NOTES

INDEFINITE CONFINEMENT AS A COERCIVE MEASURE BY COURTS

The courts' power to impose sanctions for misbehavior committed in their presence is an ancient one; centuries of use of the contempt power have left it almost as firmly entrenched in the minds of laymen as in the Anglo-American legal system. While it has been many years since anyone has seriously questioned the legitimacy of the contempt power, its expansion over the last two centuries has not gone unchallenged. Recent cases displaying some of the most extreme applications of this power, particularly the use of indefinite confinement as a coercive measure, have received considerable publicity and have struck a note of anger and shock in many Americans. In light of what appears to be a growing willingness to reexamine the foundations of and limits to the contempt power, this note is an attempt both to offer a practical overview of summary incarceration as a tool for coercing compliance with judicial orders, and to present an opinion regarding the legal validity of such a power.

Compelling obedience to court orders is one of three purposes for which judges currently use the contempt power. Courts also use contempt to punish individuals for violating court orders or for interfering with judicial proceedings, and to provide damages for a party injured by the contemnor's disobedience.[1] Judges may, under certain circumstances, exercise the contempt power in a summary fashion for each of these three reasons, but it is only in the first scenario—contempt as a coercive measure—that incarceration of a person may be ordered for an indefinite period of time, at the discretion of a trial judge, and without the safeguards typically required by due process of law. It is therefore this aspect of the contempt power that provokes the most controversy and receives the most attention from the media.

It is certainly understandable that Justice Black once characterized the summary contempt power as an "anomaly in

1. United States v. United Mine Workers of America, 330 U.S. 258, 302-04 (1947).

the law."[2] Summary judicial power in any form is alien to the most fundamental concepts of justice upon which our legal system is built. The ability of a court to sentence someone to jail without a trial or jury, and with limited opportunities for appeal, does great violence to our common understanding of "due process of law." This effect is compounded enormously when the sentence a judge may impose is not limited to any definite term, and may be used to compel obedience to that judge's own order and to redress a private wrong rather than to punish a violation of law. We are all accustomed to believing that the liberty of an American citizen may not be taken from him without compliance with certain basic procedures, and that when it is taken it shall only be through the administration of a specific sentence proportionate to the crime of which he has been found guilty. Long before courts used the summary contempt power to impose indefinite confinement as a coercive tool, Sir William Blackstone acknowledged that this summary exercise of judicial power was an aberration from the norm, indeed that it was "not agreeable to the genius of the common law in any other instance [of judicial power]."[3] The use of such a power to force an act of obedience through imprisonment is not only unique in our common law tradition; courts in civil law countries flatly reject coercive confinement.[4] Yet modern decisions in England and the United States almost unanimously state that the ability to compel obedience to court orders is "inherent" in the very nature of judicial power.[5]

The recent saga of Dr. Elizabeth Morgan has served as a catalyst to resurrect the controversy over indefinite confinement as a coercive tool. A District of Columbia trial court incarcerated Dr. Morgan in August of 1987 after her refusal to permit her five-year-old daughter on an unsupervised visit with the child's father. Dr. Morgan alleged that her former husband had sexually

2. Green v. United States, 356 U.S. 165, 193 (1958) (Black, J., dissenting).

3. Blackstone attributed the anomalistic nature of the summary contempt power to a probable origin in the courts of equity. 4 W. BLACKSTONE, COMMENTARIES *287. A more likely explanation centers around his friendship with Justice Wilmot, the enthusiastic advocate of summary judicial powers whom Blackstone consulted while writing his famous treatise. *See infra* text accompanying notes 130-36 for a discussion of Justice Wilmot's contribution to this area of the law and the significance of the relationship between Wilmot and Blackstone.

4. R. GOLDFARB, THE CONTEMPT POWER 2 (1963).

5. *Id.* The Supreme Court recently reaffirmed this belief in Young v. United States *ex rel.* Vuitton Et Fils, S.A., 481 U.S. 786, 795 (1987).

abused the child almost from infancy.[6] During the twenty-five months of Dr. Morgan's incarceration, the national media kept the details of her case constantly before the public eye. While courts were using coercive confinements in child custody cases long before the Morgan case, the public seemed particularly horrified at this exercise of summary power by a judge to force a mother to expose her child to a danger that she believed was very real. Dr. Morgan's dilemma fanned the smoldering controversy over coercive confinement into open flame, resulting in a flurry of newspaper editorials and law review articles, many of which called for statutory limits on the duration of such confinements.

Yet it is at least arguable that the summary application of indefinite jail sentences is not itself the problem, but merely an extreme symptom of a more fundamental error. Quite often when we find an anomalous result that seems to represent an irreconcilable conflict between legitimate competing interests, the real problem lies in one of our presuppositions. The judicial response to such conflicts is frequently to adopt some sort of "balancing test" instead of reevaluating assumptions that, while possibly fallacious, have served as the logical foundation for prior court actions. Yet a willingness to reexamine the basis for the summary contempt power would be fruitful, as it would demonstrate that the apparent conflict between the courts' "inherent" authority to compel obedience and the citizens' rights to due process of law does not arise from the lack of statutory limitations on coercive confinement. The problem lies instead with the summary exercise of the contempt power in any form, for this summary power is less inherent than appropriated, a bastard born of the illicit union of judicial and executive powers. The tripartite separation of powers is central to our Anglo-American system of law and government. It was not incorporated into the United States Constitution as a matter of convention but as an expression of the deeply held conviction that "the separate and distinct exercise of the different powers of government ... [is] essential to the preservation of liberty."[7] It is only natural then that the courts' assumption of the power to enforce their own orders would ultimately result in a significant loss of liberty.

The doctrine of separation of powers as embodied in our Constitution developed concurrently with the common law in

6. Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U.L. REV. 491, 491 (1989).

7. THE FEDERALIST NO. 51, at 348 (J. Madison or A. Hamilton) (J. Cooke ed. 1961).

England. This is not to say that medieval England was the first society to recognize the distinction between legislative, executive, and judicial powers. One can find similar divisions of authority in far more ancient governments. Yet the theory of separation of powers found in England and incorporated in the American Constitution, while perhaps influenced by the writings of classical political theorists, is not derived from the systems found in Rome or Greece. It developed independently and was refined over a period of centuries. The absence of a direct link between the Anglo-American separation of powers principle and that found in the older classical societies in no way, however, detracts from the legitimacy of the ideal adopted by our founding fathers. To the contrary, the independent development of the theory in so many distinct political systems reinforces the claim that there are inherent differences in the nature of these powers.

James Madison and his colleagues understood that the powers granted to each branch of the federal government had, by nature, distinct descriptions and boundaries. Centuries of legal scholarship had given recognition and definition to these limits. This understanding of the nature of these powers enabled the framers of the Constitution to state that "[t]he judicial power of the United States shall be vested in one Supreme Court"[8] without an explanation of what judicial power was. They were incorporating a pre-existing principle well recognized by their contemporaries. The limits of judicial power were found in its very nature and therefore did not need to be explicitly described. The framers simply built those limits into our system of government by granting all nonjudicial powers to the President or Congress. Alexander Hamilton echoed the then prevalent belief that the only safeguard necessary to prevent abuses by the courts was keeping the legislative and executive powers separated from the judicial:

> Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community .... The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength

8. U.S. CONST. art. III, § 1.

> or the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm for even the efficacy of its judgments.[9]

Conversely, the framers saw the failure to separate these powers as a guarantee that liberty would be lost.[10]

The framers' optimism concerning the small risk to liberty posed by a distinct and separate judiciary was based on their understanding that judges have no power to enforce either the law or their judgments. The "sword" wielded by government for this purpose was held exclusively by the executive branch. In contrast, Chief Justice Marshall positively described the nature of judicial power in his immortal statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[11] This duty of judges to state and apply the law was clearly distinct under common law from the enforcement power held by the executive branch, for, as Sir William Blackstone noted, "it would be highly unbecoming, that the executioner of justice should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next."[12]

The power exercised by courts to enforce their own orders through coercive confinement or to summarily punish offenses against their dignity is, therefore, not an inherent power of the judiciary. The former is blatant arrogation of the executive power to enforce laws and court judgments. The latter permits a judge to serve as policeman and prosecutor as well as judge, denying the executive branch its role in bringing charges against an accused and arguing those charges before an impartial trier of fact. This summary punishment of contempts that occur in court is much less controversial than the use of contempt to impose indefinite incarceration because it seems less likely to result in truly egregious abuses. Yet it is legal error nonetheless; the error is simply less obvious as it is closer to the unrecognized root problem, to wit, the summary exercise of judicial power in any form. This note will later address the manner in which the

9. THE FEDERALIST NO. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961).

10. "For I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers'." *Id.* at 523 (quoting Montesquieu).

11. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

12. 1 W. BLACKSTONE, COMMENTARIES *344.

summary contempt power found its way into common usage. At this point we will turn to a more pragmatic review of the current understanding of the law concerning summary use of the contempt power.

I. VARIETIES OF CONTEMPT

While the primary focus of this note is indefinite confinement as a coercive measure, this particular variety of contempt cannot be properly understood apart from its context. It is, after all, simply a part of the larger body of the law of contempt[13] and draws much of its peculiar character from that fact. A basic overview of the different forms of the contempt power is vital to an understanding of what circumstances will give rise to the summary imposition of coercive confinement.

There are two overlapping schemes that attempt to classify and distinguish the various types of judicial powers collectively called contempt powers. The first classification distinguishes between direct and indirect contempt; this distinction is based on the immediacy and location of the act constituting contempt.[14] Direct contempts are episodes of misconduct committed in the presence of the court or so near to it that they physically obstruct its proceedings.[15] Any number of things may constitute an act of direct contempt, from the obvious example of striking a judge, juror, or attorney,[16] to verbal acts of disrespect directed at the trial judge.[17] Indirect contempts are matters that arise outside the courtroom setting, the most common example being refusal to comply with court orders that are to be performed elsewhere.[18] Older cases and treatises often referred to indirect contempt as "constructive contempt." Current practice, however, is to classify all contemptuous acts occurring out of court as indirect contempt. The one exception to this is contempt by publication in the press, which is now referred to as constructive contempt and is the only type of contempt called by that name.[19]

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13. R. GOLDFARB, *supra* note 4, at 51.

14. *Id.* at 68.

15. S. RAPALJE, A TREATISE ON CONTEMPT 26-27 (1884); R. GOLDFARB, *supra* note 4, at 68.

16. R. GOLDFARB, *supra* note 4, at 68.

17. S. RAPALJE, *supra* note 15, at 28. Rapalje gives the example of a person on trial for "blasphemous libel" who said to the judge, "My Lord, if you have your dungeon ready I will give you the key." The King v. Davison, 4 Barn. & Ald. 329, 330-31 (K.B. 1821).

18. S. RAPALJE, *supra* note 15, at 27.

19. R. GOLDFARB, *supra* note 4, at 69.

The distinction between direct and indirect contempt still lives[20] but has less significance now than it once did. The direct contempt was at one time the only form that was subject to summary punishment by a trial judge.[21] Jurists considered summary procedures appropriate in such circumstances because the judge was present and actually observed the contemptuous conduct; direct observation by the trier of fact obviated the typical trial procedures.[22] The Federal Rules of Criminal Procedure still authorize the use of summary contempt to impose sanctions if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the presence of the court.[23] Courts now, however, impose summary incarceration in other situations that cannot be classified as direct contempt, diminishing the importance of the distinctions between the direct and indirect forms.

The second classification of types of contempt is criminal versus civil. This distinction is much less clear than that made between direct and indirect contempts and has given rise to a plethora of tests. While classification of a contemptuous act as civil or criminal can be difficult, it has considerable practical importance because the classification largely determines the form of the proceedings used, the due process guarantees available to the alleged contemnor, and the form of sanctions imposed.[24] Courts generally consider criminal contempt indistinguishable from an ordinary criminal conviction.[25] Statutory guidelines govern punishment for criminal contempt under federal law[26] and in some states.[27] All of the safeguards applied to other criminal proceedings also apply to criminal contempt.[28] The trier of fact must presume the alleged contemnor innocent until the prosecutor proves guilt beyond a reasonable doubt.[29] The self-incrimination privilege and

20. *Id.* at 68.

21. *Id.* at 15.

22. Note, *The Modern Status of Rules Permitting a Judge to Punish Direct Contempt Summarily*, 28 WM. & MARY L. REV. 553, 557 (1987) (authored by Teresa Hanger).

23. FED. R. CRIM. P. 42(a).

24. Note, *Modern Discussion of a Venerable Power: Civil Versus Criminal Contempt and Its Role in Child Support Enforcement:* Hicks v. Feiock, 22 CREIGHTON L. REV. 163, 170 (1989) (authored by Diana Vogt).

25. Bloom v. Illinois, 391 U.S. 194, 201 (1968).

26. 18 U.S.C. § 402 (1982) limits punishment for a non-summary criminal contempt conviction to six months and a maximum $1000 fine.

27. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 268 (1971).

28. *Id.* at 241-42.

29. Hicks v. Feiock, 485 U.S. 624, 635-37 (1988); Parker v. United States, 153 F.2d 66, 70 (1st Cir. 1946).

double jeopardy rules also apply.[30] Civil contempt, on the other hand, is not subject to statutory sentencing limits except in a few well-defined contexts.[31] More importantly for the purposes of this note, civil contempt is the variety that gives rise to indefinite confinement. Indeed, it is not permissible to assign a definite term of imprisonment for civil contempt.[32] A judge may only release someone incarcerated for coercive purposes after the contemnor complies with the order in question, or after a sufficient period of time has elapsed to demonstrate that no amount of further imprisonment will produce the desired behavior.[33] The determination, however, of whether the confinement has lost its coercive effect is entirely within the discretion of the judge.[34]

The importance of correctly distinguishing between civil and criminal contempt has not motivated the courts to adopt a clear, uniform rule on the matter. Justice Brewer's statement that "it may not always be easy to classify a particular act as belonging to either one of these two classes"[35] has proven to be a prophecy fulfilled by the courts' very attempts to remedy the difficulty. One thing that is clear is that the nature of the underlying action does not determine the classification of the contempt charge. Civil contempts may occur in a criminal case while criminal contempt can likewise arise out of a civil suit.[36]

One way to describe the difference between these two types of contempt is that criminal contempt involves no element of personal injury; it is an offense against the power and dignity of the court.[37] If the act of contempt is the refusal of a person to do an act ordered by the court for the benefit of a party to the action at bar, and the judge confines the disobedient party until compliance occurs, the contempt is civil. The real party in interest is the one who benefits from the judgment.[38] The Supreme Court used this approach in its first attempt to define the difference between civil and criminal contempts. In *Bessette v. W.B. Conkey Co.*, the Court held that the difference between a civil and a

30. Dobbs, *supra* note 27, at 242-43.

31. *See* 28 U.S.C.S. § 1826 (Law. Co-op. 1990) (limiting federal court coercive confinement of recalcitrant witnesses to eighteen months).

32. Gompers v. Buck Stove & Range Co., 221 U.S. 418, 441 (1911); *Parker*, 153 F.2d at 70.

33. United States v. Jenkins, 760 F.2d 736, 740 (7th Cir. 1985).

34. *In re* Crededio, 759 F.2d 589, 591 (7th Cir. 1985).

35. Bessette v. W.B. Conkey Co., 194 U.S. 324, 324-25 (1904).

36. Dobbs, *supra* note 27, at 237.

37. *Bessette*, 194 U.S. at 328 (quoting *In re* Nevitt, 117 F. 448, 458 (8th Cir. 1902)).

38. *Id.*

criminal contempt lies in the interest that the trial court seeks to protect and whether a private party or the dignity of the court is to benefit.[39] The Court said that punishment imposed until the party complies with a court order resembles an execution enforcing an order and therefore indicates a civil action.[40]

The next attempt by the Court to refine this test came in *Gompers v. Buck Stove & Range Co.*[41] The Court in *Gompers* focused on both the character and purpose of the sanctions imposed, holding that imprisonment for civil contempt is remedial in nature and imposed for the benefit of a party to the case. In criminal contempt cases, however, imprisonment is a punitive measure vindicating the court's authority.[42] The unfortunate use of a test with two distinct focal points by the *Gompers* Court resulted in still more confusion. Some courts after the *Gompers* case focused on the character of the punishment[43] while others examined its purpose.[44] The difficulty experienced by lower courts and attorneys in identifying and applying the tests has engendered a multitude of variations and has caused a split among federal courts over whether it is always necessary to make the distinction at all.[45]

The Supreme Court recently responded to this confusion in *Hicks v. Feiock*[46] by again attempting to establish a clear rule. The Court rejected the notion that there was no real distinction between civil and criminal contempt and upheld the denial of criminal due process safeguards in civil contempt cases. The modern formulation of the test to distinguish between the two as stated by the *Hicks* Court is essentially a purpose test with a twist. While the purpose is determinative, courts must assess it by looking at the type of punishment imposed rather than at the subjective intent of the trial judge. A fixed punishment indicates that the contempt was criminal while an indefinite sentence demonstrates that a civil contempt has occurred.[47] It is not at all clear that this refinement of the test will alleviate the problem, as the most likely motive for raising the classification issue on appeal would be the denial of due process rights that

39. *Id.*
40. *Id.*
41. 221 U.S. 418 (1911).
42. *Id.* at 441.
43. *See, e.g.*, Penfield v. SEC, 330 U.S. 585, 590 (1947).
44. *See In re* Grand Jury Investigation, 610 F.2d 202, 212 (5th Cir. 1980).
45. Note, *supra* note 24, at 169.
46. 485 U.S. 624 (1988).
47. *Id.* at 630-35.

accompanies a civil contempt proceeding. Assessing whether a lower court was justified in denying due process rights by looking at whether the court did indeed deny one of them seems to beg the question. This is, however, the current statement of the law concerning the matter and the civil versus criminal contempt distinction has not been abandoned.

II. INDEFINITE CONFINEMENT: PARTICULAR APPLICATIONS

The use of the contempt power to impose indefinite confinement as a coercive measure can, in theory, occur in two types of situations. The first is an attempt by a court to force someone to promise to obey a court order in the future. The incarceration in these cases continues until the individual gives such a promise. This situation is really quite rare; only a few courts have dealt with the issue.[48] Almost all of those that have, however, have ruled that there must be an actual violation of an order before a court can initiate a contempt proceeding.[49] While trial courts have occasionally used the contempt power in this manner, it appears that only one appeals court has actually upheld the use of coercive incarceration to force a promise of future compliance with a court order.[50]

The flaws in using the contempt power to compel a promise to obey, apart from those that may apply to the use of summary power in general, are obvious. It is, in essence, a punishment for intent to perform a wrongful act, or perhaps more accurately, for a mere possibility of harboring such an intent. Fundamental to our legal system is the proposition that contemplation of performing an illegal or otherwise wrongful act is not punishable as a crime until either the contemplated act has occurred or some other concrete acts have occurred, perhaps not wrongful in themselves, but which evince a clear, unequivocal intent to

48. Annotation, *Contempt: State Court's Power to Order Indefinite Coercive Fine or Imprisonment to Exact Promise of Future Compliance with Court's Order—Anticipatory Contempt*, 81 A.L.R. 4th 1008 (1990).

49. *Id.; see, e.g., In re* Contempt of Dougherty, 429 Mich. 81, 413 N.W.2d 392 (1987); Board of Educ. v. Brunswick Educ. Ass'n, 61 Ohio St. 2d 290, 401 N.E.2d 440 (1984). One court, however, held that evasive or negative answers by defendants as to whether they would obey an order might be construed as disrespect to the court, and therefore be punishable as criminal contempt. *In re* White, 60 Ohio App. 2d 62, 67-68, 395 N.E.2d 499, 506-07 (1978).

50. Neshaminy Water Resources Auth. v. Del-Aware Unlimited, Inc., 332 Pa. Super. 461, 481 A.2d 879 (1987).

complete the wrongful act. Indeed, if judges could punish men for wicked desires or the mere consideration of a wrongful act, it is doubtful that anyone older than perhaps twenty months of age would remain free to serve as judges and jailers. In addition, a refusal to promise to obey an order may never culminate in actual disobedience. Such a refusal is ambiguous and might have a number of explanations other than a firm decision to actually disobey. Even if the refusal does represent such a decision, the disobedience may still never occur. No one can say whether a person contemplating disobedience might not change their mind or whether circumstances might not in some way frustrate him from carrying out the act of disobedience.

The other situation that gives rise to indefinite incarceration is the more typical one where the sentence is a remedial measure designed to force compliance with a court order rather than to force a promise of compliance. The specific applications of such an exercise of power are numerous, but a few of the more common ones are worthy of mention. Perhaps the most obvious use for indefinite confinement is to elicit testimony from a reluctant witness. The "Recalcitrant Witness" statute found in Title 28 of the United States Code[51] authorizes federal judges to use the contempt power to compel witnesses to testify.[52] This statute permits imprisonment of a witness who refuses without just cause to testify in a court proceeding, including ancillary proceedings, or before a grand jury. It also applies to refusals to produce documents, books, recordings, or other like materials on an order of the court. The Recalcitrant Witness statute, and other state statutes like it, essentially codify a power previously used by courts without legislative authorization, for the refusal of a witness to testify is one of the behaviors that courts have long considered a direct contempt.[53] If the refusal to testify causes harm to a party to the case, it may constitute a civil contempt whether the action itself is civil or criminal.

The possibility of using privilege as a justification for refusing to testify will be examined at a later point in this note, but the invocation of one particular privilege must be mentioned here for it produces an entirely different situation than the typical reluctant

51. 28 U.S.C.S. § 1826 (Law. Co-op. 1990).

52. Examples of appellate cases reviewing sanctions imposed to force a witness to testify are numerous. *See In re* Crededio, 759 F.2d 589 (7th Cir. 1985); Sanchez v. United States, 725 F.2d 29 (2d Cir. 1984); *In re* Grand Jury Investigation, 600 F.2d 420 (5th Cir. 1979).

53. S. RAPALJE, *supra* note 15, at 81-82.

witness scenario does. This is the privilege claimed by news gatherers. Journalists subscribe to a code of conduct that calls for them to maintain the confidentiality of their sources.[54] It is no surprise that this canon has frequently placed them at odds with prosecutors and civil litigants seeking information to prove their cases. In spite of this recurring conflict, courts in the United States have not made extensive use of the contempt power against the press.[55] This is particularly notable when contrasted with England, where journalists more frequently find themselves subject to the contempt power.[56] Much of the success of American journalists is attributable to the first amendment of the Constitution. Indeed, the guarantee of freedom of the press has probably been the most effective means of limiting the contempt power in this country.[57]

Cases of coercive confinement of journalists can, however, be found in the United States. Judges in criminal cases seem to be much less open to recognizing the journalists' privilege than they do in civil cases, even to the point of openly rejecting the existence of such a privilege in a particular context.[58] While an occasional state court has taken a similarly unsympathetic view when the journalist is a defendant in a libel suit,[59] this seems to be a rare occurrence. The more typical approach in civil cases is to employ the predictable balancing test, weighing the impairment of first amendment rights against the need for information.[60] Courts using this type of analysis have decided both for and against the use of contempt to coerce testimony from journalists,[61] with a discernibly greater restraint shown by judges when the journalist is not a party to the case.[62]

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54. J. BARRON & C. DIEMS, HANDBOOK OF FREE SPEECH 414 (1979).

55. R. GOLDFARB, *supra* note 4, at 7.

56. *Id.*

57. *Id.* at 90.

58. J. BARRON & C. DIEMS, *supra* note 54, at 453; *see In re* Tierney, 328 So. 2d 40 (Fla. Dist. Ct. App. 1976) (holding that a news gatherer has no privilege to refuse to disclose sources of grand jury leaks).

59. *See, e.g.*, Dow Jones & Co. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847 (1973).

60. *See* Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). Judge Potter Stewart (later to become Justice Stewart) declared that the point at which the plaintiff's need for information outweighed the first amendment was when the disclosure sought "went to the heart of the plaintiff's claim." *Id.* at 550.

61. The first amendment prevailed in Carey v. Hume, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974) and in Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1978), in contrast with the result in *Garland*, 259 F.2d at 545.

62. J. BARRON & C. DIEMS, *supra* note 54, at 453.

Perhaps the fastest growing area where coercive confinement is utilized is the one that also produces the strongest public reaction to its application—the domestic relations area. The typical cases involve either refusal to pay child support or denial of visitation to the noncustodial parent. Some of these actions are undoubtedly motivated by vindictiveness on the part of one or both parents. All too often, however, visitation is withheld by a parent after evidence of incest appears. While Dr. Morgan's case is the most publicized in this area, it is by no means the only one. Courts have imprisoned numerous parents for their refusal to permit visitation or to disclose the whereabouts of their children.[63] Undoubtedly many more parents have complied with such orders after the threat of imprisonment. It is this scenario that pushes civil contempt to its ugliest extreme and forces an otherwise abstract issue into the public consciousness. Whether the explosion of sexual molestation charges is real or a mere witch hunt, it is unlikely that the parents incarcerated for civil contempt would choose indefinite imprisonment unless they earnestly believed that compliance with the order would expose their children to a serious threat. The argument that imprisonment is not punishment for the parent's desire to protect their child because the parent "carr[ies] the keys of their imprisonment in their own pocket"[64] has a somewhat hollow ring when the use of those keys involves placing his or her child in the hands of someone the parent believes is a sexual deviate. The emergence of this issue more than any other may be ultimately responsible for a reevaluation of the legitimacy of summary contempt. At a minimum, it will almost certainly lead to the imposition of statutory limitations.

These are by no means the only situations where courts use the contempt power in a summary fashion to impose indefinite incarceration. They are probably the most common, however, and are representative of the issues involved.

III. Rights and Remedies of the Contemnor

The Supreme Court has consistently expressed approval of the diminished level of due process afforded to those incarcerated

63. Apel, *supra* note 6, at 493.

64. *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902) (in reference to coercive confinement in general).

for civil contempt.[65] Judges at all levels have articulated numerous rationales for this absence of basic due process rights. One argument favored by the Supreme Court is that due process of law only applies in a proceeding where the certain result is deprivation of liberty. Civil contempt, by contrast, only raises the possibility of imprisonment on the contemnor's refusal to obey.[66] The ability to purge oneself at any time and obtain release differentiates a civil contempt proceeding from a criminal one and is said to eliminate the need for the usual safeguards.[67] These and other arguments supporting indefinite incarceration will be addressed in more depth later in this note.

Whatever the rationale, the effect of the diminished standards is dramatic. Essentially the only due process afforded one charged with civil contempt is that he must receive notice and a hearing.[68] The contemnor has a qualified right for this hearing to be open and public.[69] Where the contemptuous act did not occur in the presence of the court, the offender has the right to offer evidence and argument in his defense.[70] It is well settled, however, that there is no right to a jury trial.[71] Nor is there a universal right to appointed counsel unless it is statutorily granted.[72] The standard of proof required in a civil contempt hearing is "clear and convincing" rather than "beyond a reasonable doubt" as in other cases where an individual's liberty is at stake.[73]

Although the constitutional prohibition against cruel and unusual punishment generally applies to punishments for contempt,[74] courts have not found the imposition of indefinite sentences a violation of this provision *per se*.[75] Both solitary

65. The Court recently reaffirmed the constitutionality of granting diminished levels of due process in civil incarcerations in a case involving psychiatric commitment of a "sexually dangerous person." Allen v. Illinois, 478 U.S. 364, 372-73 (1986). The Court noted that the "sweeping statement that the Constitution guarantees that no person shall be compelled to be a witness against himself when threatened with deprivation of liberty ... is plainly not good law." *Id.* at 372.

66. Lassiter v. Dept. of Social Services, 425 U.S. 18, 24-25 (1981).

67. Shillitani v. United States, 384 U.S. 364, 370-77 (1966).

68. Dobbs, *supra* note 27, at 243.

69. *In re* Rosahn, 671 F.2d 690, 696-97 (1982).

70. S. RAPALJE, *supra* note 15, at 150.

71. R. GOLDFARB, *supra* note 4, at 168-69.

72. Mascolo, *Procedural Due Process and the Right to Appointed Counsel in Civil Contempt Proceedings*, 5 W. NEW ENG. L. REV. 601, 622 (1983).

73. KSM Fastening Systems v. H.A. Jones Co., 776 F.2d 1522, 1524 (Fed. Cir. 1985); Fox v. Capital Co., 96 F.2d 684, 686 (3d Cir. 1938). *See generally* Wright, Byrne, Haakh, Westbrook & Wheat, *Civil and Criminal Contempts in the Federal Courts*, 17 F.R.D. 167, 174 (1955).

74. *See, e.g., Ex parte* Keeler, 45 S.C. 537, 538-39, 23 S.E. 865, 867-68 (1896).

75. Uphaus v. Wyman, 360 U.S. 72, 76-82 (1959).

confinement and hard labor are, however, constitutionally impermissible in the context of coercive confinement.[76] A number of state courts have held that civil contempt sentences imposed to compel the payment of money do not violate the prohibitions against imprisonment for debt found in their states' constitutions.[77]

The duration of a coercive incarceration does have some limits despite the impossibility of a fixed sentence in civil contempt cases. Statutory limits on coercive confinement have existed for more than sixty years and courts have consistently upheld them.[78] The Recalcitrant Witness statute, for example, imposes a ceiling of eighteen months on confinement of reluctant witnesses.[79] While the Supreme Court has recently reaffirmed the belief that civil contempt is an "inherent" power of the judiciary,[80] it has also said that Congress may develop statutory procedures and limitations on the exercise of this power so long as they do not infringe upon the substance of the power.[81] State legislatures may also enact limiting statutes under the principle that states are free to grant more individual rights than the federal Bill of Rights affords.[82]

Statutory caps on the duration of coercive confinements are not the only limits, however. Once it becomes clear that incarceration will no longer coerce compliance, the rationale for it ceases and it is generally accepted that the court must release the contemnor.[83] The contemnor, however, has the burden of proving that the incarceration has lost its coercive impact.[84] The test used is whether there is a "realistic possibility" or "substantial likelihood" that continued confinement will accomplish its purpose.[85] Judges look at a number of factors in making this determination,

76. Williams v. State, 125 Ark. 287, 288, 188 S.W. 826, 827 (1916) addresses the solitary confinement issue. For a case dealing with a contempt sentence to hard labor, see Flannagan v. Jepson, 177 Iowa 393, 394-95, 158 N.W. 641, 642-44 (1916).

77. *See, e.g.*, Pabian v. Pabian, 480 So. 2d 237, 238 (Fla. Dist. Ct. App. 1985) (holding that coercive confinement is not a prohibited imprisonment for debt when the payment is in the nature of spousal or child support rather than a settlement of property rights).

78. Michaelson v. United States, 266 U.S. 42, 65-66 (1987).

79. 18 U.S.C.S. § 1826 (Law. Co-op. 1990).

80. Young v. United States *ex rel.* Vuitton Et Fils, S.A., 481 U.S. 786, 795 (1987) (holding that private counsel who represents a party that would benefit from enforcement of a court order may not be appointed to prosecute a civil contempt proceeding).

81. *Michaelson*, 266 U.S. at 65-66.

82. PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Cooper v. California, 386 U.S. 58, 62 (1967).

83. Simkin v. United States, 715 F.2d 34, 36-37 (2d Cir. 1983); *In re* Crededio, 759 F.2d 589, 590 (7th Cir. 1985).

84. *In re* Grand Jury Investigation, 600 F.2d 420, 425 (5th Cir. 1979).

85. *Simkin*, 715 F.2d at 37, 83; *In re* Grand Jury Investigation, 600 F.2d at 425.

such as the length of the incarceration to date,[86] the age and health of the contemnor,[87] and fear of retribution for the testimony.[88] The contemnor's stated reasons for refusing to comply may also carry some weight.[89] Courts generally agree that a reluctant witness cannot be held after the termination of the action or the discharge of the grand jury. Confinement beyond that point would be punitive rather than coercive, requiring full application of due process.[90] This limitation, of course, is of little benefit to contemnors refusing to obey orders other than those requiring them to testify.

Few defenses are available to a person charged with civil contempt arising from failure to obey an order. A person may successfully invoke privilege in any recognized form as a defense against a civil contempt charge stemming from a refusal to testify, such as where the testimony sought might incriminate the witness.[91] The offer of absolute immunity from prosecution would usually, though not always, vitiate such a privilege.[92] Inability to comply with the order is always a complete defense to a civil contempt charge,[93] but the contemnor must carry the burden of proof.[94] An allegation that the court order was invalid is not, however, a defense for the refusal to obey such an order.[95] This

86. Catena v. Seidl, 68 N.J. 224, 227, 343 A.2d 744, 747 (1975).

87. *Id.*

88. *In re* Grand Jury Investigation, 600 F.2d at 426.

89. *In re* Ford, 615 F.Supp. 259, 261-62 (S.D.N.Y. 1985). Courts are aware, however, that even the contemnor's sincere belief that further incarceration will not coerce compliance may be inaccurate; it is entirely possible that continued incarceration may still coerce the behavior in spite of such a belief. *In re* Parrish, 782 F.2d 325, 327-28 (2d Cir. 1986). Testimony by the contemnor to this effect is therefore not considered conclusive. *In re* Crededio, 759 F.2d 589, 592-93 (7th Cir. 1985); Sanchez v. United States, 725 F.2d 29, 31 (2d Cir. 1984).

90. Shillitani v. United States, 384 U.S. 364, 371 (1966). *In re* Dinnan 625 F.2d 1146, 1150 (5th Cir. 1985) carried this proposition even further by stating that imprisonment for civil contempt may not continue beyond the time when the testimony ordered would be useful.

91. *See Ex parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906); Siklek v. Commonwealth, 133 Va. 789, 112 S.E. 605 (1922).

92. People v. Rockola, 339 Ill. 474, 475-76, 171 N.E. 559, 560-61 (1930) held that the privilege against self-incrimination could be invoked, preventing a contempt charge, even after an offer of immunity. This decision was based on construction of a state statute applying only to bribery cases which required witnesses to testify if immunity was offered. The exclusive application of the law to bribery implied that the rule was intended not to apply in other cases.

93. S. RAPALJE, *supra* note 15, at 155.

94. United States v. Rylander, 460 U.S. 752, 755 (1983) (defendant may not bypass the burden of production concerning an alleged inability to comply by invoking fifth amendment self-incrimination privilege).

95. S. RAPALJE, *supra* note 15, at 117.

rule stems from the old equity principle that affected parties must obey an erroneously issued injunction or order until a court determines that error did indeed exist.[96] In general, only when the issuing court can be said to have lacked jurisdiction over the subject matter or the persons involved may a disobedient contemnor rely on invalidity of the order as a defense.[97] This principle naturally raises the question of whether a contemnor might use invalidity of the order as a defense based on a claim that the use of coercive confinement is itself outside the court's lawful authority. One could certainly find support for such a position, or for a similar argument that the denial of procedural rights violates either the federal or state constitutions. Such arguments are probably untenable, however, in light of the Supreme Court's consistent position concerning the constitutionality of coercive confinement. It is conceivable, though, that an independent state supreme court might be receptive to such an argument, either as an attack on the common law validity of coercive confinement or as a challenge under the provisions of a state constitution.

Another defense that has the potential for success is a claim of necessity. This defense may be available to a party who can demonstrate that the harm resulting from compliance would have significantly outweighed the harm actually caused to the opposing party by the failure to obey.[98] The successful use of such a defense does not require proof that harm was actually occurring at the time the disobedience occurred, only that the disobedient party had a reasonable belief that such harm was imminent.[99] A number of states have codified the necessity defense,[100] but it is still limited by the common law rule that a necessity defense will not lie when a legal alternative to disobedience exists.[101] A novel variation on the necessity defense is the enactment in a few states of "custodial interference" statutes, which provide a

96. M. KADISH & S. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 111 (1973).

97. *Id.*

98. Griffin v. United States, 447 A.2d 776, 777 (D.C. 1982), *cert. denied sub nom.* Snyder v. United States, 401 U.S. 907 (1983).

99. *Griffin*, 447 A.2d at 778.

100. Apel, *supra* note 6, at 513.

101. The court in Gerlach v. State, 699 P.2d 358, 360 (Alaska Ct. App. 1985) refused to permit a necessity defense on these grounds when a mother hid her daughter for over a year after a modified custody agreement required her to relinquish custody to the child's father. The court held that the mother had not exhausted all recourse through the courts; there was, therefore, a legal alternative to the disobedience.

statutory necessity defense to the crime of interfering with lawfully granted child custody.[102] These statutes only grant the necessity defense in specific limited circumstances, but prior awareness of the statute would greatly increase the chances that a subsequent act of disobedience would meet the statutory requirements.

A person incarcerated for refusing to obey a court order does have remedies available to him, albeit limited ones. The contemnor may not, in general, use a writ of habeas corpus to obtain review of his confinement.[103] The reason for this is that habeas corpus is a collateral remedy, and a court may not collaterally impeach the judgment of another court of competent jurisdiction.[104] The only application of habeas corpus to a coercive confinement is when there is a question as to the court's jurisdiction.[105] Courts still typically adhere to this common law rule, and the various statutes authorizing habeas corpus reflect it.[106] While the habeas corpus writ was usually the only remedy available when a contemnor alleged a lack of jurisdiction, a few states permitted the use of certiorari in such cases.[107] It appears today that courts grant certiorari in civil contempt cases more often than they deny it; only a few cases in this century have resulted in a denial of certiorari in this context.[108]

The availability of appeal to one incarcerated for civil contempt depends in part upon the jurisdiction. The majority of modern state cases dealing with the matter have departed from the common law rule and have held that appeal is available.[109] State

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102. Apel, *supra* note 6, at 519.

103. S. RAPALJE, *supra* note 15, at 222.

104. *Id.*

105. *Id.*

106. *See, e.g.*, 28 U.S.C.S. § 2254 (Law. Co-op. 1990). This section permits a federal court to entertain an application for a writ of habeas corpus by a person held in custody under authority of a state court only when the incarceration is in violation of the Constitution or laws of the United States. Courts may only grant a such a writ when the contemnor has exhausted all remedies available through state courts, or upon a showing that under the circumstances of the case the corrective processes are ineffective.

107. S. RAPALJE, *supra* note 15, at 198.

108. Annotation, *Contempt Adjudication or Conviction as Subject to Review, Other Than by Appeal or Writ of Error*, 33 A.L.R. 3d 589 (1990). Denials of certiorari mostly have occurred in Minnesota cases. *See* Proper v. Proper, 188 Minn. 15, 15, 246 N.W. 481, 481 (1933); Dahl v. Dahl, 210 Minn. 361, 363, 298 N.W. 361, 363 (1941). Most cases have held that coercive contempt is reviewable by writ of certiorari. *See, e.g.*, Lovelady v. Lovelady, 281 Ala. 642, 643, 206 So. 2d 886, 888 (1968).

109. Annotation, *Appealability of Contempt Adjudication or Conviction*, 33 A.L.R. 3d 448 (1990).

rulings denying appeals in such cases do exist, however.[110] Statutory provisions govern appeals in federal courts: 26 U.S.C. section 1826(b) permits a contemnor to appeal from a civil contempt incarceration and requires the appellate court to hear such an appeal within thirty days.[111]

In jurisdictions where the law permits appeals concerning civil contempt incarcerations, the standard of review may vary with the length of time the contemnor has been incarcerated. Federal cases, of course, are subject to an eighteen-month statutory limit on the length of coercive incarcerations.[112] Federal courts have therefore held that no due process concerns arise until the end of this eighteen-month period and have applied only an abuse of discretion standard until that point.[113] In states without statutory limits that would clearly indicate when due process considerations arise, most reviewing courts apply a two-tiered standard of review. These courts typically employ an abuse of discretion standard when reviewing the initial decision of a trial judge to impose coercive confinement, but later apply a much higher degree of scrutiny if a contemnor confined for a significant period of time appeals his continued incarceration on the grounds that it no longer has a coercive effect.[114] No clear pattern has yet emerged in these cases as to when the standard shifts, or, stated another way, when a contemnor may raise a legitimate claim that his refusal to obey in spite of incarceration demonstrates that further confinement will not be likely to produce compliance. It seems likely, however, that the eighteen-month federal limitation will be influential in this matter. These propositions concerning the availability of appeal only apply, of course, to a direct attack on the civil contempt ruling itself. There may be other more indirect methods of challenging the incarceration, such as appealing a decision by the judge in the underlying action.

IV. THE ORIGINS OF THE POWER

It should be evident at this point that the summary contempt power has tremendous potential for abuse. The ability of a judge

110. *Id.* Two examples are Lovelady v. Lovelady, 281 Ala. 642, 643, 206 So. 2d 886, 888 (1968) and Zobel v. People, 49 Colo. 142, 143, 111 P. 846, 847 (1910).

111. 26 U.S.C.S. § 1826(b) (Law. Co-op. 1990).

112. 26 U.S.C.S. § 1826(a) (Law. Co-op. 1990).

113. Sanchez v. United States, 725 F.2d 29, 31 (2d Cir. 1984); Simkin v. United States 715 F.2d 34, 37 (2d Cir. 1983).

114. *See* Morgan v. Foretich, 564 A.2d 1, 22-25 (D.C. 1989) (holding that the issue of whether a civil contempt confinement has lost its coercive effect is a mixed question of law and fact and applying a "de novo determination" standard to the application of law to the facts).

to both dictate an order, and then to enforce it without providing the contemnor with the traditional safeguards granted by the common law and the Constitution, seems more characteristic of the Inquisition than of our current understanding that judges are ministers of justice who not only apply the law but respect its limits. An examination of the history of the power provides some insight into how it digressed from its more limited original form.

The contempt power in England is ancient; historians have traced it back to at least the tenth century.[115] While early common law courts exercised the contempt power, they viewed it not so much as an inherent judicial power as an executive power delegated by the King.[116] The courts of early medieval England acted on behalf of the King and on his authority. Offenses committed in the realm were violations of the "King's peace" and were treated as offenses against his authority. This concept is not entirely alien to twentieth-century America where many injuries to private parties are violations of the law regardless of whether a civil cause of action for the injury exists or is actually brought. In early England, however, the concept of the King's peace was much broader in that there was less legal recognition of private injury. Since judges were officers of the King and derived their authority from him, disobeying a writ or other judicial command was a violation of the King's peace in the same way that a crime was.[117] This concept existed in Anglo-Saxon times but grew and flourished under Norman rule.[118] So the power that courts now maintain is inherently judicial really had its origins as executive authority delegated to the King's officers to punish offenses against him. It was a method not for redressing a private wrong but a public one, and only took the form of what we now call criminal contempt.[119]

Until the fifteenth century there was essentially no summary contempt power. While courts used contempt with some frequency, they conducted all contempt proceedings in accordance with the law of the land, including trial by jury. Courts only imposed summary punishment when an accused pled guilty and therefore

115. R. GOLDFARB, *supra* note 4, at 14.

116. Blackstone still spoke of this royal delegation of power to courts in the eighteenth century. By this point, however, common law scholars saw this more as a theoretical derivation of authority than an actual delegation. Blackstone acknowledged that complete separation of the powers was a matter of law that the crown could not alter without action by Parliament. *See* 1 W. BLACKSTONE, COMMENTARIES *267.

117. R. GOLDFARB, *supra* note 4, at 9-10.

118. *Id.* at 12-13.

119. *Id.* at 50.

needed no jury to determine his guilt.[120] The introduction of summary enforcement powers came with the Star Chamber, an offshoot of the King's Council. This Council exercised broad legislative, judicial, and executive powers in the middle ages. Courts gradually split off from the Council, each having particular functions and jurisdictions, but the Council itself remained intact and powerful.[121] The powers of the Council were largely undefined and unchecked; this aroused opposition from some quarters and support from others. Frustration over the cumbersome legal process found in the common law courts ultimately led Parliament to enact the Pro Camera Stellata,[122] a 1487 statute affirming the power of the Council, which was by this time known by the name of the room in which it met. This act gave sufficient latitude to the "Star Chamber" to permit it to convict and punish without the inconvenient due process required in other courts.[123]

While freedom from the incommodious requirements of due process permitted the Star Chamber to deliver justice in an extremely efficient manner, that freedom also permitted unrestrained abuses. The use of torture and extreme sentences became increasingly intolerable,[124] and in 1641 Parliament formally abolished the Star Chamber in a document that recited a long list of violations of the Magna Carta and subsequently enacted statutes.[125] The Abolition of the Star Chamber reaffirmed the necessity for due process of law, including the right to trial by jury.[126] The document required that all matters previously handled by that body would henceforth "have their proper remedy and redress, and their due punishment and correction, by the common law of the land, and in the ordinary course of justice."[127] Parliament ensured that the summary procedures introduced to the court during the life of the Chamber disappeared with the Star Chamber itself—with one exception: Courts retained the power to execute summary process in cases that we would now call direct contempt, where an act occurred in the immediate presence of the court.[128] The rationale for this exception was necessity. Jurists of the day believed that courts would be unable to function if they were

120. *Id.* at 15.
121. R. PERRY, SOURCES OF OUR LIBERTIES 125 (rev. ed. 1978).
122. 3 Hen. 7, ch. 1 (1487).
123. R. PERRY, *supra* note 121, at 127-28.
124. *Id.* at 131.
125. Abolition of the Star Chamber, 16 Car. 1, ch. 10 (1641).
126. R. PERRY, *supra* note 121, at 132.
127. 16 Car. 1, ch. 10, § 2.
128. R. GOLDFARB, *supra* note 4, at 15.

stripped of the power to immediately squelch misconduct in judicial proceedings.[129]

Such was the state of the law of contempt until the latter part of the eighteenth century when there was an unusual convergence of events that was to have a profound impact on the contempt power, ultimately expanding it to its present form.[130] In 1765, Lord Mansfield complained that a man named Almon, a bookseller, had libeled him. Justice Wilmot, who wrote the opinion holding Almon in contempt for writing the allegedly libelous article, was an admirer of Lord Mansfield.[131] As the judgment granting a writ of attachment against Almon was about to be delivered, someone realized that it carried the wrong name, rendering it invalid against Almon. Almon's attorney refused to grant permission for an amendment, and Wilmot had no choice but to abandon the judgment as legally inoperative. The void opinion was not published until 1802 when Wilmot's son posthumously released a collection of his father's opinions.

The opinion in the *Almon* case was significant for its creative account of the historical roots of the power to summarily punish indirect contempts. The opinion not only said that such powers were legitimate but justified their use by declaring that they were "coeval with [the courts'] first foundation and institution."[132] Wilmot claimed that:

> "Issuing attachments . . . for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the *lex terrae* and within the exception of Magna Carta as the issuing [sic] any other legal process whatsoever."[133]

The effect of this legally void opinion might have been negligible but for the close friendship between Justice Wilmot and Sir William Blackstone. Blackstone consulted his friend concerning the law of contempt while writing his *Commentaries on the Laws of England.* He then reported Wilmot's unique views

129. *Id.*

130. For a more detailed chronicle of the events that surround the *Almon* case see R. GOLDFARB, *supra* note 4, at 16-20. The account here is an abbreviated version of the one found in that source.

131. Justice Wilmot apparently considered Lord Mansfield at least indirectly responsible for obtaining Wilmot his seat on the bench. R. GOLDFARB, *supra* note 4, at 16-17.

132. R. GOLDFARB, *supra* note 4, at 17.

133. *Id.*

in the *Commentaries* as fact without citing any authorities to support the position.[134] Yet even as he wrote his famous treatise, Blackstone appears to have been given pause by Wilmot's historical claims, for he candidly acknowledged that this type of summary judicial power was "opposed to the genius of the common law in any other instance."[135]

Blackstone's statement of the law of contempt gave the *Almon* opinion the sanction of knowledgeable authority. The *Commentaries* being the definitive legal text in nineteenth-century England and America, several generations of law students learned the Wilmot-Blackstone view of summary contempt as the law. Courts increasingly cited *Almon* to extend the summary power over indirect or constructive contempts, and by the twentieth century this summary power had developed into much of its present form.[136]

The first codification of the contempt power in the United States, the Federal Judiciary Act of 1789, essentially incorporated the common law of contempt without defining it.[137] Early state legislation that more specifically described the boundaries of the contempt power included misconduct of court officers, and the type of misconduct in the presence of the court that had been subject to summary procedure before *Almon*. The constructive or indirect contempt advocated by Justice Wilmot was not included in these state statutes.[138] The first major controversy over the extent of summary contempt occurred during the impeachment proceedings against James Peck. Peck, a federal judge, had imposed summary punishment on a Missouri lawyer for publishing an article critical of Peck's handling of a case in which the attorney was involved. The angry attorney provoked Congress into initiating impeachment proceedings. During the course of the hearings, heated debate arose over the authority for the judge's exercise of summary power to punish a contemptuous act occurring out of court. The Senate exonerated Peck based on his claim that he had fairly interpreted the law. One month after the acquittal, however, discussion began concerning a bill which followed the pattern of the earliest state contempt statutes and limited the exercise of summary punishment to contempts committed in a

134. *Id.* at 19.
135. 4 W. BLACKSTONE, COMMENTARIES *287.
136. R. GOLDFARB, *supra* note 4, at 19.
137. *Id.* at 20.
138. *Id.*

court's presence.[139] Congress passed such a bill in 1831, and as late as 1860 twenty-two of the thirty-three states still retained the more limited version of the contempt power by statute.[140] Yet the latter half of the nineteenth century saw the rapid acceptance of the summary punishment process as applied to indirect contempts, including the summary application of incarceration as a tool to provide civil remedies to injured parties, as more and more courts gradually adopted the views expressed by Blackstone and Wilmot. The summary procedures were, after all, much more efficient and convenient than the traditional requirements of due process.

V. COMMENT

The authority for the use of summary power, particularly in the context of coercive civil contempt, is tenuous at best. Summary judicial power was born in the Star Chamber, a body granted far-reaching judicial and executive powers on the grounds of expediency. The mixture of these powers, so as to permit a court to enforce its own orders without the safeguards of due process and appellate review, produced a form of justice that can only be described as tyrannical. Certainly, there were cases in which justice was administered more efficiently than had been previously seen, but the price paid for efficiency was one of man's most treasured possessions—liberty. It seems we have forgotten the lessons of the Star Chamber and so have continued to use necessity and historical error to justify the same despotic exercise of power by courts. The problem with indefinite confinement is not simply that judges, unrestricted by statutory limits, impose it in a harsh or unjust manner. Men will always misuse a power whose limits are not to some extent inherent. There exists a natural tendency to alter and expand boundaries that are drawn merely as a matter of convention, so that the power applies to situations just beyond the previous limits. The inevitable result of this process is that the power grows into something monstrous. It is therefore the summary exercise of the contempt power that is the root problem, rather than extreme applications of it such as indefinite confinement, for it is the combining of inherently different powers that has caused the innate boundaries of each

139. *Id.*
140. *Id.*

to be lost. The men who designed our system of government built in the separation of powers because centuries of experience had demonstrated that only by keeping these powers distinct could they effectively serve as checks against each other.

Given that the problem lies in the use of summary contempt procedures in any form, the development of limits, by statute or otherwise, to prevent courts from abusing the summary punishment of contempt is not the answer. These limits, such as the statutory caps on civil contempt sentences that are often recommended, would merely be lines drawn as matters of convention rather than boundaries inherent in the nature of the power. Courts would therefore merely expand them once again. Yet turning back the clock four or five hundred years is a drastic step, and there are certainly many who would balk at the suggestion that summary contempt procedures be abolished. It would only be natural to ask whether centuries of legal precedent does not legitimize a practice even if it was, perhaps, inappropriate at its inception, or even if a historically inaccurate description in a discarded legal opinion served as justification for it. Justice Black aptly addressed this concern in a 1958 opinion when he said that "the principle commonly referred to as stare decisis has never been thought to extend so far as to prevent courts from correcting their own errors."[141]

There are numerous arguments supporting the courts' use of summary procedures to coerce behavior. Perhaps the most common is the well-known adage already mentioned that the person incarcerated for civil contempt carries the keys to the jailhouse door in his own pocket. The implication of this statement is that the courts are not really keeping the contemnor in jail—he is, in reality, doing it to himself. This argument is absurd on its face. No rational person wishes to be confined. Most people who refuse to obey a court order do so only because the court has commanded them to do something which they believe is so unjust, or so harmful, that to obey would be worse than being imprisoned. It is the court, in such cases, that has forced upon the contemnor a choice between his liberty and his conscience. What is worse still is that the contemnor is not simply punished for harboring different beliefs about justice than those embodied in the law; the trial judge is actually compelling the individual to perform an act so abhorrent to him that jail seems preferable to compliance. This is not to say that courts should refrain from

141. Green v. United States, 356 U.S. 165, 195 (1958) (Black, J., dissenting).

imprisoning someone who violates the law, or a court order based upon the law, simply because the violation was motivated by sincere convictions. It is well settled that the conscience of an individual does not define the law. Someone may sincerely believe that violence in any form is immoral, yet this belief does not relieve them of the legal duty to register for the draft. Yet to punish someone indefinitely for their refusal or inability to change their conscience does great violence to the freedom of thought and belief that is at the very heart of our Constitution.[142]

Another line of reasoning offered in support of the diminished level of procedural protections available when a person faces a civil contempt charge emphasizes the fact that the offense is a private wrong committed against an individual. The point here is that it would place an undue burden on a civil plaintiff seeking redress of a grievance against a contemnor if the relief sought could only be obtained after compliance with the procedures guaranteed to a criminal defendant.[143] It is certainly true, of course, that both the common law and the United States Constitution impose less stringent procedural requirements in civil suits than in criminal cases. These differing standards, however, developed during a time when there was no incarceration for civil grievances. The gravity of the consequences of a criminal conviction were the basis for the heightened due process requirements necessary in these cases. The use of imprisonment in civil contempt cases therefore alters the underlying distinction between criminal and civil cases that necessitated the different levels of due process. If the potential harm to an individual deprived of his liberty through a criminal conviction warrants the safeguards granted to citizens by the federal and state constitutions, why should those safeguards be any less important when the judiciary has begun to deprive persons of their liberty in a civil context?

The other arguments typically offered in support of summary contempt proceedings are further variations on the necessity or expediency theme. There is concern, for example, that the application of criminal due process requirements to all contempt

142. See R. GOLDFARB, *supra* note 4, at 59-61 for a similar opinion.

143. See Note, *supra* note 24, at 182-83 for elaboration on this point. Two of the burdens mentioned by the author that would be placed on the plaintiff are the availability to the defendant of the fifth amendment privilege against self-incrimination and the difficulty and expense of gathering information to prove the defendant's ability to comply. It is, in other words, inconvenient for the plaintiff to prove his case without the defendant's assistance.

proceedings would seriously impair judicial enforcement of court orders.[144] This, however, erroneously presupposes that enforcement is a judicial function. Advocates of the power to summarily convict persons for direct contempts also use expedience to support their position. They argue that there is no need for a trial when a competent trier of fact witnessed the contemptuous act. To require a jury determination of whether a contemptuous act occurred would, it is said, unnecessarily crowd an already overloaded docket, and would make it difficult for courts to function should someone act in a disruptive or disrespectful manner. The difficulty with this argument is twofold. First, while it might appear that summary proceedings limited to this context carry relatively little potential for abuse, history reminds us that summary contempt started in just this form and grew beyond its limits. Once again, combining executive enforcement power with judicial power, even in a way that appears innocuous, will result in the loss of the limitations found in the nature of the powers themselves. These limits are inevitably replaced with artificial ones, created by men and subject to gradual expansion.

This theoretical objection, however, is not the only one. The summary punishment of direct contempt carries a very real potential for abuse. A criminal contempt is, by definition, an offense against the dignity and authority of the court. It seems questionable whether the court whose dignity has suffered offense is in a position to serve as an impartial judge of whether a legally sanctionable act of contempt has indeed occurred. Interestingly enough, the Federal Rules of Criminal Procedure seem to recognize the potential for this problem. A federal judge is disqualified from presiding over a jury trial when the defendant is charged with an act of contempt involving disrespect to that judge.[145] Yet summary punishment is still authorized for acts of disrespect to a judge that occur in his presence.[146] One would think that emotion or personal bias would be a greater danger when a judge serves as summary trier of fact than when he merely presides over a jury trial.

The basic foundation for the claim that summary contempt power is inherent in the judiciary is the underlying belief that

144. *See* Note, *supra* note 24, at 181 (citing Hicks v. Feiock, 485 U.S. 624 (O'Connor, J., dissenting)). This impairment would, it is said, apparently result from the increased length of the proceedings if the law required a court to hold a full criminal trial in conjunction with a support enforcement action.

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

146. FED. R. CRIM. P. 42(a).

courts could not function effectively without the power to summarily punish disruption and to enforce their own orders.[147] Under this rationale, summary contempt must by necessity be an inherent part of the judicial power if courts have to exercise such power to properly perform their duties. The flaw here is in the presupposition that it is indeed necessary. One must remember that courts managed to function without exercising summary powers for centuries.[148] As stated previously in this note, summary convictions for criminal contempt were a product of the Star Chamber, and coercive confinement in civil contempt cases is a relatively modern invention. Courts may have become accustomed to relying on summary contempt powers and may prefer their use to reliance on the executive branch,[149] but one should not confuse habit or convenience with necessity. There are other ways to effectuate court orders and to ensure that acts of disrespect do not prevent the application of justice.

If a plaintiff in a civil suit, for example, committed repeated acts of disrespect or disruption, the court might dismiss the suit without prejudice. The wasted cost of litigation would prove a most effective deterrent. A repeat of the behavior in the next suit could be sanctioned by a dismissal with prejudice. It would certainly not be a denial of justice to require persons seeking redress of grievance through the courts either to behave appropriately in those courts or to forfeit the opportunity to use them in that instance. Courts could dismiss attorneys behaving improperly from representing the case, or they might perhaps bar the attorney from the courtroom for a period of time.[150] These

147. "The ability to punish disobedience to judicial orders is regarded as essential in ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other branches." Young v. United States *ex rel.* Vuitton Et Fills, S.A., 481 U.S. 786, 796 (1987).

148. Recall Alexander Hamilton's averment that the judiciary "can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm for even the efficacy of its judgments." THE FEDERALIST No. 78, *supra* note 9, at 522-23.

149. This desire to exercise power free from the checks built into our system of separated powers is very real, as illustrated by the recent emphatic comment by Mr. Justice Brennan that "[c]ourts cannot be at the mercy of another branch in deciding whether such proceedings should be initiated." *Young*, 481 U.S. at 796. The similarity between this statement and the rationale that produced the Star Chamber with all its attendant horrors is striking.

150. Sanctions imposed upon attorneys for inappropriate behavior in the courtroom would, of course, have a detrimental impact on their clients. The Supreme Court, however, has expressed approval of sanctions more extreme than simply dismissing an attorney from a case when the attorney's conduct was the sole basis for the sanction. In Link v. Wabash Railroad Company, 370 U.S. 626, 633-34 (1962), the Court said that there was "no

methods are simple disciplinary procedures rather than criminal ones, and could therefore be administered without giving rise to due process problems. Civil or criminal defendants who behave in a disruptive manner, or persons not a party to the case, should enjoy the same kinds of procedural rights available to anyone charged with a crime regardless of whether the acts occurred in court. A determination of whether a criminally punishable contempt occurred should always be made by a trier of fact not personally involved in the incident.

The alternative to coercive confinement is equally as obvious. Courts must limit themselves to their proper role of stating and applying the law. It is for the executive branch to enforce. Should a person fail to comply with a court order, the matter must be dealt with like any other violation of law that causes harm to another. Apart from any of the traditional civil remedies that might be helpful to the party injured by the noncompliance, the aggrieved party should have the option to file a complaint resulting in criminal charges. Refusals to comply with a court order should be punishable as any other act of criminal contempt, and the accused tried in accord with the same limitations and protections afforded to others threatened with loss of liberty at the hands of the state. Appropriate penalties for disobedience will certainly deter many, though not all, of such acts. Refusals to comply with court orders in the face of sufficiently serious penalties are very likely an indication that the disobedience is in some way the result of deeply held values or beliefs which conflict with the order. Illegal actions motivated by conscience are matters that courts may very well be justified in punishing, but no court has jurisdiction over the mind or heart of a human being. It is the ultimate act of tyranny to force a person to change his beliefs or to perform an act that is abhorrent to those beliefs.

While alternatives to judicial exercise of summary contempt powers are feasible, they clearly would not operate as efficiently as the summary mechanisms currently employed. The point, however, is that necessity or expediency are never in themselves a valid basis for law. Certainly, there are valid laws of convention that do not represent moral values *per se,* but that are tailored to the conditions of a particular society or community to make life in that society more pleasant or safe or efficient. Traffic laws

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merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."

are a good example. These laws of convention may be flexible so as to adjust to changing conditions and maintain the desired effect. Yet the very structure of our Constitution, and the "law of the land" that preceded it, rejects the notion that necessity or expediency may override laws of principle having a moral foundation. Something that is inherently wrong does not become any less so because it is easier than doing what is right. The men who founded this nation and developed our system of government believed, as did their ancestors, that the basic liberties collectively called "due process" or the "law of the land" were moral imperatives that could not be compromised for the sake of practicality. This is why England explicitly rejected the experiment of the Star Chamber in favor of the more ponderous "law of the land," and it is why each of the thirteen original American states accepted the cumbersome restraints imposed on the executive and judicial branches by our Constitution. If liberty is still the principle that guides and animates our nation, let us have the courage to defend it even when there is a price that must be paid for doing so. The inevitable alternative is tyranny.

ALLEN GARDNER KINGMAN