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Disruptive Defendants and Prejudice-Prone Jurors: Toward an Implied Waiver of Trial by Jury?

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Comments

DISRUPTIVE DEFENDANTS AND PREJUDICE-PRONE JURORS: TOWARD AN IMPLIED WAIVER OF TRIAL BY JURY?

I. THE PROBLEM

Disruption, disobedience, disrespect: bad anywhere, these indices of civil unrest are especially undesirable in the courtroom. Yet our courtrooms have not been able to avoid disruptive behavior. Particularly troublesome is the disruptive criminal defendant, sometimes characterized as the "political" defendant. He uses the courtroom as a forum for the vociferous airing of political and social views. More than that, he and his counsel may draw upon an arsenal of disruptive and delaying tactics, vilifying the judge and prosecution and prolonging the proceedings at tremendous cost. Moreover, the defendant may benefit by his misconduct. For example, in the 1944 sedition trial[1] the defendants and their counsel deliberately obstructed the trial proceedings with the result that the judge, unable to withstand their constant abuse, collapsed and died. A mistrial was declared and the prosecutor, unwilling to face another seven-month ordeal, decided to discontinue the prosecution.[2]

This Comment will focus upon the problem of how to cope with disruptive defendants. It will discuss several approaches to this problem suggested by courts and commentators. Additionally, a

1. For an interesting account of the 1944 sedition trial and similar "political" trials, see Nizer, *Order in the Court!*, READER'S DIGEST, July 1970, at 95, *condensed from* N.Y. Times, April 5, 1970, § 6 (Magazine), at 12.

2. *Id.*

new alternative for the control of disruptive defendants will be examined.

The new alternative takes into account the fact that much of the difficulty encountered in "political" trials stems from the presence of the jury and the necessity of keeping the jury free from prejudice and confusion. The possibility that the jury will be prejudiced by the defendant's outbursts—possibly in the defendant's favor and possibly against him—necessitates restraint of the defendant. However, since the jury might also be prejudiced by any attempt by the judge to restrain or censure the defendant, the judge is handicapped in his efforts to control the defendant and maintain a fair and speedy trial. Particularly distressing is the self-restraint which the judge must exercise when subjected to abusive personal attacks. Such restraint is often necessary, however, to keep the jury free from possible prejudice.

This Comment will discuss an "implied waiver" approach to the right of trial by jury as a possible solution to the confusion, prejudice, delay, and disorder engendered by the coexistence of the disruptive defendant and the prejudice-prone jury. The implied waiver, supportable by modern trends in legal thinking, can be of value when applied to the disruptive defendant; but it also entails legal and practical problems.

II. Existing Solutions

Several solutions to the problem of the disruptive defendant have been proposed, and in some cases adopted. They may be divided into two categories: disciplinary measures and "implied waiver".

A. Disciplinary Measures

The disciplinary category includes measures which are designed to curtail misconduct anticipatorily, and to punish misconduct after it occurs. These disciplinary measures, however, are more effective in controlling counsel than they are in controlling defendants, since attorneys generally have more to lose by being disciplined.

1. Contempt Citation

The court may punish obstreperous conduct with a criminal contempt citation. The distinction between civil and criminal contempt is not altogether clear, but in general the distinction lies in

the purpose for which the contempt power is used.[3] If administered for the purpose of punishing the offender, preserving the authority of the court, and promoting the fair administration of justice, the contempt is considered criminal.[4]

Summary exercise of the criminal contempt power, though of ancient origin and predicated upon the inherent power of a court to maintain order, has been criticized as being too susceptible to abuse.[5] Abuse is possible because the contemner has traditionally been denied many of the recognized requirements of due process, including notice, the right to counsel, an opportunity to defend, and the right to a jury trial.[6] Apprehension concerning judicial abuse of such a broad contempt power has resulted in the creation of a variety of legislative and judicial restrictions.[7] Of particular importance to the disruptive defendant is the restriction imposed by the United States Supreme Court in *Cheff v. Schnackenberg*.[8] As a matter of federal policy the Court held that sentences exceeding six months for criminal contempt may not be imposed by federal courts without a jury trial unless a jury trial has been waived.[9] The right to a jury trial in the case of a two-year contempt sentence was placed upon constitutional grounds and applied to state courts in *Bloom v. Illinois*.[10] The United States Supreme Court declared that criminal contempt is a crime in the ordinary sense for purposes of the fifth, sixth, and fourteenth amendments.[11]

Now a state judge cannot sentence an obstreperous defendant or his counsel to a prison term exceeding six months[12] without granting a jury trial. This limits the judge's ability to control dis-

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3. Generally, if the purpose is coercive and remedial, the contempt is considered civil. Shillitani v. United States, 384 U.S. 364, 368-71 (1966).

4. Bloom v. Illinois, 391 U.S. 194, 210 (1968); *In re* Debs, 158 U.S. 564, 596 (1895).

5. *See generally* Bloom v. Illinois, 391 U.S. 194 (1968); Comment, *Dealing with Unruly Persons in the Courtroom*, 48 N.C. L. REV. 878 (1970).

6. *Id.*

7. *Id.*

8. 384 U.S. 373 (1966).

9. *Id.* at 380.

10. 391 U.S. 194 (1968).

11. *Id.* at 201.

12. The precise dividing line for the constitutional requirement of a jury trial has been at issue in several cases decided by the Supreme Court. The six-month rule of *Cheff*, applicable only to federal courts, was based upon the opinions of six justices, four of whom rested their opinions on the Court's "supervisory" power, and two of whom rested their opinions on constitutional grounds. Cheff v. Schnackenberg, 384 U.S. 373, 381 (1966) (concurring opinion). *Bloom*, on the other hand, was placed squarely on constitutional grounds, and made applicable to state courts, but the sentence in question was for two years and the Court declined to rule upon the *constitutionality* of a non-jury sentence of less than two years but longer than six months. Bloom v. Illinois, 391 U.S. 194, 211 (1968). In Mayberry v. Pennsylvania, 91 S. Ct. 499 (1971), the Supreme Court's only objection to the summary imposition of eleven contempt sentences of one to two years each was that the sentences should have been imposed by a judge not involved with the trial on the merits. Apparently the location

ruptive behavior through contempt citations. A jury trial on the contempt charge would merely afford the contumacious party a second opportunity to disrupt judicial proceedings. The suggestion has been made that the six-month barrier[13] can be surmounted by cumulating several shorter contempt sentences, but the legality of this suggestion is uncertain.[14]

The trend of authority is toward restricting the court's summary contempt power.[15] Moreover, appellate courts have shown an increasing willingness to examine *de novo* the facts surrounding a summary citation.[16] Thus, the contempt power is not the complete answer to the problem of disruptive behavior. Another drawback of the contempt sentence is that it has its greatest effect on counsel and not on the defendant. The defendant, if already on trial facing a severe penalty, will probably be undaunted by the addition of a summary contempt sentence. In fact, the true "political" defendant may even *welcome* the publicity resulting from a contempt citation.

2. Removal and Suspension of Attorney

A disruptive attorney may be removed from the trial.[17] The client cannot complain because, as the attorney's principal, he has impliedly consented to the attorney's course of conduct. Additionally, since a judge can summarily imprison an attorney for contempt, it has been argued that the judge can also invoke lesser and included measures.[18] One such measure is the suspension of the attorney's right to appear in any court in the same jurisdiction, and possibly in any court in the country, for a period of at least six months.[19] Finally, disciplinary proceedings may be instituted to

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of the dividing line has finally been settled by the Supreme Court in Baldwin v. New York, 399 U.S. 66 (1970) which held that a jury trial is constitutionally required for any offense punishable by a sentence in excess of six months.

13. See discussion note 12 *supra*.

14. Note, however, that in Mayberry v. Pennsylvania, 91 S. Ct. 499 (1971) (discussed in note 12 *supra*), the Supreme Court, while reversing on a related ground, did not specifically object to the non-jury imposition of eleven contempt sentences. The contemner was sentenced to not less than one, nor more than two years for each of the eleven contempts or a total of eleven to twenty-two years.

15. See note 5 *supra*.

16. Comment, *Dealing with Unruly Persons in the Courtroom*, 48 N.C. L. REV. 878, 890 (1970).

17. *See generally* AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS ON DISRUPTION OF THE JUDICIAL PROCESS, *reported in* CASE & COM., Sept.-Oct. 1970, at 28.

18. *Id.* Principle VI and Commentary.

19. *Id.*

censure, suspend, or disbar any attorney who engages in disruptive conduct.[20]

3. Criminal Prosecution

Louis Nizer has suggested that legislation should be enacted making courtroom misconduct a felony. The felony would be known as obstruction of justice.[21] The effect of such legislation would be somewhat similar to the contempt citation. However, the obstruction legislation would afford several additional advantages. The charge of obstruction of justice could be added to the other charges already on trial. Unlike contempt proceedings, the jury that decides the original charges could also decide the obstruction charges. Since the jurors would all be eye witnesses to the alleged crime of obstruction of justice, and since all the necessary evidence would be readily available, prosecution of the offense could be handled swiftly. If the penalty for the obstruction of justice charge approximated the penalty for the original charges, the prosecutor could bring the trial to a quick end simply by accepting a conviction for the crime of obstruction of justice and dropping the other charges. This procedure would be particularly suitable for a "political" trial where the alternative might be a multi-month, disorderly, costly, and highly-publicized trial. The penalty imposed for violation of an obstruction of justice statute could approximate, within limits, the penalty which could be imposed for the original charges. Such a penalty would be analogous to an "accessory" statute imposing upon the abettor of a crime a penalty commensurate with that imposed upon the perpetrator of the crime.[22] Disruptive defendants and counsel could be convicted for violation of an obstruction of justice statute.[23]

B. Implied Waiver of Rights

The second method of controlling unruly defendants is the "implied waiver" approach which operates on the premise that rights may be "waived" or "lost." Although there may be an academic distinction between the defendant who, by his conduct, has impliedly "waived" a right, and the defendant whose conduct has caused him to "lose" the right, the result and underlying rationale is the same.[24]

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20. *See, e.g., id.* Principle XI and Commentary.

21. Nizer, *Order in the Court!*, READER'S DIGEST, July 1970, at 95, 99, *condensed from* N.Y. Times, April 5, 1970, § 6 (Magazine), at 12, 15.

22. *See, e.g.*, State v. Nance, 77 N.M. 39, 419 P.2d 242, *cert. denied*, 386 U.S. 1039 (1966).

23. *See generally* Mayberry v. Pennsylvania, 91 S. Ct. 499, 506 (1971) (concurring opinion).

24. The Supreme Court in Illinois v. Allen, 397 U.S. 337 (1970) used the word "lost" rather than "waived". *Id.* at 346. This change in terminology has been regarded by one writer as significant. Comment, *Dealing with Unruly Persons in the Courtroom*, 48 N.C. L. REV. 878, 884 (1970). However, it has not been made clear *why* the change should be considered significant.

Since most authorities refer to the result as an "implied waiver" rather than as a "loss," the former designation is the one which has been adopted for the purposes of this Comment.

The underlying rationale of the implied waiver approach turns upon the defendant's conduct at trial; if his conduct is inconsistent with the proper exercise of one of his rights, the defendant is deemed, by his inconsistent conduct, to have "waived" the right. For example, the defendant normally has the right to be present at his trial, but this right carries with it attendant duties, including maintenance of proper demeanor. If the defendant is disruptive and fails to fulfill his duty of good behavior, he is acting inconsistently with his right to be present, and thereby impliedly waives the right.[25] The justification for the implied waiver derives not only from the notion that a defendant cannot assert inconsistent rights, but also from the maxim that a defendant should not be entitled to benefit from his own wrongful and disruptive conduct.

The following are rights which obstreperous defendants have been deemed to have waived.

1. The Right to be Present at Trial

The right to be present at trial, which includes the right to counsel and the right to confront one's accusers,[26] has been regarded as waived by defendants who persist in being disruptive. The United States Supreme Court, in *Illinois v. Allen*,[27] decided that either complete physical removal of the defendant,[28] or shackling and gagging,[29] is a permissible consequence of the "waiver" or "loss"[30] of the right to be present at trial.

If the defendant is physically removed from the courtroom he should at least be apprised of the progress of his trial. For example, he should be sent the stenographic minutes of each day's proceedings. Additional safeguards of the defendant's rights have been suggested. Perhaps the defendant could be permitted to oversee his trial, either by closed circuit television or by a telephone connection with his counsel. Another alternative would be to place the defendant in a box in the rear of the courtroom. The box could permit the defendant a full view of the proceedings, or limit the de-

25. Waiver of the right to be present at trial will be more fully discussed *infra*.
26. These rights are derived from U.S. CONST. amend. VI.
27. 397 U.S. 337 (1970).
28. *Id.* at 344.
29. *Id.*
30. See discussion note 24 *supra*.

fendant's view of the proceedings and likewise limit the view which the jury would have of the defendant. A primary difficulty with these suggestions is that they entail considerable expense in addition to the costs already caused by the defendant's disruptive and delaying tactics. *Allen* does not require such expenditures, and it seems unreasonable to enable defendants, by their unruliness, to place such an additional financial burden on our courts.

The shackling and gagging alternative also has its drawbacks. It is acceptable if there is a clear danger that the defendant will commit acts of violence or will attempt to escape.[31] In such cases even the stationing of armed guards around the courtroom is permissible.[32] However, absent the possibility of violence or escape, shackling and gagging is an undesirable alternative. Although the jury may be prejudiced by the defendant's complete absence from the trial, it is much more apt to be prejudiced by the sight of the defendant bound and gagged. Moreover, such a sight offends the dignity of the court.[33]

2. Right to a Speedy Trial

The right to a speedy trial can also be impliedly waived by disruptive conduct.[34] The judge may, therefore, declare a continuance until such time as the defendant is willing to guarantee that he will not be disruptive.[35] If the defendant is able to obtain bail, the continuance method of dealing with unruly defendants is obviously inadequate. As a solution to this inadequacy, the United States Supreme Court has held that a disorderly defendant may be imprisoned for civil contempt during the period of the continuance.[36] If, during the continuance, a juror becomes unavailable and is later replaced, or if a new jury is subsequently impanelled, the defendant is precluded from raising a "double jeopardy" defense, as discussed *infra*.[37] Of course, if *witnesses* are apt to become unavailable, the continuance method should not be employed.

3. Right not to be Twice Placed in Jeopardy

If, after the declaration of a continuance or mistrial, a juror becomes unavailable and is later replaced, or if a new jury is subsequently impanelled, the defendant is not permitted to raise the defense of double jeopardy. In case a juror becomes unavailable,

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31. Odell v. Hudspeth, 189 F.2d 300 (10th Cir.), *cert. denied*, 342 U.S. 873 (1951).
32. United States v. Bentvena, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963).
33. Illinois v. Allen, 397 U.S. 337, 344 (1970).
34. *Id.* at 345 (by implication).
35. *Id.*
36. *Id.*
37. See discussion accompanying notes 38-42 *infra*.

the defendant has two options:[38] (1) He may elect to proceed with a jury of less than twelve, thus waiving his right to a twelve-man jury;[39] or (2) he may choose to have a new juror, or an entirely different jury impanelled, impliedly waiving his right to plead double jeopardy.[40] Depriving the defendant of the double jeopardy defense in such a case is based upon the rule of necessity.[41]

If the defendant's misconduct results in a mistrial and an entirely new jury is subsequently impanelled, the defendant is likewise precluded from raising a double jeopardy defense. The defendant's misconduct operates as an implied waiver of his double jeopardy right to prevent the defendant from benefiting from his own wrongful conduct.[42]

Thus, the implied "double jeopardy" waiver is justifiable. However, it is not an affirmative answer to the judge's problem of coping with the unruly defendant. The defendant is merely afforded a new trial and thus has a second opportunity to be disruptive.

4. Right to a Public Trial

In "political" trials in which the defendant has actively encouraged the spectators to disrupt the proceedings, the court may order the removal of the unruly spectators. This action is authorized on the theory that the defendant has impliedly waived his right to a public trial, or more traditionally, on the theory that the trial judge has the inherent power to oust disorderly spectators in order to maintain order, avoid overcrowding, and prevent undue strain on witnesses.[43]

A limiting factor on the judge's right to expel spectators is the generally accepted view that the right to a public trial belongs

38. A juror may become insane, ill, or otherwise unavailable. Collins v. State, 220 Tenn. 23, 413 S.W.2d 683, *cert. denied*, 389 U.S. 824 (1967).

39. The defendant may waive the presence of one or more, or even all of the jurors. Patton v. United States, 281 U.S. 276 (1930).

40. United States v. Burrell, 324 F.2d 115 (7th Cir.), *cert. denied*, 376 U.S. 937 (1963); United States v. Gori, 282 F.2d 43 (2d Cir.), *aff'd*, 367 U.S. 364 (1960); United States v. Harriman, 130 F. Supp. 198 (S.D.N.Y. 1955); Collins v. State, 220 Tenn. 23, 413 S.W.2d 683, *cert. denied*, 389 U.S. 824 (1967).

41. United States v. Gori, 282 F.2d 43 (2d Cir.), *aff'd*, 367 U.S. 364 (1960); United States v. Harriman, 130 F. Supp. 198 (S.D.N.Y. 1955); Mack v. Commonwealth, 177 Va. 921, 15 S.E.2d 62 (1941).

42. Commonwealth *ex rel.* Green v. Rundle, 422 Pa. 236, 221 A.2d 187 (1966); Mack v. Commonwealth, 177 Va. 921, 15 S.E.2d 62 (1941).

43. United States v. Kobli, 172 F.2d 919 (3d Cir. 1949); *see also* Comment, *Dealing with Unruly Persons in the Courtroom*, 48 N.C. L. REV. 878, 885 (1970).

not only to the defendant, but also to the public, to enable it to oversee the administration of the law.[44] Thus the judge, in expelling spectators, may leave himself open to criticism for conducting "Star-Chamber" proceedings. To avert such criticism, while preserving order in "political" trials, it has been suggested that the judge invite representatives of such groups as the American Civil Liberties Union to attend the trial in lieu of public spectators.[45]

III. Implied Waiver of Trial by Jury

A. *Background*

The disruptive defendant challenges the judicial system to control his misconduct without depriving him of due process. In response to the defendant's challenge, several measures have been employed, with varying degrees of success.

The "implied waiver" is one such measure. Courts following the implied waiver theory have found implied waivers of the right to be present at trial,[46] the right to a speedy trial,[47] the right to a public trial,[48] and the right to be free from double jeopardy.[49]

Waivers of these rights, while legally justified, are not entirely satisfactory in regulating courtroom misconduct. The implied waiver of the double jeopardy right merely affords the defendant a second opportunity to be disruptive. The same objection applies to the waiver of the right to a speedy trial; the defendant can simply prolong his disruptive tactics. Even the defendant's waiver of his right to a public trial may have no direct effect upon him.

A more effective waiver, from the standpoint of controlling unruly conduct, is the defendant's implied waiver of his right to be present at trial. However, even this waiver entails difficulties. The possibility that the defendant's absence will prejudice the jury is very strong. Even stronger is the possibility of prejudice arising from binding and gagging the defendant in the jury's presence. Furthermore, the defendant may be materially hampered in preparing his defense if he is shackled or imprisoned during trial. Corrective measures have been suggested to reduce the possibility of jury prejudice and to help the defendant oversee his trial, but they involve considerable expense and inconvenience.[50]

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44. United States v. Kobli, 172 F.2d 919 (3d Cir. 1949).
45. Nizer, *Order in the Court!*, Readers Digest, July 1970, at 95, 99, *condensed from* N.Y. Times, April 5, 1970, § 6 (Magazine), at 12, 15.
46. See discussion accompanying notes 26-33 *supra*.
47. See discussion accompanying notes 34-37 *supra*.
48. See discussion accompanying notes 43-45 *supra*.
49. See discussion accompanying notes 38-42 *supra*.
50. These measures include the use of stenographic minutes, telephone connections, and closed circuit television sets when the defendant is removed from the courtroom, and the use of an Eichmann-type box if the defendant is permitted to remain in the courtroom. See the discussion of these measures in Part II, B, 1 *supra*.

B. Operation and Effect

As an additional and possibly more effective means of controlling unruly defendants, a new waiver is here proposed: an implied waiver of trial by jury. The operation of this waiver is the same as for the other waivers. Basically, the defendant may be deemed to have waived his jury trial right if his acts are inconsistent with the proper exercise of the right. Courts may reasonably expect that to derive the benefits of a jury trial, defendants will discharge the duties which such a trial entails. The duties include cooperation in keeping the jury free from prejudice and confusion, and the trial free of violence, abusive outbursts, and unjustified delay.

Accordingly, after persistent disruptive outbursts, acts of violence, or unjustified delay, the defendant should be warned that his conduct is inconsistent with the proper exercise of his right to a trial by jury, and that subsequent disruptions of a similar nature will be construed as an election on the defendant's part to forego his jury-right.

There are several advantages to an implied waiver of the right to trial by jury. Just the *warning* that further misconduct may result in dismissal of the jury might induce better behavior if the defendant is adverse to a non-jury trial. If, however, the defendant persists in his disruptive conduct, the judge could then dismiss the jury and proceed without it. Thereafter, the judge would no longer be hamstrung by the omnipresent danger of jury prejudice and the commission of reversible error in his efforts to restrain the defendant's outbursts. Not only would the judge be better able to maintain order, but the defendant would be less likely to continue his abusive conduct, knowing the judge to be the arbiter of his guilt. A further advantage is the elimination of the possibility that charges against "political" defendants would be dismissed on the ground that it is impossible to obtain an impartial jury.[51]

An added advantage of the jury waiver is economy. Justice is supposedly not concerned with financial matters. Nevertheless, as long as justice is done, it is relevant to determine which measure accomplishes the just result most economically. It is significant that most of the measures presently employed or suggested to control unruly defendants entail varying costs to accomplish their purpose.

51. An example is the recent murder-kidnapping prosecution against defendants Huggins and Seale. Following a hung jury and a resultant mistrial, all charges against the defendants were dismissed on the ground that it would be "virtually impossible" to obtain an impartial jury. It had taken four months to impanel the first jury. N.Y. Times, May 26, 1971, § 1, at 1, col. 8.

The jury trial waiver is the only measure which would actually decrease the cost of prosecution.

The jury trial waiver can therefore be an effective and efficient means of controlling disruptive conduct. It is, however, subject to legal and practical objections.

C. *Legal and Practical Objections*

The two principal legal objections are that the implied jury trial waiver will have a "chilling effect" on the defendant's "political" activities within the courtroom, and that the waiver is unconstitutional.

The "chilling effect" argument has little to recommend it. The defendant has no right to disrupt judicial proceedings in the first place, and cannot claim such a right by designating his disruptive conduct "political." Since the defendant has no legally protected right, he cannot complain that his activities have been "chilled." Furthermore, the "chilling effect" argument, if valid, would preclude *all* attempts to control unruly defendants and would not be limited to the jury trial waiver.

The second legal objection, regarding the constitutionality of the implied jury trial waiver, is more serious. The problem presented is twofold: whether a jury trial may be waived at all, and whether it may be waived by implication.

Originally the right to a jury trial in a criminal prosecution was considered so fundamental by federal courts and most state courts that it could not be waived.[52] So even if a defendant expressly and knowingly waived the right, the waiver was generally not upheld.[53] However, since the Supreme Court decided *Patton v. United States*[54] in 1930, the trend has been toward allowing express jury trial waivers.[55] In *Patton* the Court declared that a defendant could expressly waive his right to a jury trial in either felony or misdemeanor prosecutions.[56]

Assuming that an express jury waiver is valid, the next question concerns the constitutionality of an *implied* jury waiver. The other rights discussed in this Comment have been impliedly waived without constitutional objection. The question is whether the jury trial right is so basic that, unlike the defendant's other rights, it cannot be waived by implication.

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52. Comment, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 VA. L. REV. 655, 656 (1934); Comment, *Waiver of Jury in Felony Cases*, 20 CALIF. L. REV. 132, 134 (1931).

53. Comment, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 VA. L. REV. 655, 656 (1934).

54. 281 U.S. 276 (1930).

55. *See generally* Comment, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 VA. L. REV. 655 (1934); Comment, *Waiver of Jury in Felony Cases*, 20 CALIF. L. REV. 132 (1931).

56. Patton v. United States, 281 U.S. 276, 309 (1930).

The Constitution itself does not provide an answer to this question. There is no clear-cut statement of the meaning and application of the "trial by jury" provision.[57] As a result, varying meanings have been attached by courts to the phrase "trial by jury." Originally, the Supreme Court ruled that a twelve-man jury was required by the Constitution.[58] Recently, however, the Court has declared that a jury of less than twelve is constitutionally permissible.[59] This trend toward relaxing the jury requirement, coupled with the Supreme Court's recent endorsement of an implied waiver of the right to be present at trial,[60] may point toward the Court's acceptance of an implied jury trial waiver.

Significantly, the Constitution has been interpreted as permitting trial without jury, even absent defendant's consent, in certain situations. The situations include petty offense cases, extradition actions, "quasi-criminal" proceedings such as deportation, criminal contempt citations, and military trials.[61] There is a noticeable trend however, particularly in petty offense and criminal contempt cases, toward broadening the application of the jury trial requirement. Specifically, the Supreme Court has held that the classification of petty offenses, where there is no right to a trial by jury, is restricted to those offenses punishable by a sentence of six months or less.[62] The Court will presumably apply the six-month rule to contempt proceedings against contumacious defendants; if the contempt sentence is for more than six months, the defendant is entitled to a jury trial on the contempt charge.[63] This protection of the contemner's jury right makes Court's acceptance of an implied jury trial waiver questionable.

A final, practical objection to the jury waiver exists. If the defendant fails to heed the judge's warnings and continues to be abusive and disruptive after the jury is dismissed, the question arises of whether the judge, as the new trier of fact, is apt to be as prejudiced as the original jury. Since the implied waiver of the jury is partly based on the defendant's failure to keep the jury free of prejudice, the waiver loses much of its justification if the judge

57. On the ambiguity of U.S. CONST. art. III, § 2, and amend. VI, providing for trial by jury, *see generally* Williams v. Florida, 399 U.S. 78 (1970).

58. The leading case on this point is Thompson v. Utah, 170 U.S. 343 (1898).

59. Williams v. Florida, 399 U.S. 78 (1970).

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

61. *See* Orfield, *Trial by Jury in Federal Criminal Procedure*, 1962 DUKE L.J. 29.

62. See discussion note 12 *supra*.

63. See discussion note 12 *supra*.

is as prone to prejudice as the jury.

Theoretically, the judge is better able to avoid personal prejudice. However, the judge's dual role as disciplinarian and representative of the "political system" disdained by the defendant may make the judge the constant butt of invective from the defendant. Under such circumstances it may be difficult for the judge to avoid bias.

One solution to the prejudice problem is to have one judge preside over the trial and have a second judge try the facts in lieu of a jury. If most of the defendant's outbursts were leveled at the presiding judge, the second judge would be relatively bias-free and able to arrive at a fair verdict.

Another answer to the problem of the judge's possible prejudice is simply to recognize that the defendant has the clear alternative of not abusing the judicial system generally and the judge personally. If the defendant does choose to be abusive and disruptive, he cannot complain about any prejudice he has created or about any corrective measures which have been adopted to accord him a fair, but orderly trial.

IV. Conclusion

All of the measures presently employed or suggested for the control of disruptive defendants have shortcomings. By comparison, the proposed implied waiver of the right to trial by jury would be more effective and economical. However, its constitutionality is questionable.

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