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CONTEMPT OF COURT AS AN ALTERNATIVE TO THE EXCLUSIONARY RULE

The fourth amendment to the United States Constitution guarantees the people the right to remain free of unreasonable searches and seizures.[1] To enforce this guarantee against the police, the judiciary created the exclusionary rule.[2] Reappraisals of the rule's effectiveness and benefits have appeared in Supreme Court decisions[3] and scholarly

[1] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ." U.S. CONST. amend IV.

[2] United States v. Calandra, 414 U.S. 338, 348 (1973). Under the exclusionary rule, evidence obtained in violation of the fourth amendment cannot be used against the victim of an illegal search or seizure. *Id.* at 347. Many scholars have reiterated the idea that the exclusionary rule is a product of the courts. *See, e.g.*, S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 1 (1977); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 433 (1974). However, many other scholars contend that the exclusionary rule is a constitutional requirement. *See, e.g.*, Shrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & C. 338, 368-75 (1980).

The Supreme Court first ordered illegally obtained evidence excluded in Boyd v. United States, 116 U.S. 616 (1886). In Weeks v. United States, 232 U.S. 383 (1914), Justice Day analyzed the history of the fourth amendment and concluded that unless certain evidence seized in violation of the Constitution was excluded from federal prosecution, "[t]he protection of the Fourth Amendment is of no value." *Id.* at 393. The rule was applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

[3] The most extensive Supreme Court critique of the exclusionary rule is Chief Justice Burger's dissent in Bivens v. Six Unknown Named Federal Narcotics Agent, 403 U.S. 388 (1971). After a detailed analysis of exclusion as an "anomalous and ineffective mechanism," *id.* at 420, Burger called for Congress to evaluate the rule and develop a more effective alternative. *Id.* at 422-24. In his concurrence in Coolidge v. New Hampshire, 403 U.S. 443 (1971), Justice Harlan called for an overhaul of search and seizure law, beginning with the overruling of *Mapp*. *Id.* at 490. Burger and Harlan's demands for reappraisal were not the first time Supreme Court justices criticized the exclusionary rule. *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 468 (1928) (Justice Taft stated that exclusion "would make society suffer and give criminals greater immunity than has been known heretofore.")

Burger's dissent signaled the Court's gradual rejection of the primacy of the exclusionary rule. The Court has found a number of situations where the rule's deterrent effect on police violations of the fourth amendment did not justify the harm caused by the suppression of relevant and incriminating evidence. Recent decisions have prohibited the rule's application in: searches following arrests under presumptively valid statutes later held unconstitutional, Michigan v. DeFillippo, 443 U.S. 31 (1979); habeas corpus proceedings, Stone v. Powell, 428 U.S. 465 (1976); and grand jury hearings, United States v. Calandra, 414 U.S. 338 (1974).

works.[4] Many alternatives to the rule have been suggested and evaluated.[5] One novel alternative, contempt of court sanctions against police officers, has been mentioned frequently[6] but has not been given exten-

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Some observers have concluded the Court is ready to abandon or modify the exclusionary rule. *See* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 21 (1978); *The Supreme Court 1979-80 Term—Exclusionary Rule*, 27 CRIM. L. REP. 4137 (BNA) (July 23, 1980).

Lower courts have followed the Supreme Court's lead. The Fifth Circuit recently held that illegally seized evidence could not be suppressed as long as police acted in good faith. United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980). Four current members of the United States Supreme Court, Justices Powell, Rehnquist and White, and Chief Justice Burger, have urged the adoption of a good faith exception to the exclusionary rule. Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & C. 635 (1978).

[4] *See, e.g.*, S. SCHLESINGER, *supra* note 2; Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence*, 62 JUDICATURE 214, 232 (1978). *See also* Schlesinger & Wilson, *Property, Privacy and Deterrence: The Exclusionary Rule in Search of a Rationale*, 18 DUQ. L. REV. 225, 227 (1980) (call for reconsideration of the rule's basic rationale).

[5] There have been so many alternatives suggested that we can only list a sample of them: Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964) (civilian review boards); Davidow, *Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal*, 4 TEX. TECH. L. REV. 317 (1973) (independent government official to punish police illegality); Gilligan, *The Federal Tort Claims Act: An Alternative to the Exclusionary Rule*, 66 J. CRIM. L. & C. 1 (1975) (tort suits against police); Gottlieb, *Feedback from the Fourth Amendment: Is the Exclusionary Rule An Albatross Around the Judicial Neck?*, 67 KY. L.J. 1007, 1013 (1979) (tort suits against police); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1037, 1050-53 (1974) (internal police discipline); Levin, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 JUDICATURE 74 (1974) (joint liability insurance plan). For an excellent analysis of exclusionary rule alternatives, *see generally* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 684-722.

[6] Cases which have mentioned the contempt alternative include: State v. Baker, 78 Wash. 2d 327, 332, 474 P.2d 254, 258 (1970); City of Tacoma v. Heater, 67 Wash. 2d 733, 742, 409 P.2d 867, 873 (1966) (Finley, J., dissenting); McNear v. Rhay, 65 Wash. 2d 530, 542-43, 398 P.2d 732, 740-41 (1965) (Finley, J., concurring).

Respected scholars have considered the contempt alternative in their treatises. *See, e.g.*, C. WHITEBREAD, CRIMINAL PROCEDURE 50-51 (1980); 8 WIGMORE, EVIDENCE § 2184a at 31, n.1 (McNaughton rev. 1961).

The articles and comments suggesting contempt or contempt-like proceedings are numerous. *See, e.g.*, Blumrosen, *Contempt of Court and Unlawful Police Action*, 11 RUTGERS L. REV. 526 (1957); Finley, *Who Is on Trial—The Police?, The Courts?, or the Criminally Accused?*, 57 J. CRIM. L.C. & P.S. 379, 386 (1966); Gangi, *Confessions: Historical Perspective and a Proposal*, 10 HOUS. L. REV. 1087, 1104 (1973); Geller, *supra* note 5, at 717; Gorecki, *Miranda and Beyond—The Fifth Amendment Reconsidered*, 1975 U. ILL. L.F. 295, 309; Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories"*, 53 J. CRIM. L.C. & P.S. 171, 182-83 (1962) (conditional agreement with concept); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 674 (1970); Plumb, *Illegal Enforcement of the Law*, 24 CORN. L.Q. 337, 388 (1939). Comment, *Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards*, 5 HARV. C.R.-C.L. L. REV. 104, 106-07 (1970) [hereinafter cited as *Use of § 1983*].

A number of others have treated the contempt alternative unfavorably. *See, e.g.*, Allee v. Mendrano, 416 U.S. 802, 858 (1974) (Burger, C.J., concurring and dissenting); Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143, 151 (1968); Comment, *Judicial Control of Illegal Search*, 58 YALE L.J. 144, 162-63 (1948) [hereinafter cited as *Judicial Control*].

sive analysis.[7] This Comment will critically examine contempt of court sanctions as an alternative to the exclusionary rule.

I. CONTEMPT AS AN ALTERNATIVE

The Supreme Court created the exclusionary rule to safeguard fourth amendment rights. This view, recently articulated in *United States v. Calandra*[8] and subsequent decisions,[9] differs from the earlier *Mapp v. Ohio*[10] concept of exclusion as an "essential part" of the fourth amendment's limitation upon the encroachment of individual privacy.[11] The Court's movement away from characterizing exclusion as constitutionally mandated is significant for consideration of alternatives. If exclusion of evidence is not required by the fourth amendment,[12] the rule could be readily replaced by alternatives which can more effectively accomplish the rule's purposes while avoiding its considerable drawbacks.[13]

The exclusionary rule has not been successful in accomplishing its goals. The primary justification for the rule is the deterrence of police conduct that violates the fourth amendment.[14] The Court viewed the rule as deterring police misconduct by "removing the incentive to disre-

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[7] Of the works listed in note 6 *supra*, only Professor Blumrosen's 1957 article thoroughly examined contempt of court as an alternative. He focused on the use of contempt sanctions to punish the delay of preliminary hearings as an obstruction of justice. *See* Blumrosen, *supra* note 6, at 537-40. The late Washington Supreme Court Justice, Judge Robert Finley, championed the contempt alternative from the bench. His consideration of contempt in his dissent in McNear v. Rhay, 65 Wash. 2d at 542-43, 398 P.2d at 740-41, is the lengthiest examination of the alternative in any reported opinion.

The Israeli criminal justice system deals with illegal police searches by allowing the evidence to be used at the defendant's trial while punishing the misbehaving officer in a proceeding similar to American contempt actions. *See* Cohn, *The Exclusionary Rule Under Foreign Law: Israel*, 52 J. CRIM. L.C. & P.S. 282 (1961).

[8] 414 U.S. at 348: "The rule is a judicially created remedy designed to safeguard Fourth Amendment rights, generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

[9] *See, e.g.*, Stone v. Powell, 428 U.S. at 482, 486.

[10] 367 U.S. 643 (1961).

[11] *Id.* at 656-57.

[12] Justice Black remarked in his opinion in Coolidge v. New Hampshire that "nothing in the Fourth Amendment provides that evidence seized in violation of that Amendment must be excluded." 403 U.S. at 498. *See also* Stone v. Powell, 428 U.S. at 499 (Burger, C.J., concurring) (exclusion is "a purely judge-created device").

[13] "If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule." Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. at 414 (Burger, C.J., dissenting).

[14] The primacy of deterrence in the hierarchy of exclusionary rule justifications has been repeatedly confirmed by the Supreme Court. *See, e.g.*, United States v. Calandra, 414 U.S. at 347; Stone v. Powell, 428 U.S. at 486; Terry v. Ohio, 392 U.S. 1, 12 (1968); Elkins v. United States, 364 U.S. 206, 217 (1960). *See also* 1 W. LAFAVE, *supra* note 3, at 17; Sunderland, *supra* note 2, at 365.

gard" the fourth amendment.[15] However, the evidence supporting the rule's deterrent effect on police is, at best, inconclusive.[16] The rule has also been described as a means to protect judicial integrity by insulating the courts from the taint of illegally obtained evidence.[17] Yet, by suppressing reliable evidence from a criminal trial, the rule may undermine judicial integrity by interfering with the courts' duties to pursue truth and to punish the guilty.[18]

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15 Elkins v. United States, 364 U.S. at 217. This incentive is removed by not permitting any evidence obtained by police in violation of the Constitution to be used in subsequent criminal proceedings.

16 Stone v. Powell, 428 U.S. 492 n.32. In the same opinion, Justice Powell noted that there is an absence of supportive empirical evidence for the rule's deterrent effect. *Id.* Many studies have attempted to answer whether the exclusionary rule is an effective deterrent. *See generally* S. SCHLESINGER, *supra* note 2, at 50-60. Although most observers do not believe these studies have been conclusive, *see, e.g.*, Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 JUDICATURE 398, 403 (1979); Sunderland, *supra* note 2, at 368, others maintain that these studies either demonstrate or refute the rule's deterrent value. *See, e.g.*, Kamisar, *Does the Exclusionary Rule Affect Police Behavior*, 62 JUDICATURE 70 (1978) (doubts cast on studies showing rule's ineffectiveness); Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is a Deterrent to Police?*, 62 JUDICATURE 404, 405 (1979) (studies indicate the rule's ineffectiveness).

As Professor Oaks observed in his article, the determination of the deterrent effect of the exclusionary rule is an "exceedingly complicated inquiry into human motivation within a complex social model, the criminal police system." Oaks, *supra* note 6, at 715. He concluded that to design any single test or group of tests that could measure the deterrent effect would be impossible. *Id.* at 716. Professor Canon believes that without a test, empirical claims that the rule does or does not work cannot be made. Canon, *supra* at 403. However, Professor Schlesinger replies that the proponents of the rule have the burden of proving its effectiveness due to the primary importance of deterrence as a rationale for the rule and to the rule's many costs and disadvantages. "If the proponents of the rule are unable to show that it is an effective deterrent, then it is time for the [Supreme] Court to reconsider its position." Schlesinger, *A Reply to Professor Canon*, 62 JUDICATURE 457 (1979).

17 Justice Brandeis' dissenting opinion in Olmstead v. United States, 277 U.S. 438 (1928), is generally regarded as the source of the judicial integrity argument. Justice Brandeis argued that exclusion preserved the judicial process from contamination by preventing courts from impliedly approving illegal conduct through the admission of unlawfully seized evidence. *Id.* at 484 (Brandeis, J., dissenting).

A third argument for exclusion involves the maintenance of trust in government. Justice Brennan in his dissent in *Calandra* observed that exclusion assured all people "that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." 414 U.S. at 357 (Brennan, J., dissenting). *See also* Sunderland, *supra* note 2, at 348-51 (concise analysis of both arguments described above).

The Supreme Court has not relied on these arguments in its recent decisions involving the exclusionary rule. *See, e.g.*, United States v. Calandra, 414 U.S. at 347-48. *See generally* C. WHITEBREAD, *supra* note 6, at 14.

18 *See* S. SCHLESINGER, *supra* note 2, at 86-87; Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1, 25 (1975); Wilkey, *supra* note 4, at 223. Dean Paulsen has observed that the "rule destroys respect for law because it provides the spectacle of the courts letting the guilty go free." Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 256 (1961).

One of the major criticisms of the exclusionary rule is its suppression of reliable evidence, often the most probative evidence of the guilt of the defendant. Stone v. Powell, 428 U.S. at 490; S. SCHLESINGER, *supra* note 2, at 62. In contrast, the evidence typically obtained from

Contempt of court sanctions could be a more satisfactory remedy for fourth amendment violations than suppression. Courts use the contempt power to punish acts of disobedience or disrespect.[19] If creation and enforcement of the exclusionary rule demonstrates the courts' special desire to safeguard fourth amendment rights, an unreasonable search or seizure could be construed as a serious instance of disrespect or disobedience of the judiciary. By using its contempt power against the police, the courts could directly and efficiently punish the misconduct while at the same time permitting reliable evidence to be used at trial. The goals of exclusion, particularly deterrence,[20] could be more effectively accomplished without the rule's accompanying drawbacks.

A simple hypothetical, based on the suggestion of Dean Wigmore,[21] demonstrates the utility of a contempt alternative. Darryl Dogooder has

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coerced confessions or flawed lineup identifications is properly suppressed because of its inherent unreliability. Wilkey, *supra* note 4, at 227, n.49. If justice is a truthseeking process, *id.* at 222, the exclusion of reliable evidence is not only a distortion of truth but an obstruction of justice as well.

In his often quoted opinion in People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926), then Chief Judge Cardozo laments the possible consequence of suppression:

> The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed and the murderer goes free.

Id. at 21, 23-24, 150 N.E. at 587, 588.

[19] R. GOLDFARB, THE CONTEMPT POWER 1 (1963).

[20] *See, e.g.*, S. SCHLESINGER, *supra* note 2, at 71.

Deterrence is a complex concept dependent on a number of variables, including the severity and certainty of punishment and the individual's knowledge of the law and its prescribed sanctions. *See, e.g.*, Ball, *The Deterrence Concept in Criminology and Law*, 46 J. CRIM. L.C. & P.S. 347, 348 (1955). The deterrent value of the contempt alternative would depend, in part, on how willing courts would be to punish police officers for their fourth amendment violations.

This Comment's position, that police officers would be more effectively deterred from fourth amendment violations by the threat of direct punishment than by the possible suppression of evidence, is necessarily based on intuition. Since the contempt alternative has never been tried, data on its deterrent value are not available. Moreover, studies which have been done on the deterrent effect of exclusion have not been conclusive. *See* note 16 *supra*. Finally, marginal deterrence, which considers whether one sanction is a more effective deterrent than another, requires specialized research well beyond the scope of this Comment. (For a detailed study on marginal deterrence, *see* F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL (1973).) When scientific certainty is unavailable, judges have used "common experience and introspective reports" to evaluate the deterrent value of punishment. *See* United States v. Paterno, 375 F. Supp. 647, 649 (S.D.N.Y. 1974) (Judge Frankel approves imprisonment for defendants convicted of tax fraud).

[21] Dean John Henry Wigmore, in his landmark treatise on evidence, proposed a contempt alternative in these words:

> The natural way to do justice here would be to enforce the healthy principle of the Fourth Amendment directly, i.e., by sending for the high handed, over-zealous marshal who had searched without a warrant, imposing a 30-day imprisonment for his contempt of the constitution and then proceeding to affirm the sentence of the convicted criminal.

8 WIGMORE, *supra* note 6.

just had his wallet stolen from his back pocket. Darryl locates a policeman on patrol in the area, Officer Bumbling, and tells him about the crime. Although Dogooder never saw the pickpocket, Bumbling knows that a reputed pickpocket, Quincy Quigley, has been in the area. Several hours later, Bumbling bumps into Quigley. He immediately stops Quigley and, without a word of explanation, conducts a thorough pat-down search. He finds in Quigley's back pocket a wallet which contains Dogooder's identification and credit cards. Quigley is arrested, booked and stands trial for petty theft. Despite the unlawful search of Quigley, the wallet and its contents would not be excluded but would be used at trial as evidence of Quigley's guilt. Quigley is eventually convicted on the basis of that evidence. Then, after announcing Quigley's sentence, the judge informs Bumbling that because of the unlawful search of the defendant, he is guilty of contempt and must pay a $100 fine.[22]

The contempt of court sanction presents an attractive alternative to the exclusionary rule in this hypothetical. Highly probative evidence was admitted at the defendant's trial, and both wrongdoers, the pickpocket and the policeman, received direct, proportionate punishment from the court. Moreover, the officer will probably think twice before he makes an illegal search in similar circumstances. Despite these advantages, however, a contempt alternative would have significant flaws which would limit its practical scope. Before the practicality of applying this contempt alternative to all, or even some,[23] instances of police misconduct can be evaluated, the components of the contempt power should be examined.

II. THE CONTEMPT POWER

A. HISTORY

The power of the courts to punish contempts arose from the divine right of kings. The medieval monarch possessed absolute power and authority,[24] and subjects owed complete obedience to the king. As his

22 If he were the judge, Dean Wigmore might have assessed a stiffer sentence. *See* note 21 *supra*. Also, Wigmore's "contempt of the Constitution" is not a legal concept. He may have been calling for punishment of the police misconduct by any means or treating the Constitution as a set of court rules, violation of which would justify a contempt sanction. *See* Blumrosen, *supra* note 6, at 526, n.4. In any event, the step from Wigmore's contempt of the Constitution to contempt of court is not a long one. *Id.* at n.3.

23 Professor Blumrosen suggested that the contempt power might be initially applied to a narrow area of police misconduct so as to gauge its deterrent effect. If it proved to be an effective deterrent, the remedy he proposed would then be extended into other areas by legislative or judicial action. Blumrosen, *supra* note 6, at 545.

24 R. GOLDFARB, *supra* note 19, at 11. Although the formal contempt power began during the Middle Ages, many older societies had similar schemes which also sought to assure respect for the governing sovereign. *See id.* at 9-10.

kingdom grew, the monarch selected chancellors and judges to represent him in certain governing duties. Disobedience of their writs or orders was considered "a grievous contempt of the king."[25] Contempt of the king gradually evolved into contempt of the administration of justice.[26] By the early eighteenth century, British courts could use summary convictions to punish a wide variety of contempts committed within and outside the courtroom.[27] This same extensive power was used by American colonial courts.[28]

Americans saw the potential for judicial abuse of an unfettered contempt power. The Judiciary Act of 1789 vested in federal courts the power to punish by fine or imprisonment[29] any contempt of their authority. In 1826, Judge James Peck's controversial use of the contempt power to punish the author of an article that criticized Peck triggered strong protests.[30] The outcry led to passage of an Act in 1831 which restricted the courts' contempt power to three defined classes. The current federal statute limits the contempt power to the same three categories.[31]

B. TYPES OF CONTEMPT

Contempt of court has been called the "Proteus of the Legal World,"[32] because it is capable of great diversity of form. In fact, the many forms of contempt have unnecessarily complicated the understanding of this judicial power.[33] The following discussion will focus on

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25 Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161, 166 (1908).

26 This change was strongly influenced by a controversial decision by Judge Wilmot in an unpublished 1764 British case, *Rex v. Almon*. For a discussion about this complicated case, see R. GOLDFARB, *supra* note 19, at 16-19.

27 Green v. United States, 356 U.S. 165, 185 (1958).

28 R. GOLDFARB, *supra* note 19, at 19.

29 Federal courts had the power "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any case or hearing before same. . . ." Judiciary Act of 1789 § 17, 1 STAT. 83.

30 James Peck was a federal judge who held a Missouri attorney in contempt for publishing an article that criticized the judge's decision in a series of pending proceedings concerning land grants. Judge Peck narrowly avoided impeachment as a result of his action. *See* Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 410, 423-30 (1928).

31 18 U.S.C. § 401 (1966):

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

For further discussion of the contempt statute, *see* notes 86-97 & accompanying text *infra*.

32 Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780 (1943).

33 R. GOLDFARB, *supra* note 19, at 46.

the two uniformly accepted[34] classifications: civil and criminal, and direct and indirect.

The purpose of the trial court's issuance of the contempt judgment determines whether the contempt is civil or criminal.[35] Civil contempt sanctions coerce or repair—they seek to enforce compliance with a pending court order or to compensate a party injured by noncompliance.[36] Whereas civil contempt lies for refusal to do a commanded act, criminal contempt punishes the completion of some forbidden act.[37] Criminal contempt sentences aim to vindicate the court's authority and to deter future acts of disrespect.[38] Fourth amendment violations by the police probably would be punished as criminal rather than civil contempt because courts would want to punish the officer's misconduct and

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[34] *Id.* at 47.

[35] Shillitani v. United States, 384 U.S. 364, 368-70 (1966); Smith v. Sullivan, 611 F.2d 1050, 1053 (5th Cir. 1980). The contempt proceeding or sentence is classified as civil or criminal, not the contumacious conduct.

A given act might be subject to both civil and criminal contempt sanctions, and both may be imposed in the same proceeding. *See, e.g.*, United States v. United Mine Workers, 330 U.S. 258 (1947) (Supreme Court approves civil and criminal sanctions against union and its leaders for refusing to obey court order to end nationwide strike). *See generally* Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 236-37 (1971).

Professor Dobbs notes that while both types of contempt can be used in the same proceeding, most courts seek the dominant purpose of the proceeding and classify the contempt accordingly. *Id.* at 238.

[36] United States v. United Mine Workers, 330 U.S. at 303-04.

A federal district court recently sought to achieve both aims by holding the superintendant of a woman's penitentiary in civil contempt for failing to comply with a prior court order regarding prison disciplinary procedures. Powell v. Ward, 487 F. Supp. 917 (S.D.N.Y. 1980). The superintendant was fined $5,000 plus $1,000 for every additional day of noncompliance with the order. The court believed the fine was needed to: (1) demonstrate to the defendants the seriousness with which the court viewed their noncompliance; and (2) generate the effort necessary for prompt and meaningful compliance. Furthermore, to make reparations to the inmates injured by the defendants' noncompliance, the court ordered the expungement of all records of disciplinary proceedings conducted in violation of the court order, and the payment of the inmates' attorneys' fees and nominal damages. *Id.* at 934-36.

One author has criticized the use of contempt as a means of compensating victims of noncompliance through the payment of monetary damages. Rendleman, *Compensatory Contempt to Collect Money*, 41 OHIO ST. L.J. 625 (1980). He believes that this use of contempt springs from the outdated notion of the courts possessing a "roving commission under an inherent contempt power." *Id.* at 635. He calls for courts to restrict the exercise of contempt powers to their statutory limits and to be skeptical of "achieving perfect solutions with blunt judicial remedies." *Id.* at 636.

[37] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442-43 (1911) (this case has been called the leading case on contempt; *see, e.g.*, Dobbs, *supra* note 35, at 239); Skinner v. White, 505 F.2d 685, 688-89 (5th Cir. 1974) (concise outline of some distinctions between civil and criminal contempt).

[38] In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest and the importance of deterring such acts in the future.

United States v. United Mine Workers, 330 U.S. at 303.

deter similar violations in the future.[39]

Civil and criminal contempts require different sanctions. Courts can use fines or imprisonment for either type of contempt.[40] Since its purpose is usually coercive, however, the civil contempt sanction is indeterminate—the punishment may only last until the contemnor purges himself of his unclean conduct.[41] The criminal sanction, on the other hand, is definite and unconditional. It need not terminate following the contemnor's pledge not to repeat his offense.[42] Moreover, a court would not need to monitor the contemnor's conduct when it issues a determinate sentence.[43] The weakness of indeterminate civil contempt sanctions to enforce police compliance with the fourth amendment was demonstrated in *Lance v. Plummer*,[44] a civil rights case where the deterrent effect of the contempt sanction was questionable, since the offend-

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39 When considering contempt sanctions, courts must exercise "[t]he least possible power adequate to the end proposed." Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821). This language has been interpreted to require judges to consider coercive civil contempt sanctions before resorting to the punitive criminal contempt measures. *See, e.g.*, Shillitani v. United States, 384 U.S. at 371 n.9 (contempt for refusal to testify). But, since the purposes of any sanction against police are to punish the completed misconduct and to deter future violations, courts could justify the use of the criminal contempt power. *See* text accompanying notes 130-37 *infra*.

40 18 U.S.C. § 401. A criminal contempt sanction cannot consist of both a fine *and* imprisonment. *See In re* Bradley, 318 U.S. 50 (1943); United States v. DiGirlomo, 548 F.2d 252, 253 (8th Cir. 1977). The amount of the punishment is within the sound discretion of the trial court. *See, e.g.*, Green v. United States, 356 U.S. at 188; Keyes v. United States, 314 F.2d 123 (9th Cir. 1963).

41 The civil contemnor has often been described as carrying the keys of his prison in his own pocket. *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902). This phrase refers to the fact that the civil contemnor's decision to comply with the court's order is all that is necessary to terminate his sanction.

In *Powell v. Ward*, the court's civil contempt sanction, an escalating fine, would be dropped if the prison superintendant achieved compliance within thirty days. After thirty days, the fine would cease increasing on the day the order was complied with. 487 F. Supp. at 935.

42 *See* Gompers v. Bucks Stove & Range Co., 221 U.S. at 442.

43 In *Powell*, the federal district court had to appoint a special master to expedite compliance efforts and to serve as the court's "eyes and ears." 487 F. Supp. at 935. A civil contempt sentence will often require some post-sentencing monitoring by the court so that the time of compliance can be determined.

44 353 F.2d 585 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966). A federal district court had issued injunctions against members of various "social groups," including the Ku Klux Klan, as well as against motel and restaurant owners, enjoining them from intimidating blacks who sought to use various public facilities in Saint Augustine, Florida. Charles Lance, an unsalaried deputy sheriff and a member of one of the enjoined groups, was adjudged to be in civil contempt for his abusive treatment of certain blacks. *Id.* at 589-90. The district court's punishment, requiring Lance's immediate dismissal and forbidding him from serving as a peace officer in the future, was modified by the Court of Appeals. The Fifth Circuit held that, because the contempt was civil, the sanction had to be open-ended to give Lance an opportunity to purge himself. If he promised to comply with the injunction's terms, Lance could be permitted to return as a deputy. *Id.* at 592.

If civil contempt sanctions were used against police officers on a regular basis, the issuing court would have trouble determining when, and whether, the officer had "purged" himself.

ing officer was merely required to promise not to repeat his abusive treatment of blacks.

Prosecutors would need to meet a higher standard of proof to secure a criminal, as opposed to a civil, contempt conviction. In a civil contempt action, the proof of the defendant's conduct must be clear and convincing,[45] a higher standard than the preponderance of the evidence standard commonly required in civil cases. In criminal contempt cases, the prosecutor bears the more difficult burden of proving the contemnor's guilt beyond a reasonable doubt.[46]

The intent requirements for civil and criminal contempt differ significantly. Willfulness need not be shown for a civil contempt conviction[47]—the mere fact of noncompliance or disrespect is sufficient to support the coercive penalty.[48] A criminal contempt conviction, however, requires some showing of willfulness by the alleged contemnor.[49]

Confusion surrounds the intent requirement for criminal contempt because courts have taken inconsistent approaches to defining the requisite mental state.[50] Courts generally agree that the defendant's mental state must be shown beyond a reasonable doubt,[51] and that intent can be inferred from the actor's conduct.[52] Courts disagree, however, on the degree of intent that must be proven. Debates have focused on what the defendant must actually have intended[53] and how that intent will be

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Moreover, most officers would not consider promising to "not do it again" to be a severe sanction.

45 *See, e.g.*, United States v. Rizzo, 539 F.2d 458, 465 (5th Cir. 1976).

46 *See, e.g.*, Michaelson v. United States, 266 U.S. 42, 66 (1924); *In re* Stewart, 571 F.2d 958, 965 (5th Cir. 1978). Proof beyond a reasonable doubt is required for any criminal conviction. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 52 (1972).

47 McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).

48 Inability to comply, if shown clearly and categorically by defendants, is a valid defense to a civil contempt motion. United States v. Bryan, 339 U.S. 323, 330-34 (1950). However, since civil contempt aims only to coerce compliance or to repair damage, the state of mind of the alleged contemnor is not relevant to his guilt.

49 *See generally* Dobbs, *supra* note 35, at 261-65; Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 YALE L.J. 39, 50-51 (1978).

50 Compare three circuits' descriptions of the intent requirement for criminal contempt: "willfully, contumaciously, intentionally, with a wrongful state of mind," Richmond Black Police Officers v. City of Richmond, 548 F.2d 123, 129 (4th Cir. 1977); "willful, contumacious or reckless state of mind," *In re* Joyce, 506 F.2d 373, 378 (5th Cir. 1975); "a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful," United States v. Seale, 461 F.2d 345, 368 (7th Cir. 1972).

The courts have acknowledged this confusion, but have not sought to reconcile it. *See, e.g.*, United States v. Smith, 555 F.2d 249, 252 (9th Cir. 1977) ("The formulation of the requisite intent cannot be expected to be uniform in all contexts.").

51 *See, e.g., In re* Brown, 454 F.2d 999, 1007 (D.C. Cir. 1971). *Cf.* Dobbs, *supra* note 35, at 262 & n.325 (intent sometimes only required to be proven by a preponderance of the evidence).

52 *See generally* W. LAFAVE & A. SCOTT, *supra* note 46, at 202-03.

53 Dobbs, *supra* note 35, at 262-63. Professor Dobbs examined four ways in which the

shown.[54] Ultimately, the degree of willfulness that a court requires will affect the deterrent potential of the contempt alternative. If a court's intent requirement is difficult to meet, prosecutors will rarely be able to secure contempt convictions.[55] A slight chance of punishment will hardly be an adequate deterrent to police misbehavior.

The location of contumacious behavior determines whether a contempt is direct or indirect. Direct contempt generally takes place within the presence of the court.[56] Disruptions in the courtroom and insults to the judge are two examples of direct contempt. Indirect contempt consists of all misbehavior of which the court has no firsthand knowledge.[57] Thus, police misconduct would almost always be classified as indirect contempt.

The distinction between direct and indirect determines the type of hearing an alleged contemnor receives. Some direct contempts can be punished summarily, without affording the contemnor any notice or formal hearing.[58] Summary contempt has been confined to extraordinary situations where instant action is necessary to vindicate the court's authority or prevent obstruction of justice.[59] When the contempt is indi-

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allegedly contumacious disobedience of a court order might be regarded as willful: (1) the defendant intended both to violate the order and to express defiance in doing so; (2) the defendant intended to disobey the order; (3) the defendant intended to perform the conduct which violated the order; or (4) the defendant's action was of a "particularly bad quality." Dobbs concludes that an acceptable standard for willfulness should at least include the contemnor's realization of his disobedience.

54 Kuhns, *supra* note 49, at 50-51. Professor Kuhns notes that certain courts require a showing of subjective criminal intent, "thereby implying that the defendant must actually intend to act wrongfully or, at least, be aware of the likelihood that his conduct is wrongful." Other courts use an objective test that focuses not on the defendant's perceived state of mind but on "what a reasonable person would have been aware of."

55 *Id.* at 51. Professor Kuhns believed this would be especially true if the subjective test for intent was used by a court. *See* note 54 *supra*.

56 Direct contempts have been referred to as those which occur "under [the] eye and within the hearing of the court." United States v. Marshall, 451 F.2d 372, 374 (9th Cir. 1974) (quoting *Ex parte* Terry, 128 U.S. 289 (1888)).

57 The best example of indirect contempt would be disobedience of a judicial order to be performed outside the courtroom. *See* Dobbs, *supra* note 35, at 224-25.

58 Rule 42(a) of the Federal Rules of Criminal Procedure permits summary contempt punishment "if the judge certifies that he saw or heard the conduct constituting the contempt" and if the contumacious act was committed in the actual presence of the court. FED. R. CRIM. P. 42(a). The summary power has been thoroughly examined. *See generally* N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT 220-30, 232-38 (1973); Kuhns, *supra* note 49; Sedler, *The Summary Contempt Power and the Constitution: The View from Without and Within*, 51 N.Y.U.L. REV. 34 (1976).

59 The Supreme Court in Harris v. United States, 382 U.S. 162, 164 (1965), stated that the summary contempt power should be reserved for exceptional circumstances such as acts threatening the judge or disrupting a hearing or obstructing court proceedings. The Court has justified punishment without a hearing for some direct contempts because the acts occurred in the judge's presence and were within his knowledge. Sacher v. United States, 343 U.S. 1, 9 (1952). More recently, in United States v. Wilson, 421 U.S. 309 (1975), the Court

rect, or when there is no "overriding necessity for instant action to preserve order,"[60] the summary contempt power cannot be used.[61] Since fourth amendment violations by police generally occur outside the courtroom and cannot receive immediate judicial attention, they cannot be dealt with summarily. Due process requirements must be met.

C. PROCEDURAL GUARANTEES

An officer facing a possible contempt conviction is entitled to a number of procedural guarantees. Rule 42(b) of the Federal Rules of Criminal Procedure requires notice and hearing for contempt proceedings.[62]

The notice required for contempt proceedings must provide the essential facts constituting the contempt, but need not have the technical accuracy of an indictment.[63] Rather, the notice should be sufficiently particular to inform the officer of the events constituting the contempt so as to give him a fair opportunity to defend himself.[64] The contempt should be designated as civil or criminal.[65] The notice can be delivered in various forms. The judge can orally notify the officer of the contempt

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upheld summary contempt convictions of immunized witnesses who refused to obey a court order to testify at a criminal trial. It emphasized that summary punishment is permissible where the trial judge must act swiftly and firmly to prevent contumacious conduct from disrupting the orderly progress of a criminal trial. *Id.* at 319. Lower courts have interpreted *Wilson* as holding that summary punishment is appropriate only where there is a compelling need for immediate action. *See, e.g., In re* Gustafson, 619 F.2d 1354 (9th Cir. 1980); United States v. Brannon, 546 F.2d 1242, 1248 (5th Cir. 1977).

60 Codispoti v. Pennsylvania, 418 U.S. 506, 515 (1974).

61 The Supreme Court in *Wilson* noted that in situations where time is not of the essence, due process provisions of Rule 42(b) would be more appropriate in dealing with the contumacious conduct. 421 U.S. at 319. *See also In re* Oliver, 333 U.S. 257 (1948) (usual due process requirements must be afforded if conduct is not in open court and not in the judge's immediate presence).

62 FED. R. CRIM. P. 42(b). Although this rule is entitled "Criminal Contempt," many circuits have held that the notice requirements of Rule 42(b) apply to civil contempt proceedings as well. *See, e.g.*, Brown v. Braddick, 595 F.2d 961, 966 n.7 (5th Cir. 1979).

63 *See, e.g.*, United States v. Eichhorst, 544 F.2d 1383, 1385-86 (7th Cir. 1976). In fact, a criminal contemnor has no due process right to an indictment. Green v. United States, 356 U.S. at 183-85.

64 United States v. United Mine Workers, 330 U.S. at 297 (the notice should fairly and accurately inform the officer of the events and conduct constituting the alleged contempt); Cooke v. United States, 267 U.S. 517 (1925).

See generally N. DORSEN & L. FRIEDMAN, *supra* note 58, at 230; L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, § 42.29 (1967).

65 Although Rule 42(b) requires that the notice designate the contempt charged as criminal or civil, the failure to do so does not necessarily invalidate contempt findings. If the defendants know the criminal nature of the charge and are accorded the appropriate procedural safeguards, the omission will not be fatal. *See* United States v. United Mine Workers, 330 U.S. 297 at 297-98; United States v. Eichhorst, 544 F.2d at 1386; FTC v. Gladstone, 450 F.2d 913, 916 (5th Cir. 1971).

charge during the criminal defendant's trial.[66] An order to show cause why the defendant should not be held in contempt can be issued by the trial judge or upon application of the contempt prosecutor.[67] An arrest order[68] or even an indictment[69] would satisfy the notice requirements.

The time and place of the contempt hearing must be stated in the notice.[70] The officer must be given reasonable time to prepare a defense. Although the trial court has discretion in the amount of time it can provide,[71] contempt convictions have been overturned on this issue.[72] A fair interval would become standard after initial experimentation. Thus, following the criminal defendant's trial, the judge would tell the officer charged with contempt that he had a certain number of days to return to court to defend himself.

The hearing for an officer charged with contempt serves a number of purposes. To impose a just punishment, a sentencing judge should know all the facts surrounding the officer's conduct.[73] Disputed issues can be properly resolved at a full hearing.[74] At the hearing, the officer should be able to call witnesses and receive the assistance of counsel in order to exculpate himself or to prove extenuating or mitigating circumstances.[75]

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66 FED. R. CRIM. P. 42(b).

67 L. ORFIELD, *supra* note 64, at § 42.28.

The order to show cause is the most widely used method for giving notice to alleged contemnors. *See* Kuhns, *Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury*, 73 MICH. L. REV. 484, 489 (1975).

68 FED. R. CRIM. P. 42(b).

69 Kuhns, *supra* note 67, at 488 (notice is occasionally given by the return of a grand jury indictment; no court has disapproved this method). *See, e.g.*, United States v. Mensik, 440 F.2d 1232, 1234 (4th Cir. 1971).

70 FED. R. CRIM. P. 42(b).

71 Nilva v. United States, 352 U.S. 385, 395 (1957). As little as one or two days has been upheld as reasonable time for preparation in uncomplicated cases. *See, e.g.*, *In re* Timmons, 607 F.2d 120, 125 (5th Cir. 1979) (two days, criminal contempt); United States v. Hawkins, 501 F.2d 1029, 1031 (9th Cir. 1974) (one day, civil contempt).

72 *See In re* Stewart, 571 F.2d 958 (5th Cir. 1978). The Court of Appeals ruled that the defendant did not have reasonable time to prepare a defense to his contempt charge where the order to show cause had been signed in the morning and the hearing was held in the afternoon. *Id.* at 965.

73 Harris v. United States, 382 U.S. at 166.

74 Dobbs, *supra* note 35, at 229. Professor Dobbs calls for a full hearing whenever there are disputed issues.

75 Cooke v. United States, 267 U.S. at 537. At their hearings, contempt defendants have the right to confront and cross-examine witnesses, *In re* Oliver, 333 U.S. at 273, 275, the right to an impartial judge, Taylor v. Hayes, 418 U.S. 488, 501-03 (1974), and the right to be presumed innocent until proven guilty beyond a reasonable doubt, Gompers v. Bucks Stove & Range Co., 221 U.S. at 444.

The assistance of counsel has been acknowledged as essential to an effective defense. Powell v. Alabama, 287 U.S. 45, 68-69 (1932). Nonetheless, if imprisonment of a police officer was not being considered in the contempt proceeding, counsel would not need to be provided by the state. Argersinger v. Hamlin, 407 U.S. 25, 37 (1971).

The right to a jury trial for contempt cases has changed significantly in recent years. The Supreme Court has gradually moved away from its previous position that any criminal contempt could be punished without a jury.[76] In *Cheff v. Schnackenberg*,[77] the Court held that criminal contempt sentences exceeding six months may not be imposed without a jury trial.[78] In *Bloom v. Illinois*,[79] the Court concluded that the Constitution required[80] a jury trial in contempt cases where serious punishment was contemplated.[81]

The Court has not mandated jury trials for all criminal contempts. *Bloom* declared that criminal contempt was a crime,[82] but added that it was not an offense that required a jury trial regardless of the potential penalty.[83] If a jury could be requested in every criminal contempt case, the efficiency of the contempt alternative would be minimal. Therefore, if a six-month maximum were imposed on imprisonment terms for police contempt,[84] the contempt punishment would not be considered serious,[85] and a burdensome addition to the alternative would be avoided.

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76 Green v. United States, 356 U.S. at 187: "The principle that criminal contempts of court are not required to be tried by a jury . . . is firmly rooted in our traditions."

77 384 U.S. 373 (1966).

78 *Id.* at 380. Six month imprisonment was treated as the dividing line between petty and serious punishments. *Id.* at 379. The Court observed that, historically, petty sentences could be administered without jury trials. Since Cheff received a six-month prison sentence, he could be convicted without a jury trial.

79 391 U.S. 194 (1968).

80 The *Cheff* decision was not of a constitutional dimension, but was made under the Court's supervisory power over federal courts. The Court in Duncan v. Louisiana, 391 U.S. 145 (1968), held that the right to a jury trial for serious offenses was guaranteed for both federal and state trials by the sixth and fourteenth amendments, respectively. Thus, the constitutional quality of the *Bloom* ruling enabled it to apply equally to state and federal proceedings.

81 Bloom was charged with criminal contempt for introducing a false will to probate. He was denied a jury trial and convicted and sentenced to prison for twenty-four months. 391 U.S. at 195. To determine whether he was wrongly deprived of a jury trial, the Court explored whether his offense could be considered serious, and looked to the maximum sentence authorized by the Illinois legislature. Since no maximum penalty had ever been established, the Court relied on the penalty actually imposed as the best evidence of the seriousness of the offense. *Id.* at 211. It concluded that a two-year prison sentence was serious and that Bloom was entitled to a jury trial. *Id.*

82 *Id.* at 202. The Court declared that "in terms of those considerations which make the right to a jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes." *Id.*

83 *Id.* at 211.

84 *See* Kuhns, *supra* note 67, at 498-99 (precedent for maximum contempt penalties has been established).

85 The United States Code defines offenses as petty if their penalties do not exceed imprisonment for a period of six months or a fine of five hundred dollars. 18 U.S.C. § 1(3) (1969). But, the five hundred dollars fine by itself has not served as an indicator that "serious punishment is contemplated." In Muniz v. Hoffman, 422 U.S. 454 (1975), the Court refused to grant a jury trial in a case where a union had been fined $10,000 for being in contempt of court. "[W]e cannot say that the fine of $10,000 . . . was a deprivation of such magnitude

D. THE FEDERAL CONTEMPT STATUTE

The contempt power of the federal courts has been statutorily restricted to three types of misbehavior.[86] Police misconduct punishable as contempt under the present statute must fit under one of these categories: (1) misconduct in the court's presence or so near thereto as to obstruct the administration of justice; (2) misbehavior of court officers; (3) disobedience of the court's "writ, process, order, rule, decree or command."[87]

The fourth amendment violations by the police probably would not fit under either of the first two categories. Conduct punishable under the first category[88] must occur in or close to the courtroom.[89] The second category, "officers of the court," typically applies to judges, marshalls, bailiffs and all others whose services are rendered solely for judicial purposes.[90] Attorneys[91] and law enforcement personnel[92] are not considered officers of the court for purposes of this statute.

To punish police misbehavior as contempt, the misconduct must be construed as disobedience of a court order. The courts would need to issue some type of decree, order, or set of rules which would specify directives and prohibitions for police behavior.[93] Officers would be held

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that a jury should have been interposed to guard against bias or mistake." *Id.* at 477. Thus, a criminal contempt case in which the penalty could be a fine exceeding five hundred dollars may not always necessitate a jury trial. *Compare* Girard v. Goins, 575 F.2d 160, 163-65 (8th Cir. 1978) ($500 fine establishes no entitlement to jury trial, but fines between $2,500 and $10,000 indicate that contempts are serious) *with* Richmond Black Police Officers v. City of Richmond, 548 F.2d at 127 (fine exceeding $500 means the contempt is serious and requires a jury trial.)

86 *See* note 31 *supra* for text of 18 U.S.C. § 401, the federal contempt statute. Most state contempt statutes are patterned after the federal law. N. DORSEN & L. FRIEDMAN, *supra* note 58, at 218-19. Most states, however, provide courts with broader contempt powers than does the federal statute. *See, e.g.*, CAL. CIV. PROC. CODE § 1209 (West Supp. 1981); N.Y. JUD. LAW §§ 750 (criminal), 753 (civil) (McKinney 1975); TENN. CODE ANN. § 29-9-102 (1980); WASH. REV. CODE ANN. § 7.20.010 (1961).

87 18 U.S.C. § 401(3).

88 *Id.* § 401(1). Most courtroom disruptions are punished under this subsection. These disruptions can be either confrontative or subversive. In both cases, the court shall use its contempt power to assure parties the opportunity to be heard and to prevent a loss in the court's dignity and authority. *See* Dobbs, *supra* note 35, at 186-87.

89 Nye v. United States, 313 U.S. 33, 49 (1941).

90 Cammer v. United States, 350 U.S. 399, 405 (1955) (The category of officers subject to § 401(2) should not be expanded beyond the group of persons who serve as conventional court officers and are treated as such in the laws.)

91 In *Cammer*, an attorney was held not to be an officer of the court for purposes of contempt punishment. *Id.*

92 The only instances in which law enforcement officials have been punished for contempt as court officers are when they have been entrusted with the custody of prisoners. *See, e.g.*, Fanning v. United States, 72 F.2d 929 (4th Cir. 1934) (sheriff permitted escape of prisoners).

93 The Supreme Court has been authorized to prescribe procedural rules for criminal proceedings, 18 U.S.C. §§ 3771-72 (1969), civil actions, admiralty cases, and proceedings for

in contempt only if they disobeyed one of these directives or prohibitions during a search or seizure.

The order itself would be determinative of the validity of a contempt sanction for disobedience. The order must be clear and specific, leaving no doubt or uncertainty in the minds of those to whom it is addressed.[94] Court decrees will not be expanded or twisted by implication beyond the plain meaning of their terms.[95] However, the parties to whom an order is directed must obey its commands even if the commands are later declared invalid.[96] Courts have held persons in contempt for disobeying orders which are eventually found invalid.[97]

III. POLICE AND THE COURTS

A. DISOBEDIENCE PUNISHED BY CONTEMPT

The contempt sanction has been used by the courts to punish police disobedience of judicial orders, but instances of this application are rare.

The Supreme Court's only approval of the contempt sanction

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judicial review or enforcement of administrative orders or Tax Court decisions, 28 U.S.C. § 2072 (Supp. 1979). Federal courts have authority to make and establish rules for the conduct of their business, 28 U.S.C. § 2071 (1959) and FED. R. CIV. P. 83. Court rules have been deemed the most effective means by which courts can impose sanctions on disrespectful attorneys. See Comment, *Sanctions Imposed by Courts on Attorneys who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 633-36 (1977). This rulemaking power is limited to judicial activities.

The rulemaking power is not analogous to a power to make rules for police behavior. Nonetheless, the Supreme Court, in a search and seizure case, could end the confusion now prevalent in fourth amendment law by setting out guidelines for what police can and cannot do under the Constitution. It is unlikely, however, that such a ruling, if issued, would be construed as a "lawful writ, process, order, rule, decree or command," disobedience of which would be punished as contempt. Most federal courts have been reluctant to exercise their contempt powers in cases not falling within the confines of a narrow construction of the contempt statute. *See*, Note, *Federal Courts-Contempt*, 52 VA. L. REV. 1556, 1563 (1966).

94 *See* International Longshoremen's Ass'n v. Marine Trade Ass'n, 389 U.S. 64, 76 (1967); *In re* Brown, 454 F.2d at 1008 n.49 (D.C. Cir. 1971). Justice Holmes, in Swift & Co. v. United States, 196 U.S. 375, 401 (1905), observed that "the defendants ought to be informed as accurately as the case permits what they are forbidden to do." *See also* Chapman v. Pacific Tel. & Tel., Co., 613 F.2d 193, 195 (9th Cir. 1979) (criminal contempt is established when there is willful disobedience of a clear and definite order).

95 *See, e.g.*, United States v. Greyhound Corp., 363 F. Supp. 525, 534 (N.D. Ill. 1973), *aff'd* 508 F.2d 529 (7th Cir. 1974). The case also points out that while stretching will not occur, the order will be read in light of the purpose for which it was entered, and thus may be subjected to a reasonable interpretation. *Id.*

96 "Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect." Manness v. Meyers, 419 U.S. 449, 458 (1975). *See also* United States v. United Mine Workers, 330 U.S. at 294; Howat v. Kansas, 258 U.S. 181, 189-90 (1922); ITT Community Development Corp. v. Barton, 569 F.2d 1351, 1356 (5th Cir. 1978).

97 *See, e.g.*, Dolman v. United States, 439 U.S. 1395 (Rehnquist, Circuit Justice 1978). *See also* Walker v. City of Birmingham, 388 U.S. 307, 314 (1967); United States v. United Mine Workers, 330 U.S. at 293-94; Howat v. Kansas, 258 U.S. at 189-90.

against law enforcement officers occurred over seventy years ago in *United States v. Shipp*.[98] Ed Johnson, a black man, had been convicted of raping a white woman by a Tennessee court. He appealed his death sentence to the Supreme Court, which temporarily stayed all state proceedings. The Court also ordered the Hamilton County sheriff, Joseph Shipp, to hold Johnson in custody pending appeal.[99] When word of the Court's action reached Hamilton County, a mob quickly formed to lynch the prisoner. Although Shipp knew of this impending threat of violence, he sent all his guards home and left only the night watchman in charge of the jail.[100] That night, the mob stormed the jailhouse and murdered Johnson.[101] The Court held that Shipp had failed to make any preparation to resist the threatened violence, and in fact, aided and abetted the actions of the mob.[102] His "utter disregard of [the] Court's mandate . . . and defiance of the Court's orders" justified a finding of criminal contempt.[103] Shipp was sentenced to ninety days imprisonment for his contempt, while one of his deputies received a sixty day sentence.[104]

Civil contempt has been used to respond to police disobedience of court orders. Unlike the punitive measures in *Shipp*, the civil sanctions were meant either to coerce police compliance with the order, or to compensate victims of the contempt.[105]

Hicks v. Knight[106] involved police misconduct during civil rights demonstrations in Bogalusa, Louisiana. A federal district court enjoined police officials and officers from failing to protect the demonstrators from harassment and assaults. Three weeks later, the same court held the police chief and the public safety commissioner in civil contempt.[107] They were fined $100 a day and sentenced to remain in the custody of the Attorney General until they demonstrated compliance with the court order by following the court's eight-point plan.[108] A police officer

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98 214 U.S. 386 (1909).

99 United States v. Shipp, 203 U.S. 563, 571 (1906).

100 United States v. Shipp, 214 U.S. at 412.

101 *Id.* at 414. The mob's tactics were ugly and shocking. After breaking down the prisoner's cell door with sledgehammers, the vigilante mob brought the prisoner to a nearby bridge. Twice they tried, unsuccessfully, to hang Johnson from this bridge. Johnson was then shot to death by members of the mob.

102 *Id.* at 423.

103 *Id.* at 420.

104 Shipp v. United States, 215 U.S. 580, 582 (1909).

105 *See* note 36 & accompanying text *supra*.

106 Civil Action No. 15727 (E.D. La. 1965), *reported in* 10 RACE REL. L. REP. 1504 (1965).

107 *Id.* at 1506.

108 *Id.* at 1507-08. The plan included a requirement that the police department develop a comprehensive program "for police coverage in the City of Bogalusa including coverage of all picketing and demonstrations." The program was to contain specific written instructions as

under their charge was also held in civil contempt for refusing to obey the court's initial order. His $25 a day fine continued until he agreed to follow the court order.[109]

In *Clark v. Boynton*,[110] another civil contempt sanction was issued to misbehaving police officers. In the spring of 1965, white policemen in Selma, Alabama prevented blacks from registering to vote. The federal district court, through a temporary restraining order, prescribed certain registration procedures. Law enforcement officials were directed not to intimidate or harass any citizens attempting to register.[111] About two weeks after the order's issuance, Sheriff James Clark and his deputies were confronted by nearly two hundred young black demonstrators at the county courthouse. The sheriff and about twenty deputies surrounded the teenagers and forced them to march for several miles through the streets of Selma. For this action, the district court held Sheriff Clark in "direct contempt" of its order and fined him $1,500.[112] The Fifth Circuit vacated the contempt order because of the district court's failure both to specify whether the contempt was civil or criminal and to provide necessary procedural safeguards for the sheriff.[113] On remand, the district court modified its order and found Clark in civil contempt.[114] Upon the presentation of affidavits showing evidence of damages suffered as a result of the forced march, Clark was ordered to pay $1,505 "as partial compensation for [plaintiff's] losses suffered as a result of his civil contempt."[115]

Hicks and *Clark* demonstrate the inherent problems with civil contempt sanctions for police misconduct. Inasmuch as civil contempt is punished indeterminately, courts would constantly need to monitor the contemnor's behavior to determine when the open-ended sentence could be lifted.[116] Judicial resources would be strained considerably by this task. Furthermore, sentences which would terminate on a showing of good behavior would be much less of a deterrent than definite punitive criminal contempt sanctions.

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to the duties of each officer and written assurances from the officer that he understood and would comply with the program.

109 *Id.* at 1508-09.

110 362 F.2d 992, 994 (5th Cir. 1966).

111 *Id.* at 994 n.4.

112 *Id.* at 994-95.

113 *Id.* at 995-97.

114 Boynton v. Clark, Civil Action No. 3559-65 (S.D. Ala. 1965), *reported in* 12 RACE REL. L. REP. 620 (1967).

115 *Id.* at 621.

116 *See* note 43 & accompanying text *supra*.

B. ORDERS GRANTED AGAINST THE POLICE

Courts have granted injunctions against persistent patterns of police misconduct. Disobedience of these orders could have been punished with contempt sanctions. In *Allen v. Mendrano*,[117] the Supreme Court upheld a district court order prohibiting Texas police officers from unjustifiably interfering with union organizing efforts.[118] Thirty-five years earlier, in *Hague v. CIO*,[119] the Court upheld similar relief against police officers who sought to crush a rising labor union.[120] The orders in both cases did not restrain any lawful police conduct.[121] Lower federal courts have also granted injunctive relief against police misconduct.[122]

The power of federal courts to enjoin police misconduct is not un-

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117 416 U.S. 802 (1974).

118 In 1966-67, attempts were made to unionize the Mexican-American farmworkers of the lower Rio Grande Valley. Local and state police officers allegedly used unlawful arrests, detentions and confinements to intimidate the organizers. The union efforts collapsed after a year of constant police pressure. *Id.* at 809. The federal district court, upon the union's request, issued an injunction specifically prohibiting the police from using their authority to arrest, stop, disperse or imprison the plaintiffs without adequate cause. *Id.* at 811 n.7. Adequate cause was defined as either (1) unreasonable interference with public or private passways, (2) force or violence, or (3) probable cause to believe a crime had been, or was about to be, committed. *Id.* at 814. The Court felt this injunction was appropriate in light of the persistent pattern of police misconduct. *Id.* at 815.

119 307 U.S. 496 (1939).

120 In 1937, the CIO, an organization established to organize workers into labor unions, launched a drive for members in Jersey City, New Jersey. City officials, believing the CIO to be a Communist organization, prevented CIO leaders from holding public meetings and, eventually, from remaining in the city. The Supreme Court upheld an injunction which enjoined Jersey City police from: (1) interfering with the union leaders' free access to the city's streets and parks; (2) removing union leaders from the city; (3) enforcing a void ordinance which prevented the union from publicly distributing their leaflets and handbills; and (4) enforcing an ordinance requiring permits for any public gathering. *Id.* at 517-18.

121 *See* Allee v. Mendrano, 416 U.S. at 815.

122 *See, e.g.*, Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966). The Fourth Circuit upheld an injunction which prohibited the Baltimore police from continuing to search homes on the basis of anonymous phone tips and without warrants. During a massive 19-day effort to locate two blacks suspected of the shootings of various policemen, over 300 warrantless searches were conducted by the police, all in the city's black community. The court called the effort "a series of the most flagrant invasions of privacy ever to come under the scrutiny of a federal court." *Id.* at 201.

See also NAACP v. Thompson, 357 F.2d 831 (5th Cir. 1966), *cert. denied*, 385 U.S. 820 (1967) (police enjoined from interfering with lawful protests against racial discrimination). *See generally* C. WHITEBREAD, *supra* note 6, at 46-48; Comment, *Federal Injunctive Relief from Illegal Searches*, 1967 WASH. U.L.Q. 104; Note, *supra* note 6.

A comprehensive order restricting intelligence gathering activities of the Chicago Police Department is being considered by a federal judge in the Northern District of Illinois. The order has been proposed pursuant to a consent decree which settled two class action suits which alleged unconstitutional spying by the Chicago Police. Alliance to End Repression v. City of Chicago, No. 74-C-3268 (N.D. Ill., agreement signed April 24, 1981); American Civil Liberties Union v. City Of Chicago, No. 75-C-3295 (N.D. Ill., agreement signed April 24, 1981). If the final order reflects the terms agreed to in the consent decree, it will contain a number of limits on the search and seizure procedures used by the Chicago police.

limited. A persistent pattern of misbehavior, rather than an isolated incident, must be shown before an injunction will be granted.[123] Thus, an allegation of a single unlawful search was held insufficient to support an injunction against police search tactics in *Long v. District of Columbia*.[124] The appellate court not only required a pattern of unlawful police action, but "a substantial risk that future violations will occur."[125]

The Supreme Court has also restricted federal court intervention in local law enforcement activity. In *Rizzo v. Goode*,[126] the Court refused to uphold a district court injunction requiring the Philadelphia police department to develop a comprehensive civilian complaint procedure. Justice Rehnquist, writing for the majority, said that the injunction was a sharp limitation on the police department's latitude in its own internal affairs,[127] and that the principles of federalism required the injunction's dismissal.[128]

The *Rizzo* holding would not prohibit the contempt alternative. *Rizzo* applied to an injunction regulating the internal affairs of a police department.[129] The search and seizure methods of a police department are not internal affairs. Moreover, the contempt alternative should not

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123 *See, e.g.*, Allee v. Mendrano, 416 U.S. at 815; Lankford v. Gelston, 364 F.2d at 202.

124 469 F.2d 927 (D.C. Cir. 1972). The D.C. Court of Appeals refused to grant injunctive relief against police misconduct because, among other reasons, a single unlawful stop and frisk incident was not enough to demonstrate a pattern of unlawful police conduct. *Id.* at 932.

125 *Id. But see* Lyons v. City of Los Angeles, 615 F.2d 1243 (9th Cir.), *cert. denied*, 101 S. Ct. 333 (1980). In *Lyons*, the Ninth Circuit held that a citizen had standing to seek injunctive relief to enjoin the Los Angeles Police Department's use of stranglehold controls in non-life-threatening situations. The plaintiff sought the injunction after he allegedly had been rendered unconscious by a stranglehold applied by officers who had stopped him for a traffic violation. 615 F.2d at 1244. The Ninth Circuit found the use of these holds to be "accepted police practice, even in non-life-threatening situations." *Id.* at 1246. Although the plaintiff's claim was based on only one stranglehold incident, the court believed the claim could be heard because "there is a strong possibility of recurrence of this police tactic." *Id.* at 1248. The actual injunction against the Los Angeles Police Department has been stayed by the Ninth Circuit pending appeal.

126 423 U.S. 362 (1976).

127 *Id.* at 379. The injunction was ordered by the District Court after a long trial involving a series of police violations of the constitutional rights of Philadelphia minority group members. The injunction directed the Philadelphia police to draft a comprehensive program for adequately dealing with civilian complaints. *Id.* at 369. The district court suggested guidelines for this program, and appropriate revisions of police manuals and rules of procedure were to be major parts of this program. *Id.* at 369-70. The District Court saw its order as a necessary first step in its attempt to prevent future police abuses. *Id.* at 370.

128 *Id.* at 378. Justice Rehnquist recognized that federalism governs the relationship between federal courts and state governmental branches in ongoing criminal proceedings. *Id.* at 380. He also noted that the principles of federalism are applicable when certain injunctive relief is sought against a local police department. *Id.* When the district court "injected itself by injunctive decree into the internal disciplinary affairs of [the Philadelphia Police Department]," the Court held that it had departed from those principles. *Id. See also* Lewis v. Hyland, 554 F.2d 93 (3d Cir. 1977).

129 Rizzo v. Goode, 423 U.S. at 380.

be based on individual district court injunctions against local police departments. Rather, in the interest of uniformity of constitutional interpretation, the Supreme Court should issue the order which police officers would be required to obey under threat of contempt.

IV. REVISING THE PROPOSAL

The Wigmore-inspired contempt proposal is not a realistic alternative to the exclusionary rule. Its attractive simplicity and efficiency would not be possible given the limited indirect contempt powers of American courts. Therefore, the Wigmore model must be modified before a viable contempt alternative can be evaluated.

A. TYPE OF CONTEMPT

Wigmore called for the misbehaving police officer to be prosecuted for contempt of the Constitution.[130] Although this suggestion is an inventive way to characterize fourth amendment violations, American courts are limited to civil and criminal contempt of court sanctions. Both types have distinct advantages and drawbacks for the contempt alternative.

Courts might justify the use of civil sanctions as a means to compel future compliance with the fourth amendment. Civil contempt would be easier to establish than criminal contempt because it requires no showing of willfulness and only a preponderance of the evidence.[131] Courts which try to use the least available power when resorting to contempt might prefer coercive civil penalties over punitive criminal measures.[132] The indeterminate nature of the civil contempt penalty, however, would require continuing court involvement following sentencing.[133] This strain on judicial resources and the questionable deterrent value of civil contempt sanctions[134] outweigh any advantages. Therefore, civil contempt sanctions would not be a practical remedy for police violations.

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130 *See* note 22 *supra* for further treatment of Wigmore's "contempt of the Constitution" concept.

131 In the hypothetical illustrating Wigmore's contempt proposal, if Officer Bumbling's actions were not willful, the judge might use a civil contempt sanction to coerce Bumbling's compliance with approved search and seizure procedures. Bumbling would be fined $500, but since civil contempt requires that the punishment terminate on a showing of compliance, *see* note 41 *supra*, the fine could be refunded to him if he was not found guilty of any similar convictions during the next twelve months.

132 Some courts, aiming to employ "the least possible power" when resorting to contempt punishment consider the coercive civil contempt sanction before the harsher punitive criminal contempt measure. *See* note 39 *supra*.

133 *See* note 43 & accompanying text *supra*.

134 *See* note 44 *supra*.

The purpose of the contempt alternative suggests that criminal contempt sanctions would be the preferable remedy for police misconduct. The contempt alternative aims to deter police misconduct by directly punishing officers for actions that violate the Constitution.[135] Since criminal contempt punishes completed acts while civil contempt coerces future compliance, the police violation should be punished as criminal contempt.[136] However, because it demands some showing of willfulness and proof beyond a reasonable doubt, criminal sanctions may be difficult to secure for many police violations.[137] Despite these proof problems, the determinate, punitive criminal contempt sanction would be the more appropriate punishment for police misbehavior under the contempt alternative.

B. NOTICE AND HEARING BEFORE PUNISHMENT

Assuming the officer's misconduct did not take place in the court's presence, he could not be punished summarily—he would be entitled to both notice and hearing before contempt punishment would be considered. If, during the criminal defendant's trial, the judge believed there was evidence of illegal police conduct, he could order a contempt hearing on the matter.[138] This hearing would take place shortly after the defendant's trial, regardless of its outcome, either before the same judge or a new one.[139]

The due process requirements are necessary to assure fair treatment of the officer. These requirements, however, reduce the efficiency of the contempt alternative. Full hearings to determine whether an officer should be held in contempt probably would require more court time than is presently needed for most motions to suppress. Yet, this burden

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135 *See* text accompanying notes 37-39 *supra* for discussion of the purposes of criminal contempt.

136 Professor Goldfarb stated that disobedience of court orders, which police misconduct must be construed as under the contempt alternative, is characteristically considered civil contempt, unless the disobedience is of a gravity which would suggest some public interest. R. GOLDFARB, *supra* note 19, at 67. Police disobedience is clearly of significant public interest.

137 *See* notes 46, 55 & accompanying text *supra*.

138 Since the defense attorney would have little incentive to pursue a contempt conviction against the offending officer, the judge presiding in a criminal case would need to be particularly alert for police violations of the fourth amendment. *See* S. SCHLESINGER, *supra* note 2, at 72.

139 Rule 42(b) of the Federal Rules of Criminal Procedure permits the disqualification of the trial judge from hearing the criminal contempt case if the contempt charged involves disrespect or criticism of a judge. This provision is meant to prevent any personality clashes from interfering with the expected impartiality of the contempt hearing. A change of judges may not be necessary, however, when the contempt is not a personal attack on the judge, as in the case of police misconduct. *Cf.* Kuhns, *supra* note 67, at 529 (fear that even a new judge could be prejudiced by the assessment of seriousness made by the original judge).

on the crowded court schedules might be justified if the contempt alternative is shown to be an improved protector of citizens' fourth amendment rights.

Neither the defense attorney nor the prosecutor in the earlier criminal case would be likely to accept the responsibility of prosecuting the officer at his contempt hearing. The defense attorney would have little incentive to prosecute a police officer because the potential contempt conviction could not be used as evidence in his client's appeal.[140] The prosecuting attorney would be reluctant to prosecute the same officer who brought in the criminal, since prosecutors rely on maintaining good relations with the police.[141] Moreover, the prosecutor might not treat contempt cases as seriously as his other criminal cases.[142]

The court would have to supply the prosecutor of the offending officer. The court can appoint a United States attorney or a private lawyer to prosecute criminal contempt cases.[143] Since appointment may not be feasible if a large number of misconduct cases arose, the court might instead hire a special prosecuting team to handle all contempt cases brought against the police. These special prosecutors would be affiliated with the court, and to prevent any conflicts of interest, would be entirely separate from the prosecutor's office. Their sole responsibility would be to conduct all investigative, procedural and prosecutorial tasks beginning with the court's contempt notice and continuing until the final verdict of the judge hearing the case.[144]

C. RESTRICTING AND EXPANDING PUNISHMENT OPTIONS

Courts issuing contempt punishments would not be limited to the thirty-day prison terms suggested by Wigmore. The contempt statute presently permits the use of fines *or* imprisonment as contempt sanctions.[145] Judges who impose fines on officers should prohibit any contribution from the department or the governmental employer to maximize

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140 An officer's contempt conviction for an illegal search would not be relevant to the defendant's guilt. Under the Federal Rules of Evidence and most state rules of evidence, only relevant evidence is admissible. *See, e.g.*, FED. R. EVID. 402.

141 S. SCHLESINGER, *supra* note 2, at 72.

142 Kuhns, *supra* note 67, at 511.

143 *See* L. ORFIELD, *supra* note 64, at § 42.28.

144 Virgil Peterson proposed the appointment of a separate Civil Rights Office "charged solely with the responsibility of investigating and prosecuting alleged violations of the Constitution by law enforcement officials." Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. U.L. REV. 45, 62 (1957).

145 18 U.S.C. § 401 (1966). Civil contempt sanctions have not been limited to fines or imprisonment. *See, e.g.*, McComb v. Jacksonville Paper Co., 336 U.S. at 193-95 (defendant ordered to pay back wages to employees). Some observers have suggested that the contempt statute only limits the criminal, and not the civil, contempt power. *See* Note, *supra* note 93, at 1560. *Cf.* Penfield Co. v. SEC, 330 U.S. 585, 594 (1947) ("We assume, arguendo, that the

the deterrent effect on the officer. Prison terms for police contempt should be limited to a maximum of six months to prevent demands for jury trials,[146] which should be avoided because they are time-consuming, expensive, and awkward. Moreover, doubts have been raised over the impartiality of jurors considering punishment for officers who have interfered with the rights of a convicted criminal.[147] To compensate for this six-month ceiling on prison sentences, the sentencing options should be legislatively expanded to include promotion restrictions or suspensions of officers from duty,[148] constituting intermediate punishments between fines and imprisonment. Overzealous officers, probably the most likely violators of search and seizure rules, would find the temporary loss of their patrol a strong deterrent against prohibited conduct.[149]

D. PRIOR COURT ACTION

To be punished as contempt, police misconduct must be construed as the disobedience of a court order.[150] Modern courts do not have the sweeping power that existed under the Judiciary Act of 1789 to punish "all contempts of authority";[151] rather, punishable contempt is limited to three types of conduct. Disobedience of a court's "writ, process, order, rule, decree, or command"[152] is the only category under which po-

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statute allowing fine or imprisonment governs civil as well as criminal contempt proceedings.")

146 *See* notes 84-85 & accompanying text *supra*.

Whatever their length, prison sentences for law enforcers demand careful consideration by judges. Police officers would be subject to greater risks of violence than most prisoners since they represent the forces that put many inmates behind bars. However, if judges seriously considered prison terms for serious police misconduct, and the officers were aware of this possibility, the threat of imprisonment could be one of the strongest deterrents against police misbehavior.

147 *See, e.g.*, Paulsen, *supra* note 18, at 261.

A recent study of § 1983 suits against the police revealed a definite jury bias for the police side. Project, *Suing the Police*, 88 YALE L.J. 781, 788-809 (1979).

148 Courts having jurisdiction to try offenses against the United States may place a defendant on probation, whether his offense is punishable by fine, imprisonment, or both. 18 U.S.C. § 3651 (1981 Supp.). Courts can couple probation with necessary and proper conditions. *See* United States v. Fultz, 482 F.2d 1, 4 (8th Cir. 1973). In United States v. Villarin Gerena, 553 F.2d 723 (1st Cir. 1977), an officer who struck a private citizen and arrested him without probable cause was punished under 18 U.S.C. § 242 (1976). His two year probation sentence was conditioned upon his resignation from the police force. 553 F.2d at 724.

If promotion restrictions or suspensions were not coupled with probation, courts may need legislative assistance to so expand its sentencing options. Court restrictions on police employment or promotion decisions could be construed as the interference with a department's internal affairs which *Rizzo v. Goode* prohibited. *See* 423 U.S. at 379 and note 127 *supra*.

149 *See* Oaks, *supra* note 6, at 710 (special impact of promotion restrictions or departmental discipline).

150 *See* text accompanying note 93 *supra*.

151 *See* note 29 & accompanying text *supra*.

152 18 U.S.C. § 401(3).

lice misconduct could be classified. Thus, the first step in implementing a contempt alternative must be the issuance of an order regarding police search and seizure procedures.

The order to police officers would have to be clear. The order could not simply require officers always to comply with the fourth amendment; one cannot be held in contempt for disobeying a vague order.[153] To avoid vagueness problems, the order should specifically inform police of: (1) their duties under the order; (2) conduct prohibited by the order, and (3) the potential punishment for disobedience. A court attempting to frame an order encompassing the totality of fourth amendment law will face a monumental task. A possible approach to this problem would involve the court's solicitation of suggestions and comments from interested parties, such as police and citizens' groups and legal scholars.[154] Using the expertise of these groups, a court would be better able to formulate a clear and specific order.

The order might be more than just an opening for the courts' use of their contempt powers. The law of search and seizure has degenerated into confusing technicalities;[155] if the order clearly explains proper search and seizure methods, fourth amendment law could be easier to understand. Some commentators have remarked that police officers break the law simply because they have no idea what it is.[156] The Boston Police Task Force recently prepared a booklet of guidelines for various criminal investigation procedures.[157] Their highly readable work demonstrates the potential value of clear directives for the police.

To achieve some uniformity in the interpretation of fourth amendment law, the Supreme Court should formulate the order and apply it to all American police departments. As it considered another difficult fourth amendment problem, the Court might choose to avoid creating another exception to the exclusionary rule and to eliminate the rule en-

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153 *See* International Longshoremen's Ass'n v. Marine Trade Ass'n, 389 U.S. at 76.

154 *See Developments In the Law: Injunctions*, 78 HARV. L. REV. 994, 1067 (1965).

155 *See* Schlesinger & Wilson, *supra* note 4, at 227: "The Burger Court, in attempting both to maintain the rule and to limit its effect, has found it necessary to resort to dubious distinctions which appear increasingly arbitrary."

156 *See* LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1005 (1965); Burger, *supra* note 5, at 11: "The basic training of a policeman is rarely adequate to make him understand what he can and cannot do in all situation; it is unlikely that without some special effort and outside help he will ever understand what he did wrong in a given case." *See also* 1 W. LAFAVE, *supra* note 3, at 24-25; Oaks, *supra* note 6, at 730-31.

157 BOSTON POLICE TASK FORCE, CRIMINAL INVESTIGATIVE PROCEDURES (1978). This 249-page booklet covers procedures involving search warrants, searches incident to arrest, motor vehicle searches, stop and frisk, arrest, and eyewitness identification. Its language is clear and is free of confusing legal and policy considerations, which are contained in a separate volume. The work, though lengthy, can be comprehended by the average law enforcement officer.

tirely. In its place, the Court might substitute a decree specifying the duties of a police officer under the fourth amendment. Disobedience of the decree would be punished as contempt. The simple structure of this suggestion collapses, however, on consideration of the constitutional requirements for a judicial order.[158]

V. EVALUATING THE CONTEMPT ALTERNATIVE

A. STRENGTHS

The contempt alternative would have numerous advantages over the exclusionary rule as a protector of fourth amendment rights. The alternative would have a greater deterrent effect on police, provide greater flexibility in dealing with police misconduct, permit reliable, though tainted, evidence to enter a trial, and expand the courts' reach to other fourth amendment violations.

Police would be more effectively deterred because the impact of a contempt sanction would fall directly on the offending officer, while the officer is punished only indirectly, if at all, by the exclusionary rule.[159] Improper police activity under the contempt alternative would subject the officer to a loss in his wallet, his tenure, or even his freedom. Suppression of evidence rarely results in any discipline of the officer;[160] instead, the burden falls on the prosecutor who had no role in the illegal conduct.[161] Holding the officer directly accountable for his illegal acts would appreciably deter violations of constitutional rights.[162] Although conclusive data is not available to support the deterrence value of either suppression or contempt sanctions,[163] some improvement in deterrence

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158 *See* notes 182-84 & accompanying text *infra*.

159 S. SCHLESINGER, *supra* note 2, at 57: "If one examines the effects of the rule, it is clear that its impact falls only indirectly on the policeman . . . Suppression does not affect his official status as a policeman; he is not censured by his fellow officers or the Court. It simply lets the criminal go free."

Justice Jackson remarked that "[r]ejection of [the] evidence does nothing to punish the wrongdoing official." Irvine v. California, 347 U.S. 128, 136 (1954).

160 Oaks, *supra* note 6, at 710, 727. If an officer is disciplined because of his conduct in a search or seizure, it will be for failure to meet the norms within the police organization, not the rules set by judicial decisions. J. SKOLNICK, JUSTICE WITHOUT TRIAL 219, 224 (1966). Professor Oaks notes that "judicial review by means of the exclusionary rule does not have a reforming effect over competing norms of police behavior [because t]he rule arises out of a review of an individual officer, not a challenge to the policy of a department." Oaks, *supra* note 6, at 729. (Professor Oaks is presently a Justice on the Utah Supreme Court.)

161 *Id.* at 726: "The immediate impact of the exclusionary rule falls not upon the police but upon the prosecutor who is attempting to obtain a conviction . . . But the prosecutor is not the guilty party in an illegal arrest or search or seizure, and he rarely has any measure of control over the police who are responsible."

162 *See* Peterson, *supra* note 144, at 62; S. SCHLESINGER, *supra* note 2, at 85.

163 *See* note 16 *supra*.

should result from the direct punishment of police officers.[164] The amount of improvement would partly depend on the severity and certainty of punishment for police misconduct.[165] Given the Supreme Court's emphasis on deterrence in justifying retention of the exclusionary rule,[166] any improvement in deterrence of police misconduct would be important.

The contempt alternative would permit the introduction of reliable evidence despite police misconduct. The excluded evidence is typically reliable, and often "the most probative information bearing on the guilt or innocence of the defendant."[167] Thus, exclusion of improperly obtained evidence usually results in the defendant's release.[168] Rather than increasing public respect for the courts, this result may cause them to appear foolish.[169] By admitting reliable but tainted evidence into the defendant's trial and then punishing the wrongdoing official, the contempt alternative permits the courts to punish two guilty persons rather than none.[170] Public respect for the judiciary will not diminish if courts use illegally obtained evidence to reach the truth and then punish any public officer involved in the illegality.

A wide variety of sanctions would be available to courts using the contempt alternative. Courts could tailor the sanction—fines, imprisonment and, with legislative help, suspensions—to the seriousness of the violation. Officers engaging in outrageously unconstitutional conduct would receive harsh and swift punishment. Judges also might consider the officer's past record in assessing punishment; officers who repeatedly commit minor infractions may require more than a slap on the wrist to deter further misconduct. Courts could be lenient with officers whose infractions were committed in the good faith belief that their conduct was legal. Any sanction assessed for good faith violations would have a

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164 *See* note 20 *supra*.

165 *See id. See also* F. ZIMRING & G. HAWKINS, *supra* note 20, at 161 (effectiveness of a deterrent depends more on its certainty than its severity).

166 *See, e.g.*, Stone v. Powell, 428 U.S. at 492.

167 *Id.* at 490.

168 S. SCHLESINGER, *supra* note 2, at 60-61; Peterson, *supra* note 144, at 55.

169 *Id.* at 61. Judge Wilkey has observed that this result also forces judges presiding over suppression hearings into awkward, hypocritical positions. When a judge spots a police violation during a criminal trial, he may overlook the officer's error to prevent the criminal from going unpunished because certain evidence was suppressed. Judge Wilkey calls for the abolition of the exclusionary rule and the creation of a system where courts can deal separately with the criminal and the police. *See* Wilkey, *Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351, 355-56 (1979).

170 Dean Wigmore criticized the exclusionary rule for letting *both* the misbehaving police officer and the criminal go free. "Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." 8 WIGMORE, *supra* note 6.

greater deterrent effect than exclusion.[171] The exclusionary rule offers one remedy—suppression of tainted evidence—for all degrees of police misconduct. Justice is not served when officers using a deficient search warrant are treated in the same way as officers who break down a door to make an unannounced warrantless search.[172]

As a replacement for the exclusionary rule, the contempt alternative could be expanded beyond police violations that are discovered during criminal trials. The exclusionary rule is invoked only if illegally obtained evidence is sought to be introduced at trial, and thus the rule cannot act against police misconduct which is not directed toward acquiring evidence.[173] The rule is therefore inapplicable to a high proportion of police activity.[174] Contempt sanctions could be used to punish fourth amendment violations beyond the reach of the exclusionary rule.

Monitors could be appointed by the courts to assist them in the substantial investigative and administrative work involved in extending the contempt alternative beyond police violations revealed at trial. Although the revised model of the contempt alternative provides a special prosecutor to handle contempt cases,[175] his work should be limited to the period following the issuance of the contempt notice. Monitors, similar to masters, are advisory officials appointed by the court to assist in the handling of a particular case.[176] Courts could appoint monitors to

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171 *See* United States v. Janis, 428 U.S. 435, 459 n.35; Stone v. Powell, 428 U.S. at 540 (White, J., dissenting). The *Williams* majority, which recently created a good faith exception to the exclusionary rule in the Fifth Circuit, *see* note 3 *supra*, noted that "[i]t makes no sense to speak of deterring police officers who acted in the good faith belief that their conduct was legal by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all." 622 F.2d at 642.

172 Chief Justice Burger remarked, in reference to this anomaly: ". . . [E]very violation . . . should not evoke the same judicial response. Letting a mouse free in a schoolroom is not as serious as putting a tiger there and the law would hardly punish these two acts in the same way." Burger, *supra* note 5, at 13 n.42.

173 Oaks, *supra* note 6, at 720.

174 *Id.* Professor Oaks offers a variety of motivations, other than the desire for convictions, that prompt some police searches and seizures. Among these are confiscations in gambling and liquor law violations and arrests for the purpose of controlling prostitution. *Id.* at 721-22.

Consideration should be given to the degree to which this type of police behavior should be restrained. Because of the restraints of the fourth amendment, vices such as gambling and prostitution cannot be controlled through prosecutions; police are forced to resort to harassing measures to control these victimless crimes. *See* J. WILSON, VARIETIES OF POLICE BEHAVIOR 99-100 (1970).

175 *See* text accompanying note 144 *supra*.

176 Comment, *Use of § 1983*, *supra* note 6, at 110. That author suggests the use of monitors by courts as "watchdogs" to ensure that the police comply with an injunction. "Courts are simply not equipped to supervise the day-to-day operations of police officers by injunction." Hughes v. Rizzo, 282 F. Supp. 881, 885 (E.D. Pa. 1968). Masters have been used in the prison context when corrections officials were unable or unwilling to comply with a court order. *See* Powell v. Ward, 487 F. Supp. at 935; Palmigiano v. Garrahy, 443 F. Supp. 956, 986 (D.R.I. 1977).

hear and investigate citizen complaints of improper police tactics,[177] and, if the monitor concludes that an officer has engaged in unconstitutional activity, he could apply to the court for permission to draw up an order to show cause against the disobedient officer. Since the monitor would need a number of assistants to carry out his responsiblities properly, present budgetary constraints might prevent this extension of the contempt alternative. Nevertheless, the availability of this option offers greater flexibility to courts seeking to protect citizens' fourth amendment rights.

B. WEAKNESSES

The contempt alternative has a number of serious problems. The problems inherent with punishing law enforcement officers and the potential deterrence of lawful police conduct are relatively minor weaknesses. However, the considerable difficulties in framing the necessary order and in justifying a court's involvement would ultimately prevent the contempt alternative from serving as a remedy for all fourth amendment violations by police.

The contempt alternative will punish officers and could affect the manpower levels of police departments. If officers are suspended without pay or imprisoned for fourth amendment violations, police departments will need to hire more persons to guarantee that sufficient personnel are available to patrol the streets. Although in many cities, such as Chicago, waiting lists for police employment are lengthy, the possibility of punishment for discretionary decisions may discourage persons from seeking careers in police work. Patrol positions, which often have the most uncertain guidelines[178] and the most dangerous responsibilities, could be decimated by this added disincentive. Salaries would need to be increased to compensate for the risk of contempt punishment. Local governments straining to keep budgets under control will not appreciate plans which force them to hire more policemen at

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177 The *Use of § 1983* Comment suggests that the monitor be an active rather than passive figure, and seek out information falling within his mandate rather than merely waiting for complaints to spur him to action. Comment, *Use of § 1983, supra* note 6, at 114-15.

Of course, complaints against police misconduct can always be brought in the form of section 1983 suits for damages or injunctions. 42 U.S.C. § 1983 (Supp. 1979). This statute permits citizens to proceed directly against police officers for "deprivation of any rights, privileges or immunities secured by the Constitution or the laws." These suits have many shortcomings as a practical remedy for police misconduct. *See* Project, *supra* note 147.

178 Professor Wilson found that patrol duty was not a popular assignment. J. WILSON, *supra* note 174, at 52-53. A major reason for this dislike of patrol work is the lack of clearly defined expectations. Non-patrol personnel have "clearer, less ambiguous objectives . . . need not get involved in family fights or other hard to manage situations and . . . need not make hard-to-defend judgments." *Id.* at 53. The additional element of contempt sanctions will increase the uncertainty in a patrol officer's work.

higher salaries.[179]

The threat of punishment might deter many legal searches and seizures. Despite the specificity of the court order, officers will encounter situations demanding responses that cannot be definitely classified as "prohibited" or "permitted". Faced with the possibility of fines, suspensions or imprisonment, officers will often choose to forego conduct of questionable legality.[180] The officers' reluctance to act might be viewed as a positive step toward reducing police misconduct. The deterrence of lawful police conduct could, however, hinder local law enforcement.

The order required by the contempt alternative would be a practical impossibility. For the police to be held in contempt for disobeying a court order, the order itself must clearly describe the permissible and impermissible. If the contempt alternative replaced the exclusionary rule in all applicable situations, the court would need to enumerate all fourth amendment violations which could be punished as contempt. Although it might be easier to lay down rules for law enforcement than for the maintenance of order,[181] a greater number of search and seizure possibilities will still need to be considered. The commendable guidelines prepared by the Boston Police Task Force,[182] though clear and detailed, would fall short of the specificity required of the triggering order because they did not treat every possible fourth amendment violation for which an officer could receive a contempt sanction. Yet, any effort to treat all search and seizure situations would be too complex and technical for the average patrolman to understand. Given the competing requirements of clarity and specificity, the order required by the contempt alternative could not be drawn.

The most glaring flaw of the contempt alternative involves its most basic element, participation of the judiciary. Even if it could be prepared, the order needed to trigger the contempt alternative could not be

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179 Probably a more economical way to adjust to the contempt alternative would be to improve the selection and training of police officers. Professor Inbau has advocated improved police selection and training as the most effective means of improving police practices. *See, e.g.*, Inbau, *Restrictions in the law of Interrogation and Confessions*, 52 NW. U.L. REV. 77, 78-79 (1958). Emphasis should be on training since, as Professor Wilson maintains, the better educated segments of the population are unlikely to find police patrol work attractive. J. WILSON, *supra* note 174, at 281.

180 *See, e.g.*, Comment, *Judicial Control, supra* note 6, at 162-63.

181 J. WILSON, *supra* note 174, at 64-66. In examining the patrolman's role, Professor Wilson distinguished between law enforcement (where officers bring to the bar of justice persons who had broken a law) and order maintenance (handling behavior that either disturbs or threatens the public peace or involves face-to-face conflicts between two or more persons). In both situations, rules cannot always specify whether to intervene. *Id.* at 64-65. However, Professor Wilson believed that rules on how to intervene could be created for law enforcement situations, where most searches and seizures arise. *Id.* at 65.

182 *See* note 157 & accompanying text *supra*.

issued by an American court. No court will issue an order binding on all police departments without the constitutionally required case or controversy before it.[183] A party could attempt to create the necessary case or controversy by challenging the adequacy of the exclusionary rule as a safeguard of fourth amendment rights. It is unlikely that a party could demonstrate both "the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law" which the Supreme Court requires for the granting of equitable relief.[184] The host of civil and criminal remedies available for illegal police conduct[185] would prevent a showing that the order regulating all police conduct was necessary. Moreover, the injury that would have to be shown for the Court to issue the expansive order required by the contempt alternative is difficult to imagine. Without this order, courts could not use their statutorily limited contempt powers to punish misbehaving police officers.[186]

VI. CONCLUSION

The contempt alternative is not a practical replacement for the exclusionary rule. The alternative would seek to punish unconstitutional actions by police officers with contempt of court sanctions. Since courts can only use contempt powers in limited instances, police misbehavior would need to be construed as disobedience of a court order. An expansive court order covering all police conduct and applicable to federal, state and local law enforcement officers would be needed. Such an order would not only be a monumental undertaking, but would not be feasible in a system where courts attempt to tailor remedies to the controversies before them. The contempt alternative fails because it requires judicial involvement beyond constitutional limits.

Despite its flaws, the contempt alternative possesses numerous advantages over exclusion. Deterrence of police misconduct would be improved through the direct punishment of officers. Flexible contempt

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183 U.S. CONST. art. III; Flast v. Cohen, 392 U.S. 83, 94-101 (1968). In *Flast*, the Court explains that the business of federal courts is limited to those questions "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Id.* at 95.

184 O'Shea v. Littleton, 414 U.S. 488, 502 (1974). In *O'Shea*, the Supreme Court found that the plaintiffs, seeking equitable relief against alleged discriminatory practices of an Illinois judge and magistrate, failed to meet the case or controversy requirement and did not demonstrate an adequate basis for equitable relief. The *Lyons* court attributed the *O'Shea* outcome, in part, to the plaintiffs' request for massive structural relief which asked a federal court to "supervise the conduct of state officials and institutions over a long period of time." 615 F.2d at 1247. The expansive court order needed for the contempt alternative would probably qualify as the massive structural relief objected to in *O'Shea*.

185 C. WHITEBREAD, *supra* note 6, at 37-53 (summary of available remedies against police misconduct).

186 *See* text accompanying note 93 *supra*.

sanctions could be tailored to fit the seriousness of the infraction. By providing punishment for its acquisition, the contempt alternative would permit reliable evidence obtained illegally by police to be used at the criminal defendant's trial. The contempt alternative could provide more effective protection for fourth amendment rights while doing less injury to the truthseeking process.

The advantages of the contempt alternative could be obtained on a smaller scale than proposed in this Comment. Rather than seeking to punish *all* police misconduct with contempt sanctions, courts might limit such punishment to specific violations. One commentator has proposed contempt sanctions for the delayed arraignments of arrested suspects.[187] Similarly, the contempt alternative could be readily applied to other types of police conduct for which objective standards can be established.

The contempt alternative could be used by a state court experimenting with alternatives to the exclusionary rule. In his dissent in *Bivens*, Chief Justice Burger declared that the exclusionary rule should not be abandoned until efficient alternatives were developed.[188] A few years later, in his concurring opinion in *Stone v. Powell*, the Chief Justice called for the immediate overruling of the exclusionary rule to "inspire a surge of activity" toward the development of these alternatives.[189] If the exclusionary rule was overruled,[190] state courts might choose to use contempt sanctions as an experimental replacement for the rule.[191] Experimentation could provide data on the effectiveness of the contempt alternative and could lead to legislation[192] approving the contempt alternative in other jurisdictions. This gradual approach to adoption of the contempt alternative is more realistic than the immediate use of contempt sanctions for all police misconduct throughout the country.

The advantages of contempt sanctions could be obtained through other alternatives. Even if police violations can be construed as the diso-

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187 Blumrosen, *supra* note 6, at 537-40.

188 Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. at 420 (Burger, C.J., dissenting).

189 Stone v. Powell, 428 U.S. at 500-01 (Burger, C.J., concurring).

190 *See* note 3 & accompanying text *infra*.

191 Defendants in the experimental jurisdictions using the contempt alternative who were convicted on the basis of illegally obtained evidence might complain that they were denied equal protection by the inability to suppress the tainted evidence. In order to remedy these equal protection problems, one commentator has recommended that experimental alternatives be employed as supplements, rather than as temporary replacements, for the exclusionary rule. *See* Geller, *supra* note 5, at 689-90.

192 Professor Kamisar supported the Wigmore "contempt of the Constitution concept," but believed that authorizing legislation would be necessary. *See* Kamisar, note 6 *supra*, at 182-83.

bedience of a court order, some courts may not approve of the extension of contempt sanctions to the regulation of police behavior. One proposal suggests that an independent review board, rather than the courts, determine penalties for police behavior.[193] Whether a court or an independent review board is used, the direct punishment of officers, coupled with the admissibility of reliable, tainted evidence, would offer greater protection for fourth amendment rights and the truthseeking process than is presently provided by the exclusionary rule.

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193 S. SCHLESINGER, *supra* note 2, at 72-76. As in the contempt alternative, illegally obtained evidence could still be used in the criminal trial.

Professor Schlesinger prefers a board over a judge because (1) the board has more time and resources to investigate alleged misconduct than a judge, and (2) a board would have the capacity to investigate the possibility that an officer's supervisors encouraged or ordered the misconduct. As the contempt alternative has been designed in this Comment, however, the appointment of special prosecutors for police contempt would permit an arm of the court to adequately pursue police misconduct and a monitor to oversee police action would be able to oversee police actions that never came out during a criminal trial. Moreover, since the judiciary has the responsibility for protecting the Constitution, the sanctioning of misbehaving officers should remain in the care of a co-equal branch of government rather than an independent review board. The practical difficulties in obtaining judicial involvement might necessitate the use of a non-judicial review board.