The Contempt Power. By Ronald L. Goldfarb

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Although the contempt power is frequently discussed in terms of its technical procedural and legal implications, its fundamental interest both to lawyers and laymen is that it has been the vehicle for deciding a variety of dramatic and significant social problems. In many cases these problems involve a conflict between one constitutional right and another and in some, a conflict between competing economic interests. In any event, these conflicts bear heavily on any consideration of the contempt power. As Mr. Goldfarb points out, the contempt proceeding has been, at least until recent years, "the testing ground for the power of the press with respect to its privilege of contemporaneous comment about courts and trials" (p. 7). Many issues involving the struggle of labor for economic equality during the early part of the Twentieth Century were resolved in the context of contempt proceedings for violation of injunctions. Congressional investigations into subversion and communism, involving the clash between the constitutionally protected rights of free speech and freedom from incrimination, on the one hand, and, on the other, the Congressional Committee's expressed intent to protect the National Security, are familiar to today's lawyer and layman. Perhaps the most significant legal issue facing our courts today is the dramatic conflict between the constitutional right to jury trial and the problem of upholding federal court orders in civil rights matters (p. 8). In this context, Mr. Goldfarb's book deserves close scrutiny.

Mr. Goldfarb states that: "The purpose of this book is to examine the history, varieties, and implications of the power of contempt of court and Congress and other governmental bodies, to describe its birth, growth, and maturation, and its conflicts with American notions of constitutional law" (p. 9). He then traces the contempt power to the early English rulers and the "divine law of kings, and its aspects of obedience, cooperation, and respect toward government bodies" (p. 11). Originally, the king's courts and officers

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1 See, e.g., Bridges v. California, and Times-Mirror Co. v. Superior Court of California, 314 U.S. 252 (1941).
appropriated his power on the ground that they were acting in his place. Gradually, the contempt power was considered to be one inherent in the courts themselves and eventually, courts held that it was necessary to their judicial function (pp. 12-14). Mr. Goldfarb argues that until the end of the Eighteenth Century, contempts, except those "in the face of the court," were treated procedurally, "in the ordinary course of the law" (pp. 15-16). Apparently, Mr. Goldfarb means by "in the ordinary course of the law," the right to jury trial, among other things (p. 18). "Contempts in the face of the court" includes, apparently, physical disruption of the court's proceedings, but it must also include frustration of the court's orders out of its presence, since the Supreme Court, in the appendix to its opinion in United States v. Barnett,\(^6\) cites numerous examples from as early as the mid-Seventeenth Century where persons were punished by colonial courts without jury trial for contempt of court outside of the court's presence, including the contempt of speaking critically of the courts and their decisions. Of course, as Mr. Justice Goldberg pointed out in his dissent in the Barnett case, the penalties authorized and imposed for criminal contempts during colonial times and at the time of the adoption of the American Constitution were generally minor and the courts were generally permitted by law to impose minor criminal penalties without a trial by jury for a variety of trivial offenses, "including, but not limited to, criminal contempts."\(^6\) Whether or not Mr. Goldfarb is right in his conclusion that the court's power to deal summarily with contempts committed outside its presence is an invention of Justice Wilmot in Rex v. Almon\(^8\) (p. 16), or whether the Almon case is merely a more celebrated example of the court's tendency to punish criticism of itself, this is not the answer to the question whether a person accused of committing a criminal contempt of a court outside its immediate presence is or is not entitled to a jury trial and the other constitutional safeguards extended to criminal defendants. Mr. Goldfarb argues along with Mr. Justice Black\(^8\) that the constitutional right to a jury trial should extend to a criminal contempt committed outside the courtroom (pp. 183-84), and he predicted, in an appendix to his book (pp. 333-34), that the Supreme Court would adopt this view in its decision in the Barnett case. In that case, contrary to Mr. Goldfarb's prediction, the court reached the opposite conclusion; but in a puzzling footnote states, by way of dictum: "Some members of the Court are of the view that, without regard to the seriousness

\(^{6}\) Ibid.

\(^{6}\) Id. at 740.

\(^{7}\) The opinion in Rex v. Almon was written in 1765, but was not published until 1802 when Justice Wilmot's son included it in WILMOT'S NOTES (Wilmot ed.).

of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." Because of this footnote, Mr. Goldfarb's prediction may have been only partly wrong.

In any event, the right to a jury trial in criminal contempt cases has been extended by statute to a broad category of contempts of court, and summary proceedings in contempts committed in the court's presence have been limited by judicial interpretation.

Of course, Mr. Goldfarb does not confine himself to a discussion of criminal contempts. He also discusses the civil contempt at length (pp. 46-67). One of the most useful purposes which Mr. Goldfarb's book will serve for the lawyer is as an exposition of the incredible bootstrapping which is involved in the categorization of contempts as Civil as opposed to Criminal.

... For example, since the method of reviewing contempt cases is determined by the classification of the contempt (civil contempt was reviewed by a direct appeal, and criminal contempt by a writ of error), it is circuitous to use this aspect of the proceeding at a later stage to reflect upon the proper classification of that same contempt (p. 63).

One must note that these classifications are signally important. With each labeling of a given contempt, a different door is opened to a different legal arena and a new association of participating procedures and characteristics. These classifications go to the heart of an accused contemnor's liberty and property rights... (p. 48).

... For example, direct contempts are dealt with summarily, indirect contempts demand some hearing; direct contempts are insignificantly protected by the First Amendment, constructive contempts usually are protected; criminal contempts are pardonable, civil contempts are not; civil contempts allow for punishment which could conceivably continue without end, while criminal contempts have vaguely limited punishments; the privilege against self-incrimination and the criminal Statute of Limitations apply to criminal but not civil contempts; the burden of proving the offense is greater for criminal than for civil contempts; the civil contempt sentence can be purged while an adjudication of criminal contempt is fixed and final. The variations on this theme go on and on. These are but a few of the more glaring examples, which underscore the perceptive Holmesian comment that the substance of the law is secreted in the interstices of procedure (pp. 48-49).

The problems of classification become even more intolerable when a litigant is faced with a combined criminal and civil contempt pro-

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9 376 U.S. at 695 n.12.
10 See, e.g., 38 STAT. 738-740, 18 U.S.C. §§ 402 and 3691, and Rule 42(b) F.R.Cr.P.

Although Mr. Goldfarb points out that the concept of contempt, particularly the use of the contempt power to coerce compliance with judicial decrees in civil matters, is not known in Civil Law Countries (p. 2), he does not adequately discuss the procedures which are used in Civil Law Countries as devices for obtaining compliance.

Mr. Goldfarb argues that originally "the contempt power was directed at offensive conduct which derived its criminality from the active interference with the crown or its acting official agents," and that "what is now called civil contempt was originally called contempt in procedure and was considered a quasi-contempt; contempt in theory and name alone" (p. 50). In effect, civil contempt is merely an appropriation of the use of fines and imprisonment by a court to compel obedience to a civil judgment of the court. The author argues that civil contempt is retributive and that it violates basic principles of criminal law and justice which have long been accepted in the American sense of values in that it deprives the individual of the right to trial by jury precedent to his imprisonment, it allows indefinite imprisonment for an undefined offense, and it allows imprisonment in a civil matter (pp. 293-94). Further, he concludes that it is unnecessary in most cases, since the aim could be accomplished by other available methods short of imprisonment. By way of example, he points out the typical case of a civil contempt where the husband fails to deliver property to the wife in accordance with a decree of a divorce court. He states that powers of execution such as garnishment, levy and attachment should be perfected so that the true aim of the court’s order, i.e., the payment, can be accomplished. He states: “Only when the recalcitrant witness goes so far as to make normal execution by the court impossible should personal action against him be taken, and then it would be for a true contempt of court, a criminal interference with government. After trial for this offense, the contemnor could be imprisoned for a definite period” (p. 296). He also states that “where insufficient powers of execution exist, the legislature should provide adequate machinery” (p. 296). Mr. Goldfarb’s conclusions with respect to civil contempt, particularly his comment that indefinite imprisonment is really retribution no matter what the courts say about carrying the keys to one’s freedom (p. 61), make a great deal of sense and it does seem questionable that an individual should be

held in custody or subjected to confiscatory fines in civil matters. Of course, if it is conceded that the imprisonment or fine is in fact a penalty exacted for interference with government, then the true nature of the proceeding becomes apparent and it is proper to ask whether unlimited punishments and penalties for criminal acts are proper in this country.

Congress early in its history successfully claimed that it had an implied power to punish summary contempts. In 1857, a congressional contempt statute was adopted for the prosecution of contempts in courts of law. Congress has not used the implied power recently (p. 43) and the principal issues which have involved the use of the contempt power by Congress have been those of balancing the rights of free speech and association against the congressional desire for information. Mr. Goldfarb's concern about the use of contempt as a device to determine these issues is twofold: (i) he claims the contempt procedure is most frequently used as a device to expose and that this is not really related to Congress' legislative function, and (ii) that it is a device to punish by exposure those who have engaged in behavior which if not criminal, is at least unpopular (p. 288). He states:

Ours has traditionally been a government of cooperation between Congress and the people. The ordinary representative or senator who seeks legitimate information directly relevant to his legislative work can usually get it without force. Most often, he need only ask to be given zealous, popular assistance. Even in the two areas of greatest conflict, crime and subversion, there is reason to conclude that Congress might have done all it did (possibly more) without the contempt sanction. Most people simply cooperate. . . (pp. 288-89).

He argues that it is not necessary to consider the congressional investigative power and the congressional contempt power as one issue. Without reaching a definite conclusion that the congressional contempt power should be abolished, he indicates that he favors this result (p. 290).

With respect to the judicial power of contempt Mr. Goldfarb argues that courts could be protected from direct contempts by the power to exclude recalcitrant persons from the courtroom, (no mention is made of the recalcitrant defendant in a criminal case), and to cause disciplinary proceedings to be held with respect to misbe-

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13 Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).
Under this statute, Congress may refer the matter to a United States Attorney who presents it to a grand jury. If the grand jury returns an indictment, the case is tried in a Federal district court by ordinary criminal processes.
behavior of counsel or other court officers rather than by the summary power to punish (pp. 298-99).

Mr. Goldfarb concludes that he cannot expect either the courts or Congress to adopt these suggestions so, instead, he suggests the abolition of all civil contempts and all implied and statutory criminal contempts and the adoption of the following statute to replace criminal contempt. The statute defines an offense he calls "misdemeanor to government" (p. 301):

Any person, whether as an individual or in a representative capacity, who willfully does an act or omits to act, in such a way as to substantially obstruct a governmental agency's legitimate work, without a legal right to so act or omit to act, is subject to a fine of from $100 to $5,000, and imprisonment of from one day to one year, or both. Where the act proscribed by this section is also prohibited by any other penal law of the United States, the offender may be punished under either statute at the election of the United States, but never may be prosecuted under both that statute and this statute. Action under this law must be initiated by the complaint of the proper and authorized representative of the government body offended. In any action under this section, all rights guaranteed by the United States Constitution will be guaranteed for the benefit of the accused. Acts under this statute shall be confined to personal conduct which affects official governmental proceedings, and matters of attendance, cooperation, and obedience at those proceedings (p. 302).

The purpose of the statute is to avoid many of the criticisms leveled by Mr. Goldfarb at the contempt procedure, including the "generality . . . of contempt law . . . which leaves undefined to potential wrongdoers both the acts which are forbidden and the punishment which may be exacted for their commission . . ." (p. 300) and the "denial of general rights of criminal procedure . . . (p. 301). Although the author has made a very plausible cause for eliminating or substantially modifying the contempt procedure, his "misdemeanor to government" statute as set forth above does not come off well. He does not explain what the phrase "without a legal right to so act or omit to act" means other than to refer to constitutional or "other legally recognized rights" and gives as an example the exercise of the privilege against self-incrimination by refusing to testify (p. 303). It would have been more illuminating had he given an example other than constitutional since a constitutional right scarcely needs statutory recognition and it is difficult to envision others except those which might be expressly provided by other statutes. Perhaps the phrase is not intended to mean anything more, but the reader cannot be sure and presumably neither could a court.
nor a witness pondering whether it included such things as the "right to privacy" (p. 219).\footnote{See Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).}

The more serious defect in Mr. Goldfarb's statute is the word "substantially." He is drafting a criminal statute and "substantially" is hardly specific enough. What Mr. Goldfarb says he means, by way of example, is that a person cannot be convicted for willfully refusing to answer a congressional question even if there was a right to ask and get an answer, since it may be that Congress could get the answer from some other source (p. 303). If so, it is merely another vehicle for a court to review the pertinency of congressional investigation, a subject which would still be a legitimate source of judicial inquiry. Mr. Goldfarb does not explain what happens if a court charges a witness with violating this statute by refusing to answer a question and is met with the defense that the litigant asking the question could obtain, or perhaps already has obtained in judicially admissible form, the same evidence. The answer is that neither Congress nor the courts will permit this kind of re-examination of the relevancy and value of information they desire to obtain.

Moreover, it is possible that the concept of obstruction of the governmental agency's legitimate work would extend to executive functions; a prospect which neither Mr. Goldfarb nor most citizens would relish and which, in fairness to Mr. Goldfarb, he recognizes may exist in the statute as set forth above (p. 305).

Mr. Goldfarb's recommendation would be more helpful had he further explained and expanded it. He does state that he will leave the "exact articulation . . . to others more skilled at the art [of legislative draftsmanship]" (p. 308). It is probable that Mr. Goldfarb did work hard at articulating his statute and found it a very hard subject to deal with definitively. It is equally probable that Congress will not enact any such statute unless Mr. Goldfarb and a great many others spend more time and effort on the subject; even then it is unlikely.

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