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## CIVIL AND CRIMINAL CONTEMPT IN THE FEDERAL COURTS

ON November 21, 1941, an Act to extend the rule-making authority of the Supreme Court to procedure for the punishment of criminal contempt<sup>1</sup> received executive approval. Ostensibly to bridge a gap in the previous rule-making authorization created by a decision<sup>2</sup> which in effect had held that the Court was empowered to regulate all procedure "except proceedings to punish for criminal contempt of court,"<sup>3</sup> it is the first Congressional legislation referring in terms to *criminal* contempt.<sup>4</sup> In accordance with this enabling Act,

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1. 55 STAT. 779 (1941), 18 U.S.C. §689 (Supp. 1946).

2. *Nye v. United States*, 313 U.S. 33 (1941).

3. H.R. REP. No. 1178, 77th Cong., 1st Sess. (1941); SEN. REP. No. 768, 77th Cong., 1st Sess. (1941).

4. *But cf.* 28 U.S.C. §§387, 388 (1940) where through an ambiguous compilation reference is made specifically to "criminal" contempt. Comparison with the original

Rule 42 of the Federal Rules of Criminal Procedure was adopted, effective March 21, 1946, to codify criminal contempt procedure for the first time.

The recent Congressional recognition of a classification of criminal contempt implies its civil counterpart. But no federal legislation purporting to regulate civil contempt has ever been enacted and it remains an open question whether even general contempt legislation, with the possible exception of the Norris-LaGuardia Act,<sup>5</sup> is applicable to civil contempt.<sup>6</sup>

Yet on March 20, 1947, for the violation of a restraining order, a labor union was fined \$700,000 for criminal contempt and, conditionally, \$2,800,000 for civil contempt by a mandate of the Supreme Court.<sup>7</sup> Following shortly thereafter, a controversy over the proper disposition of contempt charges was renewed between Justice Rutledge and Justices Frankfurter and Jackson under circumstances indicating uncertainty as to the ultimate alignment of the majority of the Court. Mr. Justice Rutledge re-emphasizes the necessity of maintaining a clear-cut difference between civil and criminal contempt justifiable upon "historical grounding and constitutional compulsion"<sup>8</sup> while the latter assert that "contempt proceedings are *sui generis*. . . . They are not to be circumscribed by procedural formalities or by traditional limitations of what are ordinarily called crimes, except insofar as due process of law and the other standards of decency and fairness in the administration of federal justice may require."<sup>9</sup> The controversy focuses attention upon serious inadequacies in the existing federal law of contempt and invites examination of the mechanism by which the power of the federal courts is made effective.

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statute, 38 STAT. 738-9 (1914), which in this respect has never been amended, indicates that the word "criminal" has been added by the Committee on Revision of the Laws, and not by Congress. The ambiguity has been incorporated into 28 U.S.C.A. §§ 387, 388 (Supp. 1946), but not into 8 FED. CODE ANN., tit. 28, §§ 387, 388 (1937, Supp. 1946). For a collection of federal statutory provisions enumerating contempts, see Notes of Advisory Committee on Rules, FED. R. CRIM. P. 42 (1946).

5. 47 STAT. 72 (1932), 29 U.S.C. §111 (1940).

6. See *Penfield Co. v. SEC*, 67 Sup. Ct. 918, 923 (1947) (assuming only *arguendo* that the basic federal contempt statute, REV. STAT. §725 (1875), 28 U.S.C. §385 (1940), governs civil as well as criminal contempt); *In re Sixth & Wisconsin Tower, Inc.*, 108 F.2d 538, 544 (C.C.A. 7th 1939) (concurring opinion), 54 HARV. L. REV. 137 (1940) (arguing that the statute applies only to criminal contempt). Application is usually assumed without question, as in the majority opinion, *id.* at 540, or ignored, as in *Lamb v. Cramer*, 285 U.S. 217 (1932).

7. *United Mine Workers v. United States*, 67 Sup.Ct. 677 (Mar. 6, 1947); 67 Sup.Ct. 976 (Mar. 17, 1947).

8. *Penfield Co. v. SEC*, 67 Sup.Ct. 918, 924 (Mar. 31, 1947) (concurring opinion based upon his dissent in *United Mine Workers v. United States*, *supra* note 7 at 730).

9. *Penfield Co. v. SEC*, *supra* note 8 at 930 (dissenting opinion). Mr. Justice Jackson may have been committed to the proposition that contempt is *sui generis* three weeks previously by his brief concurring opinion in *United Mine Workers v. United States*, 67 Sup.Ct. 677, 703 (1947); for he there subscribed to a civil as well as a criminal contempt fine although maintaining that the court contemned had no jurisdiction to issue the restraining order violated, a circumstance which has traditionally defeated a judgment for civil contempt. See *id.* at 696.

## BACKGROUND—THE BASIC FEDERAL CONTEMPT STATUTE

A comprehensive definition of contempt of court has rarely been judicially attempted with success. Two state court definitions may be suggested as sufficiently vague to include all recorded federal contempt: contempt is an act in "disregard of the authority of the court"<sup>10</sup> or against "the integrity of the court."<sup>11</sup> A similar amorphous conception appears to have been the basis of the contempt provision in the Judiciary Act of 1789 conferring upon the courts of the United States the power "to *punish* by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."<sup>12</sup>

The Supreme Court early adopted the position that contempt is a "specific criminal offense,"<sup>13</sup> a position not discarded officially until 1901.<sup>14</sup> The classification, however, carried with it none of the safeguards commonly associated with the prosecution of crimes. For the power to punish contempt of court was metaphysically conceived as "inherent,"<sup>15</sup> a conception which served not only to remove contempt from the protection of general criminal statutes but also to induce the emasculation of specific contempt legislation.<sup>16</sup> The im-

10. *In re MacKnight*, 11 Mont. 126, 135, 27 Pac. 336, 338 (1891).

11. *In re Merrill*, 88 N.J. Eq. 261, 267, 102 Atl. 400, 402 (1917).

12. 1 STAT. 83 (1789) (italics added).

13. *Ex parte Kearney*, 7 Wheat. 38 (U.S. 1822). ". . . for when a court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution." *Id.* at 43.

14. See p. 92 *infra*.

15. See *Respublica v. Oswald*, 1 Dall. 319, 329 (Sup. Ct. Penn. 1783); *United States v. Hudson*, 7 Cranch 32, 34 (U.S. 1812); *Anderson v. Dunn*, 6 Wheat. 204, 227 (U.S. 1821); *Ex parte Robinson*, 19 Wall. 505, 510 (U.S. 1874); *cf.* 3 SROXY, CONSTRUCTION, §§1497, 1768 (1833) [§§1503, 1774, in 5th ed. 1891]. The doctrine receives more than metaphysical support, however, from the principle of separation of powers. In the first place, it is urged that "the right of self-protection and self-preservation" lies in its acceptance; "and be it said to the credit of many courts who have not bowed to popular enthusiasm . . . they unqualifiedly adhere to the doctrine." 1 BAILEY, HABEAS CORPUS 221 (1913) (comparing the doctrine in state and federal courts); *cf.* Chief Justice White in *Marshall v. Gordon*, 243 U.S. 521, 541 (1917). Having granted the necessity of the contempt power to self-preservation, it follows that its abridgment by Congress will directly affect the independence of the judiciary. For "without it they [the courts] are mere boards of arbitration whose judgments and decrees would be only advisory." *Gompers v. Bucks' Stove and Range Co.*, 221 U.S. 418, 450 (1911). The extent to which a separation of powers is thought to be constitutionally required will therefore determine the extent of permissible regulation. For criticism of the "inherent" power theory as designed to achieve a separation of powers, with the suggestion that a competing principle of constitutional construction stressing "checks and balances" is equally feasible, see Chief Justice Taft in *Ex parte Grossman*, 267 U.S. 87, 119-20 (1925); THOMAS, PROBLEMS OF CONTEMPT OF COURT 85-9 (1934). Compare H. R. REP. NO. 613, 62d Cong., 2d Sess. 3 (1912) with H. R. REP. NO. 613 pt. 2 (minority rep.) 4-7. For general criticism, see DANGEL, CONTEMPT §§ 42, 42A (1939); Frankfurter and Landis, *Power to Regulate Contempts*, 37 HARV. L. REV. 1010, 1012-23 (1924).

16. *Michaelson v. United States*, 266 U.S. 42 (1924) [limiting construction given to

munity thus achieved from Congressional interference was matched by immunity from constitutional restriction with the doctrine, of "immemorial usage," that contempt is not amenable to the provisions governing trial of traditional offenses and, in particular, to trial by jury.<sup>17</sup> In addition, there being no general criminal appellate jurisdiction,<sup>18</sup> the classification insured that neither appeal nor writ of error would lie from any contempt judgment to the Supreme Court.<sup>19</sup>

It is not surprising that the royal prerogative vested in a single judge as prosecutor, judge, jury and executioner was early abused. Consequently, following the abortive impeachment proceedings against Federal Judge James H. Peck, who had disbarred and imprisoned an attorney for publishing a criticism of his opinion pending its review by a higher court,<sup>20</sup> Congress in 1831 passed an Act "declaratory of the law concerning contempts of court."<sup>21</sup> As combined in the Judicial Code with the 1789 provisions,<sup>22</sup> the Act recognizes but three categories of offenses punishable as contempt: 1) misbehavior "in the

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38 STAT. 738 (1914), 28 U.S.C. §§386-90 (1940)]; *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918) [limiting construction given to REV. STAT. §725 (1875), 28 U.S.C. §385 (1940)]; see pp. 94 and 87 *infra*. That the contempt power of the lower federal courts may be regulated by Congress has not, however, been successfully denied, although applicability of contempt legislation to the Supreme Court, an express creature of the Constitution, remains undecided. See *Ex parte Robinson*, 19 Wall. 505, 510-1 (U.S. 1874), *Michaelson v. United States*, *supra* at 66.

17. *In re Debs*, 158 U.S. 564, 594 (1895); *Eilenbecker v. Plymouth County*, 134 U.S. 31 (1890); see *Gompers v. United States*, 233 U.S. 604, 610 (1914); *Ex parte Burr*, 4 Fed. Cas. No. 2186, at 797 (C.C. D.C. 1823). For the origin of this doctrine, see Fox, *THE HISTORY OF CONTEMPT OF COURT* 4-15 (1927) where it is traced to a dictum in an undelivered opinion by Wilmot, J., *King v. Almon* (K.B. 1765) in *WILMOT, NOTES OF OPINIONS AND JUDGMENTS* 243 (1802). Fox has demonstrated that the doctrine, far from being "of immemorial usage," is virtually unsupported by common law precedents prior to 1720. Fox, *op. cit. supra* at 112-6. The error, nevertheless, via Blackstone, has permeated the law of England, *id.* 16-33, and that of the United States, *Frankfurter and Landis, supra* note 15, at 1042-58. See also *United Mine Workers v. United States*, 67 Sup.Ct. 677, 732 n. (dissenting opinion).

18. See p. 92 *infra*.

19. *Ex parte Kearney*, 7 Wheat. 38 (U.S. 1822) (habeas corpus will not lie to review indirectly erroneous contempt decree which could be reviewed only upon certificate of division in opinion below); *New Orleans v. Steamship Co.*, 20 Wall. 387 (U.S. 1874) (no appeal from contempt decree); *Hayes v. Fischer*, 102 U.S. 121 (1880) (no writ of error from contempt decree); cf. 2 STAT. 159 (1802) (review of criminal cases by Supreme Court only upon certificate of division), *United States v. More*, 3 Cranch 159, 172 (U.S. 1805). There is talk in the early cases that the power to control contempt rests by nature exclusively with the contemned court and is not subject to review by any other court regardless of appellate criminal jurisdiction.

20. For the history of this famous episode, see STANSBURY, *REPORT OF THE TRIAL OF JAMES H. PECK* (1833); *Frankfurter and Landis, supra* note 15, at 1024-7; THOMAS, *op. cit. supra* note 15, at 25-7; Nelles and King, *Contempt by Publication*, 28 COL. L. REV. 401, 423-31 (1928).

21. Act, March 2, 1831, §1, 4 STAT. 487 (1831).

22. REV. STAT. §725 (1875), 28 U.S.C. §385 (1940) (JUDICIAL CODE §268).

presence of the court or so near thereto as to obstruct the administration of justice," 2) misbehavior of an officer of the court "in official transactions," and 3) disobedience or resistance to a "lawful" court order.

GROWTH OF SUBSTANTIVE LIMITATIONS ON THE POWER TO PUNISH  
MISBEHAVIOR

Although nominally "declaratory," the general misbehavior provision, apparently applicable only to what is now termed *criminal contempt*,<sup>23</sup> has proved to be a substantial limitation on the contempt power. Since its passage followed directly the impeachment of Judge Peck, it would seem that Congress intended at least to restrict the summary punishment of misbehavior so remote as to constitute only constructive contempt.<sup>24</sup> Such an interpretation is reinforced by the inclusion within the original Act of a second section making the endeavor corruptly to "influence, intimidate, or impede any witness, juror," or court officer, or to "obstruct or impede the due administration of justice"<sup>25</sup> a criminal offense to be prosecuted only by indictment. Moreover, such was the construction adopted by the first federal court to pass upon the legislation, which held that the clause "so near thereto as to obstruct the administration of justice" in the misbehavior provision must be read in conjunction with "presence" and thus requires physical, not merely causal, proximity.<sup>26</sup> Nevertheless, the Supreme Court in 1918, approving the punishment of contempt by newspaper publication, held that a reasonable tendency to obstruct the due administration of justice regardless of geographical nearness to the court was sufficient to support the federal contempt power<sup>27</sup> and added that "the provision conferred no power not already granted and imposed no limitations not already existing."<sup>28</sup>

The sequel to this subsequently unpopular decision was the collection and distribution of legal ammunition by outraged contempt scholars<sup>29</sup> with the result that the test of physical proximity was re-established in 1941 by the

23. *In re Sixth & Wisconsin Tower, Inc.*, 108 F.2d 538 (C.C.A. 7th 1939) *semble*.

24. The brief legislative history of the Act is contained in unpublished House and Senate Journal entries, a transcript of which may be found in Frankfurter and Landis, *supra* note 15 at 1026n.

25. Act, March 2, 1831, §2, 4 STAT. 488, from which 35 STAT. 1113 (1909), as amended 59 STAT. 234 (1945), 18 U.S.C. §241 (Supp. 1946) derives. This section has been broadly construed and, although permitting a full criminal trial and therefore not as immediate, appears effective in punishing bribery, intimidation, or improper influencing of jurors or witnesses. *See, e.g.*, *Samples v. United States*, 121 F.2d 263 (C.C.A. 5th 1941).

26. *Ex parte Poulson*, 19 Fed.Cas. 1205, No. 11,350 (C.C.E.D. Pa. 1835); *see Ex parte Robinson*, 19 Wall. 505, 511 (U.S. 1873); *cf. United States v. Emerson*, 25 Fed.Cas. No. 15,050, at 1012 (C.C.D.C. 1831).

27. *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918).

28. *Id.* at 418.

29. Felix Frankfurter and James M. Landis, *supra* note 15, at 1010; Walter Nelles and Carol W. King, *supra* note 20 at 525; and C. H. THOMAS, *op. cit. supra* note 15.

decision in *Nye v. United States*.<sup>30</sup> Presumably, the second section of the Act of 1831 must also be re-interpreted from a mere provision for the cumulative or alternative punishment of out of court contemnors to the exclusive method of reaching contempt by publication, bribery of a witness, or the improper influencing or intimidation of jurors. It is true that the opinion of the court appeared to sanction the punishment of such offenses as contempt if committed near the courtroom although without physical disturbance of the proceedings,<sup>31</sup> but, in view of the unequivocal statement that "meticulous regard for those separate categories of offenses must be had, so that the instances where there is no right to jury trial will be narrowly restricted,"<sup>32</sup> caution dictates questionable acceptance of so mechanical a construction.<sup>33</sup> At any rate, the area of overlap in practice will be small<sup>34</sup> since the bribery of a witness under the nose of the judge, for example, will not be frequently attempted and the occasions upon which such an offense can be consummated in the witness room and hallway will be limited.

Moreover, the Supreme Court has shown no tendency to recede from its strict interpretation of the contempt power,<sup>35</sup> but, on the contrary, the direction has been to deprive even the state courts, under the guise of the Fourteenth Amendment, of the power to punish contempt by publication unless the latter presents a "clear and present danger" to the administration of justice.

30. 313 U.S. 33 (1941).

31. Cited without apparent disapproval: *Ex parte Savin*, 131 U.S. 267 (1889) (attempting to bribe witnesses in jury room and hallway); *Sinclair v. United States*, 279 U.S. 749 (1929) (shadowing jurors near the courtroom). Since the *Nye* decision, the Court of Appeals for the District of Columbia has held contempt an attempt to influence a juror thirty feet from the court entrance. *Higgins v. United States*, 160 F.2d 223 (App.D.C. 1946), *cert. denied*, 67 Sup.Ct. 1511 (1947); see 54 HARV. L. REV. 1398 (1941).

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

33. See *Pendergast v. United States*, 128 F.2d 676, 687 (C.C.A. 8th 1942) (dissenting opinion) *rev'd* 317 U.S. 412 (1943).

34. As indicative of the trend since the *Nye* decision, see, e.g., *United States v. Welch*, 154 F.2d 705 (C.C.A. 3d 1946) (influencing prospective jurors fourteen miles from court necessitating discharge of entire panel not punishable as contempt although an offense under no other statute); *McKee v. United States*, 126 F.2d 470 (C.C.A. 6th 1942) (attempting to influence juror two blocks from court not contempt); *Wimberly v. United States*, 119 F.2d 713 (C.C.A. 5th 1941) (attempting to influence juror sixty miles from court not contempt); cf. *Schmidt v. United States*, 124 F.2d 177 (C.C.A. 6th 1941) (filing of derogatory affidavit in court clerk's office while court is in recess not contempt); *Millinocket Theatre, Inc., v. Kurson*, 39 F.Supp. 979 (D. Maine 1941) (wilful destruction of prospective evidence not contempt). *But cf.* *Higgins v. United States*, 160 F.2d 223 (App. D.C. 1946) *cert. denied*, 67 Sup. Ct. 1511 (1947) (attempting to influence juror thirty feet from entrance to court held contempt).

35. See *In re Bradley*, 318 U.S. 50, 52 (1943) (refusing to decide whether intimidating witness in corridor adjoining court room is punishable as contempt, but reversing a contempt sentence on other grounds); *Pendergast v. United States*, 317 U.S. 412, 416 (1943) (refusing to decide whether obtaining a court decree through bribery and fraudulent misrepresentations some of which were made in the actual presence of the court is punishable as contempt, but reversing a contempt sentence on other grounds).

No such danger has yet been recognized in the three state publication cases reversed since the *Nye* decision.<sup>36</sup>

The drastic restriction of the power of punishing misbehavior to direct as distinguished from constructive contempt thus eliminates from federal practice a substantial element of the controversy raging over abuse of the contempt prerogative. There appears to be general approval of the limited power of the judge to maintain order and decorum within the court room, and to protect the bench from derogatory remarks addressed orally or by affidavit of disqualification.<sup>37</sup> Moreover, for contempts committed in the face of the court, as distinguished from other direct contempts,<sup>38</sup> no jury is needed to assist in determination of the facts and no extension of time for preparation of defense is required; but on the contrary, to be effective, there should be immediate penal vindication of the court's dignity.

Even control over direct contempt, however, has not been without qualification. Perjury, frequently punished as contempt by exasperated courts distrustful of the cumbersome but safeguarded criminal procedure, was held in *Ex parte Hudgings*<sup>39</sup> to be beyond reach of the contempt power unless to the essential elements of perjury is added "the further element of obstruction to the court in the performance of its duty."<sup>40</sup> The ground for requiring this precaution was said to be the danger that the unrestricted power to punish perjury might become a legal thumbscrew to exact "a character of testimony which the court would deem to be truthful."<sup>41</sup> The result in the *Hudgings* case has recently been reaffirmed by the Supreme Court,<sup>42</sup> but with a shift of emphasis to the policy underlying the *Nye* decision: to exclude as far as possible from the area of contempt punishment offenses triable by jury. Perjury, it is thus indicated, is not summarily punishable at all, although its incidence

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36. *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 67 Sup.Ct. 1249 (1947). Mr. Justice Frankfurter criticizes the similarity of result reached on dissimilar grounds: "It is an inadmissible jump from finding that conduct is not contempt within the federal Act, to finding that an exertion of State power offended the Fourteenth Amendment. . . . There is not a breath of a suggestion in the opinion in the *Nye* case that the restricted geographic meaning which the Court gave to the Act of Congress designed to limit the power of the lower federal courts was required by constitutional considerations." *Id.* at 1260 (dissenting opinion).

37. *Laughlin v. United States*, 151 F.2d 281 (App. D.C. 1945) *cert. denied*, 326 U.S. 777 (1945); *United States v. Bollenbach*, 125 F.2d 458 (C.C.A. 2d 1942). *But cf. Schmidt v. United States*, 124 F.2d 177 (C.C.A. 6th 1941).

38. *Cooke v. United States*, 267 U.S. 517 (1925) (derogatory letter addressed to judge in chambers is not summarily punishable although constituting contempt "in the presence of the court" since it is not "in the face of the court"); *FED. R. CRIM. P.* 42 (1946) (contempt not seen or heard by the judge in the "actual presence" of the court is not summarily punishable). See note 72 *infra*.

39. 249 U.S. 378 (1919).

40. *Id.* at 383.

41. *Id.* at 384.

42. *In re Michael*, 326 U.S. 224 (1945). See also *United States ex rel. Johnson v. Goldstein*, 158 F.2d 916 (C.C.A. 7th 1947).

to the clear obstruction of justice administration "does not immunize the culprit from contempt proceedings."<sup>43</sup> The character of obstruction necessary to invoke contempt reprisal is illustrated by two previous opinions cited with apparent approval:<sup>44</sup> 1) the misrepresentations of a prospective juror in order to qualify<sup>45</sup> and 2) the evasive answer of a witness which on its face and without inquiry collaterally is "not a bona fide effort to answer the questions at all."<sup>46</sup>

The overlap in misbehavior between crime and contempt has thus been effectively narrowed. So long as contempt be punishable without the safeguards of a criminal trial, such a policy seems clearly desirable.

#### PARALLEL GROWTH OF CIVIL CONTEMPT WITH PROCEDURAL LIMITATIONS ON THE POWER TO PUNISH DISOBEDIENCE

The need for a limitation on the judicial power to compel obedience came dramatically to the public attention in connection with abuse in the issuance of labor injunctions. In 1894, Eugene Debs and the American Railway Union, embroiled in a labor dispute, conducted a strike and boycott of a Pullman Company which interrupted freight and passenger service in the Chicago area. The ensuing national dislocation led the Attorney General to invoke the Sherman Anti-Trust Act by securing an *ex parte* restraining order against interference "in any way or manner" with railroads engaged in interstate commerce, thus rendering the subsequent violation of a criminal law punishable in a contempt proceeding. As a result, the not unexpected disregard of the restraining order was followed by the imprisonment of Debs and other officers of the union after a hearing before a single judge.<sup>47</sup>

A solution to the problem represented by the *Debs* case was complicated by an aspect of contemptuous disobedience not generally associated with misbehavior in that disobedience may affect directly not only the authority of the court but the remedy of an adverse party as well.<sup>48</sup> For this reason, the judiciary appears to have approached the problem through the separation of *civil* from *criminal* contempt so as to limit the prerogative of the offended court without impairing the remedy of the offended party.<sup>49</sup>

By a convenient fiction, the more enlightened federal courts had provided

43. *In re Michael*, *supra* note 42, at 228.

44. *Ibid.*

45. *Clark v. United States*, 289 U.S. 1 (1933). See also *United States v. Lampkin*, 66 F.Supp. 821 (S.D. Fla. 1946).

46. Judge Learned Hand in *United States v. Appel*, 211 Fed. 495, 496 (S.D.N.Y. 1913). See pp. 102-3 *infra*.

47. *United States v. Debs*, 64 Fed. 724 (C.C.N.D. Ill. 1894), *writ of error denied*, 159 U.S. 251 (1895); *habeas corpus denied*, 158 U.S. 564 (1895).

48. See *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 329 (1904).

49. A distinction between civil and criminal contempt was recognized in England and in many of the United States long before its acceptance by the federal courts. It has been traced in Briefs for Respondent and for the United States as *amicus curiae*, *Ex*



remedial relief for contempt as early as 1869, although the offense was supposed to be a criminal one, in the form of a "fine" payable to the clerk of court for the benefit of the complainant;<sup>50</sup> or where special elements of contumacy were found the fine was made payable part to the complainant and part to the United States<sup>51</sup> on the implied assumption that it was immaterial to the guilty to whom went the proceeds. To enforce payment of the fine, accepted practice was to commit the contemnor until he contributed.<sup>52</sup> A description of these aspects of contempt in terms civil and criminal was not illogical, and the

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*parte* Grossman, 267 U.S. 87, 94, 103 (1925) to King v. Myers, 1 Durn. & E. 265 (K.B. 1786) (contemnor may be attached on Sunday for the benefit of a private party but not for criminal punishment), and Wellesley v. Duke of Beaufort, 2 Russ. & M. 639, 39 Eng. Rep. 538 (Ch. 1831) (privilege of parliament is defense against attachment for "civil" not "criminal" contempt). See RAPALJE, CONTEMPT §21 (1884); Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161, 168 (1903).

50. See, e.g., *In re Mullee*, 17 Fed.Cas. 968, No. 9911 (C.C.S.D. N.Y. 1869); *Doubleday v. Sherman*, 7 Fed.Cas. 959, No. 4020 (C.C.S.D. N.Y. 1870); *In re Tift*, 11 Fed. 463 (E.D.N.Y. 1881); *Searls v. Worden*, 13 Fed. 716 (C.C.E.D. Mich. 1882) *rev'd on other grounds*, 121 U.S. 14 (1887); *Wells Fargo & Co. v. Oregon Ry. & Nav. Co.*, 19 Fed. 20 (C.C.D.Ore. 1884); *In re North Bloomfield Gravel Mining Co.*, 27 Fed. 795 (C.C.D. Calif. 1886); *Stahl v. Ertel*, 62 Fed. 920 (C.C.S.D. Ill. 1893); *Indianapolis Water Co. v. American Strawboard Co.*, 75 Fed. 972 (C.C.D.Ind. 1896); *Economist Furnace Co. v. Wrought-Iron Range Co.*, 86 Fed. 1010 (C.C.D. Ind. 1893). For a typical contempt decree of this type see *Fischer v. Hayes*, 6 Fed. 63, 67 (C.C.S.D.N.Y. 1881). *Contra*: *United States ex rel. D. & N. O. Ry. v. Atcheson, T. & S.F. Ry.*, 16 Fed. 853 (C.C.D.Colo. 1883); *Kirk v. Milwaukee Dust Collector Mfg. Co.*, 26 Fed. 501 (C.C.E.D.Wis. 1885); see *United States v. Berry*, 24 Fed. 780, 783 (C.C.W.D.Mo. 1885); cf. *Chisolm v. Caines*, 121 Fed. 397 (C.C.D.S.C. 1903).

51. *Craig v. Fisher*, 6 Fed. Cas. 725, No. 3332 (C.C.D.Calif. 1873); *Sabin v. Fogarty*, 70 Fed. 482 (C.C.D.Wash. 1895); *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 103 Fed. 873 (C.C.A. 2d 1901) *writ of error dismissed*, 187 U.S. 427 (1903); *Chicago Directory Co. v. United States Directory Co.*, 123 Fed. 194 (C.C.S.D. N.Y. 1903); *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, 121 Fed. 562 (C.C.S.D.N.Y. 1903), 130 Fed. 735 (C.C.S.D.N.Y. 1904), 135 Fed. 774 (C.C.A. 2d 1905) (affirming as to fine payable to United States, but reversing as to fine payable to complainant with instructions to reassess to correspond with actual damages suffered); *Continental Gin Co. v. Murray Co.*, 162 Fed. 873 (C.C.A. 3d 1908); cf. *Hendryx v. Fitzpatrick*, 19 Fed. 810 (C.C. D. Mass. 1884).

52. *Fischer v. Hayes*, 6 Fed. 63 (C.C.S.D.N.Y. 1881). See cases cited notes 50-51 *supra*. The practice does not violate REV. STAT. §725 (1875), 28 U.S.C. §385 (1940), conferring only the power to punish by "fine or imprisonment" (italics added) since "if there be a commitment for non-payment of the fine, there must be a discharge as soon as the fine is paid. . . . The payment of the fine, and a commitment for not paying it, cannot coexist." *Fischer v. Hayes supra* at 71; cf. *Penfield Co. v. SEC*, 67 Sup. Ct. 918, 923 (1947).

Of course, commitment of the type indicated was not restricted to enforcing the payment of fines. See e.g., *In re Chiles*, 22 Wall. 157, 168 (U.S. 1874) (party refusing to obey any lawful order of court should be "fined and imprisoned until he performs the act required of him or shows that it is not in his power to do it"); *In re Allen*, 1 Fed. Cas. No. 208, at 438 (C.C.D.Vt. 1876) (party refusing to comply with order to produce books and papers may be imprisoned "until he be discharged by order of court"); *United*

Supreme Court was soon confronted with a final decree in a suit for patent infringement containing a purely civil award to the complainant of compensation for contempt.<sup>53</sup> By reviewing on appeal and reversing on the merits,<sup>54</sup> the Court recognized that this at least was not a criminal offense of which it had no appellate jurisdiction.

The second step in the breakdown of contempt as a criminal offense followed a series of Congressional enactments beginning in 1874<sup>55</sup> and culminating in the Judiciary Act of March 3, 1891,<sup>56</sup> which established for the first time general criminal appellate jurisdiction. In the course of a more precise examination of the procedural differences between civil and criminal appeals, it was discovered that contempt involved both aspects and in 1904 the dichotomy was officially born with the initial separation of civil and criminal contempt for the purposes of review.<sup>57</sup>

Self-imposed restrictions upon the power to punish disobedience were

*States v. Sowles*, 16 Fed. 536 (D.Vt. 1883) (bankrupt refusing to comply with order to turn over funds fraudulently retained from assignee may be recommitted indefinitely during his continued disobedience); *cf. Sabin v. Fogarty*, 70 Fed. 482, 485 (C.C.D.Wash. 1895) (announcing that any delay in paying a contempt fine will be regarded "as a continuing and additional contempt" subject to \$50 additional fine per day).

Indefinite confinement to the Fleet was, prior to 1839, the normal method of enforcing the *in personam* decrees of the English Court of Chancery. See 2 DANIELL, *PRACTICE OF THE HIGH COURT OF CHANCERY* 698, 708-9, 721 (1st ed. 1840); Beale, *supra* note 49 at 169-71.

53. *Searls v. Worden*, 13 Fed. 716 (C.C.E.D.Mich. 1882).

54. *Worden v. Searls*, 121 U.S. 14 (1887). *Cf. Hayes v. Fischer*, 102 U.S. 121 (1880), 7 Fed. 96 (C.C.S.D.N.Y. 1881). Means of review other than writ of error or appeal were also being devised to supervise contempt decrees. *Ex parte Robinson*, 19 Wall. 505 (U.S. 1874) (mandamus); *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (habeas corpus); *In re Chetwood*, 165 U.S. 443 (1897) (certiorari); and writ of error was held appropriate to review a contempt judgment in a state court, *Tinsley v. Anderson*, 171 U.S. 101 (1898).

55. 18 STAT. 254 (1874) (authorizing writ of error from the U.S. Supreme Court to the Supreme Court, Territory of Utah, to review a sentence to capital punishment or a conviction for polygamy); 20 STAT. 354 (1879) (authorizing writ of error from the Circuit Courts to the District Courts in criminal cases where the sentence is imprisonment or fine in excess of \$300); 25 STAT. 656 (1889) (authorizing writ of error from the Supreme Court to Circuit Courts to review capital crime convictions).

56. 26 STAT. 826 (1891) as amended, 29 STAT. 492 (1897). § 2 established the Circuit Courts of Appeal; § 4 deprived the Circuit Courts of appellate jurisdiction; § 5 authorized a writ of error from the Supreme Court to the Circuit and District Courts in cases of capital crimes; § 6 authorized writs of error from the Circuit Courts of Appeal to the Circuit and District Courts in all other criminal cases. For legislative history of criminal appeals in the federal courts see *United States v. Sanges*, 144 U.S. 310, 319-323 (1892); 2 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 332 n., 727 (1928).

57. *Bessette v. W.B. Conkey Co.*, 194 U.S. 324 (1904). A judgment for criminal contempt even though rendered in the midst of a civil action is immediately reviewable, formerly by writ of error, *ibid.*, at present by appeal, *Wilson v. Byron Jackson Co.*, 93 F.2d 577 (C.C.A. 9th 1937); whereas a judgment for civil contempt must await the final decree in the civil suit, *Fox v. Capital Co.*, 299 U.S. 105 (1936). A contempt judgment

initiated simultaneously with the final step in separating the two categories of contempt undertaken in 1911. Reversing a sentence which imposed a fixed term of imprisonment for violation of a labor injunction, the Supreme Court, in *Gompers v. Bucks' Stove and Range Co.*,<sup>58</sup> denied the power of the federal courts to punish for criminal contempt in a civil proceeding upon the ground that prejudice to certain vaguely specified rights of the criminal contemnor might otherwise result.<sup>59</sup> To determine the correct classification of contempt, the Court suggested a rule of legal consequences based upon the character and purpose of the punishment, a rule since generally followed by the federal courts. "If it is for civil contempt the *punishment* is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court."<sup>60</sup> By its ingenious adaptation of "punishment" as the fulcrum upon which the two categories of contempt are balanced, however, the Court was able to include within the civil "remedial" classification sanctions whose effectiveness directly reflects upon the power to administer justice: 1) *compensation* to the injured party and 2) *coercive relief* by fine or imprisonment if made conditional upon the failure of the contemnor to purge himself.<sup>61</sup> The additional protection extended to the criminal contemnor by the *Gompers* case, therefore, would seem to be available only in the event that it is necessary to invoke an unconditional fine or fixed term of imprisonment in supplemental vindication of the court's authority.

The Congressional approach to the problem represented by the *Debs* case was first exemplified in general contempt legislation appended to the Clayton

embracing both a civil and criminal penalty is reviewed in its entirety as a judgment in criminal contempt. *Matter of Christensen Engineering Co.*, 194 U.S. 458 (1904); *In re Merchant's Stock and Grain Co.* 223 U.S. 639 (1912). A judgment for civil contempt may be reviewed by the contempt plaintiff, *Ingraham Co. v. Germanow*, 4 F. 2d 1002 (C.C.A. 2d 1925); *Waterman Co. v. Standard Drug Co.*, 202 Fed. 167 (C.C.A. 6th 1913); whereas a judgment for criminal contempt may not, *United States v. Bittner*, 11 F.2d 93 (C.C.A. 4th 1926). In initiating the review, conformance with civil procedure was once required in both cases, *Nye v. United States*, 313 U.S. 33 (1941), but practice appears to have re-established the civil-criminal distinction, *Moore v. United States*, 150 F.2d 323 (C.C.A. 10th 1945) *cert. denied*, 326 U.S. 740 (1945). *But see United States v. White*, 322 U.S. 694, 697n. (1944).

58. 221 U.S. 418 (1911).

59. The court indicated as possibly prejudicial to a defendant exposed to a criminal penalty in a civil contempt proceeding: 1) moving papers entitled as a suit rather than as a charge, 2) evidence bearing on severity of sentence taken from the actual equity proceeding, 3) defendant required to testify. *Id.* at 446-8.

60. *Id.* at 441 (italics added).

61. *Id.* at 442. The Supreme Court held coercive relief to be a civil contempt sanction for the first time in *Doyle v. London Guarantee Co.*, 204 U.S. 599 (1907), although this was implicit in the previous civil classification of compensatory fines enforced by imprisonment. The converse proposition that coercive relief is never a criminal sanction would not necessarily follow, however; nevertheless, the *Gompers* dictum seems to have continued unquestioned. *But see* notes 111-3 *infra*.

Act in 1914, providing that an act of disobedience which is also a crime under federal or state statute entitles the contemnor to a jury trial conforming "as near as may be to the practice in criminal cases."<sup>62</sup> Exceptions, however, seriously undermined its effectiveness, for the Act by its terms does not apply where the contempt has arisen out of an action prosecuted by the United States nor where the contempt has been committed in the presence of the court or "so near thereto as to obstruct the administration of justice."<sup>63</sup> A narrow interpretation by the judiciary further restricted its scope with the result that the Act is more a matter of historical interest than a safeguard against abuse of the contempt power. In addition to a strict limitation of applicability to "crime in the ordinary sense"<sup>64</sup> and in some doubtful cases a further restriction of applicability to contempt "within the purview" of the Clayton Act as a whole,<sup>65</sup> the significant condition attached to judicial acceptance of the Act's contempt provisions, despite reasonably clear legislative intention to the contrary, is that they are held not to affect the prosecution of civil contempt.<sup>66</sup>

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62. 38 STAT. 738 (1914), 28 U.S.C. §§386-90 (1940). Other provisions of the Act include: maximum fine payable by a natural person to the United States is \$1000 and maximum imprisonment, six months, or both (§387); prosecution under the Act must be commenced within one year after commission of the contempt (§390).

63. 38 STAT. 739 (1914), 28 U.S.C. §389 (1940); *United States v. Goldman*, 277 U.S. 229 (1928); *Hill v. United States ex rel. Weiner*, 300 U.S. 105 (1937) (contempt arising out of action brought by United States); *Redman v. United States*, 77 F.2d 126 (C.C.A. 9th 1935); *Couts v. United States*, 249 Fed. 595 (C.C.A. 8th 1918) (contempt in the presence of the court).

64. *Michaelson v. United States*, 266 U.S. 42, 66 (1924); *Armstrong v. United States*, 18 F.2d 371 (C.C.A. 7th 1927); *Taliaferro v. United States*, 290 Fed. 906 (C.C.A. 4th 1923).

65. *McGibbony v. Lancaster*, 286 Fed. 129 (C.C.A. 5th 1923). *Contra*: *Sandefur v. Canoe Creek*, 293 Fed. 379 (C.C.A. 6th 1923), 4 F.2d 1022 (C.C.A. 6th 1924); *cf. Michaelson v. United States*, *supra* note 64, at 69 (expressly leaving the question open). In *Maynard v. United States*, 23 F.2d 141 (App. D.C. 1927) the decision denying a jury trial to the contemnor was also put squarely on this ground, but as the contempt there committed was in violation of a liquor injunction issued under the National Prohibition Act, 41 STAT. 315 (1919), which expressly provided for *summary* contempt punishment, *Woodside v. United States*, 60 F.2d 823 (C.C.A. 4th 1932), the reason assigned was clearly unnecessary.

66. *Michaelson v. United States*, 266 U.S. 42, 65 (1924); *Odell v. Bausch & Lomb Optical Co.*, 91 F.2d 359 (C.C.A. 7th 1937) *cert. denied*, 302 U.S. 756 (1937) (alternate holding).

There is nothing in the wording of the statute that indicates any Congressional recognition of the distinction between civil and criminal contempt, fully accepted by the Supreme Court itself but three years before its passage. See note 4 *supra*. Nor does the explanation offered to the House by its author invite such an interpretation. H.R. REP. No. 613, 62d Cong., 2d Sess. 6 (1912). The argument that the statute applies only to criminal contempt appears to rest on such language as: "any person who shall *willfully* disobey . . ." (italics added); and contempt also constituting "a criminal offense . . ." But neither of these provisions rules out applicability to "civil" contempt as defined by the *Gompers* test, which made the distinction between civil and criminal con-

Dissatisfaction with the operation of the Clayton Act induced passage of the Norris-LaGuardia Act<sup>67</sup> designed to remedy only those abuses arising out of the granting of injunctions in labor disputes<sup>68</sup> by providing a jury trial for contempt arising "under this Act."<sup>69</sup> Like the earlier statute, however, the Act is inapplicable on its face to contempt in the presence of the court, but only to contempt "so near thereto as to *interfere directly* with the administration of justice."<sup>70</sup> Although it applies theoretically in civil contempt proceedings to the same extent as in proceedings for criminal contempt, the limited jurisdiction left to the courts in the issuance of labor injunctions has apparently produced but a single case to test its applicability in this respect. In a contempt proceeding arising out of a suit instituted by the United States in its capacity as employer, the Act was held inapplicable without regard to the classification of contempt.<sup>71</sup>

#### SUBSEQUENT DEVELOPMENT OF CRIMINAL CONTEMPT

On the criminal contempt side, the punishment of either misbehavior or disobedience by an unconditional fine payable to the United States or a fixed term of imprisonment secures nothing to the private contempt plaintiff except perhaps a sense of vicarious satisfaction, although it may have a deterrent effect on future contempts. At least when confined to these sanctions for its control, contempt may well be analogized to crime, once an offense against the court is recognized as equivalent to an offense against the United States. The premise of the Anglo-American criminal law that the rights of the individual are more jealously to be guarded than the prerogative of the sovereign becomes, therefore, equally applicable to criminal contempt.

Accordingly, the *Gompers* case has been followed by judicial extension of

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tempt a technical one based, *not* upon the nature of the act, but upon the "character and purpose of the punishment." The Act, however, expressly provides as "punishment" a fine payable to "the United States or to the complainant or other party injured by the act constituting the contempt" (italics added).

67. 47 STAT. 70 (1932), 29 U.S.C. §§101-115 (1940).

68. SWAYZEE, CONTEMPT OF COURT IN LABOR INJUNCTION CASES 107-8 (1935); THOMAS, *op. cit. supra* note 15, at 44-5; Chamberlain, *The Federal Anti-Injunction Act*, 18 A.B.A.J. 477 (1932); Frankfurter and Greene, *Congressional Power over the Labor Injunction*, 31 COL. L. REV. 385 (1931).

69. 47 STAT. 72 (1932), 29 U.S.C. §111 (1940). The Act also provides that a contempt defendant may demand the disqualification of a judge to hear the proceeding if the contempt arose from an attack upon his character or conduct not made in the presence of the court "or so near thereto as to interfere directly with the administration of justice." 47 STAT. 73 (1932), 29 U.S.C. §112 (1940). Doubt that this provision applies to cases not arising under the Norris-LaGuardia Act was expressed in *Davis v. SEC*, 169 F.2d 6, 8 (C.C.A. 7th 1940) *cert. denied* 309 U.S. 687 (1940). But *FED. R. CRIM. P.* 42(b) renders the question academic by adopting a similar provision for all criminal contempts. See note 73 *infra*.

70. 47 STAT. 72 (1932), 29 U.S.C. §111 (1940) (italics added).

71. *United Mine Workers v. United States*, 67 Sup.Ct. 677, 684, 698 (1947).

many safeguards to criminal contemnors, culminating in Rule 42 of the Federal Rules of Criminal Procedure. Restricting the power of summary punishment to conduct seen or heard by the judge in the actual presence of the court, Rule 42 requires that criminally contemptuous conduct occurring under other circumstances be prosecuted on notice, with a reasonable time for preparation of defense, by the judge or an attorney appointed by the court for that purpose;<sup>72</sup> if such conduct should involve disrespect to or criticism of a judge, the further disqualification of that judge to hear the proceeding is provided for.<sup>73</sup> In addition, where it is not inconsistent with the limited power of summary punishment, the defendant accused of criminal contempt may have the following constitutional safeguards: immunity from double-jeopardy<sup>74</sup> or self-incrimination,<sup>75</sup> right to notice of the nature and cause of the accusation, right to compulsory process for obtaining witnesses in his favor, right to assistance of counsel;<sup>76</sup> and, by extension, the protections of proof beyond a reasonable doubt,<sup>77</sup> eligibility for executive pardon,<sup>78</sup> immunity from prosecutions instituted after the three-year limitations period of the Criminal Code,<sup>79</sup> and immunity from

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72. Rule 42 also prescribes that the notice "shall state the essential facts constituting the criminal contempt charged and *describe it as such*" (italics added). Cf. *McCann v. New York Stock Exchange*, 80 F.2d 211 (C.C.A. 2d 1935). This provision has been modified in *United Mine Workers v. United States*, 67 Sup.Ct. 677, 698 (1947), to dispense with the necessity for expressly charging the defendant with "criminal contempt" if he does not suffer "substantial prejudice" thereby.

The particularity required of an indictment is not necessary for an information charging criminal contempt. *United States ex rel. Bowles v. Seidmon*, 154 F.2d 228 (C.C.A. 7th 1946). *Contra*: *Bowles v. Bullock*, 5 F.R.D. 147 (D.Del. 1945); cf. *United States v. Balaban*, 26 F.Supp. 491 (N.D.Ill. 1939) (granting motion for bill of particulars).

73. It might be argued that an element of disrespect to the judge is always involved in disobedience to his orders, but it is clear that Rule 42 is intended to provide disqualification under these circumstances only where, in addition to disobedience, there has been *personal* disrespect. See the suggestion of Chief Justice Taft in *Cooke v. United States*, 267 U.S. 517, 539 (1925), and 47 STAT. 73 (1932) 29 U.S.C. §112 (1940), from which the present rule has been taken. The reason for requiring disqualification in such a case, however, would seem applicable in a lesser degree to all criminal contempt; namely, the possibility that justice will be less than impartial where the same judge prosecutes, tries, and punishes an offense against his own authority.

74. *In re Bradley*, 318 U.S. 50 (1943).

75. See *Michaelson v. United States*, 266 U.S. 42, 66 (1924); *Gompers v. Bucks' Stove Range Co.*, 221 U.S. 418, 448 (1911). *But see* *Merchants' Stock and Grain Co. v. Board of Trade*, 201 Fed. 20, 27-9 (C.C.A. 8th 1912).

76. *Cooke v. United States*, 267 U.S. 517 (1925). On the question of notice see note 72 *supra*. On the question of the right to witnesses, cf. *Blackmer v. United States*, 284 U.S. 421, 442 (1932).

77. See, e.g., *Welling v. United States*, 9 F.2d 292 (C.C.A. 6th 1925); *Stewart v. United States*, 236 Fed. 838 (C.C.A. 8th 1916); *Schwartz v. United States*, 217 Fed. 866 (C.C.A. 4th 1914).

78. *Ex parte Grossman*, 267 U.S. 87 (1925).

79. *Pendegast v. United States*, 317 U.S. 412 (1943); *Gompers v. United States*, 233 U.S. 604 (1914). A one year limitations period applies to contempt under the Clayton Act. See note 62 *supra*.

posthumous suits against his estate.<sup>80</sup> On the other hand, he may be liable to punishment for the disobedience of a court order which has been followed by a reversal or a settlement of the controversy giving rise to its issuance,<sup>81</sup> although no civil contempt remedy lies.<sup>82</sup>

The general expansion of criminal law principles to cover contempt punishment casts doubt upon the propriety of a continued refusal by the federal courts to extend the privilege of jury trial beyond the narrow scope of the Clayton and Norris-LaGuardia Acts.<sup>83</sup> Legal justification, no longer to be found in the historically erroneous doctrine of "immemorial usage,"<sup>84</sup> has been sought unsatisfactorily in a semantic differentiation of the Fifth and Sixth Amendments to the Constitution by which the latter is said not to apply to criminal contempt.<sup>85</sup> That this is tacitly regarded as an untenable position is indicated, however, by the availability to the contemnor of many of the safeguards specifically enumerated in the Sixth Amendment under the guise of

80. *McGovern v. United States*, 280 Fed. 73, (C.C.A. 7th 1922). *But cf.* *Wasserman v. United States*, 161 Fed. 722 (C.C.A. 8th 1908) (death of defendant does not abate civil contempt proceedings). See *Moskovitz, Contempt of Injunctions*, 43 Col. L. Rev. 780, 808 (1943).

81. *See* *United Mine Workers v. United States*, 67 Sup. Ct. 677, 694 (1947); *Gompers v. Bucks' Stove and Range Co.*, 221 U.S. 418, 451 (1911); *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, 86 F.2d 727 (C.C.A. 2d 1936); *cf.* *Worden v. Searls*, 121 U.S. 14 (1887).

82. *Gompers v. Bucks' Stove and Range Co.* *supra* note 81 (alternate holding); *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.* *supra* note 81; *Anargyros v. Anargyros & Co.*, 191 Fed. 208 (C.C.N.D. Calif. 1911); *see* *United Mine Workers v. United States*, *supra* note 81 at 696; *cf.* *Worden v. Searls* *supra* note 81.

83. A related problem involves the refusal to hold a trial for criminal contempt in "the State and district wherein the crime shall have been committed." *Myers v. United States*, 264 U.S. 95 (1924).

84. *See* note 17 *supra*.

85. This notion made its Supreme Court debut via *Myers v. United States*, 264 U.S. 95, 105 (1924), and reappears in *Blackmer v. United States*, 284 U.S. 421, 440 (1932), *United Mine Workers v. United States*, 67 Sup. Ct. 677, 731n. (1947) (dissenting opinion). Its birthplace is a quotation from *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892) cited out of context in *Merchants' Stock and Grain Co. v. Board of Trade*, 201 Fed. 20, 28 (C.C.A. 8th 1912): "A criminal prosecution under article 6 of the amendments is much narrower than a 'criminal case' under article 5 of the amendments." A less formal, but equally unsatisfactory explanation was offered in *In re Debs*, 158 U.S. 564, 595 (1895): "To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." The latter rationale illustrates two fallacies: 1) that one court may not review contempt of another court, a conception discarded shortly after general criminal appellate jurisdiction was established, *see* note 57 *supra*; and 2) that violation of a criminal law requires less efficient prosecution than violation of a court decree. *But see* *Michaelson v. United States*, 266 U.S. 42, 67 (1924): "The only substantial difference between such a proceeding as we have here, [contempt] and a criminal prosecution by indictment or information is that in the latter the act complained of is the violation of a law and in the former the violation of a decree. In the case of the latter, the accused has a constitutional right of trial by jury; while in the former he has not."

the Fifth Amendment "due process" clause.<sup>86</sup> Whatever reasons may be urged for securing a trial by jury to the defendant charged with the commission of a crime would seem, moreover, equally compelling where he is charged with criminal contempt not committed in the actual presence of the court.

In addition to the jury problem, however, other inadequacies underlie the administration of criminal contempt. If additional safeguards are to be confined to criminal contempt proceedings, a prosecution separate from the civil action would seem necessary lest they be dissipated in the less handicapped process of settling the score between private litigants. But the prohibition against criminal punishment in a civil proceeding, theoretically maintained by compulsion of the *Gompers* decision, does not preclude the award of civil relief in a criminal proceeding.<sup>87</sup> Moreover, the appointment of counsel for a private litigant to prosecute criminal contempt<sup>88</sup> or the substitution of the United States as a party to a civil contempt proceeding<sup>89</sup> has so vexed the separation of the two categories that "any given distinction between civil and criminal contempt may be treated in one case as a basis of the classification and in another as a consequence of the classification."<sup>90</sup> A further result is to permit the chameleon-like transformation of a proceeding commenced in civil contempt into a criminal prosecution. Thus, in *United Mineworkers v. United States*,<sup>91</sup> where both penal and coercive fines were imposed in a single action originally instituted as ancillary to a suit in equity, it was necessary in order to justify the decision of the Supreme Court to define a criminal proceeding as one in which the defendants did not suffer "substantial prejudice."<sup>92</sup>

86. See Mr. Justice Rutledge dissenting in *United Mine Workers v. United States*, 67 Sup. Ct. 677, 731n. (1947). See also note 76 *supra*.

87. *United Mine Workers v. United States*, *supra* note 86; *Union Tool Co. v. Wilson*, 259 U.S. 107 (1922) (by implication); *Farmers and Mechanics' National Bank v. Wilkinson*, 266 U.S. 503 (1925) (by implication); *Wilson v. Byron Jackson Co.*, 93 F.2d 577 (C.C.A. 9th 1937); *Kreplik v. Couch Patents Co.*, 190 Fed. 565 (C.C.A. 1st 1911); *cf. Morehouse v. Giant Powder Co.*, 206 Fed. 24 (C.C.A. 9th 1913); *Merchants' Stock and Grain Co. v. Board of Trade*, 201 Fed. 20 (C.C.A. 8th 1912); *Brougham v. Oceanic Steam Nav. Co.*, 205 Fed. 857, 859 (C.C.A. 2d 1913).

88. That private parties were at one time privileged to prosecute criminal contempt seems to have been unquestioned, *Phillips Sheet & Tin Plate Co. v. Amalgamated Assn. of Iron, Steel & Tin Workers*, 208 Fed. 335, 344 (S.D. Ohio 1913), but at least two circuits revoked the privilege prior to FED. R. CRIM. P. 42(b). *National Popsicle Corp. v. Kroll*, 104 F.2d 259 (C.C.A. 2d 1939); *McCauley v. First Trust and Savings Bank*, 276 Fed. 117 (C.C.A. 7th 1921); *cf. McCann v. New York Stock Exchange*, 80 F.2d 211 (C.C.A. 2d 1935); 46 YALE L. J. 326 (1936). Rule 42 now requires prosecution either by the judge or an attorney appointed by the court for that purpose. A natural appointment is the counsel for the injured party who is most likely to bring the contempt to the court's attention. *See, e.g., Bowles v. Camillaci*, 53 F. Supp. 976 (W.D.N.Y. 1943); *cf. Stewart v. United States*, 236 Fed. 838, 842 (C.C.A. 8th 1916).

89. See notes 122-5 *infra*.

90. *Moskovitz, Contempt of Injunctions*, 43 COL. L. REV. 780, 781, 809-13 (1943).

91. 67 Sup. Ct. 677 (1947).

92. *Id.* at 700.



Even if the character of the proceeding to insure that the "criminal element will dominate" can be satisfactorily fixed once it is begun, the record is barren of consistent criteria for determining in advance whether disobedience of the court's command will result in criminal prosecution, civil proceedings, or both. Any selection of proper criteria, moreover, is complicated by the fact that disobedience is always, technically, an offense to the court even though it may also impair the remedy of the adverse party.<sup>93</sup>

Finally, the contemnor, within the narrow supervisory protection of an appellate court, is usually at the mercy of a single judge in the magnitude of punishment inflicted. For there is prescribed neither maximum fine nor term of imprisonment to guide or restrain the arm of justice, unless he is fortunate enough to qualify under a special statute providing limited contempt penalties.<sup>94</sup> Thus, unlike any other federal crime, contempt is not only ill-defined, but the boundaries of its punishment are unknown. A fine of \$700,000 such as imposed for criminal contempt in the *Mineworkers* case furnishes no standard and is the result of no standard customarily associated with the administration of criminal law.<sup>95</sup>

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93. See *Merchants' Stock and Grain Co. v. Board of Trade*, 187 Fed. 393, 401 (C.C.A. 8th 1911) *rev'd on other grounds*, 223 U.S. 639 (1912); *Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co.*, 129 Fed. 105, 106 (C.C.A. 6th 1904) *cert. denied*, 194 U.S. 636 (1904); *United States v. Anonymous*, 21 Fed. 761, 765 (C.C.W.D. Tenn. 1884). Although this seems to follow by definition, the energy which has been expended in attempting to differentiate contempt substantively warns of oversimplification by *a priori* reasoning. See, e.g., *United States v. United Mine Workers*, 67 Sup. Ct. 677, 701 (1947) (imposition of criminal contempt sanctions governed by "extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future"); *Bessette v. W. B. Conkey Co.*, 194 U.S. 324 (1904) (contempt by non-party); *Reeder v. Morton-Gregson Co.*, 296 Fed. 785 (C.C.A. 8th 1924) (contempt of restraining order as opposed to mandatory order); *Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co.*, 230 Fed. 120, 132 (C.C.A. 6th 1916) (absence of good faith); *In re Rice*, 181 Fed. 217 (C.C.M.D. Ala. 1910) (deliberateness); *In re La-Varre*, 48 F.2d 216 (S.D. Ga. 1930) (fraud); see *Gompers v. Bucks' Stove and Range Co.*, 221 U.S. 418, 442 (1911) (special elements of contumacy); *In re Eskay*, 122 F.2d 819 (C.C.A. 3d 1941) (no general substantive formula); *Moskovitz, Contempt of Injunctions*, 43 COL. L. REV. 780 (1943).

Of course, contumacy non-injurious to the adverse party presents no difficulty of distinction since, if contempt at all, it is criminal. General misbehavior not constituting disobedience appears to have been placed in this category, although it is conceivable that the adverse party might be severely affected thereby. See note 97 *infra*.

94. See, e.g., *Securities and Exchange Act of 1934*, 48 STAT. 900 (1934), 15 U.S.C. §78u(c) (1940) (maximum fine of \$1000, or term of imprisonment of one year, or both); *Clayton Act*, 38 STAT. 738 (1914), 28 U.S.C. §387 (1940) (maximum fine of \$1000, or term of imprisonment of six months, or both).

95. *United States v. United Mine Workers*, 67 Sup. Ct. 677, 716 (1947) (concurring opinion by Black, J., and Douglas, J.); *id.* at 737 (dissenting opinion by Rutledge, J.). Had defendant Lewis been punished under the War Labor Disputes Act rather than for criminal

## SUBSEQUENT DEVELOPMENT OF CIVIL CONTEMPT

On the civil contempt side are grouped the "remedial" sanctions supposed to inure directly to the benefit of the contempt plaintiff. At least where compensation to a private litigant is awarded, the proceeding is closely analogous to the ordinary civil action for damages<sup>98</sup> and should be available to redress private injuries suffered by reason of the contemnor's misbehavior as well as his disobedience.<sup>97</sup>

The inadequacy or failure of compensation, however, requires further measures of coercive relief designed to secure obedience, not all of which are even technically considered contempt sanctions. The failure of a party to comply upon order with certain of the Federal Rules of Civil Procedure may deprive him of substantial rights of litigation: pleadings may be stricken, evidence excluded, proceedings stayed or dismissed, or judgment taken by default.<sup>98</sup> Legal enforcement of a judgment for the payment of money may be secured by a writ of execution upon the property of the judgment debtor or if the applicable state practice or procedure so provides by "body execution": conditional imprisonment;<sup>99</sup> legal enforcement of a judgment for the

contempt, the maximum fine which could have been imposed was \$5000 with the possible addition of one year of imprisonment.

96. It has been unconsciously suggested that *quasi* contempt is a more appropriate description for an action of this kind. See RAPALJE, CONTEMPT §21 (1884).

97. No federal cases have been found unequivocally awarding compensation for contempt consisting of misbehavior as opposed to disobedience of a court order issued on behalf of a complainant. See *In re Sixth and Wisconsin Tower, Inc.*, 108 F.2d 538, 540 (C.C.A. 7th 1939). *But cf.* *Odell v. Bausch & Lomb Optical Co.*, 91 F.2d 359 (C.C.A. 7th 1937); *Chicago Directory Co. v. United States Directory Co.*, 123 Fed. 194 (C.C.S.D.N.Y. 1903). That there should be no objection to such a practice, see *Montgomery, Fines For Contempt as Indemnity to a Party to an Action*, 16 MINN. L. REV. 791 (1932).

The notion of disobedience may be stretched, however, by means of the "implied court order" or by an express decree impliedly binding others than the parties. In this manner, interference with property in *custodia legis* has been successfully rationalized under the disobedience provision of the federal contempt statute. *Lineker v. Dillon*, 275 Fed. 460, 470 (N.D. Cal. 1921) (alternate holding); *Clay v. Waters*, 178 Fed. 385, 394 (C.C.A. 8th 1910); *Cf. Lamb v. Cramer*, 285 U.S. 217 (1932); *Converse v. Highway Construction Co.*, 107 F.2d 127 (C.C.A. 6th 1939). *But cf. Hart Inv. Co. v. Great Eastern Oil Co.*, 27 F. Supp. 713 (E.D. Tex. 1939) (alternate holding).

For compensatory fines for disobedience assessed as damages rather than as a substituted criminal penalty, see, e.g., *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923); *Parker v. United States*, 135 F.2d 54 (C.C.A. 1st 1943) *cert. denied*, 320 U.S. 737 (1943); *Norstrom v. Wahl*, 41 F.2d 910 (C.C.A. 7th 1930); *Coca-Cola Co. v. Feulner*, 7 F. Supp. 364 (S.D. Tex. 1934).

98. FED. R. CIV. P. 37(b). *Cf.* § 14c(16) of the National Bankruptcy Act under which a bankrupt may be denied a discharge for disobedience to a lawful court order. 52 STAT. 850 (1938), 11 U.S.C. §32c(6) (1940).

99. FED. R. CIV. P. 69, B.I.P. (Export), Limited v. Isaacs, 10 F. Supp. 872 (S.D.N.Y. 1935); 3 MOORE, FEDERAL PRACTICE §69.02 (1938).

abatement of a nuisance or the transfer of title, by the independent action of court officers or by force of the judgment itself.<sup>100</sup> Finally, equitable enforcement of a judgment of mandatory or continuing injunctive relief may be secured by contempt as such: conditional imprisonment and, by extension, a conditional fine. The latter are included among the civil sanctions under the *Gompers* doctrine, provided the court is not "punishing yesterday's contemptuous conduct" but rather "announcing the consequences of tomorrow's contumacious conduct,"<sup>101</sup> on the theory that the contemnor carries the "keys to his prison"<sup>102</sup> and something more than vicarious satisfaction may result to a private contempt plaintiff. Under these circumstances at least, unlike criminal contempt, the need for a procedure highly favorable to the defendant through which the injured party must seek his relief is not immediately apparent.

In fact the federal courts have gone so far as to deny a trial by jury to the civil contemnor under circumstances where a reasonable construction of the Clayton Act would have permitted it.<sup>103</sup> The doubt of constitutionality said to preclude its application to civil contempt when the Act was interpreted for the first time by the Supreme Court<sup>104</sup> may be justified only if the "equity" jurisdiction conferred by Article III is construed to guarantee a trial by the court,<sup>105</sup> for it would be an illusory guarantee to ensure a court trial for a determination of the complainant's right to relief while permitting a jury to determine his right to the remedy. Such a strained construction, however, seems scarcely destined to survive its exposure in the federal courts<sup>106</sup> for it would, of course, apply *inter alia* to the Norris-LaGuardia Act.

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100. FED. R. CIV. P. 70, *Clarke v. Chicago B. & Q. Ry.*, 62 F.2d 440 (C.C.A. 10th 1932) *cert. denied*, 290 U.S. 629 (1933); *cf. Blackmer v. United States*, 284 U.S. 421 (1932) (writ of execution against property of one who failed to respond to subpoena); 3 MOORE, FEDERAL PRACTICE §§ 70.01, 70.02 (1938).

101. Mr. Justice Douglas in *Penfield Co. v. SEC.*, 67 Sup. Ct. 918, 923 (1947).

102. Judge Sanborn in his oft-quoted decision, *In re Nevitt*, 117 Fed. 448, 461 (C.C.A. 8th 1902), is usually given credit for conceiving this metaphor which has bedevilled the law of contempt and influenced the almost universal classification of coercive relief as a civil remedy through *Gompers v. Bucks' Stove and Range Co.*, 221 U.S. 418 (1911). It was actually borrowed, however, from a Pennsylvania decision, *Passmore Williamson's Case*, 26 Pa. 9, 24 (1855), where it served to describe a penalty deliberately classified as *criminal*. A similar paradox appears from *Wellesley v. Duke of Beaufort*, 2 Russ. & M. 639, 39 Eng. Rep. 538 (Ch. 1831), reputed source of the civil-criminal distinction in equity, where the coercive imprisonment of a member of parliament was justified because his contempt was *criminal* and not *civil*. Such is the foundation upon which is erected a new precept of "immemorial usage." See Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161, 167 (1908).

103. See note 66 *supra*.

104. *Michaelson v. United States*, 266 U.S. 42, 64 (1924).

105. Michigan, Wisconsin, Utah, and South Dakota have so construed their constitutions. See CLARK, CODE PLEADING 102 (2d ed. 1947).

106. *But cf.* Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161, 174 (1908), whose conclusions are cited with approval by Justices Black and Doug-

But as restrictions have accrued upon the power to punish criminal contempt, there has been increasing resort to the less inhibited coercive contempt sanctions. Hence an indiscriminating classification of the latter as a civil remedy may conceal the need for adequate safeguards.

There may be extrinsic reasons for a special limitation on the use of such sanctions. For example, the state law governing "imprisonment for debt" and "body execution," mandatory in the federal courts,<sup>107</sup> frequently precludes coercive imprisonment in actions *ex contractu* although permitting its use in tort actions where fraud or malice is established, an implied recognition that it is not merely a means of civil execution but a mode of punishment for a wrong committed as well.<sup>108</sup>

In the second place, 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. This may occur, for example, whenever the sovereign in an effort to control testimony irregularity invokes, instead of an ineffective or too restricted criminal penalty, the sanctions of civil contempt. Although under the *Hudgings* doctrine the court may not, via the contempt process, reach ordinary perjury, perjury which has become sufficiently evasive to block the inquiry or an outright refusal of testimony may be so punished.<sup>109</sup> Such punishment normally takes the form of an unconditional penalty.<sup>110</sup> But, unlike the situation confronting the court in the case of unequivocally false testimony where its discovery may simultaneously nullify its obstructive tendency, the temptation is strong to apply a judicial "thumb-screw" in order to overcome the resistance of a recalcitrant witness; punishment may yield to coercive sanctions in an apparent transposition from crimi-

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las in *United Mine Workers v. United States*, 67 Sup. Ct. 677, 715 (1947) (concurring opinion). The author, favoring a jury trial for criminal contempt, nevertheless opposes its extension to proceedings for "merely preventive imprisonment" and suggests that "statutes which commit the trial of questions of fact in such process to a jury are not likely permanently to prove satisfactory." Query, whether a similar attitude embraces proceedings for a compensatory fine.

Once the wounded dignity of the court is abstracted from the criteria affecting a choice of fact-finding agency, the mere circumstance that coercive relief is to be imposed scarcely seems to dictate arbitrarily a trial by the court in every such case, so long as a jury continues to be considered competent to try anything at all.

107. REV. STAT. §§ 990-2 (1875), 28 U.S.C. §§843-5 (1940); FED. R. CIV. P. 69.

108. See, e.g., *Coryell v. Lawson*, 25 Colo. App. 432, 139 Pac. 25 (1914); *Mozorosky v. Hurlburt*, 106 Ore. 274, 281, 211 Pac. 893 (1923); *Ex parte Berry*, 85 S.C. 243, 67 S.E. 225 (1910); cf. *Ex parte John Hardy*, 68 Ala. 303 (1881). See also Notes, 33 A.L.R. 648, 652 (1924), 54 L.R.A. (N.S.) 645 (1915), 34 L.R.A. 634 (1897).

109. See pp. 89-90 *supra*.

110. See, e.g., *Schleier v. United States*, 72 F.2d 414 (C.C.A. 2d 1934) (three months imprisonment for evasive answers before grand jury); *Haimsohn v. United States*, 2 F.2d 441 (C.C.A. 6th 1924) (three months imprisonment for evasive answers before a referee); *Davidson v. Wilson*, 286 Fed. 108 (C.C.A. 3d 1923) (three months imprisonment for refusal to testify before referee); cf. *United States v. Appel*, 211 Fed. 495 (S.D.N.Y. 1913).

nal to civil contempt. The perversity of such a consequence must have troubled the federal court which, eight years after the *Gompers* test was propounded, approved the indefinite confinement of a grand jury witness conditional upon his continuing refusal to testify, but held criminal the contempt.<sup>111</sup> Further application of contingent sanctions where criminal contempt is tacitly assumed may be found in punishment for evasive answers before a grand jury.<sup>112</sup> Similarly, in bankruptcy proceedings where information as to the status of the debtor's assets is essential, recalcitrant bankrupts have been imprisoned for fixed terms with the opportunity to purge themselves.<sup>113</sup> In view of a recent suggestion, however, that testimony not sufficiently obstructive to warrant a proceeding in criminal contempt might yet support coercive sanctions imposed in a *civil* proceeding,<sup>114</sup> attention should be redirected to the ground for the *Hudgings* restriction on the contempt power lest, reinterpreted under the policy of the *Nye* decision, emphasis be placed exclusively upon that of preserving a trial by jury in criminal cases. For, in the *Hudgings* case, the *coercive imprisonment* of an evasive witness to exact "a character of testimony which the court would deem to be truthful" was denounced without characterizing the proceeding.<sup>115</sup>

Another use of coercive sanctions by the sovereign is the collection of a penal fine by the conditional incarceration of the offender. This mode of enforcement cannot without some distortion be deemed in civil contempt although in the case of a fine payable to the complainant it would be so regarded. However, since the proceedings leading up to a penal fine would be criminal in nature anyway, the classification in this instance is not material.

Invasion of the civil contempt domain by the sovereign is not, moreover, confined to the courts. Officially sanctioned for the first time in 1939,<sup>116</sup> a federal agency may, as a private contempt plaintiff, secure the more effective

111. *Gill v. United States*, 262 Fed. 502 (C.C.A. 2d 1919); *cf.* *Blair v. United States*, 250 U.S. 273 (1919).

112. *Lang v. United States*, 55 F.2d 922 (C.C.A. 2d 1932); *O'Connell v. United States*, 40 F.2d 201 (C.C.A. 2d 1930).

113. *In re Rosenblum*, 268 Fed. 381 (W.D. Mo. 1919); *In re Schulman*, 177 Fed. 191 (C.C.A. 2d 1910).

114. *See In re Fox*, 96 F.2d 23, 25 (C.C.A. 3d 1938); *cf.* *Stein v. United States*, 9 F.2d 68 (C.C.A. 9th 1925) *reversing* 7 F.2d 169 (N.D. Calif. 1925); *In re Blitz*, 232 Fed. 276 (E.D. Pa. 1916).

115. *Ex parte Hudgings*, 249 U.S. 378, 384 (1919); see notes 39-44 *supra*. "The reasons which forbid such procedure go very deep into the past. Even when men did not wince at the most awful sanctions, the evidence procured was regarded with suspicion. A man, faced with perpetual imprisonment till he discloses his confederates, will in the end find confederates to disclose. There is no modern engine to effect the result; the costs are too high, and the results too meager." Judge Learned Hand in *Loubriel v. United States*, 9 F.2d 807, 809 (C.C.A. 2d 1926). After citing the *Hudgings* case, Judge Clark, in *In re Eskay*, 122 F.2d 819, 824 (C.C.A. 3d 1941), concluded that "a criminal contempt is the remedy appropriate to false swearing by evasion."

116. *McCrone v. United States*, 307 U.S. 61 (1939).

civil remedies in aid of law enforcement. There is the famous case of Howard Parker who was imprisoned for a "debt" owing to the Federal Marketing Administrator which was subsequently proved in bankruptcy. The "debt" was originally incurred as a compensatory fine for contempt of a mandatory injunction secured by the Administrator to compel obedience to a federal law.<sup>117</sup> All proceedings were conducted in accordance with the Rules of Civil Procedure. More recently, in *Penfield Co. v. SEC*,<sup>118</sup> the Securities and Exchange Commission brought civil contempt proceedings against a corporation officer who failed to comply with an enforcement order for a subpoena *duces tecum*. The subpoena had been issued to assist in determining the advisability of preferring criminal charges against the corporation.<sup>119</sup> Adhering strictly to the rule promulgated *for the protection* of contemnors that punishment for criminal contempt may not be imposed in a civil proceeding, the Circuit Court with subsequent Supreme Court approval set aside an insignificant fine of \$50 imposed by the lower court and directed that the contemnor be imprisoned until he should produce the subpoenaed documents;<sup>120</sup> an incidental effect of the change in terminology from "criminal" to "civil" was to preclude a review on the merits to the defendant.<sup>121</sup>

Ultimately, the Attorney General was permitted to make use of the civil contempt facilities, and in the *Mineworkers* case he secured a coercive fine of \$2,800,000 to compel obedience to a labor injunction.<sup>122</sup> It seems to have been agreed upon all sides that such a fine would have been quite properly inflicted without the safeguards said to be necessitated by the imposition of a criminal fine in the same proceeding. If this be so, attention should be directed to the confusion evidenced by the lower court which had originally imposed only an unconditional fine computed at the rate of \$250,000 per day for the fourteen days during which disobedience had already been in progress.<sup>123</sup> Unless the fine was an attempt to assess damages for the loss suffered by the United States, the only feasible explanation for the lower court's description of its sanction as both civil and criminal<sup>124</sup> is that it was er-

117. *Parker v. United States*, 126 F.2d 370 (C.C.A. 1st 1942), 135 F.2d 54 (1943) *cert. denied*, 320 U.S. 737 (1943), 153 F.2d 66 (1946).

118. 67 Sup. Ct. 918 (1947).

119. *Penfield Co. v. SEC*, 143 F.2d 746 (C.C.A. 9th 1944).

120. *SEC v. Penfield Co.*, 157 F.2d 65 (C.C.A. 9th 1946), 59 HARV. L. REV. 1311 (1946); *cf. E. Ingraham Co. v. Germanow*, 4 F.2d 1002 (C.C.A. 2d 1925).

121. *Penfield Co. v. SEC*, 67 Sup. Ct. 918, 923 (1947). Defendant, of course, did not appeal from the criminal fine. Since the Securities and Exchange Commission did not seek review until after the period for criminal appeals had expired, only a question of the proper sanction was at issue. Even the dissenting opinion stressed, however, that there was "not the faintest denial of any safeguard or of appropriate procedural protection" to the defendant. *Id.* at 930.

122. *United Mine Workers v. United States*, 67 Sup. Ct. 677, 702 (1947).

123. *United States v. United Mine Workers*, 70 F. Supp. 42, 53 (D.D.C. 1947); *Asst. Atty. Gen'l. John F. Sonnett*, N.Y. Times, Dec. 5, 1946, p. 4, col. 3.

124. *United States v. United Mine Workers*, 70 F. Supp. 42, 52 (D.D.C. 1947).

roneously<sup>125</sup> regarded as coercive. But the error is significant; for the possibility that coercive relief may become actual punishment is necessarily present in every civil contempt proceeding. At least where the contest is with the sovereign, therefore, assurance of some additional safeguards would seem appropriate.

But even in an action commenced by a private litigant, unrestricted use of the coercive contempt sanctions may result in deviation from the civil role assigned them. For if the contumacy be carried to the point of actual imprisonment or of absolute liability to a fine, it is punished quite as effectively as if subject to these penalties at the outset.<sup>126</sup> Whether it will in fact be carried so far depends upon: 1) the alternative consequences of compliance faced by the contemnor, and 2) the possibility of his performance. Unless his refusal to obey an order of the court is based upon sheer stubbornness in which event the metaphor is probably appropriate, he may not actually *possess* the "keys to his prison".

Illustrative of the abuse which may follow where coercive sanctions are imposed in an ordinary civil proceeding is the dilemma often confronting the debtor subject to a bankruptcy turnover order.<sup>127</sup> Adopting the rule that evidence of ability to comply with such an order must be "clear and convincing" to support coercive imprisonment for contempt, the Supreme Court, in *Oriel v. Russell*,<sup>128</sup> admitted that the stricter standard of proof required in criminal cases would "render the bankruptcy system less effective."<sup>129</sup> The Second Circuit, however, has recently criticized the *Oriel* rule as applied within its own jurisdiction.<sup>130</sup> In holding that proof of ability to comply with a turnover order had been established to the required degree by an un rebutted

125. But see Comment, 45 MICH. L. REV. 469, 495-6 (1947). Nov. 21, 1946, the District Court issued its rule to show cause ordering that "if upon the return of said defendants it should be found that the alleged contempt was not sufficiently purged, a trial should be held on November 27, 1946. . . ." *United States v. United Mine Workers*, 70 F. Supp. 42, 49 (D.D.C. 1946).

126. See Nelles, *The Summary Power to Punish for Contempt*, 31 COL. L. REV. 956, 961 (1932). "It is in effect a civil levy of execution which may include body execution. But I venture to say that every 'civil' contempt whose contumacy is carried to the point at which the contemnor may be committed is a 'criminal' contempt as well. . . ."

127. Compare the similar dilemma confronting the contemnor in *Parker v. United States*, 126 F.2d 370 (C.C.A. 1st 1942), 135 F.2d 54 (1943) *cert. denied*, 320 U.S. 737 (1943), 153 F.2d 66 (1946).

128. 278 U.S. 358 (1929); *cf.* *Telling v. Bellows-Claude Neon Co.*, 77 F.2d 584 (C.C.A. 6th 1935) *cert. denied*, 296 U.S. 594 (1935); *Coca-Cola Co. v. Feulner*, 7 F. Supp. 364 (S.D. Tex. 1934).

129. *Oriel v. Russell*, 278 U.S. 358, 365 (1929). In accord is the attitude of creditors. See Tolins, *Contempt in Bankruptcy Proceedings*, 1 AM. BANKR. REV. 141 (1924); Siegel, *Contempt in Bankruptcy Cases*, 4 AM. BANKR. REV. 297 (1928).

130. See *In re Luma Camera Service*, 157 F.2d 951, 953 (C.C.A. 2d 1946) *cert. granted sub. nom.* *Maggio v. Zeitz*, 67 Sup. Ct. 970 (1947); *Seligson v. Goldsmith*, 128 F.2d 977, 978 (C.C.A. 2d 1942); *Robbins v. Gottbetter*, 134 F.2d 843, 844 (C.C.A. 2d 1943); *cf.* *Kattelman v. Madden*, 88 F.2d 858 (C.C.A. 8th 1937).

"presumption of continued possession" by the bankrupt of the property in issue, Judge Frank, speaking for the court,<sup>131</sup> vigorously invited reversal. Through such fictional evidence, he said, the court without a jury may punish the bankrupt, faced with the incriminating alternative of explaining his default, for the crime of concealing his assets or swearing falsely and at the same time induce "close relatives and friends to put up the money";<sup>132</sup> he deplored the impropriety of coercing friends and relatives and denounced the substitution of a civil proceeding for a criminal trial. While the degree of proof under these circumstances scarcely appears to be "clear and convincing",<sup>133</sup> it is not an illogical outgrowth of the rigid civil classification affixed to coercive imprisonment.<sup>134</sup>

There is no reason to assume that such a perversion of civil relief is confined to bankruptcy turnover orders.<sup>135</sup> On the contrary, it may well be presumed to exist wherever compulsion of an affirmative order has been translated into actual fine or imprisonment.

#### CONCLUSION

The effective administration of justice in any court requires a variety of sanctions to secure order and obedience. These are all designed to coerce desirable conduct or to deter undesirable conduct, but they may frequently prove ineffective to accomplish their primary purpose and serve only to punish.

131. *In re Luma Camera Service Co.* *supra* note 130.

132. *Id.* at 953.

133. That *Oriel v. Russell*, 278 U.S. 358 (1929), does not require the effect given to the "presumption of continued possession" by the Second Circuit, see *Brune v. Fraidin*, 149 F.2d 325 (C.C.A. 4th 1945).

134. *Cf.* Judge Augustus W. Hand, concurring in *Robbins v. Gottbetter*, 134 F.2d 843, 844 (C.C.A. 2d 1943).

135. The turnover order is, of course, one step removed from the actual imposition of coercive sanctions. But if safeguards are required for the turnover proceeding, *a fortiori* should they be required for the contempt proceeding. The point in any litigation at which the law and facts necessary to support a contempt judgment are determined will naturally vary with the subject litigated and may vary with the circuit of trial. Compare *In re Gordon & Gelberg*, 69 F.2d 81 (C.C.A. 2d 1934), *In re J. L. Marks & Co.*, 85 F.2d 392 (C.C.A. 7th 1936) (facts litigated at turnover proceeding include the present ability of bankrupt to perform, relegating to a contempt proceeding, only facts subsequently affecting his ability), with *In re Eisenberg*, 130 F.2d 160 (C.C.A. 3d 1942) (facts litigated at turnover proceeding include ability of bankrupt to perform at time petition in bankruptcy filed resulting in greater scope for the contempt proceeding). See 2 COLLIER, BANKRUPTCY 520-1 (14th ed. 1940, Supp. 1946). *Cf.* Mr. Justice Jackson concurring in *Fleming v. Mohawk Wrecking & Lumber Co.*, 67 Sup. Ct. 1129, 1136 (1947) (emphasizing that although the safeguards "of a full hearing" should be available in at least one stage of administrative subpoena enforcement, this might be appropriate during either the administrative, court enforcement order, or contempt phase of the process). It would seem desirable, however, that the questions necessary to be resolved at a contempt proceeding should be kept to a minimum in view of a general prejudice against collateral attack upon "final" judgments.



In the event that the ultimate punishment is itself directly beneficial to the interests of a private party or to the contractual or property interests of the government in a quasi-private capacity, such as a compensatory fine, the legal consequences of a civil contempt classification may be not inappropriate. Under other circumstances, it is submitted, contempt sanctions are essentially penal varying only in the degree of imminence of punishment necessary to exert the "least possible power adequate to the end proposed."<sup>136</sup> If unconditionally imposed at the outset, they are identical in nature to the penalties evoked by any other offense against the United States, and, unless the contempt is witnessed by the judge in open court and requires no collateral explanation,<sup>137</sup> it would seem reasonable that it be punished in the same manner as an ordinary crime. This would also eliminate in many cases the need for "meticulous regard for those separate categories of offenses . . . so that the instances where there is no right to jury trial will be narrowly restricted."<sup>138</sup> If, because of the fortuitous circumstance that the contempt results from failure to take affirmative action, an opportunity is given to the offender to purge himself, the risks of abuse may be less. When this factor is coupled with potential assistance to a private litigant, sufficient justification may be found for the discretionary application of civil principles of law. But the mere fact that the government is permitted in a law enforcement proceeding to invoke the more effective coercive sanctions should not so change the character of the proceeding as to strip the offender of the protection to which he would otherwise be entitled were he guilty of irremediable misconduct. Whether the objective is to secure a criminal trial in certain cases of contempt as Justice Rutledge insists, or merely to maintain "due process of law" for all contemnors as Justices Frankfurter and Jackson recommend, the encouraged resort to coercive relief thus warrants attention lest outworn concepts obscure the way. Always more effective, if at all appropriate, its uncritical classification as a civil remedy may conceal the very problem whose solution is sought.

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136. *Anderson v. Dunn*, 6 Wheat. 204, 231 (U.S. 1821).

137. "Open court" might be considered to include, *e.g.*, referees, a grand jury, or certain administrative boards, even though the power to punish remains exclusively with the judge.

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