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BASIC ISSUES IN CIVIL CONTEMPT

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"The punishment of Contempt is the basis of all legal procedure . . . ."[1] Under the single term "contempt" are implied two distinct functions to be exercised by a court: enforcing courtroom order[2] and enforcing judicial decrees. Our concern will be limited to the enforcement by contempt of one kind of judicial decree, the injunction, which is an *in personam* order directing a defendant to act or refrain from acting in a specified way.[3] We will be most interested in examining the sanctions used to produce action by means of coercive fines or imprisonment, the so-called "civil contempt" sanctions.

Historically, the mainspring of Equity enforcement was the Chancellor's ability personally to constrain disobedience to his commands.[4] Where imprisonment of a recalcitrant defendant proved to be not all together a satisfactory way of enforcing obedience to their decrees, the Chancellors brought additional pressure to bear through fines, writs of assistance and writs of sequestration.[5]

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1. Sir John Fox, The History of Contempt of Court 1 (1927). "As a practical matter, without contempt power to put teeth in the court's order, jurisdictional power would be an empty illusion." J. Dobbyn, Injunctions in a Nutshell 216 (1974).

2. This function may be further categorized as follows: disruption in court; obstruction of the court's processes; perjury, forgery and alterations of records; symbolic acts; insult and insolence, out-of-court publications. Dobbs, *Contempt of Court; A Survey*, 56 Corn. L. Rev. 183, 186-220 (1971).

3. Some *in personam* court orders can be enforced by methods other than contempt. D. Dobbs, Remedies 91-93 (1973). On the other hand, contempt enforcement is often available to enforce certain extraordinary remedies developed out of law rather than equity. *Id.* at 111-112.

4. "[I]t was the . . . sole machinery which the Chancellor had originally to command. This was in early times well adapted, and usually adequate, to support the kind of litigation which ordinarily occupied the Court in the fifteenth century, namely, petitions for relief against force and fraud and the violent removal of a neighbor's landmark or even the neighbor himself. The failure of the common law to maintain order and to enforce its orders was partly due to the self-imposed restriction to pecuniary compensation, and partly to the curious fact that the Courts of law exercised no direct control over the execution of their decisions, which were often in effect, as in form, merely declaratory of right." D.E.C. Yale, *Lord Nottingham's Manual of Chancery Practice and "Prolegomena of Chancery and Equity"* (1965) in O. Fiss, Injunctions 709-710 (1972).

5. *Id.* at 710-713. These sanctions mark a movement away from the exclusive reliance on the *in personam* process in the sense that they were obtainable without first imprisoning the defendant.

The Chancellor's unique power to subject a defendant to punishment if he did not obey turned on the fiction that Equity did not make or change law; it merely commanded the defendant's conscience to act.[6] The early Lord Chancellors were ecclesiastic dignitaries exercising civil jurisdiction as Keepers of the King's Conscience. Chancery did no more than to coerce the will of a disobedient party until such time as he cooperated.[7] The religious, moralistic atmosphere and the degree of intimacy thus engendered between Chancellor and litigant with its emphasis on duty, obedience and conscience underlies our Anglo-American belief in responsibility for contempt, an idea foreign to some other cultures.[8] It explains how a purely private litigation between parties in Equity may become, as soon as an injunction issues, a matter personal to the court; how an act of disobedience to a court order is also felt as an act of disrespect, perhaps as an insult to the court and one bordering on obstruction of justice.[9]

To this double-edged nature of civil contempt must be added the "historical" fact that civil contempt is not really contempt at all. Criminal contempt, a power that was directed at offensive conduct and which derived its criminality from the active interference with the crown or its acting official agents, was classically understood to be contempt. It corresponds to what we have already referred to as the function of enforcing courtroom order. Historically, there was a body of law labeled "contempt" and a distinct equitable procedural device which was used to secure obedience to court orders, the so-called contempt in procedure.[10]

6. The fiction was invented by the Chancellors to rationalize the continued existence of a Court of Chancery independent of the common law courts. Jurisdictional jealousy, friction and irritations caused by the issuance of injunctions to stop proceedings in the common law court and by the lack of hard rules by which a person in Equity could measure his rights were allayed by the argument that Equity acted only to keep the law intact by making personal orders to the defendant. The defendant is ordered to use the law in a particular way under pain of personal imprisonment–nothing more.

7. The aim of the civil contempt sanction is to provoke cooperation from the contemnor and not simply to get him to forebear other people's actions. The judge jailing a reluctant party engages in an active struggle with the will of the latter and, as soon as the party changes his attitude, he is freed.

8. *See, e.g.*, Pekelis, *Legal Techniques and Political Ideology: A Comparative Study*, 41 Mich. L. Rev. 665 (1943). "It does not occur to the actors [parties before a Latin court] that you have to bow to the judge's will, or that you may be punished by him, or even more absurd, blamed for not having complied with his orders." *Id.* at 668.

9. Such act, while ordinarily considered *civil*, may become *criminal* if carried to the point of "contumacy." Kreplik v. Couch Patent Co., 190 F. 565 (1st Cir. 1911); Bessette v. W. B. Conkey Co., 194 U.S. 324, 329 (1904). The location of this point in terms of particular acts of contempt is virtually impossible.

10. The original law of contempt embraced only what is now known as criminal contempt. *See generally* R. Goldfarb, The Contempt Power 42-50 (Anchor ed. 1971).

> Originally it appears that the contempt power was regarded as a means of vindicating the court's authority by punishment in the form of an unconditional fine or imprisonment. However, *the same act which is contemptuous of the court may have the effect of impairing the remedy of an adverse party.* As a consequence, there gradually developed the concept of using the contempt power in aid of the remedy, either by the use of a conditional fine or conditional imprisonment or the assessment of a fine payable in whole or in part to the complaining party, thus giving rise to the concept of civil, as distinguished from criminal, contempt. (Emphasis added)[11]

At this point, we can begin to appreciate the difficulty inherent in distinguishing civil and criminal contempt. All true contempt derives from some offense to the law even though it may also impair the remedy of an adverse party. Contempts cannot be wholly civil or altogether criminal. And "it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both."[12] It has been said that it is not only impractical to distinguish every act of contempt in terms of its civil and criminal nature, but, that "any further distinction between law as an official body or proceeding and law as manifested through some private participant to a legal proceeding becomes hazy and imbedded in insubstantial reasoning."[13]

Difficulties of classification notwithstanding, the approach of the judiciary both in England and America has been to separate civil from criminal contempt.[14] The dichotomy was officially born with the initial separation of civil and criminal contempt for purposes of review[15] with the final step of separation taken in *Gompers v. Bucks Stove & Range Co.*[16] in 1911. Reversing a sentence which imposed a fixed term of imprisonment for violation of a labor injunction, the Supreme Court in *Gompers* denied the power of the Federal Court to punish for criminal contempt in a civil proceeding on the grounds

11. Wright, Bryne, Haakh, Westbrook & Wheat, *Civil and Criminal Contempt in the Federal Courts,* 17 F.R.D. 167 (1955) (Report by Special Comm. Jun. Barristers of L.A. Bar Assoc.). *See also* Note, *Civil and Criminal Contempt of Court,* 46 Yale L.J. 326 (1936); Comment, *Civil and Criminal Contempt in the Federal Courts,* 57 Yale L.J. 83 (1947).

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

13. R. Goldfarb, *supra* note 11, at 49.

14. *See* Comment, *Civil and Criminal Contempt in the Federal Courts, supra* note 11, at 90 n. 49.

15. Bessette v. W. B. Conkey Co., 194 U.S. 324 (1904). In order to arrive at the ruling in this case, the Supreme Court found it necessary to classify the contempt involved and it proceeded to do so according to whether the aim of the contempt was to punish a wrong to the court or to preserve and enforce the rights of private parties.

16. 221 U.S. 418 (1911).

that prejudice to certain rights of the criminal contemnor might result.[17]

> There was . . . a variance between the procedure adopted and the punishment imposed . . . . The result was as fundamentally erroneous as if in an action of "A. v. B. for assault and battery," the judgment entered had been that the defendant be confined in prison for twelve months.[18]

Gompers thus stated a cardinal principal limiting the sanctions available to a judge in a contempt case: a determinate "criminal" type sanction cannot be imposed where the trial procedure has not given the defendant the benefit of criminal due process. Here, the court reasoned from the procedure used: criminal safeguards were not afforded and hence the case must have been civil, permitting only a civil-type penalty.[19]

The Court in *Gompers* had also to determine whether the contempt involved was civil and could consequently be reconsidered on the merits of the record as a whole.[20] As a result, it felt obliged to develop a rule of legal consequences for classifying contempts based on the character and purpose of punishment. Because of its great impact on the subsequent development of the law of contempt, the Court's words deserve to be quoted in full:

> It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. 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. It is true that punishment by imprisonment may be remedial as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil con-

17. *Id.* at 444. "If then, as the Court of Appeals correctly held, the sentence was wholly punitive, it could have been properly imposed only in a proceeding instituted and tried as for criminal contempt. . . . [T]here are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

18. *Id.* at 449.

19. The court could have reasoned just as well from the nature of the sentence. The sentence was determinate and hence criminal; therefore, the procedure used must satisfy the requirements for criminal procedure.

20. If the proceeding was one at law for criminal contempt, rather than one in Equity for civil contempt where the whole record below may be examined on appeal, the findings of fact by the trial judge would have to be treated as conclusive and the appeal limited solely to questions of law.

tempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The degree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

. . . . .

On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done, nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.

It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is soley punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, *or vice versa.*

. . . . .

The distinction between refusing to do an act commanded—remedied by imprisonment until the party performs the required act; and doing an act forbidden, punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.[21]

Most clear in this role is that punishment was to be the fulcrum upon which to balance and distinguish the two kinds of contempt.[22]

21. 221 U.S. at 441-443. The quotation is preceded by a statement recognizing contempts as neither wholly civil nor altogether criminal.

Later courts have not been controlled by the statements in *Gompers* which say that a contempt is "civil" where the defendant has refused to do an affirmative act required by an order, but that if he violated a negative order, the contempt is criminal. All that this statement means is that where a defendant has refused to do an ordered act, his imprisonment would ordinarily be coercive to make him do what he is refusing to do. On the other hand, where defendant has done an act he was ordered not to do, imprisonment ordinarily cannot undo the act or afford compensation to the plaintiff.

22. The nature of the punishment test falls short in that it does not determine the

In many ways as significant for the future, especially the later developments of the law of civil contempt, the statement provided the rationale that punishment for civil contempt is not really punishment since the party imprisoned can control his incarceration by doing the required act.[23] Thus, the effectiveness of the coercion (where coercive relief by fine or imprisonment is made conditional upon the failure of the contemnor to purge himself) was made to reflect directly the power of the courts to administer justice. The result was that the Supreme Court committed itself to an approach which clearly recognized a separation of civil from criminal contempt; a separation which was to be used, not only to limit the prerogative of the offended court, but to do so without impairing the remedy of the offended party. After *Gompers* a judge was limited in his contempt sanction in two ways: he could not impose a coercive type sanction where there was nothing to coerce and he could not impose a determinate type sanction where the trial procedure had not given the defendant the benefit of criminal due process. In most American jurisdictions the distinction between civil and criminal contempt is made with reasonable sharpness today. The polar concepts of the "remedial" versus "punitive" remain the dividing line between civil and criminal contempt.[24] Much that goes to the heart of an accused contemnor's liberty and property rights depends upon the labeling of a contemptuous act. We may, for example, begin with the difference in punishment permitted by each class and note that civil contempt punishment could conceivably continue without end while criminal punishment is limited.

> The law has fixed standards for each remedy, and they are neither identical nor congealable. They are, for damages in civil contempt, the amount of injury proven and no more . . . ; for coercion, what may be required to bring obedience and not more, whether by way of imprisonment or fine; for *punishment,* what is not cruel and

correct classification for the one purpose for which it is most needed: to advise the respondent at the outset of the nature of the case against him. Not surprisingly, Justice Rutledge in a dissenting opinion written over thirty-five years later in United States v. United Mine Workers, 330 U.S. 258 (1947), stated: "This case is characteristic of the long-existing confusion concerning contempt and the manner of their trial, among other things, in that most frequently the question of the nature and character of the proceeding, whether civil or criminal, is determined as its end in the stage of review rather than, as it should be and as in my opinion it must be, at the beginning. . . . And this fact in itself illustrates the complete jeopardy in which rights are placed when the nature of the proceeding remains unknown and unascertainable until the final action on review." *Id.* at 368.

23. This is now the famous cliche that civil contemnors carry the keys to their own prison door.

24. Moskovitz, *Contempt of Injunctions, Civil and Criminal,* 43 Col. L. Rev. 780, 823 (1943).

> unusual or, in the case of a fine, excessive within the Eighth Amendment's prohibition. And for determining excessiveness of criminal fines there are analogies from legislative action which in my opinion are controlling. (Emphasis added.)[25]

A short hand way to describe these most important consequences of making the civil-contempt classification is to restate the rule that if a contempt procedure is criminal in nature, the sentence must be a determinate one, while if it is civil in nature, the sentence must be coercive.

The different procedural treatment afforded a contempt depending upon its classification as civil or criminal is most striking. This is not surprising since, as every student of law is aware, the procedures to be followed in criminal proceedings and in civil ones mark one of the great constitutional divides. A whole system of criminal safeguards comes into play once a contempt is classed as criminal.[26]

> The burden of proof is on the prosecution, the party charged cannot be required to testify against himself, cannot be put in double jeopardy, and cannot be tried without appropriate notice of the charge. Inferentially at least, he is entitled to counsel and compulsory process for bringing in his witnesses. He is now entitled to a jury trial if the criminal sentence is a potentially serious one. As with other crimes, intent is an element of criminal contempt, and it must be proven before criminal punishment can be inflicted . . . . The classification of a contempt hearing as a criminal one may also affect the right of appeal or the route that an appeal takes. At least in some criminal contempt cases, the state should be a party to any appeal proceedings. The criminal classification will also invoke the pardoning power of the state . . . . (Footnotes omitted.)[27]

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25. United States v. United Mine Workers, 330 U.S. 258, 377 (1947) (dissenting opinion). The term "punishment" is used in this statement to define the remedial goal of criminal contempt and is contrasted with the remedial goal of civil contempt: coercion and compensation. Compare this to use of the same term as the test to distinguish between civil and criminal contempt: "It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases." *Gompers*, 221 U.S. at 441. Sometimes the term "punishment" is found to exist (or not to exist) solely by reason of definition, *e.g.*, since civil contempt is not a criminal proceeding, punishment is not involved. Compare this with recognition in *Gompers* that contempts are neither wholly civil nor altogether criminal because the sanctions may have incidental effects. Confusion can be avoided by remembering that judges and writers use "punishment" in one or more of these contexts.

26. *See, e.g.*, United States v. United Mine Workers, 330 U.S. 258, 364 n. 30 (dissenting opinion).

27. Dobbs, *supra* note 2, at 242-243.

In addition, a defendant in a criminal contempt proceeding is surrounded by a presumption of innocence, United States v. Fleishman, 339 U.S. 349 (1950), and is protected by the fact that the act complained of must be established beyond a reasonable doubt. The Federal Rules of Criminal Procedure are applicable to criminal contempt proceedings, but they are

With legal consequences as important as these procedural protections depending upon classification of a contempt as "criminal," pressure rapidly mounted in the years following *Gompers* for a test that would advise a respondent at the outset of the nature of the case against him.[28] In 1946, Federal Rules of Criminal Procedure were adopted which included a requirement of notice to the contemnor of the nature of the contempt charge in all criminal contempt prosecutions.[29] However, the salutary effect of this rule has been somewhat blunted by the later decision in *United States v. United Mine Workers*[30] which held that civil and criminal contempt could be prosecuted in a single contempt proceeding provided defendants enjoyed during the trial itself all of the enhanced protections afforded in criminal contempt proceedings.[31]

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not applicable to civil proceedings. Alexander v. United States, 173 F.2d 865 (9th Cir. 1949).

There are some important disadvantages for the party charged as well. "Any fine levied is not discharged in bankruptcy. Moreover he may be held in criminal contempt for violating an order that is later reversed since it may be important to vindicate judicial power even when it is erroneously exercised. In at least some cases, this same principle applies when the court lacks jurisdiction of the subject matter and a criminal contempt sentence may stand even though there was no jurisdiction." Dobbs, *supra* note 2, at 243.

28. In McCann v. New York Stock Exch., 80 F.2d 211, 214-215 (2d Cir. 1935), Judge L. Hand prescribed a formula for distinguishing at the outset whether a contempt proceeding was civil or criminal. As a simple formula, the criminal character can be determined by the fact of prosecution either by the United States or by the court. But there are cases in which the judge prefers to use the attorney of one of the parties, as he may do. In such a case, it is often difficult for the respondent to tell whether the prosecution is a remedial move taken on behalf of a private party to the proceeding. The criminal nature could, however, be made plain by the judge's entering an order directing the attorney to prosecute the defendant criminally on behalf of the court, and by attaching a copy of the process. Judge Hand felt that unless this was done, the prosecution must be deemed to be civil.

29. Federal Rule of Criminal Procedure 42(b). "The notice shall state the time and place of hearing, allowing a reasonable time for preparation of the defense, and shall state the essential facts constituting the criminal contempt charged *and describe it as such.*" (Emphasis added.)

30. 330 U.S. 258 (1947). In *United Mine Workers,* a majority of the Court held that Rule 42(b) is satisfied if failure to give such notice "has not resulted in substantial prejudice to the defendant." *Id.* at 298.

31. *Id.* at 298-301. "If the defendants were thus accorded all the rights and privileges owing to defendants in criminal contempt cases, they are put in no better position to complain because their trial included a proceeding in civil contempt and was carried on in the main equity suit. Common sense would recognize that conduct can amount to both civil and criminal contempt. The same acts may justify a court in resorting to coercive and to punitive measures. Disposing of both aspects of the contempt in a single proceeding would seem at least a convenient practice. . . . Even if it be the better practice to try criminal contempt alone and so avoid obscuring the defendant's privileges in any manner, a mingling of civil and criminal contempt proceedings must nevertheless be shown to result in substantial prejudice before a reversal will be required." *Id.* at 298-300 (Footnotes omitted).

The Court said further: "In so far as the criminal nature of the double proceeding dominates and in so far as the defendants' rights in the criminal trial are not diluted by the mixing of civil with criminal contempt, to that extent is prejudice avoided. Here, . . . all

The *United Mine Workers* case arose out of a dispute between the United States and the United Mine Workers regarding the unilateral right of the union to terminate a contract between them under an existing labor act regulating coal wage agreements. The union and Lewis, its President, defied an injunction of the federal district court and were both found guilty beyond a reasonable doubt of civil and criminal contempt. Unconditional fines were imposed on Lewis in the amount of $10,000 and on the union in the amount of $3,500,000. The Supreme Court on review found that the proceedings in the trial court supported judgments for both criminal and civil contempt. The majority of the Court felt, however, that the fine of $3,500,000 against the union was excessive and modified it so as to require the defendant union to pay an unconditional fine of $700,000 and to further pay an additional fine of $2,800,000 contingent upon union compliance with the court order.

Justice Rutledge, in a biting dissent, took issue not only with the "idea that a criminal prosecution and a civil suit for damages or equitable relief could be hashed together in a single criminal-civil hodgepodge"[32] but also with the "mixing civil remedies and criminal punishments in one lumped form of relief, indistinguishably compounding them and thus putting both in unlimited judicial discretion, with no possibility of applying any standard of measurement on review."[33]

> That the Government is complainant here, both as "employer" seeking remedial relief and in sovereign capacity seeking to vindicate the court's authority by criminal penalty, does not nullify all these long-established limitations or put the courts wholly at large, limited by nothing except their unconfined discretion as to the scope and character of the relief allowable. Power there is to take adequate measures when violation is clearly shown and adequate proof is made to sustain them. For proven violation, criminal penalty within the Eighth Amendment's limits as we would measure similar impositions placed by Congress, at the most; for damages proven and found, civil award commensurate with the finding; and for coercion, civil relief

rights and privileges of the defendants were fully respected, and there has been no showing of substantial prejudice flowing from the formal peculiarities of defendants' trial." *Id.* at 300-301 (Footnotes omitted).

32. *Id.* at 364.

33. *Id.* at 365. "As the proceeding itself is said to have been both civil and criminal, so are the two 'fines.' Each was imposed in a single lump sum, with no allocation of specific portions as among civil damages, civil coercion and criminal punishment. The Government concedes that some part of each 'fine' was laid for each purpose. But the trial court did not state, and the Government has refused to speculate, how much was imposed in either instance for each of those distinct remedial functions." *Id.* at 376-77.

> by way of imprisonment or "fine," but in either case contingent only, not final, giving opportunity for compurgation and for termination, on its being made, of further penalty for the future. (Footnote omitted.)[34]

Finally, there was, in the view of Justice Rutledge, an usurpation of the function of the District Court in this case.

> [I]t is the District Court's function, not ours, in the first instance to fix the amounts of criminal fines. In equity proceedings for coercive relief, appellate courts including this one have power to revise and fix awards for such purposes, and if damages also are sought to review amounts awarded for this purpose for consistency with the proof. . . . But in a criminal proceeding which is at law even in contempt, . . . our function is not in the first instance to fix the fine ourselves. That function is the District Court's. . . . We can only determine whether those imposed by it are excessive under the Eighth Amendment. (Citations omitted.)[35]

For all of the reasons elucidated in the dissent by Justice Rutledge, the majority opinion in the *United Mine Workers* case must be regarded as unfortunate. No case in the United States Supreme Court had ever before sustained such conglomerate proceedings and penalties, much less a criminal contempt fine of such magnitude. What is most clear in this case is that the Court had sanctioned the prosecution in a single contempt proceeding of both civil and criminal contempt. The rule in *Gompers* that not only civil and criminal penalties but also civil and criminal proceedings are altogether different and separate things, and under the Constutition must be kept so, was not followed in *United Mine Workers.*[36] However one regards the deci-

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34. *Id.* at 380-81.

35. *Id.* at 384. The Supreme Court revised the penalties imposed by the District Court as follows: Lewis' composite fine was affirmed in amount but was made wholly criminal (thus in effect increasing the amount of the criminal imposition); the union's composite fine was held excessive and replaced by a flat criminal fine of $700,000 and a conditional penalty of $2,800,000 said to be entirely for civil coercion; any possible award for civil damages by the lower court was eliminated. *Id.* at 382.

36. *See* notes 29, 30 & 31, *supra,* and *United Mine Workers,* 330 U.S. at 299: "Rule 42(b), while demanding fair notice and recognition of the criminal aspects of the case, contains nothing precluding a simultaneous disposition of the remedial aspects of the contempt tried." *Cf.* Judge L. Hand's opinion in McCann v. New York Stock Exch., 80 F.2d 211, 214-215 (2d Cir. 1935) (suggesting that unless certain steps are taken to avoid possible confusion between criminal and contempt proceedings, "the prosecution must be deemed to be civil and will support no other than remedial punishment"). *See also* note 28, *supra.*

The possibilities for confusion are multiplied when, as in *United Mine Workers,* the contempt is instituted in a suit in which the United States is a party, since the United States may bring civil as well as criminal contempt proceedings. McCrone v. United States, 307 U.S. 61 (1939). *Cf. also* Justice Rutledge's dissent in *United Mine Workers:* "Here the right

sion in *United Mine Workers,* there can be little question that it allows "vast liberality" concerning matters of procedure and relief in contempt proceedings.[37]

There was also in *United Mine Workers* an opinion by Justices Black and Douglas, concurring in part and dissenting in part, which emphasized an aspect of the case of much significance for the law of civil contempt. Noting that the contempt citation in this case had as its purpose the "vindication of the District Court's authority against a continuing defiance," and that the "legitimate 'end purposed' was affirmative action by the defendants to prevent interruption of coal production pending final adjudication of the controversy,"[38] they concluded that a conditional civil sanction would have brought about at least as prompt and unequivocal obedience to the court's order as would the criminal punishment for past disobedience imposed by the majority in the case.[39] This being the case, they argued that the conditional civil sanction was proper under the general rule that "in contempt proceedings courts should never exercise more than 'the least possible power adequate to the end proposed.' "[40]

> In certain circumstances criminal contempt culminating in unconditional punishment for past disobedience may well constitute an exercise of "the least possible power adequate to the end proposed." Thus in situations which would warrant only a use of coercive sanctions *in the first instance,* criminal punishment might be appropriate

'to know that it was a charge, and not a suit' comprehended all other procedural rights in the trial and appellate courts. Without this, none could be asserted or maintained. The denial of that right, deferring it until the decision here is handed down, is in my opinion not only a denial of all, it is a violation both of the Constitution and of Rule 42(b)." 330 U.S. at 376.

37. *See* Penfield Co. v. Securities & Exch. Comm'n, 330 U.S. 587, 602 (1947) (Rutledge, J., concurring).

38. *United Mine Workers,* 330 U.S. at 333.

39. They gave still another important reason: "We think it significant that the conduct which was prohibited by the restraining order for violation of which these defendants have been punished for contempt is also punishable under the War Labor Disputes Act. That Act provides a maximum punishment of $5,000 fine and one year imprisonment for those who interfere with the operation of mines taken over by the United States. Had the defendants been tried under that statute, their punishment would have been limited thereby and in their trial they would have enjoyed all the constitutional safeguards of the Bill of Rights." *Id.* at 334. Justice Rutledge in his dissent likewise found the flat $700,000 criminal fine against the defendant union to be excessive by constitutional and statutory standards for the same reasons: "In my opinion, when Congress prescribes a maximum penalty for criminal violation of a statute, that penalty fixes the maximum which can be imposed whether the conviction is in a criminal proceeding as such for its violation or is for contempt for violating an order of court to observe it temporarily. Gompers v. United States, 233 U.S. 604, 612." *Id.* at 382.

40. *Id.* at 332 (citing as authority Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821) and *In re* Michael, 326 U.S. 224, 227 (1945)).

> *at a later stage* if the defendant should persist in disobeying the order of the court. (Emphasis added.)[41]

A reading of the Black-Douglas opinion suggests additional reasons influencing their choice of the civil contempt sanction in this case. Defendants did not receive a jury trial in the contempt proceedings[42] raising at least a question as to whether the constitutional requisites for criminal contempt punishment had been met in this case.[43] But there appeared to be no question with regard to the procedure for coercing obedience:

> We agree that the court had power summarily to coerce obedience to those orders and to subject defendants to such conditional sanctions as were necessary to compel obedience. And we agree that in such civil contempt proceedings to compel obedience, it was not necessary for the court to abide by all the procedural safeguards which surround trial for crime.[44]

Moreover, the coercive power carried its own resolution, making what would otherwise be an excessive fine now quite reasonable.

> The situation of grave emergency facing the country when the District Court acted called for the strongest measures—measures designed to produce quick and unqualified obedience of the court's order. If the $10,000 fine on defendant Lewis and the $3,500,000

41. 330 U.S. at 333. Elsewhere Black and Douglas make clear that the circumstances of the case called for quick action by the court to coerce future obedience by these defendants. Defendants had disobeyed a temporary restraining order and preliminary injunction and were threatening to change the status quo so that no effective judgment could be rendered. Another circumstance thought relevant in determining whether criminal punishment or coercive sanction should be employed was that the defendants, though acting wilfully, believed in good faith that they were acting legally in a case involving difficult questions of law. Cited as precedent was Cooke v. United States, 267 U.S. 517 (1925), where it was said that "the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed." *Id.* at 538.

42. "Defendants have not argued either in the District Court or in this Court that they are constitutionally entitled to a jury trial. And they expressly waived in open court whatever rights they had to an advisory jury." 330 U.S. at 367 n. 34 (Rutledge, J., dissenting). "[D]efendants ... urge only their right to a jury trial as provided in Sect. 11 of the Norris-LaGuardia Act. But Sect. 11 is not operative here, for it applies only to cases 'arising under this Act,' and we have already held that the restrictions upon injunctions imposed by the Act do not govern this case." *Id.* at 298 (majority opinion).

43. The opinion by Justices Black and Douglas expressly avoided the constitutional requisites of criminal contempt punishment in this case, *Id.* at 328, and Justice Rutledge in his dissent states: "It does not matter that some of those [procedural protections thrown about all other criminal prosecutions] which incontestably are applicable may not have been put in issue or preserved for review in this case. The question cuts more deeply than the application of any specific guaranty. It affects the right to insist upon or have the benefit of any." *Id.* at 367-68.

44. *Id.* at 330.

> fine on the defendant union be treated as coercive fines, they would not necessarily be excessive. For they would be payable only if the defendants continued to disobey the court's order. Defendants could then avoid payment by purging themselves.[45]

The Black-Douglas opinion is instructive for the light it sheds on the appeal of the civil contempt sanction to the judicial mind. Often necessary and appropriate, the coercive remedy of civil contempt manages to avoid most procedural difficulties attached to the criminal law. At the same time, it offers possibilities for imaginative application which we shall have occasion to investigate later in this writing.

In the same term as *United Mine Workers,* but subsequent to its decision, the Supreme Court heard an appeal in the case of *Penfield Company v. Securities & Exchange Commission.*[46] The Commission had subpoenaed one Young, an officer of Penfield, to produce certain books and records in connection with an investigation then being conducted of the corporation. Upon Young's refusal to comply with the subpoena, the Commission sought coercive enforcement of its subpoena by instituting a contempt proceeding in the United States District Court. The court refused to grant the coercive relief designed to force Young to comply but found Young in contempt and imposed upon him a flat, unconditional fine of $50. The defendants did not receive notice that they were being charged with a criminal contempt as required by Rule 42(b). The Commission appealed to the United States Court of Appeals challenging as error the imposition of the unconditional fine when what it had asked for was a form of coercive relief. The appellate court reversed, agreeing that it was error to impose a criminal penalty in a civil contempt proceeding, and directed that Young be imprisoned until he produced the documents.[47]

45. *Id.* at 335. After reiterating the *Gompers* view that judicial sanctions in civil contempt proceedings may, in a proper case, be employed both to coerce the defendant into compliance with the court's order and to compensate the complainant for losses sustained, the majority laid down these general standards: "Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy. But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and the magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired. It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of the defendant's financial resources and the consequent seriousness of the burden to that particular defendant." *Id.* at 304.

46. 330 U.S. 585 (1947).

47. 157 F.2d 65 (9th Cir. 1946).

The majority opinion written by Justice Douglas upheld the view of the circuit court of appeals.[48] In a concurring opinion, Justice Rutledge agreed that the rule in *Gompers* required the action by the court of appeals but wondered "why both the criminal fine imposed by the District Court and the civil relief given by the Circuit Court of Appeals should not be allowed to stand" in view of the mixed proceeding without regard to the requirements of 42(b) permitted by the *United Mine Workers* decision.[49] He felt, however, that the character and scope of relief should have been left, in the first instance, for the district court, rather than the court of appeals.

There was in *Penfield* a dissent by Justice Frankfurter[50] taking issue sharply with the majority on the question of the trial court's allowable discretion in regulatory subpoena enforcement.[51] The last paragraph in the dissent deserves to be quoted in full.

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48. 330 U.S. 585 (1947). An interesting fact in the case is that Young did not appeal from the order holding him in contempt and subjecting him to a fine but instead paid the fine and argued on appeal that the circuit court of appeals was without authority to substitute another penalty or to add to the one already imposed and satisfied. He rested his argument on 18 U.S.C. §401 (1971) which gives the federal courts power to punish by fine or imprisonment, at the discretion of the court, contempts of their authority. Since the statute provides alternative penalties, once a contemnor pays a criminal penalty, his sentence may not thereafter be amended so as to provide for imprisonment.

Justice Douglas responded as follows: "We assume, arguendo, that the statute allowing fine or imprisonment governs civil as well as criminal contempt proceedings. If the statute is so construed, we find in it no barrier to the imposition of both a fine as a punitive exaction and imprisonment as a coercive sanction, or vice versa. That practice has been approved .... When the court imposes a fine as a penalty, it is punishing yesterday's contemptuous conduct. When it adds the coercive sanction of imprisonment, it is announcing the consequences of tomorrow's contumacious conduct. At least in that situation the offenses are not the same. And the most that the statute forbids is the imposition of both fine and imprisonment for the same offense." *Id.* at 594.

49. *Id.* at 602. "I find it difficult . . . to reconcile the action taken here with what was done in the Mine Workers decision. A majority there held, as I thought contrary to the Gompers ruling, that *civil and criminal contempt could be prosecuted in a single contempt proceeding conducted according to the rules of procedure applicable in equity causes,* and that both types of relief, civil and criminal, could be imposed in such a mixed proceeding." (Emphasis added.) *Id.* at 601.

What Justice Rutledge does not say is that, in the view of the majority of the court, defendants in *United Mine Workers* were fully informed that a criminal contempt was being charged and enjoyed during the trial itself all the enhanced protections accorded defendants in criminal contempt proceedings. Thus, while Justice Rutledge is technically correct that the trial included a proceeding in civil contempt and was carried on in the main equity suit, there was no general holding that the rules of procedure applicable in equity cases were sufficient to support criminal contempt convictions.

It is possible, therefore, to distinguish *Gompers* from *United Mine Workers* while at the same time placing the *Penfield* decision in a direct line with *Gompers.* Both in *Gompers* and in *Penfield,* a criminal contempt penalty was imposed in a civil contempt proceeding without knowledge to the defendant that a charge was pending and without proper criminal procedural safeguards.

50. *Id.* at 603 (Frankfurter, J., & Jackson, J., dissenting).

51. Justice Douglas felt the courts were obligated under the Securities Act of 1933 to

> The question, then, is whether the Court could impose what constituted a fine for criminal contempt, that is, to vindicate the law as such, without a formal pleading charging Young with such disobedience. We do not think Judge Hall had to direct the clerk to issue an attachment against Young to inform him of that which he obviously knew and which the proceedings had made abundantly clear to him. The *true significance* of our opinion in United States v. United Mine Workers . . . , as we understand it, is that contempt proceedings are sui generis and should be treated as such in their practical incidence. 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 other standards of decency and fairness in the administration of federal justice may require. On this record we find not the faintest denial of any safeguard or of appropriate procedural protection. (Emphasis added.)[52]

The above language appears to indicate that 42(b) notice that a criminal contempt is pending is unnecessary as are the usual safeguards of a criminal trial provided the hearing is a fair and open one. The implication is that a contemnor obviously knows what punishments are possible and therefore is on notice. If this is the *true significance* of the *United Mine Workers* case, then we may fairly say that the federal courts have repudiated this view in recent years. Beginning with *United States v. Barnett*[53] in 1964 and finally with *Bloom v. Illinois*[54] in 1968, the federal view has been that criminal contempt is a crime in the ordinary sense since it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. The consequence is that all of the usual procedural safeguards

grant the full remedial relief which the Act placed behind the orders of the Commission in the absence of certain findings: that the Commission's request had become moot, that the documents produced satisfied its legitimate needs, or that the additional ones sought were irrelevant to its statutory functions. Justice Frankfurter favored more judicial discretion in the matter in view of the Congressional policy that courts "were not to be automata carrying out the wishes of the administrative" and because the record on appeal disclosed circumstances at the time enforcement was sought making coercive enforcement inappropriate. *Id.* at 604.

52. *Id.* at 609.

53. 376 U.S. 681 (1964). In *Barnett* the Court indicated that the question whether a severe criminal contempt punishment would itself trigger the right to a jury trial had not been firmly settled by prior cases and that some members of the Court believed that the Constitution limited the punishment which could be imposed in a criminal contempt where the contempt was tried without a jury. *Id.* at 694-695, 695 n. 12.

54. 391 U.S. 194 (1968). "[S]erious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States . . . ." *Id.* at 198. "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, requires that the accused shall be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony . . . ." *Id.* at 205.

required by the United States Constitution in criminal proceedings also surround proceedings in criminal contempt including the right to jury trial for serious crimes.[55]

Interestingly, while a virtual revolution in procedure has transformed the law of criminal contempt during the last decade, little has changed in the procedures for civil contempt. As early as 1955, arguments for a unitary procedure and the abolishing of distinctions between criminal and civil contempt were resisted on the grounds that the traditional safeguards then available in criminal contempt were unnecessary in civil contempt proceedings and on the further ground that justice to the private litigant in a civil contempt proceeding required that his burden be no greater than in the civil proceeding which gave rise to his right in the first place.[56] On the other hand, a leading authority has felt that civil contempt procedure should not be reformed but that rather the entire power abolished as an anomoly in our law.[57]

It will not be our purpose to make a critical assessment of the law of civil contempt. Rather we will briefly survey the types of sanctions that have been developed in our recent legal history and point up a few of the major problems arising from the use of the civil contempt sanction.

CIVIL CONTEMPT SANCTIONS

The definitive statement on the sanctions available for civil contempt remains that of the Court in *United Mine Workers:*

> Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained.[58]

55. The Court in *Bloom* explicitly refused to make an exception to the rule for disorders in the courtroom although recognizing that the power of a judge to quell disturbance cannot attend upon the impaneling of a jury. "The goals of dispatch, economy, and efficiency are important, but they are amply served by preserving the power to commit for civil contempt and by recognizing that many contempts are not serious crimes but petty offenses not within the jury trial provisions of the Constitution." *Id.* at 209.

Federal Rule of Criminal Procedure 42(a) provides that "a criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." According to the court in *Bloom,* "[t]his rule reflects the common-law rule which is widely if not uniformly followed in the States. Although Rule 42(a) is based in part on the premise that it is not necessary specially to present the facts of a contempt which occurred in the very presence of the judge, it also rests on the need to maintain order and a deliberative atmosphere in the courtroom." 391 U.S. at 209-10.

56. *See* Wright, Byrne, Haakh, Westbrook & Wheat, *supra* note 11, at 180-81.

57. R. Goldfarb, *supra* note 10. *See generally Id.* at 26-75.

58. *United Mine Workers,* 330 U.S. at 303-04 (citing Gompers v. Bucks Stove & Range Co., 221 U.S. 448 (1911)).

Civil contempt *to coerce compliance* is usually accomplished by the sanction of conditional fine or imprisonment.[59] It is limited by two principles: the respondent must be able to comply with the conditional order[60] and he may not be imprisoned for debt.[61] Civil contempt *to compensate for losses sustained* due to contemptuous conduct is usually accomplished by way of an unconditional fine payable to the petitioner.[62] It should be remembered that, although

59. As an alternative to conditional fine or imprisonment to coerce compliance, it is highly likely that courts will support the conditional denial of some of the normal rights or privileges of litigation such as striking pleadings, refusing to permit appeals, or otherwise limiting one's participation in a trial while one remains in contempt. Fed. R. Civ. P. 37(b)(2); United States v. 3963 Bottles, More or Less, of Enerjol Double Strength, 265 F.2d 332 (7th Cir.), *cert. denied,* 360 U.S. 931 (1959); Trans World Airlines, Inc. v. Hughes, 332 F.2d 602 (2d Cir.), *cert. granted,* 379 U.S. 912 (1965). In recent years, innovative forms of coercive civil contempt sanctions have been approved by federal courts opening up new possibilities for the development of coercive sanctions. Like the conditional denial of some of the rights of litigation, these new sanctions would *deprive* a violator of his holding public office, Lance v. Plummer, 353 F.2d 585 (5th Cir. 1965), *cert. denied,* 384 U.S. 924 (1966), or of receiving public funds, Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972), until such time as court orders were obeyed or complied with.

60. Application of McCausland, 130 Cal. App. 2d 708, 279 P.2d 820 (1955). In that case, respondent had failed to obey a court order to pay a sum of money to petitioner. In a civil contempt proceeding, the respondent was ordered to prison until he complied. The order of conditional imprisonment was reversed on appeal on the ground that there had been no finding that the respondent was able to obey the injunction. *See also* Reeves v. Crownshield, 274 N.Y. 74, 8 N.E.2d 283 (Ct. App. 1937); Shillitani v. United States, 384 U.S. 364, 371 (1966); Williams v. Illinois, 399 U.S. 235 (1970). Inability to comply with a judicial order is an affirmative defense in all contempt actions, civil and criminal. This means that the burden of proof is on the contemnor who often has only his uncorroborated testimony to offer. There is always the possibility that he may be placed in jail on an indefinite, coercive sentence even though there is no way he can comply with the decree. This problem is discussed in Dobbs, *supra* note 2, at 266-67.

61. Imprisonment for debt is forbidden by most state constitutions although some states permit imprisonment where the debtor is guilty of fraud, e.g., Cal. Const. art. 1, §15. State laws governing imprisonment for debt are followed in the federal courts. *See* 28 U.S.C. §2007 (1970); Fed. R. Civ. P. 64.

Exceptions to this limitation exist when courts exercising equity powers issue certain kinds of in personam decrees ordering a defendant to pay money. Such orders, being directions to pay and not mere declarations of a debt are within the general class of orders enforceable by civil contempt powers. Likewise, claims based on fraud or breach of a fiduciary duty are not considered "debts." *See generally* Cook, *The Powers of Courts of Equity,* 15 Col. L. Rev. 37 (1915).

62. This sanction is available only if petitioner wins his action in the original suit on the merits. *But see* Lance v. Plummer, 353 F.2d 585 (5th Cir. 1965), *cert. denied,* 384 U.S. 929 (1966), in which an auxiliary deputy sheriff was found in contempt for disobeying an interlocutory injunction and was ordered to pay to the attorney for the other party $200 to cover the fee costs of the proceeding.

Compensation for losses sustained has been held to include profits "as an equitable measure of compensation" in a patent infringement case, in effect permitting an "unjust enrichment fine" measured by defendant's gain rather than by the plaintiff's loss. Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448 (1932). We see here an example of the broader relief obtainable in equity as contrasted with law. *See also* Sunbeam Corp. v. Golden Rule Appliance Co., 252 F.2d 467 (2d Cir. 1958).

Although federal courts have used or permitted the compensatory fine as a civil contempt

all civil contempt proceedings are equitable and hence discretionary with the court, not all civil contempt proceedings are instituted and tried as part of and between the original parties to the main equity suit.[63]

In the *United Mine Workers* case, it will be recalled that the fine the Court imposed upon the union was of two kinds: $700,000 as damages for the injury already done by the strike and $2,800,000 *in terrorem* to secure its discontinuance. The Court agreed that, in fixing the amount of the second fine, it should consider the amount of the defendant's financial resources and the consequent seriousness of the burden to that particular defendant. But this second fine was only a means of securing future compliance; it was imposed conditionally and depended upon the contemnor's future conduct.

An *in terrorem* fine differs from the usual conditional fine which exacts a sanction until there is compliance; for example, where the court starts the meter running on the fine, the contemnor will have to pay until he complies or promises to comply. In the typical conditional sentence of imprisonment or fine, execution of the sanction starts at the moment the court determines there is a violation. The typical example is a civil contempt fine for alimony. H is ordered to pay a certain sum to W. A Claim is made that H has violated the injunction. The court finds that there has been a violation and orders H to remain in jail or to pay fines until he complies or promises to comply. The *in terrorem* fine or imprisonment, on the other hand, is exacted only after the court has found that H has violated the "civil contempt order."[64] This order is an additional step in the pro-

sanction only some states permit this absent statutory authority. *See* Schoenthal v. Schoenthal, 138 So.2d 802 (Fla. Dist. Ct. App. 1962); Grunberg v. Louison, 343 Mass. 729, 180 N.E.2d 802 (1962). Some states provide for compensatory contempt fines by statute, *e.g.*, N.Y. Judiciary Law § 773 (McKinney 1968). In California, where contempt proceedings of whatever nature are governed by statute, Cal. Civ. Proc. Code §§1209-1222 (West 1972), there is no provision for any remedial fine, conditional or unconditional. Under the California approach, any compensatory award to the injured party depends upon an ordinary action at law. Since civil contempts are not tried before a jury, the feeling is that civil actions for the recovery of money should be tried in an ordinary lawsuit where a jury is provided. *See* H. J. Heinz Co. v. Superior Ct., 42 Cal.2d 164, 266 P.2d 5 (1954).

63. In the usual case, the moving party has obtained as in personam order as part of his relief in an equity cause and such order has been disobeyed or disobedience is threatened by the other party. Apart from this, disobedience to a court order can also come about in legal (as distinct from equitable) proceedings, both civil and criminal through actions such as refusing to answer questions during a trial, violating a pre-trial order, etc.

64. N.L.R.B. v. Truck Drivers & Helpers, Local Union 676, 450 F.2d 413 (3d Cir. 1971). In that case, the N.L.R.B. obtained an injunction against secondary boycotts by the union. Later, the same court found the union in contempt, again enjoined it from secondary boycotts, and assessed a prospective fine of $5,000 if the union failed to comply in the future with the injunction order and an additional fine of $500 per day upon such proof of future non-compliance. The union persisted in defying the court order and, upon proof of

cedure: the court repeats the initial injunction and spells out what the sanction will be if there is another violation. This new step which does no more than make explicit and quantify the threat of sanction implicit in the initial injunction is the identifying mark of the *in terrorem* sanction and has created some interesting problems for the courts.

In *Jencks v. Goforth,*[65] a suspended sentence of imprisonment was revoked after defendants were found to have violated the terms of a *civil contempt order,* the hallmark of an *in terrorem* sanction.[66] The New Mexico Supreme Court held this to be a proper civil contempt sanction.

> As of the day this particular decree was entered, and *it is that day which controls,* the decree was truly coercive; as to the imprisonment for ninety days, there was no single one of the defendants unable to purge himself by obedience to the court's order. This we believe to be literally true and further believe it to satisfy the ancient test of "having the keys to the prison." A phrase such as this must implement the law, not control it. (Emphasis added.)[67]

It is true that when the suspended sentence was imposed, defendants could have complied and thus could have completely avoided the later revocation. But why should the ability to purge on that day control the proper procedure to be used in a later revocation hearing?

The court seems to miss the main issue in this case. It is not a

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this disobedience, the court exacted the above two fines and entered a new prospective coercive fine for future violations considerably higher than the fines imposed before. This illustrates the kind of gradual pressure for coercion that a court of equity is able to exert by use of the *in terrorem* fine. *In terrorem* fines have been used by later courts primarily in a business competition context where it can be a very effective means of securing compliance. *See* Sunbeam Corp. v. Golden Rule Appliance Co., 252 F.2d 467 (2d Cir. 1958); Singer Mfg. Co. v. Sun Vacuum Stores, Inc., 192 F. Supp. 738 (D.N.J. 1961).

65. 57 N.M. 627, 261 P.2d 655 (1953).

66. The court in *Jencks* reviewed the same position reiterated in Local 890, Mine, Mill & Smelter Workers v. New Jersey Zinc Co., 58 N.M. 416, 272 P.2d 322 (1954). In that case, the New Jersey Zinc Company brought an action against a union and associated members to enjoin trespassing and blocking of roads. An injunction was issued and the company filed a motion for a show cause order alleging violations had taken place. After a hearing, the trial judge found that the defendants had violated the injunction and held them in contempt. He fined them $4,000 each and sentenced individuals to ninety days in jail, with the proviso, however, that half the fine and all the jail sentence would be remitted or suspended if no further violations took place in the succeeding year. Further violations did take place within the year and the trial court appointed three attorneys amici curiae, and issued an order requiring defendants to show cause why the order suspending their sentences should not be revoked for violation of the suspension order. After a hearing (conceded by all to be a civil contempt proceeding), the trial court made an order revoking the suspension and sentencing each of the defendants to ninety days in the County jail.

67. Jencks v. Goforth, 57 N.M. at 636-37, 261 P.2d at 661.

question of *what day* is realistic for assessing whether a decree is coercive or not. There is no more obvious reason for looking to the date when the suspended sentence is first imposed than there is to look to the date when the suspension is revoked and the sentence actually enforced.[68] The real issue is the proper procedure to be followed in a hearing which is neither coercive nor remedial. Such hearing we know from past decisions must be conducted largely according to the rules of criminal procedure. If the criminal procedures are not used, a determinate sentence, such as imprisonment for a given number of days or a fine of a set amount, is not proper.[69]

The appeals court in *Jencks* was able to arrive at its decision only after first distinguishing *Gompers:*

> The *Gompers* case . . . has been taken to say that a civil contempt proceeding cannot result in imprisonment for a definite period of time. If this is literally true, then the sentence here involved . . . was necessarily in error. The theory in support of this contention is, of course, that the imprisonment can only be punishment for a past act and, therefore, improper in civil contempt. The argument is logical and the language of the *Gompers* case supports it. In our judgment, however, the *Gompers* case does not pass upon the question before us.[70]

The court then pointed out that *Gompers* was dealing with a civil contempt decree in which, having found a violation of its order, the trial court *then and there* sentenced individuals to fixed terms of imprisonment. Since this could only be punishment for a past act, the sentence was erroneous. The New Mexico appeals court turned then to *United Mine Workers* for its authority.

> In this decision, the Supreme Court of the United States has used a conditional fine as a proper civil contempt sentence. Obviously, in the event of the failure of the union to obey and purge itself, the fine of $2,800,000 would become final and payment be enforced.

68. A number of writers have suggested that the governing date should be the date on which the suspension was revoked, not the earlier date on which the sentence was first suspended. *See generally* 67 Harv. L. Rev. 889 (1954); 39 Minn. L. Rev. 447 (1955); 1 U.C.L.A. L. Rev. 220 (1954). This seems more sensible in view of the fact that, in *Jencks,* the violations took place and the original suspended sentence revoked long after the controversy between the company and the union had been settled. Query: as a practical matter, is it wise to leave the punished party in a state which may seriously impair the on-going relations of the parties?

69. Here the reasoning is from the procedure used to the type of contempt for which certain limited sanctions are permitted. One might as well reason from the sentence meted out that the case was civil or criminal and that the procedure should be adjusted accordingly. What is important is that a reviewing court be able to reverse when the procedure and sentence are not compatible. *See also* Moskovitz, *supra* note 24.

70. 57 N.M. at 635-36, 261 P.2d at 655.

> At that time, the moment at which this penalty becomes final, it is primarily punitive; no one will contend, however, that for this reason the Supreme Court was in error in its decision and *unable to enforce the fine in the event of continued disobedience.* (Emphasis added.)[71]

Here again, the New Mexico Supreme Court misses the issue. The issue is not enforcement of disobeyed conditional orders. Of course, such orders need to be enforced but only after a hearing in which the party charged with contempt, knowing that a punitive, non-coercive sanction may be imposed, is afforded all of the usual criminal procedural safeguards—proof beyond a reasonable doubt, party charged cannot be required to testify against himself, proof of criminal intent, and so forth.

It is submitted that the rule in *Gompers* that a civil contempt proceeding cannot result in an imprisonment for a definite period of time should hold equally for *Jencks.* Any proceeding to exact a determinate penalty, be it disobedience for an order of injunction or for an order of civil contempt, should be categorized as a criminal contempt proceeding. What the courts in *Jencks* seems to forget is that defendants in *United Mine Workers* were "fully informed that a criminal contempt charge was charged" and "enjoyed during the trial itself all the enhanced protections accorded defendants in criminal contempt proceedings."[72] This was certainly not the situation in *Jencks* so that *United Mine Workers* was not the proper case for the court to find "full authority" for its decision.[73]

Another type of problem arising from use of the civil contempt sanction is one exemplified by the case of *McComb v. Jacksonville Paper Company.*[74] This was an injunction action relating to the payment of wages and overtime pay to certain employees brought by the federal Administrator against an employer under the Fair Labor Standards Act. A decree was entered providing a formula by which the amounts that became due were to be computed and directed the employer to obey the provisions of the Act dealing with minimum wages, overtime and the keeping of records.[75] By its terms it enjoined any practices which were violations of those statutory provisions. Employer took no appeal from this order. Several years later, the Administrator instituted a contempt proceeding alleging that the employer had not complied with the minimum wage, overtime and

71. *Id.* at 637, 261 P.2d at 661.
72. *United Mine Workers,* 330 U.S. at 298.
73. 57 N.M. at 637, 261 P.2d at 661.
74. 336 U.S. 187 (1949).
75. *Id.* at 189.

bookkeeping provisions of the judgment and asked the District Court to order the employer to pay unpaid statutory wages to employees. The court found that the employer had violated the provisions of the decree by following a plan which was not specifically enjoined. The decree itself was couched in terms of the Act. However, both the federal district court and U.S. Court of Appeals did not find the employer in civil contempt because there was no "willful contempt" since neither the law nor the injunction specifically referred to or condemned the practices which were found to violate the decree.[76] The District Court further held that it had no power on the application of the Administrator to enforce compliance with its former decree by ordering back wages to employees. However, Justice Douglas writing for the majority reversed the conclusion of the two lower courts that there was no contempt because there was no disobedience to the injunction. He made the following points in his decision.

> First. The absence of wilfulness does not relieve from civil contempt. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree . . . laid on them a duty to obey specified provisions of the statute.[77]
>
> Second. Decrees of that generality [directing the respondents to obey certain provisions of an Act] are often necessary to prevent further violations *where a proclivity for unlawful conduct has been shown.* They took a calculated risk when under the threat of contempt they adopted measures designed to avoid the legal consequences of the Act. Accordingly where as here the aim is remedial and not punitive there can be no complaint that the burden of any uncertainty in the decree is on respondent's shoulders. (Emphasis added.)[78]
>
> Third. The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief. The fact that another suit might be brought to collect payments [Section 16(b) of the Act authorizes suits by employees to recover wages and overtime unlawfully withheld] is, of course, immaterial. The fact that the Administrator is the complainant and that the back wages go to the employees is not material. It is the power of the court with which we are dealing . . . .[79]

In a sharply worded dissent, Justice Frankfurter joined in by Justice Jackson reminded the Court that:

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76. *Id.* at 190, 191.
77. *Id.* at 191.
78. *Id.* at 192.
79. *Id.* at 193-95.

> For violation of the command of an injunction under the Act, . . . [one] may not only be exposed to more severe civil penalties than the Act by its own terms imposes, but made to suffer imprisonment without benefit of jury trial. It is for such reasons that this Court has indicated again and again that *a statute cannot properly be made the basis of contempt proceedings merely by incorporating a reference to its broad terms into a court order.* These considerations become increasingly important as there is increasing use of injunctions for the enforcement of administrative orders and statutory duties. (Emphasis added.)[80]

and warned that "the Court is rendering a decision of far-reaching import to the law of injunctions." Some years later in *Walker v. City of Birmingham,*[81] the Court did indeed find itself split on First Amendment issues arising from an injunction enjoining petitioners from certain conduct as required by a Birmingham ordinance. While the two cases are quite dissimilar, the fact is that in both punishment was permitted and rights lost under an injunction incorporating a statute which would not have been issued had Justice Frankfurter's admonition been followed.

CONCLUSION

In recent years, public attention has focused on the criminal contempt sanction, in particular, on enforcing courtroom order. While the power of judges to apply punitive sanctions to persons who obstruct or interfere with orderly procedures remains considerable, severe penalties have been circumscribed by criminal procedural protections, including the right to a jury trial in all criminal contempts involving serious penalties.

Civil contempt, by contrast, affords a contemnor only minimal due process rights. Yet coercive punishment in certain situations can be every bit as severe as a criminal sanction.[82] While theoretically, the power to coerce is assumed to be exercised on behalf of a party, in reality any disobedience to a court is an act of disrespect which invites a punitive response to vindicate the authority of the court.

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80. *Id.* at 195-96.

81. 388 U.S. 307 (1967). "Petitioners in this case contend that they were convicted under an ordinance that is unconstitutional on its face . . . . They further contend that the ordinance was unconstitutionally applied to them . . . . The Court does not dispute these contentions, but holds that petitioners may nonetheless be convicted and sent to jail because the patently unconstitutional ordinance was copied into an injunction–issued ex parte without prior notice or hearing . . .–forbidding all persons having notice of the injunction to violate the ordinance without any limitation of time." *Id.* at 324 (dissenting opinion).

82. *E.g.,* indefinite imprisonment conditioned on compliance with a court order where defiance is based on principled belief.

> The circumstances—often expressed in the observation that the defendant "carries the key to his own prison"—has been advanced as a reason why procedure is not of substantial concern to civil contempt defendants .... It should be recognized that, while the operation of the sanction may be prospective or conditional, the matter at issue is not the defendant's future activity but his past conduct. A court is without power to impose a contempt sanction unless a violation has already occurred. Thus, a civil contempt order, like a criminal conviction, embodies a condemnation of the defendant's past conduct. Accordingly, a court's imposition of a contempt sanction may seem more like an original determination of the unlawfulness of a course of conduct of crucial importance to the defendant and in which he has engaged in good faith, than like a simple compulsion to obey the law in the future.... Under such circumstances the contention that the defendant has no substantial interest in the procedure afforded him to dispute an assertion that his conduct violated the injunction is unconvincing.
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> There is no necessary correlation between the severity of the burden imposed on the defendant by a coercive or deterrent civil contempt sanction and the cost of making the complainant whole; nor is there any assurance that the imposition of such a sanction will inure to the complainant's benefit. Rather the term of a coercive imprisonment or per diem fine is inherently tied to the exigencies of compelling obedience. Such an order is analogous to a penal statute in that it attempts to evaluate the quantum of state power necessary to coerce obedience to or deter disobedience of the law, and thus requires the exercise of legislative judgment. It appears then that these sanctions are designed to protect the interest of the state in vindicating its authority as well as that of the complainant in obtaining redress. This consideration, taken together with the possibility of stigma which may result from the imposition of sanctions similar in form to criminal punishment, suggests that *ordinary civil practice should not necessarily be determinative of the procedures afforded in cases of civil contempt* .... (Emphasis added.)[83]

83. Note, *Procedures for Trying Contempts in the Federal Courts,* 73 Harv. L. Rev. 353, 354-357 (1959). *Cf.* Wright, Byrne, Haake, Westbrook & Wheat, *supra* note 11, at 180-81. "It is apparent that the value of [abolishing the distinction between civil and criminal contempt] depends upon the procedural safeguards which surround the proceeding. On the one hand, there is the consideration that whether the judgment of the court be punitive or coercive in nature, the court is always relying (except in those cases involving a compensatory fine) upon a sanction which is traditionally regarded as criminal in nature. On the other hand, if such procedural safeguards as the requirement of proof beyond a reasonable doubt [required in criminal proceedings as compared to clear and convincing evidence in civil contempt] and the privilege against self-incrimination are invoked, the rights of a private litigant seeking to obtain compliance with an injunction may be seriously jeopardized.... Justice to the private litigant under these circumstances would seem to require that his burden be no greater than in the civil proceeding which gave rise to his right in the first instance."

It is for these reasons that the civil contempt power may be regarded as an anomoly and as a "sleeper" in our law: providing opportunities for enforcing obedience not available to other remedies, assuming forms as yet untried, yet limited only by the "necessity of the case" and the "least possible power" to accomplish the desired end.