The Coercive Function of Civil Contempt

"Coercive imprisonment" is a sanction which courts may use to enforce compliance with orders and decrees that constitute a final adjudication between parties[1] and, in the fact-finding process, to obtain information from unwilling witnesses.[2] Upon noncompliance with an order, the party for whose benefit it was issued may institute a proceeding to imprison the opposing party until compliance is obtained. Questions of fact must be determined at this proceeding, yet the recalcitrant party is afforded no criminal safeguards. It is the thesis of this comment that in many of its current applications coercive imprisonment is undesirable and, because it involves imprisonment without criminal safeguards, in some situations unconstitutional as well.

Coercive imprisonment today is viewed as one of the sanctions available to a court of general jurisdiction through its "contempt power."[3] The fundamental dichotomy is between criminal and civil

1 Coercive imprisonment is used recurrently in certain factual situations. For example, it is used to ensure compliance with alimony decrees. See, *e.g.*, Harkins v. Harkins, 127 N.W.2d 87 (Iowa 1964); Hurd v. Hurd, 63 Minn. 443, 65 N.W. 728 (1896); Smiley v. Smiley, 99 Wash. 577, 169 Pac. 962 (1918). In bankruptcy, it may be used to enforce orders to turn over assets to the trustee. See, *e.g.*, Maggio v. Zeitz, 333 U.S. 56 (1948); Oriel v. Russell, 278 U.S. 358 (1929). Coercive imprisonment is often used to gain compliance with injunctions. See, *e.g.*, United States v. UMW, 330 U.S. 258 (1947); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); United States v. Debs, 64 Fed. 724 (N.D. Ill. 1894). However, due to fears of conflict with prohibitions against imprisonment for debt, coercive imprisonment is seldom used to enforce ordinary damage actions.

2 It is used to enforce orders to appear and testify. See, *e.g.*, McCrone v. United States, 307 U.S. 61 (1939); Fox v. Capitol Co., 299 U.S. 105 (1936). Such procedure has seen increasing application in aiding grand jury investigations. See WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 2308. See also account of imprisonment of Momo Giancana, Chicago Sun-Times, June 2, 1965, p. 3, col. 1; *Id.*, Sept. 17, 1965, p. 28, col. 1. Coercion may also be used to enforce orders to present books and records. See, *e.g.*, Penfield Co. v. SEC, 330 U.S. 585 (1947).

3 This label is currently applied to an array of sanctions a court may impose to enforce compliance with its orders and to maintain its dignity. Courts assume that absent legislation they have an inherent power to imprison coercively. See Doyle v. London Guar. & Acc. Co., 204 U.S. 599 (1907); *In re* Lee, 170 Md. 43, 183 Atl. 560 (1936); State *ex rel.* Beck v. Frontier Airlines, Inc., 174 Neb. 172, 116 N.W.2d 281 (1962); Upper Lakes Shipping, Ltd. v. Seafarers' Int'l Union, 22 Wis. 2d 7, 125 N.W.2d 324 (1963). An historical argument favoring this position is that the English Chancellor from as early as the time of Richard III could imprison until his orders were complied with. The argument can also be made that coercive imprisonment is necessary in order to maintain the independence of the judiciary; that is, a court which could not enforce its own orders would be powerless and at the mercy of the other branches of government. See State *ex rel.* Beck v. Frontier Airlines, Inc., *supra*. Contempt, however, has also been a matter for legislation. See, *e.g.*,

contempt:[4] while a defendant in a criminal contempt proceeding has almost all the safeguards of a normal criminal defendant[5] except the right to indictment and trial by jury,[6] the civil contemnor has only the rights of any civil litigant.[7] The civil contemnor is entitled neither to a

the general federal contempt statutes: 18 U.S.C. § 401 (1958) (power of court); 18 U.S.C. § 402 (1958) (contempts constituting crimes); 18 U.S.C. § 3691 (1958) (jury trial of criminal contempts); 18 U.S.C. § 3692 (1958) (jury trial for contempt in labor dispute cases). These statutes, like many state statutes, are unclear as to whether they apply solely to criminal contempt or whether they are also applicable to civil contempt. The better view, however, is that limitations which these statutes place on the contempt power are inapplicable to coercive imprisonment. See, *e.g.*, Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry., 266 U.S. 42 (1924); Alexander v. United States, 173 F.2d 865 (9th Cir. 1949) (rules of criminal procedure inapplicable); *In re* Sixth & Wis. Tower, Inc., 108 F.2d 538, 542 (7th Cir. 1939) (Evans, J. concurring); Odell v. Bausch & Lomb Optical Co., 91 F.2d 359 (7th Cir. 1937). See also 54 HARV. L. REV. 137 (1940). There have been scattered statements to the contrary. See, *e.g.*, Penfield Co. v. SEC, 330 U.S. 585 (1947) (which assumed only arguendo that the statute was applicable); Estes v. Potter, 183 F.2d 865 (5th Cir. 1950); United States v. Montgomery, 155 F. Supp. 633 (D. Mont. 1957). However, the fact that since the 1952 revision of titles 28 and 18, all general contempt statutes have appeared in title 18—"Crimes and Criminal Procedure"—reinforces the view that the provisions are applicable only to criminal contempt.

4 See Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); McCann v. New York Stock Exch., 80 F.2d 211 (2d Cir. 1935). As to the standards that are used to distinguish civil from criminal contempt actions, see Wright, Byrne, Haach, Wetbrook & Wheat, *Civil and Criminal Contempt in the Federal Courts*, 17 F.R.D. 167 (1955); Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161 (1908); Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780 (1943); Note, *Civil and Criminal Contempt in the Federal Courts*, 57 YALE L.J. 83 (1947).

5 The criminal contemnor may be pardoned. *Ex parte* Grossman, 267 U.S. 87 (1925); *In re* Mullee, 17 Fed. Cas. 968 (No. 9911) (C.C.S.D.N.Y. 1869). The state cannot appeal from an acquittal. United States *ex rel.* West Virginia–Pittsburgh Coal Co. v. Bittner, 11 F.2d 93 (4th Cir. 1926); Plumb v. Plumb, 372 S.W.2d 771 (Tenn. App. 1962). *But see*, Welborn v. Mize, 107 Ga. App. 427, 130 S.E.2d 623 (1963). The defendant may refuse to testify. Hammond Lumber Co. v. Sailors' Union, 167 Fed. 809 (C.C.N.D. Cal. 1909); *cf.* Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry., 266 U.S. 42, 66 (1924); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911). *But see*, Merchants' Stock & Grain Co. v. Board of Trade, 201 Fed. 20 (8th Cir. 1912). The defendant is presumed to be innocent. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911); Cliett v. Hammonds, 305 F.2d 565 (5th Cir. 1962); United States v. Balaban, 26 F. Supp. 491 (N.D. Ill. 1939). His guilt must be proven beyond a reasonable doubt. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911); Cliett v. Hammonds, 305 F.2d 565 (5th Cir. 1962); United States v. Pollack, 201 F. Supp. 542 (W.D. Ark. 1962).

6 The absence of a right to trial by jury in criminal contempt cases has been subjected to increasingly critical scrutiny. See United States v. Barnett, 376 U.S. 681, 724 (1964) (Black, J., dissenting); Green v. United States, 356 U.S. 165, 193 (1958) (Black, J., dissenting); Ballantyne v. United States, 237 F.2d 657, 666 (5th Cir. 1956) (Cameron, J., dissenting in part); Farese v. United States, 209 F.2d 312 (1st Cir. 1954). The dictum in United States v. Barnett, *supra*, at 694-95 n.12, suggests that the Court will no longer permit the imposition of long term criminal contempt sentences without trial by jury. See generally Tefft, *United States v. Barnett: "'Twas a Famous Victory"*, 1964 SUP. CT. REV. 123.

7 Not even Mr. Justice Black, the most consistent opponent of contemporary criminal contempt practices, questions "the power of courts to impose conditional imprisonment

trial by jury[8] nor to a fifth amendment right to refuse to testify,[9] and he is not favored by a presumption of innocence.[10] The "burden of proof lies somewhere between the criminal 'reasonable doubt' and the civil 'fair preponderance' burden";[11] it is heavy, but less than that required for criminal conviction. Furthermore, in many jurisdictions the burden of proving an affirmative defense is on the defendant.[12]

In spite of the greater procedural protection afforded the criminal contemnor, coercive imprisonment is more harsh in its post-trial treatment of the defendant than is a criminal proceeding. Because confinement may continue until compliance,[13] the civil contemnor's open-ended sentence theoretically can continue indefinitely and with no opportunity for executive clemency.[14] In addition, there is danger of double jeopardy in a nontechnical sense: although no appeal may be taken from the acquittal of a criminal defendant, a decision favorable to an alleged contemnor in a coercive imprisonment proceeding is appealable.[15] Such radical differences in the rights of the defendant depending on the classification of the proceeding can only be justified by corre-

for the purpose of compelling a person to obey a valid order." Green v. United States, 356 U.S. 165, 197 (1958) (Black, J., dissenting). *But see* GOLDFARB, THE CONTEMPT POWER 168-74 (1963). The civil contemnor of course is entitled to those fourteenth amendment safeguards applicable to all judicial proceedings. For example, the contemnor has a due process right to notice and an opportunity to present a defense. Parker v. United States, 153 F.2d 66 (1st Cir. 1946); Boyd v. Glucklich, 116 Fed. 131 (8th Cir. 1902); Philippe v. Window Glass Cutters League, 99 F. Supp. 369 (W.D. Ark. 1951); In the Matter of Von Gerzabek, 58 Cal. App. 230, 208 Pac. 318 (1922).

8 United States v. UMW, 330 U.S. 258 (1947) (by implication); Odell v. Bausch & Lomb Optical Co., 91 F.2d 359 (7th Cir. 1937).

9 Merchants' Stock & Grain Co. v. Board of Trade, 201 Fed. 20 (8th Cir. 1912); American Pastry Prods. Corp. v. United Prods. Corp., 39 F.2d 181 (D. Mass. 1930).

10 Coca-Cola Co. v. Feulner, 7 F. Supp. 364 (S.D. Tex. 1934).

11 In the Matter of Dresden, 177 F. Supp. 339, 344 (S.D.N.Y. 1959). The burden has been described as being met by "clear and convincing evidence," Fox v. Capitol Co., 96 F.2d 684, 686 (3d Cir. 1938), or by "something more than a bare preponderance," Kansas City Power & Light Co. v. NLRB, 137 F.2d 77, 79 (8th Cir. 1943). *But see* Quezada v. Superior Court, 171 Cal. App. 2d 528, 340 P.2d 1018 (1959), where proof beyond a reasonable doubt was required of a complainant in a civil contempt proceeding.

12 See, *e.g.*, Cutting v. Van Fleet, 252 Fed. 100 (9th Cir. 1918); Dishinger v. Bon Air Catering, Inc., 336 Ill. App. 557, 84 N.E.2d 562 (1949); State *ex rel.* City of Minneapolis v. Minneapolis St. Ry., 154 Minn. 401, 191 N.W. 1004 (1923); Drake v. National Bank of Commerce, 168 Va. 230, 190 S.E. 302 (1937). This is especially true in the alimony situation where the majority of states place the burden on the contemnor to prove the affirmative defense of inability to perform. See Annot., 53 A.L.R.2d 607 (1957), for a listing of cases.

13 See Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); Parker v. United States, 153 F.2d 66 (1st Cir. 1946).

14 *In re* Nevitt, 117 Fed. 448 (8th Cir. 1902); Miller v. Rivers, 31 F. Supp. 540 (M.D. Ga. 1940).

15 Lamb v. Cramer, 285 U.S. 217 (1932).

sponding differences in the "character and purpose" of the proceedings.[16]

Criminal contempt is punitive.[17] By punishing acts of disrespect and disobedience, criminal contempt vindicates the court's honor and thus protects "the public interest in the effective functioning of the judicial system."[18] On the other hand, civil contempt preceedings do not seek to punish the defendant, but rather to benefit the complainant:[19] the remedial measures applied are either compensatory or coercive;[20] compensatory measures benefit the complainant directly,[21] while coercive

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16 Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911); *accord,* Nye v. United States, 313 U.S. 33 (1941); McCrone v. United States, 307 U.S. 61 (1939); Bessette v. W. B. Conkey Co., 194 U.S. 324 (1904); MacNeil v. United States, 236 F.2d 149 (1st Cir. 1956). Unfortunately courts often place reliance on other indicia as aids in classification and thus lose sight of the reason for classification. Among these indicia are: (1) Who is the complainant? If he is a private party, it is an indication that the proceeding is civil. See Raymor Ballroom Co. v. Buck, 110 F.2d 207 (1st Cir. 1940). If the complainant is the government, it is an indication that the proceeding is criminal. See United States *ex rel.* West Virginia-Pittsburgh Coal Co. v. Bittner, 11 F.2d 93 (4th Cir. 1926). However, the United States may be a party to a civil contempt proceeding when the purpose of the proceeding is to coerce performance. See United States v. UMW, 330 U.S. 258 (1947); McCrone v. United States, 307 U.S. 61 (1939). (2) How is the proceeding styled? Civil contempt proceedings are ancillary to the main cause of action and are captioned in that cause, while a separate caption is used in the criminal proceeding. See *In re* Door, 195 F.2d 766 (D.C. Cir. 1952). (3) What is the nature of the court's order? Proceedings to coerce compliance with a mandatory injunction are civil, while punishment for violation of a restraining order is criminal.

Courts should be particularly careful to avoid the circularity of deeming a proceeding civil because a right that a defendant deserves in a criminal proceeding has been denied. Rather, the purpose of the contempt proceeding must be determined, then the suitability of the methods used can be evaluated.

17 See Nye v. United States, 313 U.S. 33, 42-43 (1941); *In re* Nevitt, 117 Fed. 448, 458 (8th Cir. 1902).

18 Juneau Spruce Corp. v. International Longshoremen's Union, 131 F. Supp. 866, 871 (D. Hawaii 1955).

19 See United States v. UMW 330 U.S. 258 (1947); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); MacNeil v. United States, 236 F.2d 149 (1st Cir. 1956); Parker v. United States, 126 F.2d 370 (1st Cir. 1942).

20 This distinction was drawn in United States v. UMW, 330 U.S. 258, 303-04 (1947); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 448-49 (1911).

21 The most common form of compensatory relief is the imposition of a "fine payable to an aggrieved litigant as compensation for special damages he may have sustained by reason of the contumacious conduct of the offender." Parker v. United States, 126 F.2d 370, 380 (1st Cir. 1942). A litigant is usually considered entitled to demand remedial relief. Penfield Co. v. SEC, 330 U.S. 585 (1947); Yanish v. Barber, 232 F.2d 939 (9th Cir. 1956); *cf.* Parker v. United States, 153 F.2d 66 (1st Cir. 1946). However, some courts in the absence of statutory authority refuse to allow compensatory contempt awards. See Kasparek v. May, 174 Neb. 732, 119 N.W.2d 512 (1963); Edrington v. Pridham, 65 Tex. 612 (1886); *cf.* State *ex rel.* Lanning v. Lonsdale, 48 Wis. 348, 4 N.W. 390 (1880). States which do not provide statutory authority fear that the granting of compensatory fines for contempt

measures influence the defendant to act in a way that will ultimately benefit the moving party.

Although these categories appear to be distinct, the lines separating criminal from civil contempt and compensatory from coercive civil proceedings are far from clear. Courts frequently misuse the terms, such as when they speak of punishment for remedial purposes,[22] and thus engender confusion. Since different categories of contempt sanctions may be employed concurrently in many factual situations, there is further opportunity for confusion. A contempt proceeding may have both criminal and civil elements,[23] and noncompliance with a compensatory measure may provoke coercive ones.[24] Furthermore, a single sanction may fulfill more than one purpose; a *per diem* fine payable to a complainant is both compensatory and coercive, since it both reimburses the complainant and puts pressure on the defendant to comply. Moreover, even coercive measures ostensibly imposed solely for the benefit of the complainant also serve to uphold the dignity of the court by indicating that orders will be enforced. But this incidental effect is insufficient to require the classification of all coercive imprisonment as punitive, just as all tort actions are not punitive simply because they too deter certain forms of antisocial behavior. Similarly, criminal contempt has an implicit civil effect because fear of punishment may coerce the action desired by a particular complainant.[25]

However, the difficulty and inexactitude of classification does not diminish its necessity. Classification is a shorthand manner of determining what procedures and sanctions are desirable and constitutionally permissible. Thus, there is no objection to the commingling of a criminal contempt proceeding with one for civil contempt if the defendant is not thereby deprived of rights he would have enjoyed in a separate criminal contempt proceeding.[26] But the converse is not true; punitive action by the government should never be treated as civil,

would serve as a substitute for damage actions, while allowing avoidance of a jury trial at the plaintiff's discretion.

22 See United States v. Onan, 190 F.2d 1 (8th Cir. 1951); *In re* Sixth & Wis. Tower, Inc., 108 F.2d 538 (7th Cir. 1939); Coca-Cola Co. v. Feulner, 7 F. Supp. 364 (S.D. Tex. 1934). Particularly troublesome in this respect are statutes which refer to civil contempt by such phrases as "to punish as for contempt." See, *e.g.*, N.C. GEN. STAT. §§ 5-8 (1953).

23 See, *e.g.*, United States v. UMW, 330 U.S. 258 (1947); *In re* Swan, 150 U.S. 637 (1893).

24 See Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); Parker v. United States, 126 F.2d 370 (1st Cir. 1942); Raymor Ballroom Co. v. Buck, 110 F.2d 207 (1st Cir. 1940); Trotcky v. Van Sickle, 227 Ind. 441, 85 N.E.2d 638 (1949).

25 See Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 443 (1911).

26 See United States v. UMW, 330 U.S. 258 (1947). A defendant might prefer for the proceeding to be categorized as civil. The time for appeal, for example, might be greater in a civil than in a criminal case.

thereby depriving the defendant of the protection of criminal procedure, even if the action has a remedial aspect.[27]

Although the differences in treatment of the defendant in civil and criminal contempt have frequently been noted, the essential question is rarely asked or satisfactorily answered: Why should the civil contemnor not be entitled to the same rights as the criminal contempt defendant? The usual answer to this question is that civil contemnors do not need the safeguards of criminal procedure because they "carry the keys of their prison in their own pocket."[28] However, they may not actually have the keys in their pocket. Both compliance and inability to comply are complete defenses to coercive imprisonment proceedings.[29] The contemnor may have already complied or be incapable of doing so, yet the determination of these facts is made without criminal safeguards even though imprisonment hinges on the outcome of that determination.

The better justification for the differing rights of the civil and the criminal contempt defendants rests on the function of civil contempt vis-à-vis the complaining party. Since no private party can insist that a criminal contempt citation issue,[30] the safeguards there granted the defendant do not conflict with the rights of any other party. But granting additional safeguards to the defendant in a civil contempt proceeding is directly opposed to the interests of the complainant, to whom the defendant owes a duty by reason of a prior judicial decree. Even so, allowing an individual to be imprisoned without traditional criminal safeguards seems inconsistent with modern notions of individual freedom. Resolution of this tension requires a balancing of the interests of the two parties to the proceeding.

Once a judgment on the merits has been entered, both parties have already had their day in court, and coercive imprisonment is simply used to enforce compliance with that judgment. In such cases, to grant the recalcitrant defendant in the contempt proceeding all the rights of a criminal defendant would place an unfair burden on the plaintiff's right to have his judgment enforced. An important, and perhaps the

27 See notes 36-41 *infra* and accompanying text.

28 *In re* Nevitt, 117 Fed. 448, 461 (8th Cir. 1902). Judge Sanborn's rationalization has since become a staple in the rhetoric of civil contempt.

29 Maggio v. Zeitz, 333 U.S. 56, 76 (1948); United States *ex rel.* Emanuel v. Jaeger, 117 F.2d 483 (2d Cir. 1941); United States *ex rel.* Paleais v. Moore, 294 Fed. 852 (2d Cir. 1923).

30 See McCann v. New York Stock Exch., 80 F.2d 211 (2d Cir. 1935); McCauley v. First Trust & Sav. Bank, 276 Fed. 117 (7th Cir. 1921); State *ex rel.* Reichert v. Youngblood, 225 Ind. 129, 73 N.E.2d 174 (1947). The State of Georgia stands alone in allowing private individuals to initiate criminal contempt proceedings. See Alred v. Celanese Corp., 205 Ga. 371, 54 S.E.2d 240 (1949).

only, means of enforcement would be eliminated if the complainant were unable to meet the criminal burden of proof.

It even seems peculiar that a heavier burden of proof must be carried against the civil contemnor than against the ordinary civil defendant.[31] The explanation would seem to be that burden of proof, unlike an issue such as right to jury trial, presents a question of varying degrees and not of simple alternatives. Courts that require the complainant to carry a burden greater than the ordinary fair preponderance standard probably feel that even with such treatment, judgments can still be enforced effectively.

When coercion is used in the fact-finding process to enforce subpoenas to appear and testify or to present records, a balancing of conflicting interests is also necessary because the testimony that is to be obtained may have bearing on the rights of other parties to the investigation. For example, if a bankrupt refuses to turn over books to the trustee, interests of a plaintiff-creditor might be infringed. This sort of balancing process often justifies the remedial imprisonment of uncooperative defendants and witnesses, even though the procedures followed lack the safeguards deemed necessary in cases of punitive imprisonment. Additional safeguards should be denied the defendant in order to protect the rights of a complainant.

Despite this policy justification for not granting the civil contemnor criminal safeguards, arguably the fifth and sixth amendments require that they be granted. Such arguments have generally been dismissed with the assertion that, because contempt is sui generis,[32] these amendments are inapplicable. However, since the scope of these amendments is constantly expanding,[33] the fact that they have not yet been applied to coercive imprisonment is insufficient to dispose of the constitutional argument.

For purposes of discussion, three categories of constitutional rights must be distinguished. The first category includes those due process rights, such as the right to an impartial hearing, to which all litigants are entitled. The second category includes the expressly enumerated rights secured by the sixth amendment and the fifth amendment provisions dealing with indictment, double jeopardy and self-incrimination. The last category is composed of the rights, such as a presumption

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31 See note 11 *supra*.

32 See, *e.g.*, Myers v. United States, 264 U.S. 95, 103 (1924); Bessette v. W. B. Conkey Co., 194 U.S. 324, 326 (1904); State *ex rel.* Wright v. Barlow, 132 Neb. 166, 170, 271 N.W. 282, 284 (1937).

33 See, *e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

of innocence, that are secured solely by the due process clause and have been applied only to criminal defendants.[34]

There is no question that the civil contemnor, like any civil litigant, is entitled to the first group of rights.[35] However, in spite of the widening scope of the fifth and sixth amendments, the second category of rights would seem inapplicable to coercive imprisonment proceedings which, in fact, are not punitive.[36] The sixth amendment deals only with "criminal prosecutions." Except for the "due process" and "just compensation" clauses, the language of the fifth amendment limits its application to a "criminal case," "offense," and "capital or otherwise infamous crime." Although these terms are not coextensive,[37] they all limit the application of the amendments to situations where a disability is imposed for "the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc."[38] The imposition on a defendant of a disability is not in itself sufficient to require the application of the safeguards guaranteed by these amendments. Although a defendant is entitled to those guarantees when a disability is being imposed for punitive purposes,[39] if the disability is imposed only to "accomplish some other legitimate governmental purpose"[40] no criminal safeguards need be granted.[41] When coercive imprisonment is applied only to enforce rights due others and is the sole means of enforcing those rights, it is being used for purely nonpunitive purposes.

An apt analogy may be drawn to the relationship between a tort

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34 These rights are hereinafter referred to as "criminal due process rights." By this phrase is meant only the rights of criminal defendants guaranteed by the due process clauses of both the fifth and fourteenth amendments, and not rights which are afforded the criminal defendant in state courts simply by fourteenth amendment incorporation of other, specific constitutional rights. An example of the latter is Gideon v. Wainwright, 372 U.S. 335 (1963), where the sixth amendment right to counsel was incorporated into fourteenth amendment due process.

35 He has a due process right to notice and an opportunity to present a defense; Parker v. United States, 153 F.2d 66 (1st Cir. 1946); Boyd v. Glucklich, 116 Fed. 131 (8th Cir. 1902); Philippe v. Window Glass Cutters League, 99 F. Supp. 369 (W.D. Ark. 1951); In the Matter of Von Gerzabek, 58 Cal. App. 230, 208 Pac. 318 (1922).

36 See text accompanying notes 53-67 *infra*, for examples of sanctions which are sometimes applied under the name of remedial action, but which in effect are punitive.

37 See Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at* Kennedy v. Mendoza-Martinez, 32 U. CHI. L. REV. 290, 291 n.2 (1964), and cases cited therein.

38 Trop v. Dulles, 356 U.S. 86, 96 (1958).

39 See Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Wong Wing v. United States, 163 U.S. 228 (1896).

40 Trop v. Dulles, 356 U.S. 86, 96 (1958).

41 See Helvering v. Mitchell, 303 U.S. 391 (1938); Mahler v. Eby, 264 U.S. 32 (1924). See also United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); *cf.* Johnson v. Wall, 329 F.2d 149 (4th Cir. 1964).

action and a punitive fine imposed by the government. Despite the fact that it may truly be a hardship for the defendant in a tort action to pay large compensatory damages, no one would seriously suggest that this would entitle the defendant to criminal safeguards even though an action imposing a fine of lesser amount would entitle the defendant to some of these procedural protections. The mere fact that a contemnor's imprisonment is not *quid pro quo* the loss to the complainant is no reason to discard the analogy. Rather, imprisonment to obtain what is due the complainant is analogous to the process of execution sale, to which no constitutional objections can be raised. In both, because the defendant is recalcitrant more may be exacted from him than the plaintiff receives in order to give the plaintiff what he is entitled to; the yield of an execution sale often fails to equal the price the property would bring in an unhurried, voluntary sale.

Even though an execution sale might harm an individual more than a short-term confinement, one could argue that because imprisonment is primarily a criminal sanction, fairness requires that "criminal due process rights"[42] be granted to the civil contemnor where imprisonment may result. However, imprisoning a party without such safeguards is permitted in a number of situations. For example the insane may be confined,[43] as may those with contagious diseases.[44] State constitutional provisions which deny bail in capital cases are valid when "proof of guilt was evident or the presumption thereof was great."[45] In all of these situations, strong overriding social considerations justify incarceration without the usual "criminal due process rights." Just as the hardship of imprisonment without a criminal trial may be imposed upon the insane and the diseased for the protection of society as well as for their own welfare, when coercive imprisonment is the *only* effective method of ensuring a complainant's rights it too serves social ends which, coupled with its nonpunitive character, render it permissible even without granting the defendant "criminal due process rights."

Apart from the constitutional argument, when the complainant has other equally effective but less harsh remedies against recalcitrance, coercive imprisonment cannot be justified. The deprivation of liberty

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42 See note 34 *supra* for definition of this term.

43 See Martin v. Settle, 192 F. Supp. 156 (W.D. Mo. 1961); In the Matter of Coates, 9 N.Y.2d 242, 173 N.E.2d 797, 213 N.Y.S.2d 74 (1961); *In re* Cornell, 111 Vt. 525, 18 A.2d 304 (1941).

44 See People *ex rel.* Barmore v. Robertson, 302 Ill. 422, 134 N.E. 815 (1922); *In re* Caselli, 62 Mont. 201, 204 Pac. 364 (1922); Crayton v. Larabee, 220 N.Y. 493, 116 N.E. 355 (1917).

45 See In the Matter of Berry, 198 Wash. 317, 319, 88 P.2d 427, 429 (1939); *cf.* United States *ex rel.* Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949) (Minton, J.).

is an extreme measure and should not be resorted to unless necessary to protect the complainant's rights. Thus, when a complainant can effectively proceed by ordinary attachment or garnishment proceedings policy dictates that the coercive remedy should not be available. Similarly, in the fact-finding process less severe remedies may be applied against litigants. In the federal courts, for example, pleadings may be struck or facts may be taken as established against the recalcitrant party.[46] The utilization of these alternatives should be encouraged[47] by permitting the defendant to plead them as defenses to coercive imprisonment.[48] This proposal would not impair the effectiveness of proceedings to enforce judgments, as coercive imprisonment would still be available when necessary; however, it would eliminate the possibility of coercive imprisonment being used for purely vindictive purposes.[49] The proposal is not entirely novel. In New York, it has been held that the possibility of execution of the judgment is a defense to coercive imprisonment.[50] The Supreme Court of Michigan has also stated in dictum that coercive imprisonment cannot be used when "execution, attachment or garnishment may issue, or there is *any other* adequate remedy."[51]

Although coercive imprisonment should not be used when alternative remedies are available, if it is used in such a situation it would appear to be unconstitutional unless the defendant is accorded "criminal due process rights" at the contempt proceeding. The cases have not yet reached this result, but, as noted above, the only situations in which imprisonment has been imposed without such safeguards have involved strong competing public interests, such as confining the dangerously insane. Absent such competing interests, for example where alternative

46 See FED. R. CIV. P. 37(b).

47 In some cases, because contempt proceedings were available, alternative methods of enforcement, rather than being encouraged, were only grudgingly allowed. Fisher v. Medwedeff, 184 Md. 167, 40 A.2d 360 (1944); State *ex rel.* Place v. Bland, 353 Mo. 639, 183 S.W.2d 878 (1944); Kane v. Smith, 56 Wash. 2d 799, 355 P.2d 827 (1960).

48 This proposal raises ancillary problems. For one thing, since attorney's fees may, at the judge's discretion, be granted in a civil contempt proceeding to a successful complainant, Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 447 (1911) (dictum), a similar provision should be made where alternative sanctions are employed. For another, in determining whether the alternative remedy will be equally effective the additional procedural limitations imposed on the complainant by the alternative remedy must be considered.

49 See the humorous opinion of Judge Bonynge in Politano v. Politano, 146 Misc. 792, 262 N.Y. Supp. 802 (Sup. Ct. 1933), regarding the fate of "an ignorant and penniless Italian" at the hands of a vindictive "waspish woman."

50 Hennig v. Abrahams, 246 App. Div. 621, 282 N.Y. Supp. 970 (1935), *aff'd*, 270 N.Y. 626, 1 N.E.2d 362 (1936).

51 Burton v. Wayne Circuit Judge, 325 Mich. 159, 165, 37 N.W.2d 899, 902 (1949) (emphasis added); *accord*, Carnahan v. Carnahan, 143 Mich. 390, 107 N.W. 73 (1906); Atchison, T. & S. F. R.R. v. Jennison, 60 Mich, 232, 27 N.W. 6 (1886).

remedies are available to a complainant in a coercive imprisonment proceeding, there seems to be no reason for an exception to the general notion that imprisonment without "criminal due process rights" is unconstitutional.

If criminal procedural safeguards are not afforded, it is necessary to distinguish between permissible imprisonment—that which is truly coercive—and unjustifiable, or punitive, imprisonment. Imprisonment cannot be considered coercive unless the contemnor is kept in prison only until he complies with the relevant court order.[52] However, courts occasionally impose a term of imprisonment of set duration for civil contempt.[53] This practice does not serve a coercive function and therefore is unjustified. Once committed, a contemnor would have no incentive to comply with the order. The Wisconsin Supreme Court has recently indicated that it would allow the imposition of a flat six-month term of imprisonment in the name of civil contempt "to deter the contemnor from repeating his misconduct."[54] Surely such a sanction would be punitive, because the contemnor would have no opportunity to recant and free himself. Its only function would be that of deterrence, and it should therefore be considered unconstitutional since it is applied without criminal safeguards. In this connection, no objection can be raised to the imposition of a determinate sentence if the contemnor is given the right to purge himself of the contempt. In such a case, if the contemnor retains the same defenses which would have been available to him had the commitment order been couched in terms of "confinement until compliance," the court has simply limited the potential term of imprisonment. To that, the contemnor certainly cannot object.

Conditional fines are another method of coercion, often consisting of the imposition of a fine *per diem* until compliance.[55] The more common practice, however, is to threaten the imposition of a large fine unless there is compliance by a certain date.[56] If the fine does not represent the actual damage caused by the contumacy it is not compensatory.[57] Once the date for compliance has passed, exaction of the

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52 See authorities cited note 13 *supra*.

53 See, *e.g.*, Doyle v. London Guar. & Acc. Co., 204 U.S. 599 (1907); Dahl v. Dahl, 210 Minn. 361, 298 N.W. 361 (1941). In Jencks v. Goforth, 57 N.M. 627, 261 P.2d 655 (1953), a ninety day sentence which could be suspended only in its entirety was upheld.

54 Upper Lakes Shipping, Ltd. v. Seafarers' Int'l Union, 22 Wis. 2d 7, 8, 125 N.W.2d 324, 328 (1963) (dictum).

55 See, *e.g.*, Department of Health v. Borough of Fort Lee, 108 N.J. Eq. 139, 154 Atl. 319 (Ch. 1931).

56 See, *e.g.*, United States v. UMW, 330 U.S. 258 (1947).

57 The amount of a compensatory fine must be the actual damages sustained. United States v. UMW, 330 U.S. 258 (1947); Yanish v. Barber, 232 F.2d 939 (9th Cir. 1956).

fine cannot be justified on the basis of coercion; at that point, compliance with the court order—performance by a certain date—cannot be coerced. This practice is analogous to the imposition of a determinate jail sentence[58] and, even though the deterrent effect of the threat might indirectly benefit specific complainants, must be viewed as punitive rather than coercive and hence unconstitutional absent criminal safeguards.

Coercive imprisonment is remedial, of course, only when the defendant is able to comply.[59] As the Supreme Court has said, "to jail one for contempt for omitting an act he is powerless to perform would make the proceeding purely punitive, to describe it charitably."[60] This is true because imprisoning a defendant incapable of performance cannot possibly cause him to take action to benefit the complainant. Given that inability to perform is a complete defense, it is necessary to determine whether placing the burden of proving this issue on the defendant is justifiable.[61] Even in a standard criminal proceeding, it is constitutionally permissible to place the burden of proving such affirmative defenses as insanity[62] or intoxication[63] on the defendant. The law accomplishes this result by raising a presumption against the defendant on the issue. But, in order for such a presumption to satisfy due process, the fact established must have a "rational connection" with the fact presumed.[64]

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58 The analogy between a determinate jail sentence and a fine payable unless there is compliance is noted in Jencks v. Goforth, 57 N.M. 627, 261 P.2d 655 (1953). However, the analogy is used to justify a determinate sentence which could be suspended only in its entirety.

59 Maggio v. Zeitz, 333 U.S. 56, 76 (1948); United States *ex rel.* Emanuel v. Jaeger, 117 F.2d 483 (2d Cir. 1941) (dictum); United States *ex rel.* Paleais v. Moore, 294 Fed. 852 (2d Cir. 1923).

60 Maggio v. Zeitz, 333 U.S. 56, 72 (1948).

61 When coercive imprisonment is used to enforce orders to pay money or to turn over books, ability to perform is usually the central issue. However, when it is used to enforce injunctions, the factual issue litigated is generally whether there has been compliance, and not whether the defendant is able to comply. See, *e.g.*, California Artificial Stone Paving Co. v. Molitor, 113 U.S. 609 (1885); Electro-Bleaching Gas Co. v. Paradon Eng'r Co., 15 F.2d 854 (E.D.N.Y. 1926).

62 Leland v. Oregon, 343 U.S. 790 (1952); *cf.* Pollard v. United States, 282 F.2d 450 (6th Cir. 1960); Snider v. Smyth, 187 F. Supp. 299 (E.D. Va. 1960), *aff'd sub nom.* Snider v. Cunningham, 292 F.2d 683 (4th Cir. 1961).

63 See United States *ex rel.* Thompson v. Dye, 113 F. Supp. 807 (W.D. Pa. 1953), *rev'd on other grounds*, 221 F.2d 763 (3d Cir. 1955); Commonwealth v. Chapman, 359 Pa. 164, 58 A.2d 433 (1948).

64 Tot v. United States, 319 U.S. 463 (1943). See Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527 (1955). An interesting example of a permissible presumption is seen in the so-called net worth cases. See Comment, 42 MARQ. L. REV. 91 (1958). The government's theory in these cases is that once there has been a showing that a taxpayer's assets have increased, there exists a presumption that all unexplainable increases are attributable to income. See Holland v. United States, 348 U.S. 121 (1954).

In coercive imprisonment proceedings the original order stands as the established fact. If contempt is used to enforce a judgment in which the original proceeding did not consider the question of ability to pay, there is no "rational connection" between it and the presumption of ability to pay; consequently, shifting the burden of proof is unjustified.[65] However, when the order allegedly violated is "predicated on a finding of ability,"[66] such as an alimony order, there has already been an adjudication against the contemnor on that issue, although one not arrived at pursuant to criminal procedural standards.

Even if the original order is based on a finding of ability, the passage of time between the original proceeding and the subsequent contempt proceeding allows the defendant to claim inability at the contempt proceeding because with the passage of time the "rational connection" between the original finding and the question of present ability weakens.[67]

A period of imprisonment also lends credence to a contemnor's assertion of inability to comply. Furthermore, the mere fact that an imprisoned contemnor remains in jail is evidence that the coercion has not been effective and is grounds for the inference that the imprisonment may continue to be futile. At some point, further confinement cannot be justified as an effective manner of assuring the complainant his rights.

In conclusion it can be said that coercive imprisonment is a powerful judicial tool for the enforcement of court orders. On occasion it can,

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65 It might be suggested that since the defendant has easier access to the evidence he should bear the burden of proof on the issue of ability. However, the Supreme Court has held that the "comparative convenience" test is insufficient by itself to justify shifting the burden of proof in criminal cases. See Tot v. United States, 319 U.S. 463, 469 (1943).

66 In the Matter of Carpenter, 36 Cal. App. 2d 274, 278, 97 P.2d 476, 478 (1939).

67 In bankruptcy cases there is often a plea of inability at the contempt proceeding. Prior to Maggio v. Zeitz, 333 U.S. 56 (1948), it had generally been understood that Oriel v. Russell, 278 U.S. 358 (1929), precluded any investigation at the contempt proceeding dealing with inability to comply except that which positively showed the disposition of assets deemed to be in the bankrupt's hands at the time of the turnover order. See, *e.g.*, *In re* Luma Camera Service, Inc., 157 F.2d 951 (2d Cir. 1946), *rev'd sub nom.* Maggio v. Zeitz, 333 U.S. (1948), and cases collected at 954 n.7. Nineteen years later, in *Maggio*, the Supreme Court concluded that *Oriel* stood only for the proposition that in a contempt proceeding a defendant with a turnover order against him is thereby confronted by a prima facie case against him "which he can successfully meet only with a showing of *present* inability to comply." 33 U.S. at 75 (Emphasis added.) Thus the defendant at a contempt proceeding can in fact contradict the original order by bringing forth evidence on the question of present inability. See, *e.g.*, *In re* Luma Camera Service, Inc., *supra; In re* Bar-Craft Dresses, Inc., 101 F. Supp. 921 (S.D.N.Y. 1952). The Supreme Court has even stated that merely being in "the shadow of prison gates" may be taken as some indication of inability; as time passes, the presumption of ability to perform lessens. Maggio v. Zeitz, 333 U.S. 56, 72 (1948).

however, be too powerful. Its utilization without criminal safeguards can only be justified if its application is limited to situations in which it is both effective and necessary to guarantee rights due other parties. Its use as punishment is unjustifiable and may be unconstitutional. Limiting coercive imprisonment to its proper role can and should be accomplished both by legislation[68] and by judicial restraint.

[68] Courts sometimes assume that their "inherent" power cannot be restricted by statute. In Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry., 266 U.S. 42 (1924), the Supreme Court hinted that there might be doubts as to the power of Congress to limit the power of courts by requiring that a jury trial be made available in cases of civil contempt. This view, however, seems extremely questionable, at least as far as the federal courts are concerned. See 5 MOORE, FEDERAL PRACTICE ¶ 38.33 [1], at 259-60 (2d ed. 1951). Power may be withheld from the courts "in the exact degrees and character which to Congress may seem proper for the public good." Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845), quoted in Lockerty v. Phillips, 319 U.S. 182 (1943). See Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924), for the instances in which Congress has limited the power of the lower courts. In state courts which have considered the problem, the most common view has been that reasonable legislative regulation of the contempt power is permissible. *Compare* In the Matter of Garner, 179 Cal. 409, 177 Pac. 162 (1918), *and Ex parte* Creasy, 243 Mo. 679, 148 S.W. 914 (1912), *with* Opinion of the Justices, 86 N.H. 597, 166 Atl. 640 (1933).