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The Constitution and Contempt of Court

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I. INTRODUCTION

THE contempt power of American courts is as old as our judiciary itself and, while derived from historical common-law practices, is peculiar both to and within American law. It is peculiar to American law in that other legal systems (not based on the English) have no such power of the nature or proportions of ours.[1] It is peculiar within our system in that no other of our legal powers is comparable to contempt in pervasiveness or indefiniteness. Nor does any analogy come to mind of a legal power with the inherent constitutional anomalies characteristic of contempt. The contempt power of American courts is truly "sui generis," to adopt a favorite cliché of our judiciary.

Few legal devices find conflict within the lines of our Constitution with the ubiquity of the contempt power. These conflicts involve issues concerning the governmental power structure such as the separation of powers and the delicate balancing of federal-state relations. In addition, there are civil rights issues attributable to the conflict between the use of the contempt power and such vital procedural protections as the right to trial by jury, freedom from self-incrimination, double jeopardy, and indictment—to name only the most recurrent and controversial examples. Aside from these problems, there are other civil liberties issues, such as those involving freedom of speech, association, and religion, arising out of the exercise of the contempt power. The purpose of this article is to present an extensive review of the constitutional problems provoked by the use of the contempt power by American courts.[2]

Most of the constitutional issues concerning the courts' contempt power arise from both its procedural authorization and practical implementation. A brief outline of contempt procedures should assist the review which follows.

* The substance of this article is drawn from a book to be published by the author entitled THE CONTEMPT POWER. Other articles adapting sections of this book have appeared in 24 MODERN L. REV. 239 (1961); 36 N.Y.U.L. REV. 810 (1961); 13 SYRACUSE L. REV. 44 (1961); and 1961 WASH. U.L.Q. 1.—Ed.

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1 See generally Goldfarb, *The History of the Contempt Power*, 1961 WASH. U.L.Q. 1.

2 Analogous constitutional problems relating to the congressional and administrative contempt powers will not be discussed in detail in this article.

While the congressional contempt power is presently governed by a single clear statute,[3] the judicial contempt power is procedurally more intricate, confused, and troublesome. The power of courts to punish contempts early became a settled precedent in English common law, though the extent of its application, historically, is open to question. After a brief colonial use of contempt powers, claimed to be inherent in the common law, and the formal establishment of the power by some state legislatures, the first federal statute concerning contempt of court was passed in 1789.[4] This statute gave federal courts the discretionary power to punish contempts as defined by the common law, expressly covering misconduct of officers of the court, disobedience of process, and misbehavior in the presence of the court.[5] The contemnor was provided with no procedural rights and a judge was limited in sentencing only by his conscience. This enactment was followed in 1821 by a second federal statute[6] authorizing a summary, virtually unrestricted power, albeit with certain specific limitations, encompassing the same categories of conduct as the prior legislation, except that the controversial words "or so near thereto as to obstruct the administration of justice" were added with reference to the offense of misbehavior in the presence of the court.[7] A court's sentencing power is in many ways unlimited, and the procedures are often summary. Through the years some fear has been expressed about the unlimited nature of the power. Though few have advocated abolishing the contempt power itself, there have been some restrictions in its use by both limiting legislation and judicial interpretation.

The Clayton Act of 1914[8] included a provision guaranteeing the right to a jury trial in all criminal contempt cases arising out of willful disobedience of any lawful writs or orders of the district courts. Further conditions required that the contemptuous act must be one listed as a federal or state criminal offense in order to fall within this provision, and that direct contempts and contempts arising out of suits brought by the United States be excluded from the statute's coverage. These qualifying conditions sobered hopes that the new law would be labor's Magna Carta by so circumscrib-

3 52 Stat. 942 (1948), 2 U.S.C. § 192 (1958).

4 Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 92. See generally Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 422 (1928).

5 Judiciary Act of 1789, ch. 20, § 17, REV. STAT. §§ 725-26 (1875).

6 18 U.S.C. § 401 (1958).

7 The present statute reads much the same as the 1821 law. 18 U.S.C. § 401 (1958).

8 18 U.S.C. § 3691 (1958).

ing the scope of jury rights as to prevent the useful and available employment of the jury which it was hoped might be accomplished.[9]

In the next decade, numerous bills were presented to Congress calling for liberalization of the harsh summary contempt procedures, and finally in 1932 the Norris-LaGuardia Act was signed into law by President Hoover. This statute provided for trial by jury in indirect contempt cases arising out of labor disputes, and disqualification of judges personally involved in contempt actions.[10] When the Supreme Court ruled that legislation such as this did not violate the separation of powers doctrine,[11] several of the states followed with similar legislation ameliorating some of their more stringent contempt procedures. Rule 42 of the Federal Rules of Criminal Procedure further refined the accompanying procedures for prosecution of all direct and indirect criminal contempts in matters of notice and hearing.

In 1957, the Civil Rights Act which was passed included certain contempt provisions.[12] This act, the first major federal attempt to deal with civil rights since post-Civil War times, gave injunctive protection to voting rights, enforceable through criminal contempt proceedings. Use of the contempt power was a pivotal issue in passage of the act, providing as it did an effective means for governmental protection of rights already existing but lacking enforceability. Contemptuous misconduct under this statute might arise out of disobedience to subpoenas issued by the Civil Rights Commission[13] or interference with voting rights.[14] The statute grants contemnors the right to demand a jury trial de novo when their sentence exceeds 300 dollars or forty-five days' imprisonment. Otherwise the right to trial by jury is permissive and in the court's discretion.

The courts have also shown some self-consciousness about the exercise of the summary contempt power, and at times have limited some of its harshnesses through judicial interpretation. Though less direct than legislation, this technique has often been as effective. For example, it has been noted that a strong policy against judicial control of the press provoked the Supreme Court to interpret the "so near thereto as to obstruct the administration of jus-

9 See generally SWAYZEE, CONTEMPT OF COURT IN LABOR INJUNCTION CASES (1935).
10 18 U.S.C. § 3692 (1958), formerly the Norris-LaGuardia Act.
11 Michaelson v. United States, 266 U.S. 42, 67 (1924).
12 71 Stat. 637 (1957), 42 U.S.C. §§ 1971(e), 1995 (1958).
13 71 Stat. 637 (1957), 42 U.S.C. § 1975d(g) (1958).
14 71 Stat. 637 (1957), 42 U.S.C. § 1971 (1958).

tice" clause of the federal contempt statute in a way which all but precludes most constructive contempt convictions.[15] This attitude, the antithesis of the English treatment, results probably as much from distaste for summary procedures as from attitudes about the contempt power itself. Another example of judicial conservatism with the applicability of contempt procedures may well be evidenced by their interpretation of the federal statute's words "officer of the court" not to include attorneys.[16] By such an interpretation contempt sanctions are given one less subject, though in other contexts attorneys are considered officers of the court. Further, courts have created mystic distinctions between civil and criminal, direct and indirect contempts,[17] often to avoid or apply specific procedural protections attaching to those various kinds of contempts, if in disregard of all other legal symmetry.[18] Many of the tenuous judicial classifications of contempt appear to have been prompted, at least in part, by a desire to avoid the summary procedures typical of certain types of contempt. In other more isolated instances, courts have gone far to interpret statutes and situations in order to arrive at more just results, where the contempt power, strictly construed, might not have clearly directed such results. Thus one can note in the present body of contempt law a trend toward limiting in specific instances the harshness of certain procedures customarily used in trying contemnors.

Beyond the statutory scheme within which the contempt power is now operative, the greater, more taxing and more vital issues

15 See Craig v. Hecht, 263 U.S. 255, 280 (1923); Toledo Newspaper Co. v. United States, 247 U.S. 402, 418-19 (1918); Savin, 131 U.S. 267, 278 (1889); Froelich v. United States, 33 F.2d 660, 662 (8th Cir. 1929). *Cf.* Nye v. United States, 313 U.S. 33, 50-52 (1941), overruling Toledo Newspaper Co. v. United States, *supra.*

16 See Cammer v. United States, 350 U.S. 399, 405 (1956). *But see* Farese v. United States, 209 F.2d 312, 315 (1st Cir. 1954); Schmidt v. United States, 124 F.2d 177 (6th Cir. 1941).

17 Contempt of court has been traditionally classified as either criminal or civil. Criminal contempt relates to conduct directed against the dignity and authority of the court, involving an act obstructing the administration of justice or which is disrespectful to the judiciary. Civil contempt, on the other hand, consists essentially in a failure to perform, or not perform, an act as ordered by a court in a civil action for the benefit of the opposing litigant. If, however, the contempt consists of doing a forbidden act, injurious to the opposing party, it may be considered as criminal. Whatever the initial classification, a contempt has usually been further categorized as either direct or indirect (or constructive). A direct contempt of court involves an act committed in the physical presence of the court while it is in session. An indirect (or constructive) contempt is one in which the contemptuous act is committed outside the court's presence. See, *e.g.,* Nelles, *The Summary Power To Punish for Contempt,* 31 COLUM. L. REV. 956, 960-61 (1931).

18 See generally Goldfarb, *The Varieties of the Contempt Power,* 13 SYRACUSE L. REV. 44 (1961).

concerning limitations of the contempt power lie in the Constitution. As with so many important legal issues, it is necessary, in this case, to examine those parts of the Constitution which in a number of ways would appear to curb and qualify the contempt power.

II. TRIAL BY JURY

The most apparent abridgement of civil liberties resulting from current contempt practices is the denial of the right of an accused to have a trial by jury. Originally, few contempts in this country were tried by a jury. Gradually, American courts and legislatures, while relentlessly adhering to other vestigial common-law characteristics of the contempt power, have discernibly, if sketchily, retreated from an absolute denial of the right to a jury trial. Now, all contempts of Congress are tried by a jury; so are indirect criminal contempts of court if they arise out of certain labor disputes, if the act constitutes another state or federal crime, or if it arises under the Civil Rights Acts. But all direct criminal contempts, the remaining indirect criminal contempts, and all civil contempts continue to be punished summarily.

A recent decision, *Green v. United States*,[19] clearly underscored both the problems with respect to the right to trial by jury in criminal contempt cases, and a political dilemma which arises out of the judicial dispositions of Supreme Court members, affecting the law in general, and contempt law more particularly. The case involved two of the men who had been convicted in the celebrated New York Smith Act trial for conspiring to teach and advocate the violent overthrow of the government of the United States. They were sentenced to five-year imprisonments and 10,000 dollar fines. They were released on bail, but the court ordered them to appear on a set date for execution of their sentences. On that date it was discovered that they had absconded. They remained fugitives until their voluntary surrender four and one-half years later. At that time the United States brought criminal contempt charges against them for willful disobedience of the surrender order. This action was tried by the district court without a jury; they were found guilty and were sentenced to an additional term of three years' imprisonment. The Supreme Court upheld this conviction and sentence, finding no reasons of law, history, or policy which would mitigate the egregious offense of the defendants.

No one would seriously suggest that the defendant's tardiness

[19] 356 U.S. 165 (1958).

ought to have gone unsanctioned. The issue which the *Green* decision raised was the extent to which the constitutional safeguard of trial by jury is applicable to criminal contempts. Mr. Justice Harlan, who wrote the majority opinion, disposed of issues regarding the applicability and extent of the contempt power by resort to the accepted history and precedent surrounding the exercise of this power. Conflicting constitutional safeguards were dismissed as being inapplicable. An existing bail-jumping statute,[20] under which defendants might have been tried, was deemed irrelevant.

Mr. Justice Black, in a strong dissent, criticized the summary nature of the contempt power as "an anomaly in the law," ripe for "fundamental and searching reconsideration."[21] He called for judicial action which would reconcile the existence of a contempt power with what he conceived to be basic principles of the American form of government and our Constitution. His principal complaint was that the manner in which the contempt power is administered denies the accused's traditional right to trial by jury, in his words, the "birthplace of free men."[22]

This sharp divergence in attitude emphasizes the vital importance of the membership of the Supreme Court in the resolution of legal, political and even philosophical problems. Statement of such a conclusion unfortunately comes more easily than accurate and thorough description of the precise sources of the difference. As well as any single legal issue, the review of contempt practices crystallizes the existing differences in attitude within the recent Court.

The majority disposition is best attributed to Mr. Justice Frankfurter's philosophy concerning the nature of judicial power. In 1924, while a member of the faculty at Harvard Law School, Professor Frankfurter and a colleague published an article which unearthed much of the academic misconception about the summary use of the contempt power.[23] The clear import of the article was one of criticism. In fact, in his attack upon the historical support for the summariness of contempt procedures, Mr. Justice Black alluded to this article, and noted that the myth of immemorial usage as a justification for continuance of the practice had been exploded by recent scholarship.[24] Yet, Mr. Justice Frankfurter con-

20 18 U.S.C. § 3146 (1958).
21 356 U.S. at 193-94.
22 *Id.* at 209.
23 Frankfurter & Landis, *Power To Regulate Contempts*, 37 HARV. L. REV. 1010 (1924).
24 356 U.S. at 202-03.

curred in the majority opinion in the *Green* case, which upheld the contempt conviction, for reasons which he has typically urged. Change, he argued, must come, if at all, from the legislature. Courts are inhibited in this respect, notwithstanding their impressions concerning the merits of the existing law. He stated that "the fact that scholarship has shown that historical assumptions regarding the procedure for punishment of contempt of court were ill-founded, hardly wipes out a century and a half of the legislative and judicial history of federal law based on such assumptions."[25] Calling a roll of Supreme Court Justices and lower federal court judges who for 150 years approved of the summary use of the criminal contempt power, and admonishing that the court is not a third branch of the legislature, Mr. Justice Frankfurter refused "to fashion a wholly novel constitutional doctrine . . . in the teeth of an unbroken legislative and judicial history."[26] Citing former Mr. Chief Justice Hughes' words— "we do not write on a blank sheet"—and never mentioning the merits or demerits of the doctrine at issue, he cast the vote which made his views the substance of the majority decision.

When Mr. Justice Black's attitude about those matters deemed crucial by Mr. Justice Frankfurter is compared, their differences become apparent. After stating his fear of the political dangers of the summary contempt power arising out of their conflict with the Bill of Rights, he urged that the precedents mentioned by Mr. Justice Frankfurter should be rejected because they were wrong. Though sound policy directs adherence to prior decisions, this practice should not be so inflexible as to preclude correction of obvious errors. Mr. Justice Black suggested that the prime responsibility of the courts lies precisely in the exercise of this power to reappraise when valued parts of the Constitution are jeopardized.[27]

Mr. Justice Black is usually characterized as the leader of that school of Supreme Court personnel loosely labelled as liberals or judicial activists. Speaking often in dissent, this group has been chiefly concerned with the substantial effect of any law upon the rights and liberties of individuals guaranteed by the Constitution in the Bill of Rights. The attitudinal conflict within the Court, which often reappears in the garb of legal rationales, has had an enormous impact upon contemporary American law and society

25 *Id.* at 189.
26 *Id.* at 193.
27 *Id.* at 195-98.

in general, and often lies at the heart of the contempt decisions of American courts.

There has been, in the past quarter of a century, an increasing inclination to alleviate some of the procedural harshness of standard contempt procedures. Extension of the right to trial by jury has been a foremost example of this trend. This trend is at least in part reflective of generally changing attitudes toward the value of the jury method of trial. As with more mundane fashions, the vogue toward the value of the jury system has had periods of rising and falling favor. Critics of the jury system in general have been as frequent and as vociferous as have been its advocates. Rather than digressing to enumerate the arguments, it should be only briefly noted that summary contempt procedures are most obnoxious to those who place faith and importance in the libertarian nature of trials by jury.

It could well be suggested that, most peculiarly in contempt cases, the jury has a valuable role. First, it permits public participation in a dispute which is usually of an official, governmental character. Public enlightenment, even if only through jury representation, has been characterized as an "indispensable element in the popular vindication of the criminal law."[28] This hopefully encourages popular understanding and acceptance of the administration of justice. Secondly, the jury may serve as an insulation between the alleged offender and the offended party (who is sometimes his judge and sentencer), allowing the jury, in an otherwise unlimited, uncontrolled situation, to function as a wall against possible abuses by governmental powerholders upon individuals. The general public may look with skepticism upon a judicial process which allows one man to be victim, prosecutor, judge, and jury, while, as Mr. Justice Black has aptly observed, there is inclined to be less false martyrdom where a jury convicts. Thirdly, there are subtle subversive potentialities in summary criminal proceedings other than the direct issues concerning who should be the decision-maker and why. The lack of external restraints over the vices of summary proceedings was also scored by Mr. Justice Black in his dissent to the *Green* decision. The detached review of a contempt decision by an appellate court whose members are sometimes sympathetic to their brethren of the lower trial courts, and are often hesitant to reverse in absence of clear and serious error, is to some viewers an impotent or idle ceremony. Therefore, the original

28 Frankfurter & Landis, *supra* note 23, at 1054.

denial of a jury trial is not only dangerous in itself, but this danger is compounded by being carried up through appellate levels in the form of an often "cold," unreviewable record.[29] Judicial self-restraint, as that voiced by Mr. Justice Frankfurter in the *Green* decision, induces lethargy in appellate judicial scrutiny. This has provoked Mr. Justice Black to comment that this offense, which is inordinately vague and sweeping in substantive scope, is now punished by the harshest procedures known to law and is subject only to token review.[30]

For better or worse American law has adopted the practice of summarily trying contempt cases. How, then, can this practice be justified in light of our most basic legal directives—those found in the Constitution? With respect to the right to trial by jury, article III, section 2 of the Constitution provides: "The trial of all crimes, except in cases of Impeachment, shall be by Jury . . . ." This particular section was included within the early substance of the Constitution as a reflection of the strong feelings at the time of our nation's birth that the right to trial by jury was coequal with, and essential to, a government under law free from tyrannical abuse. The deprivation of this right was one of the serious grievances which the American settlers held against the King.[31] Specific exceptions to this guarantee were included in the Constitution, so that it can be argued that the intent was not to exclude contempt from this coverage since it is not one of those exceptions. This argument is strengthened by the fact that contempt is not listed as a special judicial or legislative power in the enumeration of the granted powers of those governmental branches. Any other conclusion respecting this aspect of the contempt power is interpretive, and based on less evidence. In the *Green* case, again, Mr. Justice Black noted that, although called upon to present any available evidence of intent on the part of the authors of the Constitution or expressed at the original state conventions, the government attorneys in that case could find no corroboration for the use of summary contempt proceedings.[32] The cases during this period do not illuminate this uncertainty.[33]

The Bill of Rights twice reaffirmed the importance to the people of the right to trial by jury. The fifth amendment directs that

29 See 356 U.S. at 200.
30 *Id.* at 199-200.
31 See I JOURNALS OF THE CONTINENTAL CONGRESS 1778–1789, at 69 (Ford ed. 1904).
32 356 U.S. at 206-07.
33 See Comment, 57 MICH. L. REV. 258, 262 (1958).

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." And the sixth amendment follows, declaring: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." The import of this latter constitutional provision was applied to the contempt situation in these compelling words:

> "The history which gave rise to the constitutional provisions guaranteeing the right of trial by jury 'is succinctly summarized in the Declaration of Independence in which complaint was made that the Colonies were deprived "in many cases, of the benefits of Trial by Jury." '
>
> "The Constitution provides, 'The Trial of all Crimes . . . shall be by Jury. . . .' But those fresh from experiences with tyranny were not content with this general guarantee, and Amendments VI and VII were promptly adopted, the former providing: 'In all [criminal prosecutions], the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .' The concept of a criminal 'prosecution' is broader than a 'trial' and the addition of the more inclusive term indicates a determination to afford the right of trial by jury to those subjected to prosecution of any sort which might result in fine or imprisonment. The selection of the language of the Sixth Amendment is hardly explainable upon any other postulate."[34]

Nonetheless, contemptuous conduct has been excluded from these constitutional protections and those who have disputed the clear meaning of these words have, for the most part, prevailed in their unique constitutional interpretations.

The right to jury trial is initially dependent upon an ability to classify the contemptuous act as criminal.[35] Writers, judges, and lawmakers have peremptorily brushed aside any argument about juries for civil contempts with declarations that such procedural provisions simply do not apply to the ordinary contempt situation.[36] Interestingly, even Mr. Justice Black has found no fault with summary procedures for civil contempts, although he has suggested that all criminal contempts be tried by a jury. In this former respect, he is not in a minority. Since civil contempts most often arise out of equity proceedings, the seventh amendment's guarantee of

34 Ballantyne v. United States, 237 F.2d 657, 667 (5th Cir. 1956).

35 See Goldfarb, *supra* note 18.

36 See, *e.g.*, FOX, THE HISTORY OF CONTEMPT OF COURT 2-3 (1927); RAPALJE, A TREATISE ON CONTEMPT § 10 (1890).

jury trials in civil matters would by its own terms—"In Suits At Common Law"—be inapplicable. So, civil contemnors are between two rules. One allows jury trial in civil matters arising out of other than equity actions. The other guarantees jury trial in criminal cases, a category from which civil contempts have been exempted, though many characteristics of criminal treatment attach in those cases.

With these constitutional provisions in mind, as well as the judicial and legislative fiats concerning contemporary contempt practice, an analysis of the propriety of jury trial would seem appropriate. Is contempt a crime? Is it an infamous crime? Are there any valid reasons for applying variant non-jury procedures in this situation?

The fifth amendment speaks of "infamous crimes." Like the eighth amendment's prohibition of "cruel and unusual" punishments, this phrase is subject to changing interpretations. In 1885 the Supreme Court, drawing upon Lord Auckland's *Principles of Penal Law*, attempted to impart substance into the words "infamous crime."[37] Ruling that no United States court had jurisdiction over infamous crimes unless the fifth amendment's conditions precedent of indictment and grand jury were fulfilled, the Court set up two criteria of "infamy." The first entailed an inquiry into whether a conviction for that particular crime would result in impeaching the credibility of the criminal in the future. This is based on an old rule of evidence which impugns the credibility of testimony given by one who has committed a crime involving moral turpitude or bearing on veracity. This test for infamy may become circuitous when one presses for definitions of moral turpitude. This legal term of art is often applied as an ingredient or characteristic of more infamous crimes, the type which would reasonably connote some questionable trait bearing on the probable truthfulness of the criminal. Reasonable as this rule may be, in the present context it leaves one with a formula stating that infamous crimes bear on credibility, and crimes bearing on credibility are infamous. It leaves indeterminant which crimes are by their nature infamous, or which aspects of criminal behavior bear either upon the infamy of the crime or the credibility of the criminal.

The second criterion, which the Court adopted as a guide to determine the infamous nature of a crime, involved the mode of punishment authorized for the particular crime. Here again there

[37] *Ex parte* Wilson, 114 U.S. 417, 422 (1885).

is less insight afforded before the fact to establish the nature of a crime than reflection after the crime has been characterized or classified. Since in contempt cases, where no constitutional or statutory maximums exist, the potential extent of the punishment is unlimited, and therefore unknown until it is announced, one cannot determine at the time of indictment whether the crime is infamous or not. This phenomenon accounts for the inadequacy of the mode of punishment test in classifying criminal contempts as infamous.

The Court has also mentioned that the nature of the crime, independent of its punishment, determined its characterization as infamous. Therefore precedent is only partly helpful in determining whether contempt, or any crime, is infamous and warrants the protection of the fifth amendment. What was infamous early in English history may not have been so during the period of American colonialism, and in turn may or may not be so at the present time. Generally, the decisions have held that the possibility that grave punishment could be inflicted is the test for an infamous crime, and the test of grave punishment is the possibility of being sentenced to hard labor or imprisonment. This tautological logic consists of little more than holding that an infamous crime is infamous, and that infamous crimes are treated with punishments worthy of infamy. This is of little assistance in cases where there is question as to whether a crime has been committed, and what the sentence will ultimately be.

Later decisions appear to have adopted the mode-of-punishment test.[38] If a crime can be punished by a sentence including imprisonment or hard labor, it is infamous. Again, a contemnor often does not know that he has committed what a court may later decide was a criminal contempt, or what his sentence will be even if he has some notion of his contemptibility. It is suggested that without employing further semantic niceties, it can be fairly concluded that contempt qualifies as an infamous crime by any reasonable standard which considers either the nature of the wrong or the usual gravity of the sentence. Contemporary America can concern herself with the procedural protection of her people who commit acts for which serious and unlimited prison sentences can be exacted, and which are as socially grave as rationales for the contempt power imply. The right to an indictment and a grand jury hearing has already been recognized in limited contempt situations by legisla-

[38] See, *e.g.*, United States v. Moreland, 258 U.S. 433, 436-41 (1922); United States v. J. Lindsay Wells Co., 186 Fed. 248, 249-50 (W.D. Tenn. 1910).

tion. Those areas which are not now embraced by this protection, other than civil contempts, should be. Society is apt to lose less by the minor delays and insignificant expenses of jury trials than it may from the insecurity which flows from arbitrary treatment of its citizens. Inexpensive, fast or easy convictions are the aim of neither the Constitution nor the Bill of Rights, and in fact are a trifling economy in view of the inequities likely to result from such unrestrained governmental tactics. This conclusion is strengthened by reference to the statutory definition of a felony as any offense punishable by death or imprisonment for a term exceeding one year.[39] Contempt frequently qualifies under this criterion, as well as having all other characteristics commonly attributed to crimes.

The other pertinent constitutional jury provisions allow even less latitude. That there shall be no trial without jury admits of little interpretation. But the courts have ignored this constitutional admonition, or disregarded it as inapplicable to contempt.

The distinction between civil and criminal contempt has often entailed no more than a matter of retrospective classification of characteristics. The courts are as inconsistent in their conclusions as they are in deciding upon which characteristics to base their classification. So, while the Supreme Court was saying at one time:

> "These contempts are infractions of law visited with the punishment as such. If such acts are not criminal we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early laws they were punished only by the usual procedure . . . and that at least in England it seems that they may be and preferable are tried in that way,"[40]

at another time it was asserting with equal authority and vigor:

> "If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, or enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power."[41]

39 18 U.S.C. § 1(*l*) (1958).
40 Gompers v. United States, 233 U.S. 604, 610-11 (1914).
41 Eilenbecker v. District Court of Plymouth County, 134 U.S. 31, 36 (1890).

And a still more judicious, if not more perplexed Court, was saying about the dichotomatic difference between criminal and civil contempts that "it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both."[42]

The decision last quoted from held that contempt was sui generis, possessing the qualities of both civil and criminal wrongs.[43] Indeed it does. On the authority of precedent alone, that Court said that although contempt is criminal in nature, it is not criminal in the sense that the sixth amendment envisions.[44] So concluding, it denied the right to a jury trial. This inconsistent, illogical judicial treatment is not unusual in contempt cases. Courts are wont to justify their decisions on grounds that contempt is peculiar and subject to novel treatment. Therefore it may be considered a crime for the purposes of the statute of limitations and the pardon power, but not for the purpose of applying the venue guarantees of the sixth amendment.[45] Such *ad hoc* treatment is all too typical. Courts have selectively held that contempt is what the Constitution meant by a crime in one clause, but not what it envisioned in another. All this is done with vision bordering on the clairvoyant, since the constitutional authors left no evidence of their intent in this respect.

Strong statements like those of Mr. Justice Black, if not prevailing as judicial policy, have had some liberalizing effect on the courts. Mr. Justice Jackson has written that summary punishments must always and rightly should be regarded with disfavor.[46] In another case, a court wrote:

> "It is abhorrent to Anglo-Saxon justice as applied in this country that a man, however lofty his station or venerated his vestments, should have the power of taking another man's liberty from him.
>
> "Society has always permitted one exception,—a limited right of courts to punish for contempts. But that right has been grudgingly granted, and has been held down uniformly to the 'least possible power adequate to the end proposed.' "[47]

Mr. Justice Murphy expressed this hesitancy in these words:

42 Bessette v. Conkey Co., 194 U.S. 324, 329 (1904).
43 *Id.* at 336.
44 *Id.* at 337-38.
45 See United States v. Goldman, 277 U.S. 229, 235 (1928).
46 Sacher v. United States, 343 U.S. 1, 8 (1952).
47 Ballantyne v. United States, 237 F.2d 657, 667 (5th Cir. 1956).

> "The contempt power is an extraordinary remedy, an exception to our tradition of fair and complete hearings. Its use should be carefully restricted. . . ."[48]

And more recently, a federal court reiterated:

> ". . . the grant of summary contempt power . . . is to be grudgingly construed so that instances where there is no right to a jury trial will be narrowly restricted to the bedrock cases where concession of this drastic power to the courts is necessary to enable them to preserve . . . authority . . . order . . . decorum. . . ."[49]

These three values—authority, order, and decorum—are currently tipping the scales away from constitutional protections accorded criminal defendants, though not without the aid of some judges' thumbs. These are the overriding interests which courts consider to eclipse the established right to jury trial—these and the reverence of prevailing majorities of the Supreme Court for steady, respected precedent.

This subject was treated long ago by Edward Livingston in his famous work on the penal system of New Orleans.[50] In discussing the contempt power, he noted that all the rationales giving courts broad and indefinite contempt powers are based upon necessity.[51] This is so even though the power itself is repugnant to all the fundamental principles of criminal justice applicable to other criminal acts.[52] He pointedly asked what sort of conduct would secure a man against a vain or vindictive judge.[53] The necessity for promoting regard and respect for the judiciary which Blackstone offered as a justification for the contempt power—the need for order and respect which courts now rely upon as authority for this power—can be gained only by impeccable judicial conduct, and not always by that. In response to the claims of necessity, he wrote: "Not one of the oppressive prerogatives of which the crown has been successfully stripped, in England, but was in its day defended on the plea of necessity. Not one of the attempts to destroy them, but was deemed a hazardous innovation."[54]

Mr. Justice Black emphasized this same point in his *Green*

48 Fisher v. Pace, 336 U.S. 155, 167 (1949) (dissent).
49 Farese v. United States, 209 F.2d 312, 315 (1st Cir. 1954).
50 1 LIVINGSTON, COMPLETE WORKS ON CRIMINAL PROCEDURE 258-67 (1873).
51 *Id.* at 258-59.
52 *Id.* at 259.
53 *Ibid.*
54 *Id.* at 264.

dissent, pointing out that "necessary" has come to mean expedient rather than indispensable, and is applied too loosely to warrant derogation of fundamental constitutional rights.[55] Quoting with agreement the suggestion of Mr. Justice Holmes that, where there is no absolute need for immediate action, contempts should be dealt with like other breaches of law,[56] he added that there is actually more of a need in the contempt situation for delay to prepare and prove a case than an urgency to try it immediately.[57]

Livingston suggested that although courts may have a right of self-defense, only society as a whole has the right to punish offenses. Once the interruption to the court's proceeding ceases, the sovereign should be the only one to punish, and then only according to the procedures set out in the Constitution. It is not for the individual, or for the incorporeal body that is wronged, to punish. The sovereign which permits such retribution is radically defective because this gives a single party the right to punish. The necessity ends, he pointed out, with its own self-defense. The punishment should be by law alone. Though a governmental body has the power of self-defense, the power to punish should be exclusively vested in society as a whole, and not in its individual departments. He compared the practices in contempt cases with the right of individuals to defend themselves against assault. Certainly an individual may defend himself. But once having defended himself, he cannot punish his assailant other than through the orderly processes of law. Livingston concluded that contempt is less a necessity for the exercise of a legal power than an engine for its abuse; and though courts should have the right to dispel interference with the performance of their functions, that power should go no farther.[58]

Still others have argued that the summariness of contempt proceedings is necessary because it speeds prosecutions, deters misconduct, avoids delay in the judicial process, and promotes the dignity of the court. True as these observations may be, it is questionable whether in our democratic society these expediencies—and this is all that they are—are sufficient grounds to ignore important procedural safeguards, such as the right to jury trial, which are so imbedded in the democratic way of life and our system of justice. And as long ago as 1874 the Supreme Court held that contempt

55 356 U.S. at 213.
56 Toledo Newspaper Co. v. United States, 247 U.S. 402, 425-26 (1918) (dissent).
57 356 U.S. at 216.
58 1 LIVINGSTON, *op. cit. supra* note 50, at 266.

of court is a specific criminal offense, and the fine therefor is a criminal judgment.[59] Yet, arguments continued, opinions varied and exceptions were made, so that now there is no clear answer to gain from history.

The Constitution is specific and clear. Criminal contempt should be tried as other crimes are—with all procedural guarantees protecting the accused. There should be the right to a jury trial of the charged contempt. The confusion wrought from vague and misleading distinctions between civil and criminal contempts, and the stronger policies of protecting individual liberty underscore this logical conclusion.

The argument that contempt is of a sui generis nature because it has customarily been treated peculiarly, and that it is treated this way because it is sui generis is of questionable appeal. Clearer views, such as Mr. Justice Black's comment in the *Sacher* case that "these contempt proceedings are 'criminal prosecutions' brought to avenge an alleged public wrong . . ."[60] are more directly reasoned, if not preferable in substance.

There are instances where an act of contempt simultaneously constitutes another crime. There, by statute, the defendant is entitled to a jury trial. Such laws were probably enacted to avoid the circumvention of the right to a jury trial by hasty or angry judges, who might treat an ambivalent act as a contempt instead of whatever other crime it was, in order to apply the stricter contempt procedures. How, it could be asked, can an act be a crime for so many purposes[61]—perjury, bribery, etc.—and sui generis for another—contempt?

When a man is deprived of his property or liberty as punishment for commission or omission of an act which is proscribed by society, for whatever reason, he is treated as a criminal. In contempt cases there are no reasons strong enough to override the long and well-established policies guaranteeing the right to be tried by a jury, after indictment, and in the ordinary course of the law. The Constitution is quite clear in its directives in this respect. The policies involved go to support, at least in comparative value, the Constitution's implications.

In the *Green* case, Mr. Justice Black in his dissent carefully articulated the argument for reinstatement of jury protections in criminal contempt cases. With a directness and clarity that should

59 New Orleans v. Steamship Co., 87 U.S. (20 Wall.) 387, 392 (1874).
60 343 U.S. at 20.
61 See, *e.g.*, *In re* Steiner, 195 Fed. 299, 302 (S.D.N.Y. 1912).

be the standard of all who would follow this view in the future, he wrote:

> "The power of the judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law. In my judgment the time has come for a fundamental and searching reconsideration of the validity of this power which has aptly been characterized by a State Supreme Court as 'perhaps, nearest akin to despotic power of any power existing under our form of government.' Even though this extraordinary authority has slipped into the law as a very limited and insignificant thing, it has relentlessly swollen, at the hands of not unwilling judges, until it has become a drastic and pervasive mode of administering criminal justice usurping our regular constitutional methods of trying those charged with offenses against society. Therefore to me this case involves basic questions of the highest importance far transcending its particular facts. But the specific facts do provide a striking example of how the procedural safeguards erected by the Bill of Rights are now easily evaded by the ever-ready and boundless expedients of a judicial decree and a summary contempt proceeding.
>
> "I would reject those precedents which have held that the federal courts can punish an alleged violation outside the court room of their decrees by means of a summary trial, at least as long as they can punish by severe prison sentences or fines as they now can and do. I would hold that the defendants here were entitled to be tried by a jury after indictment by a grand jury and in full accordance with all the procedural safeguards required by the Constitution for 'all criminal prosecutions.' I am convinced that the previous cases to the contrary are wrong—wholly wrong."[62]

III. THE FIRST AMENDMENT

Some indirect ramifications of the exercise of the contempt power raise questions relating to provisions of the first amendment. All contempts are in the form of speech, writings, expressive acts or inaction. The first amendment reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances."

62 356 U.S. at 193-94.

A. *Problems Involving Freedom of Religion*

A freedom of religion issue arises only in a limited number of contempt situations. The Supreme Court of Pennsylvania in 1793 reported that in a case which was tried on a Saturday "the defendant offered Jonas Phillips, a Jew, as a witness; but he refused to be sworn, because it was his Sabbath. The court, therefore, fined him 10£.; but the defendant, afterwards, waiving the benefit of his testimony, he was discharged from the fine."[63] In a similar case, the Supreme Court, while recognizing an excuse from swearing for Quakers, denied it to a Jew, and found him in contempt for refusing to be sworn.[64] This type of problem is now somewhat obsolete since affirmation has been generally accepted as a substitute for the court oath.

Another area of conflict, though not yet of serious proportions, has recently been before the courts. The Supreme Court of Iowa in 1956 dealt with the following situation.[65] A Protestant woman and a Catholic man had married, and had had a child. They were later divorced, agreeing that the mother would have custody of the child and would rear him as a Roman Catholic. Years later the father sought to have the mother punished for contempt because she was rearing the child as a Protestant. The trial court held the mother in contempt, but suspended her sentence, giving her an opportunity to purge the contempt by rearing the child as a Catholic. This was a civil contempt proceeding to coerce her to act. She appealed to the state supreme court on the ground that this treatment violated her right to the free exercise of religion guaranteed by the first and fourteenth amendments. The court reversed the contempt conviction, but on the ground that the decree which she had disobeyed was too vague and uncertain to warrant a contempt citation for its breach,[66] thus avoiding the constitutional issue raised by the first amendment.

There is some analogous, though indirect, precedent to support this first amendment defense. Rearing a child in a particular faith has been held to be the exercise of a religious act by the parent.[67] And the right of custody includes the right to dictate the religious teachings which one's child will receive. Parental agreements con-

63 Stansbury v. Marks, 2 U.S. (2 Dall.) 213 (Pa. Sup. Ct. 1793).
64 United States v. Coolidge, 25 Fed. Cas. 622, 623 (No. 14858) (Mass. Cir. Ct. 1815).
65 Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1956).
66 *Id.* at 75, 78 N.W.2d at 496-97.
67 See Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

cerning the religious education of a child are not so binding, in this context, that they cannot be altered by one of the parties free from legal censure.[68] Those moral inhibitions of personal conscience which may flow from such an agreement have not been considered to be within the control of the law. Such a judicial attitude involves a proper and natural application of the principle of governmental non-interference with first amendment rights by the courts—applicable to the states through the operation of the fourteenth amendment.[69]

Precedent such as this does not and ought not leave the offended person without a remedy; the critical issue is with the nature of that remedy. Penal sanctions, such as those implicit in the civil contempt power, are not proper. The frustrated father may still seek the strictly civil, supervisory aid of the courts to protect his rights in ways less drastic than imprisonment of his spouse, or former spouse. Only the gravest social necessities should be deemed sufficient to warrant governmental curtailment of rights of religious activity.[70] Even then it is questionable whether the contempt power is the most suitable vehicle of control.

The issue which this problem raises could, under the present unpredictable status of the contempt power, fission into several tangential problems. The matrimonial, surrogate and juvenile courts are often called upon to deal with situations involving questions of religious freedom. Although there are numerous instances in which these courts might feel compelled to exercise their contempt power, there is no clear-cut resolution of the problems raised by the first amendment's guarantee of religious liberty by the contempt cases to date. Better reason would suggest judicial abstinence in this area, at least insofar as the exercise of the contempt power is concerned.

B. *Problems Involving Freedom of Speech and of the Press*

The free speech and press decisions in which the judicial contempt power has been questioned might, by analogy, offer a solution to the religious liberty problem. In these cases, the courts have adopted a strictly construed "clear and present danger" test for

68 See generally Friedman, *The Parental Right To Control the Religious Education of a Child*, 29 HARV. L. REV. 485, 497-98 (1916); Note, 50 YALE L.J. 1286, 1292-93 (1941).

69 See Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

70 See, *e.g.*, Church of Jesus Christ v. Utah, 136 U.S. 1, 49 (1890); Reynolds v. United States, 98 U.S. 145, 163 (1878); State v. Massey, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed*, 336 U.S. 942 (1949).

balancing the exercise of first amendment rights with other interests which are often augmented by the sanction of the contempt power.

This doctrine gradually evolved from the protracted controversy within the Supreme Court concerning contempt by press publications in this country. Both the United States and England have long wrestled with the problem of maintaining a free press consonant with a system of fair trials.[71] Often, the two goals have conflicted and, presently, both countries resolve the conflict by resorting, or not resorting, to the same contempt power.[72]

In this country, the contempt by publication problem began as one of interpretation of the federal contempt statute. Courts were given the power to punish contempts in their presence "or so near thereto as to obstruct the administration of justice."[73] This clause was first applied in its causal connotation.[74] The application of the contempt sanction was left to the discretion of the judge, who could punish accordingly if a publication's commentary had a reasonable tendency to obstruct justice. This approach was abandoned in 1941, when the Supreme Court decided that the quoted words from the federal statute should be interpreted in a physical, rather than causal, context.[75] Since most press publication occurs neither in the presence of the court nor "near thereto" geographically, the power to punish contemptuous publications was made ineffectual.[76] Soon thereafter, the Court acknowledged the presence of the first amendment issues by adopting and applying Mr. Justice Holmes' clear-and-present-danger test[77] to press comments about pending cases.[78] This approach has been held applicable to the contempt powers of both the federal and state courts. Mr. Justice Black has referred to the clear-and-present-danger test as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[79]

The evils envisioned in the contempt by publication decisions

71 See generally Goldfarb, *Public Information, Criminal Trials and the Cause Célèbre*, 36 N.Y.U.L. REV. 810 (1961).

72 See generally Donnelly & Goldfarb, *Contempt by Publication in the United States*, 24 MODERN L. REV. 239 (1961).

73 18 U.S.C. § 401 (1958).

74 See Toledo Newspaper Co. v. United States, 247 U.S. 402, 420 (1918).

75 Nye v. United States, 313 U.S. 33, 48-49 (1941).

76 See generally Donnelly & Goldfarb, *supra* note 72, at 241.

77 See Schenck v. United States, 249 U.S. 47, 52 (1919).

78 Bridges v. California, 314 U.S. 252, 262 (1941).

79 *Id.* at 263.

are disrespect to the judiciary and interference with the administration of justice. Through the years the Supreme Court has not allowed the exercise of the contempt power in the former instance. The rationale has been that judges should be above personal attack, and that popular respect for the judiciary is less apt to be gained from exercise of the contempt power than from exemplary judicial conduct subject to open criticism. "The assumption," Mr. Justice Black noted, "that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion."[80]

Though recognizing the possibility of contempt treatment in the second category of presumed evils resulting from press comments—interference with the administration of justice—courts have been chary to find the instance where the need to protect the fairness of trials overrode the value to be gained from permitting free discussion. The decisions indicate that the courts have been more concerned with the conflict between the rights to fair trial and freedom of the press than with developing a consistent doctrine with respect to the power to punish contempts by publication on theories implicit in the contempt power itself.[81] The Supreme Court's formula seems to grant the press a virtual immunity from contempt rather than resolve its historic struggle with the courts. Nevertheless, the actual scope of the immunity continues to be uncertain.[82]

Though the majority of the Supreme Court has limited contempt as used against the press, a minority of the Court has consistently sought a broadening of the scope of the contempt power. However, the Court has recognized press abuse only under the due process clause, where press commentary has made a fair trial impossible.[83] Moreover, the clear-and-present-danger test has been somewhat extended in decisions other than those involving the contempt power by emphasizing the magnitude of the danger of the evil as an aspect of its imminence.[84] A change in personnel on the Court might tip the balance in favor of the minority which has been disposed toward extension of the contempt power in these cases in emulation of the English courts.[85]

80 *Id.* at 270.
81 See generally Donnelly & Goldfarb, *supra* note 72; Goldfarb, *supra* note 71.
82 See generally Donnelly & Goldfarb, *supra* note 72, at 243.
83 See Shepherd v. Florida, 341 U.S. 50 (1951) (per curiam).
84 See Dennis v. United States, 341 U.S. 494, 510 (1951).
85 See Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 920 (1950) (opinion of Frankfurter, J., respecting denial of petition for writ of certiorari).

Individuals, on the whole, have not fared as well as the institutionalized press in avoiding contempt convictions for what might otherwise be characterized as an exercise of first amendment rights. In one decision the Supreme Court upheld the contempt conviction of an attorney who disobeyed a trial court's admonition to be silent about a certain matter in his summation to the jury.[86] Mr. Justice Black, for a four-man minority, wrote in his dissent to this decision: "Fisher having been stopped at one point tried another strategy. He was acting the role of a resourceful lawyer. The decision which penalizes him for that zeal sanctions censorship inside a courtroom where the ideals of freedom of speech should flourish."[87]

Another attorney was fined 1,000 dollars and imprisoned by a state court for six months for a contempt which had consisted of a series of critical letters and articles about the state judiciary.[88] A television announcer was found in contempt for comments made "over the air" concerning parties to a pending divorce proceeding in response to personal claims made against him in the divorce action.[89] The trial court exercised its contempt power on the ground that the administration of justice had been impaired. A single letter to a judge was considered contemptuous,[90] while an advertisement by an insurance company concerning excessive verdicts and their economic effect was held not to present a clear and present danger to the administration of justice.[91] A more recent case dealt with an avid segregationist who made a rousing speech to fifteen hundred people urging disobedience of federal court orders relating to the integration of Tennessee public schools.[92] He spoke in violation of an injunction against interference with the court's integration order. The court upheld a contempt conviction, and ruled that the conduct of the contemnor was not protected by the first amendment. Since the right of free speech is not absolute, it can be subordinated to legitimate and overriding governmental objectives. He had created a clear and present danger of public disorder, and it was held that the first amendment did not give him the right to incite others to violence.[93]

86 Fisher v. Pace, 336 U.S. 155, 162-63 (1949).
87 *Id.* at 165-66.
88 Stone v. State, 77 Wyo. 1, 53, 305 P.2d 777, 799, *cert. denied*, 352 U.S. 1026 (1957).
89 People v. Goss, 10 Ill. 2d 533, 538-39, 141 N.E.2d 385, 388 (1957), reversing on other grounds the lower court's contempt order. See Note, 24 BROOKLYN L. REV. 123 (1957).
90 *Ex parte* Ewell, 71 Cal. App. 744, 236 Pac. 205 (1925).
91 Hendrix v. Consolidated Van Lines, Inc., 176 Kan. 101, 110, 269 P.2d 435, 442 (1954).
92 Kasper v. Brittain, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957).
93 *Id.* at 95-96.

The cases in this area are too numerous to list comprehensively. Since most disobedience which would constitute a contempt is involved in some act which might well come within the protection of the first amendment, the possibilities of conflict are myriadal. One can examine any contempt case, and the probabilities are high that it involves some form of speech when silence was appropriate, or silence when speech was demanded.

This problem is most vexing with respect to the conduct of lawyers in the course of trials. At what point does the proper zeal of advocacy end and contumacy commence? Although, on the one hand, attorneys should be given the broadest margin to advocate their clients' causes effectively, on the other they are representatives of the court with a professional interest in the fair and respectful administration of justice.

There is no satisfactory answer to this dilemma, and courts have treated these situations in an *ad hoc* fashion. Recently, the Supreme Court disposed of two such cases. *In re McConnell*[94] dealt with an attorney who violated a court order to discontinue an offer of proof which the attorney felt in good faith was required by the Federal Rules of Criminal Procedure. The court summarily found him in contempt for obstructing the administration of justice. The Supreme Court reversed the conviction, stating that a lawyer's arguments for his client do not amount to contempt of court unless they so exceed the line of duty as to constitute an obstruction of the performance of judicial duties. Surely this line of demarcation is so vague and subjective as to provide little if any reasonable and foreseeable standard or guide. The second case, *In re Green*,[95] dealt with an attorney who advised a union client to test the validity of a state court injunction because only the NLRB had jurisdiction to issue the requested order. The court found the attorney in contempt without a hearing. The Supreme Court reversed this conviction on the ground that it violated the due process clause of the fourteenth amendment, and did not reach the first amendment issue.

The status of the individual who claims that the first amendment shields him from the contempt power of the courts is less certain than is that of the identical person who writes the same comments in a newspaper or magazine. In such situations the clear-and-present-danger test will usually be applied, but with less

94 370 U.S. 230 (1962).
95 369 U.S. 689 (1962).

certain expectation of sympathetic judicial reaction. There are no clear policies, doctrines or trends. Analogy with the press cases would indicate a liberal predisposition since the dangers of interference with proceedings by the press are greater than those which might be caused by individuals. The courts' leniency in the press cases has been consistent. The lower courts have taken a case-by-case approach in non-press cases, and no *cause célèbre* or precedent-setting decision has reached the Supreme Court which might hint of an established attitude. Nevertheless, although the degree of interference with the administration of justice by an individual would, in most cases, be less than that of the ubiquitous press, the individual's greater susceptibility to contempt conviction is indicated by a study of court decisions. Possibly this is explained by the fact that many cases of contempt by individuals arise out of personal incidents involving direct affrontery to the judiciary. There is a danger that these convictions may in fact be more the result of governmental power being exercised for personal or emotional reasons than a desire to foster the efficient administration of justice. It may, as well, be a manifestation of the long-inculcated American attitude favoring the judicial power and the necessity for contempt law.

Acceptance of what is now a minority view—that first amendment rights are absolute—would clearly resolve these issues. The wisdom as well as the popularity of such an attitude is open to question which it is not the purpose of this article to include or evaluate, except insofar as it affects the present subject. In the contempt context, it is not unreasonable to suggest a complete first amendment protection of the press. Since judges may be left to private actions for defamatory criticism by the press, and ought to be able to withstand non-defamatory criticism, the principal reason for the contempt power is to protect the fairness of the trial itself. This can be accomplished in ways calculated to interfere less with vital constitutional rights such as freedom of the press. In non-press cases it could be argued that the contempt power should be changed in this respect too.

Some distinction between press-published comment and other verbal activity might be developed, recognizing the right of press or individual editorializing or opinion-venturing, while outlawing speech which is really no more than verbal misconduct of a slanderous or clearly obstructive nature. This, too, provides only a vague standard.

The thinking and words of Mr. Justice Brandeis, as expressed

in his famous concurrence in *Whitney v. California*,[96] echo eloquently over this issue, as they have over others in the intervening years since they were uttered. Authority must be reconciled with freedom; order should not be exalted over liberty. "[O]rder cannot be secured merely through fear of punishment for its infraction; . . . it is hazardous to discourage thought, hope and imagination; . . . fear breeds repression; . . . repression breeds hate; . . . hate menaces stable government . . . [and] the path of safety lies in the opportunity to discuss freely. . . ."[97]

IV. THE FOURTH AMENDMENT

The fourth amendment provides that the people have the right to be secure in their persons, houses, papers, and effects from unreasonable searches and seizures, and that search warrants shall not issue except upon probable cause and with sufficient particularity. Fourth amendment defenses have been raised indirectly and infrequently in contempt of court cases, although such assertions in congressional contempt cases indicate the existence of some analogies.

The moving spirit of this constitutional provision was the protection of individual privacy from governmental trespass,[98] or as one court put it, to protect against autocratic and despotic action under the color of national authority.[99] The amendment was adopted in response to an unhappy English and colonial experience with general warrants and writs of assistance,[100] and was specifically aimed at protecting the interests of individual liberty from governmental overbearing.[101] In words peculiarly applicable to the contempt situation, though not so intended, one federal court interpreted the policy of this amendment to mean that expediency in law enforcement must yield to the necessity of observing individual freedom.[102]

It is now settled that Congress and the courts may compel

96 274 U.S. 357 (1927).

97 *Id.* at 375.

98 *Cf.* Jones v. United States, 131 F.2d 539, 540 (10th Cir. 1942); State v. Frye, 58 Ariz. 409, 418, 120 P.2d 793, 797 (1942).

99 United States v. O'Dowd, 273 Fed. 600, 601 (N.D. Ohio 1921).

100 See Nueslein v. District of Columbia, 115 F.2d 690, 692 (D.C. Cir. 1940); State v. Nelson, 231 Iowa 177, 181, 300 N.W. 685, 687 (1941).

101 *Cf.* Grau v. United States, 287 U.S. 124, 128 (1932); United States v. Zager, 14 F. Supp. 23, 26 (D. Md.), *aff'd mem.*, 84 F.2d 1023 (4th Cir.), *cert. denied*, 299 U.S. 558 (1936).

102 United States v. 1013 Crates of Empty Old Smuggler Whisky Bottles, 52 F.2d 49, 50-51 (2d Cir. 1931).

unwilling witnesses to disclose facts essential to proper governmental inquiry, and, to that end, may enforce the attendance of witnesses and the disclosure of evidence through their subpoena and contempt powers.[103] In this, they are limited only by the general rules of procedure and the Constitution. Where an individual asserts his prerogative not to cooperate, these governmental bodies may exercise their contempt powers to punish him, or to try to coerce his cooperation. A fourth amendment issue may arise where an individual claims that compulsion of his testimony or securance of his property amounts to a search or invasion of privacy which the Constitution prohibits.

Critical to the issues raised by fourth amendment contempt of Congress cases is the question whether the amendment's protection encompasses only physical, trespass-like interferences or whether the scope of this provision is broad enough to cover indirect psychological interferences, such as those claimed in first amendment defenses to congressional contempt convictions. In this sense, the inquiry is directed beyond questions relevant to the procedural application of the contempt power, and is addressed more to the substantive effect of its use upon rights of privacy in general. Is the amendment aimed at physical searches and seizures only or, it could be asked, is it broader, encompassing an intangible right of personal security—some privacy of person and property?

In contempt of court cases where direct physical interference is involved, the applicability of fourth amendment defenses is clear, whether or not tenable under the circumstances. For example, a contempt of court conviction by which judges and clerks concerned with a state election were punished for misbehavior in office was upheld by the Illinois courts over the objection that the trial court violated defendant's fourth amendment rights by opening ballot boxes and examining tally sheets which were used as evidence against them.[104] Here, the assertion of the fourth amendment defense is obvious. The government physically took things which were used as evidence against a defendant. Though the court did not uphold the defense, its assertion was appropriate, and typical of search and seizure cases in general.

The more indirect effects of the contempt power upon fourth amendment rights are more obscure, and the issues less clearly

103 See *In re Chapman*, 166 U.S. 661, 671 (1897).

104 People v. Montesano, 293 Ill. App. 630, 12 N.E.2d 915 (1938).

defined.[105] A recent federal case, though it dealt with a congressional contempt situation, is exemplary of the problem.[106] There the defendant argued that the threat of the contempt power nullified the voluntariness of his submission of incriminating evidence. Called before a Senate investigating committee, defendant was threatened and led to believe that he must testify and incriminate himself, or be convicted of contempt for his refusal. The defendant surrendered a drawer full of papers and books and was thereafter convicted of violation of the lottery laws, the conviction being based at least in part upon the evidence he submitted. On appeal, the defendant claimed that he did not understand his alternatives, and therefore his presentation of the incriminating evidence was really involuntary, and thus was a violation of his fourth amendment rights. On appeal, the court of appeals ruled that his "freedom of choice had been dissolved in a brooding omnipresence of compulsion. The Committee threatened prosecution for contempt if he refused to answer, for perjury if he lied, and for gambling activities if he told the truth."[107] The court went on to say: "Courts and committees rightly require answers to questions. But neither may exert this power to extort assent to invasions of homes and to seizures of private papers. Assent so extorted is no substitute for lawful process."[108] Concluding that the evidence was illegally seized in violation of the fourth amendment, the court reversed the conviction. The dissenting judge believed that the situation was one of proper compulsion, a sound feature of the judicial process, and not an illegal coercion, and that this did not violate the fourth amendment.[109]

The most profound issue raised—thus far unsuccessfully—concerns judicial determination of the outermost reaches of the fourth amendment, and the extent of the amendment's protection of the right of privacy. Does the fourth amendment protect against infringements of a physical nature alone, or does it go farther to protect people against invasions of personal thoughts, associations, and property, and from public scrutiny and exposure? The defense that use of the contempt power violates the right of privacy, guaranteed implicitly by the fourth amendment, has not thus far met with success.

105 *Cf. In re* Estes, 87 F. Supp. 461, 462-63 (N.D. Tex. 1949), *rev'd sub nom.* Estes v. Potter, 183 F.2d 865 (5th Cir. 1950), *cert. denied*, 340 U.S. 920 (1951).

106 Nelson v. United States, 208 F.2d 505 (D.C. Cir.), *cert. denied*, 346 U.S. 827 (1953).

107 *Id.* at 512.

108 *Id.* at 513.

109 *Id.* at 520-21.

So far this issue has been dealt with by the courts only in the context of congressional contempt defenses. In these situations the courts have consistently held that forced disclosure through contempt of Congress convictions is not protected by any right of privacy which might be implicit in the policy of the fourth amendment.[110] Investigations prompted by national needs can then constitutionally invade an individual's right of privacy, at least insofar as the fourth amendment is concerned. The decisions to date have consistently held that, while the fourth amendment includes a right of personal security from physical attack and inspection and guarantees some element of personal sanctity and privacy, a proper legislative investigation is not preempted thereby.[111]

The Federal Rules of Civil[112] and Criminal[113] Procedure provide for contempt proceedings in case of failure to obey subpoenas. It is conceivable that the thinking expressed in fourth amendment defenses raised in congressional contempt cases might prompt the assertion of a similar defense to a contempt of court conviction. The congressional contempt decisions portend similar disposition of possible contempt of court defenses alleging that forced disclosure or surrender of evidence violates a right of privacy protected by the fourth amendment.

In the recent flood of congressional contempt cases, where all constitutional defenses have been raised in defense to committee exposure tactics, the lower federal courts have consistently followed this approach.[114] The mere fact that an individual's private affairs are subjected to the public gaze has not been considered sufficiently serious to bar an otherwise proper legislative inquiry.[115] Still there has been no clear-cut decision by the Supreme Court dealing specifically and solely with the fourth amendment defense to a contempt conviction arising out of a congressional investigation. This defense is often made along with the gamut of other constitutional defenses which have been typically raised in these cases. The federal courts have usually either denied the defenses *in toto*, or upheld the defense on narrow procedural grounds or on the basis of limited interpretations of a specific amendment other than

110 Sinclair v. United States, 279 U.S. 263 (1929).

111 *Id.* at 294.

112 FED. RULE CIV. P. 45(f).

113 FED. RULE CRIM. P. 17(g).

114 See, *e.g.*, United States v. Josephson, 165 F.2d 82, 88 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948).

115 See generally Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 219 (1926).

the fourth. The applicability of the fourth amendment defense to congressional investigations is closely linked with arguments about the "exposure" function of legislatures, and the general rights of individuals to resist inquiry into personal matters, exposure of which would subject them to unofficial public condemnation. To this extent the defense has been thrown into what at times has been a hodge-podge of constitutional arguments, all amounting to the position that "you can't do this to me" or "there must be some constitutional provision to protect me." This has caused some uncertainty as to the scope of the fourth amendment's provisions. Though the argument, in general, against legislative infringement of conscience or intellectual privacy is compelling, the legal rationale is less clearly attached to fourth amendment principles than relevant to first amendment protections of privacy. Rights of privacy implicit in the fourth amendment differ from those guarded by the first. In the former, the invaded privacy is one deriving from a trespass of subtle though physical means, such as secretly wiretapping or televising speech or conduct. However, that right of privacy which properly protects persons from public ventilation of their spiritual or intellectual ideas is more suitably derived from first amendment freedoms of speech and association. To this extent, it would seem that right of privacy defenses in these fourth amendment cases have been ill-advised.

V. THE FIFTH AMENDMENT

The fifth amendment provides:

> "No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law. . . ."

A. *Indictment by Grand Jury*

The first clause of the fifth amendment, requiring a presentment or indictment by a grand jury prior to trial for criminal offenses, has been mentioned briefly in connection with the discussion of the right to trial by jury. The guarantee has been long established; it is based upon the idea that one should not be put on trial until a body of his peers finds probable cause.

Mr. Justice Gray, while a member of the Supreme Court, elaborated on the purposes of the Constitution's grand jury requirement,[116] though not with specific reference to the contempt situation. He said that "whether a man shall be put upon his trial for crime without a presentment or indictment by a grand jury of his fellow citizens depends upon the consequences to himself if he shall be found guilty."[117] By this standard, contempt would certainly qualify for grand jury protection, since the consequences of contempt convictions could be, and often are, grave. Mr. Justice Gray went further, stating that no congressional declaration could defeat this safeguard.[118] Broadly considered, the purpose of the clause was to limit the legislature as well as prosecuting officers. Of course, the grand jury provision of the fifth amendment applies only to the federal government, and not to the states.[119] However, most states have similar requirements in their own laws.

The Constitution specifically excludes certain classes of cases from the protection of the grand jury provision.[120] If contempt was meant to be excluded, it is conspicuously absent from any manifestation of historical intent—in the Constitution or elsewhere.

Surprisingly, although intermittent volleys of criticism have been fired at most other contempt procedures, the denial of the right to a grand jury hearing has provoked little attention or comment. This may be because the broad criticisms made of other contempt procedures implicitly include this argument. For example, if a right to trial by jury were allowed, indictments of some kind would probably follow a fortiori. If not, some of the dangers of its absence would be rectified by the jury trial itself. Sui generis rationales which are used in answer to other, often stronger, complaints about summary contempt procedures would undoubtedly be offered in response to arguments that the contemnor should be indicted by a grand jury.

In contempt cases arising out of disobedience to orders of a court, it is not an unusual procedure for the action to be commenced by an order to show cause. Some courts have held that the particularity required of an indictment is not necessary for a

116 *Ex parte* Wilson, 114 U.S. 417 (1885).
117 *Id.* at 423.
118 *Id.* at 426.
119 See Hurtado v. California, 110 U.S. 516, 535 (1884).
120 *E.g.*, courts-martial.

contempt charge, and that technical accuracy is not required.[121] In one case of contempt, which arose out of the carelessness of a sheriff in permitting the escape of his prisoners, the contemnor argued that the charge was not sufficiently made out in the information against him. The court, applying an exception to the general rule requiring particularity of indictments, denied the defense, and approved a fair notice standard for the indictment requirement.[122] But even so, such cases allowing a casual treatment of indictments impliedly conform procedurally to the constitutional directive that there be some form of indictment or information.

No case has specifically challenged the constitutionality of the practice, in direct contempt cases, of deeming the personal knowledge and action of the offended judge sufficient satisfaction of the indictment-by-grand jury requirement. In certain cases of indirect contempt, and with a contempt of Congress, no problem is presented because the customary grand jury procedure is required by statute.[123] But in cases of direct contempt, and in those cases of indirect contempt where the proceedings are commenced by the court sua sponte, by an order to show cause or similar procedural means, there may be a proper constitutional objection. Of course, civil contempts are excluded from many fifth amendment protections because they are not crimes. Civil contempts arise almost spontaneously, and are part of the original action out of which they developed.

The contemnor may well be apprised of the proceedings against him, even where summary procedures are applied. Under the present Federal Rules of Criminal Procedure indirect criminal contempts are prosecuted by an order to show cause or an arrest order, and notice and hearing are guaranteed.[124] However, pleadings may be based on information and belief, and direct criminal contempts are prosecuted on a certified order of the judge.

On the other hand, that policy of the fifth amendment's indictment clause which aims at insulating the individual from his government by interposition of a popular group of his peers is ignored. This right was adopted from the common law and is a

121 See, *e.g.*, United States v. Seidmon, 154 F.2d 228, 230 (7th Cir. 1946); Conley v. United States, 59 F.2d 929, 935 (8th Cir. 1932).

122 Fanning v. United States, 72 F.2d 929, 930-31 (4th Cir. 1934).

123 52 Stat. 942 (1948), 2 U.S.C. § 192 (1958).

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

mandatory rule in normal federal prosecutions, intended as a substantial safeguard against oppressive or arbitrary proceedings.[125] The contempt situation involves exactly the kind of summary punishing power which this provision should cure. It is one of the few situations where our government has been so brash as to act in violence of this constitutional provision. To allow this clear constitutional mandate to be circumvented on grounds of expediency is to condone the abrogation of an important mandate of the Bill of Rights. There is no counterbalancing governmental necessity warranting the circumvention of this constitutional right, except that which would call for expeditious litigation. Hurried justice may be no justice at all.

B. *Double Jeopardy*

The policy of the double jeopardy clause of the fifth amendment may conflict with the contempt power to cause any one of several difficult, somewhat mathematical problems. The double jeopardy problem can arise in two situations—the crossfire and the reiterated contempt.

The crossfire situation is presented where one act constitutes both contempt and another crime, either in the same or another jurisdiction. For example, in the case of attempted bribery of a witness, the briber could be found guilty of contempt and/or subordination of perjury, or perjury if he was successful in his attempt. One wrongful act could then be punished twice. This problem is compounded in a case where the act of contempt is not a crime in the jurisdiction where it is committed, but constitutes a separate crime in another jurisdiction. From this possibility of crossfire of prosecutions arise problems involving dual sovereignty, immunity and double jeopardy.

The second situation is one of multiplied pressures, in which the contemnor is forced to reiterate his act of contempt after he has been punished for the first act; or where one contempt is multiplied by reiteration of the same or a similar situation as resulted in the first contempt, and the separate punishment of each repeated contempt is immediately sought. The first situation could occur where an individual refuses to testify before a court, is sentenced for contempt and, after serving his sentence, is recalled before the same court, again asked the same question, and again sentenced for his second refusal. The other situation arises

[125] See Smith v. United States, 360 U.S. 1, 9 (1959).

where a witness is asked a series of related questions, refuses to answer any, and is punished separately for each contemptuous refusal. In such cases a persistent inquisitor could punish a persistent contemnor indefinitely.

In considering the applicability of the double jeopardy clause to contempt practices, it should be noted that the constitutional provision is worded in terms of "offenses"—"nor shall any person be subject for the same offense to be twice put in jeopardy. . . ." Though verbally gymnastic critics have sidestepped or passed over other constitutional protections in contempt cases, no one has gone so far as to suggest that the unique act of contempt is not an offense. In fact, "offense" is the word usually used to describe contempt. Overcoming that hurdle, one can proceed to the substance of the clause.

C. *The Crossfire of Prosecutions*

Mr. Justice Brandeis dealt with the crossfire situation in a case in which a convicted contemnor argued that his conviction for contempt of Congress was improper because the same act of contumacy was made a crime by a special federal statute.[126] The offense in that case could have been punished twice—once for contempt and again under the statute which made refusing to answer questions or produce papers before either house a misdemeanor. Mr. Justice Brandeis dismissed the argument that the defendant was immune from one punishment because of the existence of another. He wrote, "Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offense."[127]

An earlier Court, certain that this power would not be used cumulatively, had previously upheld a conviction under a federal statute which made refusal to testify before a Senate committee a statutory misdemeanor, even though the contemnor was subject to punishment for contempt of Congress as well.[128] At that time Mr. Chief Justice Fuller wrote:

> "[I]t is quite clear that the contumacious witness is not subject to jeopardy twice for the same offense, since the same act may be an offense against one jurisdiction and also an offense against another; and indictable statutory offenses may

126 Jurney v. MacCracken, 294 U.S. 125 (1935).
127 *Id.* at 151.
128 *In re* Chapman, 166 U.S. 661, 672 (1897).

> be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together."[129]

The theoretical ground for this practice, which seems to circumvent precisely those results which the double jeopardy clause sought to prevent, is quite well settled. Where one act is both a contempt and substantive crime, it is an offense against judicial authority on the one hand, and against the state in general on the other. One punishment then is for an offense against the judiciary, and the other for violation of the law created by the legislature.

Another judicial attitude, by which double jeopardy objections are avoided, was enunciated in *United States v. United Mine Workers*[130] in 1946. There the Supreme Court avoided charges of duplicity by classifying one contempt as criminal and another as civil.[131] The rationale for this approach was stated, though not in a contempt case, in 1955.[132] Congress may impose both a criminal and civil sanction in respect to the same act or omission, since the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.[133] So again, by its power to classify contempts, a court may avoid double jeopardy problems by characterizing one of the contempts as civil, though in effect treating it as an offense.

The more difficult state-federal jurisdictional problem also arises in the context of contempt and double jeopardy. Early authorities held that one criminal conviction would not bar later prosecution for the same offense in another jurisdiction. Similarly, contempt actions are not precluded merely because the same act constitutes a crime such as perjury, bribery, or insubordination in a second jurisdiction. Here the individual is subject to double punishment for his one act. The misconduct is single; the offense to society is single; but the sanction is multiple.[134] Recent statutes have, however, granted the right to a jury trial in some instances where one act is both a contempt and another crime.[135] These statutes, while preventing a conviction-minded court from circumventing a jury trial by treating an otherwise ordinary crime as a

129 *Ibid.*
130 330 U.S. 258 (1947).
131 *Id.* at 300-01.
132 Rex Trailer Co. v. United States, 350 U.S. 148 (1956).
133 *Id.* at 150-51.
134 See Bartkus v. Illinois, 359 U.S. 121 (1959).
135 Civil Rights Act of 1960, 74 Stat. 90, 42 U.S.C. § 1971(f) (Supp. III, 1962).

contempt, do not satisfactorily alleviate the double jeopardy problem. One rationale for allowing double punishments in these cases is that the social interest which warrants legal protection is different in contempt cases from that which might justify such action in the case of another crime. Even though the wrongful act is singular, the anti-social elements may be several. Contempt sanctions are aimed at misconduct which interferes with governmental activity. While kidnapping a witness, for example, is misconduct toward the person of an individual, it may also involve an interference with government processes, and therefore constitute a contempt. The wrongful act is the same, but the interests to be protected are different and, it is sometimes argued, warrant separate treatment. The usual explanation for allowing separate prosecutions in separate jurisdictions is, however, that the classic thought behind the double jeopardy clause was to prevent one sovereign from twice punishing the same act. It never was meant, so the argument goes, to preclude a second action by a second sovereign. So, one state may prosecute although the federal or another state government has already prosecuted.

D. *The Reiterated Contempt*

The second area of difficulty involves the so-called reiterated contempt. Assuming that all other elements were presented in a given contempt situation, could the punished contemnor be repunished if adamant in his disobedience to the same, though later, order? If the underlying justification for contempt convictions is the punishment of affronts to judicial authority, then a second contempt is a separate offense to that authority, although predicated on exactly similar facts. However, if the reason for using the contempt power is to coerce cooperation or deter interference with government bodies, then a repeated incident comes closer to the double jeopardy prohibition. Although it might be argued that continuous punishments for interference would tend to increase the coercive or deterrent force of the particular governmental body, the second punishment borders on the overbearing power which the Constitution proscribes in the double jeopardy clause.

The reiterated contempt situation directs attention, perhaps more clearly than any of the others involving contempt procedures, to the political and philosophical implications of this power. A court may want information. An individual may desire privacy. The conflict of the two desires may and often does cause

social friction of substantial political consequence. How far can and should government go in pressing its collective will against the uncooperative, free-willed individual? Even assuming that government can punish an individual's obstructiveness, should it be able to repunish for persistence of individual adamancy when that individual has already been once punished for that same characteristic? If so, when, if ever, is the government curtailed in its insistence? The issue is one of policy which should be reflected in the manner in which it is resolved by the law.

By the preponderance of judicial authority, the power of a prosecutor initially to multiply contempts by reiterating similar questions has been limited. In *Yates v. United States*,[136] the defendant was charged with violation of the Smith Act. After waiving her privilege against self-incrimination, she refused to answer eleven questions put to her on cross-examination. The trial court treated each refusal as a separate contempt and sentenced her to one year in prison for each. Under such a system, the only thing insulating the defendant from a one hundred-year sentence is the limited stamina of the prosecutor. Fortunately, our system of justice is based on sounder principles. The Supreme Court held that her refusals constituted only one contempt. Refusal to answer many questions within one area of refusal, it stated, constitutes but a single offense.[137] This concept has been applied in some state court decisions, but ignored in others.[138] Although lower federal court decisions had similarly divided on this issue,[139] presumably this decision of the Supreme Court has resolved the matter. Where separate questions seek to establish one fact, or relate to a single subject of inquiry, only one penalty for contempt may be imposed for refusal to answer all.

The recent decision of *Uphaus v. Wyman*[140] involved another facet of the same problem. Even though acknowledging that the government may not cause repeated contempt citations by reiterating its questions, may the frustrated government officer await the

136 225 F.2d 146 (9th Cir. 1955), *rev'd*, 354 U.S. 298 (1957).

137 Yates v. United States, 355 U.S. 66, 73 (1957).

138 *Compare* People v. Amarante, 100 N.Y.S.2d 677, 682 (Sup. Ct. 1950); Fawick Airflex Co. v. United Elec. Workers, 92 N.E.2d 431, 436 (Ohio Ct. App. 1950), *with In re* Ward, 295 Mich. 742, 745, 295 N.W. 483, 485 (1940), *and In re* Amato, 204 Misc. 454, 456, 124 N.Y.S.2d 726, 728 (Sup. Ct. 1953).

139 *Compare* United States v. Orman, 207 F.2d 148, 160 (3d Cir. 1953), *and* United States v. Costello, 198 F.2d 200, 204 (2d Cir. 1952), *and* United States v. Yukio Abe, 95 F. Supp. 991, 992 (D. Hawaii 1950), *with* Lawson v. United States, 176 F.2d 49, 53 (D.C. Cir. 1949).

140 360 U.S. 72 (1959).

fulfillment of sentence for the first contempt by the contemnor, and then greet him with the same question, threatening another contempt conviction if he persists in his refusal? The cases have not answered this perplexing question. In the *Wyman* case, the defendant refused to answer certain questions before a one-man state investigating committee. He was committed to jail for one year. As the anniversary of his imprisonment approached, the contemnor and the contemned both indicated that they would repeat the incident. An onlooker could only hope that one would relent. Neither did, and as his final act in office, the attorney general moved for the unlimited confinement of the contemnor. Judge Grant, who ordered the first commitment, denied the motion, and Uphaus went free. Interestingly, the contempt of Uphaus was termed civil throughout all of the proceedings, and it arose out of a legislative investigation by an executive officer who, upon encountering the contemnor's refusal, went to the court for an order, which resulted in a contempt of court conviction.

Analogy with past rationales would probably have supported the second conviction. Good reason and mercy would not. Once having suffered the punishment for his strong and sincere convictions, the individual ought not to be sacrificed again to overbearing officialdom. The *Yates* decision adds weight to this latter attitude.

The double jeopardy problems indicated herein can be readily resolved either by liberal construction of the policy of the double jeopardy clause, or by the adoption of a statute covering the contempt problem as a whole, thus treating contempt no better, and no worse, than other crimes.

E. *The Privilege Against Self-Incrimination in the Contempt Context*

The fifth amendment directs that no one shall be forced to testify against himself if his testimony would subject him to a criminal prosecution. Though this privilege relates solely to federal actions, all states have adopted it by their constitution, statutes, or judicial decisions.[141] In the contempt context, problems may arise in one of two ways. First, an individual charged with commission of a contempt may refuse to testify on the issue of his contempt at the contempt proceeding. Secondly, one may refuse to testify about some criminal, non-contempt matter, and

141 See KRONER, *Self-Incrimination: The External Reach of the Privilege*, 60 COLUM. L. REV. 816 (1960).

this refusal itself may be considered a contempt.[142] This would include situations where the refusal would subject him to criminal action either in the local or in another, foreign jurisdiction, and is akin to the crossfire situation discussed in the double jeopardy section. The first class of cases deals with the assertion of the privilege against self-incrimination in contempt cases. The second category concerns the convertibility into a contempt of the invocation of the privilege against self-incrimination in a non-contempt case.

The fifth amendment's proscriptions are phrased in terms of a "criminal case." Enough has been written about the important ramifications of a judicial classification of a given contempt as criminal or civil to warrant only its briefest mention again here. Better reasoning dictates agreement with Wigmore that the policy of the privilege against self-incrimination should apply to the contempt situation.[143] The possible legal consequences in the form of punishments of fine or imprisonment are reason enough to afford this constitutional protection. Wigmore concluded (and, it is suggested, correctly) that distinctions between civil and criminal contempts should not be the criteria for allowing the assertion of the privilege in cases of such basic importance. The applicability of the privilege would better rest on its own policies and logic.

Most states have held the state-established privilege applicable to contempt cases. One California court stated that "it is fundamental that requiring a defendant in a criminal case to testify violates his constitutional privilege against self-incrimination," and that "it is likewise a violation of this privilege to compel a defendant to testify in a contempt proceeding."[144] The court resolved the classification problem in this manner:

> "Contempt of court is a specific criminal offense . . . punished sometimes by indictment and sometimes in a summary proceeding . . . . In either mode . . . the adjudication . . . is a conviction . . . . [T]he proceeding to punish . . . is in the nature of a criminal prosecution. Its purpose is . . . to vindicate the dignity and authority of the court. It is a special proceeding, criminal in character. . . ."[145]

In *Gompers v. Bucks Stove & Range Co.*,[146] the Supreme Court

142 See, *e.g.*, United States v. DeLucia, 256 F.2d 493, 495 (7th Cir. 1958).
143 8 WIGMORE, EVIDENCE § 2257, at 341 (McNaughten rev. 1961).
144 Killpatrick v. Superior Court, 153 Cal. App. 2d 146, 149, 314 P.2d 164, 166 (1957).
145 *Ibid.*
146 221 U.S. 418, 444 (1911).

ruled, in a federal criminal contempt case, that the alleged contemnor is entitled to the protection of the privilege, but it avoided approval or rejection of the applicability of privilege to civil contemnors. At least one writer has concluded that "a defendant in a contempt case, *either civil or criminal,* is entitled to claim the privilege against self-incrimination, and to require that the contempt be proven against him by other witnesses. . . ."[147]

In the category of cases where testimony would subject the individual to incrimination for another crime in the same jurisdiction, the courts have allowed claims of the constitutional protection with respect to defenses to charges of both contempt of court and Congress.[148]

With the tremendous increase in legislative investigations and the adamant response of individuals in recent times to congressional exposure tactics, the fifth amendment's self-incrimination clause has been invoked by many individuals as a shield from committee harassment. Since the contempt power was then subject to judicial review, the federal courts' interpretation of the fifth amendment was crucial to the resolution of this individual-legislative committee conflict. Originally, these cases turned on procedural points such as whether the privilege was properly asserted, whether it was waived, what is incriminating, and whether the witness was apprised of his rights or the committee's purpose. The Supreme Court went far to extend the applicability of the fifth amendment in such cases, reflecting a policy sympathetic to the protection of individuals. Still, Professor Beck, in his study of the congressional contempt power, concluded that the vitality of the fifth amendment in congressional contempt cases was, as a practical matter, limited.[149] Its broad application, he concluded, did not "presage any significant substantive limitations on the investigatory power," and its application carried "an aura of skepticism toward the innocence of the persons who sought recourse to its protections."[150] Perhaps this provoked the gradual turn to the first amendment as a surer protection from exposure and harassment, as suggested in the section on that subject. In any event, a review of some of the leading fifth amendment contempt cases is

147 Merrick, *The Privilege of Self-Incrimination as to Charges of Contempt,* 14 ILL. L. REV. 181, 187 (1919). (Emphasis added.)

148 See Hoffman v. United States, 341 U.S. 479, 488-89 (1951); Blau v. United States, 340 U.S. 332, 334 (1951); United States v. Costello, 198 F.2d 200, 205 (2d Cir.), *cert. denied,* 344 U.S. 874 (1952).

149 BECK, CONTEMPT OF CONGRESS 89-90 (1959).

150 *Id.* at 90.

appropriate in understanding the background of the more recent first amendment era.

The general rules of immunity and waiver were held to apply to contempt cases as well as to any other offense.[151] The rule allowing assertion of the privilege where the testimony sought would only indirectly tend to incriminate has also been applied in contempt cases.[152] The same rule applies to contempt cases arising from the assertion of the privilege before grand juries. The breadth of the protection of the privilege in these cases has been liberally extended by the Supreme Court. Not only will the privilege against self-incrimination protect against answers that would in themselves support a conviction, but also to those which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime.[153] Any language reasonably indicating that the privilege is raised will be sufficient to invoke its protection,[154] and committees must clearly apprise individuals about the risk of possible prosecution for contempt if they do not cooperate,[155] in order to be able later to secure a contempt conviction.

Susceptibility to a non-contempt criminal prosecution in another jurisdiction has not been accepted as a basis for protection under the privilege. Therefore, refusal to answer questions, on the ground that the answer would subject the witness to prosecution for a crime in another jurisdiction, would constitute a contempt.

In 1892, the Supreme Court in broad language ruled that the self-incrimination clause of the fifth amendment precluded forced incrimination in any criminal proceeding.[156] "This provision," the Court said, "must have a broad construction in favor of the right which it was intended to secure."[157] The Court held that the object of the self-incrimination clause was to insure that a person could not be compelled to be a witness in any investigation where his testimony tended to show that he had committed a crime. Immunity legislation cannot circumvent this constitutional privilege

151 See Regan v. New York, 349 U.S. 58, 63-64 (1955); United States v. Cohen, 101 F. Supp. 906, 907-08 (N.D. Cal. 1952).

152 See Hoffman v. United States, 341 U.S. 479, 488-89 (1951).

153 Greenberg v. United States, 343 U.S. 918 (1952) (per curiam), *reversing* 192 F.2d 201 (3d Cir. 1951); Singleton v. United States, 343 U.S. 944 (per curiam), *reversing* 193 F.2d 464 (3d Cir. 1952); Greenberg v. United States, 341 U.S. 944 (per curiam), *vacating and remanding* [in light of *Hoffman v. United States*] 187 F.2d 35 (3d Cir. 1951); Hoffman v. United States, 341 U.S. 479, 486 (1951); United States v. Coffey, 198 F.2d 438 (3d Cir. 1952).

154 See Emspak v. United States, 349 U.S. 190, 195-98 (1955).

155 See Bart v. United States, 349 U.S. 219, 223 (1955).

156 Counselman v. Hitchcock, 142 U.S. 547 (1892).

157 *Id.* at 562.

unless it is so broad as to have the same extent in scope and effect as the privilege. The Court stated that "no statute which leaves the party . . . subject to prosecution after he answers the criminatting question put to him, can have the effect of supplanting the privilege conferred by the Constitution. . . ."[158] The Court held that only a grant of absolute immunity would suffice to pre-empt this constitutional privilege.[159] This decision could have been literally construed to mean that immunity must be absolute in order to do away with the self-incrimination privilege. However, the quoted language has been restrictively interpreted, by resort to its peculiar facts, to apply only within one sovereignty, and not to preclude later prosecution in a different jurisdiction. Decisions since that time have limited the immunity rule to apply only to prevent later prosecution in the granting jurisdiction. In one case[160] a man was punished for contempt of a federal immigration inspector. He based his refusal to respond to questions on the grounds that his answers would expose him to federal and state prosecutions. The court of appeals remanded, and instructed the lower federal court to advise the witness which of his answers would incriminate him under federal law, and then to allow him to refuse to answer these, free from contempt sanctions. However, those answers which would subject him to possible prosecution under state laws were not covered by the privilege, and unless he purged his offense in this respect, he could be punished for contempt.[161] This holding is consistent with a long-noted and recently accented trend to reduce the circumferential protection of the privilege in deference to the independence of sister sovereigns in matters of criminal justice. This policy was thoroughly treated in a recent article, where the author properly concluded that such a restrictive policy cannot avoid "enervating the principle embodied in the privilege."[162] However, the policy is not without respectable and persistent authority.

The problem of self-incrimination, immunity, and the contempt power, as affected by the dual sovereignty concept, was recently before the Supreme Court.[163] A prisoner was called before a federal grand jury and offered immunity with respect to questions which the federal government wanted him to answer. He

158 *Id.* at 585.
159 *Id.* at 586.
160 Graham v. United States, 99 F.2d 746 (9th Cir. 1938).
161 *Id.* at 750.
162 Kromer, *supra* note 141, at 838.
163 Reina v. United States, 364 U.S. 507 (1960).

refused, urging that his answers would subject him to state criminal prosecution. The district court found him in contempt of court, sentenced him to two years imprisonment, and included a sixty-day purge clause.[164] Both the district court and the court of appeals justified the contempt conviction on the ground that federal immunity need extend only to susceptibility to federal prosecution, and this it did in the case before it.[165] The Supreme Court was faced with the contention that older precedent,[166] to the effect that the immunity extended only to the granting sovereign, should be broadened to cover any later prosecution for the particular crime in question by any sovereign. The Court avoided the broad issue, and decided the case on the ground that the particular immunity statute under scrutiny should be interpreted as covering both state and federal prosecution.[167] A dissent noted the admixture of civil and criminal aspects in the lower court's contempt citation and the absence of criminal procedural safeguards.

In another case, which questioned a state court's contempt conviction based on the defendant's claim that state immunity did not protect him against later federal prosecution, the Supreme Court adhered to the concept of federalist division between state and national governments, and upheld the conviction.[168] A dissent criticized the uncertain posture in which Supreme Court decisions had left the matter, noting that the current status of the self-incrimination clause was such that "a person can be whipsawed into incriminating himself under both state and federal law even though there is a privilege against self-incrimination in the Constitution of each."[169] A related problem involves the hazardous situation of a witness who is called before a state or federal agency, and ordered to testify. He can testify himself into the jail of another sovereign, commit perjury, or remain silent and run the risk of imprisonment by the immediate sovereign for contempt.

This view has been vigorously attacked, and has often prevailed only by a one-man majority of the Supreme Court. The theory that the immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of

164 *In re* Reina, 170 F. Supp. 592, 596 (S.D.N.Y. 1959).
165 United States v. Reina, 273 F.2d 234, 235 (2d Cir. 1959) (per curiam).
166 United States v. Murdock, 284 U.S. 141, 148 (1931).
167 Reina v. United States, 364 U.S. 507, 510 (1960).
168 Knapp v. Schweitzer, 357 U.S. 371, 380-81 (1958).
169 *Id.* at 385.

crime seems more compelling than historical or academic arguments about the original intent of this clause.

This state-federal dichotomy is sometimes presented in situations where the work of one governmental agency invades the province of another. Such a problem arose in a typical case involving a Senate investigation of organized crime. Senator Kefauver's committee questioned the defendant about his alleged violations of state laws. The defendant's refusal to cooperate was based on the fifth amendment's self-incrimination clause. He was adjudged in contempt. A federal district court ruled that the defendant was entitled to immunity against disclosures that might incriminate him under state *or* federal laws,[170] and, in addition, that the fifth amendment precluded a federal contempt conviction where the federal investigation overlapped into matters of state concern.[171]

The conclusion from these cases may be thus summarized. In a contempt case, the privilege may be raised as a defense to testifying where the testimony would subject the individual to a criminal contempt citation. It would seem that the privilege may be successfully raised in refusing to testify in order to avoid a civil contempt charge as well. An individual may also refuse to testify about matters which would subject him to a non-contempt criminal prosecution in the same jurisdiction, and this refusal will not be deemed a contempt. However, where testimony would subject him to non-contempt criminal prosecution in another jurisdiction, his refusal on self-incrimination grounds will be held contemptuous. Yet, where one inquiry solicits testimony relating to incriminating incidents in two jurisdictions, defendant may refuse to testify about any of the incidents, or demand absolute immunity from later prosecution in either jurisdiction.

The essence of the self-incrimination clause is that forcing incriminatory evidence from an individual is unconscionable, generally resulting in unreliable testimony, and that he should therefore be constitutionally protected. This policy seems to be dissipated by that trend of cases which allows prosecutions in a second jurisdiction, based on evidence which would be unconstitutional if admitted in the jurisdiction wherein it was secured. This kind of judicial reasoning allows individual rights to be subjected to circuitous prosecution tactics. If the self-incrimination

170 United States v. DiCarlo, 102 F. Supp. 597, 606 (N.D. Ohio 1952).

171 *Ibid.* See Marcello v. United States, 196 F.2d 437, 443 (5th Cir. 1952); United States v. Licavoli, 102 F. Supp. 607, 609 (N.D. Ohio 1952); United States v. Aiuppa, 102 F. Supp. 609, 612 (N.D. Ohio), *rev'd*, 201 F.2d 287 (6th Cir. 1952).

clause is to be given more than ceremonious effect, the rule in contempt cases should be brought in line with the rule which prevails within each separate jurisdiction. Otherwise, inter-governmental cooperation could emasculate the potency of this constitutional protection.

As with the double jeopardy situation, the self-incrimination problem is aggravated in contempt cases. The problem of crossfire of prosecutions, as arising in search and seizure, double jeopardy and self-incrimination cases, is presently one of the most litigated and argued about problems concerning constitutional law and political power. The interjection of the contempt power adds another pressure to an already explosive situation, by aiming punishment at the individual who, not knowing which way to turn, elects to stand still.

F. *Due Process of Law: Proof*

> "Summary punishment of contempt is concededly an exception to the requirements of Due Process. Necessity dictates the departure."[172]

The due process clause is one which is doubly difficult to define. It is as uncertain semantically as it is as a direction of legal consequence. Its history has been one of redefinition according to the dictates of changing times and attitudes. Generally, if vaguely, it is a requirement for some minimum standard of comportment in governmental proceedings equivalent with contemporary concepts of fairness and justness. The discussion of the requirements of notice, hearing and representation, in the sixth amendment section to follow, establishes that many of the specific procedural guarantees in that amendment have been deemed applicable to the contempt situation, but under due process rationales.

In *Cooke v. United States*,[173] the Court wrote: "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them. . . . [T]his includes the assistance of counsel . . . [and] the right to call witnesses. . . ."[174] Indeed, several of these rights are now incorporated in the Federal Rules of Criminal Procedure,[175]

172 Sacher v. United States, 343 U.S. 1, 36 (1952) (dissent).
173 267 U.S. 517 (1925).
174 *Id.* at 537.
175 FED. R. CRIM. P. 42(b).

should there be any uncertainty in constitutional interpretation with respect to the contempt situation. However, there are other aspects of contempt procedures which still raise serious due process questions.

One of these problems is the requirement of a certain quantum of proof of a contempt. Civil wrongs are characteristically proved by "a preponderance of evidence," while crimes demand proof "beyond a reasonable doubt." However, the Supreme Court has again applied a variant formula to contempt cases, and, likening civil contempt to fraud, has called for a requirement of "clear and convincing evidence"—exceeding a mere preponderance,[176] but something less than the "beyond a reasonable doubt" test of criminal cases. In the case of criminal contempts, proof beyond a reasonable doubt is required.[177] These two criteria have occasionally been applied by federal courts, which have been astute about the rules but hopelessly confused about the proper classification of the contempt.[178] Again, classification of a contempt is the key to an appropriate decision.

In a recent case, *McPhaul v. United States*,[179] the Supreme Court dealt with this problem. The Court was called upon to review a conviction for contempt of a congressional committee. The defendant asserted that there was insufficient proof that subpoenaed records of the Civil Rights Congress (an organization alleged to be subversive) were relevant to the committee's inquiry, in existence or in his possession and control. The trial court refused to instruct the jury that they must find these three facts to be proved beyond a reasonable doubt. Instead, the court instructed the jury to ignore these facts because if the defendant had legitimate reasons for failing to produce the records he should have stated the reason for noncompliance with the subpoena,[180] thus giving the defendant the responsibility of coming forward with exculpatory evidence. On certiorari, the majority of the Supreme Court, following certain past decisions,[181] upheld the contempt conviction. Relying on analogous precedent that records kept in a representative rather than a personal capacity are not subject to the personal privilege

176 Oriel v. Russel, 278 U.S. 358, 362 (1929).

177 See Nilva v. United States, 227 F.2d 74, 80 (8th Cir. 1955), *aff'd in part and sentence vacated*, 352 U.S. 385 (1957).

178 See Fox v. Capitol Co., 96 F.2d 684, 686 (3d Cir. 1938).

179 364 U.S. 372 (1960).

180 *Id.* at 379.

181 United States v. Bryan, 339 U.S. 323, 332-33 (1950); Bevan v. Krieger, 289 U.S. 459, 465 (1933).

against self-incrimination,[182] as well as the primacy of the House of Representatives' committee work, Mr. Justice Whittaker, for the majority, agreed that the defendant should have proved part of the Government's case against himself by cooperating in the gathering of evidence for his own future conviction. The Chief Justice and Justices Black, Douglas, and Brennan dissented on the ground that the majority's decision "marks such a departure from the accepted procedure designed to protect accused people from public passion and overbearing officials."[183] The presumption of innocence is shifted by giving such a defendant the burden of proof on the issue of the willfulness of his refusal.

This point had been recognized in an earlier federal case.[184] Dealing with similar facts, the second circuit overruled a contempt conviction, pointing out that "the defendant can here legally be jailed only for a contempt in failing to produce the sought-after books when they are fairly shown to be presently within his power and control. He cannot legally be jailed for contempt for invoking his constitutionally protected privilege not to be a witness against himself."[185] Admonishing that this case was a step backward, the minority in the *McPhaul* case warned: ". . . when it comes to criminal prosecutions, the Government must turn square corners. If Congress desires to have the judiciary adjudge a man guilty for failure to produce documents, the prosecution should be required to prove that the man . . . had the power to produce them."[186]

The *McPhaul* case, though turning on what appears to be a narrow question of statutory interpretation, underscored a very basic concomitant of the exercise of the contempt power: the constant tug between governmental power and individual freedom, a philosophical and political problem recurring again and again in the garb of legal decisions in contempt cases. Also, the case above deviates from the past federal court treatment of this problem. As far back as 1894 one federal judge wrote: "Accusations for contempt must be supported by evidence sufficient to convince the mind of the trior, beyond a reasonable doubt, of the actual guilt of the accused, and every element of the offense. . . ."[187]

Yet, where a direct criminal contempt is committed, the defendant may be convicted upon the sworn statement of the judge

182 See Rogers v. United States, 340 U.S. 367, 372 (1951).
183 McPhaul v. United States, 364 U.S. 372, 383 (1960) (dissent).
184 United States v. Patterson, 219 F.2d 659 (2d Cir. 1955).
185 *Id.* at 662.
186 McPhaul v. United States, 364 U.S. 372, 387 (1960) (dissent).
187 United States v. Jose, 63 Fed. 951, 954 (C.C.N.D. Wash. 1894).

alone.[188] That statement, it was held, "imports absolute verity."[189] The import and gravity of this procedure is compounded by the fact that the appellate courts have no record upon which to base any review and therefore usually uphold the trial court's discretionary conduct.

All congressional contempts are now prosecuted pursuant to a federal criminal statute,[190] and as such require proof beyond a reasonable doubt, as with all other crimes. The general civil-criminal distinction is made concerning proof of contempts of court. However, these otherwise clear situations are muddied by interpretations such as that in the *McPhaul* case, and by odd classifications of contempts, as well as the special way of proving direct and civil contempts.

G. *Due Process of Law: The Judge*

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias. . . ."[191]

Another element of contempt procedures which would seem to conflict with the due process protection is that whereby the judge in a summary proceeding acts as judge, prosecutor, jury, and sentencer. Often he was personally the subject of the contempt. This anomalous procedure derives from old English practices which were not, and still are not, looked at askance. We have seen that some of these practices have been proved to be based upon shaky historical foundations. Strictly a product of the common-law system, this procedure is astonishing to those of the civil-law tradition. It is astonishing to some common-law lawyers, as well.[192] Mr. Justice Black wrote in the *Green* case:

> "When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied . . . an indispensable element of the due process of law. . . ."[193]

188 See Bowles v. United States, 50 F.2d 848, 852 (4th Cir. 1931).
189 *Ibid.*
190 52 Stat. 942 (1948), 2 U.S.C. § 192 (1958).
191 *In re* Murchison, 349 U.S. 133, 136 (1955).
192 See *In re* Oliver, 333 U.S. 257, 280 (1948) (concurring opinion).
193 356 U.S. at 199.

The Federal Rules of Criminal Procedure provide: "If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent."[194] A similar requirement was included in the Clayton Act,[195] but in some existing contempt situations the judge is still not disqualified.

These provisions, though they apply only to indirect criminal contempts, are eminently proper as far as they go. Federal rule 42 was based on the observations of Mr. Chief Justice Taft in *Cooke v. United States*.[196] There he noted the delicate balance which individual judges must strike in these cases between any impulse toward reprisal, and such leniency as would injure the authority of the court. He suggested substitution of another judge wherever possible. Obviously concerned with this problem, Mr. Chief Justice Taft in an earlier opinion had suggested this inequity as another ground for extending the pardon power to cover contempt convictions.[197]

The Supreme Court has often noted the human qualities of judges by which they, as others, are subject to fallibilities and frailties such as anger, petulance, and even vengeance. Whether judges are made of sterner stuff than other men, and are consequently better able to withstand the natural evocations of human emotion, has been debated many times and in many contexts.[198] Although variant opinions abound, and the problem may never be adequately resolved, it is not too heretical to suggest that a shift in personnel is more calculated to insure fairness in the trial of contempt cases, and that the mere donning of judicial robes, and the consciousness of an oath taken long ago, may succumb to more immediate emotional demands. In a case in which he discussed this issue, Mr. Justice Frankfurter wrote: "These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice."[199]

Although one can never know the mental processes by which a judge has acted, it seems more reasonable to conclude that the impersonal authority of law is better guarded and applied by one who is not himself personally involved in a given conflict. Perhaps

194 FED. R. CRIM. P. 42(b).
195 18 U.S.C. § 3691 (1958).
196 267 U.S. 517, 539 (1925).
197 *Ex parte* Grossman, 267 U.S. 87, 122 (1925).
198 See generally Goldfarb, *Public Information, Criminal Trials, and the Cause Célèbre*, 36 N.Y.U.L. REV. 810 (1961).
199 Offutt v. United States, 348 U.S. 11, 14 (1954).

the most striking example of this problem involves the New York communist trials in 1949. There, Judge Medina and counsel for the defense wrangled and fought for nine months during a heated, protracted trial in a celebrated political atmosphere. At the conclusion of the trial, Judge Medina summarily sentenced his contemnors to six months imprisonment. The Supreme Court upheld the conviction,[200] but Mr. Justice Frankfurter wrote a dissent in which he deplored the trial judge's conduct.[201] He included in his opinion an appendix of quotations from the trial record which indicated the open hostility and distaste which the judge and contemnors had for one another. It would have taken godliness in that case for the judge to have acted impartially and with proper detachment. Several of Mr. Justice Frankfurter's brethren felt that Judge Medina had shown somewhat less than that.

Greater expansion on the demerits of judging a cause in which one is personally interested begs the very obvious. The axiom that no man should judge his own cause was one early accepted in American law,[202] and with good reason. This was later applied so that a "direct, pecuniary interest"[203] would preclude judicial action. Professor Cahn recently noted the anomalous position which would have a wealthy judge disqualified on the basis of a minor or remote pecuniary interest in a cause before his court, while allowing him to decide a case which involved matters of the deepest, most profound effect on his emotional attachments.[204] Not only would his interest be likely to affect the issue of innocence or guilt of the contemnor, but it might also bear on the sentence exacted as punishment for the contempt.[205] The due process inhibition on judges who are interested in proceedings applies to state officers as well, by application of the fourteenth amendment.[206]

Still the Supreme Court has not gone as far as it could. It has not ruled that as a matter of due process of law a judge cannot sit in a case in which he is personally affected. It intimated so in *Offutt v. United States*,[207] but that decision was based on the Court's supervisory authority over the administration of criminal justice in

200 Sacher v. United States, 343 U.S. 1, 14 (1952).

201 *Id.* at 30 (dissent). See also MacInnis v. United States, 191 F.2d 157, 161 (9th Cir. 1951); Hallinan v. United States, 182 F.2d 880, 887-88 (9th Cir. 1950).

202 See Tumey v. Ohio, 273 U.S. 510, 522 (1927).

203 *Id.* at 535. See Groenvelt v. Burwell, 1 Salk. 396, 397, 91 Eng. Rep. 343, 344 (K.B. 1699). See also Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 611 (1947).

204 Address by Edmond Cahn, New York University Law School, November 1960.

205 *Cf.* Fisher v. Pace, 336 U.S. 155, 167 (1949) (dissent).

206 See *In re* Murchison, 349 U.S. 133, 139 (1955) (dissent).

207 348 U.S. 11, 14 (1954).

the federal courts—not on due process grounds. This leaves those judges who are so disposed to distinguish what could have established a correct rule.[208]

The Supreme Court has upheld a summary conviction for a direct contempt which arose out of an altercation between a trial judge and defense counsel in a case before that judge.[209] Recognizing the difficulty appellate courts have in reviewing such cases, yet upholding the conviction, the majority of the Court agreed: "In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude. . . ."[210] Mr. Justice Douglas felt that the majority opinion deprived the defendant of his constitutional right of freedom of speech; Justices Rutledge and Murphy dissented as well, but on due process grounds.

Of all the complaints about the summariness of contempt procedures, the argument against having an insulted or at least interested judge preside over the proceedings which adjudge and punish the misconduct requires the least support. Its moral and reasonable sense should not be open to legal distinction. Contempt is the only instance where such an anomalous practice occurs, though there is less reason there than in any other case. This injustice is already recognized in judicial decisions and by legislation. To the extent that this view does not presently prevail, relief should be afforded.

VI. THE SIXTH AMENDMENT

The jury trial guarantee of the sixth amendment is not the only aspect of that constitutional provision which is pertinent to a review of contempt practices. The full text of the sixth amendment reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

208 *Cf. In re* Murchison, 349 U.S. 133, 139 (1955) (dissent).
209 Fisher v. Pace, 336 U.S. 155, 160, 161 (1949).
210 *Id.* at 161.

A. *Venue*

In addition to the issue of whether contempt proceedings are criminal prosecutions and as such merit jury trials (which has already been discussed), the following section of the sixth amendment, raising problems of venue, is also noteworthy. Before determining where the "crime" was committed the decision-maker is initially belabored with the recurrent problem of whether contempt is a crime, as envisioned by that section. If it is not, of course, there is no sixth amendment venue issue. Assuming that it is, as good sense and reason would dictate, the venue problem may, in a given case, be one of constitutional magnitude.

In 1924 the Supreme Court addresssed itself to the problem of ascertaining the proper venue for a contempt proceeding.[211] The defendants had violated a court decree of one district court by contumacious conduct in another district. At the trial, an objection to the contempt jurisdiction of the first court was made on the ground of the sixth amendment's direction that crimes be tried in the district where they are committed. The Court held that contempts are sui generis, not "criminal prosecutions" within the sixth amendment, and that the defendants' conviction was therefore proper.[212] This authority has been followed[213] on the theory that the court whose order was disobeyed would not have the power to punish the offense if a contempt had to be tried where the act was committed.[214] Federal statutes provide that civil actions will be tried only in a judicial district where all defendants reside,[215] subject to certain qualifications not important to this discussion. The venue provision of the sixth amendment is now embodied in the Federal Rules of Criminal Procedure, as well.[216] These are logical rules since in both civil and criminal contempts the wrong which is committed is directly or indirectly one to the court controlling the main action. In cases of contempt by publication these rules could become awkward. Take, for example, the hypothetical case of a California newspaper which publishes a contemptuous article about a pending New York proceeding. The New York court, having plenary jurisdiction over the subject matter, must

211 Myers v. United States, 264 U.S. 95 (1924).

212 *Id.* at 103.

213 See Sullivan v. United States, 4 F.2d 100, 100-01 (8th Cir. 1925); McCourtney v. United States, 291 Fed. 497, 499 (8th Cir.), *cert. denied*, 263 U.S. 714 (1923); Dunham v. United States, 289 Fed. 376, 378-79 (5th Cir. 1923).

214 See Steers v. United States, 297 Fed. 116, 118 (8th Cir. 1924).

215 28 U.S.C. § 1391(b) (1958).

216 FED. R. CRIM. PROC. 18.

have the controlling power elsewhere as well. The contempt is to the New York court, although it might seem that the offensive act really took place in California.[217] This problem has arisen most often in cases involving injunctions, where court orders were violated in different districts from that of the court which issued the order. The decisions have uniformly upheld the power of the first court to deal with the contempt. It was stated in *Dunham v. United States:*

> "A proceeding for contempt springs out of a litigation instituted in a particular court. Its principal object is to secure obedience to the orders of that court, by punishing as a contempt disobedience thereof. It is the court whose judgment or order has been defied which must try the contempt and pronounce judgment. . . . If the place of the trial for a criminal contempt must be in the district where the acts constituting it were committed, then where such acts were committed in a different district than that of the court whose order has been contemned, such court would be powerless to deal punitively with the violation of its injunctive orders, and the trial and punishment of such contempt would have to be by a different court than that whose order had been defied. This would clearly be an alteration of the entire idea of a contempt, and in derogation of the power of a court to deal with violators of its orders."[218]

The principal policy of the venue section of the sixth amendment is to guarantee that a person charged with the commission of a crime will be tried by his neighbors who are familiar with the factual setting, rather than by strangers unappreciative of local problems, customs and values. This central idea is maintained in the contempt venue situation, though for slightly different reasons. Since a contempt conviction is designed to punish an act's ramifications (like judicial indignity or inconvenience) rather than the act itself (such as writing a letter to a judge, or failing to produce a book), it is sensible to conclude that the wrong took place where the particular ramification resulted, and not where the act which initiated that result was committed. A jury composed of residents of the area in which the affected court presided would be attuned to the problems presented by the case, and aware of the effect of the offense.

217 See Sullivan v. United States, 4 F.2d 100, 101 (8th Cir. 1925); Binkley v. United States, 282 Fed. 244, 246 (8th Cir. 1922).

218 289 Fed. 376, 378 (5th Cir. 1923).

B. *Speedy Trial*

The first section of the sixth amendment also speaks about the right to a "speedy trial." Is there some statute of limitations governing the contempt action? This problem was dealt with in *Gompers v. United States*,[219] in which Mr. Justice Holmes wrote an opinion which discussed the time limitations for contempt actions. Gompers defended himself on the ground that a general statutory three-year time limitation for all non-capital offenses implicitly barred his conviction for contempt. Mr. Justice Holmes ruled that this statutory period was appropriate, and that formal or rigid legal formulas for statutory interpretation were to be avoided in such vital proceedings. Dismissing an attempt to avoid the application of the statute or the Constitution by classifying contempt as a sui generis "offense" not quite within the terms of either, he wrote:

> "[P]rovisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."[220]

"Indeed," he continued, "the punishment of these offenses peculiarly needs to be speedy if it is to occur."[221] He said by way of dictum that it was well that some rule be set out dealing with the punishment of this crime, by the courts if not by the legislature.

> "The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the Government. By analogy if not by enactment the limit is three years."[222]

Central to Holmes' thinking was his conviction that allowing an action to be commenced at any time "would be utterly repugnant to the genius of our laws."[223]

In a later contempt case, Mr. Justice Douglas applied the three-year statute of limitations held applicable by Mr. Justice Holmes, and refined the holding by ruling that the statute began to run

219 233 U.S. 604 (1914).
220 *Id.* at 610.
221 *Id.* at 612.
222 *Ibid.*
223 *Id.* at 613.

from the time of the contemptuous act, and not from the time of the last act by which the misbehavior was consummated.[224] A five-year period of limitations for the commencement of criminal contempt actions is now guaranteed by a federal statute.[225] A sister statute limits this time to one year in cases where the contemptuous act also constitutes another crime.[226]

A civil contempt, by its very nature, becomes extinguished at the termination of the action from which it arose.[227] One court has said that a district court which issues a compensation-oriented civil contempt order may, as part of that remedial process, later commit to prison where the order is not obeyed.[228] However, acts violative of a decree, and thereby contemptuous, but occurring after the date of the final decree, can be punished as a contempt only so far as they violate terms of that final decree. Another court has gone farther and held that it is "within the power of the court to order punishment for such [civil] contempts whenever the proof was brought to its attention . . . whenever it learns of acts which constitute such contempts."[229] This language seems unduly broad. Suppose the court learned of the contemptuous conduct long after it was committed, and after the main action from which it arose was completed. A civil contempt citation would not only violate the policy against the revitalization of stale claims, but also would have no relation to the purpose of civil contempt—coercing a certain lawful result. In fact, this would seem to constitute a criminal contempt sanction.

C. *Notice and Hearing*

The general trial procedures which govern contempt proceedings are less than uniform, and depend again upon a prior classification of the particular contemptuous act—here, as direct or indirect.[230] This distinction was drawn by the Supreme Court in 1888 in a case which involved a determination of the proper procedures for a contempt committed in the presence of the court.[231] The Court first stated the proposition that proceedings without notice

224 Pendergast v. United States, 317 U.S. 412, 420-21 (1943).
225 18 U.S.C. § 3282 (1958).
226 18 U.S.C. § 3285 (1958).
227 *Cf.* Parker v. United States, 126 F.2d 370, 379-80 (1st Cir. 1942).
228 *Id.* at 380.
229 Odell v. Bausch & Lomb Optical Co., 91 F.2d 359, 361 (7th Cir.), *cert. denied*, 302 U.S. 756 (1937).
230 *Cf.* Savin, 131 U.S. 267, 276-78 (1889).
231 *Ex parte* Terry, 128 U.S. 289, 307 (1888).

and hearing are not judicial, or worthy of respect.[232] It then expounded a special rule "of almost immemorial antiquity, and universally acknowledged"[233]—that notice and hearing are not required, and imprisonment may immediately follow—vital to personal liberty and ordered society, and applicable to direct contempts. The Court adopted this rule, which it felt was based on precedent and necessity.

> "[I]t is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, . . . the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof . . . . [S]uch power, although arbitrary in nature and liable to abuse, is absolutely essential. . . ."[234]

In a later case that same term,[235] the Court articulated the rule for indirect contempts. Citing the earlier opinion and its rule for direct contempts, the court distinguished indirect contempts, holding that "whereas, in cases of misbehavior of which the judge cannot have such personal knowledge, and is [only] informed thereof . . . the proper practice is . . . to require the offender to appear and show cause why he should not be punished."[236] At this proceeding, the court held, the accused should be given notice of the charges made, and an opportunity for explanation and defense.[237] The particular manner of the proceeding, though, is a matter for judicial regulation, so long as "it be without oppressiveness or unfairness."[238] Thirty-six years later, the Supreme Court ruled that these sixth amendment procedural rights were equally protected by the due process clause of the fifth amendment.[239]

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel,

232 *Id.* at 306.
233 *Id.* at 307.
234 *Id.* at 313.
235 Savin, 131 U.S. 267 (1889).
236 *Id.* at 277.
237 *Id.* at 279.
238 *Ibid.*
239 Cooke v. United States, 267 U.S. 517 (1925).

if requested, and the right to call witnesses to give testimony. . . ."[240]

And so the sixth amendment's rights of notice, hearing and counsel were held applicable to indirect contempts, though direct contempts were still permitted to be treated summarily, in order to avoid a feared demoralization of the court's authority. The balance again was judicially tipped in favor of judicial security and efficiency over personal liberty and procedural safeguards.

The problem arose again in 1947.[241] The Supreme Court was called upon to review a contempt conviction arising out of a secret one-man grand jury proceeding held pursuant to a Michigan statute. The court reversed the conviction on the grounds that the fourteenth amendment's due process protection included such procedural rights as public trial, hearing, notice of charges, examination of witnesses, and representation by counsel. Although the court was divided in its decision, the majority held that these procedural rights bound the states as well as the federal government, even in criminal contempt cases.[242]

These rights are now covered by federal statute in most situations. For any contempt of Congress the accused is allowed all rights guaranteed by the sixth amendment. A similar situation also exists with respect to an indirect criminal contempt of court. For direct criminal contempt of court, or civil contempt of court, exceptions to the otherwise general rule are made. It is suggested that these exceptions are, as a matter of policy, unnecessary, and, as a matter of law, unconstitutional. The reasons advanced in support of these exceptional deprivations of procedural rights are precedent, judicial self-defense and respect, and efficiency. Any legal proceeding, in which an individual may be imprisoned (whether for a specified and limited time, or more especially where the duration is unlimited), or deprived of his property in a penal sense, as is the case in all present contempt situations, should be treated as a criminal prosecution as contemplated by the sixth amendment. All rights warranted by that constitutional provision should be available to the accused contemnor. Any loss to society through judicial embarrassment, inconvenience, or delay would be far outweighed in social values by the added dignity of individual freedom and the greater respect which would derive from a system

240 *Id.* at 537.
241 *In re* Oliver, 333 U.S. 257 (1948).
242 *Id.* at 273-76.

which consistently recognized these constitutional liberties. This is the liberal essence of our constitutional government, of our philosophy of the relation between men and law and government.

VII. THE EIGHTH AMENDMENT

The eighth amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Mr. Justice Black's sweeping condemnation of contempt practices in the *Green* case also included an attack upon the open-end sentencing procedure available in many contempt situations. He wrote:

> "[A]s the law now stands there are no limits on the punishment a judge can impose on a defendant whom he finds guilty of contempt except for whatever remote restrictions exist in the Eighth Amendment's prohibition against cruel and unusual punishments or in the nebulous requirements of 'reasonableness' now promulgated by the majority."[243]

And later in that opinion he noted:

> "[I]ts subversive potential . . . appears to be virtually unlimited. All the while the sentences imposed on those found guilty of contempt have steadily mounted, until now they are even imprisoned for years."[244]

This constitutional provision has been infrequently applied and strangely interpreted.[245] The phrase "cruel and unusual punishment" first appeared in the English Bill of Rights in 1688. Thereafter, it appeared in early legal declarations in the United States, and finally was adopted as a part of the eighth amendment to the Constitution. All states have similar constitutional language. Courts, though infrequently visited with eighth amendment issues, have not always agreed upon its true meaning or application. Although there is common agreement that the original purpose of this clause was to allay fears of excessive governmental intrusion upon personal liberties by providing a constitutional check, modern courts are less than clear about its interpretation, specifically regarding questions such as what is cruel, what is unusual, what constitutes punishment, and whether civil sentences are covered.

243 356 U.S. 165, 200 (1957).
244 *Id.* at 208.
245 See generally Note, 36 N.Y.U.L. REV. 846 (1961).

The predominant view is that the clause is aimed only at preventing barbaric, torturous punishments.[246] Modern interpretations have occasionally gone farther, holding that it could be used to relieve sentences whose durations were cruel in proportion to the wrongful act, as well as in the mode or nature of the punishment itself.[247]

The eighth amendment promises little shelter to the contemnor who feels that his sentence is onerous. First of all, there is serious question about its applicability in civil contempt cases. The clause speaks of punishments, and the argument can be made that civil contempt sentences are remedial devices, not punitive sanctions. In a legal sense, punishments are imposed for the commission of crimes. In a literal sense, punishment is a penalty, retributive suffering, pain or loss. Civil contempt sentences are punishments in the latter sense, but not necessarily in the former.

Occasionally the point has been litigated. In a New York case,[248] a husband was imprisoned for failing to pay alimony to his wife. He had suffered financially from the Depression, and his wife was childless and earning her own living. After two years and seven months in jail, he applied for discharge from imprisonment. The court, facetiously nominating him "the senior inmate of the sheriff's alimony colony," released the contemnor, noting that the state's cruel and unusual punishment provision need not be limited to "barbarities," but should be construed as a "forward-looking and progressive declaration of principle."[249] Critical of the rule which would confine the merciful application of the clause to criminal contempts while denying it in harsher civil contempt cases, the court wrote:

> "Under these sections if an intruder disturbs the serenity of a courtroom . . . the limits of judicial displeasure are circumscribed by statute. . . . However, let a waspish woman pluck the sleeve of the judicial gown . . . and this temperate restraint is immediately cast aside, and the delinquent spouse faces the possibility of unending imprisonment. . . . This carries the supposed rights of women to absurd . . . lengths. [T]here are those who doubt the expediency of its extension into a form of petticoat justice."[250]

246 *Id.* at 847.
247 *Ibid.*
248 Politano v. Politano, 146 Misc. 792, 262 N.Y. Supp. 802 (Sup. Ct. 1933).
249 *Id.* at 793, 262 N.Y. Supp. at 804.
250 *Id.* at 794, 262 N.Y. Supp. at 805.

The good sense of this reasoning has not prevailed. The cruel and unusual punishment provision has generally been held relevant only to situations arising out of the more traditional criminal punishments, and civil contempts have consistently been differentiated from this class of cases.

The New York newspapers have reported, with proper indignation, the confinement of an eighty-year-old woman for civil contempt of a surrogate court. She had languished in prison for over three years before the same judge who committed her ordered her release. At the time of this writing she is still in contempt of that court, and conceivably could be sent back to prison. Her contempt resulted more from her naiveté and ignorance of probate proceedings than it involved any corruption of the administration of justice. The severity of the law of contempt upon little old ladies has been dramatically frustrating to the courts of England, too. In 1886, a woman, unsuccessful in attempts to get legal title to some houses and property to which she claimed ownership, had to be enjoined from forcibly possessing them.[251] When her endeavors were not deterred, she was incarcerated for contempt until she would conform to the court's order. She remained adamant, though in jail. Two years later, an embarrassed court discharged her from custody, lamenting their position and hopefully ordering her cooperation. In its opinion, the court voiced regret that this annoying, though not serious, offense was punishable by imprisonment at all.[252]

Mr. Justice Rutledge defined what he thought to be the mandate of the eighth amendment, in his dissent to *United Mine Workers v. United States*.[253] There, he wrote:

> "The law has fixed standards for each remedy, and they are . . . for damages in civil contempt the amount of injury proven and no more . . . for coercion, what may be required to bring obedience and not more, whether by way of imprisonment or fine; for punishment, what is not cruel and unusual or, in the case of a fine, excessive within the Eighth Amendment's prohibition."[254]

The realities have not always coincided with his articulation of policy.

In civil contempt cases there is often no relation between the

251 *In re* Maria Annie Davies, 21 Q.B.D. 236 (1888).
252 *Id.* at 239.
253 330 U.S. 258 (1947).
254 *Id.* at 377.

sentence and the coercion necessary to compel obedience. In cases where the contemnor does not cooperate on grounds of moral indignation or principle, or impossibility (as in some alimony cases), there is no calculable relation between the punishment and the goal sought. Unfortunately, this often results in harsh waiting-out periods, with the prisoner remaining in jail indefinitely. Moreover, civil contempts are in fact sometimes civil in name only, entailing, in reality, criminal punishments.[255]

There is equal question about the realism of the Rutledge formula in criminal contempt cases. Most criminal contempt sentences are something short of cruel or unusual, though they may at times be viewed as harsh, more than necessary, or overly strict.

In the *Green* case the convicted Smith Act defendants were given an additional sentence of three years' imprisonment for "jumping bail" in contempt of a federal court order to appear for sentencing. The maximum sentence under the bail-jumping statute was five years.[256] But indictment under that statute would have guaranteed a jury trial before a disinterested judge. Such a severe sentence (and at that the judge was limited only by his conscience) is not unusual in contempt cases.

Another Smith Act defendant was found guilty of criminal contempt and sentenced to imprisonment for four years.[257] He failed to obey a district court order to surrender, and was apprehended two years later. The second circuit considered this sentence "well within a reasonable exercise of discretion by the trial judge, obviously . . . not violating the eighth amendment . . . ."[258]

In *United States v. Toledo Newspaper Co.*[259] the publishers and editor of a local newspaper were fined 7,500 dollars for their constructive contempt of a pending judicial proceeding. Their offensive conduct consisted of no more than editorializing about a disputed street railway franchise in the city of Toledo. Far more vitriolic comments have gone unpunished since then because of the Supreme Court's reluctance to include press comments within the wording of the federal contempt statute.

In the sensational *United States v. United Mine Workers* case,[260]

255 *Cf.* Uphaus v. Wyman, 360 U.S. 72 (1959).

256 18 U.S.C. § 3146 (1958).

257 United States v. Thompson, 214 F.2d 545, 546 (2d Cir.), *cert. denied*, 348 U.S. 841 (1954).

258 *Ibid.*

259 220 Fed. 458, 515 (N.D. Ohio 1915), *aff'd*, 237 Fed. 986 (6th Cir. 1916), *aff'd*, 247 U.S. 407 (1918). The case was expressly overruled in Nye v. United States, 313 U.S. 33 (1941).

260 330 U.S. 258 (1947).

John L. Lewis, the famous union leader of the mine workers, was fined 10,000 dollars and his union was fined 3,500,000 dollars for contempt. Their contempt involved disobedience of a court order restraining interference by the mine workers with temporary governmental operation of the mines during conciliation of a labor-management dispute. The Supreme Court upheld Lewis' fine, but reduced the union's to 700,000 dollars, conditioned upon its subsequent compliance with the same order. In a separate opinion, Justices Black and Douglas criticized the excessive sentence. They pointed out that the same interference during wartime would have been governed by a 5,000 dollar maximum fine under the War Labor Disputes Act. The equities in that case were compounded by the fact that the defendants believed, in good faith, that they were acting within their legal rights. Lawyers and legal scholars have differed in their interpretations of many laws similar to the one which gave rise to the contempt in the *United Mine Workers* case, and of the sweepingly broad language of the contempt statute itself. Even the Supreme Court has been unable to clarify this muddled area of the law.

Regardless of how onerous sentences for contempt may become, present indications point to little solace from the eighth amendment's protections. This amendment was originally included in the Constitution to protect citizens against those horrid and barbarous punishments which the history of man had seen inflicted, and which shock the conscience of civilized society.[261] However, American courts have restrictively construed this potentially merciful legal vehicle to the point where its utility is minimal. Capital punishment by gas, hanging, and electrocution have been considered neither cruel nor unusual. Prolonged imprisonments, and sometimes capital punishments have been imposed by less progressive states for relatively insignificant crimes. A three and a half million dollar fine for contempt was based upon a persistent but mistaken interpretation of the law. When John Kaspar, an extremist racist, flaunted a court order and attempted to provoke interference with the Supreme Court's segregation decision at Clinton High School in Tennessee, he was sentenced to one year's imprisonment.[262] The federal court which reviewed that contempt conviction disposed of the defense that the sentence violated the eighth amendment. Punishments are cruel and unusual, the court held,

261 See *In re* Kemmler, 136 U.S. 436, 437 (1890).
262 Kasper v. Brittain, 245 F.2d 92, 96 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957).

only where they are "so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice."[263] What criteria, or what sense of justice, the court did not indicate. Another federal court has held that the words "cruel and unusual" are to be considered in light of developing civilization, not what was so in the eighteenth century.[264] But courts have given little attention to this constitutional problem, even philosophically. In a California case where policemen pumped a man's stomach to retrieve evidence later to be used against him at trial, the Supreme Court could not muster approval.[265] They reversed the conviction because these tactics were too close to the rack and screw for American justice to tolerate. In discussing the meaning of due process, the Court has spoken of those fundamental rights basic to fair play upon which our concepts of justice are founded. And in 1959, the Second Circuit, while recognizing that the unlimited contempt power exists, remanded a case for redetermination because, among other things, a contempt sentence was so inordinately harsh as to be onerous.[266] There, a defendant was fined 1,500 dollars and sentenced to imprisonment for six months. He had been summoned in California to appear before a New York grand jury. He sought a temporary adjournment but was refused. Though he failed to appear on the date required, he did appear voluntarily soon thereafter. He offered to purge his contempt and testify before the grand jury, but the government officials refused, and prosecuted the contempt instead. However, such sporadic decisions have not coalesced to form a definite eighth amendment philosophy.

On another occasion the Supreme Court offered a vague formula for considering the cruel or unusual quality of punishments, which sought to strike some balance in the relation between the crime and the punishment.[267] In discussing the cruel and unusual punishment provision, one state court judge wrote:

> "It is regarded as primarily relating to the kind and character or method of punishment, referring to inhumane or barbarous treatment or punishment unknown to the common law or which has become obsolete with the progress of humanitarianism, rather than to the severity in the amount or duration. But

263 *Ibid.*

264 *Ex parte* Pickens, 101 F. Supp. 285, 288 (D. Alaska 1951).

265 Rochin v. California, 342 U.S. 165, 172 (1952).

266 United States v. DeSimone, 267 F.2d 741, 747-48 (2d Cir.), *cert. denied*, 361 U.S. 827 (1959).

267 Weems v. United States, 217 U.S. 349, 380-81 (1910).

it would seem that most of the courts hold it covers that too."[268]

The examples presented in this section would indicate either that the last sentence of this opinion is inaccurate, or that one individual's concept of what is excessive in amount is at odds with that prevailing among many present authorities.

In a recent contempt case,[269] a federal court sustained a fifteen-month sentence on the ground that it was reasonable when viewed in the light of other similar convictions of eighteen months,[270] or three and four years,[271] and the Supreme Court upheld the decision. The lower federal courts have "considerable latitude" in sentencing for contempt.[272] Compounded by the minimal trial record in contempt proceedings, and the reluctance of appellate courts to overturn the decisions of lower courts, this discretion is tantamount to total license. In the case above, an aggressive district attorney asked the judge to mete out a substantial sentence, to omit a standard clause by which the contemnor might purge his offense, and to deny bail. The judge, in his discretion, did all three.

In summary, for contempt of Congress there is a one-year maximum sentence; the eighth amendment would not prohibit this severity, but might possibly apply in cases where successive convictions were sought for the same but repeated act of contumacy. For certain specific contempts of federal courts, there are statutory limitations. Many situations find the courts with unlimited powers. Only three states have no statutory maximum on the quantum of punishment permitted incident to an exercise of the contempt power.[273] Sixteen have a maximum for contempts committed outside of court, but none for direct contempts. Twenty-nine have overall maximums. Nine have maximums of six months; one has a three-month maximum; and the rest have thirty-day limitations.[274]

The cruel and unusual punishment provision of the Constitu-

268 Weber v. Commonwealth, 303 Ky. 56, 63, 196 S.W.2d 465, 469 (1946).

269 United States v. Brown, 247 F.2d 332, 339 (2d Cir. 1957), *aff'd*, 359 U.S. 41 (1959).

270 See Lopiparo v. United States, 216 F.2d 87, 92 (8th Cir. 1954), *cert. denied*, 348 U.S. 916 (1955).

271 See United States v. Green, 241 F.2d 631 (2d Cir. 1957), *aff'd*, 356 U.S. 165 (1958); United States v. Thompson, 214 F.2d 545 (2d Cir.), *cert. denied*, 348 U.S. 841 (1954); United States v. Hall, 198 F.2d 726 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953).

272 United States v. Brown, 247 F.2d 332, 339 (2d Cir. 1957), *aff'd*, 359 U.S. 41 (1958).

273 New Hampshire, Rhode Island, and Vermont.

274 See Note, 104 U. PA. L. REV. 998, 1000 n.18 (1956).

tion, though indicative of a policy against excessive sentencing practices, in actuality operates only against barbarous, Draconian punishments. While contempt sentencing practices do not fall into this category, they may be viewed as more harsh, more extensive, and aimed less at purposeful, judicious goals than they might be. Some alleviation, at least, is deserved. The chances would appear to be better that this relief will be arrived at through avenues other than the eighth amendment. Courts may someday decide that current contempt practices improperly result in cruel punishments, and the versatility of the Constitution, through the elastic powers of judicial review, will then be brought into play.

Beyond this possibility, some trend can be sensed in recent years in which contempt sentences have been increasingly limited by statute. These legislative maximums have been realistic, and are the best answer to this problem—for two reasons. A statutory maximum sentence apprises the potential contemnor of the likely consequences of his wrongful conduct before he acts. It would also limit the power of judges to exaggerate the gravity of punishments in cases where they might otherwise be so inclined. This is a far clearer method of controlling sentencing powers than the vague, varying, and often unusable protections of the eighth amendment, or the equally impractical recourse to judicial interpretations of excessiveness or unreasonableness.

VIII. THE TENTH AMENDMENT: FEDERAL-STATE RELATIONS

The tenth amendment to the Constitution reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The powers of the federal government were early interpreted to include all those necessarily inferrable from specific constitutional grants as well as the powers which were expressly enumerated.[275] These so-called implied powers have been the source of heated political and social conflicts from earliest times. One of the most volatile parts of the Constitution, touching sensitive areas of local chauvinism and power, the tenth amendment has caused debate both concerning the respective content of state and federal powers, and relating to conflicts between those same powers. Which powers are to be left solely to the control of the states, and which to the national government? And how does one

275 See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

determine which should prevail where both, properly asserted, conflict? Into this struggle the contempt power enters only indirectly and infrequently. When it does, it provokes deep and difficult basic problems with respect to the balance of government powers.

In re Comingore[276] illustrates the basic problem. In that case a collector of internal revenue for the federal government was questioned as a witness in a state civil proceeding. He refused to provide certain information attempted to be elicited from him, on the ground that a regulation of the Treasury Department forbade such disclosure. He was fined and imprisoned for contempt, and brought habeas corpus proceedings. The federal district court held that the state had no authority over property or archives of the United States Government. The state imposition through the medium of a contempt proceeding was therefore improper. The court further held that though this might not be the case with respect to the federal government's access to *public* records of states, or vice versa, there was no corresponding right to demand information about non-public matters.[277] If the latter pertained to internal governmental conduct which policy demanded be kept from the public, no right of inspection would exist. "The state has neither occasion nor right to call upon the United States nor her officers for reports made under the administration of its laws in order to enforce the collection of state revenue. Nor would the United States have the right to call upon the state."[278]

Occasionally, the issue has recurred in the context of congressional contempt cases.[279] In *United States v. Owlett*[280] the power of a state committee to investigate intrastate work of the Federal Works Progress Administration in that state was questioned. The United States objected on the ground that this interference would obstruct proper governmental functions. The federal court enjoined the disputed investigation, holding that it was beyond the jurisdiction of the state, and an interference with the established immunity of federal agencies from state control.[281] Since this was not a proper area for state legislative action, an injunction against the state was issued.

276 96 Fed. 552 (D. Ky. 1899), *aff'd sub nom.* Boske v. Comingore, 177 U.S. 459 (1900).
277 *Id.* at 559.
278 *Id.* at 561. See also Hopkins Savings Ass'n v. Cleary, 296 U.S. 315 (1935).
279 See *In re* Wallace, 170 F. Supp. 63 (M.D. Ala. 1959). See also Comment, 70 YALE L.J. 812 (1961).
280 15 F. Supp. 736 (M.D. Pa. 1936).
281 *Id.* at 742.

The recent conflict between the New York-New Jersey Port Authority and the Celler House Judiciary Sub-Committee gave to the problem some added notoriety.[282] An officer of the Port Authority, an interstate municipal agency created by a compact between the two states, was subpoenaed to produce a voluminous amount of the Authority's records before the House sub-committee. In obedience to orders of the governors of New York and New Jersey he refused, and Congress cited him for contempt. One of his defenses to the congressional contempt citation was that federal investigations into areas of state concern unconstitutionally interfere with the federal system of government as exemplified by the reservation clause of the tenth amendment. It had been suggested that "the theory that state documents are sacrosanct when dealing with wholly internal matters was recently rejected.[283] The district court found Tobin guilty of contempt. The court of appeals reversed. The Port Authority case is now being appealed by the Government. The tenth amendment issue was left unanswered by the court of appeals decision. In the lower court opinion in this case, Judge Youngdahl did attempt to reach this constitutional issue. He wrote:

> "If possible, attempt should be made to accommodate conflicting powers which overlap before it is decided that one must yield absolutely to the other. . . . Honest and vigilant administration of the balancing test by the courts can accomplish this result. The Federal system is itself the product of accommodation between the need for central direction of affairs affecting the entire nation and the desire to prevent overcentralization . . . ."[284]

As a final example, the contempt situation which arose from the recent dispute in Mississippi between the governor of that state and the federal courts and executive glaringly exemplifies the emotional content of tenth amendment conflicts. Such cases show both the versatility of the amendment, its adaptability to thwart any federal action with which a state may disagree, as well as the deep-felt and incendiary nature of the issue which the amendment raises.[285]

282 United States v. Tobin, 195 F. Supp. 588 (D.D.C. 1961), *aff'd*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 31 U.S.L. WEEK 3165 (U.S. Nov. 13, 1962).

283 Comment, 70 YALE L.J. 812, 817 (1961).

284 United States v. Tobin, 195 F. Supp. 588, 612 (D.D.C. 1961).

285 It might have been an interesting paradox had Governor Barnett questioned the constitutionality of contempt of court practices, and taken his case to the Supreme Court,

The assertion of states' rights arguments to uphold civil liberties is itself interesting. Lately, a states' rights approach has been frequently argued in defense of conservative causes, and in conflict with certain libertarian objectives. Yet, it may be that contempt convictions, arising out of federal interference with state governmental bodies or agents, violate the tenth amendment, and that the reverse might well be true unless some broader province is given to the powers of the national government in conflicts arising out of a federal system. The final decision should be doubly interesting, as most issues arising from use of the contempt power involve the rights of government versus individuals. Here, the case is one of two sovereigns disputing powers, and attempting to utilize the coercive contempt tool to prevail.

IX. CONCLUSION

The matters which have been herein discussed indicate that the legal treatment of the judicial contempt power has created a constitutional maze. Peculiar handling of a frequently-implemented power has resulted in a unique body of law. The purpose of this article was merely to point out some of the constitutional ramifications and anomalies incident to the utilization of this unusual legal device. Answers or attitudes about particular problems have been suggested or hinted at along the way. No complete analysis was intended. Even so, selective consideration of the major constitutional problems suggests that some new and deep-cutting changes should be wrought.

where the activists have as consistently criticized the denial of the right to trial by jury in contempt cases as they have supported the right of Negroes to equal protection and due process of law. The governor would also have had to appeal on the ground that his contempt was criminal, not civil, and that therefore he was entitled to trial by jury.