

## Contempt of Court a Survey

Dan B. Dobbs

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Dan B. Dobbs, *Contempt of Court a Survey*, 56 Cornell L. Rev. 183 (1971)  
Available at: <http://scholarship.law.cornell.edu/clr/vol56/iss2/1>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# CORNELL LAW REVIEW

Volume 56

January 1971

Number 2

## CONTEMPT OF COURT: A SURVEY\*

Dan B. Dobbs†

### TABLE OF CONTENTS

I. ACTS OF CONTEMPT .....	185
A. <i>Generally</i> .....	185
B. <i>Acts Constituting Contempt</i> .....	186
1. <i>Disruption in Court</i> .....	186
2. <i>Obstruction of the Court's Processes</i> .....	189
3. <i>Perjury, Forgery, and Alteration of Records</i> .....	194
4. <i>Symbolic Acts</i> .....	200
5. <i>Insult and Insolence</i> .....	204
6. <i>Out-of-Court Publications</i> .....	208
7. <i>Disobedience of Court Orders</i> .....	219
II. THE MODE OF TRIAL IN CONTEMPT CASES .....	221
A. <i>Summary and Plenary Trials</i> .....	221
B. <i>The Direct-Indirect Test</i> .....	224
C. <i>Right to a Hearing</i> .....	227
III. RIGHT TO JURY TRIAL .....	230
IV. CIVIL AND CRIMINAL CONTEMPT .....	235
A. <i>General Rules</i> .....	235
B. <i>Deviant Statements of the Distinction</i> .....	239
C. <i>Consequences of the Distinction</i> .....	241
D. <i>Analysis and Proposals</i> .....	245
V. PERSONS SUBJECT TO THE CONTEMPT POWER .....	249
A. <i>General Rules</i> .....	249
B. <i>Agents, Abettors</i> .....	252
C. <i>Class Actions, Successors, and Injunctions in Rem</i> .....	254
D. <i>The Limits Under Rule 65(d)</i> .....	259
E. <i>Conclusion</i> .....	260
VI. INTENT AND ABILITY TO COMPLY .....	261
A. <i>Intent</i> .....	261
B. <i>Ability To Comply</i> .....	265

\* Copyright © 1971 by Dan B. Dobbs. All rights reserved.

† Professor of Law, University of North Carolina. B.A. 1956, LL.B. 1956, University of Arkansas; LL.M. 1961, J.S.D. 1966, University of Illinois. This article was prepared in cooperation with the North Carolina Law Center. The author wishes to express appreciation for the helpful assistance of several students at the School of Law, University of North Carolina, particularly Mr. Farris Duncan, Miss Ann Reed, and Miss Audrey Glenn.

VII. SANCTIONS FOR CONTEMPT .....	267
A. <i>In General</i> .....	267
B. <i>Imprisonment</i> .....	268
1. <i>Criminal Punishment</i> .....	268
2. <i>Civil Sanctions</i> .....	268
3. <i>Enforcement of Money Decrees</i> .....	269
a. <i>Imprisonment for "Debt"</i> .....	269
b. <i>Execution as an Alternative</i> .....	273
C. <i>Fines</i> .....	274
1. <i>Criminal</i> .....	274
2. <i>Civil</i> .....	275
D. <i>Denial of Right To Litigate</i> .....	278
E. <i>Other Sanctions</i> .....	282

Every system of resolving disputes must, in some form and under some name, provide for at least these two things: its own power to preserve the orderliness of the decision-making process and its own power to enforce decisions once made. Unhappily, the performance of these disparate tasks has been accomplished in the Anglo-American system of law through disparate powers under the single term "contempt." Some of the resultant confusion is documented in succeeding portions of this article.

The power to preserve courtroom order is clearly essential. Unfortunately, it is easy to shade the need for order into a requirement of dignity. An authoritarian system is perhaps more interested in the trappings of respect for order than it is in whether the respect is deserved or the order in reality maintained. The Russians provide for correctional labor of up to a year for insulting a "representative of authority" engaged in the maintenance of public order and up to six months imprisonment for insulting a policeman.<sup>1</sup> Even judges reared on Anglo-American concepts of freedom are capable at times of an insistence on more than courtroom order—of a demand for dress, dignity, a mode of address, even a cultural air from another era—all enforced through the massive power of contempt. When the authority of law is in doubt and subjected to question, as when the crown sits lightly on the king's head or the frontier is a lawless place, the law is apt to demand symbols of obeisance as well as order. This is natural enough. Yet in a law-oriented society this kind of overkill must somehow be avoided.

The power to enforce decrees, once made, is likewise essential and important, though often enough this is done through execution of sentence rather than through the contempt power. Where contempt powers are used, however, extremes are again possible. One court may deny a man his day in court as a punishment for some disobedience,

<sup>1</sup> R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) § 192.

while another may fear, like the French with their *astreintes*, to enforce its own orders at all.<sup>2</sup>

The trick, both in enforcing courtroom order and in enforcing judicial decrees, seems to be to avoid extremes. But our system has few doctrines precise enough to permit adequate control of immoderate impulses. The law of contempt is largely judge-made law,<sup>3</sup> and indeed judges have spoken often of their "inherent" powers to punish for contempt notwithstanding any legislative regulation.<sup>4</sup> This judicial control over contempt cases has tended to close the conceptual system off from legislative reform, while the small number of contempt cases has tended to prevent the judiciary from acquiring an overview and an adequate experience to generate its own reform, or even to generate much clarity in basic concepts. Lacking these, it is not easy to avoid extremes.

This article critically surveys some of those areas central to an understanding of the contempt power and most suitable for legislative restructuring, with the hope that, in the future, extreme results may be avoided.

## I

### ACTS OF CONTEMPT

#### A. Generally

Contempt of court consists of an act or omission substantially disrupting or obstructing the judicial process in a particular case. This

---

<sup>2</sup> The *astreinte* is an *in terrorem* fine; e.g., "You must pay \$10,000 for each day you continue to violate the court's order." In the past, the French permitted this in form but refused to permit actual collection of the fines. Now, at least partial collection is the rule. See P. HERZOG, *CIVIL PROCEDURE IN FRANCE* 563 (1967); Catala, *Astreintes in French Law: The Conclusive Case*, 6 JURID. REV. (n.s.) 53 (1961); Catala, *Astreintes in French Law*, 4 JURID. REV. (n.s.) 163 (1959).

<sup>3</sup> There is an ancient statute that seems as remote from the modern power of contempt in logic as it is in time. The Statute of Westminster II, 13 Edw. 1, c. 39 (1285), provided that a sheriff might in some instances imprison those who resisted his process. This resembles contempt power, but much as the acorn resembles the oak: no one would ever have recognized the resemblance in advance. See J. FOX, *THE HISTORY OF CONTEMPT OF COURT* 11 (1927).

<sup>4</sup> E.g., *LaGrange v. State*, 238 Ind. 689, 153 N.E.2d 593 (1958).

The power to punish for contempt is inherent in every court of superior jurisdiction in Indiana. This power is essential to the existence and functioning of our judicial system, and the legislature has no power to take away or materially impair it. . . . However, the legislature may regulate the exercise of the inherent contempt power by prescribing rules of practice and procedure.

*Id.* at 692-93, 153 N.E.2d at 595.

*Ex parte McCown*, 139 N.C. 95, 51 S.E. 957 (1905).

[A]s the power to attach for a certain class of contempts is inherent in the courts and essential to their existence and the due performance of their functions, the Legislature cannot, as to them, deprive the courts of this power or unduly interfere with its exercise.

*Id.* at 105, 51 S.E. at 961.

may include behavior during a trial, such as disruption of the proceedings, or it may include obstructive behavior outside the courtroom itself. Contempt may also include disobedience of judicial orders, as, for example, where a defendant violates an injunction or where a witness refuses to answer a question when ordered to do so by the judge.

Clearly enough, all of this covers a wide range of conduct and, just as clearly, not all this conduct should be treated alike, even though it all goes abroad under the umbrella of "contempt." It is important to recognize at the outset that several classifications are made in determining what constitutes contempt.

Courts commonly distinguish contempts at two levels. First, they distinguish civil from criminal contempts. This is a matter that can be reserved for later treatment since the present inquiry concerns only whether any given conduct constitutes contempt. Second, courts distinguish contempts that are "direct" from those that are "indirect." This dichotomy is more significant for immediate purposes. Roughly speaking, a contempt is direct if it is in the presence of the judge and indirect otherwise, though it must be understood that such a simple distinction cannot stand without qualification, and it must also be understood that terminology may differ in various jurisdictions.

Contempts are typically classed in both tiers—that is, first as either civil or criminal and second as either direct or indirect; thus a contempt might be criminal and direct, or civil and indirect, and so on. The significance of these classifications lies in the powers and procedures that attend them. Generally speaking, judges have more immediate power over direct contempts than over indirect ones and, in some important respects, more power in civil than in criminal contempts. The details of this are taken up later.

Perhaps one word of warning is necessary. No classification of factual patterns can be an absolute one; each situation shades into others, and a disobedience of a court order may shade into, or even be identical to, a disruption in court. To classify may be to obscure such shadings. Yet if all contempts are treated alike, important differences may be ignored. Thus, classification is used with the hope that it will allow one to see relevant policy differences in different factual situations; it is not intended to suggest that all cases necessarily fall squarely into one category alone.

## B. *Acts Constituting Contempt*

### 1. *Disruption in Court*

Definitions of contempt tend to be extremely broad. They are replete with the desire to avoid interruption of, and insult to, the judi-

cial process.<sup>5</sup> The two things, of course, are rather different. An obstruction or disruption of the court may be intolerable, but insult might be borne if need be.

Any judicial system must find means of protecting itself from disruptions so that parties may be heard, and the common law system is not alone in seeking to protect itself against such practices. What constitutes a disruption is another matter.<sup>6</sup> Simple noisemaking might serve admirably to prevent a trial or to delay it substantially,<sup>7</sup> and there is no doubt that any serious disruption during a judicial proceeding is a contempt and punishable as such. The Pennsylvania Supreme Court, for example, had no difficulty in deciding that a defendant who threw a *World Almanac* at the judge and expressed a murderous emotion was in contempt.<sup>8</sup> This form of contempt is ancient. In the summer of 1631 at the Salisbury assizes, a prisoner aggravated at his sentence "ject un Brickbat a le dit Justice que narrowly mist . . ." An indictment was immediately drawn and "son dexter manus ampute & fix al Gibbet sur que luy mesme immediatement hange in presence de Court."<sup>9</sup>

Interruptions carried out almost continuously during a trial, though not so dangerous as brickbats, are also effective, and also contempts.<sup>10</sup> A disruption almost as effective—perhaps more so—occurred in one case. A number of defense counsel, as a protest, walked out of the trial in a body, leaving their clients unrepresented and halting the trial for several hours. The attorneys were held in contempt, and

<sup>5</sup> *E.g.*, *South Dade Farms v. Peters*, 88 So. 2d 891 (Fla. 1956) (any despising of authority); *People v. Gholson*, 412 Ill. 294, 298, 106 N.E.2d 333, 335 (1952) ("any act which is calculated to embarrass, hinder, or obstruct a court in the administration of justice, or which is calculated to lessen its authority or dignity").

<sup>6</sup> The French Code of Civil Procedure provides for a 24-hour summary commitment of those who create disturbances in court, but a prison term may be meted out to one who insults an officer of justice, and criminal conduct in court is punished as other criminal conduct. C. PRO. CRV. arts. 89-92 (63e ed. *Petits Codes Dalloz* 1966-67). See P. HERZOG, *supra* note 2, at 285.

<sup>7</sup> *Commonwealth v. Reid*, 123 Pa. Super. 459, 187 A. 263 (1936) (noisy and "boisterous" defendant shackled).

<sup>8</sup> *Commonwealth v. Mayberry*, 435 Pa. 290, 255 A.2d 548 (1969), *cert. granted*, 397 U.S. 1020 (1970).

<sup>9</sup> Anonymous, *Dyer* 188b (note) (1688 reprint). A later report carries the translation from law French as follows:

[The prisoner] threw a brickbat at the said Judge, which narrowly missed; and for this an indictment was immediately drawn by Noy against the prisoner, and his right hand cut off and fixed to the gibbet, upon which he was himself immediately hanged in the presence of the Court.

73 Eng. Rep. 416 n. (1631).

<sup>10</sup> *Mayberry Appeal*, 434 Pa. 478, 255 A.2d 131 (1969). See also *Illinois v. Allen*, 397 U.S. 337 (1970).

of course this is entirely proper.<sup>11</sup> Actually, courts often go further and punish attorneys for their mere absence or even their tardiness without excuse,<sup>12</sup> though there are no doubt valid excuses that will operate as defenses in some cases.<sup>13</sup>

Disruptions may be less spectacular. An attorney may insist on arguing his point after the judge has ruled on it, and to keep proceedings moving the trial judge may, if need be, hold him in contempt,<sup>14</sup> though there are at least some cases where the attorney has an absolute right to insist upon being heard.<sup>15</sup> Perhaps a court is even justified in holding an attorney in contempt when his fist fight spills over from the corridor into the courtroom and disrupts, although unintentionally, a trial in progress.<sup>16</sup>

One might expect some disruptions to be more tolerable than others. The disruption caused by a moment's anger might seem tolerable where it is neither part of a planned scheme of harassment nor a substantial interruption. Yet even some of these relatively understandable and tolerable disruptions have been thought to justify contempt punishments. During the Nuremberg war crimes trials, a witness was asked to identify a man who had performed criminal experiments upon him at Auschwitz. The witness not only identified the man but also attempted to assault him. He apologized to the court, explaining that he was "very excited" and that the man had ruined his life. The judge sentenced the witness to ninety days in jail for contempt, but later relented and "paroled" the contumacious witness to the custody of his wife. Even so, the witness apparently served more than three weeks in confinement at the Nuremberg Military Prison.<sup>17</sup>

---

<sup>11</sup> *United States v. Krupp von Bohlen und Halbach*, Case No. 10, 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 996-1013 (1949) (excerpts from transcript and contempt ruling).

<sup>12</sup> *E.g.*, *Chula v. Superior Ct.*, 57 Cal. 2d 199, 368 P.2d 107, 18 Cal. Rptr. 507 (1962); *Knajdek v. West*, 278 Minn. 282, 153 N.W.2d 846 (1967) (late appearance by 20 minutes could be contempt, but attorney is entitled to jury trial since guilt would be determined not only by absence, but by the reasons for the absence, which the judge could not know firsthand); *see* Annot., 97 A.L.R.2d 431 (1964).

<sup>13</sup> *See, e.g.*, *In re Marshall*, 423 F.2d 1130 (5th Cir. 1970) (attorney absent to contact witness sent another attorney to be at court; contempt conviction reversed).

<sup>14</sup> *Holman v. State*, 105 Ind. 513, 5 N.E. 556 (1886).

<sup>15</sup> *In re Abse*, 251 A.2d 655 (D.C. Ct. App. 1969) (attorney was not in contempt for insisting on right to be heard after trial; judge had accused him of unprofessional conduct in open court); *cf. In re McConnell*, 370 U.S. 230 (1962) (mere statement by lawyer that he will continue to press questions against court's order is not contempt).

<sup>16</sup> *Young v. State*, 275 P.2d 358 (Okla. Crim. App. 1954).

<sup>17</sup> *United States v. Brandt*, Case No. 1, 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 967-72 (1949) (excerpts from transcript and contempt rulings).

In the late 1940's, in the famous trial of eleven persons accused of a conspiracy to overthrow the government, the judge sentenced one defendant for contempt for refusing to answer a question. This angered the others and they stood up with their lawyers and began "shouting" at the judge. Some of them took several steps forward. Additional marshals were called in to restore order, and the judge immediately remanded the defendants to the custody of the marshal for the duration of the trial. Later this act was characterized by the judge as an informal conviction of and sentence for contempt; his action was approved by the Second Circuit.<sup>18</sup> The case is interesting for several reasons. One is that the defendants do not appear to have acted with the intention of affecting the jury, which was not present, or with the intention of deliberately disrupting the trial. They were not, for instance, engaging in the more contemporary pastime of chanting at the judge, nor for the most part were they even reported to have been insulting. It seems clear that the judge felt somewhat threatened, but it is not clear why his sentence—jail for the duration of the trial—was thought to be correlative to the offense.

Although something short of contempt punishment might have been successful in handling the situation, and although some other form of sentence might have been more desirable, the case did involve conduct that could fairly be characterized as disruptive of an actual judicial proceeding. A number of other cases fall in a different zone of behavior and create different problems.

## 2. *Obstruction of the Court's Processes*

Actual disruption of judicial proceedings by noisemaking, assaults, or other physically disruptive acts is a relatively small problem in the total contempt picture. Probably more common is the challenge presented to the administration of justice through distortion or blocking of its processes—obstruction rather than disruption. The distinguishing characteristic of obstruction cases is that the contemptuous act tends to subvert fairness or efficiency without the direct challenge of disruption. In general, this may include such acts as bribery, interfering with execution of process, and other subversive rather than confrontative acts.

One kind of obstruction may occur when the court's processes are blocked. This might happen where the defendant induces prosecution witnesses to leave the jurisdiction;<sup>19</sup> where one interferes with property

---

<sup>18</sup> *United States v. Hall*, 176 F.2d 163 (2d Cir.), *cert. denied*, 338 U.S. 851 (1949).

<sup>19</sup> *See, e.g., State v. Jones*, 111 Ore. 295, 226 P. 433 (1924).



in the court's custody;<sup>20</sup> where a debtor's property is concealed in violation of a court order, so that it cannot be levied upon;<sup>21</sup> or where a judgment debtor conveys his property to a purchaser in violation of a court order.<sup>22</sup>

Another kind of obstruction involves conduct that prejudices the fairness and procedural safeguards of the judicial process; for example, intimidation of judges or jurors. Such conduct is not necessarily a physical disruption of the trial, but neither judge nor jury can decide according to conscience, law, and fact if their decisions can be threatened by the abuse of those who disagree.

An assault on a judge, though outside the courtroom, may constitute a contempt of court. This seems appropriate enough when the assault is committed by a party to some proceeding and when it may have an intimidating effect.<sup>23</sup> Similarly, an assault or other abuse of a juror may constitute contempt, even though the juror has been discharged.<sup>24</sup> A threatened assault on a witness while he is on the stand is also a contempt, even if provoked by the witness's conduct or testimony.<sup>25</sup>

There are, of course, many ways in which a judicial proceeding might be improperly influenced, and contempt may be used to punish such influences even though they fall far short of intimidation.<sup>26</sup> A

<sup>20</sup> *Gottwals v. Manske*, 60 Nev. 76, 99 P.2d 645 (1940) (creditor and attorney attached debtor's money in hands of receiver; held contempt).

<sup>21</sup> *Commonwealth ex rel. Messer v. Mickelson*, 196 Pa. Super. 464, 175 A.2d 122 (1961) (concealment, re-concealment upon discovery). See also *Drake v. National Bank of Commerce*, 168 Va. 230, 190 S.E. 302 (1937).

<sup>22</sup> See *Ex parte Coffelt*, 239 Ark. 324, 389 S.W.2d 234 (1965) (attorney gave money to wife before turnover order; contempt for evading judgment). There are limits to this kind of contempt power. For example, one who is not a party to a receivership proceeding may withhold property from the receiver and is not in contempt by so doing; the receiver must by plenary action sue to get the property. See, e.g., *Ex parte Harvill*, 415 S.W.2d 174 (Tex. 1967).

<sup>23</sup> *Weldon v. State*, 150 Ark. 407, 234 S.W. 466 (1921) (assault on judge during vacation by man charged with crime; conviction by another judge for contempt affirmed).

<sup>24</sup> *In re Fountain*, 182 N.C. 49, 108 S.E. 342 (1921). The court said in part:

There would be small assurance of the impartial and fearless administration of justice if the judges only are to be protected from such misconduct as is here shown, but the jurors who are much more liable to be thus called in question should be left to defend themselves by physical strength or by indictment or prosecution of the offenders.

*Id.* at 53, 108 S.E. at 343.

<sup>25</sup> *Cohran v. Sosebee*, 120 Ga. App. 115, 169 S.E.2d 624 (1969) (attorney drew back fist and presented threat to witness on stand when witness made reference to attorney's "lying"; contempt conviction affirmed).

<sup>26</sup> See *City of Macon v. Massey*, 214 Ga. 589, 592, 106 S.E.2d 23, 25 (1958) (contempt to call judge on phone to discuss judge's sentence of son; contempt again to go to judge's office and demand apology: "The time has not yet arrived in Georgia when a person

man was held in contempt because he said, in the presence of a jury that was deliberating on a case, "Don't convict my friend Ruef."<sup>27</sup> Attempted bribery of either juror<sup>28</sup> or witness<sup>29</sup> is likewise punishable by the contempt power.<sup>30</sup>

Several somewhat unusual cases raise questions about improper influence on jurors. In *People v. Higgins*,<sup>31</sup> a deputy sheriff was held in contempt on two counts, first for purchasing liquor for a jury (and becoming drunk himself), and second for having sexual intercourse with a woman juror. This case is troubling because there seems to have been no need for the immediate reaction involved in a contempt charge—the deputy's conduct was less likely to obstruct the judicial process than to affect public opinion about it. An ordinary criminal charge might have been more appropriate.

A second case, *People v. Gholson*,<sup>32</sup> involved a rather direct attempt to influence jurors. Gholson, a chiropractor, was charged with criminal violation of the Illinois Medical Practice Act.<sup>33</sup> Shortly after his case was set for trial, he sent a reprint of the *Chiropractic News* to a number of persons, including some prospective jurors. This contained laudatory material about Gholson. He then published an advertisement referring to his great success in treating a polio victim in two papers of general circulation a few days before trial. Finally, on the day of the trial, a "motor caravan" of several hundred supporters attended the trial. Contempt was held proper here, and this seems justified since the use of contempt operated to prevent defendant from attempting to further influence the trial.

---

dissatisfied with the results of a judicial proceeding may with impunity require the judge to discuss the matter . . .").

<sup>27</sup> *Ex parte Creely*, 8 Cal. App. 713, 716, 97 P. 766, 767 (1908).

<sup>28</sup> *State v. Weinberg*, 229 S.C. 286, 92 S.E.2d 842 (1956). "[A]ll willful attempts, of whatever nature, seeking to improperly influence jurors in the impartial discharge of their duties, whether it be by conversations or discussions, or attempts to bribe, constitute contempts." *Id.* at 293, 92 S.E.2d at 846.

<sup>29</sup> *Ex parte Savin*, 131 U.S. 267 (1889).

<sup>30</sup> It is not even necessary to bribe or intimidate in traditional fashion. An employer who discharged an employee because the employee was absent on jury duty was held in contempt by an Illinois court. *People v. Vitucci*, 49 Ill. App. 2d 171, 199 N.E.2d 78 (1964). A juror himself may be held in contempt for giving misleading responses on voir dire. Once his misstatements or misleading answers on voir dire are shown, then even his misconduct in the jury room, otherwise privileged from disclosure, may be considered in the contempt. *Clark v. United States*, 289 U.S. 1 (1933). On the other hand, not every unethical act relating to witnesses or evidence is a contempt, and it is no contempt, though it is certainly unethical and perhaps illegal, to obtain a witness's presence by misrepresentation. *Cancellieri v. De Modica*, 57 N.J. Super. 598, 155 A.2d 167 (1959).

<sup>31</sup> 173 Misc. 96, 16 N.Y.S.2d 302 (Sup. Ct. 1939).

<sup>32</sup> 412 Ill. 294, 106 N.E.2d 333 (1952).

<sup>33</sup> ILL. ANN. STAT. ch. 91, §§ 1-16x (Smith-Hurd 1966).

A third case<sup>34</sup> seems arguable. An attorney for the plaintiff in a civil trial responded to a ruling of the trial judge with the words, "I think it demonstrates your prejudice without doubt."<sup>35</sup> He was held in contempt the next day. The appellate court thought this justified in principle because the

immediate and obvious results [of the statement] were to disrupt the trial, to inject in the minds of the jurors strong resentments incompatible with the dispassionate determination of the issues before them, and to deprive both plaintiff and defendant of an early resolution of their litigation. A more extended harm to be expected from such an accusation on the part of an officer of the court is a lessening of public respect for the bench, the bar and the judicial process.<sup>36</sup>

This is the kind of case that easily shades into mere insult or insolence without any obstructive effect. The appellate court's theory was that fair trial became impossible once the accusation was made before the jury. The court may have overdramatized the effect on the jury, but given its premise, the insult became an obstruction. It must be remembered, however, that a claim of judicial bias made incident to a motion to disqualify would be constitutionally protected, even if made vigorously and impertinently.<sup>37</sup>

If judges are warranted in expediting judicial procedures to prevent delay and obstruction, that warrant does not justify any plenary police power. If the summary power of contempt—the power to punish without information, indictment, or jury—is not needed to protect the processes of the court, aggressive conduct should be dealt with under ordinary criminal statutes.

A number of cases, however, seem to assume that the precincts of the court are hallowed, and perhaps that even the judge himself carries an aura of privilege. In a Washington case,<sup>38</sup> the court was in recess

---

<sup>34</sup> *Alexander v. Sharpe*, 245 A.2d 279 (Me. 1968), *cert. denied*, 397 U.S. 924 (1970).

<sup>35</sup> *Id.* at 281.

<sup>36</sup> *Id.* at 283.

<sup>37</sup> *Holt v. Virginia*, 381 U.S. 131 (1965). In this case a lawyer read to the judge a written motion for change of venue based on the judge's alleged prejudice. The motion stated that the judge was "in effect and/or in fact acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge." *Id.* at 133. The right to a hearing on the issues was held to include the right to make motions alleging such bias. Any insult was inherent in the charge of bias. This is similar to the rule in defamation cases, which holds that statements made in court are absolutely privileged if pertinent. Pertinency is given a liberal interpretation. *E.g.*, *Irwin v. Ashurst*, 158 Ore. 61, 74 P.2d 1127 (1938). The policy seems similar to the one that should obtain in contempt cases—to encourage full argumentation and disclosure in judicial hearings rather than risk artificial limits in the name of decorum.

<sup>38</sup> *State v. Buddress*, 63 Wash. 26, 114 P. 879 (1911).

and the judge was leaving for his chambers, where he was to sign an order at the request of the defendant, Buddress. In the clerk's office, and in the presence of the judge, Buddress got into a fight with one Trumbull. The judge summarily punished them for contempt. The Supreme Court of Washington affirmed the conviction, saying that since the contempt was in the judge's presence, it was not necessary that it be committed in court. There certainly seems nothing wrong in punishing the misbehavior of Buddress. But since he does not appear either to have disrupted or obstructed any judicial proceeding, it would seem more desirable to use ordinary criminal processes than the summary contempt power.<sup>39</sup>

Somewhat more distressing is a recent Iowa case<sup>40</sup> in which state district court Judge Paradise was disturbed by some boys making noisy and obscene comments late at night outside the judge's home. They also spoke to a girl "about sex and intercourse," and Judge Paradise dressed and went out. He told them to quiet their loud, offensive, and disturbing voices and to go home. When challenged, he told them he was Judge Paradise "and what I just said to you is an order of court." Two of them threatened to "get the son-of-a-b[itch]."<sup>41</sup> Three struck the judge and someone said, "To hell with the judges and courts." They ran away but were caught, and it turned out that two of the young men were the subjects of juvenile proceedings then pending in Judge Paradise's court. A show cause order was issued and counsel appointed to represent them at the contempt hearing. Judge Paradise presided at the contempt hearing and sentenced each of the four young men to six months in jail and a fine of \$500.

The contemnors sought review by certiorari. The Supreme Court of Iowa affirmed the conviction, subject only to a reduction in the sentence. The court held that the boys' conduct was contemptuous because it was "insolent and it tended to impair the respect due" to Judge Paradise's authority, and it further held that the contempt was committed toward a court "while engaged in the discharge of a judicial duty."<sup>42</sup>

---

<sup>39</sup> Chief Justice Dunbar of the Washington court dissented from the majority decision on a ground in accord with this conclusion. He said in part:

I am unable to divest my mind of the idea that, in the interest of liberty and in harmony with the genius of our government, every citizen should have a right at some time and in some place to defend himself against a charge of crime a conviction of which works a deprivation of his liberty or his property rights. *Id.* at 34, 114 P. at 883.

<sup>40</sup> *Newby v. District Ct.*, 259 Iowa 1330, 147 N.W.2d 886 (1967).

<sup>41</sup> The last word appears only incompletely in the somewhat maidenly opinion.

<sup>42</sup> 259 Iowa at 1337, 147 N.W.2d at 891.

It is difficult to see why a contempt charge—rather than a charge of crime or tort or both—should have been permitted here. There is no more justification for taking courts to the streets than there is for taking the streets to the courts. Certainly, where a criminal action is possible and there is no immediate need for action to aid the progress of a trial, the ordinary criminal law processes are preferable to the summary processes of contempt, especially where the same judge who was assaulted sat in judgment—something that would hardly be permitted in a criminal case. The bare citation to other judge-assault cases<sup>43</sup> does not prove very much, for surely there is a distinction between assaults that may intimidate judges in their work and that grow out of their work, and assaults that are unrelated, do not delay trial, and can be criminally punished.

### 3. *Perjury, Forgery, and Alteration of Records*

The judicial process may be substantially impaired when the decision-making process itself is compromised, as in the cases where attempts are made to influence or intimidate the judge or jurors. They may also be compromised when the merits of the controversy are somehow distorted, as in cases where there is perjury by a witness, forgery of a document, or alteration of a record.

These problems are somewhat peculiar. The lying witness is one of the things the system is designed to cope with through devices such as cross-examination. Whether the witness speaks the objective truth is "intrinsic" to the trial—a matter in issue. We expect trials to involve issues of fact and, pretty regularly, a certain amount of lying under oath. We can cope with it by cross-examination, the use of other testimony, and the common sense of the trier of fact. Thus, direct perjury is quite different from the kind of contempt involved in disruptive behavior that prevents the jurors from hearing a witness. The system cannot work at all with disruptions (nor could any system designed to achieve truth or justice), but the system can and does work with perjury and in fact is designed to do so.<sup>44</sup>

Another distinction between perjury and disruptive behavior

---

<sup>43</sup> *Id.* at 1337-41, 147 N.W.2d at 891-93.

<sup>44</sup> All this is quite similar to the policy involved where a losing party seeks to set aside a final judgment for fraud. In such cases, the same notions expressed in the text are at work and lead courts to refuse modification of judgments for fraud, except the so-called extrinsic fraud—the kind the system is not designed to catch and the kind that prevents the system from coming into operation in the first place. See *United States v. Throckmorton*, 98 U.S. 61 (1878); *Dobbs, Recent Developments in the Law of Judgments in Arkansas*, 10 ARK. L. REV. 468, 472-77 (1956).

should be sketched. It seems perfectly sound to encourage participants in a trial to expect punishment for disruptions. On the other hand, punishment for perjury may be easily misinterpreted to mean punishment for being on the losing side. In other words, any system that regularly punishes those who are disbelieved runs the serious risk of communicating to honest as well as to dishonest witnesses a serious warning. This warning may be read to require not so much telling the truth as telling a story that will be believed. Thus, the use of the contempt power to punish perjury may create special problems not involved in pure disruption or even in other obstruction cases.<sup>45</sup>

Some courts and writers apparently think of perjury as fitting into a continuum that begins with a simple refusal to answer. A refusal to speak, absent privilege, obstructs the judicial process in a procedural way; it cannot succeed where those who know the truth will not speak, for then it cannot even ascertain whether they are truthful, lying, or mistaken. Thus, there is little difficulty in holding a witness in contempt for a flat refusal to answer.<sup>46</sup> But this flat refusal shades very quickly into an evasive answer, and an evasive answer shades further into a lie: "I don't know, I don't recall, I can't remember." Repeated enough, these phrases compel the feeling that the witness is refusing to answer. Hence, in some cases, the evasive answer may be treated as simple refusal to answer and punished as a contempt.<sup>47</sup> Judge Learned Hand, then a district judge, took this view when he said:

It is indeed impossible logically to distinguish between the case of a downright refusal to testify and that of evasion by obvious subterfuge and mere formal compliance.

The rule, I think, ought to be this: If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like any one else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For

---

<sup>45</sup> This point seems to have been completely overlooked in some writings. See, e.g., Note, *Jury Trial for Criminal Contempts: Restoring Criminal Contempt Power and Protecting Defendants' Rights*, 65 YALE L.J. 846 (1956).

<sup>46</sup> *Brown v. United States*, 356 U.S. 148 (1958). Where the refusal to answer is not in the judge's presence, as where it is a refusal to answer in a grand jury proceeding or a proceeding before a master, it may be that summary contempt is not proper, and a full-scale hearing is required. See *Harris v. United States*, 382 U.S. 162 (1965); *Galyon v. Stutts*, 241 N.C. 120, 84 S.E.2d 822 (1954). As to summary and plenary contempt hearings, see Section II(A) *infra*.

<sup>47</sup> See, e.g., *People v. Gilliam*, 83 Ill. App. 2d 251, 227 N.E.2d 96 (1967) (witness recalled nothing prior to arrest, though he had normal intelligence; held contempt).

instance, it could not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week. If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry.<sup>48</sup>

It is perhaps easy to believe that if a court can hold a man in contempt for giving no answer and if a court can hold a man in contempt for giving a sham answer, it must equally be permitted to hold him in contempt for giving a false answer. Judge Hand did not feel this way, however, for he added, no doubt with decisions of the Supreme Court in mind, that the contempt power "must not be used to punish perjury."<sup>49</sup> Thus, under some decisions, whenever the witness's conduct becomes not a refusal to answer but a lie, a different policy applies, and contempt is not properly used to punish such behavior.

A leading case is *Ex parte Hudgings*,<sup>50</sup> where the trial judge, after a witness repeatedly asserted he could not recall a certain event, held the witness in contempt for perjury. The witness was also indicted for perjury. Imprisoned in punishment for the contempt, the witness sought habeas corpus relief. The United States Supreme Court, in hearing the habeas petition, first pointed out that although perjury was a crime, it might nevertheless furnish the basis for contempt charges "when exceptional conditions so justify."<sup>51</sup> The Court then went on to insist that perjury in the presence of the court was punishable as a contempt only when it operated to obstruct the court in the performance of its duty. False swearing, the Court said, is not necessarily obstructive. The Court then alluded to what perhaps were the more pressing reasons against the use of contempt in cases like the one before it:

[I]t would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled.<sup>52</sup>

Tested against these considerations, the conviction was held to be "void

---

<sup>48</sup> *United States v. Appel*, 211 F. 495, 495-96 (S.D.N.Y. 1913).

<sup>49</sup> *Id.* at 496.

<sup>50</sup> 249 U.S. 378 (1919).

<sup>51</sup> *Id.* at 382.

<sup>52</sup> *Id.* at 384.

for excess of power"<sup>53</sup> since there was no special circumstance giving the perjury any obstructive effect. The witness was therefore released from custody.

In a more recent decision, the Supreme Court again held that a contempt conviction for perjury was improper. In *In re Michael*,<sup>54</sup> the trial judge concluded that a witness had perjured himself before the grand jury. The witness had answered willingly and unequivocally, but the trial judge disbelieved him, believed contrary witnesses, and accordingly held him in contempt. Justice Black, writing for the Court, held this was improper. He said in part:

All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact-finding tribunal must hear both truthful and false witnesses.<sup>55</sup>

Justice Black then went on to repeat what had been the message in *Hudgings*—namely, that perjury alone would not be a sufficient basis for contempt, and that something further would have to be found if contempt convictions were to be sustained. And he added:

Only after determining from their testimony [that of other witnesses] that petitioner had wilfully sworn falsely, did the Court conclude that petitioner was "blocking the inquiry just as effectively . . . as refusing to give any [answer] at all." This was the equivalent of saying that for perjury alone a witness may be punished for contempt.<sup>56</sup>

Although it is not clear, the Court apparently believes that in any situation where the only "obstruction" found is false testimony, the falsity of which is in issue because of other evidence, no contempt will lie, and the prosecution must rely on a statutory criminal charge.

Some state courts share the reluctance of the United States Supreme Court to use the contempt power to punish perjury;<sup>57</sup> other courts, however, do not. In *Handler v. Gordon*,<sup>58</sup> a judgment debtor repeatedly answered questions falsely (or so the judge thought) in a proceeding to discover his assets. He was held in contempt, and the

---

<sup>53</sup> *Id.*

<sup>54</sup> 326 U.S. 224 (1945).

<sup>55</sup> *Id.* at 227-28.

<sup>56</sup> *Id.* at 229.

<sup>57</sup> See *People v. Shapolsky*, 8 App. Div. 2d 122, 185 N.Y.S.2d 639 (1st Dep't 1959). See also Annot., 89 A.L.R.2d 1258 (1963).

<sup>58</sup> 111 Colo. 234, 140 P.2d 622 (1943).



Colorado Supreme Court approved, saying the perjury was "manifest" and that it had necessarily operated as an obstruction to finding property. It suggested that obstruction could be found, if needed, in the time required to discover falsity, or merely because lying was itself an obstruction.

Some perjury contempt cases have arisen in either pre-trial discovery proceedings or supplemental proceedings to discover assets.<sup>59</sup> These proceedings do differ in some important respects from a trial before a jury. For one thing, a judge's decision that a witness (who is apt to be the defendant himself) is lying in a discovery proceeding is not a usurpation of the jury's function, as it tends to be in a jury trial. For another thing, a contempt citation, or even the threat of it, may be a more effective way to secure an answer in discovery proceedings than it would be in a trial. On the other hand, if the judge is mistaken about the perjury, and the witness in fact knows no more than he reveals, or is speaking truthfully, the witness might be compelled either to spend his life in jail or to invent some falsehood if an indeterminate "civil" contempt sentence is imposed.<sup>60</sup> Imposition of a determinate "criminal" contempt sentence, however, may have relatively little effect as coercion; it may be punishment and nothing else. If so, the ordinary processes of law are preferable.

In any event, it seems sufficiently clear that at least two divergent attitudes can be found concerning the use of contempt powers to punish perjury. Some courts are clearly reluctant to punish perjury if it is a part of the merits of the controversy—that is, if it is "intrinsic" to the case. Other courts show no such reluctance and seem entirely willing to use summary contempt powers to punish perjury freely.

Other factual situations may be grouped with these cases. In *Butterfield v. State*,<sup>61</sup> an attorney removed a page of a pleading and substituted another that was materially different. Under the circumstances the substitution was important to the merits of the case. The court had little difficulty in holding the attorney in contempt.

Manipulation of documents, and what is quite similar, the subornation of perjury, may be distinguished, at least in degree, from the case of direct lying on the witness stand. It may well be that a court unwilling to punish simple perjury as a contempt would be willing to so punish subornation of perjury or the forgery or other manipulation

---

<sup>59</sup> See, e.g., *United States v. Appel*, 211 F. 495 (S.D.N.Y. 1913); *Handler v. Gordon*, 111 Colo. 234, 140 P.2d 622 (1943); *Galyon v. Stutts*, 241 N.C. 120, 84 S.E.2d 822 (1954).

<sup>60</sup> See Section IV *infra*.

<sup>61</sup> 144 Neb. 388, 13 N.W.2d 572 (1944). See Annot., 151 A.L.R. 750 (1944).

of documents. The distinction in some cases is fairly clear. For example, if a lawyer changes a document that affects the procedure but not the evidence offered to the jury, the process of trial may be defeated because it is not really designed to expose such deception; lawyers are not put on the witness stand and examined about such matters. Hence, in this kind of document manipulation, contempt may be an acceptable sanction, even where it is regarded as inappropriate for perjury.<sup>62</sup>

Even manipulation or forgery of documents that are used as evidence in the trial may be regarded as distinct in some way from simple perjury and hence not subject to any rule protecting perjury from the contempt powers. It might be said, for example, that although the truth of the document is an intrinsic issue in the case (where it is offered as evidence), the question of how the document was procured or manipulated is not an intrinsic issue, except in some indirect or remote way. The document is subject to scrutiny, but the party who has manipulated it may not be, for he may not happen to be a person testifying.

The same is true with the analogous case of subornation of perjury. The truth or falsity of the witness's story is intrinsic to the case, but the question whether that story was manipulated by an outsider is only indirectly involved, and the outsider who manipulates a witness's story may himself never come under examination on the witness stand. Thus, it can be said that manipulation of documents and subornation of perjury are different from perjury itself, and that this difference justifies use of the contempt powers for punishing such behavior. The reasoning admittedly rests on differences in degree, but most courts do punish subornation of perjury without the reluctance displayed as to perjury itself.<sup>63</sup> And in the relatively few decisions on document manipulation, courts have not displayed any hesitation in imposing contempt punishments.<sup>64</sup>

---

<sup>62</sup> In *People v. Gerrard*, 15 Ill. App. 2d 301, 146 N.E.2d 229 (1957), an attorney received a transcript from the reporter and suggested that the reporter change it to be more accurate. The reporter changed it to conform to the attorney's recollection of what was more accurate. On these facts the court assumed that contempt punishment would be proper, but refused to approve it on the ground that a wilful contempt had not been proven against the attorney.

<sup>63</sup> *In re Estate of Melody*, 86 Ill. App. 2d 437, 229 N.E.2d 873 (1967), *rev'd on other grounds*, 42 Ill. 2d 451, 248 N.E.2d 104 (1969) (procuring forged will and suborning witnesses to it); *Osborne v. Purdome*, 244 S.W.2d 1005 (Mo. 1951) (attorneys bribed witness); *see* Annot., 29 A.L.R.2d 1157 (1953).

<sup>64</sup> In addition to *Butterfield v. State*, 144 Neb. 388, 13 N.W.2d 572 (1944), see the interesting case of contempt by defense counsel Marx and Mrs. Huppertz in *United States v. Altstoetter*, Case No. 3, 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 972-95 (1949) (excerpts from transcript and contempt ruling). There, someone

Finally, there is the unusual situation in which the contumacious party does not commit perjury by testifying falsely, or by manipulating a document, or even by refusing to answer, but only by failing to volunteer information to the court, where (perhaps) he has a duty to do so. In *In re Estate of Wright*,<sup>65</sup> an attorney represented the estate being administered in the court. He was entitled to a statutory fee for his representation. Without informing the judge, the attorney also undertook to represent a claim against the estate. The judge discovered this state of affairs and disallowed his fee and also held him in contempt of court. The Supreme Court of Ohio affirmed this conviction, saying it was a direct contempt as a "fraud upon the court."<sup>66</sup>

If the attorney was under a duty to disclose, contempt might seem proper, even though a failure to disclose can be viewed as a falsehood by silence covered by the rule against punishment of perjury by contempt powers. Perhaps, however, there is a difference between failure to disclose and ordinary perjury, which is once again the difference between substantive lying that the system is designed to disclose and extrinsic lying that the system is not expected to discover. If a witness began discussion of a subject on the stand, but omitted an important qualification to his answers so that they were misleading, this might be perjury and subject to the rule prohibiting contempt as punishment. On the other hand, if an attorney simply did not perform his duty as a court's officer to inform it of a collateral matter, punishment by contempt may be entirely permissible.

It must be added, however, that other procedures might be much more suitable. This kind of misconduct can be characterized in advance of its occurrence and probably should be made a crime. If so treated, the powers of contempt would not be required, and the perjurer, or manipulator of documents, or the attorney with a conflict of interest could be tried on a criminal charge.

#### 4. *Symbolic Acts*

A number of contempt cases involve neither an actual disruption of the trial nor an obstruction of judicial processes, but rather an invasion of the court's claims to respect and dignity. Such cases raise

---

removed the first page of a questionnaire signed by a Dr. Gerstaecker and filed in the case. Then Dr. Gerstaecker was given an opportunity to rewrite his answers, perhaps with the implication that he should change them. He did not change his answers, and a blank first page was then substituted in the court's file for the page originally answered by Gerstaecker. Two persons were held in contempt of court.

<sup>65</sup> 165 Ohio St. 15, 133 N.E.2d 350 (1956).

<sup>66</sup> *Id.* at 25, 133 N.E.2d at 357.

several questions. How much respect is it right for the judicial branch of the government to demand from citizens, and why is respect demanded and even ritualized as it is? Is a showing of respect either necessary or desirable to maintain a good judicial system, or is it merely a cultural bias?

There are a few cases in which either an attorney or a witness has been held in contempt for failure to follow a dress code in a judicial proceeding. In one case,<sup>67</sup> an attorney was held in contempt for entering the courtroom in an open-necked shirt with no tie and no coat—at least, that conduct appears to have been a part of the basis of the contempt charge. In a New York case,<sup>68</sup> a trial judge's attempt to prohibit a woman lawyer from wearing a mini-skirt was overruled on appeal. These cases may represent the tip of a large iceberg, for conversations with attorneys occasioned the recall of a number of dress code incidents.<sup>69</sup>

The dress cases are especially problematical. It is reasonable that lawyers and other judicial personnel be required by court rule to wear clothing appropriate to a serious search for truth and justice. It seems probable that the kind of attire worn will have some effect on the attitudes of all concerned, although any effect is apt to be remote and important only if other means of ensuring a serious trial also break down. Thus, the dress code of a local court may infringe personal freedom for relatively small gains. This is especially so when it is considered how easily dress can shift to "appearance": judges have been known to demand haircuts of parties—surely an unwarranted invasion of personal freedom by the state.<sup>70</sup>

---

<sup>67</sup> *Champion v. State*, 456 P.2d 571 (Okla. Crim. App. 1969). Much of the detail must be gleaned from related cases, *Bearden v. State*, 458 P.2d 914 (Okla. Crim. App. 1969), *cert. denied*, 397 U.S. 960 (1970), and *Crumb v. State*, 458 P.2d 909 (Okla. Crim. App. 1969).

<sup>68</sup> *Peck v. Stone*, 32 App. Div. 2d 506, 304 N.Y.S.2d 881 (4th Dep't 1969).

<sup>69</sup> Several interesting cases were reported to the author. In one, a divorce hearing was scheduled during the lunch hour for the convenience of the husband, who drove a delivery truck. The divorce was uncontested and the husband appeared with his attorney as scheduled, but wore his uniform. The judge refused to hold the hearing and insisted that the husband take time off from work and come to court in a suit.

<sup>70</sup> A case reported to the author involved a traffic court judge who required all men brought before him to wear very short hair and required those with long hair to go to a nearby barber. At times he sent them back to the barber for a further haircut.

Reports of judicial criticism and sarcasm at dress of parties are fairly widespread. One newspaper editorial, headlined "Judicial Tyranny for Today's Youth," reported that Judge Woodrow Hill met long-haired parties in his court with the remark: "Now let me get this straight. Do I address you as Miss, Mrs., or Mister?" Chapel Hill (North Carolina) Weekly, May 24, 1970, at 2, col. 1. The Associated Press recently reported the appeal of a juvenile who had been found in contempt and jailed by a judge as a result of his "weird and undesirable appearance" in court. The judge had likened his coiffure and beard "to a cross

The form of dress of a participant in the trial is not likely to inhibit the ongoing work of the court, except in extreme cases or where the mode of dress used has a threatening aspect, such as a Nazi Party uniform. Thus, the issue becomes the validity of a dress rule. Perhaps the sensible approach to resolution of these conflicts is simply to adopt a "reasonable dress" rule and to allow wide variations in it. Certainly this seems desirable as to parties, jurors, and witnesses, but even such a rule has the defect of failing to specify in advance what kind of dress will not be approved, and thus may permit authoritarian and capricious judges—who certainly exist, as many contempt cases show—to impose their highly personal standards.

Dress is a symbolic mode of expression and a means of permitting or forcing one into a role appropriate to the dress.<sup>71</sup> Other formal acts in a judicial proceeding may serve similar purposes, and similar considerations may apply. In *United States v. Malone*,<sup>72</sup> some nuns sitting in a courtroom refused to rise when the judge entered. They were held in contempt, even though the court might have no power "to require . . . purely ceremonial or symbolic acts," because it was thought that rising on the judge's entrance "probably serves to remind all that attention must be concentrated upon the business before the court, . . . and [that] there must be silence . . . ."<sup>73</sup>

The issues here are similar to the dress violation issues, with added overtones of historical notions about the propriety of religious submission to state authority. Religious problems aside, there is, on the one hand, the need for some sort of solemnity to the occasion of a trial (as anyone who has spent time in justice of the peace courts will know), and, on the other hand, the matter of individual freedom. Once again, the problem of providing a suitable atmosphere seems relatively remote, and it is not likely to be a problem at all if the other mechanisms of trial do not break down. Surely it is doubtful whether the court in approving such a contempt conviction has given a very strong reason for it.

---

between an Angora goat and a baboon." The appeal is based on the legal premise that Anglo-American jurisprudence provides no "standards or judge's opinions" as to what constitutes improper appearance. It is also founded on the historical fact that President Van Buren's hair resembled a "koala bear" and Justice Holmes's "a cross between a moose, a yak and an European aoudad." Ithaca (New York) J., Oct. 17, 1970, at 2, col. 1.

<sup>71</sup> See M. ROKEACH, *THE OPEN AND CLOSED MIND* (1960). This book deals largely with intolerance of the "belief systems" of others as distinct from intolerance of race or class of others. However, a person's dress or demeanor may (reasonably) lead others to think he holds certain fairly well-defined beliefs. The judge's robe, the nun's habit, the hippie's beard may all convey in symbolic shorthand the main outlines of the subject's beliefs and values.

<sup>72</sup> 412 F.2d 848 (7th Cir. 1969).

<sup>73</sup> *Id.* at 850.

In some cases it may be that the judge's social or ideological bias leads him to classify an act as contempt, even though there is nothing inherently contemptuous involved. It may lend perspective to consider Voltaire's report of the ancient case of George Fox, founder of the Quakers, who was taken before a justice of the peace in England in the middle of the seventeenth century. Fox committed two acts of contempt, neither of which could conceivably have hindered or distorted a fair proceeding: he failed to remove his cap, and he used the familiar words "thee" and "thou" rather than the more formal and respectful word "you."<sup>74</sup> He was taken to prison and flogged.<sup>75</sup>

The judge was a part of a social system that did not embrace democratic values, one that distinguished between those who might become judges and those, like Fox, who might be only the sons of silkweavers. In this system respect was expected, not because it was important to a fair and efficient trial, but because the social distinction was carried into the courtroom just as it was carried everywhere else. The point is an important one, for it may be that in both the symbolic act cases and in the insult cases, social or class distinctions are being carried into the courtroom. It may well be that those who refuse to make obeisance by rising or doffing their caps are protesting, not the judge's authority as such, but the social distinctions that obeisance seems to imply.

A modern example of this problem occurred in *Johnson v. Virginia*,<sup>76</sup> where a Negro sat in a traffic court in a place theretofore reserved for whites. He refused to move when instructed to do so and was held in contempt. The United States Supreme Court reversed his conviction since, in substance, it was a conviction for violating the constitutionally-impermissible policy of segregated seating.

This case illustrates how a symbolic act may be regarded as very

<sup>74</sup> The following colloquy occurred during the Chicago Conspiracy Trial:

MR. DELLINGER: Mr. Hoffman, we are observing the moratorium.

THE COURT: I am Judge Hoffman, sir.

MR. DELLINGER: I believe in equality, sir, so I prefer to call people mister or by their first name.

THE COURT: Sit down.

CONTEMPT: TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY 10, at 45 (1970).

<sup>75</sup> VOLTAIRE, PHILOSOPHICAL LETTERS 11-12 (E. Dilworth transl. 1961). It seems reasonably clear that Fox was indeed mistreated, and also that there was much judicial trouble for all Quakers. See note 87 *infra*. On the other hand, Sewel's account of these incidents, though it reports trouble over "thee" and "thou," does not specifically report a contempt conviction before the justice. See I.W. SEWEL, THE HISTORY OF THE RISE, INCREASE AND PROGRESS OF THE CHRISTIAN PEOPLE CALLED QUAKERS 74-75 (1856).

<sup>76</sup> 373 U.S. 61 (1963).

important by both the judge and the contemnor. For each it will express social values. To a large extent this is inevitable and not altogether undesirable. But in a pluralistic society where differing values coexist in the community at large, judges act inappropriately when they enforce their own values by requiring symbolic acts not directly related to the needs of judicial administration. A judicial system that seeks conformity to the judge's values in trivial matters will eventually fail; it will necessarily alienate large numbers of people by ethnocentric attitudes, and ultimately respect for the legal process will suffer. It seems especially important, then, that judges act most moderately in these symbolic act cases.

### 5. *Insult and Insolence*

It is generally assumed, both in the common law and non-common law systems, that in at least some circumstances the insult of an official, such as a judge, is properly punishable. The system of law under the United States Constitution, however, puts careful limits on the power to punish for mere insult. The first amendment guarantees free speech and may prevent the use of contempt power to punish critical speech, even when it is critical of judges and courts.<sup>77</sup> Similarly, the first amendment permits to public officials an action for defamation against their critics only when criticism of their official conduct is knowingly or recklessly false.<sup>78</sup> More authoritarian systems may reject these limits and see insult of officials as a threat rather than as a prized right of citizens.<sup>79</sup>

When insult occurs in the course of judicial proceedings, the impact of the first amendment may be minimized by the need for a fair and speedy trial. On the other hand, a passing insult that does not hinder the operation of the trial is probably not a sufficiently important matter to merit elaborate attack through use of the contempt powers.

If it is believed that the judicial system cannot bear insults and that whenever reasonably possible insults should be punished, there remain problems. It is very easy in the heat of trial to make statements in anger and frustration that one would not consider making elsewhere. And since the trial judge may be personally involved and feel personally

---

<sup>77</sup> See text accompanying notes 92-96 *infra*.

<sup>78</sup> See *St. Amant v. Thompson*, 390 U.S. 727, 730-32 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-83 (1964).

<sup>79</sup> The Russian Code, R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) § 192, provides in part: "Publicly insulting a representative of authority . . . who is fulfilling duties for the protection of public order . . . shall be punished by correctional tasks" for a term of no more than one year or a fine. Article 192-1 imposes punishment not to exceed six months confinement for insulting a policeman.

insulted, it may be very difficult for him to achieve any reasonable perspective on the "insulting" statements.

In *In re Hallinan*,<sup>80</sup> the following colloquy took place in a trial in which Mr. Hallinan, a lawyer, represented a defendant charged with a battery on a police officer:

MR. HALLINAN [petitioner]: And I move for a mistrial.

There have been too many comments by this court as to what is—I ask for a mistrial now upon the ground that the Court had no right to state that there was an assault upon Officer Gutierrez.

THE COURT: Maybe if you'd listen once, Mr. Hallinan,—

MR. HALLINAN: That is what you said.

THE COURT: If you listened to what I said, I said "the alleged assault."

MR. HALLINAN: I like to hear it—to have that read back.

THE COURT: Read it, Mr. Reporter.

(Record read by the Reporter: "THE COURT: It doesn't explain the alleged assault upon Officer Gutierrez. This man wasn't involved with that, Mr. —")

MR. HALLINAN: I see I am sorry. I apologize on that.

THE COURT: Your apologies are accepted, Mr. Hallinan.

MR. HALLINAN: But I do say, if the Court please, that the rulings of the Court have been such that I have contemplated several times asking for a mistrial, and I'm going to do it if they are continued in this fashion.

THE COURT: Well, Mr. Hallinan, if you are inferring that this Court is siding with anybody here, I cite it as contempt.

MR. HALLINAN: No, I'm not saying that at all. But I say that the restrictions that have been imposed upon the evidence are unfair to the defendant.

THE COURT: Well, I cite that as contempt also, Mr. Hallinan.

MR. HALLINAN: Well, I'm sorry. I did not intend it as such. I have known you for a long time. I have great respect for you.<sup>81</sup>

Reading a cold record, it is a little difficult to find insolence in the words spoken by Mr. Hallinan. Yet the trial judge found contempt here and sentenced the attorney to five days in jail. The California Supreme Court reversed the contempt conviction, with the observation that where the language itself is not insolent, a mere recital in conclusory terms that the contemnor spoke in an insulting tone of voice is not enough to support conviction. The court went on to point out that attorneys must be given substantial freedom of expression if they are to work in an adversary proceeding, and it noted further that in the "heat of courtroom debate" a certain amount of persistence by attor-

---

<sup>80</sup> 71 Cal. 2d 1179, 459 P.2d 255, 81 Cal. Rptr. 1 (1969).

<sup>81</sup> *Id.* at 1181 n.2, 459 P.2d at 256 n.2, 81 Cal. Rptr. at 2 n.2.



neys is to be expected. Thus, the court said, where the words used are pertinent, "it is not unnecessarily burdensome to require the judge first to warn the attorney that his tone and facial expressions are offensive . . . ." <sup>82</sup>

Mr. Hallinan won his case, but only after going to the Supreme Court of California. What may be most significant, however, is not that he won, but that he was charged in the first instance. This is not an uncommon pattern,<sup>83</sup> though in some cases even an appeal does not yield protection, and a lawyer is fined not only for such conduct as persistent requests for recess but also for "the manner in which he [made them]."<sup>84</sup>

There are cases in which attorneys have rather clearly gone too far, even considering the strong policy reasons for allowing the attorney wide latitude in the forceful representation of his client. A Mr. Schiffer, in a famous trial involving charges of jury tampering against James Hoffa and others, accused the trial judge of acting as an affiliate of the prosecution and implied that he suppressed important evidence for the defense. He referred to a "drum head court martial" and a "star chamber proceeding," saying "justice is finished in America." The court had no difficulty in finding this to be contempt,<sup>85</sup> and no doubt was correct in doing so. At some point there is more involved than insult; there is a demeanor that converts serious search for truth and justice into a rally run on rhetoric. And it is this, not insult, that justifies the contempt sentence in such cases.

<sup>82</sup> *Id.* at 1185, 459 P.2d at 258, 81 Cal. Rptr. at 5, quoting *Gallagher v. Municipal Ct.*, 31 Cal. 2d 784, 797, 192 P.2d 905, 913-14 (1948).

<sup>83</sup> See *Offutt v. United States*, 232 F.2d 69 (D.C. Cir.), cert. denied, 351 U.S. 988 (1956). In this case, a lawyer was charged with making insolent and insulting remarks to the trial judge and with asking witnesses questions which were highly prejudicial and without foundation. The trial judge found the lawyer in contempt, refused to permit evidence that the lawyer was not insulting or insolent or that the questions were relevant, and refused to permit evidence that the judge was antagonistic toward the lawyer and his client. The contempt conviction was reversed, and the evidence was required to be admitted.

<sup>84</sup> *In re Osborne*, 344 F.2d 611, 615 (9th Cir. 1965). Mr. Osborne, attorney for a man accused of forging government checks, repeatedly requested a recess and complained that the court was not using normal hours. He argued that by not allowing a recess the court was depriving him of time needed for seeing witnesses and hence depriving his client of a fair trial. His manner was clearly aggressive and the judge described it as surly, defiant, and contemptuous. The trial judge also said he thought all of this was done deliberately for the purpose of making the jury believe the court was prejudiced toward counsel and his client. But in the two pages of fine print constituting the record and judgment of contempt, nothing more than irritating requests and spirited advocacy for recess appear. The court apparently did not ask Mr. Osborne to cease this behavior or conduct any in-chambers colloquy with him.

<sup>85</sup> *United States v. Schiffer*, 351 F.2d 91, 94 (6th Cir. 1965), cert. denied, 348 U.S. 1003 (1966).

Several points in these cases are worthy of comment. First, it is often extremely difficult to ascertain what went on in the courtroom or why the contemnor is being charged. In contrast with the detailed reporting of the proceedings in the *Hallinan* case, a number of cases merely report in general terms that the alleged contemnor was "argumentative and arrogant" or that he was guilty of "open defiance" or "disorderly conduct."<sup>86</sup> Second, the cases that are adequately reported often reflect misbehavior by the judge. Sometimes it is behavior that would be regarded as contempt if committed by others.<sup>87</sup> At other times judges provoke irritable responses from attorneys by their own hostility or unprofessional conduct. At still other times judges seem willing to find misbehavior by attorneys or others where it simply does not exist. Appellate courts have frequently been forced to consider the provocation factor. In *In re Abse*,<sup>88</sup> a trial judge accused an attorney of unprofessional conduct. The attorney sought to be heard on the issue thus raised and insisted on this right until he was held in contempt. The appellate court reversed his conviction, emphasizing his right to be heard after a personal attack. Similarly, the judge's hostility to an attorney has been considered relevant in judging whether an attorney's response is contemptuous or whether it might be, under the circumstances, understandable and permissible.<sup>89</sup>

These two points—that contumacious behavior is often not specifi-

<sup>86</sup> In *In re Du Boyce*, 241 F.2d 855 (3d Cir. 1957), Mrs. Du Boyce, who was attempting to represent herself, was charged with contempt since she had a "complete misconception of judicial procedure" and refused to retain counsel. The conviction was affirmed.

<sup>87</sup> Judges have been known to berate juries for verdicts of which the judges disapproved, surely a contempt if committed by others.

According to William Penn's account, the judges severely menaced the jury in Penn's case, threatening to lock up the jury "without meat, drink, fire, and tobacco" when it brought in a not-guilty verdict. One of the judges said he would cut the foreman's throat, and another said he recognized for the first time the "prudence of the Spaniards, in suffering the inquisition among them: And certainly it will never be well with us, till something like unto the Spanish inquisition be in England." When the jury refused to vote "guilty," each juror was imprisoned for contempt, as was William Penn. Trial of Penn & Mead, 6 How. St. Tr. 951, 965-70 (1670). The jury, however, was released on habeas corpus. See *id.* at 969.

Max Radin commented bitinglly that

[e]vidently a court must have dignity or it will be a bad court, although not necessarily an impotent one. There have been truculent and brutal judges—Braxfield, Jeffreys, Kenyon—without much sense of dignity but terrible enough to the hapless litigants and practitioners before them.

Radin, *Freedom of Speech and Contempt of Court*, 36 ILL. L. REV. 599, 609 (1942) (footnote omitted).

<sup>88</sup> 251 A.2d 655 (D.C. Ct. App. 1969).

<sup>89</sup> *People v. Pearson*, 98 Ill. App. 2d 203, 240 N.E.2d 337 (1968) (the statement "your bias is showing," in response to judicial hostility, was held not contemptuous under the circumstances).

cally described in the appellate opinions, and that it is often induced by judicial misbehavior—are of special importance where the contempt consists of non-obstructive disrespect. The necessity for proceeding with trial no doubt justifies dealing with both obstruction and disruption by the contempt power, even though this may risk misjudgment by the trial court. Where nothing more than disrespect or discourtesy is involved, however, the dangers of abuse of contempt power may outweigh the benefits of using that power. The readiness of some judges to find contempt in perfectly respectful conduct, and readiness of others to induce it by behavior on the bench, suggest these dangers of abuse. Finally, it should be emphasized that mere personal insult or irritating conduct should not readily be accepted as contempt. The nature of the trial as an honest human effort to reach a just result must be preserved and enhanced, and no person by his conduct should create an atmosphere that makes this impossible. But personal discourtesy or insult is on an altogether more trivial plane, and a certain amount of that should be tolerated when it falls short of interfering with the nature of the trial.<sup>90</sup>

#### 6. *Out-of-Court Publications*

Publications made in court will usually involve situations already mentioned—disruption, obstruction, or insult—and will be dealt with as such. However, a publication can also be made out of court, by advertisement, news story, editorial comment, or otherwise. These out-of-court publications are obviously not disruptive. Nevertheless, they may obstruct the fair application of the judicial processes. For example, if one comments strongly about what should be done in a pending case, this may tend to influence the judge or jurors involved. It may operate as a form of social pressure that approaches intimidation. Every judicial system that tries to ensure both fair trial and free speech must cope with this problem.<sup>91</sup>

---

<sup>90</sup> Judicial dignity is an important element of our system and serves a real legal function. . . . It is, however, not a legal duty to be well mannered and it may even be said that it would be unconstitutional to make it one.

But there is no reason why the dignity of the court should take such dimensions or assume such a character that it demands awe or veneration. There is no *crimen laesae maiestatis* in the United States . . . .

Radin, *supra* note 87, at 610-11 (footnote omitted).

<sup>91</sup> The French Penal Code, C. PÉN. art. 227 (61e ed. Petits Codes Dalloz 1964), provides punishment for anyone who publishes comments tending to exert pressure on the testimony of witnesses or on decisions of trial judges before final judicial decision. Similar provisions appear in ¶ 452 of the 1962 German Draft Penal Code, 11 AMERICAN SERIES OF FOREIGN PENAL CODES 237 (N. Ross transl. 1966).

One solution would be to insist that all comment be reserved until cases have been finally decided. This approach has been rejected by the Supreme Court's holding that certain contempt citations are unconstitutional as abridging freedom of speech or of the press.<sup>92</sup> Although fair trials represent a primary value, free criticism is considered to be the ultimate guarantor of the fair judicial process. If the press were required to comment only after a proceeding was finally terminated, journalists would become historians, with little to say about the judicial system to ordinary people. Thus, it has been thought that comment on pending cases could not be automatically foreclosed.

The opposite approach would be to allow comment outside the courtroom without any threat of contempt citations whatever. This approach is required by statute in the federal courts,<sup>93</sup> although of course it does not affect state courts.

For the state courts, unless they are regulated by state statute, neither course is available; they may not automatically punish for published comments, even about pending trials, nor are they bound to permit all such comments. Rather their power to punish for contempt committed by published comment is limited by the constitutional free speech requirement, balanced by fair trial considerations. The Supreme Court decisions hold that comment on pending cases may be punished by contempt sanctions if, but only if, it presents a clear and present danger to fair trial.<sup>94</sup>

The danger, the Court has said, must not be remote. It is not even enough that it be probable. To justify use of the contempt power to shut off free speech, the danger must be immediate.<sup>95</sup> Under this standard, it seems reasonably clear that out-of-court publications expressing disrespect for the judiciary—insult cases—are not enough to justify use of the contempt power. Out-of-court criticism concerning a case pending or concluded is hardly likely to hamstring the fair administration of justice.<sup>96</sup> In addition, the Court has pointed out that the protection of the judiciary from disrespect may backfire:

---

<sup>92</sup> *E.g.*, *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941).

<sup>93</sup> 18 U.S.C. § 401 (1964) limits the power of federal courts to punish for contempt and specifically requires that any contempt punishments must be only for misbehavior in the presence of the court or "so near thereto" as to obstruct administration of justice. This in effect forbids use of contempt punishments to regulate out-of-court comment on trials. *See Nye v. United States*, 313 U.S. 33 (1941).

<sup>94</sup> *Pennekamp v. Florida*, 328 U.S. 331, 334-36 (1946).

<sup>95</sup> *Craig v. Harney*, 331 U.S. 367, 376 (1947).

<sup>96</sup> *In re Bozorth*, 38 N.J. Super. 134, 118 A.2d 430 (1955) (clergyman's letter to newspaper implied judge was improperly influenced in liquor matter; held no contempt, the

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.<sup>97</sup>

Not all of these cases are so easy, however. Some criticism goes beyond insult and disrespect to exert social pressure and perhaps political pressure on the judge or juror. To some extent, any serious criticism about a pending case will have this effect. In *Bridges v. California*,<sup>98</sup> one of the defendants in a contempt trial had published an editorial saying it would be a terrible mistake if convicted union "gorillas" were put on probation. At the time, the judge had scheduled a hearing to consider probation for the convicted men. The publisher's contempt conviction was justified on the ground that this kind of editorial—which was certainly very strong and in very crude taste—would reasonably tend to influence a judge's decision. The other defendant in the case, Harry Bridges, had sent a telegram to a federal official, in effect threatening a strike in the event a certain judicial decision went against him. He too was held in contempt. The Supreme Court reversed both convictions, however, setting forth the clear and present danger test and concluding that no immediate danger to the judicial process was presented that would justify curbing free speech. In considering the probable effect of these publications on the then-pending cases, the Court pointed out that in both the judges could not have been unaware of the points of view expressed, and would have expected their existence in the community even if they had not been expressed by the defendants.

A few years later the Supreme Court reaffirmed its position in reversing contempt convictions of a newspaper publisher and writer who had been extremely critical of certain judicial behavior.<sup>99</sup> Here, the Court pointed out that one should not indulge an assumption "against the independence of judicial action" in determining the existence of a clear and present danger to the administration of justice.<sup>100</sup>

---

clear and present danger test applies to writings published after decision as well as while case is pending).

<sup>97</sup> *Bridges v. California*, 314 U.S. 252, 270-71 (1941) (footnote omitted).

<sup>98</sup> 314 U.S. 252 (1941).

<sup>99</sup> *Pennekamp v. Florida*, 328 U.S. 331 (1946).

<sup>100</sup> *Id.* at 349.

This same position was expressed in *Craig v. Harney*,<sup>101</sup> where a paper, in criticizing a local judge and reporting efforts to force him to grant a new trial, inaccurately reported the facts. Even so, its contempt conviction was reversed. The Court thought inaccurate reporting was probably endemic to the journalistic tribe. And as to the criticism, the Court thought that "vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice."<sup>102</sup>

More recently, in *Wood v. Georgia*,<sup>103</sup> a sheriff, in a press release, criticized a trial judge's charge to the grand jury, characterizing it as "either . . . a crude attempt at judicial intimidation of negro voters and leaders, or, at best, . . . agitation for a 'negro vote' issue . . ." <sup>104</sup> The sheriff was convicted of contempt, but the Court reversed the conviction, once again stating the requirement of clear and present danger.

Some state courts have utilized the same standard. In a recent Virginia case,<sup>105</sup> an editorial criticized a court on a redistricting matter, saying that "Judge Jones didn't have the guts to order a redistricting" and that any judge who "can't see the inequity in such a spread in population as Rocky Mount district's 8880 and Snow Creek's 2540" is blind.<sup>106</sup> The Virginia Supreme Court of Appeals reversed the summary contempt conviction on the ground that, though "intemperate and unwarranted," the editorial would not clearly endanger the course of justice and that the contempt conviction could not stand without a showing of clear and present danger.<sup>107</sup>

A number of other decisions seem in accord with this attitude. Thus, an advertisement referring to an important pending test case and expressing a point of view on it was not a clear and present danger.<sup>108</sup> In a Colorado case,<sup>109</sup> a newspaper editor published an attack on the Supreme Court of Colorado. Understandably, since he did not investigate, he had his facts distorted, and said some unpleasant things about the court. Nevertheless, the Colorado court held him not guilty of contempt, even though the statements were inaccurate and grossly unfair. The court said that it was "absurd" to think that the editorial

---

<sup>101</sup> 331 U.S. 367 (1947).

<sup>102</sup> *Id.* at 376.

<sup>103</sup> 370 U.S. 375 (1962).

<sup>104</sup> *Id.* at 379.

<sup>105</sup> *Salyer v. Commonwealth*, 209 Va. 662, 166 S.E.2d 110 (1969).

<sup>106</sup> *Id.* at 663, 166 S.E.2d at 111.

<sup>107</sup> *Id.* at 665, 166 S.E.2d at 112.

<sup>108</sup> *Crosswhite v. Municipal Ct.*, 260 Cal. App. 2d 428, 67 Cal. Rptr. 216 (1968).

<sup>109</sup> *In re Jameson*, 139 Colo. 171, 340 P.2d 423 (1959).

comments would affect the court's ability to render an impartial decision.<sup>110</sup> In a Georgia case,<sup>111</sup> a newspaper published statements about the accused in a criminal trial that would not have been admissible in evidence and that were clearly prejudicial. But since these statements were published after the jury had been empaneled, and since the primary responsibility for keeping publicity from the jurors lay with the trial judge, a contempt conviction was set aside.<sup>112</sup>

Other decisions, however, seem to be unsympathetic to the constitutional standards. And, because neither the Federal Constitution nor the Supreme Court decisions are cited in some of these cases, one suspects that the lawyers and judges may be unaware of their relevance. In an Arkansas case, *Tupy v. State*,<sup>113</sup> a citizen published and distributed a pamphlet referring to a "Set-up Grand Jury." From the context, this apparently was meant as a criticism of the circuit judge for selecting the jury commissioners by consulting with courthouse officials. There were other charges in the pamphlet, the thrust of which was not so clear; for example, a plot to "white wash the accused" was alleged, without an indication of who the plotters were.<sup>114</sup> The citizen's complaints netted him a conviction for contempt of court. Not only does the result seem at odds with the United States Supreme Court decisions,<sup>115</sup> but the Arkansas court's attitude seems basically unconcerned with the free speech considerations involved. The state court did not demand proof of clear and present danger but rather appears to have assumed such a danger existed. Moreover, the opinion makes it clear that the court believed any critical and degrading comments about courts would be punishable.<sup>116</sup>

Although mere criticism of judges or abstract denunciations of the "system" seldom if ever pose any substantial threat, some publications may well have strongly intimidating effects, particularly on the non-

---

<sup>110</sup> *Id.* at 181, 340 P.2d at 428.

<sup>111</sup> *Atlanta Newspapers, Inc. v. State*, 216 Ga. 399, 116 S.E.2d 580 (1960).

<sup>112</sup> On quite similar facts the same result was reached in *Worcester Telegram & Gazette, Inc. v. Commonwealth*, 354 Mass. 578, 238 N.E.2d 861 (1968), where the court pointed out that a mistrial was properly granted at defendant's request. However, "[f]rom the mere fact that a written publication has resulted in a mistrial . . . it does not necessarily follow that the publishers of the article are automatically . . . in contempt . . ." *Id.* at 581, 238 N.E.2d at 863. The court, noting that petitioners had no wilful design to affect the trial, held that a clear and present danger did not exist and that a contempt conviction was unwarranted. *But see* *Baltimore Radio Show, Inc. v. State*, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950).

<sup>113</sup> 234 Ark. 821, 354 S.W.2d 728 (1962).

<sup>114</sup> *Id.* at 823, 354 S.W.2d at 729.

<sup>115</sup> *E.g.*, *Wood v. Georgia*, 370 U.S. 375 (1962).

<sup>116</sup> 234 Ark. at 823, 354 S.W.2d at 729.

professional personnel of the judicial processes—jurors and witnesses. No doubt there is room for some latitude in judgment in such cases. In *Dawkins v. State*,<sup>117</sup> a grand jury apparently had been convened to consider charges that police officers were “having improper relations with female prisoners at the jail.” Mr. Dawkins circulated a mimeographed handbill near the grand jury room which alleged that the grand jury investigation was “fixed” in an effort by whites to smooth over the charges. The handbill went on to say that the grand jury “is just as racist and klan infested as the police department,” and that when it “got through lying, fixing, framing, and denying—nothing was going to be done!” The handbill then suggested that some “Uncle Toms” would be put on the grand jury and ended by saying that the “so-called Negro-leaders in Gainesville” were afraid to stand up and were “a part of white oppression.”<sup>118</sup> The trial judge found in the contempt hearing that the handbill was distributed in the corridor where witnesses were waiting their turn to testify, and that it could be expected to influence their testimony. He also concluded that the reference to “Uncle Toms” was a veiled threat to Negro grand jurors, indicating that unless they voted “right,” they would suffer the censure of the black community. Grand jurors testified that in fact the handbill did intimidate them. The contempt conviction was affirmed with the comment that the handbill represented not “mere criticism” but the equivalent of jury-tampering.

This set of facts represents the kind of situation in which reasonable people might well find a clear and present danger to the judicial process, though it may be possible to conclude otherwise. The publication here was no abstract criticism, no mere defamation; it could well have operated to intimidate, and there was in fact evidence that it did so.

Although intimidation could be found in *Dawkins* and contempt therefore seems proper, the case illustrates one of the fundamental defects of the use of contempt punishments. *Dawkins* may well have thought he was acting legally; no order requiring him to move was given.<sup>119</sup> Few other crimes exist without a statute, and not only a statute, but one that clearly states what is forbidden. Yet Mr. Dawkins had no such warning, either by statute or by court order, and he may well have believed that he was simply stating “the truth”—crusaders usually do believe that—and that he was acting within his rights.

---

<sup>117</sup> 208 So. 2d 119 (Fla. Dist. Ct. App.), *cert. denied*, 211 So. 2d 211 (Fla.), *cert. denied*, 393 U.S. 854 (1968).

<sup>118</sup> *Id.* at 121.

<sup>119</sup> *Cf. In re Hennis*, 276 N.C. 571, 173 S.E.2d 785 (1970).



In some cases the question is one of judgment: did the publication represent a clear and present danger to the judicial process or to fair trial? This alone is a difficult question. Other cases, however, raise more complex issues.

*United States v. Tijerina*<sup>120</sup> is one of the latter. A man named Reies Tijerina had assumed leadership of a group of Spanish-Americans in New Mexico. His group asserted that land had been taken from its former owners in violation of the treaty terminating hostilities with Mexico.<sup>121</sup> Tijerina, apparently believing that all or part of the national forest belonged to him and his followers, led them into that forest, asserted sovereignty over it, and, with the aid of a threatening mob, arrested United States forest rangers for trespassing.<sup>122</sup> He and others were charged with assault on the rangers and conversion of certain government vehicles, probably fairly mild charges against one who claims to have set up a rival "kingdom." Tijerina and his followers had been involved in other political activities in New Mexico, and there is not much doubt that they had had a considerable impact on the state, with a good deal of attendant publicity.<sup>123</sup> The trial judge held a pre-trial hearing to discuss the problem of pre-trial publicity with counsel

---

<sup>120</sup> 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

<sup>121</sup> The Treaty of Guadalupe Hidalgo with Mexico, March 16, 1848, 9 Stat. 922, T.S. No. 207. Article VIII specifically provided that Mexicans established in ceded territories would be allowed to remain and retain the property they possessed.

Tijerina's contention seems rather dubious. The Mexicans specifically retained title in all lands in New Mexico if they had previously owned them. When Congress subsequently donated 160 acres to every adult white man in New Mexico, provisions were made for the Surveyor General to ascertain Mexican ownership and to set aside such lands. Act of July 22, 1854, ch. 103, §§ 2, 8, 10 Stat. 308-09. This task seems to have been carried out at great length and in great detail. *See, e.g.*, the Surveyor General's work on these claims in H.R. EXEC. Doc. No. 58, 36th Cong., 2d Sess. (1861) (recommending confirmation of certain claims).

<sup>122</sup> *United States v. Tijerina*, 407 F.2d 349, 351-53 (10th Cir.), *cert. denied*, 396 U.S. 843 (1969). This opinion was reported separately from the contempt conviction under discussion.

<sup>123</sup> For instance, the previous summer Tijerina was reported to have led a raid on a courthouse in which two lawmen were critically wounded and a deputy sheriff and a reporter were taken hostage. The Governor of New Mexico ordered out several hundred National Guardsmen. Tanks were used in an effort to capture Tijerina, and the Guard took hostages of its own, with an unusually casual dismissal of civil rights. ("Let's don't talk about civil liberties now.") *NEWSWEEK*, June 19, 1967, at 37-38. In this "manhunt," some 50 people were herded into a "dung-filled cowpen" and held for two days without food, clothing, or sanitary facilities. *THE NEW REPUBLIC*, July 1, 1967, at 10-11. According to another report, a huge area of New Mexico was under virtual "siege" by Spanish-Americans who cut miles of fence, poisoned wells, killed cattle, and burned crops. *TIME*, Nov. 29, 1968, at 17. There were further events, notably a long state court trial, but they occurred after the events involved in the federal contempt charge. *See NEWSWEEK*, Dec. 23, 1968, at 30.

for all the parties. Defense counsel had previously suggested an order prohibiting extrajudicial statements, and the court made such an order, submitting the proposed draft to counsel in advance. It forbade any party or counsel to

make or issue any public statement, written or oral, either at a public meeting or occasion or for public reporting or dissemination in any fashion regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the Court.<sup>124</sup>

No objection was made to this order. Nevertheless, Tijerina and a co-defendant both made speeches at a Convention of Free City States, which was public and which was fully reported by television and other news media. Tijerina said, among other things:

We know that the Judge has taken the power in his own hands. We know that the Judge is using the law to take vengeance and drink blood and humiliate our race. In this case we can advise the Negro pueblo of what is going on and they can come out and march around the court house. This is their business.<sup>125</sup>

A co-defendant advocated a war with the United States, to commence at the beginning of the trial, and argued for a scorched-earth policy: "We must burn every tree, every blade of grass, every building within the kingdom."<sup>126</sup> The speakers were held in contempt, and their convictions were affirmed.

This case raises a troublesome point that is also involved in disruption cases. What is to be done about the defendant who by his own actions makes a fair trial impossible or unlikely?<sup>127</sup> It seems probable that Tijerina's statements, though apt to incite his supporters, would be unlikely to prejudice the government's case at trial. Since most jurors would probably react adversely to these statements, fair trial may well have been prejudiced, but prejudiced against the speakers. That being so, could Tijerina appropriately be held in contempt for prejudicing himself?<sup>128</sup> The court discussed the contempt question

---

<sup>124</sup> 412 F.2d at 663 n.1.

<sup>125</sup> *Id.* at 665.

<sup>126</sup> *Id.*

<sup>127</sup> The significance of this problem has been illustrated by the current trial of Charles Manson and his cohorts for the grotesque and widely-publicized murders of a prominent movie starlet and several socialites. President Nixon, in a speech to law-enforcement officials in Denver, had intimated that Manson was clearly guilty. Despite elaborate efforts by the trial judge to shield the jurors from possible prejudice, Manson himself intentionally displayed a banner headline of the story within the view of the jury. *N.Y. Times*, Aug. 5, 1970, at 1, col. 2.

<sup>128</sup> It is conceivable, of course, that his statements prejudiced the government's case,

only in connection with the defendants' violation of the silence order, and did not concern itself with the separate question of whether the defendants could be held in contempt for prejudicing their own fair trial.<sup>129</sup>

Another point in *Tijerina* is of much broader concern. The court used a pre-trial order to forbid publications outside the court. Assuming the publications were permissible if no order had been issued, would the defendants' violation of the order present grounds for contempt sanctions that would not otherwise exist? This really involves two questions: was the order a valid one? And if it was not, is it nevertheless permissible to impose sentences for violation of an invalid order?

The court in *Tijerina* took the last question first. It pointed out the black-letter rule: "When a court has jurisdiction of the subject matter and person, its orders must be obeyed until reversed for error by orderly review."<sup>130</sup> This view has, indeed, been the law of criminal contempt.<sup>131</sup> The Supreme Court has said that even where jurisdiction of the subject matter was lacking, the court's order must be obeyed until it is set aside.<sup>132</sup> In other words, there are situations in which it has seemed more important to insist on orderly judicial processes than upon validity of the court's order. In such cases, contempt sentences have been imposed even when the defendant's only wrong was to violate an order that itself was wrong. But in other instances it may be important to limit judicial power and correspondingly to preserve individual freedom. Thus, in some cases, not at all well-defined, courts have refused to permit contempt convictions for the violation of improper court orders, presumably in the belief that enforcement of an unlawful order is itself more unlawful than its violation and more apt to lessen respect for the process.<sup>133</sup>

---

but, given the requirement that the threat of prejudice be clear and immediate, this does not seem to have been proven.

<sup>129</sup> What the court said in connection with the silence order, however, implies that its answer would have been in the affirmative:

The theory of the defense seems to be that because the order was entered for their protection, they cannot be charged with a violation. We do not agree.

The public has an overriding interest that justice be done in a controversy between the government and individuals . . . .

412 F.2d at 666.

<sup>130</sup> *Id.*

<sup>131</sup> *E.g.*, *Friedman v. Friedman*, 224 So. 2d 424 (Fla. Dist. Ct. App. 1969); *Green v. Griffin*, 95 N.C. 50 (1886).

<sup>132</sup> *United States v. UMW*, 330 U.S. 258 (1947). See *Dobbs, The Validation of Void Judgments: The Bootstrap Principle* (pts. 1-2), 53 VA. L. REV. 1003, 1241 (1967).

<sup>133</sup> See *Ex parte George*, 371 U.S. 72 (1962) (refusing to apply the bootstrap principle

Is *Tijerina* the kind of case in which a court's order must be obeyed even if it is wrong? The *Tijerina* court, although recognizing an argument on the subject, assumed it was. It implied contempt sanctions were appropriate even if a pre-trial silence order was erroneous.<sup>134</sup> This may be correct, but there are at least indications that the Supreme Court might view the matter differently. Where primary constitutional rights are involved, the Court has been careful to develop special rules or procedures to avoid any limit on free speech that is not absolutely necessary. For example, the Court recently struck down an *ex parte* injunction of the sort generally authorized in other cases, solely because it enjoined a rally and thus interfered with free speech.<sup>135</sup> The Court said that "within the area of basic freedoms guaranteed by the First Amendment" an *ex parte* order cannot be justified where there is no showing that it is impossible to give opposing parties a chance to be heard.<sup>136</sup> This result not only expresses the Supreme Court's concern with the protection of first amendment rights, but it also suggests rather strongly a situation in which a party will probably be free to violate an invalid order. It is difficult to imagine the Court upholding a contempt sentence where the only act of contempt was the violation of a constitutionally-forbidden *ex parte* order. If a contempt sentence were permitted to stand, the rule against such *ex parte* orders would have little force behind it.

It seems at least possible, then, that a contempt charge based on violation of a court's silencing order will be upheld only if the order itself is valid. One other case is illustrative here. In *Johnson v. Virginia*,<sup>137</sup> a Negro refused to obey a judge's instruction to respect a racially-segregated pattern of seating in the courtroom. The Supreme Court reversed his contempt conviction, pointing out that the essence of the contempt was a failure to comply with an illegal requirement of racial segregation. In other words, the presence of an invalid order was not sufficient to justify a contempt conviction that would not be justifiable without the order. This decision is highly instructive. At the very least, it shows that disobedience of an order does not per se amount to contempt where the order itself interferes with underlying

---

used in *United States v. UMW*, 330 U.S. 258 (1947)); *In re Green*, 369 U.S. 689 (1952). Cases often describe an error of law as a jurisdictional defect and by this device are able to describe the court order involved as "void." By then refusing to use the bootstrap principle, these courts can sanction disobedience of the order. See Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 TEXAS L. REV. 854 (1965).

<sup>134</sup> 412 F.2d at 666-67.

<sup>135</sup> *Carroll v. President & Comm'rs.*, 393 U.S. 175 (1968).

<sup>136</sup> *Id.* at 180.

<sup>137</sup> 373 U.S. 61 (1963).

constitutional rights.<sup>138</sup> This suggests that one must go further and examine the validity of a silence order. Interestingly enough, the Tenth Circuit must have had similar feelings, for this is exactly what it did despite its implication that validity of the order was irrelevant.

The *Tijerina* court implicitly held that a silence order, followed by contempt proceedings, could cover broader ground than could contempt proceedings alone. It apparently believed that even if *Tijerina*'s statements would be protected from contempt sanctions under the clear and present danger test in the absence of a silence order, the order was nevertheless valid. The court indicated that the clear and present danger test did not apply where a court order forbidding speech existed, and that such an order might properly issue even in the absence of a clear and present danger.<sup>139</sup>

Where a silence order is used, opportunity should be given in advance to argue the issue of clear and present danger and to object if the order is too broad or otherwise defective. On the other hand, where an opportunity is given to all parties to be heard on the proposed silence order, no objection is made to it, and there is no effort to vacate it later, enforcement by contempt may be justified. A silence order issued without this opportunity may not furnish a sound basis for a contempt citation, but when the issue is dealt with in an adversary proceeding, it seems reasonable to deem the issue foreclosed unless review is sought. It at least serves as a warning, which all too often does not exist in contempt cases because contempt is not defined adequately. Moreover, review of such orders should be readily available,<sup>140</sup> espe-

---

<sup>138</sup> Of interest here is *Walker v. City of Birmingham*, 388 U.S. 307 (1967). In that case a state circuit court issued a temporary injunction forbidding an Easter civil rights parade without a permit as required by a city ordinance. The injunction and the ordinance were both subject to serious constitutional challenge, but the persons interested did not attempt a challenge in the courts nor did they attempt to comply by applying for a permit. Instead, they carried out the forbidden march and were held in contempt of court. This conviction was upheld in the Supreme Court, but the Court implied that a different result might have been obtained had the defendants first attempted a court challenge. "This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims." *Id.* at 318.

<sup>139</sup> We believe that reasonable likelihood [of danger to fair trial] suffices. The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial.

412 F.2d at 666.

<sup>140</sup> 28 U.S.C. § 1292(a)(1) (1964) authorizes interlocutory appeals from preliminary injunctions. Possibly a silence order would be regarded as part of internal trial administration and not an "injunction," but even so, it is possible that review could be obtained by mandamus or otherwise. *See Miller v. United States*, 403 F.2d 77, 78-79 (2d Cir. 1968). If review is not readily available, perhaps the case should be treated like an *ex parte* injunction case.

cially when the court may issue a silence order using a less demanding standard than the clear and present danger test.

The contempt cases involving out-of-court publications are troublesome. They raise a difficult conflict of values, with free speech pitted against fair trial, but indicate that where those values are in substantial conflict with one another, the fair trial concerns should prevail. At the same time, the cases insist that if we can reasonably hope to have both free speech—however offensive—and fair trial, we must refrain from contempt punishments for speech.

This resolution of the problem is not as complete as one might like. The absence of statutory regulation of some acts continues here, as elsewhere, to subject a complaining citizen to the danger that what he considers legitimate activity will be regarded as a contempt by someone else.<sup>141</sup> The tendency of courts to react strongly when derogatory remarks are made about them still exists and may color their decision whether or not a clear and present danger exists.

### 7. *Disobedience of Court Orders*

Disobedience of a court order can come about in several ways, some of which have already been discussed; for example, disobeying a court order to answer questions during trial, or violating a pre-trial silence order. Apart from these ways, however, there is an important group of cases involving disobedience to a more or less substantive order.

In such cases, the moving party usually has sought an in personam order as part of the main relief in the case. The court order is often an injunction in some form or a specific performance order. For example, it may be an order to turn over property to the court or to another party, or to convey land, or, perhaps more commonly, a prohibitory order forbidding a demonstration, a march, the continuance of a nuisance, or the violation of a trademark or copyright.

Contempts of this kind rarely offer the serious and difficult questions presented in other cases. The element of personal insult that may offend a judge and impair his deliberate judgment is not present here as it is in many disruption and obstruction cases, and the free speech element of the out-of-court publication cases is seldom involved.<sup>142</sup> The danger that a citizen can be held for the "crime" of contempt without knowing what is proscribed is minimal.<sup>143</sup>

---

<sup>141</sup> See Section VI(A) *infra*, as to the intent required.

<sup>142</sup> When a demonstration or a march is enjoined and the free speech issue is involved, serious questions may be presented. See *Walker v. City of Birmingham*, 388 U.S. 307 (1967), and discussion in note 138 *supra*.

<sup>143</sup> Vague court orders do constitute a problem for the party who must try to comply.

The kind of contempt proceeding used when a court order is disobeyed—other than one made during the course of a trial—is usually a relatively safe proceeding. It often is merely a way of compelling compliance or getting the opposing party what he is entitled to by way of relief. In such cases, the contempt power is used much the way a writ of execution might be used, though usually with more effect. The courts do run the risk, however, that the contemnor did not intentionally violate the court order, or that, in any event, he is unable to comply with the order. This may require a court to try his subjective state of mind—always a danger as well as something of a problem. It may also require a court to assume that compliance is possible even though this is not shown. In *Commonwealth ex rel. Messer v. Mickelson*,<sup>144</sup> a party who had been ordered to pay certain sums contended he had spent the money and no longer had it.<sup>145</sup> The court disbelieved him and held him in contempt. There is no way to be sure that the debtor was not being jailed for failure to pay money he did not have. By comparison, an ordinary execution writ is much safer, for property could not be executed upon and sold unless it were actually found.

What is needed here is a more serious concern than has yet been given to the element of wilfulness and ability to comply with court orders. If the burden is put squarely on the complaining party to show that the court order is being wilfully violated and that, in fact, the contemnor has the ability to comply with it, much of the danger of contempt would be removed.<sup>146</sup> But the use of the contempt power in this class of cases remains far more acceptable than it is in many of the cases that do not involve disobedience of a substantive order.

---

Happily, it was held in *International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967), that one could not be held in contempt unless the court order was clear enough to be understood.

<sup>144</sup> 196 Pa. Super. 464, 175 A.2d 122 (1961).

<sup>145</sup> It is true that the stories told on these occasions sometimes lack verisimilitude. In *Drake v. National Bank of Commerce*, 168 Va. 230, 190 S.E. 302 (1937), Mr. Drake explained that he was unable to turn over \$18,000 of corporate money to a receiver because, after collecting it, he had gone hunting and lost it. Witnesses testified to Drake's good reputation for truth and veracity, but this reputation had no doubt been formed before Mr. Drake testified to the loss of \$18,000 in cash while bird-hunting.

<sup>146</sup> Wilful violation is generally said to be required to establish criminal (but not civil) contempt. See *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *United States ex rel. Porter v. Kroger Grocery & Baking Co.*, 163 F.2d 168, 177 (7th Cir. 1947). Some cases put the burden of proof on the complaining party to show wilfulness (where required as an element) beyond a reasonable doubt but others do not. Compare *Chicago v. Hart Bldg. Corp.*, 116 Ill. App. 2d 39, 253 N.E.2d 496 (1969), with *Tusing v. State*, 241 Ind. 650, 175 N.E.2d 17 (1961). See generally Sections IV & VI *infra*.

## II

## THE MODE OF TRIAL IN CONTEMPT CASES

A. *Summary and Plenary Trials*

There are traditionally two basic modes of proceeding in contempt cases. One way of proceeding is a summary hearing in which there are ordinarily none of the trappings of the usual criminal trial: there is no indictment, no information, no jury, and sometimes not even testimony. This kind of hearing is typically triggered by an act of contempt committed in the courtroom, and it is tried, usually on the spot, by the judge who is on the bench. This may be done quite informally with the announcement, "I find you in contempt."<sup>147</sup>

The plenary hearing is usually more formal and more extensive. It is typically triggered by the filing and service of some document that operates to charge a contempt. A show cause order may be used for this purpose, and it usually requires the defendant to appear at a time certain to "show cause" why he should not be held in contempt.<sup>148</sup> Ordinarily, evidence is introduced to prove the alleged contempt. The plenary hearing will involve a jury trial in certain serious cases, but generally all issues will be decided by the judge.

If a full hearing is accorded, the judge who decides the case may be a stranger to the contempt; that is, he may be a judge to whom no contempt or disobedience was shown. However, it is quite common to find that the judge to whom contempt was shown is also the judge who sits in the contempt hearing. A rather mild provision of the federal criminal rules requires the judge to disqualify himself when the contempt involves "disrespect to or criticism of" the judge personally.<sup>149</sup> Apart from this requirement, the judge who is offended by alleged misconduct may serve in the roles of prosecutor and judge, and this remains true even in the relatively formal procedure of a plenary hearing.

Generally speaking, the summary contempt power may be used when the contempt is direct, that is, in the presence of the court,<sup>150</sup>

---

<sup>147</sup> See, e.g., *In re Hallinan*, 71 Cal. 2d 1179, 1184, 459 P.2d 255, 258, 81 Cal. Rptr. 1, 4 (1969).

<sup>148</sup> See, e.g., *Holt v. Virginia*, 381 U.S. 131 (1965). As in that case, the state's attorney is frequently asked by the judge to prepare the order and prosecute the contempt case. Private attorneys as members of the bar and officers of the court may also be asked by the judge to perform this task.

<sup>149</sup> FED. R. CRIM. P. 42(b).

<sup>150</sup> *Hancock v. Bell*, 274 Ala. 390, 391, 149 So. 2d 842, 843 (1963) (contempt committed "in the face of the court"; offender "may be instantly apprehended and punished . . . without any further proof or examination").



or so near thereto as to obstruct the judicial processes.<sup>151</sup> These rules are frequently codified in both state<sup>152</sup> and federal statutes.<sup>153</sup> Where the alleged contempt occurred outside the court's immediate presence or

<sup>151</sup> *E.g.*, *People v. Higgins*, 173 Misc. 96, 99, 16 N.Y.S.2d 302, 307 (Sup. Ct. 1939) (deputy sheriff's seduction of woman juror a contempt "in the presence of the court").

<sup>152</sup> *Arkansas:*

Contempts committed in the immediate view and presence of the court, may be punished summarily; in other cases, the party charged shall be notified of the accusation, and have a reasonable time to make his defense.

ARK. STAT. ANN. § 34-903 (1962).

*California:*

When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily. . . .

When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit shall be presented to the court or judge . . . .

CAL. CIV. PRO. CODE § 1211 (West 1955).

*New York:*

Where the offense is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily. For that purpose, an order must be made by the court . . . stating the facts which constitute the offense and which bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor . . . .

N.Y. JUDICIARY LAW § 755 (McKinney 1968).

*North Carolina:*

Contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record . . . .

N.C. GEN. STAT. § 5-5 (Repl. 1969).

*Wisconsin:*

Contempts committed in the immediate view and presence of the court may be punished summarily; in other cases the party shall be notified of the accusation and have a reasonable time to make his defense.

WIS. STAT. ANN. § 256.04 (1957).

<sup>153</sup> See 18 U.S.C. §§ 401-02 (1964). FED. R. CRIM. P. 42(a) provides for summary punishment of contempt where the judge certifies that he saw or heard the conduct constituting contempt. Otherwise, under rule 42(b), notice and hearing are required.

18 U.S.C. § 401 (1964) is derived from an 1831 statute (Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487), which provided that the power of the United States courts to inflict summary punishments for contempts was limited to the cases specified. The present statute, § 401, dropped the word "summary" and purports on its face to limit the contempt power to the specified cases and not merely to limit the *summary* contempt power. The change was probably inadvertent, occurring as it did in the Revision of 1873, which was generally intended to clarify and codify, not to change. See REPORT OF THE COMMISSIONERS APPOINTED UNDER ACT OF JUNE 27, 1866 TO PROVIDE FOR THE REVISION AND CONSOLIDATION OF THE STATUTE LAWS OF THE UNITED STATES, S. MISC. DOC. NO. 101, 40th Cong., 2d Sess. (1868). A number of mistakes were made, some of which were later corrected by Mr. Thomas Jefferson Durant, but his report is not available, and he clearly did not fully correct the earlier mistakes of the revisors. See Dwan & Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1013-14 (1938). Probably, then, § 401 is intended to restrict the summary contempt power only, with the implication that in other cases notice and hearing must be provided.

view, it is usually denominated as constructive or indirect, and a more formal hearing, with notice and presentation of evidence, must be furnished.<sup>154</sup> In a fair number of cases, the trial judge appears to have given at least an informal hearing to the contemnor, even where the contempt is a direct one.<sup>155</sup>

Although direct contempts may be punished summarily, with virtually no trial, review is of course possible. One protection built into many statutes is that the trial judge must state in his contempt order the essential facts found constituting the contempt. If he does not do so, the contempt order must be reversed.<sup>156</sup> The requirement that the judge certify or specify the acts of contempt is a good one, aimed at protecting those charged. But the certificate of the judge can be exceedingly unclear and vague even when it is quite minutely detailed, and it is often very difficult to be sure what the judge had in mind as the precise act of contempt.<sup>157</sup> Thus, though the certificate and specifica-

<sup>154</sup> *People v. Vitucci*, 49 Ill. App. 2d 171, 199 N.E.2d 78 (1964) (employer discharged juror because juror could not be at work while in court; employer in contempt, but it was indirect and bad to be instituted by show cause order).

<sup>155</sup> *See, e.g., Taylor v. Gladden*, 232 Ore. 599, 377 P.2d 14 (1962).

<sup>156</sup> *Garland v. State*, 99 Ga. App. 826, 110 S.E.2d 143 (1959); *Ponder v. Davis*, 233 N.C. 699, 65 S.E.2d 356 (1951). In the latter case the court said in part:

There is no finding of contempt in Judge Rudisill's judgment . . . hence it is without sufficient foundation to support the imposition of the fines.

In contempt proceedings it is essential that the facts upon which the contempt is based should be found and filed in the proceedings, especially the facts concerning the purpose and object of the contemnor . . . .

*Id.* at 707, 65 S.E.2d at 361. *See* note 152 *supra*.

<sup>157</sup> In *United States v. Sacher*, 182 F.2d 416 (2d Cir. 1950), the court affirmed contempt convictions on a number of specifications made by Judge Medina in the trial of eleven persons for violation of the Smith Act, 18 U.S.C. § 2385 (1964). Judge Medina's specifications were included in his certificate as required by FED. R. CRIM. P. 42(a). 182 F.2d at 430-53. A few specifications of contempt were found too vague by the appellate court, but the remaining ones were affirmed. Something of the vagueness of the specifications, when they are subjected to analysis, is indicated in Harper & Haber, *Lawyer Troubles in Political Trials*, 60 YALE L.J. 1, 10 *passim* (1951).

More recently, Judge Julius Hoffman specified a number of acts of contempt on the part of seven persons charged with conspiracy and other crimes alleged to have taken place during the 1968 Democratic Convention in Chicago. A number of these specifications consisted entirely of extended quotations from the trial transcript. Usually there was an exchange between the judge and the contemnor, but Judge Hoffman did not specify what portion of the exchange constituted contempt, nor did he indicate what there was in the exchange that made him believe it was contemptuous. In other instances, there was at least an arguable possibility that an earnest, honest effort was made by one of the defendants, Mr. Seale, to argue his own case. The certificate ought to have made clear precisely what he said and did that was contumacious. Judge Hoffman's extensive quotations from the transcript, without other indication of his views on the conduct, merely obscure the issue. *See* CONTEMPT: TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY 10 (1970).

tion may tend to protect those charged with contempt and may also facilitate review, this procedure is not always an adequate substitute for a full hearing and an adversary process.

### B. *The Direct-Indirect Test*

In many cases classification of contempts as direct is easily made. Contemptuous conduct in open court stands as the classic illustration.<sup>158</sup> And of course the contempt is no less direct if it comes in written form as a part of papers filed in the case,<sup>159</sup> although not every improper writing is a direct contempt.<sup>160</sup> Another example of direct contempt is a witness's refusal to answer a question when ordered to do so in the course of trial.<sup>161</sup>

Classification of indirect contempts can also be easily made. The disobedience of a judicial order to be performed outside the court—for example, an order to make child support payments or to cease picketing—is clearly an indirect contempt, and the party charged is entitled to a hearing in which he can deny the charge or explain his behavior.<sup>162</sup> Even refusal to obey an order to produce documents in court, though in a sense committed in the court's presence, may be explainable if the witness does not have the documents, and a hearing should be

<sup>158</sup> *E.g.*, Mayberry Appeal, 434 Pa. 478, 255 A.2d 131 (1969) (disruption, insults); Taylor v. Gladden, 232 Ore. 599, 601-02, 377 P.2d 14, 15-16 (1962):

THE COURT: Mr. Taylor, I find you in contempt of Court.

MR. TAYLOR: How much do I owe you?

THE COURT: I find you in contempt of Court and you will be here next Monday morning for contempt proceedings.

MR. TAYLOR: I can't express my contempt for you.

<sup>159</sup> Whiteside v. State, 148 Conn. 77, 167 A.2d 450 (1961); *In re Estate of Melody*, 86 Ill. App. 2d 437, 229 N.E.2d 873 (1967), *rev'd on other grounds*, 42 Ill. 2d 451, 248 N.E.2d 104 (1969) (the filing of an allegedly forged document said to be indirect contempt unless forgery was admitted, in which case it could be tried as a direct contempt).

<sup>160</sup> The Supreme Court has said that a letter to the judge as to pending matters, if contemptuous at all, is not a disruption in open court and therefore must be tried as an indirect contempt. *Cooke v. United States*, 267 U.S. 517 (1925).

It may be best if forgery is not treated as contempt at all. *See* Section I(B)(3) *supra*. Likewise, there may be limits on the use of contempt to punish written or spoken motions to disqualify the judge. *Holt v. Virginia*, 381 U.S. 131 (1965) (right to trial includes right to make such a motion); *Ponder v. Davis*, 233 N.C. 699, 65 S.E.2d 356 (1951) (a different judge must hear contempt charges arising out of such a motion, at least under some circumstances).

<sup>161</sup> *See* *Brown v. United States*, 356 U.S. 148 (1958).

<sup>162</sup> *In re S.L.T.*, 180 So. 2d 374 (Fla. Dist. Ct. App. 1965) (child support); *Clausen v. Clausen*, 250 Minn. 293, 84 N.W.2d 675 (1957) (alimony payments); *Upper Lakes Shipping, Ltd. v. Seafarers' Int'l Union of Canada*, 22 Wis. 2d 7, 125 N.W.2d 324 (1963) (injunction against picketing; though picketing was admitted, there remained issue whether injunction applied to alleged contemnor and he was entitled to hearing).

afforded when contempt is charged in such a case.<sup>163</sup> A juror who discusses the case on which he is sitting outside of court is surely in contempt, but he is surely entitled to a hearing on the question whether he did in fact discuss the case, and the contempt should be classified as an indirect one.<sup>164</sup> Publications outside court may at times constitute contempts;<sup>165</sup> if so, they are ordinarily considered indirect, and the publisher, if punishable at all, is punishable only after a hearing.<sup>166</sup>

These easy cases aside, it is often difficult to know whether a contempt can be classified as direct (and hence subject to summary punishment) or not. If an attorney for an accused in a criminal case leaves the courtroom without permission from the trial judge, he necessarily stops the proceedings and has no doubt committed a direct contempt in the court's view or presence, and is summarily punishable.<sup>167</sup> But what is to be said of the attorney who arrives late or not at all? Is his contempt committed in the court's presence? A number of courts have said not and have held that such attorneys are entitled to plenary contempt hearings, with notice and an opportunity to defend,<sup>168</sup> while a few others have considered the contempt of non-

---

<sup>163</sup> See *Galyon v. Stutts*, 241 N.C. 120, 84 S.E.2d 822 (1954), where the witness offered, and the reviewing court accepted, such an explanation. See also *In re Shapolsky*, 8 App. Div. 2d 122, 185 N.Y.S.2d 639 (1st Dep't 1959), where a contempt conviction was reversed after the court pointed out that proof would be required that subpoenaed records were in fact in the defendant's possession before contempt would be proper.

<sup>164</sup> *State ex rel. Geary v. Kelly*, 137 So. 2d 262 (Fla. Dist. Ct. App. 1962). *But cf.* *People v. Higgins*, 173 Misc. 96, 16 N.Y.S.2d 302 (Sup. Ct. 1959).

<sup>165</sup> See the discussion of contempt by publication in Section 1(B)(6) *supra*.

<sup>166</sup> *LaGrange v. State*, 238 Ind. 689, 153 N.E.2d 593 (1958) (radio broadcast about alleged plea bargaining during trial indirect contempt).

Under the federal statute, 18 U.S.C. § 401 (1964), conduct not in the geographical presence of the court, or "near thereto," may not constitute a direct contempt (although it may be conduct otherwise punishable through ordinary criminal procedures). This was the holding in *Nye v. United States*, 313 U.S. 33, 52 (1941) (based on predecessor to § 401), where two persons were charged with contempt for improperly influencing a plaintiff to dismiss his claim. Conviction was held invalid since the act was not done in the geographical proximity of the court. In some cases it is difficult to be sure whether the court is holding, on the basis of this kind of statute, that no contempt exists at all, or only that a full rather than a summary hearing must be granted for such contempt charges. The difficulty stems from the word "summary." All contempt cases are more "summary" than are full-scale criminal trials. On the other hand, the plenary trial in a contempt charge does offer counsel opportunity to be heard, and so on, while the summary contempt hearing does not. When a court says the summary contempt powers of a court cannot be invoked, it is not always clear which sense is involved, and it may mean "contempt is not a valid charge here," or it may mean "contempt is a valid charge, but a full hearing must be afforded." See *Atlanta Newspapers, Inc. v. State*, 101 Ga. App. 105, 113 S.E.2d 148 (1960) (full hearing required; contempt "not so near" court as to permit summary proceeding).

<sup>167</sup> *Thorne v. Municipal Ct.*, 237 Cal. App. 2d 249, 46 Cal. Rptr. 749 (1965).

<sup>168</sup> *E.g., Rogers v. Superior Ct.*, 2 Ariz. App. 556, 410 P.2d 674 (1966).

appearance direct and summarily punishable.<sup>169</sup> The California courts have, at least in some cases, treated the attorney's absence at trial as a hybrid situation, neither direct nor indirect, with the result that, although the attorney is not entitled to a show cause order and a formal hearing, he is entitled to an opportunity to explain his absence.<sup>170</sup>

If the attorney-absence cases illustrate the difficulties of meaningful application of the direct-indirect test, other cases illustrate the ease with which the test may be subverted or ignored. A loosely-linked line of cases involving some form of tampering with judicial personnel will illustrate this point. In *People v. Higgins*,<sup>171</sup> a deputy sheriff, charged with guarding a jury, took the opportunity to perpetrate an "act of sexual intercourse with a woman juror" and was cited in contempt for his conduct. It was held that, though the act took place in private, it was nevertheless "in the immediate view and presence of the court," since the court is comprised of jurors as well as judges.<sup>172</sup> Hence, summary proceedings for direct contempt were proper.

A number of other acts are given the same treatment. The attempted bribery of a juror, though done in utmost secrecy, is in the immediate view and presence of the court.<sup>173</sup> An assault on the judge, though not in the courthouse nor disruptive of any proceeding, is a direct contempt "committed during the sitting of any court," with the result that the victim of the assault is also the judge of his own case.<sup>174</sup> The same may be true where the "contempt" is nothing more than a scuffle of lawyers in the presence of the judge strolling through a corridor.<sup>175</sup>

These cases illustrate how readily the direct-indirect classification can be subverted. One technique is to treat the word "direct" as a term of art that does not mean what it says except through an artificial and contrived re-definition of words: an act is said to be in the presence

<sup>169</sup> E.g., *In re Clawans*, 69 N.J. Super. 373, 174 A.2d 367 (1961), cert. denied, 370 U.S. 905 (1962).

<sup>170</sup> Where counsel fails to appear, however, the offensive conduct, to wit, the absence, occurs in the presence of the court. Thus, when an absent attorney reappears in the courtroom, due process should be satisfied if the judge confronts him with the charge and offers him a reasonable opportunity to explain. *Arthur v. Superior Ct.*, 62 Cal. 2d 404, 409, 398 P.2d 777, 780, 42 Cal. Rptr. 441, 444 (1965). The "hybrid" designation was applied to this situation in *Morales v. Superior Ct.*, 239 Cal. App. 2d 947, 49 Cal. Rptr. 173 (1966).

<sup>171</sup> 173 Misc. 96, 16 N.Y.S.2d 302 (Sup. Ct. 1939).

<sup>172</sup> *Id.* at 99, 16 N.Y.S.2d at 305.

<sup>173</sup> *Ex parte Savin*, 131 U.S. 267 (1889).

<sup>174</sup> *Newby v. District Ct.*, 259 Iowa 1330, 147 N.W.2d 886 (1967); *Ex parte McCown*, 139 N.C. 95, 51 S.E. 957 (1905).

<sup>175</sup> *State v. Bুদ্ধess*, 63 Wash. 26, 114 P. 879 (1911).

of the court and the court is said to be sitting whether this is actually so or not. A different technique is to insist that the power to punish for contempt is "inherent" in courts and cannot be materially altered by legislation.<sup>176</sup> Frequently, both techniques are used together, each reinforcing the other. An example occurred in a North Carolina case<sup>177</sup> where the contemnors assaulted a judge near the judge's boarding house. This was said to be a direct contempt in spite of statutory requirements that direct contempts be committed during the sitting of the court and that they directly disrupt the proceedings. This result was accomplished by a broad construction of the statute, accompanied by the alternative suggestion that if the statute were not so construed, the court would nevertheless "not hesitate to declare the statute in that respect unconstitutional and void . . ."<sup>178</sup>

### C. *Right to a Hearing*

The direct-indirect dichotomy has not only been hard to apply in many cases, it has been more or less deliberately subverted, either by broad statutory interpretation or by a flat refusal to be bound by the statute. Since what is involved is an accused's right to a hearing, the results are too often bad ones.

All this suggests that a different test should be used. If one's right to a due process hearing is to be curtailed, surely it ought to be only on a showing of clear need, and where there is apt to be no genuine dispute on facts. The Supreme Court, interpreting the Federal Rules of Criminal Procedure, seems headed toward such a conclusion. In *Harris v. United States*,<sup>179</sup> a witness refused to answer questions before a grand jury. Even when the district court judge afforded the witness immunity from prosecution based upon his answers, he continued to refuse to testify. The judge thereupon swore the witness, asked him to answer, and on his refusal held him in contempt and sentenced him to one year in prison. The Supreme Court reversed, holding that although this was a summary procedure, the actual contempt had not been committed in the presence of the judge. It reasoned that the refusal to testify in the judge's presence was not the essence of the contempt because the whole proceeding served no purpose other than to comply with rule 42; thus, the "real" act of contempt

---

<sup>176</sup> *LaGrange v. State*, 238 Ind. 689, 692, 153 N.E.2d 593, 595 (1958): "[T]he legislature has no power to take away or materially impair [the court's inherent contempt powers] . . ."

<sup>177</sup> *Ex parte McCown*, 139 N.C. 95, 51 S.E. 957 (1905).

<sup>178</sup> *Id.* at 100, 51 S.E. at 959.

<sup>179</sup> 382 U.S. 162 (1965).

was committed before the grand jury, not the judge. The Court held, therefore, that the witness was entitled to a hearing on the contempt charge, proper notice, and an opportunity to defend.<sup>180</sup> It pointed out that even where, as here, the facts seemed not in dispute, a hearing might reveal matters important on the issue of sentencing: "What appears to be a brazen refusal to cooperate with the grand jury may indeed be a case of frightened silence."<sup>181</sup>

This decision seems to beat a narrower path for the direct contempt cases and stands in contrast to the broad swath cut by the earlier decisions. If this decision is followed in the state courts, one presumes that a great many contempts now treated as direct and subject to summary punishment would be afforded a plenary trial. The briber, the suborner of perjury, and the forger may all wish to dispute the charges against them; the deputy sheriff who seduces jurors may wish to plead extenuating circumstances or contributory temptation.

Parallel to this notion that direct contempts ought to be defined more narrowly is the idea that the direct-indirect test itself fails to trigger the appropriate considerations. The question, after all, is whether a summary trial or a full hearing is to be granted; yet the relation of this issue to the direct-indirect test is only accidental.

A good example for the proposition that a contempt committed in the presence of the court sometimes ought to be dealt with by a full rather than a summary hearing occurs in *Panico v. United States*.<sup>182</sup> In that case, the contemnor was a defendant in a criminal trial who had been found guilty of criminal contempt for his conduct during the trial in summary proceedings. The defense to the contempt charge was based upon the contemnor's alleged insanity, and, in fact, he was independently found to be insane; hence, his guilt of criminal contempt was in doubt because his intent was in doubt. The acts constituting contempt were unquestionably committed in the presence of the court, but it was nevertheless held that he was entitled to a hearing on the issues he raised.

The law should be more alert to recognize the principle of *Panico*. For example, there are a number of cases in which motive or intent is a relevant issue, at least on the question of punishment. The lawyer or party who disrupts a trial may justifiably be punished immediately in many cases, and the "need for speed" in punishment to protect the ongoing trial may also justify its summary infliction. However, in

---

<sup>180</sup> *Id.* at 166 n.4.

<sup>181</sup> *Id.* at 166.

<sup>182</sup> 375 U.S. 29 (1963). See also *In re Oliver*, 333 U.S. 257 (1948).

several cases, the trial judge has waited until the end of the trial to punish for contempt, having saved up contempt citations.<sup>183</sup> Again, punishment may well be proper, but if the judge can wait until the end of the trial, it is clear there is no "need for speed" in punishment, and a hearing ought to be afforded if those charged with contempt wish to have one. Even if the external facts are clear because they took place in the presence of the judge, the issue of motive or intent is subject to exploration.<sup>184</sup>

An appropriate response to both the difficulties and the inadequacies of the direct-indirect test may be legislative substitution of new rules. The policies seem fairly clear. First, a full hearing should be afforded on any disputed issues, unless for some demonstrable reason a summary hearing is urgently needed. This should carry with it the same rights as any other criminal trial. Particularly, it should carry with it the disqualification of the offended or even exasperated judge. Second, a summary power is genuinely and urgently needed for cases in which the immediate judicial process is interrupted. It is not necessary that the contempt power be utilized in every instance of disruption; at times the trial judge will be wiser to hold the sword of contempt over the contemnor's head than to wield it mightily.<sup>185</sup> This must be left to the trial judge's discretion, but, nevertheless, the need for use of summary procedures should be shown, and the lack of factual issues should be clear.

The appropriate statutory language is not here important. What is important is that the present approach be altered. A better approach would not ask whether the contempt is direct, but whether there is any factual dispute that would require a hearing and whether, even in the absence of such a dispute, there is a demonstrated need for the use of summary contempt powers. Only after those questions have been answered can both the citizen and the judicial process receive the protection both must have.

This shift in statutory approach would reflect what are, after all, basic due process considerations. It is not clear how far these considerations control contempt cases under existing precedents. It is certain,

---

183 CONTEMPT: TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY 10, at 39-44 (1970).

184 See Harper & Haber, *supra* note 157, at 16-29.

185 For instance, removal of a contumacious defendant from the trial (with due protection for his confrontation rights via television and electronic communication with his attorney). See *Mayberry Appeal*, 434 Pa. 478, 255 A.2d 131 (1969). An alternative of this sort has the approval, when need is shown for it, of the Supreme Court. *Illinois v. Allen*, 397 U.S. 337 (1970).



however, that they do control some cases, and that in those cases an individual may not be convicted of contempt without a hearing any more than he can be convicted of any other crime without a hearing. In *In re Oliver*,<sup>186</sup> a witness was called before a state circuit judge, who functioned in Michigan as a one-man grand jury. After hearing his testimony, the judge-grand juror concluded the witness was lying and accordingly held him in contempt. Both the secrecy of the trial and the lack of a hearing concerned the Supreme Court. Although the perjury or evasion by the witness—if it existed—was committed in the judge-grand juror's presence, the Court held that the witness was entitled to a hearing, with a charge, notice, and an opportunity to secure counsel and defend. The Court recognized that this contempt was in a sense "direct" because committed in the presence of the judge. It pointed out, however, that the *need* for summary punishment was not present here as it would be in the case of a heckler in court.<sup>187</sup> In this situation, where the need for immediate punishment was absent, the Court thought that a full adversary hearing was a requirement of due process. And it seems reasonably clear that a hearing would be required any time the contempt is predicated upon evidence obtained from other persons since in such cases the right to confront adverse witnesses would come into play.<sup>188</sup> With these constitutional requirements in mind, it seems appropriate to reformulate the direct-indirect test in order to achieve easier and fairer application.

### III

#### RIGHT TO JURY TRIAL

It is usually said that, historically, a jury trial was neither required nor used in criminal contempt cases.<sup>189</sup> The point has been disputed,<sup>190</sup>

---

<sup>186</sup> 333 U.S. 257 (1948).

<sup>187</sup> *Id.* at 274.

<sup>188</sup> See *id.* at 275; *Morales v. Superior Ct.*, 239 Cal. App. 2d 947, 49 Cal. Rptr. 173 (1966).

<sup>189</sup> See 4 W. BLACKSTONE, COMMENTARIES \*286-87; 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 391-94 (5th ed. 1942). The exact historical development is sometimes obscure and sometimes disputed. But it is clear that at many times the jury was not a part of the contempt trial at common law, either for civil or criminal contempt.

<sup>190</sup> See *Green v. United States*, 356 U.S. 165, 203 (1958) (Black, J., dissenting). However, there is agreement that contempts in the face of the court have always been summarily punishable and that for several hundred years the practice has been to try all contempts without a jury. See Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1042-48 (1924).

but the Supreme Court repeatedly refused to alter this historic usage, holding until very recently that the constitutional jury-trial requirement did not apply in such cases.<sup>191</sup>

In 1966 the Supreme Court decided *Cheff v. Schnackenberg*,<sup>192</sup> holding that when the contempt punishment in a criminal contempt case was something more than a petty sentence, the federal courts were required to grant a jury trial. The decision was made under the Court's supervisory power over federal courts, not under the Constitution. The Court laid down six months as the dividing line between petty sentences and more serious ones.

The next step was taken in *Duncan v. Louisiana*,<sup>193</sup> where the Court held that the right to jury trial for serious offenses, as guaranteed in federal courts by the sixth amendment, was also required in state courts under the fourteenth amendment. This decision meant that any constitutional rule concerning jury trial in contempt cases would apply equally to the states and to the federal government.

The final step was to decide in *Bloom v. Illinois*<sup>194</sup> that the Constitution did after all require a jury trial in contempt cases where the offense was more than a petty one. Whether the offense is petty or not is judged by the maximum sentence authorized by the legislature, or, in the absence of legislative authorization, by the sentence actually imposed. Under the rule in *Cheff*, a sentence of up to six months in jail would presumably be authorized without a jury.<sup>195</sup> The Court in *Bloom* called attention to this possibility, remarking that many courtroom disturbances could be handled summarily since, unless very lengthy sentences were contemplated, they would constitute petty offenses and no jury would be required.

As with any new legal rule, a number of uncertainties are apt to arise. One problem is whether the jury trial requirement will be applied to civil as well as to criminal contempt cases. Probably it will not. The sixth amendment, of course, does not apply to civil cases at all. The seventh amendment does apply to civil cases and requires a jury trial in those involving more than twenty dollars, but it speaks only of suits at common law. Since the civil or coercive kind of con-

---

<sup>191</sup> *United States v. Barnett*, 376 U.S. 681 (1964); *Green v. United States*, 356 U.S. 165 (1958).

<sup>192</sup> 384 U.S. 373 (1966).

<sup>193</sup> 391 U.S. 145 (1968).

<sup>194</sup> 391 U.S. 194 (1968).

<sup>195</sup> As the Court subsequently pointed out in *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968), sentences shorter than six months are, under *Cheff*, considered to be "petty." It is not clear whether a somewhat longer sentence would also be considered petty. See also 18 U.S.C. § 1(3) (1964).

tempt is usually thought of as equitable in nature and not part of the common law, the seventh amendment, even if applicable to the states, would not seem to be controlling. Of course, it would be possible for the Court to hold that the fourteenth amendment's due process requirement imposes the jury trial obligation upon states quite apart from the seventh amendment's terms. Because civil contempt sentences can be quite harsh, in some ways worse than criminal contempt sentences,<sup>196</sup> some argument could be made for such a rule. On the other hand, there seems to be much agreement that a jury trial is not required in civil contempt cases, and not much pressure for a change in this rule has arisen.<sup>197</sup> Even Justice Black, who championed the right of jury trial in criminal contempt cases long before *Bloom* arrived, seems to have believed that a non-jury trial was acceptable in civil contempt cases.<sup>198</sup> Probably there are many civil contempt cases in which a jury trial would be feasible and desirable; for example, the purely private-party litigation where time is not an essential factor. On the other hand, the injunctive order and even the specific performance decree are often valuable and effective because they do not subject the plaintiff to delay. Indeed, in some instances the injunctive order is the only hope in an emergency, and this is why a temporary restraining order is authorized. In cases of this sort, the delay of a jury trial on a coercive, civil contempt hearing might well defeat the central purposes of the equitable procedure. And so it might, too, in cases where coercive contempt is used in the midst of a trial to quell a disturbance or to elicit testimony. Coercive contempt to quiet a haranguing defendant is probably a sound and desirable sanction, probably more desirable than a punitive contempt sentence. Such sanctions should be available, and they might not be available if a jury were required in civil contempt cases across the board. On the whole, then, it seems better to retain

---

<sup>196</sup> Consider, for example, the case of the man who is ordered to turn over specific property to the court or to another party. He does not do so and defends against the contempt charge on the ground that because the property is lost or destroyed he cannot comply. If the judge disbelieves his testimony, the judge may put the man in jail until he complies—which may be never if he has in fact been telling the truth. In such a case the sentence could theoretically run the man's lifetime. Cf. *Commonwealth ex rel. Messer v. Mickelson*, 196 Pa. Super. 464, 175 A.2d 122 (1961); *Drake v. National Bank of Commerce*, 168 Va. 230, 190 S.E. 302 (1937).

<sup>197</sup> See R. GOLDFARB, *THE CONTEMPT POWER* 175 (1963).

<sup>198</sup> See *Green v. United States*, 356 U.S. 165, 197 (1958) (Black, J., dissenting). Since that time, Justice Black has been instrumental in increasing the right of jury trial in federal equity cases (on a non-constitutional basis). As this right expands through judicial construction, it seems entirely conceivable that it will even reach civil contempt. The notable cases in which the Court expanded jury-trial rights are *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

the non-jury trial for civil contempt, at least until a more detailed classification scheme is worked out.

A different realm of difficulty arises in determining what criminal contempt punishment is sufficiently serious to require a jury, and what is merely "petty." As indicated, the basic dividing line will probably be the six-month sentence, although possibly some sentences in excess of this will be considered petty under some circumstances. However, to draw this line is merely to open new questions. One of these quickly reached the Court—how to treat a contempt sentence of three years where the sentence was suspended and the offender put on probation.<sup>199</sup> It was clear that a three-year sentence without probation would indicate an offense requiring a jury trial.<sup>200</sup> On the other hand, the offender, who had violated an injunction obtained by the SEC, was serving no time at all, and would not be expected to do so unless he further misconducted himself. Still, the *in terrorem* effect of three years probation might be more serious than a six-month definite jail sentence. In the hands of the worst sort of judge, the suspended sentence may become a tool of control and oppression even to the details of the offender's life, and to avoid this oppression the offender may be forced to regulate his own conduct in ways that the law could not constitutionally do. The Court rejected this kind of thinking, however.<sup>201</sup> Chief Justice Warren lodged a dissent, expressing the fear that this decision could be used to control unpopular views through probation conditions.<sup>202</sup>

This kind of problem raises a serious issue for states and perhaps the Congress. If the contempt procedure is to be reformed, one of the central problems lies in the uncertainty of both the "crime" and the sentence. It may well be that the majority of the Court was correct as a constitutional matter, but that as a matter of legislative policy at either the state or federal levels, a different rule should be laid down. This would, of course, be constitutionally permissible since the decision only holds that the Constitution does not require a jury trial; it does not forbid one.

Another problem in determining whether the nature of the sen-

---

<sup>199</sup> Frank v. United States, 395 U.S. 147 (1969).

<sup>200</sup> The sentence in Bloom v. Illinois, 391 U.S. 194 (1968), was two years, and this required a jury trial.

<sup>201</sup> Frank v. United States, 395 U.S. 147, 151-52 (1969).

<sup>202</sup> *Id.* at 153. A paroled individual does not share all the constitutional rights enjoyed by the general citizenry. For example, a person on parole may be liable to have his home broken into and searched by officials without the full protections of the search and seizure provisions of the fourth amendment. People v. Hernandez, 229 Cal. App. 2d 143, 40 Cal. Rptr. 100 (1964), *cert. denied*, 381 U.S. 953 (1965).

tence requires a jury trial arises in cases where multiple contempts and multiple sentences are handed down at once. Something like this happened in the famous Chicago Conspiracy Trial presided over by Judge Hoffman.<sup>203</sup> It certainly happened in *Mayberry Appeal*,<sup>204</sup> where, for a long series of contempts in the course of a trial, a defendant was sentenced to a maximum of twenty-two years—not for the offense with which he was charged, but for his contempts. In cases of this sort, should the contempts be regarded as separate offenses so that the judge could, without jury, impose sentence of up to six months for each one? Or should the entire trial be viewed as one large contempt, with a jury trial required if the one sentence exceeds six months?<sup>205</sup> Would it not be significant to this issue to determine whether each contempt was sentenced at the very time it arose, or, as seems more common, whether all contempts were sentenced together at the end of the trial?

Perhaps these questions will suggest to judges the possibility of coercive contempts in courtroom disruptions. By and large the coercive (that is, civil) contempt seems well suited at many stages of the trial, and the now-authorized removal of the defendant from the courtroom<sup>206</sup> may also serve well in such cases. Criminal penalties assessed immediately upon a disruptive contempt may also have a sound effect in avoiding future disturbances. If such penalties are assessed immediately, the issue concerning aggregation of sentences at the end of a trial does not arise. With these alternatives available to the trial judge confronted with disruptions, it seems reasonable to suggest that a series of contempts committed during trial be regarded as unitary and a jury trial be granted when that series of contempts may, taken together, warrant punishment in excess of six months and when the contempts are saved up, tried, and sentenced together. It is easy to lose perspective when confronted by these problems, but it should be remembered that this issue involves nothing more than affording a jury trial to those charged with contempt where the contempts have been "saved up" for the end of the main case, if indeed this "saving up" is itself permissible.<sup>207</sup> It should be remembered, too—particularly in a trial with wide political and social impact—that "[m]artyrdom does not come easily to a man who has been found guilty as charged by twelve of his neighbors and fellow citizens."<sup>208</sup>

<sup>203</sup> CONTEMPT: TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY 10, at 39-44 (1970).

<sup>204</sup> 434 Pa. 478, 255 A.2d 131 (1969).

<sup>205</sup> See *id.* at 488, 255 A.2d at 136 (separate opinion of O'Brien, J.).

<sup>206</sup> *Illinois v. Allen*, 397 U.S. 337 (1970).

<sup>207</sup> See Harper & Haber, *supra* note 157, at 29-45; Section II(c) *supra*.

<sup>208</sup> *Green v. United States*, 356 U.S. 165, 216 (1958) (Black, J., dissenting).

## IV

## CIVIL AND CRIMINAL CONTEMPT

A. *General Rules*

Most courts distinguish between civil contempt proceedings and criminal contempt proceedings.<sup>209</sup> In some instances, the distinction is built into statutes.<sup>210</sup> In any event, the distinction is important for several reasons, one of which is that if the proceeding is criminal in nature, then the constitutional safeguards for criminal trials will apply; in a civil case this is not so.<sup>211</sup>

The distinction is usually based on the purpose for which the contempt sentence is meted out. If the contempt proceeding is a civil one, its purpose is remedial—that is, its purpose is to compel obedience to the court's order, or, failing that, to get some substitute relief for the benefit of the opposing party.<sup>212</sup> On the other hand, if the contempt proceeding is a criminal one, its purpose is to vindicate the court's authority. The relief is punitive, much as any other criminal sentence is punitive.<sup>213</sup> Occasionally courts say that contempt proceedings are neither civil nor criminal, but are *sui generis*.<sup>214</sup> This is accurate enough if not misunderstood. Such statements do not mean that the classification of contempt cases as civil or criminal is abandoned; rather, they mean only that there are instances in which special rules must apply to contempt cases. For example, even a criminal contempt case need not be initiated by indictment or information,<sup>215</sup> and a juvenile may be punished for contempt not only in juvenile courts, but in other courts as well.<sup>216</sup> Special problems of this sort aside, the classification of contempt cases as civil or criminal remains the standard approach.

There are many examples of civil contempt sentences. A defendant

---

<sup>209</sup> See, e.g., *Ex parte Griffith*, 278 Ala. 344, 178 So. 2d 169 (1965), *cert. denied*, 382 U.S. 988 (1966); *In re Bozorth*, 38 N.J. Super. 184, 118 A.2d 430 (1955).

<sup>210</sup> E.g., N.C. GEN. STAT. § 5-1 (Repl. 1969) ("contempt" means criminal contempt); *id.* § 5-8 ("as for contempt" means civil contempt).

<sup>211</sup> See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911).

<sup>212</sup> *Vanderkooi v. Echelbarger*, 250 Ind. 175, 235 N.E.2d 165 (1968); *Winter v. Crowley*, 245 Md. 313, 226 A.2d 304 (1967); *Godard v. Babson-Dow Mfg. Co.*, 319 Mass. 345, 65 N.E.2d 555 (1946).

<sup>213</sup> See, e.g., *State v. Mancari*, 43 Del. Ch. 236, 223 A.2d 81 (Sup. Ct. 1966); *Shiflet v. State*, 217 Tenn. 690, 400 S.W.2d 542 (1966).

<sup>214</sup> See *Jencks v. Goforth*, 57 N.M. 627, 261 P.2d 655 (1953).

<sup>215</sup> See Section II(A) *supra*, as to summary and plenary trials.

<sup>216</sup> *Young v. Knight*, 329 S.W.2d 195 (Ky. 1959); *Annot.*, 77 A.L.R.2d 1004 (1961).

refuses to make a conveyance as ordered in a specific performance suit; he is in contempt and may be jailed until he signs the deed required.<sup>217</sup> A defendant refuses to pay alimony as ordered or to permit a former spouse the right to visit children as provided in a decree; he is in contempt and may be jailed until he complies or shows a willingness to do so.<sup>218</sup> A defendant continues to trespass in violation of an injunction; he is in contempt and may be jailed until he shows a willingness to obey.<sup>219</sup> In all these cases the contempt sentence is coercive and remedial in the realistic sense that it is aimed at forcing the defendant to comply with the decree by relieving him of a sentence if he does so.

There are likewise many examples of criminal contempt sentences. A defendant commits an outburst in the courtroom during a trial; he is in contempt and may be sentenced to a definite period in jail.<sup>220</sup> A lawyer insults the judge during the trial; he is in contempt and may be fined.<sup>221</sup> A defendant violates an injunction; he is in contempt and may be fined or imprisoned for a definite time, such as thirty days.<sup>222</sup> It is enough to justify the criminal proceeding that the court's authority is flouted, and it is enough to identify the proceeding as a criminal one if the sentence is definite and punitive rather than coercive.<sup>223</sup>

Any contempt may be punished by criminal sanctions, but some contempts may not be punished by civil sanctions. For example, in the case of an injunction that forbids a May Day sit-in, a violation of the order is not remediable, although it is surely punishable. The plaintiff who sought to prohibit the May Day sit-in cannot now get what the court ordered. Imprisonment in such a case will be neither coercive nor remedial since it will not force the defendant to comply with the order that has already been conclusively violated.

As these examples clearly show, the classification is of the contempt proceeding or the sentence, not of the *act* of contempt; that is, a given contemptuous act may be subjected to both civil and criminal sanctions and both sanctions may be imposed in a single proceeding,

<sup>217</sup> *Seventy-Six Land & Water Co. v. Superior Ct.*, 93 Cal. 139, 28 P. 813 (1892); see *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911).

<sup>218</sup> *Goetz v. Goetz*, 181 Kan. 128, 309 P.2d 655 (1957) (wife refused to give husband visitation rights prescribed by court order; coercive imprisonment would be proper, but not criminal sentence).

<sup>219</sup> See *Cliett v. Hammonds*, 305 F.2d 565 (5th Cir. 1962).

<sup>220</sup> *Mayberry Appeal*, 434 Pa. 478, 255 A.2d 131 (1969).

<sup>221</sup> See *Champion v. State*, 456 P.2d 571 (Okla. Crim. App. 1969).

<sup>222</sup> *Brown v. State*, 89 Okla. Crim. 443, 209 P.2d 715 (1949) (reflecting statutory limits on determinate, criminal contempt sentences).

<sup>223</sup> *E.g.*, *Demetree v. State ex rel. Marsh*, 89 So. 2d 498 (Fla. 1956).

provided proper constitutional protections are afforded.<sup>224</sup> The court may wish to vindicate its authority by levying a criminal sentence; at the same time, it may wish to coerce compliance with its decrees for the benefit of the other parties. If the court does both, it will be using both criminal and civil contempt powers.

A corollary to this notion is that a criminal contempt proceeding may grow out of a civil case, or a civil contempt proceeding may grow out of a criminal case.<sup>225</sup> For example, a defendant in a civil action in equity may disrupt the courtroom and the judge might summarily fine or imprison him for contempt to vindicate the court's authority. This would be a criminal contempt sentence.<sup>226</sup> On the other hand, if a defendant in a criminal case disrupted the court during the trial and refused to answer questions, the judge might remand him to custody until he expressed a willingness to permit orderly processes to continue and to answer questions. This would be a coercive—and hence civil—contempt sentence.<sup>227</sup>

As all these examples indicate, the coercive feature of the civil contempt sentence is reflected in its indeterminate nature. The contumacious party need not stay in jail for any definite term; he may get out at will. He need only purge himself of his contempt by complying or showing a willingness to comply with the court's order. This is classically expressed in the aphorism that the person imprisoned for civil contempt carries the keys to the jail in his own pocket.<sup>228</sup> The hallmark of the criminal sentence, on the other hand, is that it is determinate. At least in theory, no amount of repentance will remit the criminal sentence. Thus, although even a civil sentence may involve imprisonment, there is an important difference in the two kinds of sentences.

As already indicated, there is no theoretical barrier to the use of both civil and criminal contempt powers simultaneously, though pro-

---

<sup>224</sup> *United States v. UMW*, 330 U.S. 258 (1947); *State v. Our Chapel of Memories, Inc.*, 74 N.M. 201, 392 P.2d 347 (1964). See *Songer v. State*, 236 Ark. 20, 364 S.W.2d 155 (1963), where the court affirmed a contempt conviction on the ground that if it was a civil contempt it was correctly imposed and that if it was a criminal contempt review by certiorari was so limited that an affirmance was required.

<sup>225</sup> *In re Hege*, 205 N.C. 625, 172 S.E. 345 (1934). Occasional implications to the contrary are usually qualified or contradicted later. See, e.g., *State ex rel. Anderson v. Daugherty*, 137 Tenn. 125, 191 S.W. 974 (1917).

<sup>226</sup> E.g., *Mayberry Appeal*, 434 Pa. 478, 255 A.2d 131 (1969).

<sup>227</sup> *Ex parte Griffith*, 278 Ala. 344, 178 So. 2d 169 (1965), cert. denied, 382 U.S. 988 (1966) (inquiry into ethics of attorney's practices); cf. *Uphaus v. Wyman*, 360 U.S. 72 (1959) (in attorney general's one-man investigation of subversive activities in New Hampshire, coercive contempt used to force contemnors to turn over records of World Fellowship, Inc.).

<sup>228</sup> *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902).



cedural demands may put practical limits on such an operation. The sentences would necessarily be meted out separately, and the constitutional demands for criminal trials would necessarily be observed throughout the hearing. It would probably be difficult to obtain much coercive effect from an indeterminate sentence during the period when the contumacious defendant is in jail on the determinate criminal sentence. As a practical matter, then, courts using a coercive civil contempt sentence seldom seem to combine it with a determinate criminal contempt sentence. The usual technique is to seek the dominant purpose of the proceeding and to classify accordingly. Occasionally courts express the rule more stringently and say that if *any* part of the contempt sentence is punishment for an affront to the law, the contempt must be classified entirely as a criminal one.<sup>229</sup>

In any event, although both criminal and civil sanctions are theoretically available for the same acts of contempt, courts may not validly hold a civil contempt hearing and then impose a determinate criminal sentence. In *Gompers v. Bucks Stove & Range Co.*,<sup>230</sup> Mr. Gompers and other labor leaders were enjoined from boycotting the plaintiff, Bucks Stove, or including it on any "Unfair" list. Defendants did certain acts in violation of this injunction, and Bucks Stove petitioned the court to hold them in contempt. The trial court issued an order requiring the defendants to show cause why they should not be held in contempt, and there was a hearing on the issue. Bucks called defendants to the witness stand as adverse witnesses and sought to prove the alleged contempt by their testimony. When the hearing was concluded, the trial court found that acts of contempt had been committed and sentenced the defendants to several months in jail. The Supreme Court reversed these convictions. It pointed out, among other things, that the case was tried as a civil case and was so regarded by the parties. Indeed, since the defendants were called to testify against themselves, the contempt hearing had to be a civil one, or else the constitutional protections applying to criminal cases were violated. Since the case was a civil one, the criminal sentence—determinate and non-coercive—could not properly be meted out.<sup>231</sup>

---

<sup>229</sup> *Godard v. Babson-Dow Mfg. Co.*, 319 Mass. 345, 65 N.E.2d 555 (1946). The court said in part:

If the penalty is not imposed *wholly* for the benefit of the aggrieved party, but in part at least is punishment for the affront to the law, the contempt is deemed criminal. If, on the other hand, the power of the court is used only to secure to the aggrieved party the benefit of the decree . . . then the contempt is deemed civil.

*Id.* at 347, 65 N.E.2d at 557 (emphasis added).

<sup>230</sup> 221 U.S. 418 (1911).

<sup>231</sup> *Id.* at 444.

The basic rules, then, are purportedly simple: (1) one distinguishes a criminal contempt proceeding from a civil contempt proceeding by the purpose involved, usually revealed by the sanction applied; if the purpose is coercive or remedial, the contempt proceeding is a civil one, if purely punitive, the proceeding is a criminal one; (2) criminal contempt hearings must, by and large, comply with the rules for other criminal trials, with an exception in some instances as to jury trial requirements. Two broad areas of qualification must now be reached. First, there are a few deviant tests of the distinction between civil and criminal contempt cases which must be considered. Second, the difficult problem of applying the rules stated above must also be examined.

### B. *Deviant Statements of the Distinction*

In *Gompers*, the leading American case on contempt, the Supreme Court laid down the basic distinction already mentioned: a criminal contempt proceeding is purely punitive while a civil contempt proceeding is, mainly at least, coercive. However, the Court implied that the distinction might turn at times on other matters, or at least that other matters might be used as evidence on the issue. The Court suggested, for example, that the character of the proceeding might be determined, at least in part, if a private party commenced it rather than the state's attorney.<sup>232</sup> This kind of evidence—if evidence it is—has not gained much eminence in contempt cases, though it occasionally crops up. If the main test is the coercive or non-coercive function of the hearing, then it hardly seems important to know how the hearing was commenced. On the other hand, how the contempt hearing was commenced, and by whom, as well as the procedures by which it was tried, are all relevant to the question whether the alleged contemnor was fairly apprised of the charges or claims against him. If proper notice is what is important—and it will be suggested later that in part it is—then the question of who commenced the contempt hearing will indeed be relevant. And so will questions of how the papers are styled, what testimony was produced, and what privileges were accorded the parties.

The *Gompers* case is also the source of another deviant test for distinguishing civil and criminal contempt. The *Gompers* Court said:

[I]mprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. . . .

....  
On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accom-

---

<sup>232</sup> *Id.* at 446.

plished. Imprisonment cannot undo or remedy what has been done . . . [and in such a case] imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.<sup>233</sup>

The quoted passage is accurate enough, and entirely consistent with the same Court's basic distinction between coercive and punitive sanctions for contempts. This language merely means that the sanction is necessarily a criminal one if nothing is left to coerce. Where the defendant has violated a single order and is under no continuing obligation, it is clear enough that only a punitive sanction is possible since no imprisonment can "undo or remedy what has been done." An illustration used earlier makes this point: if the defendant is ordered not to engage in a May Day sit-in, but does so anyway, his conduct is complete and the order is irremediably broken. Any sanction can only be punitive and hence "criminal." The distinction between mandatory orders and prohibitory ones is only illustrative of this point. For instance, a prohibitory order might enjoin trespasses for all future times. If a defendant so enjoined violates the order once, there is still something left to coerce; a civil contempt would therefore be appropriate since it could be used to compel compliance for the future, even though the past trespass cannot be remedied specifically. Furthermore, to the extent that compensatory fines are used in contempt proceedings,<sup>234</sup> even a past act can, in some sense, be remedied. The distinction between mandatory and prohibitory orders in *Gompers*, then, was not intended to be a major test; rather, it was merely indicative of cases in which contempt sanctions could be coercive and hence civil.<sup>235</sup>

Still another deviation occurs. Courts sometimes speak of the difference between civil and criminal contempt as a difference in whether the contemnor violates an order made for the benefit of an adverse party or whether he is disrespectful of the court.<sup>236</sup> This is probably a case of loose language rather than a real attempt to use a different measure of contempt. It is entirely clear that the violation of an order made for the benefit of an adverse party can be punished

<sup>233</sup> *Id.* at 442-43.

<sup>234</sup> See Section VII(C)(2) *infra*.

<sup>235</sup> Most cases are in accord with this result. *E.g.*, *Drake v. National Bank of Commerce*, 168 Va. 230, 190 S.E. 302 (1937). In *State ex rel. Anderson v. Daugherty*, 137 Tenn. 125, 191 S.W. 974 (1917), the court used the basic *Gompers* distinction, but said civil contempts arose "in a civil case." This seems to be a matter of misunderstanding *Gompers*, and on certain facts it is carried forward in Tennessee today. *Shiftet v. State*, 217 Tenn. 690, 400 S.W.2d 542 (1966).

<sup>236</sup> See *Holt v. McLaughlin*, 357 Mo. 844, 210 S.W.2d 1006 (1948); *Brown v. State*, 89 Okla. Crim. 443, 209 P.2d 715 (1949); *cf. State v. Jackson*, 147 Conn. 167, 158 A.2d 166 (1960).

as a criminal contempt, that is, with a determinate sentence and in a criminal-type trial. It is also clear that disrespect of the court can be handled coercively, that is, by civil contempt to force the contemnor to behave in court. It is, then, fairly uninformative to suggest a difference based on the purpose of the order in the main case. Courts that say things of this sort often end up with self-contradictory statements:

Contempts may be civil or criminal. In a civil contempt the contemnor violates a decree or order of the court made for the benefit of an adverse party litigant. In a criminal contempt a court's process is violated or disobeyed and disrespect of the court is manifested. <sup>237</sup>

The barest analysis reveals how useless the statement is to discriminate between two kinds of contempt. Violation of a decree made for the benefit of an adverse party—a specific performance decree, for example—is said to be a civil contempt; disrespect for the court or violation of its process is said to be criminal. But violation of a decree made for the benefit of an adverse party certainly qualifies as violation of the court's process and as disrespect as well. The net result is that the conduct referred to can be either criminal or civil, and definitions of this kind do not help us distinguish the two at all.

The deviant tests are not very important because they seldom if ever directly affect results of cases; courts do not follow the deviations even when they state them.<sup>238</sup> The deviant tests do, however, tend to confuse an already confused subject.

### C. *Consequences of the Distinction*

As already indicated, the classification of a contempt case as criminal or civil has a number of important consequences. If the case

---

<sup>237</sup> State *ex rel.* Oregon State Bar v. Lenske, 243 Ore. 477, 480, 405 P.2d 510, 512 (1965), *cert. denied*, 384 U.S. 943 (1966).

<sup>238</sup> In State *ex rel.* Oregon State Bar v. Lenske, *id.*, an attorney had been suspended and by fair implication an order had been entered ordering him not to engage in further practice of law. The court defined the difference between civil and criminal contempts with the language quoted in the text accompanying note 237 *supra*. However, it classified the proceeding as a criminal contempt, though apparently the contempt arose out of disobedience of an order of the court in a suit by the Oregon State Bar (a party litigant). Furthermore, as often happens, nothing whatever seems to have turned on the question whether the contempt was civil or criminal.

In *Brown v. State*, 89 Okla. Crim. 443, 209 P.2d 715 (1949), a closely similar definition of criminal and civil contempt was adhered to, and the court said that disobedience of an injunction was a criminal contempt because disobedience of a court order shows disrespect and tends to obstruct justice. This illustrates the ease with which the definition can be manipulated. Again in *Brown*, as in *Lenske*, this deviation made no difference. The trial court clearly had a criminal contempt conviction in mind, for it sentenced the defendant to one year in the penitentiary. The appellate court held this in error because a statute limited the punishment for criminal contempts.

is a criminal one, almost the entire panoply of criminal safeguards comes into play. The burden of proof is on the prosecution,<sup>239</sup> the party charged cannot be required to testify against himself,<sup>240</sup> cannot be put in double jeopardy,<sup>241</sup> and cannot be tried without appropriate notice of the charge.<sup>242</sup> Inferentially at least, he is entitled to counsel and to compulsory process for bringing in his witnesses.<sup>243</sup> He is now entitled to a jury trial if the criminal sentence is a potentially serious one.<sup>244</sup> As with other crimes, intent is an element of criminal contempt, and it must be proven before criminal punishment can be inflicted,<sup>245</sup> though intent to violate the court's order is not an issue in a civil contempt proceeding.<sup>246</sup> The problem of intent and inability to comply with court orders is, however, a complex one, and it is treated more fully elsewhere.<sup>247</sup> The classification of a contempt hearing as a criminal one may also affect the right of appeal or the route that an appeal takes.<sup>248</sup> At least in some criminal contempt cases, the state should be a party to any appeal proceedings.<sup>249</sup> The criminal classification will also

<sup>239</sup> *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry.*, 266 U.S. 42, 66 (1924); *Hood v. United States*, 326 F.2d 33, 34 (5th Cir. 1964); *Cancellieri v. De Modica*, 57 N.J. Super. 598, 603, 155 A.2d 167, 170 (1959).

<sup>240</sup> *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911); *Parker v. United States*, 153 F.2d 66, 70 (1st Cir. 1946). The privilege against self-incrimination may apply in a civil trial if the testimony sought to be elicited is incriminatory on some criminal matter.

<sup>241</sup> *In re Bradley*, 318 U.S. 50 (1943); *State v. Mancari*, 43 Del. Ch. 236, 223 A.2d 81 (Sup. Ct. 1966). In *Bradley*, the Court attempted to change the sentence by returning a fine paid and imposing a sentence of imprisonment. This was held impermissible in a brief opinion with a citation to *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874). The *Lange* case, on somewhat similar facts, but not involving contempt, held that a new sentencing of this sort violated the double jeopardy clause, commenting: "[O]f what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict?" *Id.* at 173.

<sup>242</sup> "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." *Cooke v. United States*, 267 U.S. 517, 537 (1925); *accord*, *Yates v. United States*, 316 F.2d 718 (10th Cir. 1963): "[D]ue process requires that such notice—in this case the order to show cause—should contain enough to inform him of the nature and particulars of the contempt charged." *Id.* at 723 (footnote omitted).

<sup>243</sup> *See United States v. UMW*, 330 U.S. 258, 364 n.30 (1947) (Rutledge, J., dissenting).

<sup>244</sup> *Bloom v. Illinois*, 391 U.S. 194 (1968).

<sup>245</sup> *United States ex rel. Porter v. Kroger Grocery & Baking Co.*, 163 F.2d 168 (7th Cir. 1947).

<sup>246</sup> *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949).

<sup>247</sup> *See* Section VI *infra*.

<sup>248</sup> *E.g.*, *State v. Jackson*, 147 Conn. 167, 158 A.2d 166 (1960).

<sup>249</sup> *Welborn v. Mize*, 107 Ga. App. 427, 130 S.E.2d 623 (1963).

invoke the pardoning power of the state, which, of course, would not exist in civil cases.<sup>250</sup>

There are disadvantages for the party charged if his contempt case is classified as a criminal one. Any fine levied is not dischargeable in bankruptcy.<sup>251</sup> Moreover, he may be held in criminal contempt for violating an order that is later reversed since it may be important to vindicate judicial power even when it is erroneously exercised.<sup>252</sup> In at least some cases, this same principle applies when the court lacks jurisdiction of the subject matter, and a criminal contempt sentence may stand even though there was no jurisdiction.<sup>253</sup>

Civil contempt cases are not altogether different, of course. Even in civil cases, apart from the summary contempts in open court, some sort of hearing and notice is ordinarily required, though the form of hearings may be somewhat less significant here. But proof beyond a reasonable doubt is not required as it is in criminal cases,<sup>254</sup> and, though no doubt *res judicata* rules will apply to civil contempt cases, the double jeopardy provisions will not.<sup>255</sup>

Perhaps the most important result of the distinction between civil and criminal contempt is the rule that if a contempt procedure is criminal in nature, the sentence must be a determinate one, while if it is civil in nature, the sentence must be coercive. It is true that the nature of the contempt is sometimes determined from the nature of the sentence, and the contempt is called a criminal one if the sentence is determinate. In other cases, however, this cannot be done. For instance, the court may already have decided that the contempt is a

---

<sup>250</sup> See Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161, 168 (1908).

<sup>251</sup> *Parker v. United States*, 153 F.2d 66 (1st Cir. 1946) (civil contempt fine dischargeable, criminal contempt fine not).

<sup>252</sup> *Mathison v. Felton*, 90 Idaho 87, 408 P.2d 457 (1965), is illustrative. Defendant was restrained from interfering with public access to a road. When he allegedly continued to interfere, he was held in contempt and two sanctions were imposed; first, he was fined \$500; second, he was sentenced to jail with a provision for suspension of the sentence should he comply. The injunctive order was reversed, and it was determined there were no public rights in the road. The fine was, however, affirmed on the ground that even an erroneous order represents judicial authority that may not be flouted. The coercive portion of the sentence was set aside since, on reversal of the main judgment, there was nothing left to coerce.

<sup>253</sup> The conventionally stated rule is that one is free to violate a "void" order and is not in contempt in so doing. *Shapiro v. Ryan*, 233 Md. 82, 195 A.2d 596 (1963); see Annot., 12 A.L.R.2d 1059 (1950). Where the "bootstrap" principle applies, however, there may be criminal punishment for contempt even of certain orders made without jurisdiction of the subject matter. *United States v. UMW*, 330 U.S. 258 (1947); see *Dobbs*, *supra* note 132.

<sup>254</sup> *E.g.*, *Songer v. State*, 236 Ark. 20, 364 S.W.2d 155 (1963).

<sup>255</sup> See *City of Macon v. Massey*, 214 Ga. 589, 106 S.E.2d 23 (1958).

criminal one, perhaps because the state initiated the proceeding and because fifth amendment rights were claimed and allowed. In such a case, the contempt hearing having already been denominated a criminal one, the sentence must be determinate.<sup>256</sup> By the same token, if the proceeding is determined to be a civil one, the sentence must be coercive, and it must be lifted when its coercive feature terminates.<sup>257</sup>

Courts often blur the distinction between determinate and indeterminate sentences. One device that blurs the distinction—some might say obliterates it—is the sentence that is determinate in form, but that is suspended on condition of compliance.<sup>258</sup> This was the device used in *Jencks v. Goforth*,<sup>259</sup> a case which, in its time, drew a good deal of comment. In that case, the New Jersey Zinc Company brought an action against a union and associated individuals to enjoin trespassing and blocking of roads. The injunction was first issued as a temporary restraining order, and then, after a hearing, was made permanent. Two days later, the company claimed violations had taken place and filed a motion for a show cause order. After another hearing the trial judge found the defendants had violated the injunction and held them in contempt. He fined them \$4,000 each and sentenced individuals to ninety days in jail, with the proviso, however, that half the fine and all the jail sentence would be remitted or suspended if no further violations took place in the succeeding year. Further violations did take place, and accordingly the suspension was revoked and the original sentence imposed—but long after the controversy between the company and the union had been settled. The New Mexico Supreme Court held all this to be a proper civil contempt sanction. “As of the day this particular decree was entered, and it is that day which controls, the decree was truly coercive” because each defendant could have avoided the punishment stated by complete future obedience.<sup>260</sup> The court reiterated this position in a subsequent review of the same case.<sup>261</sup>

These decisions received some criticism at the hands of law review writers.<sup>262</sup> It was suggested that the governing date should be the date on which the suspension was revoked, not the earlier date on which the sentence was first suspended. The reasoning here would no doubt

<sup>256</sup> *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); see 67 HARV. L. REV. 889 (1954); 39 MINN. L. REV. 447 (1955); 1 U.C.L.A.L. REV. 220 (1954).

<sup>257</sup> *Shillitani v. United States*, 384 U.S. 364 (1966); 39 MINN. L. REV. 447 (1955).

<sup>258</sup> See 67 HARV. L. REV. 889 (1954); 39 MINN. L. REV. 447 (1955).

<sup>259</sup> 57 N.M. 627, 261 P.2d 655 (1953).

<sup>260</sup> *Id.* at 636, 261 P.2d at 661.

<sup>261</sup> *Local 890, Mine, Mill & Smelter Workers v. New Jersey Zinc Co.*, 58 N.M. 416, 272 P.2d 322 (1954).

<sup>262</sup> See note 256 *supra*.

be that the date on which punishment is actually meted out is the more realistic date for assessing whether it is coercive or not, and that, once the dispute between the parties is over, the sentence could hardly be coercive.<sup>263</sup> On the other hand, it must not be overlooked that the suspended sentence, conditioned on compliance in the future, is certainly coercive at the time it is first handed down. There is no obvious reason why one must look only to the date when the suspension is revoked and the sentence actually enforced to test its coercive effect.

Yet it may be wrong to attempt a solution based purely on logic here. There is no ready basis for the selection of one premise over another or of one date over another. It seems clear enough that a suspended sentence must have coercive effect; but it also seems clear that, once the parties' dispute is at an end, any punishment rendered for a purpose that is then non-coercive will be apt to leave the punished party with a sense of injustice, and it may seriously impair the on-going relations of the parties themselves. The suspended sentence technique, then, seems to be a dubious one, particularly if there are other coercive alternatives available. Nevertheless, courts appear to use this<sup>264</sup> or similar techniques without much forethought.<sup>265</sup>

The consequences of the distinction between civil and criminal contempt are, then, quite significant, but the application of the distinction is often difficult and the differences are often blurred.

#### D. *Analysis and Proposals*

The confusion surrounding the criminal-civil distinction is an unfortunate one, and costly as well, for it prevents effective use of contempt powers within constitutional bounds. Actually, the effort by reviewing courts to label the case as a criminal or as a civil one is often an exercise in futility. One can reason that a case is a criminal one and hence that the criminal law protections must be afforded the accused.<sup>266</sup> One might equally well reason that, since criminal law procedural safeguards were *not* afforded, the case must have been a

---

<sup>263</sup> 39 MINN. L. REV. 447, 450 (1955).

<sup>264</sup> *E.g.*, State *ex rel.* Lay v. District Ct., 122 Mont. 61, 198 P.2d 761 (1948). Here, the sentence was five days in jail and a \$200 fine (payable by serving time in jail at the rate of \$2 a day). This was suspended on condition that the defendant make certain child-support payments to the plaintiff, his former wife. In this situation, the suspended sentence technique may be justified on the ground that the alternatives are less effective than they are in cases like that mentioned in the text.

<sup>265</sup> See Section VII *infra*, on sanctions for contempt, and particularly the discussion of the *in terrorem* fine, notes 389-91 and accompanying text *infra*.

<sup>266</sup> *E.g.*, State *ex rel.* Sandquist v. District Ct., 144 Minn. 326, 175 N.W. 908 (1919).



civil one.<sup>267</sup> Or one might reason, not from the procedure but from the sentence meted out, that the case was criminal or civil and that the procedure should be adjusted accordingly.

The fact is that most of this is not only confusing, it is also unnecessary. In each case supposed, a reviewing court could reverse, whatever classification is used, simply because procedure and sentence were not compatible. It is enough to say that a determinate ("criminal") sentence cannot be meted out where criminal-type protections are not afforded in the procedure. It is not necessary to say more.

The process of classification of contempt hearings into civil and criminal cases has probably made matters worse rather than better. The classification process, if it worked at an ideal level, would serve to remind judges, lawyers, and parties to consider the following:

1. There are options in dealing with any contempt found; sanctions may be coercive or they may be non-coercive and punitive.

2. If there is a risk that a punitive, non-coercive sanction may be imposed, the party charged with contempt should know of this in advance.

3. If there is a risk that a punitive, non-coercive sanction may be imposed, the hearing must be conducted largely according to the rules of criminal procedure—contempt must be proved beyond a reasonable doubt, the party charged must have an opportunity to confront accusers, the party cannot be forced to testify against himself, and so on.

4. If the criminal procedures are not used, a determinate sentence, such as imprisonment for a given number of days or a fine of a set amount, is not proper.

These considerations are important because they go to basic rights. They also go to matters of good judgment. (For instance, the trial judge needs to be very much aware of his options in sentencing if he is to be effective.) If the classification of contempt hearings into civil and criminal did indeed uniformly remind judges, lawyers, and parties of these factors, the process would be a highly satisfactory one. But the classification scheme breaks down in confusions, and courts are apt to talk of contempts themselves (rather than the hearings) as criminal or civil, and in the same opinion may adopt both the basic test of purpose and some deviant variation on it. Sanctions for contempt are often not meted out thoughtfully and effectively, partly because of this confusion between civil and criminal. In short, the abstract distinctions between civil and criminal contempt have not worked very well.

---

<sup>267</sup> See Moskowitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780 (1943).

Of course, it is not possible to abolish the substance of the rules involved. We could not constitutionally provide by statute an arrangement whereby the contempt hearing could be tried on a preponderance-of-evidence standard and then result in a two-year determinate sentence. Nor would we want to do so. Yet we can avoid the definitions and confusion built into the distinction between criminal and civil contempt punishments and hearings by developing an *operational* definition rather than an abstract one. In other words, by providing in a statute exactly what is to be *done* rather than by describing a theory.

A statute might, for instance, begin by requiring the trial judge to state whether coercive or non-coercive sanctions or both were possible results of any contempt hearing. This would serve, first, to remind the judge of the options available to him and to warn the party charged exactly what was in jeopardy at the hearing. Second, such a statute might set forth a rule that if non-coercive (punitive) sanctions are possible, criminal procedure must be followed. This would serve to remind all parties, and the trial judge, what procedures are necessarily involved. Third, the statute could set forth the rule that coercive sanctions may be used in any case where they are an announced possibility, and that non-coercive sanctions may be used only where the procedure at the hearing complies with that in other criminal cases. (A modified rule might be necessary for direct contempts.) Once these rules are set out—and they are simple and direct—the statute could serve as a guide to judgment as well as to fairness, and it would certainly serve to avoid the confusions surrounding the present distinction between civil and criminal hearings.

Although the simple statute just outlined would likely suffice in most cases, there are probably a few cases in which the protections normally afforded in criminal cases should be insisted upon, regardless of whether the sentence is coercive or non-coercive. In some states, injunctions have been used to enforce criminal laws, especially those that are vaguely associated with “nuisances” that can be abated. Illegal liquor sales, for example, have been enjoined in some cases. In such a situation, the alleged illegal liquor seller would be subject to criminal proceedings in which the prosecution would be required to prove guilt beyond reasonable doubt. If he is enjoined from his illegal activity and later is charged with violation of the injunction as a contempt of court, the same standard should be applied—that is, he should not be convicted of contempt of court for illegal liquor sales any more readily than for the statutory crime of illegal liquor sales. The prose-

cution in either situation should have the burden of proving guilt beyond a reasonable doubt, and it should not evade this burden by dealing with the liquor violation as a "contempt" rather than as a "crime" under the statute. Even if the proposed sentence is a coercive, civil one, courts should not lose sight of the essential criminal character of the proceeding; the label of the case as one of civil contempt should not allow an undermining of basic safeguards. It is perhaps with this problem in mind that courts refuse, in most cases, to enforce criminal laws by injunction.<sup>268</sup> The Massachusetts Supreme Court specifically rejected the introduction of "criminal equity" cases into the jurisprudence of Massachusetts on the ground, among others, "that it substitutes for the definite penalties fixed by the Legislature whatever punishment for contempt a particular judge may see fit to exact . . . ."<sup>269</sup> If injunctions are to issue at all to control crimes—whether called nuisances or not—criminal law standards ought to be invoked when contempt is alleged for violation of the injunction. Although their grounds are not always clear, some courts seem to agree with this proposition. They have classified the hearings on alleged violations of antiliquor or antiprostitution injunctions as "criminal" contempt hearings, with the result that the prosecution has the burden of proving guilt beyond a reasonable doubt.<sup>270</sup>

This does not mean that every contumacious act constituting a crime should always be given a criminal-type contempt hearing. The criminal aspects of an enjoined act may be quite secondary to the enforcement of a private right. If a group of persons are enjoined from forceful occupation of a bank, but allegedly violate this injunction, there are no doubt criminal acts alleged. Yet if the bank seeks

---

<sup>268</sup> It is commonly said that courts will not, in general, enjoin the commission of crimes, but that they will enjoin acts amounting to crimes, if they consist of public nuisances or invasions of private property interests. *State v. Robertson*, 63 N.M. 74, 313 P.2d 342 (1957) (court could abate public nuisance of lewdness and prostitution at a given place, but could not enjoin defendant from committing such acts in general); *Village of Blaine v. Independent School Dist. No. 12*, 265 Minn. 9, 121 N.W.2d 183 (1963) (injunction may go to protect "property rights," including a utility franchise, so that holder of franchise may enjoin illegal operation by competitor).

<sup>269</sup> *Commonwealth v. Stratton Finance Co.*, 310 Mass. 469, 474, 38 N.E.2d 640, 643 (1941). Other grounds were: it deprives defendants of jury trials, it is often an attempt to circumvent the "supposed shortcomings of jurors," and it may induce a practice of "government by injunction."

<sup>270</sup> *Demetree v. State ex rel. Marsh*, 89 So. 2d 498 (Fla. 1956); *Sliflet v. State*, 217 Tenn. 690, 400 S.W.2d 542 (1966); *State ex rel. Anderson v. Daugherty*, 137 Tenn. 125, 191 S.W. 974 (1917). In *Anderson*, the court said that even though such a contempt might arise in private litigation, it might "in a very true sense 'raise an issue between the public and the accused.'" *Id.* at 127, 191 S.W. at 974.

a coercive contempt sanction, the contempt hearing is surely appropriately considered to be a civil one rather than a criminal one. This seems quite unlike the case in which conduct is enjoined for "public" purposes, as in the liquor violation cases, and it may well be, as one writer suggested, that "the mere substitution of the government for the private contempt plaintiff would seem to call for at least some of the restrictions evolved to protect the criminally accused."<sup>271</sup>

Another possible solution is a broader one that would tend to solve several other problems of contempt. This solution would prescribe the use of contempt prosecutions, except in private, coercive contempt cases, whenever the acts charged would amount to statutory crimes. In other words, if an act is a crime, it would, under this proposal, be prosecuted under criminal statutes and not under contempt laws. Parallel limits are to some extent already in force in civil, coercive contempt cases and these might be clarified. For instance, statutes or constitutional requirements may limit the use of civil, coercive contempt to enforce payment of money debts when ordinary execution is available.<sup>272</sup> This, of course, is quite closely related to the idea that criminal contempt should not be used as punishment when ordinary criminal punishment is available. These two notions, taken together and clarified, might well solve many of the contempt problems, and would certainly minimize the criminal-civil classification problem.

## V

### PERSONS SUBJECT TO THE CONTEMPT POWER

#### A. *General Rules*

If someone disrupts a judicial proceeding or obstructs the process of the court, he is in contempt and subject to the court's contempt power whether he is a party to the litigation or not. A very different situation arises, however, where there is no disruption, obstruction, or even insult. If a court issues an injunction or other decree, it is clear that parties to the suit are bound once they are notified of the order. It is not so clear who, other than the parties themselves,

---

<sup>271</sup> Comment, *Civil and Criminal Contempt in the Federal Courts*, 57 YALE L.J. 83, 102 (1947).

<sup>272</sup> N.C. GEN. STAT. § 5-8(2) (Repl. 1969) authorizes civil contempt for nonpayment of any sum of money ordered by a court "in cases where execution cannot be awarded for the collection of the same." Related is the problem of imprisonment for debt, discussed in Section VII (B)(3)(a) *infra*.

may be bound. For example, a court may enjoin close-order picketing of the plaintiff's plant. The named defendants are bound by the order and subject to the contempt power if they do not obey. Suppose, however, an entirely different group of persons who were not parties to the injunction suit substitute themselves for the original picketers. If they have notice of the injunction, are they bound by it? Are they in contempt if they commit acts which, had they been committed by the named defendants, would constitute contempt? The answers are not altogether certain.

As a matter of due process, one is ordinarily not bound by any proceeding of which he had no notice and in which he had no opportunity to appear. An injunction that bound persons not parties would, of course, run counter to this proposition. Furthermore, an injunction that attempted to bind nonparties would look very much like legislation and not very much like a judicial decree. If one pierces the form of words, a decree that says *no one* shall trespass upon the plaintiff's property is similar in substance to a statute that prohibits trespass—except that the punishment and the procedures for punishment may be harsher in the case of the judicial decree. When an injunction can run not only against parties but against all the world, the tendency is to “govern by injunction” rather than by legislation. This tendency was wittily criticized by Chief Justice Fuller, who said: “‘Brother B. would codify all laws in an act of two sections: 1st, All people must be good; 2d, Courts of equity are hereby given full power and authority to enforce the provisions of this act.’”<sup>273</sup>

There are thus two problems if an injunction or other decree is given effect against nonparties. First, it may violate due process to hold in contempt a person who was not a party to the suit and who had no formal opportunity to take part in its decision. Second, it may run counter to our form of government to permit courts to legislate for all persons in rem, including those persons who are not parties to the suit.

The earlier cases seem to have taken this approach. In *Iveson v. Harris*,<sup>274</sup> it was clear to Lord Eldon that

it is [not] competent to this Court to hold a man bound by an injunction, who is not a party in the cause . . .

. . . .

. . . I should hesitate very much to proceed against him for breach of the injunction.<sup>275</sup>

<sup>273</sup> Quoted in Gregory, *Government by Injunction*, 11 HARV. L. REV. 487, 510 (1898).

<sup>274</sup> 32 Eng. Rep. 102 (Ch. 1802).

<sup>275</sup> *Id.* at 104. In *Fellows v. Fellows*, 4 Johns. Ch. 24 (N.Y. Ch. 1819), Chancellor

On the other hand, if this approach is applied without deviation, a party prohibited from carrying on some conduct might defeat the injunction by getting another to act in his stead. This fear was expressed in *Silvers v. Traverse*,<sup>276</sup> where, pursuant to a state statute, an injunction that forbade liquor sales by a certain party on stated premises also barred liquor sales by any person, whether a party or not. Mr. Silvers, who was not a party to the case, allegedly sold liquor on the premises and was charged with violating the injunction. The court held that Mr. Silvers could properly be held for violating the order, since the purpose of the statute was to burden the tainted premises, and if the statute were construed otherwise, the injunction could be subverted by a pro forma transfer of the property to some person who was not subject to the injunction. The fear that the court's decree could be thwarted unless it applied to the world at large led a number of courts to reject the older view and to bind persons who were not parties in a number of situations. Sometimes this rejection has seemed to be a wholesome one, and it is possible to find broad statements endorsing the use of the injunction to bind the world. One authority asserted the general rule to be that anyone who violates an injunction of which he has knowledge is guilty of contempt, provided only that he was within the class the judge intended to restrain.<sup>277</sup>

In spite of this broad statement and similar ones in some cases, the law clearly does not permit the application of injunctions to every person who has knowledge of them.<sup>278</sup> It is true, however, that certain persons may be bound by an equitable decree even though they are not parties. But these persons belong to very limited classes.<sup>279</sup> Most commonly the nonparties who are bound are agents and those who aid and abet violation, but the successor in interest may also be bound by the decree. Beyond this, some courts have taken the view that once jurisdiction is acquired over a *res*, that *res* may be protected against all persons, whether parties or not. Finally, persons otherwise represented in the proceeding, as in class suits, are bound.

In spite of their willingness to bind nonparties, courts have not been willing to dispense with notice to them that an injunction has issued. As a result, one who is not a party to the suit will not be held in con-

---

Kent said in part: "The Court has no right to grant an injunction against a person whom they have not brought, or attempted to bring, before the Court, by *subpoena*." *Id.* at 25.

<sup>276</sup> 82 Iowa 52, 47 N.W. 888 (1891).

<sup>277</sup> Annot., 15 A.L.R. 386, 387 (1921).

<sup>278</sup> *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431 (1934); *Kean v. Hurley*, 179 F.2d 888 (8th Cir. 1950); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930).

<sup>279</sup> See Note, *Binding Nonparties to Injunction Decrees*, 49 MINN. L. REV. 719 (1965).

tempt for his "violation" of the decree unless he has actual notice of it.<sup>280</sup> A few cases have reached a contrary result where the "in rem" theory is used, but these are distinctly a minority and they create serious constitutional doubts.<sup>281</sup> The notice need not be a formal one; it is not necessary to serve a copy of the decree upon nonparties, but they must have actual notice of its contents.<sup>282</sup>

### B. *Agents, Abettors*

It seems reasonable to bind an agent or servant by an injunction against the master, subject to the rule that he must have notice of the decree before he can be held in contempt. So long as the agent acts for the principal, it is entirely right to hold him in contempt if he violates the decree, and there seems to be no current dissent from this position. The proposition, of course, includes all forms of vicars—partners, co-owners, agents, and servants.<sup>283</sup>

Two qualifications must be stated. First, the agent may show he did not violate the decree or did not have notice of it. Second, he may show that he acted, not as an agent, but for himself. This was the situation in *Alemite Manufacturing Corp. v. Staff*,<sup>284</sup> where one who was a servant of *A*, and bound by an injunction against *A*, later left his employment and independently violated the injunction. The court held that he could not be found in contempt because he was bound by the injunction only as *A*'s servant and not as a private person.

One may aid and abet another's violation of the injunction even though he is in no formal sense an agent or servant. But, though formal agency is not an element of the abettor's liability here, he does resemble an agent in the sense that he acts with knowledge that he aids another's violation of the injunction. His own act is not forbidden by the injunction, but if his act aids the violation of the decree by one who is bound, and if the aider knows this, he is liable.<sup>285</sup>

---

<sup>280</sup> *Walker v. City of Birmingham*, 279 Ala. 53, 64, 181 So. 2d 493, 504 (1965), *aff'd*, 388 U.S. 307 (1967) (to hold a nonparty for contempt, "it must be shown clearly that he had knowledge of the order for the injunction in such a way that it can be held that he understood it, and with that knowledge committed a wilful violation . . ."); *State ex rel. Lindsley v. Wallace*, 114 Wash. 692, 195 P. 1049 (1921); *see Note, supra* note 279; 46 HARV. L. REV. 1311 (1933).

<sup>281</sup> *See, e.g., Silvers v. Traverse*, 82 Iowa 52, 47 N.W. 888 (1891); text accompanying notes 301-06 *infra*.

<sup>282</sup> *E.g., Crucia v. Behrman*, 147 La. 144, 84 So. 525 (1920) (counsel for plaintiff informed nonparty of injunction; held nonparty was bound by it and subject to contempt sanction).

<sup>283</sup> *E.g., State ex rel. Kruckman v. Rogers*, 124 Ore. 656, 265 P. 784 (1928) (partners).

<sup>284</sup> 42 F.2d 832 (2d Cir. 1930).

<sup>285</sup> This situation is somewhat analogous to that in *State v. Haines*, 51 La. Ann. 731,

There are many examples of the liability for aiding and abetting. When Mr. Weiss is enjoined from operating premises for illegal liquor sales or prostitution, Mr. Weiss is liable if he continues to operate, and so is Fifi Belondon if she aids him by engaging in the forbidden sale or service on the premises.<sup>286</sup> Or when Dr. Reich is enjoined from selling a certain product, he is liable for contempt if he continues to sell it, and so is the purchaser who buys it knowing of the injunction.<sup>287</sup> In both cases the abettor might well have independent interests of his own. Fifi Belondon may enjoy her work or may engage in it for personal profit; Dr. Silvert may wish to purchase the forbidden "energy accumulators" to further his own research, not to aid Dr. Reich in violating the injunction. But, although such independent purposes are permissible when the party is not aided, they are not permissible when he is and when this fact is known by the abettor.

Such illustrations seem to represent established practice. Yet there are problems. At some point the "aid" furnished by the contemnor to the party defendant is surely an insubstantial factor in the injunction's violation. Surely, for instance, mere verbal approval or even verbal encouragement would not be enough to warrant holding the nonparty as an aider and abettor. But what of a loan of money made for the purpose of allowing the party defendant to violate the injunction, or, if not for that purpose, with the certainty that it would be so used?

At some point, too, the nonparty's independent interest may outweigh the need for broad enforcement of the decree. Suppose that *A* has several times claimed some form of ownership in Blackacre, and *B*, the person in possession, procures an injunction that bars *A* from trespassing, claiming, or supporting the claims of any other persons. Now suppose that *O* is in fact the true owner and has good title documents on which to base his claim. If he has knowledge of the injunction against *A*, must he refuse a gift or loan of money from *A* aimed at financing his lawsuit and paying his attorney's fees? *O*'s interest, even if his claim proves inadequate, is legitimate and of a high order. The incidental aid it may give to *A*'s violation of the injunction seems so

---

25 So. 372 (1899), where the court decided that the defendant could not be held for a rape upon his own wife, but that he would nevertheless be liable as principal if he aided and abetted the same act by another.

<sup>286</sup> Weiss v. State *ex rel.* Cardine, 455 P.2d 904 (Wyo. 1969).

<sup>287</sup> Reich v. United States, 239 F.2d 134 (1st Cir. 1956), *cert. denied*, 352 U.S. 1004 (1957). The facts are not abundantly clear from the opinion, but it appears that Dr. Silvert, who was not a party to the injunction suit, had purchased one of the forbidden devices and had helped arrange shipment to himself. Petitioner's Reply Brief on Petition for Certiorari at 5, Reich v. United States, 352 U.S. 1004 (1957).



insubstantial in comparison that *O* might well feel justified in accepting money from *A*.

Of course, *O* might seek to intervene in the injunction suit and secure an exception from the injunction. However, this would merely add to the burden of litigation for all parties, including *B*, the very party the injunction is aimed at protecting. And, if intervention is denied, *O*'s attempt might not be a defense to a later contempt proceeding.<sup>288</sup>

Much work needs to be done to refine both the conceptual tools and the policy analysis of this problem. Clearly, not every nonparty should be held for every act that in some way aids a party's violation of the injunction. Just as clearly, some nonparties should be held. We can speak vaguely of nonparties who are "identified" somehow with the party, and we can speak just as vaguely of nonparties who are not identified but who, on the contrary, have independent interests of their own. But these terms are so broad that they represent little more than a conclusion that one ought or ought not to be held subject to the injunction. The steps that lead one to such a conclusion remain yet to be charted.

### C. *Class Actions, Successors, and Injunctions in Rem*

In many instances, persons who are not parties are nevertheless represented by persons who are. Sometimes this representation is so formalized that its function is obscure, but it is certainly true that when a corporation or association is sued as an entity, the corporation in a very real sense represents the stockholders. In a number of other cases representation is permitted under the name of "privity."<sup>289</sup> The trustee or the fiduciary may be sued; if so, the judgment binds him and indirectly binds the *cestui que*.<sup>290</sup> The same may be true with class actions—some persons may represent a very large class, with the result that the entire class is bound.<sup>291</sup> In all these cases the normal res judi-

<sup>288</sup> Application to intervene was denied in *United States v. Wilhelm Reich Foundation*, 17 F.R.D. 96 (D. Me. 1954), *aff'd mem. sub nom. Baker v. United States*, 221 F.2d 957 (1st Cir. 1955). "The fact that the applicants may subject themselves to contempt proceedings if they act in concert with the named defendants in violating the terms of the decree does not," the court said, justify intervention. *Id.* at 101. The applicant for intervention later apparently bought a product the party defendants had been enjoined from selling and was held in contempt, even though intervention had been denied. *Reich v. United States*, 239 F.2d 134 (1st Cir. 1956), *cert. denied*, 352 U.S. 1004 (1957).

<sup>289</sup> *Ben Constr. Corp. v. United States*, 312 F.2d 781 (Ct. Cl. 1963) (controlling stockholder and corporation in privity).

<sup>290</sup> See RESTATEMENT OF JUDGMENTS §§ 80(4), 85(1) (1942).

<sup>291</sup> See *Lance v. Plummer*, 353 F.2d 585 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966); FED. R. CIV. P. 23.

cata rules would make a judgment binding upon those represented. If the representation is adequate, the same result should obtain with an injunction decree of which the represented person has notice.<sup>292</sup>

The successor in office to a person who has been enjoined is a special instance of one who has been represented at a hearing, and who is bound by the decree. School board members who are enjoined to desegregate schools are personally bound by the decree, and so should be their successors since the successors were fully represented in the original hearing.<sup>293</sup>

But there are other kinds of successors whose situations are different. Successors in interest to tangible property are in some sense "in privity" with their predecessors. As to the state of the title of the property, they are ordinarily bound by prior litigation, either through res judicata rules or through the operation of recording statutes. Are they, however, bound by injunctive regulation of the use of the property merely on the ground that they are in privity? In an Arkansas case,<sup>294</sup> one Flannery was enjoined from operating a snooker parlor in the town of Paris, Arkansas, on the ground that it was a public nuisance. Flannery sold his equipment to Rogers for almost \$3,000, and Rogers opened the business in a different building. The lower court held Rogers in contempt of court, though he had not been a party to the proceeding. The supreme court reversed, saying that the purchase of the property was not shown to be a subterfuge, and that, in the absence of subterfuge, Rogers was entitled to the use and enjoyment of the property that he had purchased, at least until he, too, was enjoined from its use.<sup>295</sup>

Several cases appear to reach opposite results by emphasizing the privity between vendor and purchaser. But at least some of the cases that bind the purchaser by a prior injunction can be distinguished from the Arkansas case. In a Nebraska decision, *Wilcox v. Ashford*,<sup>296</sup> a landowner obtained an injunction restraining Frank Skinner from entering upon or attempting to take possession of land belonging to plaintiff. The injunction also ran against "all persons claiming through or under" Skinner. Thereafter, Skinner deeded the land to his daughter

---

<sup>292</sup> Note, *supra* note 279, at 731.

<sup>293</sup> See *Lucy v. Adams*, 224 F. Supp. 79 (N.D. Ala. 1963), *aff'd*, 328 F.2d 892 (5th Cir. 1964), where the court held that an injunction restraining a named person, who was dean of admissions of a university, from denying Negroes the right to enroll and pursue courses bound his successor in office, who had knowledge of the decree. See also *Wright v. County School Bd.*, 309 F. Supp. 671 (E.D. Va. 1970).

<sup>294</sup> *Rogers v. State ex rel. Robinson*, 194 Ark. 633, 109 S.W.2d 120 (1937).

<sup>295</sup> *Accord*, *Big Four, Inc. v. Bisson*, 132 Mont. 87, 314 P.2d 863 (1957).

<sup>296</sup> 131 Neb. 338, 268 N.W. 81 (1936).

and her husband, and they took possession. The daughter was held in contempt for violating the injunction to which she was not a party. The court justified this simply on the ground that "one who has knowledge of an injunction and is in privity with the party enjoined is bound thereby."<sup>297</sup> Perhaps the *Wilcox* decision can be justified even by one who agrees with the Arkansas decision. If a judgment is in the chain of title, it at least settles the title question, and, that being settled, any occupation of the land by one with knowledge of the injunction is apt to be in bad faith. But more important, the contempt sanction imposed in *Wilcox* was coercive only; it aimed *solely* at enforcing the original decree by getting the false claimant off the land and held her only until she left. Thus, in substance, though not in form, the *Wilcox* decision operates much like a new injunction against the new defendant,<sup>298</sup> and, though a more formal approach might be more satisfying, the informality of *Wilcox* is at least justifiable in a way that criminal punishment would not be.

The "privity" approach, holding successors in interest bound by the injunction affecting property, seems undesirable for criminal contempt, even though it may be justified in a *Wilcox*-type situation for civil contempt. It is perfectly appropriate to bind successors in interest by earlier judicial decisions affecting the state of title or incumbrances, and both the law of *res judicata*<sup>299</sup> and the recording statutes may do this.<sup>300</sup> But an injunction with respect to property does more than adjudge title; it regulates *conduct*. Furthermore, the penalties for failing to observe the state of title and the penalties for conducting oneself in violation of an injunction aimed at another are vastly different. It is one thing to subject a man to economic loss—or the risk of economic loss—when he fails to check the title to land that he buys. It is quite another thing to subject him to criminal punishment merely because he has bought and operated a business that was condemned when owned by another.

Perhaps the source of the difficulty is the substantive impropriety of a decree that bars Smith from operating a business in a proper manner because Jones had operated a similar business improperly at some earlier time. If Smith is a mere subterfuge, a front man for Jones's for-

---

<sup>297</sup> *Id.* at 340, 268 N.W. at 82.

<sup>298</sup> In *Hindi v. Smith*, 73 N.M. 335, 388 P.2d 60 (1963), the court emphasized privity and held a purchaser bound by an earlier decree. A new injunction was issued on this basis by the lower court and affirmed on appeal; the contempt power was not involved.

<sup>299</sup> RESTATEMENT OF JUDGMENTS § 89 (1942).

<sup>300</sup> When the judgment goes in the chain of title, or when a *lis pendens* is used, constructive and binding notice is afforded all purchasers as to the state of the title.

bidden business, of course he can be punished. If not, and the business continues to be a nuisance, then Smith, too, can be enjoined. But if neither of these suppositions is true, to punish Smith for Jones's earlier misconduct is surely improper. Thus, it seems preferable to use aiding and abetting rather than the rules of privity to bind successors in interest.

Even more troubling than the privity theory for holding strangers to the decree is the *in rem* theory. In certain limited kinds of cases, courts have used the power to seize property—usually tangible—and adjudicate title to it, or even to subject that property to the claims of the owner's creditors, in the so-called quasi *in rem* cases.<sup>301</sup> These cases are authorized only so far as they deal with title to property, or incumbrances on title. They do not deal with regulation of conduct. In 1891, however, the Iowa Supreme Court ignored the distinction between the adjudication of title and the regulation of conduct and held that an injunction decree padlocking a place of business as a nuisance and prohibiting all persons from selling unlawful liquor therein was an *in rem* decree binding all persons, including those who were not parties and those who were wholly unaware of the injunction.<sup>302</sup> Kansas has followed the same theory,<sup>303</sup> and so, in a dictum, has the state of Washington.<sup>304</sup> Several federal court decisions have also impliedly given some support to this view.<sup>305</sup>

A number of criticisms can be leveled at these cases, including the criticisms already mentioned about the "privity" cases involving successive ownership. It seems substantively improper to punish Smith because an injunction has gone against Jones for some other conduct on some other occasion. It seems undesirable to regulate conduct—as distinct from title—without having the parties whose conduct is regulated before the court. But beyond these points, there are problems that

---

<sup>301</sup> See *Tyler v. Judges of the Ct. of Registration*, 175 Mass. 71, 55 N.E. 812, *appeal dismissed*, 179 U.S. 405 (1900). In that case, Holmes, C.J., said in part:

[A] proceeding *in rem* dealing with a tangible *res* may be instituted and carried to judgment without personal service upon claimants within the State or notice by name to those outside of it . . . . Jurisdiction is secured by the power of the court over the *res*.

*Id.* at 75, 55 N.E. at 813.

<sup>302</sup> *Silvers v. Traverse*, 82 Iowa 52, 47 N.W. 888 (1891).

<sup>303</sup> *State v. Porter*, 76 Kan. 411, 91 P. 1073 (1907).

<sup>304</sup> *State v. Terry*, 99 Wash. 1, 168 P. 513 (1917).

<sup>305</sup> *E.g.*, *United States v. Dean Rubber Mfg. Co.*, 71 F. Supp. 96 (W.D. Mo. 1946), indicated that an injunction against distribution of defective prophylactics already in stock would be an injunction "in rem." However, the nonparties against whom enforcement was sought probably were closely identified with the enjoined party, and the reference to *in rem* injunctions hardly seems to be a significant part of the case.

may transcend those encountered in the privity cases. The in rem theory would permit enforcement of the injunction by the contempt power even against persons who had no notice of the decree, since the *res* theory is that the whole world is bound by the court's control of the property. Courts subscribing to the in rem theory have actually embraced this point of view.<sup>306</sup> Even if one could justify the denial of a hearing and an opportunity to present evidence on the merits, it seems difficult to justify contempt sanctions against one who is not even aware that a decree has been issued. Presumably, cases taking this extreme view would raise serious due process issues.

Another problem arises from the old saw that "equity acts in personam." There is, perhaps, no real reason why equity must act in personam and not in rem in proper cases.<sup>307</sup> Nevertheless, equity normally proceeds by summons, not by seizure of the property involved, and absent a seizure in advance,<sup>308</sup> or at least some reasonable notice to the parties affected,<sup>309</sup> the in rem procedure may not be valid.

In more concrete terms, it may be said that the in rem theory is probably a case of overkill, a kind of massive retaliation in response to a trivial problem. The problem is, as the Iowa court recognized in *Silvers*, cutting off the power of an enjoined individual to evade the injunction. In the nuisance cases, at least, this can be done readily enough without resort to the in rem theory. If a new nuisance is created by a nonparty using the same premises, he may be enjoined. There is, no doubt, some slight risk that, once enjoined, he will convey the property to still some other person, who in turn will have to be subjected to the judicial processes. But the risk of an indefinite number of evasions is small, and in any event the judicial process seems capable of closing an indefinite number of successive nuisances if need be. And if there is actual evasive action, aiding or abetting, or an agency relationship, then this itself will be a sufficient basis for binding the nonparty. The in rem theory, then, seems wholly unnecessary and undesirable.

---

<sup>306</sup> See *Silvers v. Traverse*, 82 Iowa 52, 47 N.W. 888 (1891) (the action is "notice to all the world" and no other notice needed); *State v. Porter*, 76 Kan. 411, 91 P. 1073 (1907). But see *Newcomer v. Tucker*, 89 Iowa 486, 56 N.W. 499 (1893).

<sup>307</sup> Statutes sometimes authorize in rem decrees in equity transferring real property. E.g., N.C. GEN. STAT. § 1-228 (Repl. 1969). Notice, however, that this is a title adjudication and an enforcement of the title, not a decree like an injunction that regulates conduct.

<sup>308</sup> *Pennyoy v. Neff*, 95 U.S. 714 (1877).

<sup>309</sup> *Tyler v. Judges of the Ct. of Registration*, 175 Mass. 71, 55 N.E. 812, *appeal dismissed*, 179 U.S. 405 (1900).

#### D. *The Limits Under Rule 65(d)*

The Federal Rules of Civil Procedure, adopted by statute or otherwise in many states,<sup>310</sup> lay down in rule 65(d) this limit on injunctions:

[The injunction] is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.<sup>311</sup>

Where this rule is in force, it presumably forbids the use of the *in rem* theory since that theory would dispense with the requirement of notice specified in rule 65. Whether the rule would equally forbid use of the *privity* theory in its more liberal form is not clear. It seems arguable that it would. The Supreme Court, interpreting the rule, seems to have emphasized the necessity for aiding and abetting or active concert:

The term "successors and assigns" in an enforcement order of course may not enlarge its scope beyond that defined by the Federal Rules of Civil Procedure. Successors and assigns may, however, be instrumentalities through which defendant seeks to evade an order or may come within the description of persons in active concert or participation with them in the violation of an injunction. . . . We have indicated that Labor Board orders are binding upon successors and assigns who operate as "merely a disguised continuance of the old employer."<sup>312</sup>

On the other hand, the Supreme Court has also characterized rule 65 as one "derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control."<sup>313</sup> This somewhat broader formulation might tend to support some of the old *privity* cases under rule 65, but the Court stopped short of saying that rule 65 incorporates this common law doctrine, and its emphasis seems to be on the narrower requirement of "active concert or participation" or substantial identity.<sup>314</sup> Other cases seem to bear out this more restrictive emphasis of rule 65,<sup>315</sup>

---

<sup>310</sup> *E.g.*, N.C. GEN. STAT. § 1A-1, rule 65(d) (Repl. 1969).

<sup>311</sup> FED. R. CIV. P. 65(d).

<sup>312</sup> *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945), *quoting* *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*; *see* *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

<sup>315</sup> *See* *Lance v. Plummer*, 353 F.2d 585 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966); *Annot.*, 97 A.L.R.2d 490 (1964).

and it seems likely that mere privity without concert, vicarious action, identity, or representation will not be enough.

### E. Conclusion

There is a need for detailed study of the problems presented when nonparties are sought to be bound by an injunction. Even if we assume that rule 65 clearly governs and limits the application of an injunction to those in "active concert," this term is not self-explanatory. Furthermore, even if one is in active concert with a named defendant, rule 65 does not exclude the possibility that he may, as a nonparty, have a sufficient independent interest to justify his acting until he is personally enjoined.

On this point—what constitutes an adequate independent interest—much thought is needed. The nature of the problem can be illustrated hypothetically as follows:

X plans a demonstration in a bank to indicate its opposition to the bank's all-white hiring policy. The bank, hearing of the plan, seeks and obtains a temporary restraining order forbidding this demonstration on its property. In the meantime, the local chapter of Z independently plans a similar demonstration in the same bank as a protest of the bank's support for the Vietnam War. This is not known by the bank, and no injunction runs against Z. The injunction against X, however, forbids any trespass or demonstration on bank property, and Z learns of this. Nevertheless, Z carries out its planned demonstration.

Such a situation is complex.<sup>316</sup> In the hypothetical case outlined, Z probably could not be bound by the injunction if X members did not violate it, since Z could not be regarded as being in concert or participating with X where X did not participate at all.<sup>317</sup> If, however, X proceeded to demonstrate in the bank, any similar action by Z may fairly be regarded as concert and participation, even though the purposes may be slightly different. In such a case, does the independent basis of Z's plan—the fact that its purpose is not to assist X—relieve it of liability under the injunction? If so, would the case be a different one if the Z demonstrators share X's purpose more closely, that is, if the Z demonstration were also a protest against all-white hiring policies instead of a protest against the War?

---

<sup>316</sup> A reading of the bank-demonstration cases makes the hypothetical easy to believe. See *People v. Poe*, 236 Cal. App. 2d 928, 47 Cal. Rptr. 670 (1965) (protest against bank's alleged discriminatory hiring policies by blocking entrance to bank; claim of justification on grounds that bank was in fact discriminatory); *Curtis v. Tozer*, 374 S.W.2d 557 (Mo. 1964) (similar).

<sup>317</sup> *United Pharmacal Corp. v. United States*, 306 F.2d 515 (1st Cir. 1962).

These questions cannot now be answered with confidence. Yet they deal with basic rights, with free speech, and with the fundamental notions of fair play involved in the requirement that a person must have his day in court before he can be punished.

## VI

### INTENT AND ABILITY TO COMPLY

#### A. *Intent*

It is sometimes said that in criminal contempt proceedings the alleged contemnor must be shown to have wilfully or intentionally violated the court order.<sup>318</sup> The same "wilfulness" is not said to be required in civil contempt cases since the purpose of those cases is to give the opposing party the relief to which he is entitled, and the contemnor's state of mind is not, therefore, important.<sup>319</sup> An apparent exception to this occurs in some alimony cases, where, although the contempt proceeding is civil, wilful disobedience is a prerequisite to any sanction.<sup>320</sup> This exception is probably, however, an inaccurate formulation of a rule that is of special importance in money decree cases: inability to comply with a decree is a good defense.<sup>321</sup>

This simple dichotomy, however, is a little too facile. The same confusion that shrouds other aspects of contempt covers this one as well. Although some cases seem to treat the intent element just as they might treat that element with any other crime, other cases do not. Thus, it may be that intent must be proved beyond a reasonable doubt in criminal contempt cases;<sup>322</sup> then again, it may be that a lack of intent

---

<sup>318</sup> See *United States ex rel. Porter v. Kroger Grocery & Baking Co.*, 163 F.2d 168 (7th Cir. 1947); *Chicago v. Hart Bldg. Corp.*, 116 Ill. App. 2d 39, 253 N.E.2d 496 (1969); cf. *Re Bramblevale Ltd.*, [1969] 3 W.L.R. 699 (C.A.).

<sup>319</sup> See *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949). The Court said in part:

The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. . . . Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.

*Id.* at 191 (footnote omitted).

<sup>320</sup> See *Robertson v. State*, 20 Ala. App. 514, 519, 104 So. 561, 565 (1924); *Cooper v. Cooper*, 225 Ga. 462, 169 S.E.2d 324 (1969); *Moskovitz*, *supra* note 267, at 793.

<sup>321</sup> *E.g.*, *Garrouette v. Garrouette*, 455 P.2d 306 (Okla. 1969), where the court confused the wilfulness requirement with the affirmative defense of inability to comply.

<sup>322</sup> See *In re Rice*, 181 F. 217 (C.C.M.D. Ala. 1910): "This proceeding is highly punitive and criminal in its nature, and respondents are entitled to the benefit of the reasonable doubt. The criminal intent here turns upon the scienter . . ." *Id.* at 227. In



to commit contempt is an affirmative defense to be proven by the person charged.<sup>323</sup> In some instances, intent or wilfulness is immaterial, and one can be convicted even though he has no intent.<sup>324</sup> Another possibility is that although intent must be proven by the prosecution, it need only be shown by a preponderance of the evidence rather than beyond a reasonable doubt.<sup>325</sup> These points have not been clearly resolved as a matter of general practice, and many cases are decided without the slightest reference to the problem of intent or bad faith. Indeed, in some situations criminal contempt punishment is upheld even though the contemnor has acted in complete good faith, as where he is advised by counsel that the injunctive order against him has been superseded by an appeal.<sup>326</sup> However, this extreme form of criminal liability for good faith acts is rejected by some courts.<sup>327</sup>

There is also difficulty in interpreting the wilfulness requirement. As Joseph Moskovitz pointed out many years ago,<sup>328</sup> the contemnor's

United States *ex rel.* Porter v. Kroger Grocery & Baking Co., 163 F.2d 168 (7th Cir. 1947), the court said in part: "We are of the view that the intent with which the overcharges were made is an essential element of the contempt charged and that the burden was upon the plaintiff to establish such element beyond all reasonable doubt." *Id.* at 174. *Accord*, Chicago v. Hart Bldg. Corp., 116 Ill. App. 2d 39, 253 N.E.2d 496 (1969).

<sup>323</sup> See Note, *The Intent Element in Contempt of Injunctions, Decrees and Court Orders*, 48 MICH. L. REV. 860, 866 (1950). A number of cases by inference, if not by clear statement, put the burden upon the contemnor to show his lack of intent. In some of these, however, the ancient and now largely discredited doctrine of purgation by oath is still used. This doctrine permits any person charged with contempt to avoid all liability for contempt by simply denying his contempt under oath. He may, in such a case, subject himself to a formal perjury prosecution, but he absolves himself automatically from contempt, and as a practical matter this probably is effective to absolve him of any other liability. Where this doctrine still exists, with its liberal exit for the contemnor, it is not surprising to see that the contemnor is left with the burden of negating his intent if that is his defense. See, e.g., Allison v. State *ex rel.* Allison, 243 Ind. 489, 187 N.E.2d 565 (1963); Tusing v. State, 241 Ind. 650, 175 N.E.2d 17 (1961).

<sup>324</sup> Offutt v. United States, 232 F.2d 69 (D.C. Cir.), *cert. denied*, 351 U.S. 988 (1956).

<sup>325</sup> A typically ambiguous statement is:

In order to constitute criminal or public contempt, it must appear that the alleged act of disobedience has been expressly forbidden; that there has been a violation of the plain terms of the order, and that the violation was willful or intentional rather than inadvertent or by mistake. . . . [I]t should appear, with reasonable certainty, that it has been violated.

*In re North*, 149 Misc. 572, 574, 267 N.Y.S. 572, 574 (Sup. Ct.), *aff'd*, 240 App. Div. 937, 267 N.Y.S. 1021 (3d Dep't 1933).

<sup>326</sup> *Ladner v. Ladner*, 206 So. 2d 620 (Miss. 1968) (10-day jail sentence); *Green v. Griffin*, 95 N.C. 50 (1886) (contemnor's good faith reliance on trusted counsel found as a fact by the court trying the contempt; nevertheless, fined \$250).

<sup>327</sup> *In re Faulisi*, 7 Misc. 2d 704, 162 N.Y.S.2d 687 (Sup. Ct. 1957); *cf. In re North*, 149 Misc. 572, 267 N.Y.S. 572 (Sup. Ct.), *aff'd*, 240 App. Div. 937, 267 N.Y.S. 1021 (3d Dep't 1933) (attorney's advice plus ambiguity of decree showed lack of wilfulness).

<sup>328</sup> Moskovitz, *supra* note 267, at 794.

act might be regarded as wilful only if the defendant intended both to violate the injunction and to express defiance in doing so. His act might be regarded as wilful if he merely intended to violate the injunction, even though he had no desire to express contempt for the court's authority. Or, the act might be regarded as wilful if he merely intended to do acts that later turned out to violate the decree. Still another possibility is that the particularly bad quality of the contemnor's act, rather than his intent as such, would be determinative of his "wilfulness."<sup>329</sup> There is no clear agreement, or even analysis, on these points. It seems unreasonable to impose criminal penalties in the last situation, where the contemnor commits acts that disobey the injunction, but without realization that disobedience is involved. In such a case, civil contempt might be appropriate since no intent at all should be or is required there. Yet in some instances, disobedience alone has been enough to lead to criminal contempt penalties, even though the defendant did not realize the disobedient quality of his act.<sup>330</sup>

Probably much of the difficulty here stems from the failure to distinguish between civil and criminal contempt punishments. A frank recognition that criminal contempt is criminal, and that intent is therefore a prerequisite to criminal punishment, would be welcome.

It remains to be said that on occasion courts have dispensed with the intent requirement altogether and have said that even the good faith of the contemnor is no defense, if his acts are violative of the decree. Courts that have extended the scope of liquor injunctions to nonparties<sup>331</sup> have also held that the good faith of the violator was no defense.<sup>332</sup> Here again, this seems unjustified, and probably is explicable in historical, social, and geographical terms that would have little bearing in times less concerned with the propriety of liquor sales and with a Middle-Western version of late-Victorian manners.

So far discussion has centered on the violation of court orders, but criminal contempt sanctions may be imposed as well for disruption of judicial processes, obstruction, or even for insult or critical publications. Cases of this sort present special problems. In many of them, summary contempt procedures are used since the contempt, if it exists,

---

<sup>329</sup> See Note, *Criminal Contempt*, 32 IND. L.J. 514, 522-24 (1957).

<sup>330</sup> This occurs most notably in the advice-of-counsel cases. See cases cited in note 326 *supra*. See also *In re Rice*, 181 F. 217, 223 (C.C.M.D. Ala. 1910), where the court indicated that innocent intent is no protection when there was an intent to commit the act that constituted a violation of the injunction.

<sup>331</sup> See text accompanying notes 276-77 *supra*.

<sup>332</sup> *Silvers v. Traverse*, 82 Iowa 52, 47 N.W. 888 (1891); *State v. Porter*, 76 Kan. 441, 91 P. 1073 (1907).

is committed in the courtroom. In these circumstances especially, it is easy to overlook the intent requirement, and even if it is not overlooked, its application is difficult.

One difficulty in applying the intent requirement is that, in at least some of the cases, the intent to insult or to be disrespectful seems to be a part of the affront being redressed; yet this may turn on nothing more substantial than a cast of eye or tone of voice. What is arrogance in the mind of the judge may be spirited advocacy in the mind of the attorney. Words never used by educated middle-class citizens in a formal setting may be the everyday language of many people who appear in court. In these conditions intent to insult or otherwise disrupt should not be readily inferred. The moderation of the New Jersey court which countenanced an expression "descriptive of excrement" that was not in fact disruptive of the proceeding is to be applauded.<sup>333</sup> And the California rule requiring something more than tone of voice to support a contempt conviction when the words themselves are not contemptuous is likewise a sound protection from abuse.<sup>334</sup>

There are, nevertheless, cases in which courts seem unaware of the intent requirement in these summary contempts. A Mrs. DuBoyce was fined fifty dollars and sentenced to fifteen days in jail because her "attitude throughout the trial was argumentative and arrogant" and because "her complete misconception of judicial procedure" made trial difficult.<sup>335</sup> Of course, with no more information than this, it is quite possible to believe that Mrs. DuBoyce intentionally disrupted the trial. But it is also possible to believe that intent was lacking, and no details are given in the opinion to indicate that such an intent existed. Indeed, "her complete misconception of judicial procedure" seems to be the explanation for her conduct, and although coercive penalties would be warranted in such a case to force compliance with judicial procedures, criminal punishments for a "misconception" seem unwarranted without any showing of intentional violation.

In other cases, courts have deliberately discarded the intent requirement for certain courtroom contempts. In *Offutt v. United States*,<sup>336</sup> Judge Fahy said that if the contemnor's remarks were insolent and insulting in a way that constituted "misbehavior" in the course of a trial,

---

<sup>333</sup> *State v. Jones*, 105 N.J. Super. 493, 253 A.2d 193 (1969).

<sup>334</sup> *In re Hallinan*, 71 Cal. 2d 1179, 459 P.2d 255, 81 Cal. Rptr. 1 (1969). For a discussion of this case, see notes 80-84 and accompanying text *supra*. *But see* *Garland v. State*, 101 Ga. App. 395, 416, 114 S.E.2d 176, 190 (1960): "A court may be insulted by the most innocent words uttered in a peculiar manner or tone."

<sup>335</sup> *In re DuBoyce*, 241 F.2d 855 (3d Cir. 1957).

<sup>336</sup> 232 F.2d 69 (D.C. Cir.), *cert. denied*, 351 U.S. 988 (1956).

"there would be no need to make special inquiry into intent, except as to mitigation."<sup>337</sup> In Judge Fahy's scheme of things, intent is not an element of contempt of this kind, though "misbehavior" is. He explained further that "when the conduct in question is not clearly blameworthy . . . there is no contempt unless there is some sort of wrongful intent."<sup>338</sup> Perhaps the end result is the same as if intent or wilfulness were required, since "misbehavior" would ordinarily warrant an inference of intent where the misbehavior is "clearly blameworthy." But as a clear statement of the rules, Judge Fahy's formulation does not seem a happy one. It can be used all too easily to impose a kind of strict criminal liability without fault. Quite aside from that, it could serve to seriously impede effective advocacy of lawyers and subvert the independence of the bar if lawyers were subject to contempt charges based on zealousness and no more.<sup>339</sup> Finally, Judge Fahy's formulation of the rules may have a serious procedural effect. If intent is not recognized as an element of these contempts, summary proceedings may suffice where otherwise a full hearing would be required to develop the intent element.<sup>340</sup>

A more rigid insistence on the intent requirement for criminal contempt punishment is needed. This may be especially important when we realize that people in courtrooms often do not share the cultural assumptions of the judge. Often they may hold a genuine "misconception of judicial procedure." At times they may be goaded into contemptuous behavior because they do not understand the legal machinery and have not inherited, as the law courts have, a set of formalities from a bygone era. If such persons are to be held in contempt at all, surely it should be only on a showing of wilful or intentional misconduct.

### B. *Ability To Comply*

The question of one's ability to comply with a judicial order presents a slightly different problem from that involved in one's intent. Of course, it is true that if the contemnor had no ability to comply

---

<sup>337</sup> *Id.* at 72.

<sup>338</sup> *Id.*

<sup>339</sup> The *Watts* and *Caldwell* cases show that where the contempt of lawyers consists of advice to clients, cross-examination or other action, even if mistaken and disturbing, which purports to be on behalf of a client, then the actual evil intention is a crucial element of the contempt or relevant to the degree of guilt and consequent extent of punishment. The policy is clear: to protect honest lawyers against punishment for excessive zeal and thus preserve the independence of the bar.

Harper & Haber, *supra* note 157, at 21.

<sup>340</sup> See Section II *supra*.

with the order, he cannot be said to have wilfully violated it. For the most part, however, where wilful violation is required, the burden is upon the prosecution to show wilfulness or intentional violation, although it is usually assumed that one has the ability to comply unless he proves affirmatively to the contrary. In other words, the lack of ability to comply is usually treated as an affirmative defense, while the presence of intent or wilfulness is a part of the prosecution's prima facie case.<sup>341</sup> This rule is often reflected more in practice and assumption than in clear statement, and it is not a universal one for there are cases that seem to require affirmative proof of ability to comply, at least in decrees ordering the payment of money.<sup>342</sup>

Unlike the intent issue, lack of ability to comply is a defense not merely in a criminal case but also in a civil case.<sup>343</sup> If the inability to comply was self-induced, as where a husband ordered to pay money to his wife flushes it down the toilet, a coercive sanction may become impossible but a punitive sanction is still permissible.<sup>344</sup>

One serious problem arises where a contemnor undertakes to prove his inability to comply with the decree. Since in most instances he has the burden of proof, it is quite possible that he will fail to establish inability to comply to the court's satisfaction. His own testimony may be all he can readily adduce; it is difficult to get corroboration of one's inability to obtain money. Thus, the contemnor may be placed in jail on an indefinite, coercive sentence, even though there is no way he can comply with the decree. In this respect, the situation resembles most other dispute-of-fact situations—there is always a risk that the trier of fact will misjudge the truth. But in the coercive contempt situation, that misjudgment can result in a literally interminable jail sentence. It may very well be that a legislative adjustment is needed to remedy this situation. Several alternatives might be considered: shifting the burden of proof (or persuasion) once the inability-to-comply

---

<sup>341</sup> *In re S.L.T.*, 180 So. 2d 374 (Fla. Dist. Ct. App. 1965); *Carey v. Carey*, 132 Ind. App. 30, 171 N.E.2d 487 (1961); *Mowery v. Mowery*, 50 Tenn. App. 648, 363 S.W.2d 405 (1962); see Annot., 53 A.L.R.2d 591 (1957).

<sup>342</sup> *Noorthoek v. Superior Ct.*, 269 Cal. App. 2d 600, 75 Cal. Rptr. 61 (1969):

In order to support an indefinite commitment . . . there must be a finding, based upon evidence, that the contemner has the present ability. . . . Proof that [contemnor] had the ability to pay reasonable support, month by month, is not proof that [he] is now able to pay a lump sum of \$4,000.

*Id.* at 609, 75 Cal. Rptr. at 67.

<sup>343</sup> *E.g.*, *Ex parte Fiedler*, 446 S.W.2d 698 (Tex. Civ. App. 1969).

<sup>344</sup> *E.g.*, *Gossett v. Gossett*, 34 Tenn. App. 654, 241 S.W.2d 934 (1951). The court said in part: "[T]he Chancellor would not have been justified in committing respondent until the whole delinquent amount should be paid, because he could earn nothing while incarcerated and so far as his own earnings go he would have remained in jail forever." *Id.* at 659, 241 S.W.2d at 936-37.

issue is raised by the defense; or putting the burden on the moving party in the first instance. Other possibilities include the use of definite, criminal sentences where serious doubt is raised, the introduction of a jury into civil contempt cases of this sort, or limiting the enforcement of money decrees by the contempt power and requiring instead use of execution. This last solution only affects money decrees, but as these involve the most serious ability-to-comply problems, it may be a good one. In any event, changes are needed.

## VII

### SANCTIONS FOR CONTEMPT

#### A. *In General*

As already indicated, contempt may be punished in several ways, but one rule controls the choice of sanction in any case: if the proceeding is a criminal one, the sanction must be determinate, such as a jail sentence for a specific length of time; if the proceeding is a civil one, the sanction must be a coercive (and indeterminate) one that will be lifted immediately upon the contemnor's compliance with the court order.<sup>345</sup>

Subject to this rule, sanctions for either civil or criminal contempt may be quite varied. Imprisonment is a common sanction in both civil and criminal contempt proceedings, with a determinate or indeterminate sentence as may be appropriate.<sup>346</sup> Fines are also commonly used as sanctions in contempt, with a distinction between a punitive fine payable to the state in a criminal proceeding<sup>347</sup> and a remedial or compensatory one payable to the injured party in a civil contempt proceeding.<sup>348</sup> These common sanctions are not the only ones available. In certain circumstances, the contemnor may be denied the right to appeal or even the right to prosecute a civil claim so long as he remains in contempt.<sup>349</sup> There is no clear theoretical barrier to other sanctions, at least in civil contempt proceedings, providing they are designed to be coercive or remedial.<sup>350</sup> Each kind of sanction presents problems, however, and these are discussed individually.

---

<sup>345</sup> See generally Section IV *supra*.

<sup>346</sup> See, e.g., *People v. Nowicki*, 17 Mich. App. 525, 170 N.W.2d 187 (1969).

<sup>347</sup> E.g., *Chicago v. Hart Bldg. Corp.*, 116 Ill. App. 2d 39, 253 N.E.2d 496 (1969) (\$5,000 fine plus additional fine equal to profits made by contemnor through his contempt).

<sup>348</sup> E.g., *Grunberg v. Louison*, 343 Mass. 729, 180 N.E.2d 802 (1962).

<sup>349</sup> E.g., *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954).

<sup>350</sup> E.g., *Lance v. Plummer*, 353 F.2d 585 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966) (auxiliary deputy deprived of badge).

## B. Imprisonment

### 1. Criminal Punishment

Imprisonment is, of course, most closely associated with the determinate criminal sentence. When the criminal contempt proceeding meets the procedural requirements, there are seldom problems in imposing such punishment.

In some states, and in the federal system, there is no statutory maximum on the sentence, and the court imposing the sentence sets its own maximum.<sup>351</sup> As a practical matter, the recent federal requirement of a jury trial for contempt cases involving sentences over six months may operate as an effective ceiling on sentences in all but the most unusual cases, and perhaps this was one purpose of the Supreme Court in establishing the jury right.<sup>352</sup>

Punishment for criminal contempt has been restricted by statute. For example, in a number of states it is limited to thirty days imprisonment plus a fine not in excess of 250 dollars,<sup>353</sup> and similar limits are imposed in other states.<sup>354</sup> These provisions seem desirable as a protection against arbitrary use of judicial power.

### 2. Civil Sanctions

Imprisonment is also commonly used in civil contempt cases. In such cases the contemnor is held until he purges himself of contempt and then released; alternatively, he may be given a definite sentence that is then suspended on condition that he refrain from further contemptuous acts. In either event, the sentence tends to coerce compliance and by full compliance imprisonment will be avoided.

In most cases this creates few problems. The contemnor may comply with the decree before he ever reaches jail, or he may comply with it soon thereafter. Where the act required of him is an affirmative one that can be accomplished in jail—signing a deed, for instance—it is easy enough for him to get out. Where the act required by the

<sup>351</sup> *People v. Stollar*, 31 Ill. 2d 154, 201 N.E.2d 97 (1964), *cert. denied*, 380 U.S. 912 (1965) (no statutory limit; 18-month sentence imposed on mother-guardian for misuse of guardianship funds). The state may limit the sentence as to some kinds of contempt but not as to others. *See State v. Edwards*, 252 Ore. 325, 446 P.2d 659 (1968).

<sup>352</sup> *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *see* Section III *supra*, on the right to a jury trial in contempt cases.

<sup>353</sup> N.C. GEN. STAT. § 5-4 (Repl. 1969); N.Y. JUDICIARY LAW § 751 (McKinney Supp. 1970); WIS. STAT. ANN. § 256.06 (1957).

<sup>354</sup> ARIZ. REV. STAT. ANN. § 12-863 (1956) (six months and \$1,000); ARK. STAT. ANN. § 34-902 (Repl. 1962) (ten days and \$50); CAL. CIV. PRO. CODE § 1218 (West Supp. 1969) (five days and \$500).

court's decree must be performed outside the prison, a problem occurs since the contempt cannot be "purged" so long as the sentence remains. But the problem may be more theoretical than real. Ordinarily, an expression of willingness to perform the act will be sufficient to procure release by the sentencing judge.<sup>355</sup> A similar problem may exist where the injunctive order is prohibitory in nature, so that there is no way the contemnor can, while in jail, demonstrate his willingness to avoid future violations. He can, however, express to the judge an intention of future compliance, and on this basis will usually be allowed to demonstrate his good faith outside the prison. Of course, the contemnor may abuse the court's trust by violating the order yet again, but it seems better to risk his doing so than to keep him in jail on a civil contempt sentence after he expresses a desire to comply with the order.<sup>356</sup> If he commits a further violation, a new contempt proceeding can be instituted, and, indeed, a criminal contempt punishment would be possible if it were thought desirable. This being so, courts have been quite ready to release contemnors on their simple expressions of readiness to comply in the future, and so long as this is true, the potential problem here appears minor.

### 3. *Enforcement of Money Decrees*

a. *Imprisonment for "Debt."* Not every money judgment is enforceable by contempt power, not even theoretically. The normal judgment at law—in the usual contract or tort suit, for example—is an *in rem* judgment, more a declaration of a debt than an order to the defendant to pay it. The defendant is not in contempt when he does not pay such a judgment because it does not order him to do anything. Such a judgment is enforced through other methods, usually through execution on the defendant's property, a sale of the property, and an application of the proceeds to the debt.<sup>357</sup>

Occasionally, however, courts exercising equity powers issue in personam decrees ordering a defendant to pay money. For example, a defendant may be ordered to perform a contract to purchase real

---

<sup>355</sup> "[I]f the contemnor indicates his willingness in good faith to perform, he would be entitled, and will be allowed, to leave the jail in order to do so." *City of Vernon v. Superior Ct.*, 38 Cal. 2d 509, 519, 241 P.2d 243, 249 (1952).

<sup>356</sup> See *Cliett v. Hammonds*, 305 F.2d 565 (5th Cir. 1962), where a contemnor was released on a promise of future compliance and then again violated an injunction against interference with another's property. She was again held in contempt and again given an opportunity to purge herself.

<sup>357</sup> See N.C. GEN. STAT. § 1-302 (Repl. 1969). See generally Cook, *The Powers of Courts of Equity*, 15 COLUM. L. REV. 37 (1915).



estate and to pay the contract price for it,<sup>358</sup> or ordered to pay alimony or child support.<sup>359</sup> Such orders, being directions to pay and not mere declarations of a debt, are within the general class of orders enforceable by civil contempt powers.

The potential use of contempt power to enforce payment of money raises several problems including the specter of imprisonment for debt. Imprisonment for debt is, of course, forbidden by most state constitutions, either in absolute terms<sup>360</sup> or with limited exceptions.<sup>361</sup> These prohibitions may make contempt imprisonment, whether civil<sup>362</sup> or criminal<sup>363</sup> in nature, constitutionally impermissible if based on "debt."

What constitutes a "debt" is, however, another matter. A simple contract debt is a "debt" that cannot be enforced by an order to pay and a contempt imprisonment.<sup>364</sup> This rule is not to be subverted by first imposing a "fine" upon the recalcitrant debtor and then imprisoning him for failure to pay it. The imprisonment in such a case, though based on failure to pay the fine rather than the debt, is nevertheless grounded in the debt.<sup>365</sup> When the money claim is something other than simple contract debt it may not be a "debt" at all, even though it is assuredly a legally enforceable claim. It is commonly held that alimony and child support claims arise not from debt but from a status or an obligation imposed by law, and therefore may be enforced by contempt imprisonment<sup>366</sup> provided the requisite ability to pay exists.<sup>367</sup> But not every

<sup>358</sup> *E.g.*, Fiorito v. Yaskulski, 16 App. Div. 2d 867, 228 N.Y.S.2d 598 (4th Dep't 1962).

<sup>359</sup> *E.g.*, Mowery v. Mowery, 50 Tenn. App. 648, 363 S.W.2d 405 (1962).

<sup>360</sup> GA. CONST. art. I, § 2-121; MISS. CONST. art. 3, § 30; N.M. CONST. art. II, § 21; TENN. CONST. art. I, § 18 (in civil cases); TEX. CONST. art. 1, § 18.

<sup>361</sup> Many states specifically permit imprisonment where the debtor is guilty of fraud. *E.g.*, ARIZ. CONST. art. 2, § 18; ARK. CONST. art. 2, § 16; CAL. CONST. art. 1, § 15; COLO. CONST. art. II, § 12; FLA. CONST. art. 1, § 11; IDAHO CONST. art. 1, § 15; IND. CONST. art. 1, § 22; IOWA CONST. art. 1, § 19; KAN. CONST. Bill of Rights, § 16; MICH. CONST. art. I, § 21; MINN. CONST. art. I, § 12; NEB. CONST. art. I, § 20; NEV. CONST. art. 1, § 14; N.J. CONST. art. 1, § 13; OHIO CONST. art. I, § 15; S.C. CONST. art. 1, § 24; WYO. CONST. art. 1, § 5.

Others permit imprisonment of absconding debtors. ORE. CONST. art. I, § 14; UTAH CONST. art. I, § 16; WASH. CONST. art. 1, § 17.

<sup>362</sup> *See* People *ex rel.* Sarlay v. Pope, 230 App. Div. 649, 246 N.Y.S. 414 (3d Dep't 1930) (remedial sentence of a civil fine with jail sentence until paid; violation of the constitutional prohibition against imprisonment for debt).

<sup>363</sup> *Wojahn v. Halter*, 229 Minn. 374, 39 N.W.2d 545 (1949) (determinate fine and commitment to jail was violation of constitutional prohibition).

<sup>364</sup> *See, e.g.*, *Holden v. Holden*, 245 N.C. 1, 95 S.E.2d 118 (1956).

<sup>365</sup> *See* People *ex rel.* Sarlay v. Pope, 230 App. Div. 649, 246 N.Y.S. 414 (3d Dep't 1930).

<sup>366</sup> *E.g.*, *Johnson v. Johnson*, 241 Md. 416, 216 A.2d 914 (1966); *Lamb v. Lamb*, 83 Nev. 425, 433 P.2d 265 (1967); *Annot.*, 30 A.L.R. 130 (1924).

<sup>367</sup> Where there is no ability to pay, serious federal constitutional issues may be raised. In *Strattman v. Studt*, 20 Ohio St. 2d 95, 253 N.E.2d 749 (1969), the Ohio Supreme Court held that a statute permitting imprisonment for failure to pay a fine was a violation of indigents' equal protection rights since a \$3 credit against the fine for each day of

money order in a divorce decree is "alimony" or "child support"; some of the orders represent debt claims that cannot be enforced by imprisonment. A requirement of a divorce decree that the husband pay off certain creditors, for example, may be regarded as a "debt,"<sup>368</sup> as may a requirement that the wife repay monies wrongfully taken from the husband.<sup>369</sup> In such cases the order to pay money cannot be constitutionally enforced by imprisonment, even though support and alimony orders may be so enforced.

Other money obligations not contracted for may also be enforced by jail sentences. Where a money claim arises from fraud, many state constitutions specifically permit enforcement of the claim by imprisonment,<sup>370</sup> and quite probably the same result would obtain without any constitutional reference to fraud since it can be argued that claims based on fraud are not "debts." A number of cases so hold, thus removing the constitutional protection against imprisonment.<sup>371</sup>

A breach of fiduciary obligation may likewise result in a money obligation that is not technically a "debt." Such a breach resembles fraud in that it involves wrongdoing apart from breach of contract, and it resembles alimony and child support duties in that it usually results from a special relation between the parties supported by law and public policy. Here again there is a money obligation enforceable by contempt and imprisonment in spite of constitutional provisions.<sup>372</sup> This rule is subject, as it must be, to the rule against punishment when the contemnor is unable to pay. Other money obligations may likewise escape the constitutional limitation on imprisonment,<sup>373</sup> but the family sup-

---

confinement was grossly unfair. In *Williams v. Illinois*, 399 U.S. 235 (1970), the United States Supreme Court took a similar position. Chief Justice Burger wrote:

We conclude that when the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay . . . .

*Id.* at 240-41. In addition, an imprisonment, otherwise permissible to enforce alimony, might become a forbidden imprisonment for debt under state law if the contemnor has no ability to pay. *Horton v. Horton*, 222 Ga. 430, 150 S.E.2d 630 (1966). As to ability to pay generally, see Section VI(B) *supra*.

<sup>368</sup> *Thompson v. Thompson*, 282 Ala. 248, 210 So. 2d 808 (1968).

<sup>369</sup> *Proffit v. Proffit*, 105 Ariz. 222, 462 P.2d 391 (1969).

<sup>370</sup> Note 361 *supra*.

<sup>371</sup> See, e.g., *Nunn v. Smith*, 270 N.C. 374, 154 S.E.2d 497 (1967) (imprisonment under body execution statute, N.C. GEN. STAT. § 1-311 (Repl. 1969), would be justified if action was one in which defendant might have been arrested, e.g., fraud, otherwise not).

<sup>372</sup> *People v. La Mothe*, 331 Ill. 351, 163 N.E. 6 (1928) (trustee); *In re Clift's Estate*, 108 Utah 336, 159 P.2d 872 (1945) (executor).

<sup>373</sup> Taxes, for example, might be considered as obligations distinct from "debts." Cf. *Cincinnati v. Degoyer*, 16 Ohio Misc. 229, 232, 241 N.E.2d 769, 771 (Hamilton County Mun. Ct. 1968).

port, fraud, and fiduciary breach cases are no doubt the most significant ones.

It is sometimes suggested that the constitutional rule against imprisonment for debt is really meant only as protection for those unable to pay and that, accordingly, it would be permissible to imprison those who are able to pay and could avoid jail by meeting their obligations.<sup>374</sup> This reasoning, if followed, would apply not only to special cases of fraud, alimony, or the like, but also to simple contract debts. Then the only question would be the contemnor's ability to pay, and the question whether his obligation arose out of contract or in some other way would no longer be relevant. New York, under a statutory scheme for collection of a judgment debt in installments from income,<sup>375</sup> has upheld the constitutionality of this notion, saying that the constitutional provision is not violated if the contemnor is able to pay and he wilfully violates a court order to do so.<sup>376</sup>

Whatever the constitutional validity of this position may be, it seems unwise from a practical point of view. Although it would be easier to avoid the question of whether a given obligation is a "debt" or not, in this instance the cost of avoiding the question is too high. Part of the cost is injecting the judiciary into the private lives of citizens and forcing courts to supervise budgets in a way that seems inconsistent both with individual freedom and judicial behavior. The question of ability to pay becomes even more significant than it is now and more difficult to resolve. It is one thing to judge ability to pay child support, but it is quite another to judge ability to pay a series of installments on the television set. Furthermore, simple debt claims, arising as they ordinarily do out of voluntary transactions, can be secured if the creditor deems it desirable, and hence this serious invasion of private life seems unwarranted.

Perhaps an even more important objection to imprisonment of anyone who is purportedly able to pay a debt, but does not do so, is that it is often uncertain whether he is in fact able to pay. Leaving aside difficulties in determining what "ability" may mean, it is still possible that the contemnor is truly unable to pay but that the court does not believe him. As a result, he may be jailed indefinitely, the judge believing he can pay when in reality he cannot. This is a threat to personal liberty that warrants the traditional protective construction of the imprisonment-for-debt clauses.

---

<sup>374</sup> See 63 HARV. L. REV. 1444, 1446 (1950).

<sup>375</sup> NOW N.Y. CIV. PRAC. LAW §§ 5210, 5226, 5251 (McKinney 1963 & Supp. 1970).

<sup>376</sup> *Reeves v. Crownshield*, 274 N.Y. 74, 8 N.E.2d 283 (1937).

Another problem arises with consent decrees. If a husband in a divorce suit agrees with his wife on certain alimony or child support, and if this agreement is then incorporated in the divorce decree, is it to be regarded as essentially a contract because the parties agreed upon it, or as alimony because the court ordered it? The difference, of course, is crucial to the enforcement of the order by imprisonment. Where the agreement actually becomes a part of the decree, some courts have enforced it by contempt imprisonment as alimony or child support.<sup>377</sup> Other courts treat such a decree as "nothing more than a contract between the parties" which is not punishable by contempt unless the decree affirmatively states that contempt is a possible remedy for violation.<sup>378</sup>

A variation on this problem occurs where the obligation that underlies the consent decree is not simply a contract, as it is in the alimony cases, but is instead based on fraud, breach of fiduciary obligation, or some other claim. For instance, suppose a trustee is charged by the trust beneficiaries with having breached his trust in some fashion, so that he owes the beneficiaries or the trust itself the sum of 10,000 dollars. Suppose the trustee willingly stipulates to his breach in the sum of 5,000 dollars and a consent decree is entered by agreement of the parties for that sum. In such a case the decree would be based not on a contract debt, but on a fiduciary obligation. If one looks behind the stipulation, it would seem that contempt imprisonment would be permissible as it is in other cases of fiduciary breach; if one stops with the stipulation, one sees only a "contract" debt that is not enforceable by imprisonment.<sup>379</sup> The latter approach—to stop short at the stipulation and see it as a contract—has the merit of simplicity. But if there is a sound basis for the enforcement of alimony and fiduciary obligations through imprisonment, that policy is subverted where the nature of the stipulated obligation is ignored. For this reason, it would seem desirable to look behind stipulations on which court decrees are based, and if a stipulation is clearly based on a non-debt obligation, the use of contempt should be permissible.

b. *Execution as an Alternative.* Statutes in several states forbid the use of contempt imprisonments to enforce money judgments that can be enforced in other ways. Civil contempt is authorized under such

---

<sup>377</sup> *Scheldrup v. Gaffney*, 243 Iowa 1297, 55 N.W.2d 272 (1952). See generally H. CLARE, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 553-56 (1968).

<sup>378</sup> 35 N.C.L. REV. 405 (1957); cf. *Holden v. Holden*, 245 N.C. 1, 6, 95 S.E.2d 118, 122 (1956).

<sup>379</sup> See *Wojahn v. Halter*, 229 Minn. 374, 39 N.W.2d 545 (1949), noted in 63 HARV. L. REV. 1444 (1950).

statutes only in cases where execution cannot be awarded for the collection of the sum.<sup>380</sup>

Statutes of this sort no doubt express a wise policy, but the expression is unfortunately vague. Do these statutes apply only to debts or do they apply to other money obligations where imprisonment has traditionally been permitted? Courts use contempt in alimony and other cases where a literal reading of the statute would seem to require execution.<sup>381</sup> Does the statute apply where execution can be awarded but cannot be fully satisfied? Does it apply where execution can be awarded in a sister state, but not at home? Such statutes should be more precise in requiring the use of execution; for example, execution might be the only means of debt collection afforded where an inability to pay is claimed, regardless of the nature of the money obligation.

### C. *Fines*

#### 1. *Criminal*

The determinate criminal fine raises few problems. It may be limited in amount by statute,<sup>382</sup> just as imprisonment may be, but there are few other limitations. It seems reasonably clear that the court should not punish a failure to pay the fine by a jail sentence, unless a jail sentence would be appropriate in the first place. For instance, if the contemnor cannot be imprisoned for failing to pay a debt, the policy of this rule should not be subverted by first imposing a fine he cannot pay and then imprisoning him for failure to pay.<sup>383</sup> Beyond this, even where a jail sentence might be proper in the first place, the practice of requiring one to "work off" unpaid fines by serving jail time is unconstitutional under some circumstances.<sup>384</sup>

<sup>380</sup> See MICH. STAT. ANN. § 27A.1701(5) (1962); N.C. GEN. STAT. § 5-8(2) (Repl. 1969).

<sup>381</sup> There seems to be little interpretation of these statutes. In *Carnahan v. Carnahan*, 143 Mich. 390, 107 N.W. 73 (1906), the trial court held that the husband in a divorce action was equitably entitled to a fund held by the wife on deposit in a foreign country. The wife was ordered to pay this over to the husband as a part of the property division. The order was disobeyed and the woman found guilty of contempt and punished coercively. The Supreme Court of Michigan upheld this determination, saying:

This is not a decree for the payment of money in the ordinary sense. It is not subject to the exemption law. The decree requires delivery of the specific thing—i.e., the fund—in contradistinction to the payment of a debt, and a writ of execution is not appropriate in such a case.

*Id.* at 397, 107 N.W. at 75.

<sup>382</sup> *E.g.*, N.Y. JUDICIARY LAW § 751 (McKinney Supp. 1970); N.C. GEN. STAT. § 5-4 (Repl. 1969).

<sup>383</sup> *People ex rel. Sarlay v. Pope*, 230 App. Div. 649, 246 N.Y.S. 414 (3d Dep't 1930).

<sup>384</sup> *Williams v. Illinois*, 399 U.S. 253 (1970); *Strattman v. Studt*, 20 Ohio St. 2d 95, 253 N.E.2d 749 (1969). Statutes may go further. N.C. GEN. STAT. § 23-24 (Repl. 1965) provides for the release of any prisoner committed for fine if he takes an oath of insolvency.

## 2. *Civil*

The civil fine, which is paid to the opposing party, may serve as recompense for losses sustained because the contemnor violated a court order. Two problems arise with this kind of civil sanction. First, can it be coercive or remedial, as it must be if it is to be civil rather than criminal? Second, if the civil fine is merely damages, should the damage claim be heard in a separate suit with a jury?

If defendant, under a judicial order to convey Blackacre to plaintiff, refuses to do so and instead conveys it to another person, defendant is in contempt and may be fined. If the fine is compensatory, it will probably equal plaintiff's loss of bargain and incidental expenses. Although such a fine is not at all coercive, it is completely remedial and hence a civil sanction; it furnishes the injured party a substitutionary remedy that is easily distinguishable from punishment.

Thus, federal and some state courts have used or permitted the compensatory fine as a civil contempt sanction,<sup>385</sup> sometimes including expenses of presenting the contempt case as well as losses resulting directly from the contumacious conduct.<sup>386</sup> Other courts, for reasons not altogether clear, have rejected the compensatory contempt fine. Illinois has taken this position, apparently because it regards all contempt sanctions as criminal or quasi-criminal in nature.<sup>387</sup> North Carolina, in rather early cases, ruled that a contempt fine must be paid to the state because "[w]e know of no law" authorizing otherwise.<sup>388</sup> Here again, the court may have had in mind the criminal rather than the civil character of contempt, but with the distinctions that have been developed between the two kinds of contempt in the past 100 years, such cases have little authority.

If civil contempt fines are indeed remedial or coercive, there seems to be no logical objection to their use in a civil contempt case, at least where a court concedes that contempt may have civil as well as criminal sanctions. But it is clear that an objection does lie if, when assessed, the

---

<sup>385</sup> *United States v. UMW*, 330 U.S. 258 (1947); *Parker v. United States*, 126 F.2d 370 (1st Cir. 1942); *Schoenthal v. Schoenthal*, 138 So. 2d 802 (Fla. Dist. Ct. App. 1962); *Grunberg v. Louison*, 343 Mass. 729, 180 N.E.2d 802 (1962). Some states provide for compensatory contempt fines by statute. *E.g.*, N.Y. JUDICIARY LAW § 773 (McKinney 1968).

<sup>386</sup> *See Lyon v. Bloomfield*, 355 Mass. 738, 247 N.E.2d 555 (1969).

<sup>387</sup> *See Eberle v. Greene*, 71 Ill. App. 2d 85, 93, 217 N.E.2d 6, 10 (1966). Nebraska arrived at a strange compromise that refused to permit a compensatory fine but did allow the injured party expenses in the contempt action, including an attorney's fee. *Kasperek v. May*, 174 Neb. 732, 119 N.W.2d 512 (1963).

<sup>388</sup> *Morris v. Whitehead*, 65 N.C. 637, 638 (1871) (dictum); *In re Rhodes*, 65 N.C. 518, 519 (1871) (dictum).

fine is neither remedial nor coercive; for that reason the *in terrorem* fine may present certain problems.<sup>389</sup>

The *in terrorem* fine is not coercive at the time it is collected. If a defendant is enjoined from trespassing on the plaintiff's property he may, after one violation of the decree, be held in contempt and threatened with a fine of 100 dollars for each further trespass. At this point, the *in terrorem* fine is coercive; it tends to motivate compliance with the decree. But if for any reason the defendant proceeds to trespass again, the fine is collected when the violation of the decree is complete. At the time of collection, then, it is not coercive, and, since the fine was fixed at a sum in excess of the plaintiff's probable damages in order to make it an effective threat, the fine is not an accurate reflection of those damages and hence not remedial. Being neither remedial nor coercive at the time of collection, it has a status analogous to that of the suspended jail sentence for a definite term—it is coercive when threatened but not when applied.<sup>390</sup>

However, the *in terrorem* fine probably does not have the potential for arbitrariness that imprisonment has, and its use has been permitted by several courts.<sup>391</sup> Its primary use is in a business competition context where it can be a very effective means of securing compliance, and perhaps it may be justified where the analogous *in terrorem* prison sentence may not be.

Another variation on the compensatory fine is the unjust enrichment fine. A compensatory fine is measured by the plaintiff's loss; an unjust enrichment fine is measured by the defendant's gain. The two may be identical, but they need not be. The defendant may, for instance, violate the plaintiff's patent or trademark, or engage in some form of unfair competition in violation of an injunction without causing the plaintiff any loss at all. The defendant might have sold to a market in which the plaintiff did not compete, for example, with the result that the plaintiff has no economic losses. If the defendant's conduct in such a case is tortious, the plaintiff could probably bring a separate tort suit and invoke unjust enrichment principles by waiving the tort and suing in *assumpsit*.<sup>392</sup> This would allow the plaintiff to recover the defendant's

---

<sup>389</sup> Such a fine is usually a fixed amount, payable for each violation of the court's order. *E.g.*, *Sunbeam Corp. v. Golden Rule Appliance Co.*, 252 F.2d 467 (2d Cir. 1958) (\$2,500 for each future violation of order). The French *astreinte* operates in much the same fashion. See note 2 *supra*.

<sup>390</sup> Jencks v. Goforth, 57 N.M. 627, 261 P.2d 655 (1953). See also the discussion of the suspended jail sentence, text accompanying notes 258-63 *supra*.

<sup>391</sup> See *Sunbeam Corp. v. Golden Rule Appliance Co.*, 252 F.2d 467 (2d Cir. 1958); *Singer Mfg. Co. v. Sun Vacuum Stores, Inc.*, 192 F. Supp. 738 (D.N.J. 1961).

<sup>392</sup> See Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 YALE L.J. 221, 225-27 (1910).

illegal gains, even though the plaintiff himself lost nothing.<sup>393</sup> Given this possibility, the question arises whether the equity court might impose an unjust enrichment fine measured in the same way, that is, by the defendant's improper profits. Such a fine would not be coercive since it would necessarily be measured only after violation and could not therefore motivate the defendant's compliance with the decree. But neither is it in the strictest sense remedial; since it is based on the defendant's unjust gain, it does not compensate the plaintiff for loss. Thus viewed, the unjust enrichment fine lacks the remedial or coercive character necessary to support a civil contempt, though such a fine might well be justified as a criminal contempt sanction because of its noncompensatory, punitive nature.<sup>394</sup>

On the other hand, the unjust enrichment fine might be regarded as essentially remedial in the broad sense that it pays the plaintiff for the defendant's violation of the decree and provides an economic basis for payment. It is to be distinguished, certainly, from an arbitrary figure of the kind typically used in criminal contempt cases. Furthermore, as a matter of policy, there is no good reason why the unjust enrichment measure, readily available in a separate lawsuit, should not be the measure of contempt fines. In a patent infringement case, the Supreme Court has permitted such a fine.<sup>395</sup> Nevertheless, some judges have been concerned. One Second Circuit opinion<sup>396</sup> expressed the view that an unjust enrichment fine would be warranted only where it was apt to reflect the actual losses of the plaintiff. The Third Circuit went further and held that unless there was substantial loss to the plaintiff, unjust enrichment was not an appropriate measure of a contempt fine.<sup>397</sup>

It is difficult to assess the state of the law on this point. Many cases do say, albeit rather casually, that the plaintiff's actual losses are the measure of the compensatory fine. Some judges have apparently taken this to mean that an unjust enrichment measure is improper, but it

---

<sup>393</sup> See Douthwaite, *The Tortfeasor's Profits—A Brief Survey*, 19 HASTINGS L.J. 1071 (1968).

<sup>394</sup> In *Chicago v. Hart Bldg. Corp.*, 116 Ill. App. 2d 39, 253 N.E.2d 496 (1969), a fiduciary who had violated his trust was subjected to a criminal contempt fine of \$5,000 plus the sum equal to his net profits derived from the breach of fiduciary duty. Assuming a civil contempt fine could also be levied, could it be measured in the same way? If it could, would there be any bar to claiming two unjust enrichment fines, one criminal and one civil, where the complaining party is the state that receives the criminal fine because all criminal fines are payable to it, and the civil one because it is the complaining party?

<sup>395</sup> *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932).

<sup>396</sup> *Sunbeam Corp. v. Golden Rule Appliance Co.*, 252 F.2d 467, 470 (2d Cir. 1958).

<sup>397</sup> *National Drying Mach. Co. v. Ackoff*, 245 F.2d 192, 193 (3d Cir.), *cert. denied*, 355 U.S. 832 (1957). See also *Singer Mfg. Co. v. Sun Vacuum Stores, Inc.*, 192 F. Supp. 738, 742 (D.N.J. 1961).



seems likely that the "actual loss" formulation is meant to exclude a punitive fine rather than an unjust enrichment fine.<sup>398</sup> As a matter of policy the unjust enrichment fine does not seem more objectionable than any other civil fine, provided it reflects a measure of recovery available to the same plaintiff in a separate action.

So far discussion of the civil contempt fine has turned on the nature and measure of the fine. A different kind of problem is introduced when the jury trial issue is raised. As already indicated, with the exception of certain criminal cases, contempts are not tried before a jury. When a jury is not provided, it may be argued that no sanction should be applied in a contempt proceeding that can be applied equally well in an ordinary lawsuit. Since both unjust enrichment or pure "compensation" damages can be recovered in a suit at law, if the contempt sanction does no more than award a comparable money recovery, it is arguable that the case should be tried before a jury. There is some suggestion of this in California,<sup>399</sup> but it is possible to hold the jury's role in high regard and still feel that this position is erroneous. Once the case is in a posture to be dealt with by an *in personam* order—that is, the posture in which the old equity courts would take cognizance of it—the jury has already been excluded. The very decision to issue an order enforceable by contempt is in most states a decision to exclude the jury from the process. That being so, there is every reason to proceed with whatever effective enforcement the court can muster.

However, the role of the jury in civil contempt cases in states where an equity jury is afforded may be a more difficult question. In North Carolina, where juries are used in equity cases,<sup>400</sup> it seems incongruous to eliminate the jury from the contempt trial. It is true that the jury should not fashion the sanction for contempt, and it is equally true that the jury has no role at all in trying petty criminal contempts or contempts that occur in the course of a trial. But in a state where a jury trial in equity is accepted, the jury could easily have a role in trying disputed fact questions.

#### D. *Denial of Right To Litigate*

Contempt sanctions may also include denying a litigant some of the normal rights or privileges of litigation. This may be done by striking pleadings, refusing to permit appeals, or otherwise limiting his partici-

---

<sup>398</sup> See *United States v. UMW*, 330 U.S. 258, 302-07 (1947); *Schoenthal v. Schoenthal*, 138 So. 2d 802 (Fla. Dist. Ct. App. 1962).

<sup>399</sup> *H.J. Heinz Co. v. Superior Ct.*, 42 Cal. 2d 164, 266 P.2d 5 (1954).

<sup>400</sup> See N.C. CONST. art. IV, § 11(1). For a discussion of all states allowing jury trials in equity suits, see Hecke, *Trial by Jury in Equity Cases*, 31 N.C.L. REV. 157 (1953).

pation in the trial while he remains in contempt. This can be an extreme and dangerous sanction, and its use as a criminal punishment for contempt is probably unwarranted.<sup>401</sup> For such a purpose, fines and imprisonment are entirely adequate, and the denial of litigation privileges should be used only coercively.

At least for some purposes, a distinction must be drawn between a court's refusal to give affirmative relief to a contumacious litigant and its refusal to permit him to defend himself. In *Hovey v. Elliott*,<sup>402</sup> the trial court ordered the defendant to deposit a disputed sum with the court, pending determination of the claims. Defendant, who held the money, refused to do this, and the trial judge punished the contempt by striking defendant's answer. A default judgment was accordingly entered against defendant. The Supreme Court of the United States overturned this judgment on the ground that defendant had been denied a hearing required by due process of law.

The principle of *Hovey* extends to all sorts of defensive rights: the court cannot, for example, deprive a defendant of the right to appear by counsel<sup>403</sup> or the right to testify.<sup>404</sup> But the principle of *Hovey* does not extend equally to those who seek affirmative relief. A defense is regarded as a matter of right that cannot be modified, while an offense is regarded as a privilege: "[A] distinction must be drawn between [the contempt of] a contemnor who seeks a privilege of the court and that of one who comes in as of right to answer an attack against him."<sup>405</sup> By using this reasoning, a number of cases have held that in proper circumstances one may be denied affirmative relief as a means of coercing compliance with some court order.<sup>406</sup>

---

<sup>401</sup> *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 44 (1954).

<sup>402</sup> 167 U.S. 409 (1897).

<sup>403</sup> *Ward v. Ward*, 70 Vt. 430, 41 A. 435 (1898).

<sup>404</sup> *Kirchner v. Kirchner*, 5 N.J. Super. 341, 69 A.2d 30 (1949).

<sup>405</sup> *Id.* at 344, 69 A.2d at 31.

<sup>406</sup> *Garrett v. Garrett*, 341 Ill. 232, 173 N.E. 107 (1930). In this case a husband apparently had been convicted of contempt for refusing to pay support to his wife and had been jailed. He was released from jail by mistake and defended the divorce action, which he lost. He then sought review by writ of error. The Supreme Court of Illinois denied him review, regarding it as affirmative relief to one who remained in contempt. See Annot., 49 A.L.R.2d 1425 (1956) (dismissal of appeal); Annot., 14 A.L.R.2d 580 (1950) (striking pleading).

The distinction between refusing affirmative relief and denying an opportunity to present a defense is not quite the same as the distinction between plaintiff and defendant. What is important is whether one is attacking or defending. Thus, although a defendant cannot be denied an opportunity to defend himself in the trial court, he may be denied the right to attack the trial court's judgment on appeal if he remains in contempt. *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954); *Soderberg v. Soderberg*, 63 Cal. App. 492, 219 P. 82 (1923) (defendant's motion to vacate denied while defendant re-

There are important qualifications to this distinction, however. The *Hovey* case was decided in 1897; in 1909 the Court was faced with a similar situation in *Hammond Packing Co. v. Arkansas*.<sup>407</sup> In that case, the Hammond Packing Company, an Illinois corporation, was subject to certain Arkansas statutes. The Arkansas Attorney General brought an action against Hammond, and Hammond answered and also filed several other pleadings and motions. The Attorney General then sought and got an order permitting him to examine Hammond's records in Chicago and certain of Hammond's personnel. Hammond respectfully refused to comply with this order, contending that it violated constitutional rights. The Arkansas court, however, overruled this contention, and, when Hammond refused to comply with the order, the court under specific statutory authority, struck its answer and entered a judgment against it for 10,000 dollars as penalties. The Supreme Court upheld this procedure in spite of its apparently contrary ruling only twelve years earlier in *Hovey*. The Supreme Court first said that the due process requirement of *Hovey*, if applicable at all, was no less applicable where a statute authorized striking an answer than where it did not.<sup>408</sup> The Court then distinguished *Hovey* on different grounds. *Hovey*, the Court said, was a case of punishment by striking a pleading, and that was unconstitutional. *Hammond*, however, was a case where the legislature created the factual presumption that if evidence validly required was not produced, then the answer probably was not meritorious.<sup>409</sup> It was not clear how the Court discerned the presumption, which was not mentioned in the Arkansas law,<sup>410</sup> nor was it clear how the Court could be sure that no such presumption existed in *Hovey*; on this point the opinion is blatant fiction. As a result, it is quite difficult, perhaps impossible, to determine the exact constitutional status of *Hovey*. There is authority that limits the power of a court to strike defensive pleadings in cases where, as in *Hammond*, such a sanction is authorized by the legislature.<sup>411</sup> *Hammond* might also be interpreted as an early groping toward the rule that courts may deny certain privileges of litigation coercively, but not punitively.<sup>412</sup>

---

mained in contempt); *Garrett v. Garrett*, *supra* (defendant's appeal denied while in contempt).

<sup>407</sup> 212 U.S. 322 (1909).

<sup>408</sup> *Id.* at 350.

<sup>409</sup> *Id.* at 350-51.

<sup>410</sup> Section 9 of the Arkansas act (now ARK. STAT. ANN. § 70-109 (Repl. 1957)), merely directed the court to strike the answer when the defendant refused discovery.

<sup>411</sup> *Walter Cabinet Co. v. Russell*, 250 Ill. 416, 95 N.E. 462 (1911).

<sup>412</sup> The *Hammond* case referred to the order in *Hovey* as a punishment in attempting to distinguish it. 212 U.S. at 350.

Federal Rule of Civil Procedure §7<sup>413</sup> and similar state legislation specifically authorize the sanction approved in *Hammond* for a refusal to make discovery. Not only may pleadings be stricken; a default judgment is specifically authorized, and, short of that, designated facts may be taken as admitted. The rule draws no distinction between defensive and other pleadings, and some cases have applied the rule against defenses as well as against affirmative claims, entering default judgments against defendants who refuse to make discovery.<sup>414</sup> This assumes that the rule is valid and that little is left of *Hovey*. That may be the case, but the Supreme Court has never really clarified the point. It has said that *Hammond* "substantially modified" *Hovey* without saying how or what was left of *Hovey*.<sup>415</sup> At the same time, the Court seems to have thought that defensive pleadings were entitled to greater protection than affirmative claims, a view that certainly harkens back to *Hovey*.<sup>416</sup>

Whatever the constitutional status of rule 37 may be, courts have warned that it must not be applied with abandon. The default judgment sanction for either plaintiff or defendant "is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited."<sup>417</sup> It is not to be used, for example, where the party violates a discovery order in good faith;<sup>418</sup> nor is the penalty to be used for harassment: "Excessive or fruitless use of the [sanction] . . . is impermissible."<sup>419</sup>

Once again it must be said that the law of contempt is uncertain with respect to the standards that may control a court's exercise of discretion. We can say readily enough that pleadings should not be stricken recklessly as a punishment for contempt, but it is quite difficult on the basis of existing rules to say anything much more meaningful. We have little legal lore to guide us, even on the question whether the sanction must be related in some substantial way to the conduct that

---

<sup>413</sup> FED. R. CIV. P. 37(b)(2)(i), (iii).

<sup>414</sup> *United States v. 3963 Bottles, More or Less, of Enerjol Double Strength*, 265 F.2d 332 (7th Cir.), cert. denied, 360 U.S. 931 (1959).

<sup>415</sup> *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958).

<sup>416</sup> *Id.* at 209-11.

<sup>417</sup> *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 614 (2d Cir.), cert. denied, 308 U.S. 248 (1964) (dismissal of counterclaim with prejudice).

<sup>418</sup> *Societe Internationale v. Rogers*, 357 U.S. 197 (1958). "The presumption utilized by the court in the *Hammond* case might well falter under such circumstances"—that is, where the party made a good faith effort to comply. *Id.* at 210.

<sup>419</sup> *Miller v. International Paper Co.*, 408 F.2d 283, 293 (5th Cir. 1969), where a discovery notice referred to depositions to be taken beginning on Wednesday and continuing from day to day until completed. The deposed parties refused to appear on Saturday and were penalized costs and attorney's fees under rule 37(d). This was reversed.

called it forth. If a pleading may be stricken because the defendant refuses to make discovery, can it also be stricken if he refuses to pay alimony? If he is guilty of perjury? What is to be done if a trustee or the manager of a class action is guilty of a contempt that would normally invoke rule 37—are the persons represented to suffer a default? The only sound recommendation that can be made is that much more must be done to make the law of contempt a tolerable and fair enforcement device.

### E. *Other Sanctions*

The forms of sanctions for contempt have never been limited, much less rigidified. Indeed, this may be one area of the law where a little more rigidity, in the sense of certainty, would be welcome. One of the possibilities for developing sanctions is illustrated in *Lance v. Plummer*.<sup>420</sup> An auxiliary deputy sheriff who served without pay was accused of harassing Negroes in violation of an injunction by which he was bound. When the trial judge found the deputy had in fact harassed them, he held the deputy in contempt and ordered him to turn in his badge. On appeal, the Fifth Circuit approved the sanction with the qualification that he should be permitted to have his badge back if he repented his past misconduct and purged himself.

The court's sanction seems proper enough; it will aid the plaintiffs in getting part of that to which they are entitled—freedom from official harassment. But it is illustrative of the potential power of the contempt sanction to invade, without predetermined limits, the private lives and behavior of those within the court's decree. This kind of power—often used wisely and within appropriate limits, as in *Lance* itself—is so subject to abuse that any society based on law needs to know its limits.

### CONCLUSION

Even if no reform in the law of contempt were desirable, legislative action could help to clarify the confusions and uncertainties, and to furnish, in statutory form, a guide to lawyers and judges beset by bewildering layers of contempt lore. The hodgepodge of case law, constitutional law, and statutory regulation has yielded no unified structure. Judges, who confront contempt problems only occasionally, often come to each new case without understanding built on past learning. It is little wonder that confusion exists. A comprehensive statute would

---

<sup>420</sup> 353 F.2d 585 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966).

clarify the major substantive and procedural requirements and protect against arbitrary action as well. But more than this, reform is needed in the law of contempt. This article makes clear some of the directions it might take.

One area for reform lies in the description of the crime of contempt. It often is an impalpable crime, composed of "misbehavior," "insult," or an "embarrassment to the court." These terms would not withstand the charge of vagueness in any other crime, and they should not be accepted in contempt cases if they can be improved upon.

A second area for reform lies in the procedural protections accorded in contempt cases. In criminal contempts—and any courtroom misbehavior—the judge who acts as a prosecutor by initiating the charge should not, except where real necessities require it, be the judge who tries the case. The criminal contempt sanction should be invoked only when the prosecutor has sustained a prescribed and well-understood burden of proof on the substantive element of intent. Even in civil contempts, the question of who has the burden of proving ability to comply deserves clarification. In some cases the sanctions should be prescribed and limited.

A third area for reform lies in utilizing the alternatives to contempt. Judges must be permitted—even required—to conduct orderly trials. On the other hand, the criminal contempt punishment involved in keeping trial orderly should ordinarily be quite limited; for instance, a disrupter could be jailed twenty-four hours or simply removed from court. The use of criminal contempt for this purpose need not result in jail sentences of twenty-five years. When it seems worthwhile to go beyond a simple punishment to keep trials orderly, the alternatives of ordinary criminal prosecution seem desirable. This involves two changes. First, it should be required that if conduct amounts to a crime punishable under statute, the contempt power may not be used (except for limited purposes of orderly trials). Thus, for example, perjury should not be punishable by contempt procedures. Second, conduct deemed worthy of punishment should be made criminal by statute. The net result of this would be to furnish statutory standards more consistent with Anglo-American ideas of justice and to limit the use of criminal contempt powers for misbehavior in court, so that the powers do not exceed their purposes.

None of this would affect the power to punish criminally the disobedience of a court order, although even here the punishment should be specified in advance. Nor would any of this affect the power to punish civilly, either to prevent disobedience of a court order or to compel

proper behavior of a disrupter. (Indeed, the use of civil, coercive contempt powers should be encouraged here as a preferable alternative.)

The problem of reform and clarification is not only a local one. It needs attention in all states and in the federal system as well. The concepts of contempt are uncertain partly because every state court feeds to some extent upon the uncertainties and aberrations of others. The conceptual fog could be cleared best by a unified, if not a uniform, approach at all levels.