Marquette Law Review

Volume 66
Issue 2 *Winter 1983*

Article 6

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Marna M. Tess-Mattner, *Contempt of Court: Wisconsin's Erasure of the Blurred Distinction Between Civil and Criminal Contempt*, 66 Marq. L. Rev. 369 (1983).
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CONTEMPT OF COURT: WISCONSIN'S ERASURE OF THE BLURRED DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPT

I. Introduction

"From time immemorial, certain powers have been conceded to courts because they are courts. Such powers have been conceded because without them [courts] could neither maintain their dignity, transact their business, nor accomplish the purpose of their existence. These powers are called inherent powers."[1] The contempt power is considered an inherent power[2] enabling courts to protect their authority,[3] maintain order in their courtrooms,[4] compel compliance with their decrees[5] and protect the rights of parties to actions.[6] Without this power, courts would be "mere boards of arbitration"[7] or "debating socie[ties],"[8] issuing advisory opinions.

Although the contempt power is inherent and "consists largely of judge-made law,"[9] the power is not absolute.[10] Wisconsin courts have generally allowed legislative regula-

1. State v. Cannon, 196 Wis. 534, 536, 221 N.W. 603, 603 (1928).

2. *E.g.*, State *ex rel.* Rodd v. Verage, 177 Wis. 295, 306, 323, 187 N.W. 830, 835, 841 (1922); Brautigam, *Constitutional Challenges to the Contempt Power*, 60 Geo. L.J. 1513, 1514 (1972).

3. *E.g., In re* Kading, 74 Wis. 2d 405, 411, 246 N.W.2d 903, 906 (1976).

4. *E.g.*, Brautigam, *supra* note 2, at 1514-16; Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev. 183, 184 (1971). *See also* N. Dorsen & L. Friedman, Disorder in the Court 17 (1973) ("[C]ourtroom disruption threatens the system of orderly justice.").

5. *See, e.g., In re* Kading, 74 Wis. 2d 405, 411, 246 N.W.2d 903, 906 (1976); State *ex rel.* Rodd v. Verage, 177 Wis. 295, 323, 187 N.W. 830, 841 (1922); Brautigam, *supra* note 2, at 1515; Dobbs, *supra* note 4, at 184.

6. *E.g.*, Wisconsin Employment Relations Bd. v. Mews, 29 Wis. 2d 44, 53, 138 N.W.2d 147, 153 (1965).

7. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450 (1911); State *ex rel.* Rodd v. Verage, 177 Wis. 295, 324, 187 N.W. 830, 842 (1922).

8. State *ex rel.* Attorney Gen. v. Circuit Court, 97 Wis. 1, 8, 72 N.W. 193, 194 (1897). *See also* Comment, *Contempt of Court: Some Considerations for Reform*, 1975 Wis. L. Rev. 1117, 1117.

9. Comment, *supra* note 8, at 1117 (citing Dobbs, *supra* note 4, at 185).

10. Upper Lakes Shipping v. Seafarers' Int'l Union, 22 Wis. 2d 7, 17, 125 N.W.2d 324, 330 (1963).

tion of the power,[11] within reasonable limits such that the courts will be left with sufficient authority to accomplish their intended purposes.[12] The earliest Wisconsin statutes included contempt provisions,[13] but courts nevertheless exhibited confusion about the extent of the power, the kind of contempt involved in a particular case and the penalty allowed in any given case.[14] A major factor creating the confusion was the attempt to distinguish between civil contempt and criminal contempt.[15]

The Wisconsin Legislature attempted to clarify the contempt confusion in 1975,[16] but left intact the civil-criminal distinction. The confusion and criticism, therefore, continued.[17] In 1979 the Wisconsin Legislature again repealed the statutory contempt provisions and created new provisions which eliminated attempts to distinguish between civil and criminal contempt.[18]

This comment briefly discusses, for the sake of clarity, the kinds of conduct constituting contempt and how such behavior traditionally has been classified. It then explains the bases for and the importance of the civil-criminal distinction and illustrates how the boundaries have been blurred. Next follows a review of Wisconsin's efforts to codify and clarify the contempt power, culminating in the 1979 legislative ef-

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11. *Id.* (citing Jos. Schlitz Brewing Co. v. Washburn Brewing Assn, 122 Wis. 515, 518, 100 N.W. 832, 833 (1904)). *See generally infra* Part III, *A*.

12. State *ex rel.* Attorney Gen. v. Circuit Court, 97 Wis. 1, 8, 72 N.W. 193, 194 (1897):

> Doubtless, this power may be regulated, and the manner of its exercise prescribed, by statute, but certainly it cannot be entirely taken away, nor can its efficiency be so impaired or abridged as to leave the court without power to compel the due respect and obedience which is essential to preserve its character as a judicial tribunal.

13. WIS. STAT. ch. 87, §§ 7-9 (1849); *id.* ch. 115, §§ 1-2, 20-25 (1849) (repealed and recreated by 1975 Wis. Laws ch. 401, §§ 2-3).

14. *See infra* Part IV, *B*.

15. *See infra* Part III, *A* & *C*.

16. 1975 Wis. Laws ch. 401, §§ 2-3. For details of the changes wrought, see the analysis of the proposed bill in Comment, *supra* note 8, at 1130-34. *See also* Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 CINN. L. REV. 677, 686 (1981) ("The underlying purpose of this statute was to preserve the distinction between civil and criminal contempt by sharpening the differences between them.").

17. *See infra* Part IV.

18. 1979 Wis. Laws ch. 257, § 11.

fort. Finally, this comment raises questions about the effectiveness of the change and discusses further modifications that may be necessary.

II. Defining and Classifying Contemptuous Conduct

A. Definitions of Contempt

"Contempt of court consists of an act or omission substantially disrupting or obstructing the judicial process in a particular case."[19] Despite the apparent simplicity of this sentence, judges, legislators and commentators have been unable to precisely define the concept and what conduct it embraces.[20] Ultimately, contempt is often determined by the previously established relationship between the judge and the actor, the mood of the judge or the manner in which the act is committed.[21] The contempt can involve parties to actions, attorneys, witnesses or spectators.[22] Contempt can occur inside or outside courtrooms, within or outside the actual presence of the judge acting in an official capacity.[23]

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19. Dobbs, *supra* note 4, at 185.

20. Brautigam, *supra* note 2, at 1526; Comment, *supra* note 8, at 1117. For Wisconsin's statutory definitions, see *infra* Part IV, *A*.

21. State *ex rel.* Reynolds v. County Court, 11 Wis. 2d 560, 575, 105 N.W.2d 876, 884 (1960); Brautigam, *supra* note 2, at 1525.

22. N. Dorsen & L. Friedman, *supra* note 4 *passim*.

23. The Wisconsin Supreme Court distinguished the presence of the judge as an individual from the judge as the court:

> [S]ociety . . . has accorded to courts the greatest respect. . . . This respect is not accorded to the Judge — the man. The Judge presiding over a court is one character. The Judge in his chambers another. The Judge in his home or on the street quite another. The Judge as an individual may or may not be accorded the respect which by common consent belongs to the institution — the Court. The Judge as the individual is not entitled *per se* to any particular degree of respect. . . . It is the institution — the Court — to which belongs that degree of respect commensurate with the place which it occupies in the scheme of organized society. The Judge and the Court are not identical. The Judge is a man. The Court is an institution. It requires something more than a Judge sitting on the bench to constitute a Court. It requires, in addition, the existence of conditions authorizing the exercise of the powers of a court. It requires the presence of that upon or over which the powers of a court may be exerted, namely, a controversy involving legal or human rights. It requires the presence of litigants, generally attorneys, usually officers, such as bailiff, clerk, etc., and frequently jurors. To constitute a court, some of these elements must concur with the presence of a presiding judge. It is this institution, as distinguished from the Judge, that merits and enjoys the respect of society.

Conduct constituting contempt can be roughly categorized[24] as (1) disruptive, (2) obstructive and (3) disobedient or defiant conduct.[25] These categories will be addressed separately although they frequently overlap.

Disruptive conduct usually refers to conduct occurring in the courtroom while court is in session which tends to prevent the orderly progression of court proceedings.[26] This benign definition fails to fully illustrate the kind of conduct involved—conduct which often completely halts a trial or other court proceeding until order is restored. Examples of this kind of contemptuous conduct include repeatedly interrupting;[27] insulting other persons in court;[28] physically assaulting persons in the courtroom;[29] noisemaking, including shouting, clapping, pounding, and stamping feet;[30] being tardy or absent without excuse,[31] making frivolous or insubstantial objections and arguments,[32] disregarding court rul-

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Rubin v. State, 192 Wis. 1, 6-7, 211 N.W. 926, 928-29 (1927), *cited in* State v. Dickson, 53 Wis. 2d 532, 542, 193 N.W.2d 17, 23 (1972).

The distinction is important, but judges often ignore it and treat any personal affront as a contempt of court. *See, e.g.*, State v. Dickson, 53 Wis. 2d 532, 193 N.W.2d 17 (1972) (attorney disregarded clerk's order to have client present at pretrial conference); State *ex rel.* Reynolds v. County Court, 11 Wis. 2d 560, 105 N.W.2d 876 (1960) (county purchasing agent refused to authorize county payment for air conditioner in judge's chambers); O'Brien v. State, 261 Wis. 570, 53 N.W.2d 534 (1952) (attorney questioned whether judge had brains). *Cf.* N. DORSEN & L. FRIEDMAN, *supra* note 4, at 90-95, 149-52 (suggestion that courts overlook parties' passive disrespect and single insulting or obscene outbursts, and be somewhat tolerant of attorneys' disrespect unless it becomes disruptive or obstructive).

24. "No classification of factual patterns can be an absolute one; each situation shades into others . . . ." Dobbs, *supra* note 4, at 186.

25. A fourth category, affronts to the dignity of the court, comprises conduct which can be classified with any of the other three categories, depending upon the nature of the conduct, and may involve conduct which should not be considered contempt at all. *See supra* note 23. Typical of this category are inappropriate attire, passive disrespect, such as refusing to rise, and refusing to use respectful terms of address. *See* Dobbs, *supra* note 4, at 200-04.

26. *See, e.g.*, WIS. STAT. § 785.01 (1979).

27. N. DORSEN & L. FRIEDMAN, *supra* note 4, at 72-74.

28. United States v. Seals, 461 F.2d 345, 382 (7th Cir. 1972), *quoted in* N. DORSEN & L. FRIEDMAN, *supra* note 4, at 58-59. *See also* Dobbs, *supra* note 4, at 205-06 ("insulting tone of voice" insufficient if words themselves not insulting, but assertions that judge is biased are very likely to be sufficient).

29. Recent and ancient examples of such assaults are discussed in Dobbs, *supra* note 4, at 187 & n.9.

30. N. DORSEN & L. FRIEDMAN, *supra* note 4 *passim*.

31. Dobbs, *supra* note 4, at 187-88.

32. United States v. Sacher, 182 F.2d 416 (2d Cir. 1950).

ings[33] and otherwise engaging in tactics designed to delay or interfere with the proceedings.[34] It is not contumacious, however, for an attorney to respectfully, but firmly, disagree with a judge's viewpoint.[35]

Obstructive conduct may occur during court proceedings, but more often occurs outside the court. Such conduct "tends to subvert fairness or efficiency"[36] in the judicial process, thereby reducing or eliminating the opportunity for a fair trial. Examples include bribing, threatening or intimidating court officers, jurors, witnesses, judges or opposing parties,[37] avoiding execution of process,[38] altering documents,[39] refusing to testify[40] and concealing property to avoid levy.[41]

Disobedient or defiant conduct generally occurs outside the courtroom, as when someone refuses to comply with an interlocutory or final order in a case.[42] Examples include violating labor injunctions,[43] failing to make payments as ordered,[44] refusing to testify before a grand jury,[45] refusing to

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33. *Id.*

34. *Id.*

35. State v. Dickson, 53 Wis. 2d 532, 540, 193 N.W.2d 17, 22 (1972).

36. Dobbs, *supra* note 4, at 189.

37. *Id.* at 189-91; O'Brien v. State, 261 Wis. 570, 53 N.W.2d 534 (1952).

38. Dobbs, *supra* note 4, at 185 n.3.

39. *Id.* at 198-99.

40. *Id.* at 195-96. But the Supreme Court has held that finding a witness in contempt for perjury is improper. *E.g., In re* Michael, 326 U.S. 224 (1945); *Ex parte* Hudgings, 249 U.S. 378 (1919), *discussed in* Dobbs, *supra* note 4, at 196-97.

41. *Id.* at 190.

42. "[I]ntentional defiance of the court's . . . judgment . . . cannot be condoned . . . ." Wisconsin's Employment Relations Bd. v. Mews, 29 Wis. 2d 44, 53, 138 N.W.2d 147, 153 (1965).

The order must be an order by the judge in his or her official capacity, not an order signed by a clerk, State v. Dickson, 53 Wis. 2d 532, 540-41, 193 N.W.2d 17, 22 (1972) because "there can be no contempt, in the legal sense, of a clerk of court." *Id.* at 541, 193 N.W.2d at 22.

43. *E.g.*, Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911); State v. King, 82 Wis. 2d 124, 262 N.W.2d 80 (1978).

44. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 442 (1911); Schroeder v. Schroeder, 95 Wis. 2d 415, 420, 290 N.W.2d 548, 550 (1980), *rev'd on other grounds*, 100 Wis. 2d 625, 302 N.W.2d 475 (1981). The failure to pay must be a deliberate defiance of the court's order; a person cannot be held in contempt for failure to pay if unable to pay. Mercury Records Prods. v. Economic Consultants, 91 Wis. 2d 482, 504-06, 283 N.W.2d 613, 624-25 (Ct. App. 1979).

45. Shillitani v. United States, 384 U.S. 364 (1966).

file a financial statement[46] and refusing to produce a handwriting sample.[47]

B. *Classifications of Contempt*

Classification of the contemptuous conduct has always been considered important because, traditionally, the nature of the sanction is governed by the kind of contempt involved.[48] Courts then determine the appropriate procedures to impose the sanctions.[49] An astonishing array of classifications has developed,[50] but only two classifications, civil-criminal and direct-indirect, are widely used today.[51]

Although classifications ostensibly classify the contemptuous conduct, the contemptuous conduct is not the primary concern. In a rather backward manner, the classification is usually determined on the basis of the relief granted or sentence imposed.[52]

> It is not the nature of the act itself, but rather the manner in which it was committed, its resultant injury to parties to the action or to the dignity and authority of the court, the nature of the relief sought, and the manner in which the act was brought to the attention of the court which have been the factors determining the character of the contempt.[53]

At the same time, the nature of the proceeding is determined by whether the contemptuous act occurred within or outside the presence of the judge. Thus, a direct contempt, that is, one occurring in the immediate presence of the court, may be dealt with summarily,[54] regardless of whether it is

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46. *In re* Kading, 74 Wis. 2d 405, 246 N.W.2d 903 (1976).
47. State v. Doe, 78 Wis. 2d 161, 254 N.W.2d 210 (1977).
48. R. GOLDFARB, THE CONTEMPT POWER 48 (1963).
49. Martineau, *supra* note 16, at 681.
50. *Id.* at 681-83 (civil-criminal, direct-indirect or constructive, positive-passive, punitive-remedial, aid to litigant-protection of the authority and dignity of the court, mandatory-prohibitory, state-private and willful-inadvertent).
51. R. GOLDFARB, *supra* note 48, at 47-48; Martineau, *supra* note 16, at 681.
52. Dobbs, *supra* note 4, at 236; Martineau, *supra* note 16, at 681.
53. Statute Law, *Contempt—Distinctions in Adjudicated Wisconsin Cases Between Civil and Criminal Contempts*, 9 WIS. L. REV. 166, 170 (1934).
54. The summary procedure allows the court to deal with the contemptuous conduct immediately, without a hearing or consideration of possible mitigating factors. The summary power is justified on the grounds that it provides a convenient means for the court to maintain order and it avoids additional burdens on the court system. *See* Comment, *Counsel and Contempt: A Suggestion That the Summary Power Be*

later determined to be criminal or civil in nature.[55] The rationale for this approach is that the judge, through personal observation, has seen all the evidence regarding the incident and can, therefore, render judgment.[56] On the other hand, an indirect contempt, that is, one occurring outside the direct observation of the court, requires the usual factfinding procedures such as presentation of evidence and cross-examination of witnesses.[57]

When contemptuous conduct occurs indirectly, the civil-criminal distinction becomes crucial. In general, civil contempt sanctions are remedial or coercive, while criminal contempt sanctions are purely punitive.[58] The importance of the distinction, and the confusion surrounding it, is detailed in the following section.

III. The Civil-Criminal Distinction

A. Bases of the Distinction

Establishing whether a particular case of contemptuous conduct constitutes a civil or a criminal contempt is far from being a "purely academic" question.[59] A variety of rights and procedures are dependent upon which kind of contempt is involved.[60]

The standard analysis of contempt focuses upon the sanction involved: the kind of sanction imposed and the reason for the sanction being imposed.[61] This results in an Al-

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Eliminated, 18 DUQ. L. REV. 289, 290, 293 (1980). *See also* Note, 11 GOLDEN GATE L. REV. 153, 160 (1981) ("Summary contempt is a drastic remedy and should be used only when there is a compelling reason for immediate action.").

55. There is no need for the civil-criminal distinction in a summary proceeding. Statute Law, *supra* note 49, at 168.

56. Upper Lakes Shipping v. Seafarer's Int'l Union, 22 Wis. 2d 7, 17, 125 N.W.2d 324, 330 (1963). Courts have circumvented the "actual presence of the court" requirement by rationalizing that "the court is figuratively present in all parts of the place set aside for its use." R. GOLDFARB, *supra* note 48, at 73. This rationale allows the court to proceed summarily against persons about whose conduct the court could have only second-hand knowledge, such as bribing a juror. *Id.*

57. Upper Lakes Shipping v. Seafarer's Int'l Union, 22 Wis. 2d 7, 17, 125 N.W.2d 324, 330 (1963).

58. *Id.* at 13-14, 125 N.W.2d at 328.

59. Statute Law, *supra* note 53, at 166.

60. *See supra* Part III, *B*.

61. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911); Southern Ry. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968). Neither judicial mandate nor

ice in Wonderland approach to the problem,[62] in that the conduct is classified and dealt with according to the nature of the penalty imposed, rather than on the basis of the offensive conduct itself. Thus, the contemnor has already had his or her day in court (if the nonsummary procedure is used) and has had the appropriate sanction imposed before knowing whether the proceeding is civil or criminal.

One author criticizes this approach on the ground that "[b]y characterizing the nature of contempt according to the sanction imposed, the courts have closed the circle of their logic. To state an act constitutes criminal contempt because criminal sanctions are applied merely completes a tautology. This approach provides no aid to analysis."[63] It is precisely because of this circular reasoning that problems arise in distinguishing criminal and civil contempt. "The greatest percentage of cases of contempt could fall into either category, depending . . . upon the discretion of the particular decision-maker."[64]

The primary purpose of civil contempt proceedings is to coerce the contemnor into compliance with a prior court order.[65] The contemptuous conduct consists of refusing to do as the court ordered, usually in terms of failing to perform an affirmative act.[66] The primary purpose of criminal contempt proceedings is to punish the contemnor for a disobedient act.[67] The contemptuous conduct consists of doing something prohibited by the court, whether by violating a

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legislation has ever required a judge to establish the potential sanction before beginning the contempt proceeding. Martineau, *supra* note 16, at 684.

62. " 'Sentence first—verdict afterwards,' " L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 113 (1960) (1st ed. 1865). *See also* R. GOLDFARB, *supra* note 48, at 178 ("distinction between civil and criminal contempt has often been no more than a matter of hindsighted classifications of characteristics").

63. Comment, *supra* note 8, at 1120.

64. R. GOLDFARB, *supra* note 48, at 53.

65. *E.g.*, Shillitani v. United States, 384 U.S. 364, 370 (1966); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 442 (1911); Pabst Brewing Co. v. Brewery Workers Local 77, 555 F.2d 146, 149 (7th Cir. 1977); State v. King, 82 Wis. 2d 124, 129-30, 262 N.W.2d 80, 82 (1978).

66. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 442 (1911); Skinner v. White, 505 F.2d 685, 688 (5th Cir. 1974).

67. Pabst Brewing Co. v. Brewery Workers Local 77, 555 F.2d 146, 149 (7th Cir. 1977); State v. King, 82 Wis. 2d 124, 130, 262 N.W.2d 80, 82 (1978).

specific court order or by interfering with orderly judicial process.[68]

Civil contempt is said to be entirely for the benefit of another party in the pending cause of action.[69] "There is no question but that a court may imprison one who, violating its orders, thereby interferes with, impedes, defeats, or repudiates the rights or remedies of a litigant."[70] Sanctions for civil contempt, including imprisonment and daily fines, are intended to compel the recalcitrant party to perform as required,[71] presumably for the benefit of an opposing party.[72] In addition, a contemnor may be assessed damages to indemnify the opposing party for any losses suffered as a result of the contemnor's failure to comply.[73] A criminal contempt is not intended to benefit anyone; the sanction, be it fine or imprisonment, is imposed for the sole purpose of vindicating the authority of the court.[74]

A distinctive feature of civil contempt is that once the sanction is imposed, it usually continues indefinitely until the contemnor capitulates and performs as ordered.[75] The sanction continues only as long as the disobedience continues. Although the cumulative effect could easily exceed any statutory limitations upon sanctions for criminal contempt,[76]

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68. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 442 (1911); *see also supra* Part II, *A*.

69. Southern Ry. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968); Schroeder v. Schroeder, 100 Wis. 2d 625, 639, 302 N.W.2d 475, 482 (1981).

70. State *ex rel.* Rodd v. Verage, 177 Wis. 295, 332, 187 N.W. 830, 845 (1922) (Eschweiler, J., dissenting).

71. *See* Dobbs, *supra* note 4, at 235-36.

72. Punishing someone until the person cooperates, however, "is as much a punishment of his original refusal to do that same act as it is a coercion of his doing it in the future." R. GOLDFARB, *supra* note 48, at 60.

73. Southern Ry. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968); Getka v. Lader, 71 Wis. 2d 237, 248, 238 N.W.2d 87, 93 (1976) (damages limited to actual indemnification; damages distinct from fine).

74. United States v. Spectro Foods Corp., 544 F.2d 1175, 1182 (3d Cir. 1976); State v. King, 82 Wis. 2d 124, 130, 262 N.W.2d 80, 83 (1978).

75. *E.g.*, Shillitani v. United States, 384 U.S. 364, 370 (1966); State v. King, 82 Wis. 2d 124, 130, 262 N.W.2d 80, 82-83 (1978). *See also* Brautigam, *supra* note 2, at 1523 n.61; Dobbs, *supra* note 4, at 237.

76. Statutes often have limits on sanctions for criminal contempt. *E.g.*, WIS. STAT. § 785.04(2) (1979) (maximum of $5,000 fine or one year in jail or both). Wisconsin also limits remedial sanctions. WIS. STAT. § 785.04(1) (1979) (*inter alia*, maximum of six months in jail or forfeiture of $2,000 per day or both). Thus, coercive imprisonment cannot exceed punitive imprisonment, but at $2,000 *per day* the forfeiture can quickly surpass the maximum punitive fine.

the indefinite penalty is allowed because the contemnor can be released from jail or have the fine stop accumulating by complying with the court order.[77] A contemnor can purge himself or herself of the contumacious conduct.[78]

Criminal sanctions, however, are definite and offer no opportunity for purging.[79] The emphasis is upon punishing past acts of the contemnor, not upon coercing future compliance.[80] "[I]f the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done, nor afford any compensation for the pecuniary injury caused by the disobedience."[81] One author interprets the preceding statement as meaning that "the sanction is necessarily a criminal one if nothing is left to coerce."[82]

A final distinction is that civil contempt actions are part of the same cause of action out of which they arise.[83] The offended party to the pending cause of action must petition the court for relief from the opposing party's refusal to comply with the court's order. Criminal contempt is an offense

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77. *E.g.*, Shillitani v. United States, 384 U.S. 364, 371 (1966); *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902) (The contemnor "carries the keys of his prison in his own pocket."); State v. King, 82 Wis. 2d 124, 130, 262 N.W.2d 80, 82-83 (1978). If resistance is based upon moral principles, however, the likelihood of capitulation is low, to the point that continuing the coercive sanction indefinitely becomes cruel and onerous. *See* Uphaus v. Wyman, 360 U.S. 72 (1958).

78. The court order finding the person in contempt and imposing the sanction must also inform the contemnor how the contemptuous conduct can be purged. Schroeder v. Schroeder, 100 Wis. 2d 625, 639, 302 N.W.2d 475, 482 (1981).

The contemnor must also have the *ability* to comply and cannot be imprisoned when purging is impossible. Shillitani v. United States, 384 U.S. 364, 371 (1966) (contemnor who refused to testify before grand jury had to be released from jail when the grand jury was discharged; could no longer purge self by testifying); United States v. Wendy, 575 F.2d 1025, 1030 (2d Cir. 1978) (tax attorney with no trial experience who appeared on behalf of law partner merely to request adjournment was improperly held in contempt for refusing to immediately proceed to trial of felony criminal case); Schroeder v. Schroeder, 100 Wis. 2d 625, 638, 302 N.W.2d 475, 482 (1981) (person failing to make payments pursuant to final divorce judgment can be imprisoned only after court determines that person is able to make payments but refuses to do so).

79. *E.g.*, Southern Ry. v. Lanham, 403 F.2d 119, 124-25 (5th Cir. 1968); State v. King, 82 Wis. 2d 124, 130, 262 N.W.2d 80, 83 (1978).

80. *E.g.*, Pabst Brewing Co. v. Brewery Workers Local 77, 555 F.2d 146, 149 (7th Cir. 1977); Comment, *supra* note 8, at 1120.

81. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 442 (1911).

82. Dobbs, *supra* note 4, at 240.

83. Skinner v. White, 505 F.2d 685, 689 (5th Cir. 1974).

against the government, a flouting of the court's authority.[84] Consequently, the opposing party has no interest in the proceedings for criminal contempt. The criminal contempt is either treated summarily or is handled similarly to other offenses against the government, using the usual criminal justice procedures.[85]

In summary, civil contempt is between parties to an underlying cause of action and is designed to coerce compliance with a court order for the benefit of the other party. Sanctions can be remedial or coercive and include damages to indemnify the other party for losses sustained as a result of the contumacious conduct, fines or imprisonment, which can be indefinite, continuing until the contemnor complies. Civil contempt is prospective in nature,[86] intended to encourage the contemnor to purge the contumacious conduct by future compliance.

Conversely, criminal contempt is an offense against the authority of the court, involving only the government and the contemnor, and is designed to punish a contemnor for a prior action or omission. Sanctions, which in this context are always punitive, include fines and imprisonment, but the punishment must be definite and within statutorily defined limits. Criminal contempt is retrospective in nature,[87] intended only to punish, without providing for future good conduct.

Evaluating these distinctions often requires close scrutiny of the terminology used in a contempt order.[88] Perhaps the best approach was suggested by the United States Supreme Court: "[W]hat does the court primarily seek to accomplish

84. *Id. Accord* State *ex rel.* Rodd v. Verage, 177 Wis. 295, 317, 187 N.W. 830, 839 (1922).

85. *E.g.*, Upper Lakes Shipping v. Seafarers' Int'l Union, 22 Wis. 2d 7, 17-18, 125 N.W.2d 324, 330 (1963).

86. United States v. Wendy, 575 F.2d 1025, 1029 n.13 (2d Cir. 1978).

87. *Id.*

88. Thurman, *Contempt for Nonsupport in Florida—Civil or Criminal Proceeding?*, 9 STETSON L. REV. 333, 338 (1980).

"These formulas for distinction offer no clear guide for the actor, who cannot know whether his conduct goes so far as to interfere with the law in general, or whether it is merely an interference with a private party who is an adjunct to the administration of law." R. GOLDFARB, *supra* note 48, at 53.

. . . ?"[89] If the court wants to compel obedience to a previous order for the benefit of a party, a civil contempt is probably involved. If the court wants to punish someone for interfering with court proceedings, a criminal contempt is probably involved. When neither civil nor criminal contempt is readily discernible, a presumption in favor of civil contempt arises.[90]

B. Importance of the Distinction

Courts and commentators agree that the most important reason for attempting to distinguish between civil and criminal contempt is that, generally, more constitutional due process safeguards attach to criminal contempt proceedings than to civil contempt proceedings.[91] In nonsummary proceedings for criminal contempt, the contemnor is entitled to notice that the proceeding concerns criminal charges and is not a civil suit.[92] A person then is presumed innocent unless proven guilty beyond a reasonable doubt, is entitled to an unbiased judge, has the right to call and cross-examine witnesses, must be allowed a reasonable amount of time to prepare a defense, cannot be compelled to testify against himself or herself and has the right to trial by jury if the potential sentence is for more than six months.[93] "Although the procedure required in criminal contempt is . . . cumbersome, costly and time-consuming, it is not the policy of the law to choose expediency over due process when it should be afforded."[94] Imposing criminal contempt sanctions after the proceeding has been conducted as that of a civil contempt

89. Shillitani v. United States, 384 U.S. at 370.

90. 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 704 (1969), *cited in* United States v. Wendy, 575 F.2d 1025, 1029 n.13 (2d Cir. 1978).

91. *E.g.*, Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 444 (1911); State v. King, 82 Wis. 2d 124, 131, 262 N.W.2d 80, 83 (1978); Dobbs, *supra* note 4, at 235, 242; Martineau, *supra* note 16, at 697 & n.126; Thurman, *supra* note 88, at 335; Comment, *supra* note 8, at 1120-21. *But see infra* notes 96-99 and accompanying text.

92. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 446 (1911); Pabst Brewing Co. v. Brewery Workers Local 77, 555 F.2d 146, 151 (7th Cir. 1977). *Accord* Brown v. Braddick, 595 F.2d 961, 966 n.7 (5th Cir. 1979) (constructive notice not sufficient).

93. *E.g.*, Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 444 (1911); Pabst Brewing Co. v. Brewery Workers Local 77, 555 F.2d 146, 151 (7th Cir. 1977); State v. King, 82 Wis. 2d 124, 131, 262 N.W.2d 80, 83 (1978).

94. State v. King, 82 Wis. 2d 124, 138, 262 N.W.2d 80, 86 (1978).

constitutes a denial of due process and will be reversed on appeal.[95]

The extensive due process protections available to criminal defendants are generally considered unnecessary for civil contempt proceedings because any sanction imposed is, in a sense, self-imposed by the contemnor, who can avoid any sanction by complying with the court's order.[96] Some procedural safeguards are provided, such as notice and a hearing, but the civil standard of proof applies, and most traditional due process protections are absent.[97] The potential for deprivation of liberty, however, has prompted challenges to and modification of this distinction.[98] For example, the Wisconsin Court of Appeals recently held that when "the State is exercising its police powers to threaten an individual's liberty," the individual is entitled to counsel, regardless of whether the imprisonment will be coercive rather than punitive.[99]

The second reason for determining whether a contempt is civil or criminal concerns appellate rights. Because a civil contempt proceeding is considered part of the original cause of action,[100] involving the same parties, a contempt citation is treated as an interlocutory order and, consequently, cannot be appealed through the usual appellate channels until the entire cause of action ends.[101] If the contemnor is incarcerated as a result of the contempt finding, a writ of habeas corpus may be used to challenge the finding.[102] If a fine is imposed, Wisconsin allows interlocutory appeals in certain circumstances.[103] In either case, the reviewing court may stay the imposition of the sanction until it can hear the matter.[104]

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95. Southern Ry. v. Lanham, 403 F.2d 119, 125 (5th Cir. 1968).

96. *E.g.*, Shillitani v. United States, 384 U.S. 364, 370-71 (1966); State v. King, 82 Wis. 2d 124, 131, 262 N.W.2d 80, 83 (1978).

97. Dobbs, *supra* note 4, at 243; Comment, *supra* note 8, at 1123-24. The latter author argues that a contemnor should be afforded criminal due process protections unless his or her position in the civil contempt proceeding is "equivalent to that of a litigant in an ordinary civil suit." Comment, *supra* note 8, at 1123.

98. *See* Thurman, *supra* note 88, at 335.

99. Brotzman v. Brotzman, 91 Wis.2d 335, 339, 283 N.W.2d 600, 602 (Ct. App. 1979).

100. Skinner v. White, 505 F.2d 685, 689 (5th Cir. 1974).

101. Fox v. Capital Co., 299 U.S. 105 (1936); Pabst Brewing Co. v. Brewery Workers Local 77, 555 F.2d 146, 149 (7th Cir. 1977); Southern Ry. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968).

102. WIS. STAT. § 782.01 (1979).

103. *Id.* § 808.03(2) (1979).

104. *Id.* § 808.07(2) (1979).

A criminal contempt citation, however, can be appealed through the usual appellate channels immediately because the contempt proceeding constitutes a separate cause of action.[105] The adjudication of contempt is a final order in that proceeding and, therefore, is appealable regardless of the stage of any underlying cause of action.[106]

C. *Blurring of the Boundaries*

Despite the detailed guidelines available for determining whether a particular act should be treated as civil or criminal contempt,[107] considerable confusion exists because the boundaries are not as definite as they initially appear to be.[108] Frequently, civil and criminal contempt "are considered but nuances of each other and are often applied interchangeably."[109] One author who limited his focus to Wisconsin cases found it was "impossible to determine whether any specific contumacious act is a civil or a criminal contempt."[110]

In many cases, civil and criminal contempt are virtually inseparable.[111] One act may constitute both civil and criminal contempt.[112] For example, if a court imposes a gag order

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105. Skinner v. White, 505 F.2d 685, 689 (5th Cir. 1974).

106. Union Tool Co. v. Wilson, 259 U.S. 107 (1922); Pabst Brewing Co. v. Brewery Workers Local 77, 555 F.2d 146, 149 (7th Cir. 1977); Southern Ry. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968).

107. *See supra* Part III, *A*.

108. Part of the problem may be the tendency to refer to "punishment" for civil contempt as well as criminal contempt, and references to a contemnor being found "guilty of" civil contempt. *See, e.g.*, Upper Lakes Shipping v. Seafarers' Int'l Union, 22 Wis. 2d 7, 11, 125 N.W.2d 324, 327 (1963); State *ex rel.* Rodd v. Verage, 177 Wis. 295, 316, 187 N.W. 830, 835 (1922).

109. R. GOLDFARB, *supra* note 48, at 51.

110. Statute Law, *supra* note 53, at 169. Examples of acts found to be civil contempt in one case and criminal contempt in another included violations of labor injunctions, sheriff's failure to levy on property or execute writ, violations of other injunctions and prevarication/perjury. *Id.* at 169-70 n.29. *See also* R. GOLDFARB, *supra* note 48, at 52-53.

111. Brautigam, *supra* note 2, at 1521 n.55.

112. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911) (violation of labor injunction); Upper Lakes Shipping v. Seafarers' Int'l Union, 22 Wis. 2d 7, 13-14, 125 N.W.2d 324, 328 (1963) (violation of labor injunction); Wisconsin Employment Relations Bd. v. Allis-Chalmers Workers' Union, 249 Wis. 590, 598, 25 N.W.2d

to prevent jurors from being influenced by media reports of a trial, the order is apparently intended to benefit the parties by ensuring a fair trial. If one party violates the gag order, that party could be found in civil contempt for prejudicing the rights of the other party, or in criminal contempt for flouting the authority of the court, or both. Enforcing compliance through civil contempt proceedings would protect the rights of the other party and vindicate the court's authority at the same time.[113] Vindicating the court's authority through criminal sanctions would also result in a benefit to the other party in that the sanction would encourage future compliance. It is perhaps "immaterial to consider the distinction" since "both kinds involve the vindication of the authority of the court."[114]

The traditional method of determining the kind of contempt involved by looking to the sanction imposed[115] is ineffective in many cases. A fine or imprisonment can be imposed either to coerce or to punish, thus providing no clear basis for distinction. The nature of the act or omission also provides no assistance because, in one sense, both civil and criminal contempt deal with acts of disobedience.[116]

The purpose of the contempt sanction provides a slightly more reliable test for whether civil or criminal contempt is involved: the purpose of criminal sanctions is to punish for past misconduct; the purpose of civil sanctions is to coerce future compliance or to remedy a failure to comply.[117] But confusion persists. In one Wisconsin case, a person was found "guilty" of civil contempt for violating a labor injunc-

425, 429 (1946) (refusal to comply with final judgment by court); Wetzler v. Glassner, 185 Wis. 593, 595-96, 201 N.W. 740, 740-41 (1925) (attorneys discussing trial in presence of juror; inviting juror to lunch).

113. "The civil nature of the contempt is not turned criminal by the court's efforts at vindicating its authority, an interest which may be implicated in either civil or criminal proceedings." United States v. Wendy, 575 F.2d 1025, 1029 n.13 (2d Cir. 1978).

114. Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co., 129 F. 105, 106 (6th Cir. 1904), *cited in* Brautigam, *supra* note 2, at 1523.

115. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441-42 (1911).

116. Comment, *supra* note 8, at 1120.

117. *E.g.*, Shillitani v. United States, 384 U.S. 364, 370 (1966); United States v. Wendy, 575 F.2d 1025, 1029 n.13 (2d Cir. 1978) ("giving principal weight to the punitive-remedial dichotomy").

tion, then sentenced to six months in jail without opportunity to purge.[118]

How the parties or the trial court label a contempt proceeding is usually ignored by appellate courts.[119] For example, in *Shillitani v. United States*[120] the United States Supreme Court reviewed contempt proceedings which resulted in the contemnors being jailed until they agreed to testify before a grand jury. The Court concluded that the proceedings were civil because the sanctions were essentially remedial: "The fact that both the District Court and the Court of Appeals called petitioners' conduct 'criminal contempt' does not disturb our conclusion. Courts often speak in terms of criminal contempt and punishment for remedial purposes."[121]

In many cases, "[the] mélange of civil and criminal traits prevents, even on appeal, a determination of the true character of the proceedings . . . ."[122] The frustration experienced by courts attempting to deal with contempt cases was perhaps best expressed by the Fifth Circuit Court of Appeals:

> The simple fact is that no one, simply no one, is able to determine whether this was begun, tried, or ended as a case for criminal contempt, civil contempt, or both, or whether someplace down the trail, begun as one it was transmuted into the other. That is, of course, one thing about which there may not be any doubt if a contempt order is to stand.[123]

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118. Upper Lakes Shipping v. Seafarers' Int'l Union, 22 Wis. 2d 7, 11, 125 N.W.2d 324, 327 (1963).

119. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 424-27, 445-52 (1911) (contempt proceedings treated as part of original civil case between same parties, but definite jail sentences imposed; appeals court treated as criminal contempt; Supreme Court reversed and remanded to district court to allow proper procedures to be followed); Pabst Brewing Co. v. Brewery Workers Local 77, 555 F.2d 146, 149 (7th Cir. 1977) (parties, pleadings and court referred to proceedings as civil; circuit court found criminal contempt); State v. King, 82 Wis. 2d 124, 131-32, 262 N.W.2d 80, 83-84 (1978) (parties and trial courts agreed proceedings were for civil contempt; supreme court held proceedings were for criminal contempt because "coercive or remedial action could serve no purpose at that time. The only purpose . . . was punishment to vindicate the authority of the court.").

120. 384 U.S. 364 (1966).

121. *Id.* at 369.

122. Skinner v. White, 505 F.2d 685, 689 (5th Cir. 1974).

123. Clark v. Boynton, 362 F.2d 992, 994 (5th Cir. 1966), *cited in* Skinner v. White, 505 F.2d 685, 689-90 (5th Cir. 1974).

IV. Wisconsin: The Prior Law and the Problems

A. Statutes

Although courts traditionally have considered the contempt power an inherent power,[124] the Wisconsin Supreme Court long has recognized legislative authority to regulate the power.[125] But the court has consistently held that legislative regulation must be "reasonable."[126] The contempt power "cannot be entirely taken away, nor can its efficiency be so impaired or abridged as to leave the court without power to compel the due respect and obedience which is essential to preserve its character as a judicial tribunal."[127] The court clearly intends to maintain control over the contempt power, but will allow the legislature to attempt to define contemptuous conduct and to outline appropriate procedures and penalties.[128] Legislative enactments in this area have not yet conflicted with the court's interpretation of the power.[129]

Until the 1979 statutes completely revised Wisconsin's codified contempt law,[130] Wisconsin legislatures always

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124. *See supra* notes 1-8 and accompanying text.

125. *E.g.*, Jos. Schlitz Brewing Co. v. Washburn Brewing Ass'n, 122 Wis. 515, 518, 100 N.W. 832, 833 (1904). *But cf.* Getka v. Lader, 71 Wis. 2d 237, 247, 238 N.W.2d 87, 92 (1976); State *ex rel.* Rodd v. Verage, 177 Wis. 295, 314, 187 N.W. 830, 838 (1922). Language in both decisions seems to imply that the power is derived from the legislature. One of the dissents in the latter decision also comments that the inherent contempt power is "not superior to the rights of the people, for all power, in the last analysis, is *granted by* and comes from the people." State *ex rel.* Rodd v. Verage, 177 Wis. 295, 351, 187 N.W. 830, 851 (1922) (Doerfler, J., dissenting) (emphasis added). The legislature, of course, is the vehicle for implementing the will of the people.

126. State v. King, 82 Wis. 2d 124, 136, 262 N.W.2d 80, 85 (1978); Jos. Schlitz Brewing Co. v. Washburn Brewing Ass'n, 122 Wis. 515, 518, 100 N.W. 832, 833 (1904).

127. State *ex rel.* Attorney Gen. v. Circuit Court for Eau Claire County, 97 Wis. 1, 8, 72 N.W. 193, 194 (1897), *cited in* State v. King, 82 Wis. 2d 124, 136, 262 N.W.2d 80, 85-86 (1978).

128. *See* State v. Dickson, 53 Wis. 2d 532, 539 n.1, 193 N.W.2d 17, 21 n.1 (1971) (court expressly states that its reference to a contempt statute does not constitute a "retreat"from its inherent authority position). *See also* Brautigam, *supra* note 2, at 1526; Comment, *supra* note 8, at 1118-19; Statute Law, *Contempt—Control by the Courts and by the Legislature in Wisconsin*, 9 Wis. L. Rev. 278 (1934).

129. *See* State *ex rel.* Rodd v. Verage, 177 Wis. 295, 332, 187 N.W. 830, 845 (1922) (Eschweiler, J., dissenting); Comment, *supra* note 8, at 1118-19.

130. *See infra* Part V.

treated civil and criminal contempt separately.[131] The 1849 statutes set forth definitions, procedures and sanctions for civil contempt in a chapter entitled: "Of Proceedings as for Contempts, to Enforce Civil Remedies, and to Protect the Rights of Parties in Civil Actions."[132] The criminal contempt provisions, however, were set forth in a chapter entitled: "General Provisions Concerning Courts of Record, of the Powers and Duties of Judges, and of Attorneys and Officers of the Court."[133] By 1975 the titles had changed slightly, but still reflected inexplicable disparities: civil contempt provisions received exclusive treatment in a chapter entitled "Contempts in Civil Actions";[134] criminal contempt provisions remained in a chapter entitled "General Provisions Concerning Courts of Record, Judges, Attorneys and Clerks,"[135] where they were jumbled in with statutes regarding, among other things, legal holidays,[136] trust accounts,[137] bar examinations,[138] court calendars,[139] taxes[140] and transcripts.[141]

The rationale for those statutory classification systems is unclear. Separating the provisions for civil and criminal contempt is understandable, considering the importance of distinguishing them in order to ensure that due process safeguards are provided in criminal contempt proceedings.[142] It seems illogical, however, to treat civil contempt in relatively appropriate chapters while treating criminal contempt in catch-all chapters.

The 1849 civil contempt statute allowed courts to impose sanctions for "any neglect or violation of duty, or any misconduct, by which the rights or remedies of a party in a

131. WIS. STAT. §§ 256.03-.07, 295.01-.04 (1975); WIS. STAT. ch. 87, §§ 7-9, ch. 115, §§ 1-3, 20-25 (1849).

132. WIS. STAT. ch. 115, §§ 1-3, 20-25 (1849).

133. *Id.* ch. 87, §§ 7-9.

134. WIS. STAT. §§ 295.01-.04 (1975).

135. *Id.* §§ 256.03-.07.

136. *Id.* § 256.17.

137. *Id.* § 256.293.

138. *Id.* § 256.282.

139. *Id.* § 256.39.

140. *Id.* § 256.47.

141. *Id.* § 256.57.

142. *See supra* Part III, *B*.

cause or matter depending in such court, or triable therein, may be defeated, impaired, impeded, or prejudiced."[143] The statute continued with a laundry list of persons and kinds of conduct subject to the sanctions, including attorneys, clerks, sheriffs and coroners who wilfully neglected or violated a duty, misbehaved, or disobeyed any process or lawful order;[144] parties and attorneys who failed to pay any sum of money ordered to be paid;[145] witnesses who failed to appear, refused to testify or refused to answer questions;[146] jurors who improperly talked with a party or with anyone else regarding the merits of the case;[147] and anyone who acted as an attorney or court officer without authority, unlawfully detained a witness or party or otherwise interfered with the proceedings.[148] With the exception of minor word changes and renumbering, this statute was not changed until the 1975 revision of the contempt statutes.[149]

The 1975 revision eliminated attempts to catalog who and what was contemptuous. The laundry list was condensed into one paragraph:

> Every court of record may find in contempt any person who disobeys any process or lawful order of the court, violates or neglects an official duty, or is otherwise guilty of misconduct, by which act the rights or remedies of a party in an action or proceeding pending or triable in such court or before a court commissioner for the same county may be impaired, impeded, defeated or prejudiced.[150]

Sanctions[151] for civil contempt under the 1849 statutes included indemnity for actual losses or injuries, coercive imprisonment up to six months and a fine up to $250.[152] Again,

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143. WIS. STAT. ch. 115, § 1 (1849).
144. *Id.* § 1(1).
145. *Id.* § 1(3).
146. *Id.* § 1(5).
147. *Id.* § 1(6).
148. *Id.* § 1(4).
149. 1975 Wis. Laws ch. 401.
150. WIS. STAT. § 295.01 (1975).
151. The 1849 statutes refer to "punishment" when someone is "guilty" of civil contempt. WIS. STAT. ch. 115, § 20 (1849). *See supra* note 106 and accompanying text.
152. WIS. STAT. ch. 115, §§ 20-25 (1849). The statute appears to have allowed punitive fines, in that, contrary to the imprisonment provisions, no mention is made of the sanction continuing only until the contemnor complies.

the provisions were virtually unchanged until the 1975 revision. The only changes then made were to substitute terms such as "sanctions" and "found in contempt" for references to "punishment" and "guilt," and to increase the forfeiture to a maximum of $2,000 per day of violation.[153]

The 1849 statutory provisions for criminal contempt were much briefer than the civil contempt provisions, but again included a laundry list of contemptuous conduct.[154] A person could be found guilty of criminal contempt only by committing one of the acts listed, including disorderly, contemptuous or insolent conduct in the immediate presence of the court,[155] a breach of the peace, noise or disturbance,[156] disobedience of or resistence to lawful orders or process,[157] refusal to be sworn or to answer as a witness[158] and publication of false or inaccurate reports of the proceedings.[159]

The 1975 revision retained the laundry list approach, but condensed the list and added a category:

> Every court of record shall have the power to punish, as for a criminal contempt, persons guilty of either of the following acts and no other:
>
> (1) Any breach of the peace, noise, disturbance or other disorderly or insolent behavior committed in its immediate view and presence, in court or chambers, which directly tends to interrupt its proceedings or to impair the respect due its authority.
>
> (2) Wilful and intentional disobedience or obstruction of, or resistence to any process or order lawfully issued or made by it.
>
> (3) Wilful refusal to be sworn as a witness or, when so sworn, the wilful refusal to answer any legal or proper question when the refusal is not legally justified.
>
> (4) Wilful, intentional and contumacious misconduct on the basis of which the court could make a finding of

153. WIS. STAT. § 295.02 (1975).
154. WIS. STAT. ch. 87, §§ 7-9 (1849).
155. *Id.* § 7(1).
156. *Id.* § 7(2).
157. *Id.* §§ 7(3), (4).
158. *Id.* § 7(5).
159. *Id.* § 7(6).

civil contempt under s. 295.01, which challenges and impugns the authority of the court.[160]

Sanction provisions for criminal contempt under the 1849 statutes included a fine up to $250, imprisonment up to thirty days or both.[161] There was but a brief mention of summary procedure.[162] The 1975 revision provided detailed outlines of summary and nonsummary procedures[163] and included different sanctions for the different procedures.[164] The legislature also added a provision "to enforce any continuing order of the court for *future acts*, a fine of not more than $1,000 for each day of violation, *subject to purge* by the defendant's timely compliance with the future acts required under such continuing order."[165] Including sanctions traditionally indicative of civil contempt proceedings[166] certainly appeared to accomplish nothing but a further muddying of the waters.

At the time of the 1975 statutory revision, a judicial modification of traditional civil sanctions had been in effect for over half a century. In *State ex rel. Rodd v. Verage*,[167] a civil contempt case, the Wisconsin Supreme Court affirmed the imposition of a four month jail sentence with no opportunity to purge, thereby authorizing purely punitive sanctions in civil contempt cases.[168] In 1978, however, the Wisconsin Supreme Court overruled *Rodd*, sub silentio, on the ground that "[p]unitive sanctions in civil contempt are contrary to the well recognized opposite natures of civil and criminal contempt."[169]

The foregoing discussion demonstrates that the legislature had made few substantive changes in the statutory law of contempt since the law's appearance in the first Wisconsin

160. WIS. STAT. § 256.03 (1975).

161. WIS. STAT. ch. 87, § 8 (1849).

162. *Id.* § 9.

163. WIS. STAT. § 256.04 (1975).

164. *Id.* § 256.06 (maximum of $500 fine or 30 days imprisonment or both for the summary procedure; maximum of $5,000 fine or one year imprisonment or both for the nonsummary procedure).

165. *Id.* § 256.06(2) (emphasis added).

166. *See supra* Part III, *A*.

167. 177 Wis. 295, 187 N.W. 830 (1922).

168. The court called it "a remedial measure . . . for the purpose of preventing further injury" to the other party. *Id.* at 314, 187 N.W. at 838.

169. State v. King, 82 Wis. 2d 124, 137, 262 N.W.2d 80, 86 (1978).

statutes in 1849. Wisconsin courts have not clamored for legislative changes, choosing instead to use their inherent authority to judicially modify substantive contempt law as deemed necessary.

B. Problems

The Wisconsin Supreme Court has not raised challenges to the traditional contempt laws, but commentators have raised several distinct grounds for challenge as will be discussed below.[170]

1. Vagueness/Overbreadth

A statute which is either imprecise or too specific can have a chilling effect upon the exercise of constitutional rights.[171] Contempt statutes prohibiting "disorderly or insolent behavior," without further defining the terms, are not "sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid [their] penalties."[172] For example, an attorney is required to "represent a client zealously,"[173] but at what point does vigorous advocacy cross over into contemptuous conduct?[174] A defendant is entitled to cross-examine witnesses,[175] but when does cross-examination become badgering so as to interfere with the orderly process of the court? Ultimately, resolution of such questions lies solely within the discretion of the trial judge.[176] An insulting demeanor or tone of voice can result in otherwise innocuous words being contumacious. Because the demeanor or tone of voice will not appear in the record on

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170. *See also* R. GOLDFARB, *supra* note 48, at 185-279 (thorough analysis of constitutional challenges to the contempt power, focusing on challenges based upon the first, fourth, fifth, sixth, eighth and tenth amendments).

171. *See* Brautigam, *supra* note 2, at 1530-32; Comment, *supra* note 8, at 1124.

172. State v. Zwicker, 41 Wis. 2d 497, 507, 164 N.W.2d 512, 517 (1969) (citing Landry v. Daley, 280 F. Supp. 938, 951 (N.D. Ill. 1968), *rev'd on other grounds sub nom.* Boyle v. Landry, 401 U.S. 77 (1971)).

173. WISCONSIN CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1979).

174. *See* R. GOLDFARB, *supra* note 48, at 191; Brautigam, *supra* note 2, at 1532. For an excellent discussion of courtroom conduct of defense attorneys in relation to contemptuous behavior, see N. DORSEN & L. FRIEDMAN, *supra* note 4, at 131-68.

175. U.S. CONST. amend. VI.

176. Brautigam, *supra* note 2, at 1531.

appeal, appellate courts will defer to the trial judge[177] unless "[t]he record evinces caprice constituting an abuse of discretion."[178]

2. Equal Protection

In many cases one act can constitute both civil and criminal contempt.[179] If a criminal statute is also violated, the person could be punished for the criminal violation and the criminal contempt and also receive a sanction for the civil contempt. For example, suppose in a default action the defendant-debtor is ordered to give the collateral to the plaintiff-creditor. If the defendant instead sets fire to the collateral so that it is destroyed, the defendant could be subject to sanctions for civil contempt for disobeying a lawful order of the court and thereby defeating the rights of the other party, criminal contempt for wilful and intentional disobedience of a court's lawful order and criminal prosecution for the crime of arson. Although criminal and civil causes of action often arise from one incident without giving rise to equal protection challenges,[180] "[u]tilizing government power to impose different labels and types of sanctions upon essentially equivalent actions would seem inherently suspect."[181]

3. Judicial Bias

Assume that during the course of a trial a party throws a statute book at and strikes the judge. The judge has become the victim of the crime of battery. The judge decides the person's conduct was sufficiently egregious to support a finding of criminal contempt and, consequently, finds the person in contempt and imposes a jail sentence. The judge has acted as judge and jury for a case in which he or she was the victim. "To allow the offended judge, in a criminal citation, to act as 'victim, prosecutor, judge and jury' is fundamentally unfair. It is not enough that summary judgment be re-

177. *Id.*
178. State v. Dickson, 53 Wis. 2d 532, 548, 193 N.W.2d 17, 26 (1972).
179. State v. King, 82 Wis. 2d 124, 129, 262 N.W.2d 80, 82 (1978).
180. Comment, *supra* note 8, at 1125 & n.48 (civil wrongful death action and criminal prosecution for manslaughter allowed against one person for one incident).
181. *Id.* at 1125.

garded with disfavor; its inherent repugnancy to the Constitution requires the elimination of the procedure."[182]

One means of minimizing such judicial bias would be to have the trial judge merely cite the person for contempt, then turn the entire matter over to a different court. A neutral judge, and jury if appropriate, would try the matter and impose sentence if the person were found in contempt.[183] Another method would be to require jury trials whenever the judge is personally involved, with the jury acting as "insulation between the accused and the judge."[184]

4. No Alternatives Encouraged

The only sanctions permitted for civil or criminal contempt under the 1975 statutes were fines, imprisonment and indemnification.[185] There was no statutory provision for any other means of dealing with contemptuous conduct when the usual sanctions were ineffective.

In *Illinois v. Allen*,[186] the United States Supreme Court approved alternative sanctions to keep order during a criminal trial. Someone who is behaving in a disruptive manner must first be warned of the possible sanctions for repeated disruptions. If the disruptions continue, the person can be excluded from the trial.[187] A second alternative is to use coercive imprisonment under the usual civil contempt procedures. After being held in civil contempt, the disruptive party can be jailed and the trial discontinued until the contemnor agrees to refrain from further disruptions.[188] A simi-

182. Comment, *supra* note 59, at 294-95 (citations omitted).

183. *Id.* at 305.

184. *Id.* at 294. *See also* Brautigam, *supra* note 2, at 1535 n.155 (brief discussion of the pros and cons of requiring a full trial for contempt proceedings).

185. *See supra* note 162.

186. 397 U.S. 337 (1970).

187. *Id.* at 343. *See also* N. DORSEN & L. FRIEDMAN, *supra* note 4, at 72-75 (exclusion sanction frequently employed at murder trial of Charles Manson and three codefendants).

In criminal proceedings where the defendant is the disruptive person efforts should be made to provide the defendant with a means of listening to the trial if he or she is excluded, in order to preserve the sixth amendment right to be present. Illinois v. Allen, 397 U.S. 337, 351 (1970) (Brennan, J., concurring); N. DORSEN & L. FRIEDMAN, *supra* note 4, at 98-100.

188. *Allen*, 397 U.S. at 345. For an analysis of the pros and cons of this technique, see N. DORSEN & L. FRIEDMAN, *supra* note 4, at 103-05. *See also id.* at 66-69

lar result is reached by revoking bail and discontinuing the trial until the contemnor is willing to cooperate.[189] The third alternative proposed by the *Allen* Court is to use physical restraints, but only as a last resort.[190] The exclusion sanction is preferred because it is less prejudicial and more effective.

One writer argues that the contempt power is superfluous in civil actions, and suggests that marshalls or deputies be used to bring in recalcitrant witnesses, levy execution on property, or otherwise enforce the authority of the courts and protect the rights of parties.[191]

> Only when all methods of ordinary civil execution have failed, and an individual's recalcitrance has gone to the point of positive interference with government, should the broad and powerful contempt sanction be applied. Then it would be a criminal interference with government, and more than a personal dispute between litigants. Of course, the dividing line is hard to draw.[192]

V. THE 1979 STATUTES: ERASING THE DISTINCTIONS[193]

Wisconsin legislators quickly realized that the 1975 revision of criminal and civil contempt statutes did not accomplish its intended purpose: "to eliminate some of the confusion."[194] Because much of the confusion resulted from attempts to distinguish civil from criminal contempt on the basis of the penalty imposed,[195] the new statute draws the distinction on the basis of the purpose of the sanction *sought*

(imprisonment and adjournment of trial sanction used in trial of members of Black Panther Party).

189. Bitter v. United States, 389 U.S. 15 (1967).

190. *Allen*, 397 U.S. at 344; N. DORSEN & L. FRIEDMAN, *supra* note 4, at 100-02. *See also id.* at 57-59 (gagging and binding of Bobby Seale during Chicago Seven conspiracy trial).

191. R. GOLDFARB, *supra* note 48, at 293.

192. *Id.*

193. Robert J. Martineau was the reporter for the Wisconsin Judicial Council Committee on Contempt, 1979-1980. His article on the changes in Wisconsin contempt law, *supra* note 16, contains many personal insights into the intent and concerns of the Committee while drafting the new law. To avoid duplication, the statutory changes will be discussed in general terms in this comment, with references to the more detailed analysis found in the Martineau article.

194. WIS. STAT. ANN. ch. 785 committee comment (West 1981). *See* Martineau, *supra* note 16, at 687.

195. *See supra* notes 61-64 and accompanying text.

to be imposed.[196] "Under this approach, the statute does not attempt to draw a distinction between civil and criminal contempt,"[197] although the concepts of civil and criminal contempt are retained in the provisions for remedial and punitive sanctions.[198]

After the detailed, exhaustive "laundry lists" of earlier statutes,[199] section 785.01 of the new statute is refreshing in its brevity and clarity.[200] By using broader terms and fewer details, the legislature intended to made the statute more inclusive;[201] however, that broad general language may result in greater susceptibility to challenges on grounds of overbreadth and vagueness.[202] "Disobedience of a court order," for example, could still encompass protected behavior. An important change is the intent requirement. Thus, "for any act to be contempt it must be intentional rather than inadvertent or accidental."[203]

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196. WIS. STAT. ANN. ch. 785 committee comment (West 1981).

197. *Id.* "Civil contempt" and "criminal contempt" are never mentioned in the chapter. *See* Martineau, *supra* note 16, at 688-89 n.78 (detailed list of civil and criminal contempt statutes in other states).

198. WIS. STAT. ANN. § 785.01 committee comment (West 1981). The courts' inherent authority to impose sanctions for contempt is retained in WIS. STAT. § 785.02 (1979): "A court of record may impose a remedial or punitive sanction for contempt of court under this chapter."

199. *See supra* Part IV, *A*.

200. WIS. STAT. § 785.01 (1979), in its entirety, is as follows:

Definitions.

(1) "Contempt of court" means intentional:

(a) Misconduct in the presence of the court which interferes with a court proceeding or with the administration of justice, or which impairs the respect due the court;

(b) Disobedience, resistance or obstruction of the authority, process or order of a court;

(c) Refusal as a witness to appear, be sworn or answer a question; or

(d) Refusal to produce a record, document or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of terminating a continuing contempt of court.

Martineau classifies the four types of conduct as follows: "(1) conduct in the courtroom; (2) compliance with court orders; (3) conduct of a witness; and (4) production of documents or other things." Martineau, *supra* note 16, at 689.

201. WIS. STAT. ANN. § 785.01 committee comment (West 1981).

202. *See supra* Part IV, *B*, 1.

203. Martineau, *supra* note 16, at 689-90.

The new section dealing with contempt procedures condenses and clarifies the procedures under earlier statutes,[204] but also includes some new provisions. The most important addition is the requirement that courts decide at the outset what sanction is sought, and then determine the procedure to be used. Nonsummary procedure can be used whether a remedial sanction or a punitive sanction is sought, whereas summary procedure is expressly limited to punitive sanctions.

The nonsummary procedure for a remedial sanction must be initiated by filing a motion. The motion procedure is governed by the same rules of procedure, whether civil or criminal, as those governing the underlying matter. "A person must be aggrieved by the contempt to have standing to file the motion. This incorporates the concept . . . that a contempt must in some way impair or prejudice the rights or remedies of the person in the original proceeding."[205] The

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204. WIS. STAT. § 785.03 (1979) is as follows:

Procedure.

(1) NONSUMMARY PROCEDURE. (a) *Remedial sanction*. A person aggrieved by a contempt of court may seek imposition of a remedial sanction for the contempt by filing a motion for that purpose in the proceeding to which the contempt is related. The court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

(b) *Punitive sanction*. The district attorney of a county, the attorney general or a special prosecutor appointed by the court may seek the imposition of a punitive sanction by issuing a complaint charging the person with contempt of court and reciting the sanction sought to be imposed. The district attorney, attorney general or special prosecutor may issue the complaint on his or her own initiative or on the request of a party to an action or proceeding in a court or of the judge presiding in an action or proceeding. The complaint shall be processed under chs. 967 to 973. If the contempt alleged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial of the contempt unless the person charged consents to the judge presiding at the trial.

(c) *Joint hearing and trial*. The court may hold a hearing on a motion for a remedial sanction jointly with a trial on a complaint seeking a punitive sanction.

(2) SUMMARY PROCEDURE. The judge presiding in an action or proceeding may impose a punitive sanction upon a person who commits a contempt of court in the actual presence of the court. The judge shall impose the punitive sanction immediately after the contempt of court and only for the purpose of preserving order in the court and protecting the authority and dignity of the court.

205. WIS. STAT. ANN. § 785.03 committee comment (West 1981). *See* Martineau, *supra* note 16, at 695-701.

notice and hearing provision satisfies basic due process requirements.

The nonsummary procedure in which a punitive sanction is sought is identical to criminal procedure for a statutory crime. A person complaining of contempt, whether a private individual or a judge, must present the facts to the appropriate prosecutorial officer. Due process protections embodied in the criminal procedure chapters of the statutes[206] apply to punitive sanction proceedings for contempt. Because there is no distinction between the two kinds of proceedings, the legislature included no provision for criminal prosecution for the same conduct punished with a punitive sanction. "Even if not prevented by the technical requirements of double jeopardy, there should be only one punishment for any criminal type act."[207]

An important addition is the provision disqualifying a judge from presiding at a trial if the alleged contempt was directed at the judge personally. This goes to the heart of the concerns relating to judicial bias.[208] Though a possibility still exists that a judge may be biased even when not personally attacked, the potential for such a conflict is greatly reduced by this provision.

The joint hearing provision promotes administrative efficiency by avoiding duplication of court proceedings, but will probably be used rarely due to the increased potential for confusion. The legislature felt the option should be available even though the two proceedings may involve different personnel, evidence and standards of proof.[209]

The summary procedure is extremely limited, both as to exercise of the power and as to severity of the penalty allowed. The term "actual presence of the court" was substituted for the former term, "immediate view and presence of the court," to bring Wisconsin law into accord with federal law, such as Federal Rule of Criminal Procedure 42(A).[210] Although a hearing regarding the nature or circumstances of

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206. WIS. STAT. chs. 967-73 (1979).

207. WIS. STAT. ANN. § 785.03 committee comment (West 1981). *See supra* Part IV, *B*, 2.

208. *See supra* Part IV, *B*, 3. *See also* Martineau, *supra* note 16, at 697.

209. WIS. STAT. ANN. § 785.03 committee comment (West 1981).

210. Martineau, *supra* note 16, at 700.

the contempt is not necessary, the record must reveal the conduct identified as contemptuous.[211] The punitive sanctions allowed in summary proceedings are less than one-tenth the severity of the punitive sanctions allowed in nonsummary proceedings.[212]

Few changes were made in the sanction provisions[213] other than reorganizing them to fit within the new format. One important change, however, is the provision allowing alternative remedial sanctions, provided the court first expressly finds that the other sanctions listed in the statute would be ineffectual. This provision apparently will allow use of alternative sanctions such as exclusion, imprisonment

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211. *Id.*

212. WIS. STAT. § 785.04(2)(a), (b) (1979) (maximum of $500 or 30 days or both for summary procedure; maximum of $5,000 or one year or both for nonsummary procedure).

213. WIS. STAT. § 785.04 (1979) is as follows:

Sanctions authorized.

(1) REMEDIAL SANCTION. A court may impose one or more of the following remedial sanctions:

(a) Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.

(b) Imprisonment if the contempt of court is of a type included in s. 785.01(1)(b), (c) or (d). The imprisonment may extend only so long as the person is committing the contempt of court or 6 months, whichever is the shorter period.

(c) A forfeiture not to exceed $2,000 for each day the contempt of court continues.

(d) An order designed to ensure compliance with a prior order of the court.

(e) A sanction other than the sanctions specified in pars. (a) to (d) if it expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(2) PUNITIVE SANCTION. (a) *Nonsummary procedure.* A court, after a finding of contempt of court in a nonsummary procedure under s. 785.03(1)(b), may impose for each separate contempt of court a fine of not more than $5,000 or imprisonment in the county jail for not more than one year or both.

(b) *Summary procedure.* A court, after a finding of contempt of court in a summary procedure under s. 785.03(2), may impose for each separate contempt of court a fine of not more than $500 or imprisonment in the county jail for not more than 30 days or both.

(3) PAST CONDUCT. A punitive sanction may be imposed for past conduct which was a contempt of court even though similar present conduct is a continuing contempt of court.

See Martineau, *supra* note 16, at 701-04 (detailed discussion of the changes).

coupled with suspension of the trial, and physical restraints.[214]

VI. STANDARDS, SUCCESSES AND SUGGESTIONS

Many commentators have suggested ways to modify the statutory law of contempt.[215] The numerous specific concerns raised can be addressed in three broad categories, then applied to the 1979 contempt statutes.

First, the courts' inherent powers must be preserved.[216] The courts must be allowed sufficient means to maintain orderly administration of justice, to protect the rights of parties and to compel compliance with their orders. The new statutes meet this requirement.[217]

Second, the provisions for procedures and sanctions must be clear and unambiguous in order to avoid abuse and confusion. But there should be some flexibility in sanctions to allow fashioning the remedy or punishment to suit the circumstances of the case.[218] The sanction provisions in the 1979 statutes are unquestionably clear and unambiguous, and some flexibility is allowed in fashioning remedial sanctions. The procedural requirements have been greatly clarified, but certain aspects which are not mentioned, such as appeal rights[219] and the burden of proof in the nonsummary remedial procedure, remain unclear.

Third, contemnors' constitutional rights must be protected.[220] The new statutes meet this requirement by having constitutional safeguards built into the procedural provisions. Due process protections are provided for the nonsummary remedial sanction procedure, and the nonsummary

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214. *See supra* Part IV, *B*, 4.

215. *E.g.*, Brautigam, *supra* note 2, at 1534-36; Comment, *supra* note 8, at 1127-34.

216. *See supra* notes 1-8 and accompanying text.

217. WIS. STAT. §§ 785.01-.02 (1979).

218. For example, an indigent may be unperturbed if a large fine were imposed, and may be equally unconcerned about a jail term if he or she is already serving time in prison. Some other form of sanction may have greater impact.

219. *See supra* text accompanying notes 100-106. The incorporation of the criminal procedure chapters stopped just short of the chapter providing for appeals from criminal convictions, leaving a question as to whether immediate appeal is available. The remedial sanction procedural provisions do not facially require that the appeal be delayed until resolution of the underlying cause of action.

220. *See supra* text accompanying notes 91-99.

punitive sanction procedure incorporates many of the constitutional safeguards, as established in the Wisconsin statutes on criminal procedure. A potential for challenge on grounds of vagueness or overbreadth remains, particularly in regard to what conduct impairs the respect due the court.

VII. Conclusion

The Wisconsin Legislature tackled contempt of court, an area of statutory and case law which has been confused and confusing since 1849. The legislature managed to retain in the new contempt statutes many of the characteristics distinguishing civil from criminal contempt, but avoided the "blurred edges" problem. The new statutes do more than clarify the civil-criminal contempt distinction: they eliminate it. Although some further improvements are needed, the new statutes clarify and facilitate contempt proceedings beyond what most courts and commentators anticipated.

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