attorney during a trial and who, at the trial's conclusion, summarily convicted the attorney for contempt. Justice Frankfurter, writing for the majority, focused on language in *Cooke* which cautioned that the power to punish contempt summarily was "delicate" and that the contemnor must be protected against the oppressive exercise of such power.[47] The active participation of the trial court in arguments with the contemnor destroyed the "atmosphere of authority" which should dominate a criminal trial and rendered the judge incompetent to make an objective finding of contempt. As a result, the embroilment of the trial judge required a non-summary contempt proceeding before a neutral judge.[48]

The *Offutt* decision overruled *Sacher v. United States sub silentio*.[49] The Court, in *Offutt*, adopted the *Cooke* position that the personal involvement of the trial judge in the contemnor's conduct was a major consideration in determining the inapplicability of summary procedures.[50] The *Sacher* decision had expressly rejected the embroilment argument on the ground that it would, as a practical matter, destroy the summary contempt power. The Court in *Offutt* also disregarded the waste of resource rationale on which the *Sacher* decision rested, thereby implying that the trial judge's conduct was the determinative factor which forbade the use of summary procedures.[51]

In *Mayberry v. Pennsylvania*[52] the Court clarified the type of conduct which would disqualify a trial judge and preclude the applicability of summary procedures. In that case the judge, who was verbally attacked, did not respond to the affronts directed toward him as the judge in *Offutt* had.[53] Although the judge in *Mayberry* failed to attain the status of "active combatant," the Court reversed the contempt conviction on due process grounds,[54] finding that the attack on the integrity of the judge carried potential for bias.[55] The delay in charging the contempt and the presumption that the trial judge had become embroiled necessitated the use of non-summary procedures to support the contempt sentence.[56]

In addition to the delay in sentencing the contempt, the Court offered two justifications for requiring disqualification of the trial judge. The first rationale involved an appraisal of human nature. Justice Douglas, writing for the majority, presumed that the defendant's outrageous conduct must have an adverse effect on the judge's attitude toward him, thereby poisoning the judge's ability to adjudicate the contempt charge impartially. A desire to maintain public confidence in the trial system supported the second justification for the Court's holding. The Court believed that the public would question the motivation of any judge who punished the contemnor who insulted him. In order that the appearance of justice be served and that public respect for the judicial system be maintained, personally insulting remarks would disqualify a trial judge from conducting summary contempt proceedings.[57]

Justice Douglas foresaw situations in which summary procedure would be proper. The trial judge could have restored order in the court by citing

[44] 343 U.S. at 9.

[45] Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Offutt v. United States, 348 U.S. 11 (1954).

[46] 348 U.S. 11 (1954).

[47] *Id.* at 14.

[48] *Id.* at 17–18.

[49] United States v. Meyer, 462 F.2d 827, 838 (D.C. Cir. 1972).

[50] 348 U.S. at 17; United States v. Meyer, 462 F.2d 827, 837 (D.C. Cir. 1972).

[51] United States v. Meyer, 462 F.2d 827, 837–38 (D.C. Cir. 1972).

[52] 400 U.S. 455 (1971). In *Mayberry*, the defendant, acting *pro se*, slandered and verbally abused the judge throughout the trial. After the jury returned a verdict of guilty, the judge summarily sentenced the defendant for contempt. Although the judge did not become actively involved in the defendant's contumacious acts, the Court reversed the contempt conviction and remanded the cause for a hearing before another judge.

[53] *Id.* at 456–62.

[54] *Id.* at 466. *Mayberry* also represents an expansion of the ground on which a trial judge may be disqualified. In *Offutt*, the Court reversed the contempt citation in the exercise of its supervisory power over the federal courts. The Court in *Mayberry* grounded its holding in the due process clause of the fourteenth amendment.

[55] 400 U.S. at 465.

[56] *Id.* at 463–66.

[57] *Id.* at 465. See Ungar v. Sarafite, 376 U.S. 575 (1964), for an example of conduct which did not require disqualification of the trial judge since it did not impugn his integrity.

Mayberry's contempts when they occurred. Douglas noted that Mayberry was acting *pro se* and prejudicing no one but himself by his conduct.[58] In addition, Justice Douglas suggested that the summary punishment of attorneys might be necessary in extreme situations and that "we do not 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." [59] Thus, *Offutt* and *Mayberry*, applied together, restrict the exercise of the summary contempt power to those extreme situations in which attorneys' contempts are punished immediately after their occurrence and for the purpose of restoring the order and authority of the court.

Two recent circuit court decisions, *United States v. Meyer*[60] and *In re Dellinger*,[61] have attempted to synthesize and apply the principles governing criminal contempt procedure announced by the Supreme Court. In both cases the courts reversed summary contempt convictions because the trial judges delayed charging the contemnors until after the trials.[62] The timing of the convictions demonstrated that summary procedures were not employed to restore order to the courtrooms. The court in *Meyer* found that, if immediate action became necessary to restore the court's authority, then summary procedures would be preferable to wasting judicial resources by holding hearings on the contempts.[63]

Having announced a rule which would permit the mid-trial exercise of the summary contempt procedure, the court in *Meyer* proceeded to create a massive exception to its own holding. The court stated that the presumption in favor of mid-trial summary procedure might be rebutted by the existence of any of three circumstances[64]—the personal involvement of the trial judge in the contemnor's conduct, actions which would naturally destroy the objectivity of an outwardly calm trial judge, or the judge's adoption of an adversary posture toward the contemnor.[65] The embroilment exception set forth in *Meyer* is so broad that its application would limit the use of summary contempt procedure only to disruptive conduct which does not insult the trial judge.[66] In light of the concern for the absolute impartiality of the trial judge expressed in *Mayberry*, it is difficult to logically justify any use of summary procedure in treating contempts. In any event, these decisions indicate that rule 42(b) safeguards must be provided to attorneys charged with contempt except in extreme circumstances.

Contumacious Attorney Vs. Client—Whose Rights Predominate?

The Supreme Court confronted a serious due process issue in defining the situations in which at-

[58] 400 U.S. at 463. A circuit court found that the test of a trial judge's involvement announced in *Mayberry*, although technically applicable to defendants acting *pro se*, would also control contumacious acts of attorneys. The court adopted this view because the Supreme Court relied on *Cooke* and *Offutt* in developing the standard announced in *Mayberry*, United States v. Meyer, 462 F.2d 827, 840 (D.C. Cir. 1972).

[59] 400 U.S. at 463.

[60] 462 F.2d 827 (D.C. Cir. 1972). In *Meyer*, the court, at the trial's conclusion, summarily convicted and sentenced an attorney representing anti-war advocates. The attorney had stated in open court that the judge had predetermined the defendants' guilt. The court of appeals stated that since the trial judge failed to take immediate action on the contempts, the maintenance of order rationale for summary procedure did not exist. The circuit court remanded the case for a rule 42(b) hearing before an impartial judge because the attorney's remarks involved personal criticism of the trial judge.

[61] 461 F.2d 389 (7th Cir. 1972). In *Dellinger*, the trial judge, at the trial's conclusion, summarily convicted and sentenced defense attorneys and defendants for contempt. The court of appeals reversed the convictions and remanded the cases for a rule 42(b) hearing before an impartial magistrate because the post-trial convictions negated the waste of judicial resource justification for summary procedures and because the trial judge became personally involved in contumacious conduct of the attorneys.

[62] United States v. Meyer, 462 F.2d 827, 842–44 (D.C. Cir. 1972); *In re* Dellinger, 461 F.2d 389, 393–95 (7th Cir. 1972).

[63] 462 F.2d at 842.

[64] *Id.*

[65] *Id.* The third circumstance is similar to the first. A judge who adopts the role of adversary negates the possibility that due process will govern the sentencing of the contemnor. *In re* Murchison, 349 U.S. 133 (1955), and Johnson v. Mississippi, 403 U.S. 212 (1971), illustrate this situation. In *Murchison*, the judge, acting as a one-man grand jury pursuant to state law, convicted the defendant for contempt which arose from testimony given during secret grand jury proceedings. The Court reversed and remanded the case for a public hearing before a different judge, holding that the judge's role as an adversary in the grand jury proceeding created too great a risk that the judge would fail to view the contumacious conduct in a detached manner. In *Johnson*, the Court required reversal when a judge, who had been a losing party in a civil rights suit filed against him by the defendant, summarily punished the defendant for contempt long after the alleged contumacious conduct. The Supreme Court found that the adverse ruling in the civil rights suit caused the judge to view the defendant with prejudice.

[66] Mayberry v. Pennsylvania, 400 U.S. 455, 463 (1971); United States v. Meyer, 462 F.2d 827, 843 (D.C. Cir. 1972). *See* Ungar v. Sarafite, 376 U.S. 575 (1964). *But see* Sacher v. United States, 343 U.S. 1, 12 (1951), where the Court stated that any contempt committed in the presence of the court is an offense against the judge's dignity and authority.

torneys would be entitled to plenary hearings before impartial judges. The Court was forced to balance two policy rationales and to determine which better promoted the administration of justice.

One of the policy arguments favored the preservation of judicial authority to summarily punish contempts by means of rule 42(a) procedures, a position which found support in the *Sacher* decision. The basic argument for this policy is that the judiciary must be equipped to enforce its orders and rulings expeditiously if it is to function in a viable manner.[67]

The counter-rationale, that the contempt power is an "anomaly" in the law, is set forth in Justice Black's dissent in *Green v. United States*.[68] He argued that the summary contempt power allowed the trial judge "to lay down the law, to prosecute those who he believes have violated his command (as interpreted by him), to sit in 'judgment' on his own charges and then within the broadest kinds of bounds to punish it as he sees fit." [69] For Justice Black, the summary contempt power was inconsistent with rudimentary principles of criminal justice because it allowed "the possibility of irresponsible official action" contrary to the intent of the Bill of Rights. In conclusion, Justice Black argued that contempt defendants, in all cases, be extended all the procedural safeguards guaranteed by the Constitution.[70]

The thrust of the Supreme Court cases would seem to support the proposition that a contumacious attorney, whose conduct is neither cited immediately nor extremely insulting to the trial judge, must be provided due process protections in a non-summary proceeding. Two questions emerge from acceptance of this proposition. What due process protections should be extended to a contumacious attorney? At what juncture of the trial should a plenary hearing be held?

Although recent decisions[71] indicate that contempts by attorneys should, in nearly all cases, be adjudicated in a plenary proceeding pursuant to rule 42(b), the Supreme Court has not conclusively specified the exact nature of due process protections with which a contumacious attorney must be provided.[72] In a recent opinion, *United States v. Seale*,[73] the Court of Appeals for the Seventh Circuit required that the following due process protections be made available to the defendant in a plenary proceeding: a public hearing after adequate notice of the charge, the assistance of counsel, the presumption of innocence, proof of guilt beyond a reasonable doubt, the right to compulsory process, and the right to testify.[74]

While the reviewing courts have expanded due process protections for attorneys in contempt cases, they have neglected to thoroughly consider the effect of rule 42(b) procedures on the attorneys' clients. The interests of both the attorney and his client should be considered in determining the appropriate time for a plenary hearing.

From the attorney's viewpoint, the best time for a plenary contempt hearing would be as soon after the contempt citation as the attorney could properly prepare his defense. There are two reasons which support an immediate hearing to determine whether the attorney actually committed contempt. First, a prompt hearing informs the attorney whether he exceeded the bounds of legal advocacy and, if so, provides him with a guide to avoid future criminal conduct. Second, an immediate hearing, in which the attorney's doubts as to what conduct constitutes contempt are resolved, enables the attorney to represent his client without concern about criminal contempt citations. Without an immediate hearing, the lawyer attempts to advocate his client's cause under either a contempt

[67] Fisher v. Pace, 336 U.S. 155 (1949); *Ex Parte* Terry, 128 U.S. 288 (1888).

[68] 356 U.S. 165, 193 (1958) (Black, J., dissenting). Many commentators support the extension of due process protections to defendants summarily cited for contempt. See R. GOLDFARB, *supra* note 23, at 262–64; Comment, *supra* note 10, at 1563–69; Comment, *Summary Punishment for Contempt: Suggestion that Due Process Requires Notice and Hearing Before Independent Tribunal*, 39 S. CAL. L. REV. 463 (1966); Comment, *Conduct of Attorney During Course of Trial*, 71 WIS. L. REV. 329 (1971).

[69] 356 U.S. at 198 (1956); *In re* Murchison, 349 U.S. 133, 136–37 (1955).

[70] In Bloom v. Illinois, 391 U.S. 194 (1968), the Supreme Court accepted the reasoning of Justice Black in requiring trial by jury for all contempts punishable by imprisonment for more than six months. The Court held that, since a contemnor was susceptible to serious criminal penalties, contempts must be considered serious crimes. As a result, the Court refused to balance a contempt defendant's procedural rights against the desire for dispatch and efficiency in judicial enforcement of contempt charges.

[71] Mayberry v. Pennsylvania, 400 U.S. 455 (1971); United States v. Meyer, 462 F.2d 827 (D.C. Cir 1972); *In re* Dellinger, 461 F.2d 389 (7th Cir. 1972).

[72] FED. R. CRIM. P. 42(b), *supra* note 28, contains the minimum due process safeguards. *See also* Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Bloom v. Illinois, 391 U.S. 194 (1968); Green v. United States, 356 U.S. 165, 193 (1958) (Black, J., dissenting); Cooke v. United States, 267 U.S. 517 (1924).

[73] 461 F.2d 345 (7th Cir. 1972).

[74] *Id.* at 372–73.

citation of uncertain validity or the chilling threat of future contempt charges.[75]

The client's right to the effective assistance of counsel[76] is an important factor in determining the point in the trial for a rule 42(b) hearing. The attorney is duty-bound to provide effective advocacy for his client.[77] As a result, there is often conflict in the courtroom arising from the desire of the attorney to be an aggressive and effective advocate of his client's cause and the desire of the court to maintain orderly control of the proceedings. It is often difficult to determine the point at which the the attorney crosses the line between advocate and contemnor. Therefore, a prompt hearing preserves the client's right to have the effective assistance of counsel rather than the assistance of counsel whose representation is chilled by the fear of a contempt citation.

There is no doubt that an attorney must be allowed some leeway in pressing the claims of his client. As the Supreme Court stated in *In re McConnell*,[78]

> It is also essential to a fair administration of justice that lawyers be able to make honest, good-faith efforts to present their clients' cases. . . . The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to contempt so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty.[79]

For that reason, reviewing courts carefully scrutinize contempt citations against attorneys to "insure that trial judges (or the jury on remand) are not left free to manipulate the balance between vigorous advocacy and obstructions so as to chill effective advocacy." [80]

Magistrates conducting hearings on contumacious conduct in federal courts must make findings of a defendant's misbehavior, obstruction of justice, obstruction in the court's presence, and intent.[81] Of the four elements, only obstruction in the court's presence is susceptible to a simple interpretation.

The Supreme Court in *Sacher v. United States*[82] announced a general rule defining a line beyond which advocacy becomes contumacious misbehavior. That standard states that a lawyer may press his client's position until the court issues a ruling, at which time an attorney's only recourse becomes an appeal.[83] In many instances, trial courts issue contempt citations when an attorney continues arguments on rulings after the court has instructed the attorney to cease. However, the attorney must be afforded a sufficient opportunity to argue his client's position before the court makes a decision.[84] Trial judges should not be too hasty in issuing rulings prior to the full presentation of an attorney's argument. Granting an attorney adequate opportunity to argue his position will presumably prompt the trial judge to fairly weigh the issues, often preventing error from infecting the record.[85]

A second element necessary to support a finding of contempt by an attorney is obstruction of justice. Not every insult directed toward the bench will support a finding of contempt since judges are assumed to be hardy individuals[86] who can absorb a certain amount of abuse. Conduct which merely diverts a judge's attention from the bench will not support a contempt citation; there must be a material obstruction of justice.[87] Obstruction may oc-

[75] United States v. Kelley, 314 F.2d 461 (6th Cir. 1963). In *Kelley*, the court reversed defendant's conviction because the trial judge threatened the defendant's lawyer with contempt in the jury's presence. The court stated, "The threat of contempt not only tended to belittle the lawyer in the eyes of jury, but also to unnerve him and throw him off balance so that he could not devote his best talents to the defense of his client." 314 F.2d at 463. *See also* Washington v. Collins, 66 Wash. 2d 71, 400 P.2d 793 (1965).

[76] It is settled that "effective assistance of counsel" is a right of constitutional dimensions. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218 (1967); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932); Bastida v. Braniff, 444 F.2d 396 (5th Cir. 1971).

[77] ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 7: "A lawyer should represent a client zealously within the bounds of the law."

[78] 370 U.S. 230 (1962).

[79] *Id.* at 236.

[80] *In re* Dellinger, 461 F.2d 389, 398 (7th Cir. 1972); United States v. Schiffer, 351 F.2d 91, 94 (6th Cir. 1965), *cert. denied*, 384 U.S. 1003 (1966).

[81] United States v. Seale, 461 F.2d 345, 367 (7th Cir. 1972). The four elements are contained in the statute defining contempt, 18 U.S.C. § 401 (1970).

[82] 343 U.S. 1 (1951).

[83] Sacher v. United States, 343 U.S. 1, 9 (1951); MacInnis v. United States, 191 F.2d 157, 160 (9th Cir. 1951), *cert. denied*, 342 U.S. 953 (1952); Hallinan v. United States, 182 F.2d 880, 887 (9th Cir. 1950), *cert. denied*, 341 U.S. 952 (1951).

[84] *In re* Dellinger, 461 F.2d 389 (7th Cir. 1972); Cooper v. Superior Court, 55 Cal. 2d 291, 359 P.2d 274 (1961).

[85] *In re* Dellinger, 461 F.2d 389, 399 (7th Cir. 1972).

[86] Craig v. Harney, 331 U.S. 367, 376 (1947).

[87] Brown v. United States, 356 U.S. 148, 153 (1958); United States v. Seale, 461 F.2d 345, 369 (7th Cir. 1972). *See* Dobbs, *supra* note 23, at 208.

The Supreme Court dealt with the line between mere insult and obstruction in *In re* Little, 404 U.S. 553

cur if an attorney makes a remark in an insulting manner or if arguments by counsel cause significant delay. In any case, a court may cite contempt by an attorney only on "a showing of imminent prejudice to a fair and dispassionate proceeding." [88]

Intent is the third troublesome element in determining contempt. While courts will grant an attorney great latitude in advocating his client's cause, good faith is not an absolute defense to contempt.[89] As the court stated,

> Given this extreme liberality necessary to a vital bar and thus the effective discovery of truth through the adversary process, an attorney possesses the requisite intent only if he knows or reasonably should be aware, in view of all the circumstances, especially in the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth.[90]

When an attorney may be uncertain as to whether his conduct exceeds the bounds of proper advocacy, the court should warn the attorney that his conduct is bordering on contempt.[91] In that way, the element of intent becomes inoperative since the attorney has been informed that if he pursues a certain line of argument, a contempt citation will result. In sum, the dangers involved in walking the tightrope between contempt and advocacy would seem to require a plenary hearing of some complexity in order to assure that an attorney is not unjustifiably punished and his client is not unconstitutionally deprived of effective advocacy by hasty summary proceedings.

While a mid-trial continuance for a non-summary hearing may benefit the attorney's client to the extent that aggressive and effective assistance of counsel might be preserved, that benefit may be outweighed by the delay in the client's own trial. A lengthy delay might be prejudicial, possibly violating the client's right to a speedy trial.[92] The right to a speedy trial is, at present, not defined with regard to mid-trial continuances.[93]

Justice Brennan's concurring opinion in *Dickey v. Florida*[94] suggests some general standards by which the sixth amendment right to a speedy trial might be reviewed. He suggested that any delay not caused by the defendant but by the actions of a governmental authority might prejudice a criminal defendant's sixth amendment right.[95] Conceivably, one could argue that a judge who harasses an attorney with unsupported contempt charges, which cause the interruption of the principal trial for a rule 42(b) hearing, might violate the defendant's right to a fair and speedy trial. The violation might arise by the loss of favorable witnesses or by the jury's impatience with the delay.

It is extremely difficult to establish proof of a prejudicial attitude adopted by either the jury or by witnesses as a result of the delay. However, Justice Brennan suggests that,

> Within the context of Sixth Amendment rights, the defendant generally does not have to show that he was prejudiced by the denial of jury, knowledge of the charges against him, trial in the district where the crime was committed, or compulsory process. Because potential substantial prejudice inheres in the denial of any of these safeguards, prejudice is usually assumed when any of them is shown to be denied. Because concrete evidence that their denial caused the defendant substantial prejudice is often unavailable, predjudice must be assumed, or constitutional rights will be denied without remedy.... When the Sixth Amendment right to speedy trial is at stake, it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution.[96]

Despite Justice Brennan's suggestion that proof of prejudice may not be necessary to show a denial or infringement of this sixth amendment right, there is no case law concerning mid-trial continuances which violate the right to a speedy trial.

(1972). In *Little*, the defendant, appearing *pro se*, alleged in his summation to the jury, that the trial judge had prejudiced his trial. The Court reversed the contempt citation, holding that trial judges must not confuse their feelings with obstructions of justice. This holding indicates that the Court has set a high threshold for determining obstructions of justice.

[88] United States v. Seale, 461 F.2d 345, 370 (7th Cir. 1972).

[89] *In re* Dellinger, 461 F.2d 389, 397–98 (7th Cir. 1972); United States v. Seale, 461 F.2d 345, 362 (7th Cir. 1972).

[90] *In re* Dellinger, 461 F.2d 389, 400 (7th Cir. 1972).

[91] Ungar v. Sarafite, 376 U.S. 575 (1964); Sacher v. United States, 343 U.S. 1 (1951); Fisher v. Pace, 336 U.S. 155 (1949). Warning or citing an attorney for contempt should occur outside the presence of the jury because the possibility is great that the jury may be prejudiced against the contumacious attorney's client.

[92] U.S. CONST., amend. VI (quoted *supra* note 2). *See generally* Smith v. Hooey, 393 U.S. 374 (1969); Klopfer v. North Carolina, 386 U.S. 213 (1967).

[93] Dickey v. Florida, 398 U.S. 30, 44 (1972) (Brennan, J., concurring).

[94] *Id.* at 39.

[95] *Id.* at 51.

[96] *Id.* at 54–55.

CONCLUSION

Although the thrust of this comment supports the elimination of summary contempt procedures, the possible prejudice to the defendant caused by interrupting his trial for a plenary contempt hearing is a factor which should be weighed in favor of employing summary contempt proceedings against the defendant's attorney. Summary procedure would insure the effective assistance of counsel by the trial court's swift definition of contumacious conduct. Summary proceedings held outside the jury's presence should cause no significant delay in the primary trial. Also, the summary adjudication of an attorney's contempt would restore order to the courtroom, provided that the citation is issued when the contumacious conduct occurs.

Although the possibility of a prejudicial delay in the defendant's trial would seem to be a new justification for the use of summary contempt proceedings against an attorney, the defendant's right to the effective assistance of counsel is not impaired by an immediate plenary proceeding to review an attorney's conduct. Moreover, as previously suggested, this particular sixth amendment right would require an immediate hearing. The relationship of mid-trial continuances to the denial of a speedy trial under the sixth amendment is as yet undefined.[97] However, both an attorney facing a contempt charge and his client desire that the assistance of counsel be effective. Because courts have judged the assistance of counsel to be a right worthy of scrupulous protection,[98] the use of mid-trial rule 42(b) hearings will best give effect to the due process rights of both attorney and client.

[97] *Id.* at 40.

[98] *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218 (1967); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Hamilton v. Alabama, 368 U.S. 52 (1961); Powell v. Alabama, 287 U.S. 45 (1932); Bastida v. Braniff, 444 F.2d 396 (5th Cir. 1971).