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Due Process in Civil Contempt Proceedings: A Comparison with Juvenile and Mental Incompetency Requirements

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DUE PROCESS IN CIVIL CONTEMPT PROCEEDINGS: A COMPARISON WITH JUVENILE AND MENTAL INCOMPETENCY REQUIREMENTS

A New York father and his mistress were jailed for almost two years for refusing to produce his child at a custody proceeding.[1] A law that would have limited imprisonment for civil contempt to one year, proposed as a result of this case, was vetoed by the Governor of New York.[2] On the other hand, an alleged member of organized crime was released by the New Jersey Supreme Court after being incarcerated for almost five years for refusing to testify before the State Commission of Investigation.[3] These events indicate a need to reevaluate the due process afforded a civil contemnor, for just as the controversy over a jury trial for criminal contemnors[4] raged for years,[5] the question of coercive imprisonment may have reached the boiling point. This Note will examine the principles of civil contempt, comparing them with the due process standards evolved in juvenile delinquency adjudications and mental competency determinations. Due to the inherent difficulty in clearly delineating civil and criminal contempts, any analysis of civil contempt necessitates references to its criminal counterpart. Although these areas are not carbon copies of civil contempt, factual similarities exist, and their due process requirements are germane since the loss of personal liberty is ultimately at stake in each.

I. PRINCIPLES OF CIVIL CONTEMPT

Civil contempt sanctions are said to be coercive in nature.[6] Their purpose is "remedial, and for the benefit of the complainant."[7] They are to be

1. People ex rel. Feldman v. Warden, 46 App. Div. 2d 256, 362 N.Y.S.2d 171 (1st Dep't 1974), aff'd, 36 N.Y.2d 846, 331 N.E.2d 691, 370 N.Y.S.2d 913 (1975).

2. S. 6791-A, N.Y. Sen., 198th Sess. (1975).

3. Catena v. Seidl, 68 N.J. 224, 343 A.2d 744 (1975) (per curiam). Gerardo Catena was released without ever testifying.

4. The Supreme Court, in Cheff v. Schnackenberg, 384 U.S. 373 (1966), held that federal courts must guarantee a jury trial for serious offenses. A six month sentence delineated serious and petty offenses. Id. at 379-80. This principle was applied to the states under the fourteenth amendment in Duncan v. Louisiana, 391 U.S. 145, 149 (1968). Finally, in Bloom v. Illinois, 391 U.S. 194, 211 (1968), the Court ordered a jury trial for a criminal contemnor sentenced to two years imprisonment. Applying the Cheff rationale, all sentences over six months warrant a trial by jury. See Note, The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 153 (1968). Subsequent criminal contempt decisions have adhered to the six month distinction. Frank v. United States, 395 U.S. 147, 148-49 (1969) (if a specific penalty is authorized, the maximum potential penalty is determinative of the need for a jury trial); Maita v. Whitmore, 508 F.2d 143, 146 (9th Cir. 1974), cert. denied, 421 U.S. 947 (1975) (since contemnor faced less than six months in jail, he had no right to a jury trial).

5. See Cheff v. Schnackenberg, 384 U.S. 373, 384-85 (1966) (Douglas, J., dissenting); United States v. Barnett, 376 U.S. 681, 728 (1964) (Goldberg, J., dissenting); Green v. United States, 356 U.S. 165, 219 (1958) (Black, J., dissenting).

6. United States v. UMW, 330 U.S. 258, 303-04 (1947); 47 Minn. L. Rev. 907, 908-09 (1963).

7. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911); see Comment, The Coercive Function of Civil Contempt, 33 U. Chi. L. Rev. 120, 123 (1965).

distinguished[8] from criminal contempt sentences which are "punitive [in nature], to vindicate the authority of the court."[9] However, distinction of contempt by the "character and purpose"[10] of the punishment has not always been successful, and as the Court noted in *Bessette v. W. B. Conkey Co.*,[11] "[i]t may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both."[12] The courts seem, at times, to have lost sight of the essentially remedial nature of civil contempt,[13] that it should serve "only the purposes of the complainant, and is not intended as a deterrent to offenses against the public."[14]

Thus, punishment for criminal contempt generally takes the form of a determinate sentence, to vindicate past affronts to the court, while civil contempt imposes a conditional sanction, contingent on the contemnor's willingness to purge himself.[15] This aspect of civil contempt brings forth the time worn cry that contemnors carry "the keys of their prison in their own pockets,"[16] a phrase which permeates the law of civil contempt.[17]

Civil contempt orders are issued for a number of reasons. During a trial's preliminary proceedings, the complainant, frustrated by the action or inaction of the defendant, may seek relief from the court in the form of a civil contempt order.[18] Contempt sanctions are also frequently employed to coerce

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8. For a historical analysis of the problems in distinguishing civil and criminal contempt, see Goldfarb, The Varieties of the Contempt Power, 13 Syracuse L. Rev. 44 (1961).

9. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911); see Katz v. Murtagh, 28 N.Y.2d 234, 239, 269 N.E.2d 816, 818-19, 321 N.Y.S.2d 104, 108 (1971).

10. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911); see 32 Mo. L. Rev. 586 (1967).

11. 194 U.S. 324 (1904).

12. Id. at 329. For a discussion of the similarity and confusion between civil and criminal contempt, see R. Goldfarb, The Contempt Power 46-67 (1963).

13. See, e.g., McTigue v. New London Educ. Ass'n, 164 Conn. 348, 321 A.2d 462 (1973) (court reversed civil contempt conviction and ordered a new trial on the contempt issue due to the clearly punitive characteristic of the sentences).

14. McCrone v. United States, 307 U.S. 61, 64 (1939); see Moskovitz, Contempt of Injunctions, Civil and Criminal, 43 Colum. L. Rev. 780, 787 (1943).

15. The contemnors in Shillitani v. United States, 384 U.S. 364 (1966), were sentenced to two years in prison " 'or until the further order' " of the district court, for refusing to testify before a grand jury despite grants of immunity. Id. at 366. Their conduct was deemed "criminal contempt" despite the coercive nature of the sentence and their ability to purge themselves. Id. at 369-70. The Supreme Court, recognizing the contempt as civil, vacated the judgment since the sentence could have extended beyond the life of the grand jury, making compliance impossible. Id. at 371.

16. In re Nevitt, 117 F. 448, 461 (8th Cir. 1902); see R. Goldfarb, The Contempt Power 58-59 (1963).

17. Shillitani v. United States, 384 U.S. 364, 368 (1966); Green v. United States, 356 U.S. 165, 197 (1958) (Black, J., dissenting); United States v. UMW, 330 U.S. 258, 331 (1947) (Black & Douglas, J.J., concurring & dissenting); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442 (1911); United States v. Handler, 476 F.2d 709, 714 (2d Cir. 1973).

18. IBM v. United States, 493 F.2d 112 (2d Cir. 1973), cert. denied, 416 U.S. 995 (1974) (refusal to produce documents during discovery); United States v. Handler, 476 F.2d 709 (2d Cir.

obedience with a court's final order once the case has been decided.[19] Despite its remedial nature, some courts have been reluctant to impose civil contempt orders and have recognized the need to explore alternative courses.[20]

Once the defendant has been given notice,[21] there is a hearing at which the complainant must prove noncompliance with the court's order.[22] This is usually accomplished simply by showing the existence of the order and the defendant's noncompliance.[23] The burden then shifts, and the potential contemnor must prove inability to comply.[24]

The complainant generally must sustain a "clear and convincing"[25] burden to sustain a finding of contempt, but standards vary from requiring "proof beyond a reasonable doubt"[26] to "a preponderance of the evidence."[27] No

1973) (refusal to testify before the grand jury despite immunity); People ex rel. Feldman v. Warden, 46 App. Div. 2d 256, 362 N.Y.S.2d 171 (1st Dep't 1974), aff'd, 36 N.Y.2d 846, 331 N.E.2d 691, 370 N.Y.S.2d 913 (1975) (failure to produce child in custody proceeding).

19. Johansen v. State, 491 P.2d 759 (Alas. 1971) (failure to pay child support); Village of Great Neck Estates v. Rose, 279 App. Div. 671, 108 N.Y.S.2d 95 (2d Dep't 1951) (mem.), appeal dismissed, 303 N.Y. 904, 105 N.E.2d 491 (1952) (violation of zoning ordinance).

20. California Artificial Stone Paving Co. v. Molitor, 113 U.S. 609, 618 (1885); Kane v. Smith, 56 Wash. 2d 799, 803, 355 P.2d 827, 831 (1960); see Dobbs, Contempt of Court: A Survey, 56 Cornell L. Rev. 183, 273-74 (1971); Comment, The Coercive Function of Civil Contempt, 33 U. Chi. L. Rev. 120, 128-29 (1965) (coercive imprisonment should be avoided if ordinary attachment or garnishment would protect the complainant's rights or if pleadings may be struck, or facts established against the uncooperative defendant).

21. Failure to provide proper notice may nullify the court's finding. See Pereira v. Pereira, 35 N.Y.2d 301, 308, 319 N.E.2d 413, 417-18, 361 N.Y.S.2d 148, 153-54 (1974).

22. Johansen v. State, 491 P.2d 759, 766 (Alas. 1971); Catena v. Seidl, 68 N.J. 224, 343 A.2d 744 (1975) (per curiam); Ingraham v. Maurer, 39 App. Div. 2d 258, 260, 334 N.Y.S.2d 19, 21 (3d Dep't 1972).

23. See Maggio v. Zeitz, 333 U.S. 56, 75 (1948); Oriel v. Russell, 278 U.S. 358, 361-62, 364-65 (1929); Ex parte Carpenter, 36 Cal. App. 2d 274, 97 P.2d 476 (1939).

24. Maggio v. Zeitz, 333 U.S. 56, 75-76 (1948); Johansen v. State, 491 P.2d 759, 766 (Alas. 1971); In re Hildreth, 28 App. Div. 2d 290, 294, 284 N.Y.S.2d 755, 760 (1st Dep't 1967); see Dobbs, Contempt of Court: A Survey, 56 Cornell L. Rev. 183, 266 (1971). But see Catena v. Seidl, 68 N.J. 224, 227, 343 A.2d 744, 746 (1975) (per curiam) (imprisoned contemnor's burden was to show not that he was unable to comply, but that imprisonment had lost its coercive impact).

25. Confronted with a bankrupt who was ordered to turn over his financial records, the Court found "clear and convincing" evidence necessary to find the man in contempt of the order. Oriel v. Russell, 278 U.S. 358, 362 (1929).

26. Quezada v. Superior Court, 171 Cal. App. 2d 528, 340 P.2d 1018 (1959). The court termed civil contempt proceedings as "special proceedings" in which the contemnor was entitled to proof beyond a reasonable doubt, and "the same protection of his constitutional rights as he would be [afforded] in a criminal proceeding." Id. at 529, 340 P.2d at 1019.

27. Alaska utilized this approach, but found the contemnor entitled to a trial by jury. Johansen v. State, 491 P.2d 759, 766 (Alas. 1971). The Eighth Circuit on the other hand, seemed to reject both "clear and convincing" and "preponderance of the evidence," finding a "heavy burden" necessary. Such a burden requires a " 'degree of certainty' . . . which leaves no fair ground of doubt," and falls somewhere short of "beyond a reasonable doubt." Kansas City Power & Light Co. v. NLRB, 137 F.2d 77, 79 (8th Cir. 1943); see Comment, The Coercive Function of Civil Contempt, 33 U. Chi. L. Rev. 120, 122 (1965).

presumption of innocence attaches to the contemnor.[28] Once found in contempt, the defendant may be fined,[29] imprisoned,[30] or both.[31] If imprisoned, the contemnor is entitled to review,[32] but he retains the burden of proving his inability to comply. Moreover, there is no right to a jury trial. The Supreme Court has found that indictment and jury trial are not constitutionally required for civil contempt commitments, due to their remedial and conditional nature.[33]

At a certain point, however, the purpose of the sentence tends to become obscured as coercion fails to produce results. In *Maggio v. Zeitz*,[34] for example, the Court considered the question of a bankrupt who failed to comply with a turnover order, and was consequently imprisoned. The Court noted that " '[w]here [the confinement] has failed, and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely, the bankrupt's inability to obey the order . . . .' " he should be released.[35]

A procedure resulting in the incarceration of a person not convicted for a crime raises serious due process questions. The Supreme Court has rejected summary imprisonment of more than six months in criminal contempt cases, despite long held precedent[36] justifying it as an appropriate deterrent to defiance of judicial power. Similarly, the incarceration of a juvenile without substantial due process safeguards has been held unconstitutional, despite the commendable goals of the juvenile justice system.[37] Confinement of the mentally incompetent must be justified by some reasonable relationship to the ends the confinement seeks to accomplish,[38] notwithstanding society's interest

28. The Court, in Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911), recognized that the presumption of innocence applies to criminal contempt. No such presumption is afforded the civil contemnor. Coca-Cola Co. v. Feulner, 7 F. Supp. 364, 368 (S.D. Tex. 1934).

29. See, e.g., United States v. UMW, 330 U.S. 258 (1947) (district court fined union leader $10,000 and union $3,500,000).

30. See, e.g., Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472 (1972) (incarcerated for nearly three years).

31. See, e.g., Ditomasso v. Loverro, 242 App. Div. 190, 273 N.Y.S. 76 (2d Dep't 1934) (contemnor fined $250 and jailed until he consented to be examined by plaintiff's attorney).

32. The New York Judiciary Law provides for review, every ninety days, before the court that ordered imprisonment. N.Y. Judiciary Law § 774(2) (McKinney 1975). Appellate review, N.Y. C.P.L.R. § 5501 (McKinney 1963), and habeas corpus proceedings are also available. Id. §§ 7001-04. See Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1040-42 (1970).

33. Shillitani v. United States, 384 U.S. 364, 365 (1966).

34. 333 U.S. 56 (1948).

35. Id. at 72.

36. Green v. United States, 356 U.S. 165, 190-93 (1958).

37. The juvenile system was designed to protect young offenders from the harsh environment of the criminal justice process. It was hoped that by providing a more informal setting, presided over by an understanding judge, the goal of rehabilitation would be more readily attainable. The Supreme Court was always cognizant of the system's "idealistic hopes" when it was attacked on due process grounds. McKeiver v. Pennsylvania, 403 U.S. 528, 543-44 (1971).

38. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

in treating and segregating these people. These proceedings are relevant to civil contempt because they demonstrate a willingness on the part of the courts to adjust requisite due process standards in light of the individual's right to personal liberty.

II. Analogous Proceedings

A. *Juvenile Delinquency Adjudications*

Prior to the Supreme Court's decision of *In re Gault*,[39] the adjudication of a minor as a delinquent had been "civil"—not criminal, and as such not subject to criminal due process requirements[40] despite the possible loss of personal liberty. This procedure reflected a desire to protect children from the adult criminal justice system and to shift the emphasis from punishment to rehabilitation.[41] Because of their inherently vulnerable nature, minors were thought to be better served if kept out of the mainstream of criminal justice. This idea, although benevolent, "frequently resulted . . . in arbitrariness," depriving juveniles of "fundamental rights" which constituted a "denial of due process."[42]

In *Gault*, the defendant had been sentenced on the basis of "clear and convincing evidence,"[43] and faced the possibility of confinement for six years in a state industrial school.[44] Emphasizing that the benefits of the present juvenile system "will not be impaired by constitutional domestication,"[45] the Court held that a minor was entitled to notice,[46] the right to confront and examine witnesses,[47] legal representation,[48] and the fifth amendment's privilege against self-incrimination.[49] All these rights were found to be so integral to due process, "the primary and indispensable foundation of individual freedom,"[50] that the Court could not disregard them "because of the feeble enticement of the 'civil' label-of-convenience."[51]

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39. 387 U.S. 1 (1967).

40. Id. at 17; see Pee v. United States, 274 F.2d 556, 560-61 (D.C. Cir. 1959), Ketcham, Guidelines from Gault: Revolutionary Requirements and Reappraisal, 53 Va. L. Rev 1700, 1708 (1967).

41. 387 U.S. at 15-16. Despite the rehabilitative nature of the juvenile court system, the sanctions applied still resulted in loss of liberty. See Cohen, The Standard of Proof in Juvenile Proceedings: Gault Beyond a Reasonable Doubt, 68 Mich. L. Rev. 567, 575 (1970).

42. 387 U.S. at 18-19.

43. Id. at 11 n.7.

44. Fifteen year old Gerald Gault was committed " 'for the period of his minority [that is, until 21], unless sooner discharged by due process of law.' " Id. at 7-8. One may surmise that release through due process would occur upon a showing of good behavior or rehabilitation.

45. Id. at 22.

46. The notice required was "of the sort . . . which would be deemed constitutionally adequate in a civil or criminal proceeding." Id. at 33.

47. Id. at 57 n.98.

48. Id. at 41.

49. Id. at 55.

50. Id. at 20.

51. Id. at 50. For a discussion of the practical effects that Gault had on the juvenile courts,

In re Winship[52] expanded the rights of juveniles. A twelve year old boy was committed to a training school for an initial period of eighteen months, subject to annual extensions until his eighteenth birthday.[53] This determination was made on the basis of the "preponderance of the evidence."[54] The Court considered whether due process required proof beyond a reasonable doubt during the adjudicatory stage of a juvenile delinquency proceeding.[55] Noting that the reasonable doubt standard increases certainty, strengthens public confidence and guarantees the presumption of innocence,[56] the Court deplored imprisonment on " 'the strength of the same evidence as would suffice in a civil case,' "[57] and again rejected the civil label of convenience.[58] Rejecting the argument that the reasonable doubt standard would disable the juvenile system,[59] the standard was "explicitly"[60] held to be an essential of due process and fair treatment in a juvenile proceeding.

However, in *McKeiver v. Pennsylvania,*[61] the Court found that a jury trial was not required in the adjudicatory phase of a juvenile delinquency proceeding.[62] Nonetheless, the Court emphasized the futility of a "wooden approach"[63] that relied on the catchwords "civil" and "criminal." An examination of the juvenile justice system showed poorly trained and unqualified judges,[64] lack of funds, and other shortcomings.[65] Consequently, the Court admitted that "[p]erhaps [the] ultimate disillusionment [with the juvenile justice system] will come one day, but for the moment we are disinclined to give impetus to it."[66] Implicit in the Court's discussion was an attempt to balance the individual's rights with the goals of society. The Court wished to maintain the uniqueness of the juvenile court system and to avoid placing "the juvenile squarely in the routine of the criminal process."[67]

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see Alper, The Children's Court at Three Score and Ten: Will it Survive Gault?, 34 Albany L. Rev. 46 (1969).

52. 397 U.S. 358 (1970).

53. Id. at 360.

54. Id. & n.2.

55. Id. at 359; see 39 Fordham L. Rev. 121 (1970).

56. 397 U.S. at 362-64.

57. Id. at 363; see 46 Notre Dame Law. 373, 383-84 (1971).

58. 397 U.S. at 365-66. The civil label had been used to justify the employment of civil standards in essentially criminal juvenile adjudications. Id.

59. Id. at 366; see 16 Vill. L. Rev. 352, 355-56 (1970).

60. 397 U.S. at 364.

61. 403 U.S. 528 (1971); see 24 Vand. L. Rev. 1281 (1971).

62. 403 U.S. at 545.

63. Id. at 541.

64. Id. at 534, 544 & n.4.

65. Id. at 544-45 & n.5. The Court relied heavily on the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime, for factual support. Id.

66. Id. at 551. The Court encouraged states to experiment further for possible solutions to the juvenile justice problem. Id. at 547. State positions on jury trials for delinquents are categorized in the opinion. Id. at 548-49.

67. Id. at 547.

B. *Mental Competency Determinations*

The principles of due process developed in the juvenile area have been applied to confinement for purposes of determining mental competency. A defendant sentenced to one year for contributing to the delinquency of a minor was committed to a mental institution for the duration of his sentence pursuant to the Wisconsin Sex Crimes Act.[68] However the confinement was renewable for five year periods without the benefit of a jury trial—a safeguard afforded persons not committed under the Sex Crimes Act. In holding that this constituted a denial of equal protection, the Supreme Court spoke of the necessity of a jury trial to "justify such a massive curtailment of liberty."[69]

In the same year, the Court in *Jackson v. Indiana*[70] held that a person could not be committed to a mental institution almost indefinitely on the premise that such person was not capable of standing trial. Summary commitments of this kind are only to last for a "reasonable" time, sufficient to determine whether there is a "substantial probability" that the person will be able to stand trial in "the forseeable future."[71] This holding was based on the Court's statement that: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[72]

Using this test to gauge due process, the Court in *McNeil v. Director*[73] considered the case of a convicted criminal defendant who refused to cooperate with psychiatrists attempting to evaluate his mental condition, and consequently spent six years in a Maryland mental institution. The Court rejected the analogy to a stubborn civil contemnor, and declined to examine the parameters of civil contempt in this context.[74] The prisoner's release was

68. Humphrey v. Cady, 405 U.S. 504, 506 (1972). Pursuant to the Act, the trial court found that the crime was "probably motivated by desire for sexual excitement." Id. at 506-07.

69. Id. at 509. "[T]he jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person . . . ." Id.; see Baxstrom v. Herold, 383 U.S. 107 (1966).

70. 406 U.S. 715 (1972).

71. Id. at 738.

72. Id. A "rule of reasonableness" was urged for pretrial confinement. Such confinement cannot be imposed if it would result in indefinite loss of liberty. Id. at 733; see Note, Incompetency to Stand Trial, 81 Harv. L. Rev. 454, 471-73 (1967). The Court in Jackson found it "unnecessary" to reach the petitioner's eighth amendment claim of cruel and unusual punishment resulting from indefinite confinement. 406 U.S. at 739. The twenty year confinement of a defendant who was determined insane and unable to stand trial was found to be cruel and unusual in United States ex rel. Wolfersdorf v. Johnston, 317 F. Supp. 66, 68 (S.D.N.Y. 1970). The cruel and unusual argument has been made in the civil contempt context. See Comment, Incarceration For Civil Contempt: An Asserted Eighth Amendment Challenge Faces A Semantical Defense, 11 San Diego L. Rev. 1026 (1974).

73. 407 U.S. 245, 249-50 (1972); see Comment, An End to Incompetency to Stand Trial, 13 Santa Clara Law. 560, 565 (1973).

74. 407 U.S. at 251. But see Williams v. Director, — Md. —, —, 347 A.2d 179, 199-201 (1975) (convicted criminal defendants who refused to cooperate with examining psychiatrists were incarcerated for contempt, resulting in imprisonment beyond expiration of their original sen-

predicated specifically on the inadequate due process used to effect a "confinement that is in fact indeterminate."[75] Concurrent with the *McNeil* decision, certiorari was granted, and then dismissed for *Murel v. Baltimore City Criminal Court,*[76] which arose under the same Maryland statutes.[77] Significantly, Justice Douglas dissented, pointing out that the right to liberty was one of "transcendent value," without which other constitutional rights "become largely meaningless,"[78] and thus not susceptible to perfunctory revocation.

More recently, involuntary civil commitment to a mental institution for almost fifteen years was challenged in *O'Connor v. Donaldson.*[79] The Court refrained from considering the broader problem of the state's obligation to provide treatment for the mentally ill, and stated that "this case raises a single, relatively simple, but nonetheless important question concerning every man's constitutional right to liberty."[80] In his concurring opinion, Chief Justice Burger cited *Gault* for the proposition that confinement, for any reason, is impermissible without adequate due process.[81] His reliance upon the juvenile delinquency cases, as well as the majority's emphasis on personal liberty, evidences a grave concern for an individual's personal liberty—despite society's traditional interests in revoking that liberty. In addition, the Chief Justice noted that rehabilitative treatment offered by the state was not a "*quid pro quo*"[82] for the deprivation of individual liberty. Rather due process requires "identifying and accommodating [both] the interests of the individual and [of] society."[83]

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tences; McNeil distinguished on basis that defendant in that case was ordered confined after their sentences had expired).

75. Id. at 249.

76. 407 U.S. 355 (1972). The writ of certiorari was dismissed as improvidently granted since one petitioner had been released, and the other three were serving fixed sentences. Moreover, the applicable Maryland statutes were undergoing substantial revision. Id. at 357-58.

77. 407 U.S. at 247.

78. Id. at 363-64 (Douglas, J., dissenting). Relying on Speiser v. Randall, 357 U.S. 513, 525-26 (1958), Justice Douglas noted that there is always a margin of error in any litigation, and where one party has " 'at stake an interest of transcending value . . . this margin of error is reduced . . . by the process of placing on the other party the burden of . . . persuading the factfinder . . . of his guilt beyond a reasonable doubt.' " Id. at 362. Two years earlier, the majority of the Court had used this language from Speiser to support a reasonable doubt burden of proof in juvenile adjudications. In re Winship, 397 U.S. 358, 364 (1970). Finally, Justice Douglas relied on Gault and Winship to reject the argument that only "criminal" cases required such a burden of proof. 407 U.S. at 364.

79. 422 U.S. 563 (1975).

80. Id. at 573. The action was brought under 42 U.S.C. § 1983 (1970) against the director of the mental home for wrongfully depriving the inmate of his constitutional right to freedom since he was not dangerous, and could have lived safely outside the institution. The Court vacated and remanded the verdict for plaintiff to consider the judge's instructions to the jury. Id. at 577.

81. Id. at 580.

82. Id. at 585.

83. Id. Chief Justice Burger relied upon McKeiver for this proposition. This was an interesting choice since the Court in that case came close to abandoning the sociological principles

III. CIVIL CONTEMPT COMPARED

The due process necessary to incarcerate an individual can be viewed from two perspectives. One may ask what societal needs or reasons exist for such incarceration. This approach will allow society's interests to determine the due process required to deprive someone of his liberty. On the other hand, one may view the problem from the perspective of what the individual is losing—his liberty—and ask if society's interests may constitutionally mandate disparate due process standards. Imprisonment would be more easily justified when viewed from the broad and generalized needs of society. However the Supreme Court's position on what is necessary to justify incarcerations for criminal contempt, juvenile delinquency and mental incompetency appears to have shifted toward the second approach. Despite the Court's strong language and reasoning in the other three areas, civil contempt remains rooted in the first perspective. Strong similarities in all four proceedings make this position difficult to understand.

The civil-criminal label approach to due process is simplistic, and has been clearly rejected in the juvenile delinquency cases. The distinction between civil insanity and criminal insanity "has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all.*"[84] Yet despite the similarity of the conduct being sanctioned, the "criminal" contemnor is entitled to the full panoply of procedural safeguards if his sentence is more than six months, while his "civil" brother lacks the key due process elements[85] of a jury trial, including proof beyond a reasonable doubt, notwithstanding potentially indefinite imprisonment.

Abhorrence of such indefinite imprisonment prompted the imposition of procedural safeguards in both the juvenile delinquency and mental competency determinations. Proof beyond a reasonable doubt is mandated in order to confine a juvenile.[86] Even though the juvenile may be released when rehabilitated, or the incompetent released when sane, the initial incarceration must be accompanied with substantive due process safeguards. The usual answer to a civil contemnor on this issue is that he carries the keys to his cell in his pocket.[87] While this response may be reasonable in many instances, it is of little comfort to those contemnors unable to prove their inability to comply. Just as the most heinous criminal is provided every due process protection, the civil contemnor should be guaranteed that at some point the complainant will be required to prove his ability to comply beyond a reasonable doubt. The revocation of a man's liberty on the same standard of proof which may be "applicable to the run-of-the-mill automobile negligence actions"[88] would seem constitutionally inconsistent.

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behind the juvenile system and implementing the full due process requirements necessary to revoke an adult criminal defendant's liberty. See text accompanying notes 66-67 supra.

84. Baxstrom v. Herold, 383 U.S. 107, 111 (1966).

85. See Kutner, Contempt Power: The Black Robe—A Proposal for Due Process, 39 Tenn. L. Rev. 1, 71-72 (1971).

86. In re Winship, 397 U.S. 358, 364 (1970).

87. See text accompanying notes 16-17 supra.

88. Murel v. Baltimore City Crim. Ct., 407 U.S. 355, 359 (1972) (Douglas, J., dissenting).

Both criminal contempt[89] and juvenile delinquency adjudications[90] placed extensive power in the hands of one man. This concentration of power drew sharp criticism before it was altered. The same is true of sanity determinations, where a psychiatrist's opinion is usually the only relevant evidence available[91]—a fact that led Justice Marshall to laud the jury's role in these determinations.[92] Yet the power to imprison for civil contempt remains solely in the hands of the judge. This underlines the punitive aspect of civil contempt.[93] For while the primary goal is coercive, the contemnor has defied the power of the court. The thrust of a contempt sentence—civil or criminal—is focused on the adversity between judge and defendant, making it difficult to identify the purpose as coercive, punitive, or both. A fine of $150,000 per day for failure to produce documents smacks of punishment, despite the contemnor's wealth.[94] Nonpayment resulting in imprisonment that would eventually force the contemnor's relatives to "ransom"[95] him would seem to be punitive. Locking up a particularly stubborn defendant[96] for years with no results, cannot be termed solely "coercive."

The reluctance to alter the traditional position on civil contempt sanctions reflects a desire to preserve the power of the courts to efficiently administer justice. Without some police power of their own, be it civil or criminal, the courts would have considerable difficulty with defiant or reluctant defendants.[97] Nevertheless, recent events have manifested an uneasiness with the tenets of civil contempt and their ultimate futility.

89. Justice Black, dissenting in Green v. United States, 356 U.S. 165 (1958), saw a judge's power to summarily punish for criminal contempt as "an anomaly in the law." Id. at 193 (Black, J., dissenting). He characterized it as " 'nearest akin to despotic power of any power existing under our form of government.' " Id. at 194. "No official, regardless of his position or the purity and nobleness of his character, should be granted such autocratic omnipotence." Id. at 198; see Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Bloom v. Illinois, 391 U.S. 194, 202 (1968); Nilva v. United States, 352 U.S. 385, 395 (1957); Burdick, Problems in Contempt, 43 North Dakota L. Rev. 237, 241-42 (1967).

90. The Star Chamber was compared favorably to the power concentrated in the hands of juvenile judges. In re Gault, 387 U.S. 1, 18-19 (1967).

91. See Gobert, Competency to Stand Trial: A Pre- and Post-Jackson Analysis, 40 Tenn. L. Rev. 659, 661 (1973); Morris, The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York, 17 Buffalo L. Rev. 651, 660 (1968); Note, Incompetency to Stand Trial, 81 Harv. L. Rev. 454, 460 (1967).

92. Humphrey v. Cady, 405 U.S. 504, 509 (1972).

93. See Poster, Limits to the Contempt Power in California Courts, 49 L.A. Bar Bull. 98, 103-04 (1974).

94. IBM v. United States, 493 F.2d 112, 116 (2d Cir. 1973), cert. denied, 416 U.S. 995 (1974); see Windsor Power House Coal Co. v. District 6, UMW, Civil No. 75-1611 (4th Cir., Feb. 3, 1976) (fine imposed was too high to be purely remedial).

95. Maggio v. Zeitz, 333 U.S. 56, 64 (1948); In re Bar-Craft Dresses, Inc., 101 F. Supp. 921, 922 (S.D.N.Y. 1952).

96. Gerardo Catena flatly refused to testify, saying he'd be carried from prison "feet first" before he did. Catena v. Seidl, 68 N.J. 224, 229, 343 A.2d 744, 747 (1975) (per curiam); see Cohen, The Contempt Power—The Lifeblood of the Judiciary, 2 Loyola U. Chi. L.J. 69, 90-91 (1971).

97. It has long been recognized that in order to operate effectively, the courts must have the

In *Catena v. Seidl*,[98] the Supreme Court of New Jersey released a man who, although guaranteed immunity, refused to testify before the State Commission of Investigation, and was imprisoned for more than five years. He remained steadfast in his refusal to testify throughout his incarceration.[99] The court expressed the issue in terms of "whether there is a substantial likelihood that continued confinement will cause Catena to change his mind and testify."[100] His motive for remaining silent was no longer considered relevant.[101] Noting that confinement could not "be used to punish him for remaining silent or for any other shortcoming of which he has not been convicted,"[102] the court found "no substantial likelihood"[103] that coercion would succeed. This case contravenes civil contempt doctrines, for the contemnor admittedly had the "keys," but declined to use them.[104] One view of the decision may be that the court finally turned to Catena, saying "You win!" However, the court's reliance on a "substantial likelihood" is analogous to the "substantial probability" test used by the Supreme Court in considering standards for the commitment of the mentally ill.[105] The emphasis of the decision appears to focus on the reason and nature of the imprisonment, and evidences concern with the indefinite confinement of one not convicted of a crime.[106]

It would seem that the court, over the course of five years, changed positions on the value of Catena's incarceration. What began as a legitimate exercise of judicial power ended up as a consideration of "[a]ge, state of health and length of confinement"[107] in determining whether imprisonment served

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power to compel testimony and to police litigants. Kastigar v. United States, 406 U.S. 441, 443-44 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52, 93-94 (1964); Blair v. United States, 250 U.S. 273, 279-80 (1919).

98. 68 N.J. 224, 343 A.2d 744 (1975) (per curiam).

99. Id. at 229, 343 A.2d at 747.

100. Id. at 228, 343 A.2d at 747.

101. Id. The dissent maintained that the court's holding would result in a substitution of "organized crime's oath of silence" for the laws of society. Id. at 230, 343 A.2d at 748 (Schreiber, J., dissenting).

102. Id. at 229, 343 A.2d at 747.

103. Id.

104. Catena, once imprisoned, had the burden of showing that his commitment "had lost its coercive impact and had become punitive . . . ." Id. at 227, 343 A.2d at 746. One year earlier, the same court had ruled that Catena, imprisoned for four years, had not met this burden. Id. at 226, 343 A.2d at 746. The majority made it clear that "confinement for a particular length of time" or a contemnor's insistence that he would never talk would not "automatically satisfy the requirement of showing 'no substantial likelihood' " that coercion would succeed. New Jersey would seem to favor a case by case approach "decided on an independent evaluation of all of the particular facts." Id. at 229, 343 A.2d at 747.

105. Jackson v. Indiana, 406 U.S. 715, 738 (1972); see text accompanying note 71 supra. Yet Catena, unlike Jackson, was not a mentally ill deaf mute who would never be able to stand trial. His position was exactly what the law of civil contempt attempts to correct.

106. The only factor that changed throughout Catena's imprisonment was the length of time he spent in jail. No subsequent events transpired, making him unable to testify. 68 N.J. at 229, 343 A.2d at 747.

107. Id.

any coercive purpose. The result clearly reflects mistrust of a procedure which may summarily imprison an individual indefinitely, but the reasoning cannot be explained in terms of traditional civil contempt principles, and provides no guidelines to determine when coercion ends and punishment begins. Thus the case is perhaps best viewed as the inevitable result of a constitutionally impractical method of depriving an individual of his liberty in order to achieve a societal goal.

In *People ex rel. Feldman v. Warden,*[108] the New York Court of Appeals upheld the civil contempt incarceration for almost two years of a fifty-one year old woman in poor health. The woman, living in a New York City communal family for some twenty years, had reared a child with the child's father. The natural mother, three years after leaving the family, sought custody of the child who, although twelve or thirteen years old at the time of the court action, had never attended school. The judge ordered the woman and the natural father to produce the child in court so as to be able to determine his well being.[109] They refused, sent the child into hiding, and were imprisoned in accordance with New York Judiciary Law, section 774(1).[110]

The trial judge held an extensive hearing, pursuant to a writ of habeas corpus challenging the contemnor's continued incarceration. Noting the need to distinguish coercive and punitive motives, he saw the issue as being " 'whether or not she has the power to obey the mandate of the Court.' "[111] Finding that she did, the court ordered her imprisonment. The Appellate Division upheld the order, stating that the purpose of New York Judiciary Law section 774(1) was for " 'vindication of the authority of the court and to compel obedience to its mandate.' "[112] The contemnor was not allowed "to bargain and barter with the court on the conditions of her compliance . . . ."[113] On expedited appeal, the Court of Appeals unanimously affirmed the judgment.[114]

Due to the national attention this case received,[115] an amendment to section 774 was proposed during the 1975-1976 session of the New York legislature, in an attempt to limit imprisonment under that section to no more than twelve

108. 46 App. Div. 2d 256, 362 N.Y.S.2d 171 (1st Dep't 1974), aff'd, 36 N.Y.2d 846, 331 N.E.2d 691, 370 N.Y.S.2d 913 (1975). But cf. Vail v. Quinlan, Civil, No. 74-4773 (S.D.N.Y., Jan. 7, 1976).

109. Id. at 258, 362 N.Y.S.2d at 172.

110. Id. at 258, 362 N.Y.S.2d at 173. The N.Y. Judiciary Law § 774(1) (McKinney 1975) provides in pertinent part: "Where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it . . . ."

111. 46 App. Div. 2d at 257, 362 N.Y.S.2d at 172.

112. Id. at 258, 362 N.Y.S.2d at 173. The court's language reflects the elusive distinction between civil and criminal contempt. See 1972 Utah L. Rev. 306.

113. 46 App. Div. 2d at 258-59, 362 N.Y.S.2d at 174.

114. 36 N.Y.2d 846, 331 N.E.2d 691, 370 N.Y.S.2d 913 (1975).

115. See Time, Feb. 17, 1975, at 24; Chicago Tribune, Feb. 16, 1975, at 1, col. 1; N.Y. Times, June 20, 1975, at 39, col. 1.

months under any circumstances.[116] The governor vetoed it, because "[i]n effect what the bill does is give an individual the option of either complying with a court order . . . or spending a maximum of one year in jail." In addition, the bill would have a "detrimental effect on law enforcement," and would hinder the power of the courts "to enforce their decrees and . . . the rights of citizens . . . ."[117]

The Governor's memorandum reflected all the traditional arguments against limiting civil contempt powers. Analogous arguments were heard in opposition to changing criminal contempt powers,[118] and the juvenile delinquency system,[119] yet neither area seems to have suffered from constitutional domestication. The *Feldman* case and the subsequent bill show an attempt to limit the results of a defective system without curing the source of the defect.[120] It would make more sense to allow courts to imprison civil contemnors conditionally for up to one year at which time the defendant would be guaranteed a jury trial on the issue of his ability to comply with the court's order. This would not hamper the court's power to conduct trials or compel testimony. One year should be a definite deterrent. Moreover, the flagrant contemnor, like Catena, could not look forward to automatic release after one year, as proposed by the bill. Similarly, the civil contemnor should be afforded the same standard of proof as criminal contemnors, "beyond a reasonable doubt," since there would seem to be no real danger of allowing future Catenas to escape under this quantum of proof. As in juvenile delinquency and mental competency adjudications, the answer would seem to lie in a more rational due process which would allow courts to function properly, without losing sight of the value of personal liberty.

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116. S. 6791-A, N.Y. Sen., 198th Sess. (1975). The bill would have added to the N.Y. Judiciary Law § 774(1) (McKinney 1975) provision that "[w]here the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it . . . ." the restriction that "in no event shall any person sentenced to a term of imprisonment under this section be required to serve a specific or cumulative term of more than twelve months."

117. Governor's Memorandum filed with S. 6791-A (Not Approved) (Aug. 9, 1975).

118. See text accompanying note 36 supra.

119. In re Winship, 397 U.S. 358, 366 (1970); In re Gault, 387 U.S. 1, 24-25 (1967)

120. See Note, Contempt of Court: Go Directly To Jail. Do Not Pass Go. Do Not Collect Your Constitutional Rights, 7 Suffolk L. Rev. 517, 551-52 (1973).