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Is the Contempt Power Obsolete?

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Is the Contempt Power Obsolete?

Nino C. Monea*

ABSTRACT

Contempt power has been with us for as long as we've had courts in this country. Through summary contempt proceedings, judges may imprison any person they deem insufficiently respectful to the authority of the court—with significantly less due process than a person would be entitled to under any other criminal offense. In theory, this is necessary to maintain order in the court. But in practice, summary contempt power is serially and seriously abused. Judges use incarceration to deal with piddling offenses or for no real reason at all. This Article argues that the concept of allowing judges nearly unbridled discretion to jail people for rudeness is outdated and should be reformed.

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INTRODUCTION

“No man may be judge in his own cause.” This maxim is “so universally accepted” by courts that they struggle to conjure up scenarios where the rule might not apply.¹ It would certainly stop a former prosecutor from ascending to the bench and then judging a former defendant of his.² It is equally certain that a judge cannot oversee a case where they “have an interest in the outcome.”³ And it is further certain that due process cannot exist where there is “a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant.”⁴

Each of these proclamations of law should come with an asterisk. Because there is one type of proceeding in which the court system allows judges to not only possess a direct interest in the case, but to serve as the victim, witness, prosecutor, jury, hangman, and court of last resort. It is not begrudgingly tolerated but celebrated as the backbone of the judiciary. Nor is it particularly rare; it happens all the time.

It is the contempt power.

1. See *Terrell v. Tempe*, 274 P. 786, 787 (Ariz. 1929).

2. See *Williams v. Pennsylvania*, 579 U.S. 1, 9–10 (2016).

3. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 880 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

4. See *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

According to Blackstone, the contempt power has been “exercised as early as the annals of our law extend.”⁵ Early American courts utilized contempt power to punish disruptions of their work.⁶ Eighteenth-century judges would amputate the limbs of people held in contempt and prominently display them in the courtroom as a warning to others to obey.⁷ Today, contempt is “vast and largely unregulated.”⁸ It can be invoked to punish disobedience to a court order, a disruption of the judicial process, or for merely insulting a judge.⁹ The contempt power is said to be “inherent” in the court itself.¹⁰ For this reason, courts are not shy about going beyond statutory authority to punish people through contempt, up to and including incarceration.¹¹

No one is safe from being held in contempt and locked up summarily. Not a mayor.¹² Not a 9-year-old child.¹³ Not an 83-year-old man.¹⁴ Not courtroom security staff.¹⁵ Defendants who violate drug

5. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 994 (2d ed. 1888).

6. Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power. Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 486 (1990).

7. *Id.*

8. Joel M. Androphy & Keith A. Byers, *Federal Contempt of Court*, 61 TEX. B.J. 16, 27 (1998).

9. *See, e.g.*, S.C. CODE ANN. § 22-3-950 (2017); *Henderson v. Commonwealth*, 2010 Va. App. LEXIS 451 (Nov. 16, 2010) (unpublished) (citing *Carter v. Commonwealth*, 96 Va. 791 (1899)). For example, in *People v. Warriner*, 317 N.W.2d 681, 684 (Mich. App. 1982), it was conceded that the defendant did not disrupt court proceedings, but his actions did “impair the respect due to [the court’s] authority.”

10. *In re Millington*, 24 Kan. 214, 222 (1880); *Osborne v. Purdome*, 244 S.W.2d 1005, 1012 (Mo. 1952); *In re Samantha L.*, 824 N.W.2d 691, 694 (Neb. 2012); *State v. Goeller*, 263 N.W.2d 135, 138 (N.D. 1978); *State v. Spainhower*, 283 P.3d 361, 363 (Or. Ct. App. 2012).

11. *See State ex rel. Or. State Bar v. Lenske*, 407 P.2d 250, 255 (Or. 1965) (citing cases) (“In most jurisdictions where the legislature is prohibited from unreasonably abridging or limiting the inherent judicial contempt power of the courts.”).

12. Press Release, Ark. Jud. Discipline & Disability Comm’n, Formal Statement of Charges, *In re Judge L.T. Simes* (Dec. 17, 2008), <https://bit.ly/3WDo1hQ> [<https://perma.cc/E77L-VQCF>].

13. MICH. JUD. TENURE COMM’N, ANNUAL REPORT 2017, at 14 (2018), <http://bit.ly/3VcH4Pt> [<https://perma.cc/3AF7-BQA9>].

14. CAL. COMM’N ON JUD. PERFORMANCE, 1992 ANNUAL REPORT 11–12 (n.d.) <https://bit.ly/3EfTM9B> [<https://perma.cc/F5FB-TW37>].

15. TEX. COMM’N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARIES: FY 2000 TO PRESENT 8 (2016), <http://bit.ly/3CKqG1h> [<https://perma.cc/JQ89-W8KK>] (fining people in excess of \$100 statutory limit).

court orders can get locked up for contempt when their underlying offense is not even eligible for incarceration.¹⁶

Contempt comes in two flavors: direct and indirect. Direct contempt is misconduct that occurs in the presence of the judge and is typically punishable summarily (read: less due process).¹⁷ Think of insulting the judge or being unruly. Indirect contempt occurs outside the presence of the judge and requires notice and hearing before a person can be punished.¹⁸ Examples would be defying a court order or failing to show up to a proceeding.

This Article is primarily concerned with direct contempt. Direct contempt is more likely to be abused because (1) the judge who issues the punishment is also the victim of the offense, (2) it is immediate, there is no deliberation, and (3) there are fewer due process protections than an ordinary criminal proceeding.¹⁹ Judges should not be able to summarily imprison people for misconduct they directly observe when the only harm is to the dignity of the individual judge.

After many years of extremely punitive criminal law, the public is beginning to question the wisdom of lengthy prison terms for most crimes.²⁰ Surveys suggest people view jail as “an incredibly harmful experience.”²¹ And incarceration causes psychological harm to inmates.²² So it should be the goal of the justice system to

16. *Miss. Comm'n on Jud. Performance v. Thompson*, 169 So. 3d 857, 865–66 (Miss. 2015).

17. David A. Anderson, *Summary Contempt Power in the Military: A Proposal to Amend Article 48, UCMJ*, 160 MIL. L. REV. 158, 162 (1999).

18. *Id.* at 163.

19. This is not to say indirect contempt is never abused. For example, judges can hold people in contempt for failing to show up to court even when they were not properly informed to show up. Final Judgment and Sanctions at 5, 7, *In re Batiste* (Ala. Ct. Jud. 2013), <http://reut.rs/3ExK7vA> [<https://perma.cc/XG5W-LSGC>]; *In re Frederic-Braud*, 973 So. 2d 712, 714 (La. 2008). The judge improperly held at least four other people in contempt in violation of the rules. Final Judgment and Sanctions at 15–17, 21, 26, *In re Batiste* (Ala. Ct. Jud. 2013), <http://reut.rs/3ExK7vA> [<https://perma.cc/MH7N-64XS>].

20. Ames Grawert, *What Is the First Step Act—And What's Happening With It?*, BRENNAN CENT. JUST. (June 23, 2020), <http://bit.ly/3rFF0lo> [<https://perma.cc/L8AA-5KR7>]; *The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN HARRIS, <http://bit.ly/3RTdgo2> [<https://perma.cc/6UN8-9ZHY>] (last visited Nov. 8, 2022) (noting the President campaigned on ending mandatory minimums).

21. Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 714 (2021).

22. See Lorna Collier, *Incarceration Nation*, AM. PSY. ASS'N (Oct. 2014) <http://bit.ly/3Eu6vWz> [<https://perma.cc/F7JF-NRS6>]. Solitary confinement in particular is recognized as psychological torture. See also *United States: Prolonged Solitary Confinement Amounts to Psychological Torture, says UN Expert*, UNITED NATIONS (Feb. 28, 2020), <https://bit.ly/3UPYPdk> [<https://perma.cc/4LLG-ZJ4V>].

scrutinize incarceration, reserving it for individuals who pose a danger to society.

By this test, contempt power flunks. Far too often, people get thrown in jail for piddling misconduct—misconduct that would never justify incarceration if it was committed against a legislator, executive, police officer, bureaucrat, or anyone else in power. To make the case that the nearly unlimited power to summarily imprison people for contempt is outmoded, this Article delves into an under-analyzed dataset: judicial disciplinary cases. The author examined roughly 350 cases of judicial misconduct from around the country and several supplementary sources to analyze abuses of the contempt power. Some of the main points are:

- Contempt has been used to jail people for enormously small offenses, such as wearing a hat or failing to stand when a judge enters a room.
- Many judges use contempt as a weapon to bully people into doing what they want, even when it has nothing to do with a case.
- It is unheard of for a judge to be incarcerated for abusing contempt power—even when they wrongfully incarcerate citizens.
- Courts argue contempt power is necessary to enforce respect for the judiciary, but courts have held in all other contexts that government must earn respect, not mandate it.
- Fundamental tenants of due process often do not apply to contempt, further amplifying the risk that a person will be wrongfully incarcerated.
- The author located 2,662 complaints of judges abusing their power (not necessarily contempt power) from around the country, as reported by state judicial misconduct boards.

This Article has four Parts. Part I is about the nature of contempt power. Its historical justifications no longer exist, the modern justifications offered for it have been rejected by courts when other governmental units have sought similar power, and most due process protections have been removed from summary contempt proceedings. Part II chronicles the widespread abuse of contempt powers, mainly relying on judicial discipline cases. It shows that contempt abuse is frequent and involves stiff jail sentences or other harsh punishments. This Part also illustrates a double standard: citizens get jail time for misbehaving, but all judges receive is a finger-wagging. Part III offers solutions, drawing upon preexisting sys-

tems. Judges could deal with disruptive behavior—without the need for incarceration—by removing people from the courtroom, or by referring matters to prosecutors, attorney discipline boards, or a detached, impartial judge. Part IV concludes.

I. SUMMARY CONTEMPT POWER IS STRUCTURALLY UNSOUND TODAY

A. *Historical Justifications for Expansive Contempt Power No Longer Apply*

As courts tell it, the entire judiciary will come apart at the seams if they do not have *carte blanche* authority to jail people who misbehave in court, immediately and without a proper hearing.²³ There may have once been some truth in this. In the Founding Era, court opinions were more suggestions than legally binding edicts. But over time, norms have changed, and court rulings are unflinchingly obeyed and enforced, even on controversial topics.

When the Supreme Court decided *Marbury v. Madison*,²⁴ Chief Justice John Marshall knew he could not directly order President Thomas Jefferson to carry out a writ of mandamus, as he could simply ignore it.²⁵ Watered down as the decision ended up being, Jefferson hated it anyway, criticizing it so harshly he contributed to mistrust of the judiciary nationwide.²⁶ He and his Democratic-Republicans in Congress sought to use impeachment to purge the government of Federalist judges, with Justice Samuel Chase being impeached for “hold[ing] dangerous opinions.”²⁷ In the years that followed, Jefferson continued to vent against judges.²⁸

23. See *In re Terry*, 128 U.S. 289, 313 (1888) (noting that without contempt, “judicial tribunals would be at the mercy of the disorderly and violent”); *accord* *United States v. Murphy*, 326 F.3d 501, 503 (4th Cir. 2003); *Smith v. Adams*, 288 S.E.2d 775, 776 (Ga. App. 1982); *Mitchell v. State*, 426 P.3d 830, 843 (Wyo. 2018).

24. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

25. Melvin I. Urofsky, *Marbury v. Madison*, ENCYC. BRITANNICA, <http://bit.ly/3CK7yQW> [<https://perma.cc/MEL4-3PER>] (last visited Nov. 7, 2022).

26. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 715 (1995).

27. See ROBERT CARO, *MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON* 12 (2002).

28. See Letter from Thomas Jefferson to Abigail Smith Adams (Sept. 11, 1804), in *THE ADAMS PAPERS* (National Archives), <http://bit.ly/3Vj7TBp> [<https://perma.cc/LP27-RCEU>] (saying that judges should not get to decide the validity of a law); see also Proposals to Revise the Virginia Constitution: I. Thomas Jefferson to “Henry Tompkinson” (Samuel Kercheval) (July 12, 1816), in *10 THE PAPERS OF THOMAS JEFFERSON* (National Archives), <http://bit.ly/3CFekqf> [<https://perma.cc/W8B7-DP8A>] (complaining that judges had grown too powerful).

Jefferson was hardly alone. Plenty of other presidents had icy relationships with courts. President Andrew Jackson vetoed a national bank bill, rejecting the notion that the bank was constitutional just because the Supreme Court said so. To the contrary, he asserted “[m]ere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power.”²⁹ Abraham Lincoln, in a speech about the *Dred Scott*³⁰ decision, said judicial edicts should not be blindly accepted but should only be given weight based on their logic, nonpartisanship, and how well they match public expectations.³¹ In his first inaugural address, he warned that if a matter of public policy became “irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers.”³² And during the Civil War, Lincoln ignored an order to release a prisoner held by federal authorities and suspended habeas corpus.³³ In addition to his court-packing plan, Franklin Roosevelt prepared a speech where he pledged to not “stand idly by and to permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion” when it looked like the Court was poised to rule against him in the Gold Clause Cases.³⁴

States too were ragging on judges. In 1807, the Supreme Court of Ohio struck down statutory limits on jurisdiction. The legislature attempted to impeach the justices, and when their terms of office expired, appointed new justices.³⁵ *McCulloch v. Maryland* held that a state could not tax the federal government, but that did not stop Ohio’s state auditor from forcibly seizing \$120,000 from the national bank’s Ohio branch to collect state taxes.³⁶

29. Andrew Jackson, *Veto Message, July 10, 1832*, in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897 (James D. Richardson ed.), <http://bit.ly/3RRM8Wq> [<https://perma.cc/8NST-U4NJ>].

30. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

31. See Abraham Lincoln, *Speech on Dred Scott Decision*, TEACHING AM. HIST. (June 26, 1857), <http://bit.ly/3fU7V2H> [<https://perma.cc/L7SE-RRW5>].

32. See *First Inaugural Address of Abraham Lincoln*, YALE L. SCH.: THE AV-ALON PROJECT (2008), <http://bit.ly/3Eu7h5V> [<https://perma.cc/84KV-FGD3>].

33. Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 415 (2003).

34. See WILLIAM LASSER, *THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS* 121 (2017). The Gold Clause cases challenged governmental restrictions on gold put in place to stabilize the economy—restrictions deemed so important that FDR’s administration pondered stripping the Supreme Court of its appellate jurisdiction if it ruled the wrong way. *Id.*

35. See Theodore W. Ruger, “*A Question Which Convulses a Nation*”: *The Early Republic’s Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826, 839 (2004).

36. Carpenter, *supra* note 33, at 415.

After the Kentucky Supreme Court struck down a popular debtor relief law in 1823, the state legislature dissolved the court and replaced it with a tightly limited successor.³⁷ Another time in Kentucky, the state legislature asked the governor to advise it how “to refuse obedience to the decisions and mandates of the [United States] Supreme Court” and asked whether “it may be advisable to call forth the physical power of the State” to defy the Court.³⁸ In the 1830s, South Carolina “denied the paramount authority of the Court, and flew to arms to resist it” according to newspapers.³⁹

Around the mid-19th century, a movement formed arguing that judges should be elected, not appointed. Some of its supporters “happily conceded that judicial elections were designed to limit judicial independence.”⁴⁰ Alexis de Tocqueville diagnosed this as an attempt to “reduce the judicial power,” “diminish[] the independence” of judges, and as an attack on “the democratic republic itself.”⁴¹

Not only were non-judicial actors skeptical of the power of courts, judges themselves could be. Justice John Gibson of the Pennsylvania Supreme Court openly questioned the legitimacy of judicial review in 1825.⁴² Great controversy ensued when the U.S. Supreme Court reviewed matters of local law that had already been passed on by state supreme courts in 1849. Ohio courts, for instance, refused to follow these decisions for years.⁴³ The California Supreme Court flatly renounced the U.S. Supreme Court, saying “we see no sufficient reason in [the Supreme Court’s opinion] for the surrender of a power which belongs to the sovereignty we represent.”⁴⁴ Wisconsin state courts defied a federal court order by releasing a man convicted of assisting a runaway slave.⁴⁵ These examples underscore the causal disregard political actors had for court opinions.

37. See Ruger, *supra* note 35, at 828.

38. Carpenter, *supra* note 33, at 415–16.

39. See *The Slavery Question—The Decision of the Supreme Court*, BELMONT CHRONICLE (Apr. 2, 1857), <http://bit.ly/3emTdk3> [<https://perma.cc/U665-EEER>]; see also *The Slavery Question—The Decision of the Supreme Court*, KAN. TRIB. (Apr. 13, 1857), <http://bit.ly/3SNsM65> [<https://perma.cc/PRA5-TVVM>].

40. See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1089 (2010).

41. See ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 440 (Liberty Fund 2012).

42. See *Eakin v. Raub*, 12 Serg. & Rawle 330, 345 (Pa. 1825) (Gibson, J., dissenting).

43. Barton H. Thompson, Jr., *The History of the Judicial Impairment “Doctrine” and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1403 (1992).

44. *Johnson v. Gordon*, 4 Cal. 368, 369 (1854).

45. Carpenter, *supra* note 33, at 416.

This is not the world we know today. “American society now unquestionably obeys most any Supreme Court ruling,” noted Judge Richard E. Welch III.⁴⁶ The executive branch has universally followed judicial orders for generations.⁴⁷ When the Supreme Court called a presidential election,⁴⁸ there was no serious public resistance. Bureaucrats will defy direct orders from the president when the courts allow it, rather than defy the courts.⁴⁹ Even Richard Nixon turned over self-damning Whitehouse tapes when the Supreme Court ordered it.⁵⁰ If courts ever needed contempt power to gain respect, they no longer do. And there is no reason to think that heavy-handed application of the contempt power had anything to do with the change in norms.

B. *Courts Play by a Separate Set of Rules When It Comes to Contempt*

Great tension lies at the heart of the contempt power. As Justice Louis Brandeis said, the founders of America “knew that order cannot be secured merely through fear of punishment,” and that such a strategy would only breed discontent.⁵¹ Speaking specifically on the contempt power, the Court admitted “an enforced silence . . . solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.”⁵² Yet the contempt power is still permitted to accomplish just this.

Courts assume that if contemptuous conduct “is not instantly suppressed and punished, demoralization of the court’s authority will follow.”⁵³ And no contemptuous conduct is more contemptible than allegations of judicial corruption. Indiana’s courts have surmised that if the citizenry is free to accuse judges of corruption, it will “poison the foundation of justice and create distrust, and de-

46. Richard E. Welch III, “*They Will Not Open Their Ears*”: *Should We Listen to the Supreme Court and Should the Court Listen to Us?*, 47 *NEW ENG. L. REV.* 93, 94 (2012).

47. Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 *HARV. L. REV.* 685, 694 n.30 (2018).

48. See generally *Bush v. Gore*, 531 U.S. 98 (2000).

49. Suzanne Gamboa, *ICE Defies Biden, Departs El Paso Massacre Witness, Hundreds of Others*, *NBC NEWS* (Feb. 2, 2021), <https://nbcnews.to/3SLpwrO> [<https://perma.cc/ZA7R-RF3T>].

50. Welch, *supra* note 46, at 101.

51. *Whitney v. California*, 274 U.S. 357, 375 (1927).

52. *Bridges v. California*, 314 U.S. 252, 270–71 (1941).

53. *Cooke v. United States*, 267 U.S. 517, 536 (1925).

stroy the confidence of the people in their courts.”⁵⁴ Illinois’ courts have said that allegations of corruption (regardless of whether anyone actually believes them) represent a “serious and imminent threat to the administration of justice.”⁵⁵

Our system does not make this assumption for any other function of government. Quite the reverse. Would anyone argue against the proposition that it is essential for the legislature to have the trust of its citizens for it to be fully effective? For the president? For the bureaucracy? For the police? For the military? Yet would anyone argue that trust in these institutions would go up if citizens could be jailed for alleging they were corrupt? Of course not. That would be as crazy as arguing that confidence in foreign governments rises when they squelch dissidents.⁵⁶ If the government wants the people’s respect, it should earn it, not mandate it.⁵⁷

Case in point: President Barack Obama. During the 2009 State of the Union Address, Representative Joe Wilson was so outraged by what President Obama was saying, he yelled “You lie!”⁵⁸ At the next State of the Union Address, Justice Samuel Alito shook his head and said “not true” when the President predicted that the Court’s *Citizen United* decision would lead to foreign interference in elections at another address.⁵⁹ Both men disparaged the dignity of a constitutional proceeding. Had President Obama had contempt power, he could have jailed either of them. Judges have held spectators in contempt for less.⁶⁰ Yet, President Obama’s inability to jail

54. *Skolnick v. State*, 388 N.E.2d 1156, 1166 (Ind. App. 1979) (quoting *Ray v. State*, 114 N.E. 866, 869 (Ind. 1917)).

55. *D’Agostino v. Lynch*, 887 N.E.2d 590, 600 (Ill. App. Ct. 2008).

56. Incidentally, many foreign courts wield contempt powers like cudgel. Indian courts have imprisoned a journalist for publishing an article evaluating judges. Rahul Donde, *Uses and Abuses of the Potent Power of Contempt*, 42 *ECON. & POL. WKLY.* 3919, 3919 (2007). Nigerian courts have held a defendant in contempt for asking for a matter to be heard by another judge. A.O. Karibi-Whyte, *The Enigma of the Contempt Power*, 4 *NIGERIAN L.J.* 153, 153 (1970).

57. *In re Turner*, 174 N.W.2d 895, 903 (Mich. Ct. App. 1969) (“[W]e cannot accept the mistaken syllogism that allegations of corruption in and of themselves create corruption.”).

58. Ian Schwartz, *Flashback: Rep. Joe Wilson Yells “You Lie” When President Obama Said Illegals Will Not Get Health Insurance*, *REALCLEARPOL.* (June 28, 2019), <https://bit.ly/3fI0cER> [<https://perma.cc/3BQ7-7NT5>].

59. Ronald A. Klain, *Opinion: Justice Alito, You Owe President Obama an Apology*, *WASH. POST* (Dec. 21, 2018), <https://wapo.st/3SApfla> [<https://perma.cc/84ED-U37G>].

60. *MICH. JUD. TENURE COMM’N, ANNUAL REPORT 2014*, at 23 (2015), <https://bit.ly/3UjGFty> [<https://perma.cc/4F4K-R9HR>]; Findings of Fact and Conclusions of Law, *In re Lewis* (Utah Jud. Conduct Comm’n 2007) (No. 06-3D-069), <https://bit.ly/3rHrKfW> [<https://perma.cc/S67X-XZT5>]; *In re Spurlock*, 98 Ill. Cts. Com. 1, 1 (2001), <https://bit.ly/3RJ0QPm> [<https://perma.cc/8ATM-NPCS>] (citing *In re*

Rep. Wilson or Justice Alito did not diminish his popularity or respect nationwide: he was the most admired man in America in Gallup polls for 12 years straight.⁶¹

Indeed, when non-judicial public officials have their names drug through the mud, the courts insist that it is healthier to allow muckraking, including falsehoods, than to stamp out potentially unfair criticism.⁶² Ordinary people, too, can be tormented to an almost infinite degree. Gold star families must accept that protestors can ruin their children's funerals by screaming that God killed them as punishment for gay marriage.⁶³ Though the Supreme Court recognized that these protests "inflict great pain . . . we cannot react to that pain by punishing the speaker."⁶⁴ Women seeking abortions have to wade through a hostile mob trying to bully them—and the mob has the right to stand within spitting distance.⁶⁵ Courts have allowed neo-Nazis to march through the streets.⁶⁶ In each of these cases, judges determined that society must tolerate harm to others in the name of free speech. But they will not tolerate harm to themselves.

The same disparity exists for non-judicial institutions. Anyone can burn the American flag because, as the Supreme Court tells us, "[t]he way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong."⁶⁷ The Medal of Honor is our nation's highest accolade, given to those in war who risk their lives "above and beyond the call of duty."⁶⁸ But if you purloin this sacred honor and falsely claim you won it, there is no punishment. While your conduct would be "contemptible," in the words of the Supreme Court, the First Amendment "protects speech we detest as well as the

Keith, 3 Ill. Cts. Com. 38, 54 (1994)); Determination at 4–5, *In re Lawrence* (N.Y. Comm'n on Jud. Conduct 2005), <https://on.ny.gov/3EooVIZ> [<https://perma.cc/23EB-PSQT>].

61. Jeffrey M. Jones, *Obama, Trump Tie as Most Admired Man in 2019*, GAL-LUP (Dec. 30, 2019), <https://bit.ly/3SUDhEi> [<https://perma.cc/B8YE-PQJC>].

62. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270–72 (1964) (recognizing that we must allow "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," as well as "erroneous statement[s]" for the First Amendment to have "breathing space").

63. *Snyder v. Phelps*, 562 U.S. 443, 461 (2011).

64. *Id.*

65. *Hill v. Colorado*, 530 U.S. 703, 725–26 (2000) (allowing an eight-foot buffer).

66. *See Nat'l Socialist Party v. Skokie*, 432 U.S. 43 (1977) (permitting Nazi march through a Jewish neighborhood).

67. *Texas v. Johnson*, 491 U.S. 397, 419 (1989).

68. 10 U.S.C. § 7271.

speech we embrace.”⁶⁹ Judges have said that boards of education⁷⁰ and city councils⁷¹ may not silence attendees who criticize them. When a government agency tries to punish an employee for criticism, asserting it was detrimental to the administration of public services, judges demand evidence of actual harm.⁷² Municipalities cannot ban citizens from interrupting police officers, since “a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.”⁷³ This logic applies with equal force to criticism of judges.

Courts admit that the contempt power is “arbitrary” and “liable to abuse.”⁷⁴ One of the first California Supreme Court decisions admitted “[t]he power [of contempt] is necessarily of an arbitrary nature.”⁷⁵ Ordinarily, the fact that a governmental action is *arbitrary* is enough to close the discussion. Commanders have “broad discretion” to exclude civilians from a military installation,⁷⁶ and the decision may be made without notice or opportunity to be heard, but the exclusion may not be “patently arbitrary or discriminatory.”⁷⁷ In other words, courts retain a level of discretion over contempt power that they will not give to military commanders who fight our nation’s wars.

Disobeying an unlawful order from a judge is not a defense to contempt.⁷⁸ In *Walker v. City of Birmingham*, the Supreme Court upheld contempt convictions for African-American ministers protesting segregation in the South in violation of a court injunction.⁷⁹ One of these ministers was Martin Luther King Jr., who wrote his Letter from Birmingham Jail while imprisoned for contempt.⁸⁰ Such an injunction was plainly unconstitutional, but by the Court’s logic,

69. *United States v. Alvarez*, 567 U.S. 709, 729 (2012).

70. *Besler v. Bd. of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist.*, 993 A.2d 805, 811 (N.J. 2010).

71. *Brown v. City of Jacksonville*, No. 3:06-cv-122-J-20MMH, 2006 U.S. Dist. LEXIS 8162, at *13 (M.D. Fla. Feb. 16, 2006).

72. *In re Appeal of Chalk*, 272 A.2d 457, 461 (Pa. 1971).

73. *City of Houston v. Hill*, 482 U.S. 451, 472 (1987).

74. *In re Terry*, 128 U.S. 289, 313 (1888).

75. *People v. Turner*, 1 Cal. 152, 153 (Cal. 1850).

76. *United States v. Albertini*, 472 U.S. 675, 690 (1985).

77. *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 897–98 (1961); *see also Greer v. Spock*, 424 U.S. 828, 839 (1976) (affirming exclusion when it was “objectively and evenhandedly applied”).

78. *Maness v. Meyers*, 419 U.S. 449, 458–59 (1975).

79. *Walker v. Birmingham*, 388 U.S. 307, 338 (1967) (Brennan, J., dissenting).

80. Alexandra D. Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 UCLA L. REV. 725, 732–34 (2010).

it must be appealed, not disobeyed.⁸¹ In just about any other context, a person has not merely the right, but the obligation to disobey illegal orders. Employees who get illegal orders from their boss must disregard them.⁸² Soldiers may not follow unlawful orders,⁸³ and they may not claim the defense they were “just following orders” if they should have known the orders were illegal.⁸⁴ This is another example of how judges give themselves a level of authority we do not trust for anyone else.

C. *Due Process Protections Have Been Stripped Away from Contempt*

When it comes to contempt power, individual rights slough off like rotten meat from a bone. Contempt prosecutions have been deemed not to be “crimes,” thus depriving them of many constitutional protections.⁸⁵ The most flagrant violations occur in summary contempt.

In early America, victims had to personally prosecute crimes done against them without help from the state.⁸⁶ Today, the victim might be informed and consulted but is not the one driving the case. This makes sense, as the one hurt by the crime cannot be expected to view the situation dispassionately. In normal circumstances, a person cannot have a direct interest in the outcome of a case they are prosecuting. *Young v. United States ex rel. Vuitton*⁸⁷ was a case involving the violation of an injunction. The violating party was charged with contempt.⁸⁸ The lower court appointed the attorney of

81. See *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967); cf. *State v. Wilson*, 285 N.E.2d 38, 40 (Ohio 1972) (“The integrity of the judicial process demands total deference to the court”); *Kirby v. Mich. High Sch. Athletic Ass’n*, 585 N.W.2d 290, 297 (Mich. 1998) (“A party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect”); *In re Eastburn*, 914 P.2d 1028, 1034 (N.M. 1996) (similar); *Patriarca v. F.B.I.*, 630 F. Supp. 993, 1002 (D. R.I. 1986) (“The authorities are practically unanimous that a restraining order, though legally infirm must be obeyed.”).

82. E.g., *Garcia v. N.L.R.B.*, 785 F.2d 807, 812 (9th Cir. 1986) (“We prefer the alternative view that a citizen’s first obligation is to obey the law, not the unlawful commands of an employer.”); D.C. CODE ANN. §1-615.52(a)(5)(A) (West 2001) (protecting an employee who “refuses to comply with an illegal order”).

83. 10 U.S.C. § 890.

84. JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(d) (2019).

85. Richard B. Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 YALE L.J. 39, 41 (1978) (citing *Levine v. United States*, 362 U.S. 610, 616 (1960); *Green v. United States*, 356 U.S. 165, 184–85 (1958)); *State ex rel. Dwyer v. Dwyer*, 698 P.2d 957, 962 (Or. 1985).

86. See *State v. Davis*, 256 P.3d 1075, 1091 n.12 (Or. 2011).

87. *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 789–90 (1987).

88. *Id.*

the aggrieved party to prosecute the contempt.⁸⁹ The Supreme Court said this was not fair.⁹⁰

Contempt, however, borrows from the colonial system. The judge who rules on the charge can be the victim of the offense.⁹¹ The Supreme Court understands this is problematic, as it has said the risk of “unfair condemnation” will increase if the judge is still “smarting under the irritation of the contemptuous act,” when they hold someone in contempt, but the Court has not forbidden summary punishment.⁹²

Rules of Evidence may be a pain to deal with, but they exist to ensure only reliable sources determine the outcome of the trial. Both state and federal evidentiary codes exempt summary contempt proceedings.⁹³ This means there is nothing stopping judges from relying on hearsay, irrelevant material, unfairly prejudicial evidence, or impermissible character evidence to convict people of contempt. Guantanamo Bay detainees get more stringent rules than this.⁹⁴

Jurors are specifically barred from investigating the facts of a normal case for themselves and instead must rely upon the evidence presented at trial.⁹⁵ In “the crucible of trial,” we presume, the most reliable evidence will emerge.⁹⁶ Judges frequently relieve themselves of this obligation when prosecuting summary contempt, as they talk to whomever they please as part of their investigation.⁹⁷

89. *Id.* at 790.

90. *Id.* at 811–12.

91. *See generally* Complaint, *In re Allred*, No. 42 (Ala. Ct. Jud. 2013), <https://bit.ly/AlaCtJudComplaint> [<https://perma.cc/J7H5-B72W>] (arresting and holding lawyer in contempt for failing to appear).

92. *Sacher v. United States*, 343 U.S. 1, 10–11 (1952).

93. FED. R. EVID. 1101(b); ARK. R. EVID. 1101(b)(4); R.I. R. EVID. 101(b)(4); WYO. R. EVID. 1101(b)(4).

94. *Boumediene v. Bush*, 553 U.S. 723, 784 (2008) (finding a military tribunal may only consider evidence that is “relevant and helpful”).

95. *E.g.*, *People v. Honeycutt*, 570 P.2d 1050, 1053 (Cal. 1977).

96. *E.g.*, *Wilson v. Commissioner*, 705 F.3d 980, 993 (9th Cir. 2013).

97. *See* Determination at 1–2, *In re Colf* (N.Y. Comm’n on Jud. Conduct 1986), <https://on.ny.gov/3CwJYHn> [<https://perma.cc/C362-XC2T>] (threatening someone with contempt based on an *ex parte* communication); *see also* Determination at 2–3, *In re Glover* (N.Y. Comm’n on Jud. Conduct 2005), <https://on.ny.gov/3SWCXVJ> [<https://perma.cc/3PYZ-QHUE>] (threatening man with contempt for playing in a garage band based on *ex parte* communications from neighbors); *see also* Deferred Disciplinary Agreement at 1, *In re Marsh* (Tenn. Bd. Jud. Conduct 2016) (No. B13-5355), <https://reut.rs/3M6gof7> [<https://perma.cc/7F6Z-CM5X>] (ordering a person arrested and incarcerated on the basis of an *ex parte* allegation of domestic assault); *see also* Letter from Chris Craft, Presiding Judge, to A. Andrew Jackson, Judge (Jan. 30, 2012), <https://reut.rs/3ecsI0P> [<https://perma.cc/CL4E-Q5E9>] (holding person in summary contempt for “an incident which occurred outside of [the judge’s] presence” and sentencing her to ten days in jail); *see also*

There is no statute of limitations on contempt.⁹⁸ Actions taken in the distant past can thus be used to justify contempt. A New Jersey defendant failed to pay a \$1,000 traffic fine from ten years ago.⁹⁹ The judge sentenced him to six months for contempt and added \$1,000 after the defendant said he could only pay \$500.¹⁰⁰

The right to a jury trial has been called “the most cherished institution of free and intelligent government.”¹⁰¹ In contempt proceedings, judges call it optional.¹⁰² A defendant is not entitled to a jury trial unless they face more than six months’ imprisonment, and this is generally true of contempt defendants, too.¹⁰³ But states can pare back this standard. A “defendant charged with and immediately tried for direct criminal contempt ordinarily is not entitled to a jury trial,” according to the Maryland Supreme Court.¹⁰⁴

The First Amendment offers little protection. Way back in 1943, the Supreme Court ruled that the government could not force schoolchildren to recite the Pledge of Allegiance.¹⁰⁵ But this did not stop Judge Talmadge Littlejohn from holding an attorney in contempt for refusing to do so.¹⁰⁶ In 1971, the Supreme Court overturned a conviction for disturbing the peace for a defendant who wore “F*ck the Draft” on free speech grounds.¹⁰⁷ Turns out the only mistake the prosecution made was in the charging offense. Because seven years later, a judge ordered a woman imprisoned for

TEX. COMM’N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARIES, FY 2000 TO PRESENT 12 (2016), <https://bit.ly/3MaoZNF> [<https://perma.cc/8EBS-9SN3>] (holding a courtroom spectator in contempt for unauthorized practice of law summarily based on hearsay).

98. *Kaiser v. Kaiser*, 181 N.W. 993, 994 (Mich. 1921) (punishing misconduct which had occurred ten years prior); *Wadler v. Wadler*, 59 N.E.2d 505, 508 (Ill. App. 1945) (declining to apply statute of limitations to contempt); *Ashby v. Ashby*, 183 N.W. 965, 967 (Wis. 1921) (concluding that the statute of limitations did not bar contempt claim that was more than 40 years old).

99. Presentment at 2, *In re Gordon* (Sup. Ct. N.J. Advisory Comm. on Jud. Conduct 2007), <https://bit.ly/3EgmlDI> [<https://perma.cc/RYS5G-MHUM>].

100. *Id.* at 2–3.

101. J. KENDALL FEW, *IN DEFENSE OF THE TRIAL BY JURY* 74 (1993).

102. *United States v. Barnett*, 376 U.S. 681, 682–83 (1964); *Bloom v. Illinois*, 391 U.S. 194, 195–96 (1968); *Cross Co. v. United Auto., Aircraft & Agric. Implement Workers of Am., Local 155*, 139 N.W.2d 694, 698–99 (Mich. 1966) (“[W]e are not ready—as the United States Supreme Court has not been ready—to declare it is a necessary constitutional prerequisite to a criminal contempt proceeding that a defendant be afforded a jury trial.”).

103. *Bloom*, 391 U.S. at 197.

104. *Ashford v. State*, 750 A.2d 35, 41 (Md. 2000).

105. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

106. *Miss. Comm’n on Jud. Performance v. Littlejohn*, 62 So. 3d 968, 969–70 (Miss. 2011).

107. *Cohen v. California*, 403 U.S. 15, 16–17 (1971).

wearing a shirt that said “B*tch B*tch B*tch” for criminal contempt.¹⁰⁸

Sulky judges have long used contempt power to target journalists who write unflattering articles about them.¹⁰⁹ Journalists might be arrested by the state for merely publishing an article about an open session of court when a judge told them not to.¹¹⁰ Lawyers who criticize judges in the press can be hauled into court and reprimanded.¹¹¹ The same is true of law enforcement officers who criticize judges in the press.¹¹²

In St. Charles, Missouri, William Freeman was arrested and detained by police on charges of domestic violence.¹¹³ The defense attorney called Judge Frank Conrad personally and convinced the judge that detention was unnecessary. Agreeing, Judge Conrad went down to the police station and told the officers to release Freeman.¹¹⁴ The chief of police called another judge and an attorney and determined there was no legal authority to release Freeman.¹¹⁵ After threatening contempt, the police chief ultimately released Freeman, and it looked as if the matter was resolved.¹¹⁶ But then the police chief did something worse than disobey a court order: he spoke to the press. The police chief criticized the judge’s actions, and the judge held him in contempt.¹¹⁷ His sentence was a

108. *Summaries of Complaints Filed with the Courts Commission*, ILL. JUD. INQUIRY BD., <https://bit.ly/ShirtNG> [<https://perma.cc/RSC6-44B3>] (last visited Nov. 8, 2022) (case 78-CC-1, filed March 8, 1978; Dexter A. Knowlton, Associate Judge, 15th Circuit, Stephenson County).

109. *People v. Wilson*, 64 Ill. 195, 208–10, 217 (1872) (holding newspaper publishers in contempt for running article calling the courts corrupt); *In re Millington*, 24 Kan. 214, 220 (1880) (arresting and fining journalists for an article that accused the judge of acting as a prosecutor in a concluded trial); Thomas M. Keck et al., *The Judicial Protection of Anti-Judicial Speech*, 33 AM. U. INT’L L. REV. 693, 731, 733 (2018) (documenting dozens of cases involving people charged with contempt for criticizing judges); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 912–13 (1950) (denying cert after reversal of contempt for three radio stations that reported on a pending case); *In re Dingley*, 182 Mich. 44, 46–47 (1914) (holding a newspaper publisher in contempt for saying the judge was using a grand jury “as a club with which to get even with some of our citizens whom he does not like”).

110. *Miss. Comm’n on Jud. Performance v. Byers*, 757 So. 2d 961, 970–71 (Miss. 2000).

111. CAL. COMM’N ON JUD. PERFORMANCE, 1988 ANNUAL REPORT 13 (1988), <https://bit.ly/haledct> [<https://perma.cc/AA4E-C9C9>].

112. *In re Conard*, 944 S.W.2d 191, 197–98 (Mo. 1997) (giving a law enforcement officer a 14-day suspended jail sentence, which could be activated for “criticizing” the judge).

113. *Id.* at 193.

114. *Id.* at 194.

115. *Id.*

116. *Id.* at 194–95.

117. *Id.* at 197.

14-day suspended jail term, contingent on the police officer not “criticizing” the judge.¹¹⁸

In 2020, a North Carolina judge barred journalists from entering a courtroom in a Black Lives Matter case and arrested the journalists when they tried to enter, in contravention of the state constitution.¹¹⁹ The judge told the journalists the courtroom wasn’t closed to the public, but “it’s closed to you.”¹²⁰ As these examples show, disgruntled judges may use contempt to flaunt their power, not to rebuff genuine threats to the authority of the court.

As the old joke goes, all are presumed to know the law, except trial judges, who have an appeals court to set them right. However, when it comes to contempt, defendants may find they have no right to appeal.¹²¹ When appeal is not possible, defendants must collaterally attack the contempt order through a writ of habeas corpus.¹²² This is not merely a matter of semantics. To file a writ of habeas corpus, the burden is on defendants to file the necessary paperwork and demonstrate the grounds for their release.¹²³ Because the purpose of habeas is purely to determine if someone is unlawfully detained, their guilt or innocence is irrelevant.¹²⁴ Thus, there is no way to file a writ if a person is already released¹²⁵ or only fined.¹²⁶ Even worse, the judge may neglect to issue a written contempt or commitment order, which gives victims nothing to challenge through

118. *Id.* at 198.

119. Elahe Izadi & Mark Berman, *A North Carolina Judge is Blocking Journalists from his Courtroom. One Objected—and got Handcuffed*, WASH. POST (Dec. 11, 2020, 1:06 PM), <https://wapo.st/3ylzmsw> [<https://perma.cc/HWU3-J7T8>].

120. *Id.*

121. *Knight v. State ex rel. Butler*, 261 So. 2d 750 (Ala. 1972); *Fox v. Capital Co.*, 299 U.S. 105, 107, 109 (1936); *Docks Venture, L.L.C. v. Dashing Pac. Grp., Ltd.*, 22 N.E.3d 1035, 1038–39 (Ohio 2014) (citing cases).

122. *Wagner v. Warnasch*, 295 S.W.2d 890, 893 (Tex. 1956); *State ex rel. Kandt v. North Platte Baptist Church*, 365 N.W.2d 813, 815 (Neb. 1985); *Smith v. Pace*, 313 S.W.3d 124, 129 (Mo. 2010).

123. *Oil Workers Int’l Union v. Superior Ct. of Contra Costa Cnty.*, 230 P.2d 71, 80 (Cal. App. 1951).

124. *Ex parte Gordon*, 584 S.W.2d 686, 687–88 (Tex. 1979); *Bradley v. Hopkins*, 522 N.W.2d 394, 398 (Neb. 1994) (noting that habeas corpus is about whether “a person is detained illegally” not “an action or suit”).

125. *Crescenzi v. Sup. Ct. of N.Y.*, 749 F. Supp. 552, 555 (S.D.N.Y. 1990); *Cine-Matics, Inc. v. State*, 578 S.W.2d 530, 532 (Tex. Civ. App. 1979).

126. *Tinder v. Paula*, 725 F.2d 801, 804 (1st Cir. 1984) (citing cases); *Hanson v. Cir. Ct. of First Jud. Cir.*, 591 F.2d 404, 407 (7th Cir. 1979); *Ex parte Dancer*, 350 S.W.2d 544, 545–46 (Tex. Crim. 1961); *Sanchez v. Turner*, No. 2:19-CV-1243, 2019 U.S. Dist. LEXIS 68319, at *8 (S.D. Ohio Apr. 23, 2019) (citing cases); *Cravener v. Cameron*, No. 2:08-cv-1568, 2010 U.S. Dist. LEXIS 3289, at *9 (W.D. Pa. Jan. 15, 2010) (citing cases).

habeas corpus.¹²⁷ This can place defendants in the “unfortunate position of being denied the right of appeal and, at the same time, precluded from using the remedy of habeas corpus.”¹²⁸ And because habeas review only asks if the lower court acted beyond the scope of its jurisdiction, not whether there were errors in the judgment, the standard of review is extremely deferential.¹²⁹

Transcripts of proceedings are essential because, without one, “there is no way for an appellate court to exercise any meaningful review to determine whether the trial court has abused its discretion.”¹³⁰ Unfortunately for contempt defendants, transcripts might be absent.¹³¹ Even if there is a transcript, it may be of no use, since contempt often depends on tone of voice, facial expressions, and physical gestures,¹³² none of which will be captured in a transcription. In Virginia, if a judge witnessed the contemptuous conduct, there may be no right to a court reporter, which means no transcript will even be made.¹³³ But the lack of a transcript does not matter much since contempt defendants will not be given appellate counsel either.¹³⁴

For contempt, these issues are shrugged off. As the Supreme Court has said, the fact that a contempt defendant may be “instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred” has “never [been] supposed to be in conflict with the liberty of the citizen.”¹³⁵ Courts do not suppose summary contempt infringes on the liberty of citizens, but everyone else should.

127. TEX. COMM’N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARIES, FY 2000 TO PRESENT 49 (2016), <https://bit.ly/3MaoZNF> [<https://perma.cc/YK2X-WXWG>].

128. *Cine-Matics, Inc. v. State*, 578 S.W.2d 530, 532 (Tex. Civ. App. 1979).

129. *Bonser v. Courtney*, 481 A.2d 524, 530 (N.H. 1984); *Huffman v. Alexander*, 251 P.2d 87, 98 (Ore. 1952); *Ex parte Tremper*, 8 A.2d 279, 283 (N.J. Ch. 1939).

130. *Johnson v. Johnson*, 721 P.2d 290, 294 (Kan. App. 1986)

131. *See Krieger v. Commonwealth*, 567 S.E.2d 557, 559 (Va. Ct. App. 2002).

132. *In re Little*, 404 U.S. 553, 556–57 (1972) (Burger, C.J., concurring); *see also Ex parte Sentell*, 266 S.W.2d 365 (Tex. 1954) (punishing an attorney based on his “conduct and appearance” and “contemptuous attitude,” “independent of what he said”).

133. *Krieger*, 567 S.E.2d at 565; *see also Woodward v. State*, 238 So. 3d 290, 293 (Fla. Dist. Ct. App. 2018); *see also Ducoff v. Ducoff*, 523 S.W.2d 264, 267 (Tex. Civ. App. 1975) (“[T]he absence of a reporter in a civil matter is not a fundamental error.”).

134. *Krieger*, 567 S.E.2d at 559.

135. *Ex parte Terry*, 128 U.S. 289, 313 (1888). Although first declared by the Supreme Court over a century ago, many modern courts repeat this sentiment. *See also Mitchell v. State*, 580 A.2d 196, 199 (Md. 1990); *Commonwealth v. Moody*, 125 A.3d 1, 9 (Pa. 2015); *Barton v. Maxwell*, 933 P.2d 966, 969 (Or. 1997); *In re Spruell*, 407 S.E.2d 451, 458 (Ga. Ct. App. 1991).

II. THE ABUSE OF CONTEMPT POWER

A. *Abuse of Contempt Is Far Too Common*

There are no statistics on the abuse of contempt power.¹³⁶ Even statistics on the use of contempt power are hard to come by, but many thousands of people are incarcerated for contempt based on non-payment of child support alone.¹³⁷ Broward County, Florida, for example, regularly holds “Daddy Roundups” where parents behind on child support are brought into court for civil contempt hearings.¹³⁸ Defendants are processed at breakneck pace, with fewer than five minutes spent on each case, shoddy evidence of guilt, a prosecutor who “actively dissuades” defendants from seeking counsel, and a court that does not inquire into indigency status or make any records.¹³⁹ Defendants at these show trials can be jailed for as many as 179 days (thus subverting the pesky right to a jury).¹⁴⁰

We can make some guesses about the prevalence of contempt abuse, however. Some states track complaints filed against judges, organized by category. The author reviewed reports of judicial misconduct around the country and found thousands of complaints of judges abusing their power (though most states did not differentiate between abuse of contempt and abuse of power generally). For example, California has logged 118 allegations of abuse of contempt power since 1983.¹⁴¹ Colorado has 8 since 2014.¹⁴²

136. Raveson, *supra* note 6, at 480.

137. Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 CORNELL J. L. & PUB. POL’Y 95, 117 (2008).

138. *Pompey v. Broward Cnty.*, 95 F.3d 1543, 1545 (11th Cir. 1996).

139. *Id.*

140. *Id.*

141. Cal. Comm’n on Jud. Performance, *Annual Reports*, <https://bit.ly/3fTBX6L> [<https://perma.cc/KAE6-D6XK>] (last visited Dec. 31, 2020). The link provides a collection of all annual reports from 1983 to 2019. The yearly breakdown (and page citation) is as follows: 2019: 10 (page 17); 2018: 2 (page 13); 2017: 0 (page 13); 2016: 3 (page 13); 2015: 1 (page 13); 2014: 3 (page 13); 2013: 2 (page 13); 2012: 6 (page 13); 2011: 6 (page 13); 2010: 7 (page 11); 2009: 1 (page 11); 2008: 2 (page 11); 2007: 2 (page 15); 2006: 4 (page 15); 2005: 1 (page 26); 2004: 2 (page 15); 2003: 3 (page 15); 2002: 1 (page 15); 2001: 2 (page 15); 2000: 1 (page 15); 1999: 5 (page 15); 1998: 8 (page 17); 1997: 3 (page 15); 1996: 3 (pages 18, 22, 24); 1995: 3 (pages 19, 23, 25); 1994: 2 (pages 18, 19); 1993: 3 (pages 16, 17, 19); 1992: 5 (pages 11, 12, 14, 16); 1991: 1 (pages 9); 1990: 8 (pages 14, 23, 24); 1989: 5 (pages 21, 23); 1988: 6 (pages 7, 11, 12, 13); 1987: 5 (pages 4, 9, 10, 11); 1986: 1 (page 4); 1985: 0; 1984: 1 (page 10); 1983: 1 (page 8).

142. *Annual Reports*, COLO. COMM’N ON JUD. DISCIPLINE, <http://bit.ly/3SS-gER3> [<https://perma.cc/7VVRT-P7AN>] (last visited Nov. 8, 2022). The link provides a collection of all annual reports. The yearly breakdown (and page citation) is as follows: 2019: 1 complaint (page 9); 2018: 1 complaint (page 10); 2017: 0 (page 10);

Other states do not track contempt as its own category but do record complaints that the judge abused their power in a general sense. The District of Columbia had 111 complaints of abuse of discretion by judges.¹⁴³ Hawaii's got 63 complaints of abuse of power.¹⁴⁴ Idaho logged 18 abuse of power complaints.¹⁴⁵ There were 153 allegations of abuse of power in Kansas.¹⁴⁶ Up in Minnesota, 196 people alleged a judge abused their authority or prestige.¹⁴⁷ Connecticut recorded 151 claims of retaliation, bullying, or abuse of discretion/authority/power, abuse of contempt, or threatening behavior by judges.¹⁴⁸ North Carolina has about 416 allega-

2016: 1 complaint (page 10); 2015: 1 complaint (page 9); 2014: 4 complaints (page 30).

143. *CJDT Annual Reports*, D.C. COMM'N ON JUD. DISABILITIES & TENURE, <https://bit.ly/3ybbt6E> [<https://perma.cc/4UHG-VS9V>] (last visited Nov. 8, 2022). The link provides a collection of all annual reports. The yearly breakdown (and page citation) is as follows: 2017: 9 (page 12); 2016: 4 (page 12); 2015: 6 (page 12); 2014: 15 (page 12); 2013: 9 (page 11); 2012: 12 (page 11); 2011: 12 (page 13); 2010: 5 (page 12); 2009: 9 (page 12); 2008: 3 (page 12); 2007: 3 (page 12); 2006 and before: 24 (page 7).

144. *Commission on Judicial Conduct*, HAW. ST. JUD., <https://bit.ly/3EisXSz> [<https://perma.cc/N5TF-U5JY>] (last visited Nov. 8, 2022). The link provides a collection of all annual reports. The yearly breakdown (and page citation) is as follows: 2018–2019: 15 (page 3); 2017–2018: 7 (page 3); 2016–2017: 6 (page 3); 2015–2016: 1 (page 3); 2014–2015: 1 (page 3); 2013–2014: 4 (page 3); 2012–2013: 8 (page 3); 2011–2012: 5 (page 5); 2010–2011: 4 (page 5); 2009–2010: 1 (page 5); 2008–2009: 3 (page 4); 2007–2008: 3 (page 11); 2006–2007: 5 (page 11).

145. *Annual Reports of Past Years*, IDAHO JUD. COUNCIL, <https://bit.ly/3SRS6aL> [<https://perma.cc/D8GV-7USZ>] (last visited Nov. 8, 2022). The link provides a collection of all annual reports. The yearly breakdown (and page citation) is as follows: 2019: 1 (page 15); 2018: 5 (page 16); 2017: 4 (page 16); 2016: 1 (page 15); 2015: 3 (page 15); 2014: 0 (page 14); 2013: 0 (page 15); 2012: 0 (page 15); 2011: 0 (page 15); 2010: 0 (page 15); 2009: 2 (page 15); 2008: 0; 2007: 0 (page 15); 2006: 2 (page 15).

146. *Judicial Conduct Annual Reports*, KAN. COMM'N ON JUD. QUALIFICATIONS, <https://bit.ly/3SW0yGe> [<https://perma.cc/7QF3-LL7V>] (last visited Nov. 8, 2022). The link provides a collection of all annual reports. The yearly breakdown (and page citation) is as follows: 2018: 3 (page 20); 2017: 3 (page 20); 2016: 15 (page 20); 2015: 4 (page 21); 2014: 7 (page 22); 2013: 10 (page 20); 2012: 4 (page 22); 2011: 6 (page 20); 2010: 14 (page 20); 2009: 2 (page 20); 2008: 2 (page 20); 2007: 1 (page 19); 2006: 6 (page 19); 2005: 1 (page 19); 2004: 4 (page 25); 2003: 1 (page 27); 2002: 6 (page 25); 2001: 7 (page 25); 2000: 4 (page 25); 1999: 7 (page 25); 1998: 6 (page 21); 1997: 13 (page 21); 1996: 7 (page 21); 1995: 5 (page 21); 1994: 2 (page 21); 1993: 11 (page 21); 1992: 1 (page 17); 1991: 3 (page 17).

147. *Annual Reports*, MINN. BD. ON JUD. STANDARDS, <http://bit.ly/3e9Hi9b> [<https://perma.cc/FL9Z-7YPF>] (last visited Nov. 8, 2022). The link provides a collection of all annual reports. The yearly breakdown (and page citation) is as follows: 2019: 8 (page 11); 2018: 10 (page 10); 2017: 1 (page 9); 2016: 0 (page 9); 2015: 2 (page 9); 2014: 0 (page 7); 2013: 19 (page 8); 2012: 6 (page 8); 2011: 15 (page 8); 2010: 23 (page 7); 2009: 17 (page 6); 2008: 18 (page 6); 2007: 20 (page 6); 2006: 14 (page 6); 2005: 25 (page 6); 2004: 18 (page 6).

148. *Publications*, CONN. JUD. REV. COUNCIL, PUBLICATIONS, <https://bit.ly/3C9iYwp> [<https://perma.cc/LP6U-DQHN>] (last visited Nov. 8, 2022). The link pro-

tions of abuse of power.¹⁴⁹ Pennsylvania's got 1,060.¹⁵⁰ There are 23 claims from South Dakota.¹⁵¹ Tennessee has 345.¹⁵² Total these up, and we have 2,662 allegations of judges abusing their power from 12 jurisdictions.

But these numbers probably vastly understate the problem. They come from judicial disciplinary commissions, which suffer from grievous underreporting.¹⁵³ Moreover, most "threats of contempt are acceded to and few findings of contempt are appealed," which means we have no record of them.¹⁵⁴ But these sources alone

vides a collection of all annual reports. The yearly breakdown (and page citation) is as follows: 2019: 4 (page 11); 2018: 11 (page 11); 2017: 15 (page 11); 2016: 27 (page 11); 2015: 11 (page 11); 2014: 7 (page 11); 2013: 22 (page 10); 2012: 33 (pages 9–10); 2011: 1 (page 11); 2010: 5 (page 10); 2009: 2 (page 10); 2008: 9; 2007: 2; 2006: 2.

149. *Judicial Standards Commission Annual Report*, N.C. JUD. STANDARDS COMM'N, <https://bit.ly/3M5xx8B> [<https://perma.cc/C28A-PCCA>] (last visited Nov. 8, 2022). The link provides a collection of all annual reports. The yearly breakdown (and page citation) is as follows: 2019: ~25 (page 14); 2018: ~25 (page 14); 2017: ~40 (page 12); 2016: ~30 (page 10); 2015: 36 (page 8); 2014: 40 (page 9); 2013: 18 (page 5); 2012: 88 (page 5); 2011: 63 (page 5); 2010: 51 (page 5). Note that since 2016, the commission only reports approximate figures, not precise ones.

150. *Annual Reports*, PA. JUD. CONDUCT BD., <http://bit.ly/3C2RCrv> [<https://perma.cc/ZD4B-BYW6>] (last visited Nov. 8, 2022). The link provides a collection of all annual reports. The yearly breakdown (and page citation) is as follows: 2019: 13 (page 10); 2018: 132 (page 10); 2017: 137 (page 10); 2016: 164 (page 10); 2015: 125 (page 10); 2014: 63 (page 10); 2013: 71 (page 10); 2012: 99 (page 11); 2011: 81 (page 15); 2010: 79 (page 15); 2009: 96 (page 15).

151. S.D. JUD. QUALIFICATIONS COMM'N, COMPLAINTS RECEIVED AND DISPOSITIONS (n.d.), <https://bit.ly/3rvw6XD> [<https://perma.cc/HDP5-S7M8>] (showing 10 complaints for "On Bench Abuse of Authority" between FY2018 and FY 2022); S.D. JUD. QUALIFICATIONS COMM'N, DISPOSITION OF COMPLAINTS FROM FY 2001 TO FY 2006 (n.d.), <https://bit.ly/3CbRjKX> [<https://perma.cc/5VTX-97X6>] (showing 13 complaints of "On Bench Abuse of Authority" between FY2001 and FY 2006).

152. *Board of Judicial Conduct—Quarterly Reports*, TENN. CTS., <http://bit.ly/3e16T4j> [<https://perma.cc/K8WR-BKHZ>] (last visited Nov. 8, 2022). The link has information for the years 2012 through 2021. The numbers and page cites are as follows: 2020–2021: 24 (page 3); 2019–2020: 7 (page 3); 2018–2019: 1 (page 4); 2017–2018: 10 (page 3) (has information for 2012–2018); 2016–2017: 4 (page 4); 2015–2016: 5 (page 4); 2014–2015: 20 (page 3); 2013–2014: 30 (page 5); 2012–2013: 17 (page 3). For years before 2012–2013, see *Statistical Reports*, TENN. CTS., <http://bit.ly/3M6R5cY> [<https://perma.cc/FP7V-8RR4>] (last visited Feb. 16, 2021). The full breakdown is as follows: 2011–2012: 18 (page 1); 2010–2011: 34 (page 20); 2009–2010: 1 (page 8); 2008–2009: 12 (page 7); 2007–2008: 11 (page 6); 2006–2007: 47 (page 3); 2005–2006: 52 (page 3); 2004–2005: 52 (page 4).

153. See Michael Berens & John Shiffman, *With 'Judges Judging Judges,' Rogues on the Bench Have Little to Fear*, REUTERS (July 9, 2020), <https://reut.rs/3fLIUGV> [<https://perma.cc/3FAZ-W682>]; John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 248 (1994).

154. Raveson, *supra* note 6, at 482.

show thousands of allegations of abuses of power, which may touch upon the contempt power.

Far smaller numbers of abuse have led to outcry. Then-Judge Alex Koszinski exhorted, “There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.”¹⁵⁵ To support this claim, he cited 29 cases from around the country.¹⁵⁶ Prosecutorial misconduct should be stamped out wherever it is found, but judicial misconduct is serious, too, yet receives little attention.

B. Contempt Punishments Are Disproportionate to the Harm

Courts are quite open about the dangers of contempt. Courts have said contempt is “a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one.”¹⁵⁷ Contempt has been used to enforce segregated seating in court¹⁵⁸ and to punish a woman for refusing to answer sexist questions during jury voir dire.¹⁵⁹

The pettiest of grievances have been used to justify contempt. Expressing frustration with the judge is *verboten*.¹⁶⁰ Saying “how come” or “but” after a judge tells you to stop speaking can result in two days in jail apiece.¹⁶¹ Raising your hand in an attempt to speak is a jailable offense.¹⁶² Going to the bathroom without permission

155. *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting).

156. *Id.* at 631–32.

157. *Int’l Longshoremen’s Ass’n v. Phila. Marine Trade Ass’n*, 389 U.S. 64, 76 (1967).

158. *See Johnson v. Virginia*, 373 U.S. 61, 61–62 (1963); *George v. Clemmons*, 373 U.S. 241 (1963); *see also Wood v. Georgia*, 370 U.S. 375, 379–80 (1962) (showing a judge held sheriff in contempt who criticized judge’s order that grand jury investigate “an inane and inexplicable pattern of Negro bloc voting” as racist).

159. *See Bobb v. Mun. Court*, 192 Cal. Rptr. 270, 270–71 (Cal. Ct. App. 1983) (asking women, and only women, about their spouse’s occupation during voir dire).

160. *See In re Buckley*, 514 P.2d 1201, 1204 (Cal. 1973), *cert. denied*, 418 U.S. 910 (1974); *In re Grossman*, 101 Cal. Rptr. 176, 183 (Cal. Ct. App. 1972); *Alexander v. Sharpe*, 245 A.2d 279, 281–82 (Me. 1968); *People v. Roberts*, 356 N.E.2d 429, 430 (Ill. App. Ct. 1976); *State ex. rel. Cheadle v. Dist. Ct. 10th Jud. Dist. Fergus Cnty.*, 10 P.2d 586, 587 (Mont. 1932); *Appeal of Levine*, 95 A.2d 222, 224, *cert. denied*, 346 U.S. 858 (Pa. 1953).

161. CAL. COMM’N ON JUD. PERFORMANCE, 1990 ANNUAL REPORT 14 (1990), <https://bit.ly/3CAhSuN> [<https://perma.cc/D7VC-HBZR>].

162. CAL. COMM’N ON JUD. PERFORMANCE, 1983 REPORT OF THE COMMISSION ON JUDICIAL PERFORMANCE TO THE GOVERNOR 8 (1983), <https://bit.ly/3M9sKTC> [<https://perma.cc/UB58-3GSF>].

can be in contempt of court.¹⁶³ Repeatedly emailing to the court complaining about your case can be contemptible.¹⁶⁴ Even if you do not say something untoward, merely having a “combative tone” can get you incarcerated.¹⁶⁵ How about sighing loudly? Jail.¹⁶⁶ Grimacing? Jail.¹⁶⁷ Rolling your eyes? Jail.¹⁶⁸ Whispering inaudibly to your wife? Jail.¹⁶⁹ Taking a “long, deep breath?” Jail.¹⁷⁰ Asking questions out of turn? Jail.¹⁷¹ Having your phone on? Jail.¹⁷² Using your phone away from the judge? Jail.¹⁷³ Slamming a door on the way

163. Determination at 3–4, *In re Karen M. Uplinger* (N.Y. Comm’n on Jud. Conduct 2006), <http://on.ny.gov/3Mhat76> [<https://perma.cc/ED7R-BC9Z>].

164. DEL. CT. JUD., *Selected Case Summaries of Dismissed Complaints C.J. No. 2, 2015*, <https://bit.ly/3RDeSCo> [<https://perma.cc/7D6H-M62K>] (last visited Jan. 2, 2023).

165. MICH. JUD. TENURE COMM’N, ANNUAL REPORT 2014, at 23 (2014), <http://bit.ly/3ylw605> [<https://perma.cc/FC82-U7PS>].

166. Findings of Fact and Conclusions of Law at 4–5, *In re Leslie A. Lewis* (Utah Jud. Conduct Comm’n 2007) (No. 06-3D-069), <https://bit.ly/3Vhm0aC> [<https://perma.cc/65BP-ELS4>].

167. Louis S. Raveson, *Advocacy and Contempt—Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 743, 744 (1990).

168. Debra Cassens Weiss, *Judge Orders Detention of Public Defender for ‘Acting Like I’m Some Kind of Idiot’*, A.B.A. J. (Oct. 30, 2018), <https://www.bit.ly/3SWx0Ik> [<https://perma.cc/J665-9M9N>].

169. *In re Spurlock*, 98 Ill. Cts. Com. 1, 16 (2001), <https://bit.ly/3Tu99jp> [<https://perma.cc/5EJB-MKF6>] (citing *In re Keith*, 3 Ill. Cts. Com. 38, 54 (1994)).

170. Determination at 4–5, *In re Richard S. Lawrence* (N.Y. Comm’n on Jud. Conduct 2005), <http://on.ny.gov/3RDn0CD> [<https://perma.cc/4YDU-2R25>].

171. *In re Spurlock*, 98 Ill. Cts. Com. 1, 16 (2001), <https://bit.ly/3Tu99jp> [<https://perma.cc/XVR3-5DN4>] (citing *In re Keith*, 3 Ill. Cts. Com. 38, 66–67 (1994)).

172. Stipulation of Facts and Conclusions of Law at 2, *In re Norman R. Stone III*, (Md. Comm’n on Jud. Disabilities 2012) (No. CJD 2012–2014), <https://bit.ly/3ruUpVr> [<https://perma.cc/V7KL-8TZZ>]; see also Determination at 3–4, *In re Paul G. Feinman* (N.Y. Comm’n on Jud. Conduct 1999), <https://on.ny.gov/3CqZO6p> [<https://perma.cc/6VTB-SGRW>] (detailing how Judge had defendant handcuffed for having a beeper go off); *State v. Phair*, 668 S.E.2d 110, 112 (N.C. App. 2008) (holding woman in contempt for having her phone).

173. *Id.* at 2.

out? Jail.¹⁷⁴ Wearing a hat? Jail.¹⁷⁵ Standing up? Jail.¹⁷⁶ Sitting down? Jail.¹⁷⁷

Though the offenses may be petty, the punishments can be grave. Judge Christopher Dupuy entered 37 counts of contempt against one person, resulting in 110 days of incarceration plus \$250 per count.¹⁷⁸ Judge Ed Gossett gave three journalists six months imprisonment for contempt after photographing a police officer outside of the courtroom.¹⁷⁹ An Ohio judge gave 270 days for “contempt” to a defendant who failed to pay traffic fines.¹⁸⁰ Judge Cheryl Coleman used summary contempt to sentence someone to 300 days in jail.¹⁸¹ A North Dakota judicial referee¹⁸² kept a mother in jail for more than six months, which was longer than statutorily allowed.¹⁸³ A Washington State father was held in jail for over a year for his failure to bring his son to a dependency hearing.¹⁸⁴ Federal Judge Julius Hoffman sentenced someone to four years in prison for courtroom disruptions.¹⁸⁵ In Pennsylvania, a lawyer was held for 14 years for civil contempt in a divorce case.¹⁸⁶

174. *Id.*

175. *McMillan v. State*, 265 A.2d 453, 454 (Md. 1970); *State ex rel. Haynes v. Daugherty*, No. M2018-01394-COA-R10-CV, 2019 Tenn. App. LEXIS 449, at *17–19 (Ct. App. Sept. 10, 2019) (noting that in colonial America, Quakers were imprisoned for contempt for refusing to remove hats); *State ex rel. Burrell-EI v. Autrey*, 752 S.W.2d 895, 896 (Mo. Ct. App. 1988) (finding contempt for refusing to remove a fez for religious purposes).

176. *Ex parte Crenshaw*, 259 S.W. 587, 587–88 (Tex. Crim. 1924); *Cooper v. Super. Ct. of L.A. Cty.*, 359 P.2d 274, 278 (Cal. 1961); *In re Jaye*, 90 F.R.D. 351, 351–52 (E.D. Wis. 1981); *Curran v. Superior Ct. of Cal.*, 72 Cal. App. 258, 262 (Dist. Ct. App. 1925).

177. *Ex parte Krupps*, 712 S.W.2d 144, 145 (Tex. Crim. App. 1986); *State v. Randell*, 152 N.C. App. 469, 472–73 (2002); *Robson v. Malone*, 412 F.2d 848 (7th Cir. 1969).

178. Public Reprimand at 7, *In re Christopher Dupuy* (Tex. Comm’n on Jud. Conduct 2014) (No. 11-1106-CC), <https://bit.ly/3ya1Uoz> [<https://perma.cc/55BX-5LNF>].

179. *Ex parte Arnold*, 503 S.W.2d 529, 530 (Tex. Crim. App. 1974).

180. *State Bar Ass’n v. Goldie*, 894 N.E.2d 1226, 1229 (Ohio 2008).

181. Stipulation at 2, *In re Cheryl Coleman* (N.Y. Comm’n on Jud. Conduct 2004), <https://on.ny.gov/3RsWigc> [<https://perma.cc/7VLG-2RZG>].

182. In North Dakota, a judicial referee is an officer of the court less than a judge but authorized to preside at certain proceedings.

183. *Nygaard v. Taylor*, 900 N.W.2d 833, 835 (N.D. 2017).

184. *In re King*, 756 P.2d 1303, 1305–06 (Wash. 1988).

185. Luis Kutner, *Contempt Power: The Black Robe: A Proposal for Due Process*, 39 TENN. L. REV. 1, 2 (1971).

186. Mitchell J. Frank, *Modern Odysseus or Classic Fraud—Fourteen Years in Prison for Civil Contempt Without a Jury Trial, Judicial Power Without Limitation, and an Examination of the Failure of Due Process*, 66 U. MIA. L. REV. 599, 600 (2012).

Relatively minor misconduct can have devastating consequences when freewheeling contempt power is an option.

Incarceration is the most overused penalty for contempt, but judges may try to impose far more bizarre sanctions. A federal judge imposed a \$100 fine that doubled every day,¹⁸⁷ meaning it would exceed the nation's GDP in a little over a month. A Louisiana judge told a prosecutor to come to her office for a meeting, and when the prosecutor refused, the judge held them in contempt and continued all of the cases for the day, letting the defendants walk free without determining if detention was needed.¹⁸⁸ Judge Thomas Scattergood had an unrepresented defendant's cellphone taken for texting in court (with no indication of how texting interfered with the administration of the court) and demanded \$50 to get it back.¹⁸⁹ A Texas judge had a person handcuffed for public humiliation rather than to quell a disturbance.¹⁹⁰ Another judge wrote letters to a contempt defendant's employer telling them how rude the defendant had been, with a request that the employer teach its employees to be more respectful in court.¹⁹¹ Several judges have offered to let people stay out of jail in exchange for donating to a specific charity.¹⁹² In a marital dispute, a judge ordered a husband under threat of contempt to remain in the military until full retirement age so that the wife could collect half of his pension.¹⁹³ To drive home the point, the judge gave the husband a tour of the local jail and told him he would be sent there without a hearing if he did not comply.¹⁹⁴ Judges are not on the bench to concoct these sorts of punishments.

Too often, contempt power is used to exact vengeance for a judge's feelings being hurt, not an affront to the judiciary.¹⁹⁵ Judge

187. *S.E.C. v. Credit Bancorp, Ltd.*, 99 Civ. 11395 (RWS), 2000 U.S. Dist. LEXIS 9755, at *4 (S.D.N.Y. July 3, 2000).

188. *In re Sims*, 159 So. 3d 1040, 1043–44 (La. 2015).

189. Presentment at 16, *In re Scattergood* (N.J. Adv. Comm. on Jud. Conduct 2015), <https://bit.ly/3Cyg2ee> [<https://perma.cc/G8QJ-URTC>].

190. TEX. COMM'N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARIES, FY 2000 TO PRESENT 49 (2016) <https://bit.ly/3trd0TC> [<https://perma.cc/9PV6-LRY2>].

191. *Id.* at 28.

192. *Id.* at 30; Letter from Chris Craft, Chair of Tennessee Board of Judicial Conduct, to Reese Holley, Judge (June 30, 2015), <https://reut.rs/3Rup3Jr> [<https://perma.cc/A4HC-H238>]; *Private Admonition of a District Judge*, TEX. COMM'N ON JUD. CONDUCT (Nov. 12, 2012), <https://bit.ly/3ybix7y> [<https://perma.cc/2DUQ-LFL5>].

193. KAN. COMM'N ON JUD. QUALIFICATIONS, 2001 ANNUAL REPORT 27 (2001), <https://bit.ly/3M7xBVt> [<https://perma.cc/63PC-22TL>].

194. *Id.*

195. *In re Daniels*, 118 N.J. 51, 54 (1990) (contempt for attorney laughing under breath and smirking); *Parmelee Transp. Co. v. Keeshin*, 292 F.2d 806, 809

Emery Toth became upset when a defendant made a raspberry sound and gave her the finger. She responded with ordering the defendant to 30 days in jail. The defendant said, “Appreciate it,” and the judge upped it to 45 days. The transcript does not record what the defendant said next, but the judge ended up increasing it to 60 days. In response, the defendant said, “No, give me 70,” and the judge increased it to 75 days. This childish back and forth continued until the defendant had a 180-day jail sentence.¹⁹⁶

In Maine, a defendant committed a civil infraction of possession of marijuana and was ordered to jail for ten days. The defendant left the courtroom and called the judge a “f*cking dink.” A court officer overheard this and told the judge, who increased the defendant’s sentence to 40 days.¹⁹⁷ An Ohio man was paying a fine for his nephew at the clerk’s office, and said “judges can be crooks, too.” He left the courthouse, but employees reported the sacrilege to the judge, who ordered the man arrested, hauled back, and held in contempt.¹⁹⁸ When a New Jersey judge asked a defendant if they were guilty, the defendant supposedly said, “I guess” rather than “yes.” The judge thought this was a little too flippant and fined her \$85 “because of the mouth.”¹⁹⁹ An Ohio judge held a spectator in contempt and jailed her for muttering “I can’t believe this.”²⁰⁰ An anonymous Texas judge held a witness in contempt when she made derogatory comments about the judge on her Facebook page during a lunch break outside of the presence of the judge.²⁰¹ Sometimes, a judge cannot point to anything a person actually says, but only “her tone, her demeanor, her body language,” and that is enough to earn

(7th Cir. 1961) (contempt for “sneering”); *In re De Carlo*, 357 A.2d 273, 274 (N.J. App. 1976) (contempt for attire that offended judge).

196. Presentment at 4–5, *In re Toth* (N.J. Adv. Comm. on Jud. Conduct 2008), <https://bit.ly/3CtyJj0> [<https://perma.cc/J8P5-UWZU>]; see also Determination at 5, *In re Mills* (N.Y. Comm’n on Jud. Conduct 2004), <https://on.ny.gov/3V3DRS4> [<https://perma.cc/S5QK-B8E6>] (sentencing an attorney to three days jail for interrupting him and increasing it when the attorney talked back).

197. *In re Ross*, 428 A.2d 858, 862 (Me. 1981).

198. *Disciplinary Cons. v. Cox*, 862 N.E.2d 514, 515 (Ohio 2007).

199. Presentment at 6, *In re Maisto* (N.J. Adv. Comm. on Jud. Conduct 2007), <https://bit.ly/3e7wMzo> [<https://perma.cc/PRD9-WPPG>].

200. *Disciplinary Couns. v. Parker*, 876 N.E.2d 556, 561 (Ohio 2007).

201. TEX. COMM’N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARIES, FY 2000 TO PRESENT 66 (2020), <https://bit.ly/3Mn9VMP> [<https://perma.cc/Y22G-42N3>]; cf. *Private Warning of a County Court at Law Judge*, TEX. COMM’N ON JUD. CONDUCT (Aug. 7, 2014), <https://bit.ly/3M3v8eF> [<https://perma.cc/MM59-L46B>] (threatening a public defender with arrest for boasting about a concluded case on Facebook).

23 days of lock up.²⁰² The justice system would have to be incredibly fragile for such vapid insults to imperil it.

C. Judges Employ Contempt Power for Things That Have Nothing to Do with Maintaining Order in the Court

Scores of judges have threatened or effectuated an arrest without any legal basis to do so, other than vague notions of contempt.²⁰³ After an attorney filed a complaint against a Maryland judge, the judge summoned the attorney to a hearing before him and spent an hour badgering the attorney.²⁰⁴ When an Iowa attorney worked on a divorce case affecting a judge's personal friend, that judge launched a two-year intimidation campaign against that attorney.²⁰⁵

Too many judges also seem to believe they have unlimited power to impose any punishment they see fit. Judges have improperly ordered children to refrain from participating in school sports,²⁰⁶ told attorneys to withdraw from a case,²⁰⁷ and placed children under the care of the department of human services.²⁰⁸ One judge gave a person a "choice" between immediate incarceration

202. Presentment at 7, *In re Adames* (N.J. Adv. Comm. on Jud. Conduct 2017), <https://bit.ly/3Sx0NYi> [<https://perma.cc/MRR3-39GB>]; see also Determination at 4, *In re Mayville* (N.Y. Comm'n on Jud. Conduct 1984), <https://bit.ly/3yb41bF> [<https://perma.cc/XXN2-XEST>] (holding a woman in contempt for how she spoke to the judge over the telephone, without specifying what she said); Jud. Inquiry & Rev Bd. of Sup. Ct. v. Fink, 532 A.2d 358, 365 (Pa. 1987) (Judge summarily held an attorney in contempt without notice. He said he did it because of the attorney's "arrogance," though he admitted the attorney did not disrupt proceedings.).

203. E.g., KAN. COMM'N ON JUD. QUALIFICATIONS, 2012 ANNUAL REPORT 24 (2012), <https://bit.ly/3e3vipM> [<https://perma.cc/5VV4-YG63>]; Miss. Comm'n on Jud. Performance v. Martin, No. 2007-JP-01617-SCT, 2008 Miss. LEXIS 594, at *2 (Dec. 4, 2008); Miss. Comm'n on Jud. Performance v. Bradford, 18 So. 3d 251, 260 (Miss. 2009) (Randolph, J., dissenting); *Dexter v. Shields*, 92 P.3d 1208 (Mont. 2004); *State v. Abrams*, 680 P.2d 585, 586 (Mont. 1984); *Schroeder v. Schroeder*, 863 N.W.2d 491, 494 (Neb. App. 2015) (holding party in contempt for violation of ambiguous order); Presentment at 8, *In re Adames* (N.J. Adv. Comm. on Jud. Conduct 2017), <https://bit.ly/3NRJEM3> [<https://perma.cc/LD85-8ZQY>] (incarcerated without formal finding of contempt); TEX. COMM'N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARIES, FY 2000 TO PRESENT 48 (2016), <https://bit.ly/3ErBuXK> [<https://perma.cc/D86Z-K4V9>] (judge told people to donate to a particular charity or face incarceration).

204. Charges at 6, *In re Goetzke* (Md. Comm'n on Jud. Disabilities 2017) (No. CJD 2016-083), <https://bit.ly/3e5a6Qh> [<https://perma.cc/YN9Q-WG4M>].

205. *In re Inquiry Concerning Eads*, 362 N.W.2d 541, 550 (Iowa 1985).

206. KAN. COMM'N ON JUD. QUALIFICATIONS, 2000 ANNUAL REPORT 26 (2000), <https://bit.ly/3STCP9t> [<https://perma.cc/DJ8G-3PX8>].

207. *Id.* at 27.

208. Miss. Comm'n on Jud. Performance v. Skinner, 119 So. 3d 294, 297 (Miss. 2013).

for contempt for disrupting court or taking the risk of future prosecution for obstruction of a public officer. When the person chose the latter, the judge immediately had the person arrested, claiming it was a “citizen’s arrest.”²⁰⁹ When a Delaware judge learned that a defendant before him owed \$37.25 in unpaid fines, the judge ordered a police officer to forcibly seize the money from the defendant.²¹⁰ To accomplish this, the officer held the defendant by the neck and pressed one of his arms against a table as he took the money.²¹¹ Only after the filching was complete and the defendant had been sent off to jail was it discovered that the \$37.25 fine had actually been dismissed.²¹² An Arkansas judge imposed a county-wide banishment as an element of a defendant’s pretrial release.²¹³ Judge Marvin Wiggins threatened to incarcerate defendants who had “no money” to pay their court-ordered obligations unless they “donated” blood, seizing blood from 41 people this way.²¹⁴ In California, a judge gave a contempt defendant three years’ probation, beyond the court’s authority,²¹⁵ and another used a “grossly improper order” to scare a child into better behavior.²¹⁶ Judge James Hill used his power to menace parties, telling them he could send them to jail for contempt and “there is no appeal, you stay until I say you get out.”²¹⁷

Contempt is an easy solution for workplace problems in the wrong hands. Alan Simon, a New York judge, was furious to learn that a student intern had been hired in the clerk’s office without his knowledge and threatened to hold both the student and chief clerk

209. CAL. COMM’N ON JUD. PERFORMANCE, 1988 ANNUAL REPORT 12 (1988), <https://bit.ly/3M3xIRY> [<https://perma.cc/TTS5-ZVEW>].

210. *In re Hopkins*, 566 A.2d 1011, 1013 (Del. 1989).

211. *Id.*

212. *Id.*

213. Letter of Admonishment to Elizabeth Wise from Ark. Jud. Discipline & Disability Comm’n (Apr. 30, 2008), <https://bit.ly/3dZW6HG> [<https://perma.cc/M6CB-ZWM4>].

214. *See In re Wiggins*, at 2–3 (Ala. Ct. Jud. 2016) (No. 45), <https://reut.rs/3rpu8I4> [<https://perma.cc/7FUP-Z5HP>].

215. CAL. COMM’N ON JUD. PERFORMANCE, 1992 ANNUAL REPORT 14 (1992), <https://bit.ly/3SLI4rO> [<https://perma.cc/RM3U-NL3U>].

216. CAL. COMM’N ON JUD. PERFORMANCE, 1989 ANNUAL REPORT 21 (1989), <https://bit.ly/3SKzSrL> [<https://perma.cc/J3KQ-P267>]. Another judge threatened to have a child taken into state custody if they did not leave the courtroom. KAN. COMM’N ON JUD. QUALIFICATIONS, 1993 ANNUAL REPORT 23 (1993), <https://bit.ly/3WVXZXI> [<https://perma.cc/AS8M-AZTM>].

217. *In re Inquiry Concerning a Judge (Hill)*, 778 S.E.2d 64, 66 (2015); *cf. Disciplinary Couns. v. McCormack*, 977 N.E.2d 598, 602 (Ohio 2012) (telling an attorney “I will hold you in contempt and it will cost you a lot of money to get out of jail . . . allow me to assure you.”).

in contempt unless the student was fired.²¹⁸ The mayor had hired the intern, but the judge would not go to her directly, because, in his own words, “she’s a f*cking b*tch. Why would I even talk to her?” and mulled holding her in contempt.²¹⁹ Instead, he then went to the police and threatened to hold them in contempt if they did not arrest the student, who he claimed to have sentenced to 15 days’ confinement.²²⁰ When that failed, the judge tried to forcibly remove the student himself while “yelling at the top of his lungs” for the student to leave.²²¹ When another judge intervened, Simon threatened to hold him in contempt and sentence him to jail, too.²²² Asked about it later, Simon said he believed his conduct was “appropriate under the circumstances.”²²³

Simon (who had a habit of threatening city employees, police, and co-judges with contempt while off the bench)²²⁴ may offer the most egregious example of misusing contempt in the workplace, but he is not the only one. When there were delays in producing a jury, a Michigan judge threatened to hold a court employee in contempt.²²⁵ Judge Ellis Willard threatened a clerk with contempt because they would not get a file for him at 11:15 p.m. (the clerk said they would get it the following morning), and had the clerk arrested.²²⁶ A Mississippi judge told a security guard to sign a form, and when the guard refused, the judge scheduled a contempt hearing—only later realizing that he had given the guard the wrong

218. Brief for Respondent at 4, *Simon v. State Comm’n on Jud. Conduct* (N.Y. Ct. App. Oct. 20, 2016) (No. 135), <https://on.ny.gov/3LXoZk5> [<https://perma.cc/C722-KBNS>].

219. *Id.* at 12.

220. *Id.* at 8–9.

221. *Id.* at 11.

222. *Id.* at 4.

223. *Id.* at 13. This is not the only example of a judge losing his temper over a hiring. An Idaho judge became furious when he learned a new deputy clerk had been hired without his approval. He ordered the clerk to leave within ten seconds, and when she did not, he held her in contempt and jailed her, along with the clerk who hired her. *Crooks v. Maynard*, 718 F. Supp. 1460, 1462 (D. Idaho 1989).

224. Brief for Petitioner at 15, *Simon v. State Comm’n on Jud. Conduct* (N.Y. Ct. App. Oct. 20, 2016) (No. 135), <https://bit.ly/3M5x2eQ> [<https://perma.cc/2V4S-337X>].

225. MICH. JUD. TENURE COMM’N, ANNUAL REPORT 2008, at 27 (2008), <https://bit.ly/3M7duqn> [<https://perma.cc/A97M-7RDL>].

226. *Miss. Comm’n on Jud. Performance v. Willard*, 788 So. 2d 736, 743 (Miss. 2001); see also *Private Reprimand and Order of Additional Education of a County Court at Law Judge*, TEX. COMM’N ON JUD. CONDUCT (Dec. 18, 2014), <https://bit.ly/3C5Jg2B> [<https://perma.cc/4T8X-WUHE>] (“The evidence demonstrate the judge’s decision to charge the County Clerk with criminal contempt of court was not made in a good faith effort to safeguard the orderly proceedings of the court.”).

form.²²⁷ After getting into an argument with a probation officer, a judge threatened them with contempt when they tried to turn and walk away.²²⁸ Judge Neil Harris instituted contempt proceedings against process servers and notary publics when he heard rumors they were not doing their jobs.²²⁹ In Texas, a judge held a court manager in contempt for “insubordination,” and then called the police and told them to arrest his employee,²³⁰ and a second judge charged the elected county clerk with criminal contempt in bad faith when she offended him.²³¹

Some judges treat law enforcement like personal lackeys to be bullied or abused. Judge Roy Thomas—who was also a practicing attorney—presided over a case where his client was the defendant and threatened officers with contempt and jail time unless they provided him with the personnel records of the arresting officer.²³² A Kentucky judge used contempt power to threaten the sheriff and his deputies with jail time to influence the assignment of deputies and bailiffs in her court.²³³ An unnamed Texas judge was pulled over in a traffic stop and given a verbal warning; the judge wrote a letter to the chief of police threatening to hold the department in contempt.²³⁴ Florida judge Bernard Muszynski tried to hold a law enforcement officer in contempt for having his police radio on in a restaurant because it was annoying the judge (who was there in a private capacity).²³⁵

227. Miss. Comm’n on Jud. Performance v. Thompson, 169 So. 3d 857, 861–82 (Miss. 2015).

228. Miss. Comm’n on Jud. Performance v. Fowlkes, 121 So. 3d 904, 906 (Miss. 2013).

229. Miss. Comm’n on Jud. Performance v. Harris, 131 So. 3d 1137, 1140 (Miss. 2013).

230. Public Reprimand and Order of Additional Education at 2, *In re Uresti* (Tex. Comm’n on Jud. Conduct 2016) (No. 15-0591-JP), <https://bit.ly/3BUQbv6> [<https://perma.cc/EVC8-63WP>].

231. TEX. COMM’N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARY FY 2000 TO PRESENT 58 (2016), <https://bit.ly/3SK8zO4> [<https://perma.cc/ZE8B-LXAJ>].

232. Press Release, Ark. Jud. Discipline & Disability Comm’n, *In re Thomas 3* (Aug. 8, 2001), <https://bit.ly/3rlHVQa> [<https://perma.cc/XJV6-XNCU>].

233. Agreed Order of Suspension at 1, *In re Ward* (Ky. Jud. Conduct Comm’n 2014), <https://bit.ly/3LY2SKv> [<https://perma.cc/2M2L-QVM9>].

234. TEX. COMM’N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARY FY 2000 TO PRESENT 20 (2016), <https://bit.ly/3SK8zO4> [<https://perma.cc/5BVQ-VJZQ>].

235. *In re Inquiry Concerning Muszynski*, 471 So. 2d 1284, 1285 (Fla. 1985).

D. *People Can Be Held in Contempt for Seemingly No Reason*

People can end up being held in contempt for doing perfectly legitimate things.²³⁶ One judge charged a \$35 “contempt fee” to defendants who changed their plea from not guilty to guilty.²³⁷ In Minnesota, a judge held an attorney in contempt and handcuffed them for requesting a lawful continuance.²³⁸ An Ohio judge held an attorney in contempt for saying “[y]our honor.”²³⁹ Judge Duane Hart sentenced an attorney to 30 days in jail for placing a matter on the record that was necessary to protect his client.²⁴⁰ A Kentucky judge held an attorney in contempt for adding cases to her docket for the day, even though the attorney was not responsible for having the cases added.²⁴¹ When a defendant told a Louisiana judge he could not pay a \$100 bond on-the-spot, the judge raised the bond to

236. Determination at 3, *In re Rice* (N.Y. Comm’n on Jud. Conduct 2008), <https://on.ny.gov/3hH565C> [<https://perma.cc/PAZ7-W88A>] (threatening by a judge to hold an attorney in contempt for asserting his right to represent a client in a small claims matter); Determination at 3, *In re Assini* (N.Y. Comm’n on Jud. Conduct 2005), <https://on.ny.gov/3CofWWj> [<https://perma.cc/4GKK-K4DB>] (threatening by a judge to hold a person in contempt when he politely requested a court record); *Disciplinary Couns. v. Plough*, 931 N.E.2d 575, 578 (Ohio 2010) (finding a defense attorney to be in contempt after they refused to participate in a trial where they had not been given a chance to review voluminous discovery); *Disciplinary Couns. v. Cicero*, 34 N.E.3d 60, 62–63 (Ohio 2014) (holding a defendant in contempt and sentencing them to five days in jail for refusing to give the name of a prosecutor who purportedly made them a plea deal).

237. Press Release, Letter of Admonishment to Keith Blackman from Ark. Jud. Discipline & Disability Comm’n 1 (Mar. 21, 2014), <https://bit.ly/3dYjIMy> [<https://perma.cc/U25F-G3NP>]; cf. *In re Worthen*, 926 P.2d 853, 860 (Utah 1996) (holding a defendant in contempt for refusing to enter a plea).

238. MN. BD. ON JUD. STANDARDS, PRIVATE DISCIPLINE SUMMARY 7 (2021), <https://bit.ly/3dY0BCj> [<https://perma.cc/BKK6-HR56>]; Stipulation and Order of Consent to Public Censure and Agreement Not to Serve in a Jud. Position at 2, *In re Hafen* (Nev. Comm’n on Jud. Discipline 2017) (No. 2016-070), <https://bit.ly/3UTzcSJ> [<https://perma.cc/YL97-VFUK>] (jailing someone for contempt for asking for a continuance).

239. *Disciplinary Couns. v. McCormack*, 977 N.E.2d 598, 600 (Ohio 2012).

240. Determination at 4, *In re Hart* (N.Y. Comm’n on Jud. Conduct 2008), <https://bit.ly/3Cv9Q6l> [<https://perma.cc/4AN9-LRXK>]. In the case, a litigant asked the judge to postpone a trial so that he could see his son’s soccer game. *Id.* at 2–3. The judge denied the request. *Id.* at 2. After court was over for the day, the litigant approached the judge in the parking lot hoping to convince him to reconsider the postponement. *Id.* at 3. Instead, the judge ordered the litigant arrested, but it ultimately did not happen. *Id.* The next day, the litigant told his attorney, and the attorney wished to place the incident on the record to preserve the issue. *Id.* at 4. The judge said that if the incident was placed on the record, he would hold the litigant in contempt. *Id.* Undeterred, the lawyer placed the matter on the record, and the judge responded by imposing a 30-day jail sentence on the litigant. *Id.* at 3–4.

241. Agreed Order of Public Reprimand at 2, *In re Leibson* (Ky. Jud. Conduct Comm’n 2017), <https://bit.ly/3SU2I8X> [<https://perma.cc/YRL4-XTJE>].

\$500, and then held the defendant in contempt and jailed them for not being able to pay the bond.²⁴² A Maine judge told a defendant he could do community service at the sheriff's office in lieu of a fine but assured the defendant he could back out of the agreement without penalty. When the defendant tried to back out, the judge held him in contempt and sentenced him to five weeks behind bars.²⁴³ Judge Albert Smith held both a prosecutor and defense attorney in contempt for working out a last-minute plea deal and imprisoned the prosecutor without due process.²⁴⁴ None of these victims deserved the punishments they got.

In the realm of contempt, a person can be held vicariously liable for no reason at all.²⁴⁵ Consider one mother in North Carolina. Her children refused to visit with their father over the winter holidays, and for her children's sins, a judge scheduled a contempt hearing for the mother.²⁴⁶ At the hearing, the judge asked the boys if they understood their mother would go to jail if they did not visit their father, and the boys said they understood, but still refused.²⁴⁷ So the judge had the mother arrested and handcuffed.²⁴⁸

That's just one example. A defendant was held in contempt and sent to jail for saying he would refuse any plea offer.²⁴⁹ The judge later claimed the *defendant* was imprisoned because *his attorney* did not show up to court.²⁵⁰ In Michigan, a judge held a defense attorney in contempt for invoking his client's Fifth Amendment rights. The attorney had his wrists handcuffed behind his back, his legs placed in shackles, and a belly chain locked around his waist. While it was happening, the judge laughed, described the proceedings as "a show," told a person, "[y]ou won't get better tickets anyplace," and invited the person to sit "up close" in the "front

242. *In re Laiche*, 198 So. 3d 86, 98 (La. 2016). The judge did essentially the same thing with a second defendant. *Id.*

243. *In re Benoit*, 487 A.2d 1158, 1165–66 (Me. 1985).

244. *Miss. Comm'n on Jud. Performance v. Smith*, 78 So. 3d 889, 891 (Miss. 2011).

245. Determination at 6, *In re Sharpe* (N.Y. Comm'n on Jud. Conduct 1983), <https://on.ny.gov/3Cv5PPi> [<https://perma.cc/47CX-UFA6>] (holding prosecutor in contempt because he could not bring a missing police officer into court within two minutes).

246. *In re Inquiry Concerning a Judge*, 832 S.E.2d 684, 686 (N.C. 2019).

247. *Id.* at 686.

248. *Id.* at 687. The boys only relented when the judge told them that they would be sent to their father if their mother was incarcerated. *Id.*

249. Order of Private Reprimand at 1 (Ky. Jud. Conduct Comm'n, Apr. 15, 2017), <https://bit.ly/3yzohUX> [<https://perma.cc/58M2-QDFY>].

250. *Id.*

row.”²⁵¹ Also in Michigan, a mother had her bond increased 5,000 percent after her son made derogatory comments about a judge.²⁵² In Nevada, a defendant could not attend a traffic court hearing because of work, so he sent a friend in his place. The judge ordered the friend to be detained until the proper defendant showed up.²⁵³ Judge Gregory Middents held parents in contempt when their kids failed to go to school without specifying what the parents did wrong or how long they would be detained.²⁵⁴ A Texas court held a witness in contempt for invoking his Fifth Amendment right not to respond to a subpoena, and his attorney for counseling him to do so, and threw both of them in jail.²⁵⁵

Perhaps buoyed by unfettered contempt power, many judges seem to believe they can demand that anyone, anywhere, in any context, must do whatever they want.²⁵⁶ Judge Leigh Ann Darby believed she knew what was best for T.J., a 15-year-old youth charged with disturbing the peace. She ordered T.J.’s mother to apply for Medicaid benefits, take her child to outpatient treatment, and pay any associated costs. The outpatient treatment center was a 70-mile roundtrip, the mother would have to go there 15 days in a row during work hours, and it was financially unviable for the mother to comply. But these facts counted for little with Judge Darby, who threw the mother in jail when she could not do the impossible.²⁵⁷

In Pennsylvania, Christy McCarty accused a woman of shoplifting in a gas station. That woman happened to be a law clerk for a judge. Miffed by the accusation, the law clerk told her judge, Farley Toothman. Judge Toothman proceeded to go to the store to harass

251. MICH. JUD. TENURE COMM’N, ANNUAL REPORT 2013, at 15 (2013), <https://bit.ly/3RzhT6q> [<https://perma.cc/PZC6-92XG>].

252. MICH. JUD. TENURE COMM’N, ANNUAL REPORT 2008, at 18 (2008), <https://bit.ly/3fzRrfQ> [<https://perma.cc/2H4J-UGEG>].

253. Findings of Fact, Conclusions of Law and Imposition Of at 3, *In re Assad* (Nev. Comm’n on Jud. Discipline 2007) (No. 0602-1034), <https://bit.ly/3roEHv8> [<https://perma.cc/4ND5-FVT6>].

254. Public Admonition and Order of Additional Education at 5, *In re Middents* (Tex. Comm’n on Jud. Conduct 2008) (No. 06-0707-JP), <https://bit.ly/3STt3nE> [<https://perma.cc/7LWF-YVR2>].

255. *Maness v. Meyers*, 419 U.S. 449, 455 (1975); *see also State v. Wall*, 49 N.C. App. 678, 680 (1980) (holding person in contempt for unsuccessfully encouraging someone else to disobey an order of the court).

256. Power of this sort can seduce a person quickly. When a judge (improperly) let her constable preside over a small claims matter, the constable started threatening parties with contempt at once. *In re Foret*, 144 So. 3d 1028, 1029 (La. 2014).

257. *Miss. Comm’n on Jud. Performance v. Darby*, 75 So. 3d 1037, 1040 (Miss. 2011).

employees, called the police, tracked down who McCarty was, pulled a confidential court file on McCarty, discovered that McCarty was on probation, ordered McCarty to court the next day, held McCarty in contempt, and gave her nearly a month-long sentence.²⁵⁸ The judge also asked McCarty if she was “going to be a good girl” and told her to stay away from the gas station.²⁵⁹

Tennessee judge Reese Holley required defendants to perform community service or donate to charities specified by the judge as a precondition of getting appointed counsel.²⁶⁰ If defendants did not complete community service, the judge would hold them in contempt and jail them, and would also revoke bond for defendants who requested appointed counsel.²⁶¹ And he required defendants to waive their right to a jury trial to get a continuance, and sometimes just denied appointed counsel or insisted on cash-only bonds.²⁶²

Michael Penrose was charged with stalking, trespass, and terroristic threats against victim Anita Ferroni. Ferroni had a protective order against Penrose, though Penrose had violated that protective order in the past. Yet when the case came before Judge Dennis J. McDonald, he devised an “alternative sentence”: he ordered Penrose to take his victim out to dinner at the Ruby River Restaurant.²⁶³ The judge was also aware of the defendant’s previous stalking violations against the victim; he did it anyway.²⁶⁴

Additional evidence of abuse of power can be seen around the country. Two months into the coronavirus pandemic, a Brooklyn judge was forcing people to jam into the courthouse, and the judge ultimately caught the virus and died.²⁶⁵ Utah judge Garry Sampson drew a gun on a bailiff after the bailiff threatened to throw water on

258. Complaint at 2–5, *In re Toothman* (Pa. Ct. Jud. Discipline 2020) (No. 1 JD 2020).

259. *Id.* at 5. The judge later claimed that he “desire[d] to be educated on any limitations on his ability to review dockets, the proper procedure and right to counsel when dealing with bench warrants, and the distinction between civil and criminal contempt.” Verified Reply Brief at 4, *In re Toothman* (Pa. Ct. Jud. Discipline 2020) (No. 1 JD 2020).

260. Letter from Chris Craft, Chair of Tenn. Bd. of Jud. Conduct, to Reese Holley, Judge, at 1 (June 30, 2015), <https://reut.rs/3SF9Gi8> [<https://perma.cc/77PQ-CA5M>].

261. *Id.* at 1.

262. *Id.* at 2.

263. Findings of Fact, Conclusions of Law, and Order at 3, *In re McDonald* (Utah Jud. Conduct Comm’n 1999) (No. F99-3JC-006).

264. *Id.* at 4.

265. Noah Goldberg, *A Brooklyn courthouse was still packed as coronavirus spread. Judges, their staffs and lawyers are paying the price*, N.Y. DAILY NEWS (Apr. 8, 2020, 11:00 PM), <https://bit.ly/3E4kp1J> [<https://perma.cc/34GK-RXSM>].

him.²⁶⁶ Judge Michael Gary of New York threatened to hold the prosecutor in contempt if a defendant was arrested, even though the defendant was threatening a witness.²⁶⁷ Judge Sam Bennington told an attorney to withdraw a valid objection or else he would jail the client.²⁶⁸

A Nevada judge was a retired highway patrol officer and used this putative authority to pull someone over, take her license, and order her to follow him before letting her go.²⁶⁹ Likewise, a Texas judge pulled over a woman he believed was driving recklessly (he was neither in uniform nor driving a marked car) and then started threatening the woman with contempt and incarceration.²⁷⁰ To these women, it would have looked more like an attempted kidnapping than anything else.

New Hampshire judge Michael Jones started interrogating a traffic defendant about the merits before the matter was set for trial, and when the prosecutor objected, the judge threatened the prosecutor with contempt.²⁷¹ Judge Jerry Colclazier threatened a locksmith with contempt if he did not give the judge a new key to the courthouse.²⁷² Judge Amanda Sammons falsely told a litigant that they could be held in contempt and jailed for not paying a civil judgment.²⁷³ Judge Jim Lammey required immigrants seeking probation to register with the U.S. Immigration and Customs Enforcement to get out of jail.²⁷⁴ When a newspaper ran a story about the

266. Stipulation at 1, *In re Garry R. Sampson* (Utah Jud. Conduct Comm'n 2009) (No. 20090888-SC), <https://bit.ly/3SLCzJM> [<https://perma.cc/CW72-KFBS>].

267. Determination at 3, *In re Gary* (N.Y. Comm'n on Jud. Conduct 2016), <https://on.ny.gov/3E609Lt> [<https://perma.cc/8BJE-86ND>].

268. Letter from Chris Craft, Chair of Tenn. Bd. of Jud. Conduct, to Sam Benningfield, Judge (Nov. 15, 2017), <https://reut.rs/3E6QEgX> [<https://perma.cc/S8BQ-AFDC>].

269. Stipulation and Order for Public Reprimand at 2, *In re The Hon. Daniel Bauer* (Nev. Comm'n on Jud. Discipline 2013) (No. 1205-48), <https://bit.ly/3hCotNr> [<https://perma.cc/7PMC-99Z9>].

270. Public Admonition and Order of Additional Education at 1-2, *In re Ben E. Brady* (Tex. Comm'n on Jud. Conduct 2016) (No. 15-0900-JP), <https://bit.ly/3C0gksH> [<https://perma.cc/ZSH5-6CU7>].

271. Reprimand at 2, *In re Michael E. Jones* (N.H. Jud. Conduct Comm. 2011) (No. JC-10-069-C), <https://bit.ly/3SIntEL> [<https://perma.cc/928Z-YMHU>].

272. State *ex rel.* Edmondson v. Colclazier, 106 P.3d 138, 140 (Okla. Ct. Jud. 2002).

273. Deferred Disciplinary Agreement at 2, *In re Sammons* (Tenn. Bd. Jud. Conduct 2017) (No. B14-5904), <https://reut.rs/3rj8khl> [<https://perma.cc/YWF2-NBWG>].

274. Daniel Connolly, *Memphis Judge Posts Facebook Link to Holocaust Denier's Essay Calling Immigrants 'Foreign Mud'*, MEMPHIS COMM. APPEAL (Apr. 30, 2019, 5:00 AM), <https://bit.ly/2LBb5si> [<https://perma.cc/9LRQ-HLBP>].

controversy, he sued.²⁷⁵ Judge Luis Aguilar made an attorney attend a hearing three days after her caesarian birth surgery.²⁷⁶ One could go on.²⁷⁷

The contempt power was not directly invoked or threatened in every instance above, but the judge's unilateral authority to imprison people underwrites this kind of abusive behavior.

E. Judges Can Hold People in Contempt for Conduct That Judges Can Get Away With

When it comes to misbehavior in court, citizens get hard time while judges get hard words. Judges can use vulgar language to insult citizens without fear of spending the night in a holding cell, only a reprimand.²⁷⁸ A Tennessee judge shared an article by a Holocaust denier that called Muslim immigrants “foreign mud” and told Jews to “get the f*ck over the Holocaust.”²⁷⁹ The judge called it an “interesting read.”²⁸⁰ Judge Robert Newell told a litigant to

275. Chris Butler, *Maligned Memphis Judge James Lammey Threatens Legal Action Against Memphis Commercial Appeal*, TENN. STAR (May 13, 2019), <https://bit.ly/3SN5wVG> [<https://perma.cc/3B29-EPHH>].

276. Public Admonition and Order of Additional Education at 3, *In re Luis Aguilar* (Tex. Comm'n on Jud. Conduct 2017) (No. 15-0984), <https://bit.ly/3Cn3p5g> [<https://perma.cc/RE9K-3WTR>].

277. Public Reprimand at 11, *In re Christopher Dupuy* (Tex. Comm'n on Jud. Conduct 2014) (No. 11-1106-CC), <https://bit.ly/3ULBfbz> [<https://perma.cc/HFM9-BUSC>] (threatening to hold a clerk in contempt if she did not seal records in a personal lawsuit that had been filed against the judge); Private Order of Additional Education of a District Court Judge (Tex. Comm'n on Jud. Conduct), <https://bit.ly/3RpxVA2> [<https://perma.cc/K4HD-6BLD>] (using contempt power to pressure a witness into providing specific testimony); *Webb v. Texas*, 409 U.S. 95, 95–96 (1972) (reversing conviction after a trial judge admonished a defense witness that he would prosecute for perjury if he lied under oath, and thus, the witness was taking a chance by testifying).

278. *E.g.*, *In re Jenkins*, 503 N.W.2d 425, 426 (Iowa 1993) (reprimanding judge for calling a litigant a “beer-bellied, full-bearded, unemployed, seedy, coverall-clad lout”); *Disciplinary Couns. v. McCormack*, 977 N.E.2d 598, 600 (Ohio 2012) (telling an attorney to “shut up” and called another a “liar”); *Disciplinary Couns. v. Cox*, 862 N.E.2d 514, 515–16 (Ohio 2007) (holding man in contempt for saying that “judges can be crooks, too,” told the man he could face 180 days in jail and said, “[I]f you're too dense to understand that, maybe your lawyer will be able to explain it to you.”). A New Jersey judge called an indigent defendant a “liar” when they claimed they did not know about an application for a public defender. *Presentment at 7, In re Maisto* (N.J. Adv. Comm. on Jud. Conduct 2007), <https://bit.ly/3LY0LpT> [<https://perma.cc/F45B-4TNB>]. The U.S. Supreme Court has cast aspersions on all nonlawyers, saying “[I]aymen, foolishly trying to defend themselves, may understandably create awkward and embarrassing scenes.” *Mayberry v. Pennsylvania*, 400 U.S. 455, 462 (1971).

279. Connolly, *supra* note 274.

280. *Id.*

“shut your mouth.”²⁸¹ A Texas judge held a man in contempt for failing to respond when the judge asked him if he understood a threat the judge had just made.²⁸² Another Texas judge threatened to hold someone in contempt if they did not stop arguing, even though the judge was yelling and swearing.²⁸³ A West Virginia judge was rude to an African-American detective and repeatedly called him “boy.”²⁸⁴ Judge Samuel Kent issued an opinion that went on for pages insulting both attorneys for their low-quality briefings. The judge called them “amateurish,” “child-like,” “bumbling,” among many other taunts.²⁸⁵ Judge Jerry Smith trivialized a defendant’s arrest for cocaine possession with intent to distribute (which could result in decades behind bars depending on the circumstances²⁸⁶) by analyzing the case through the lyrics of “Should I Stay or Should I Go?” by The Clash.²⁸⁷ A mother told Judge Robert Michelson that she could not pay a fine because she had children and grandchildren to support. The judge became angry and said, “I suppose it was too much to ask that your daughter keep her pants on and not behave like a slut.”²⁸⁸ He continued, saying, “With the planet already overcrowded, my personal belief is that a young woman who finds herself unmarried and pregnant should get an abortion.”²⁸⁹ None of these judges were held in contempt, much less jailed.²⁹⁰

But if the citizen responds in kind, they will be arrested.²⁹¹ A Kentucky judge told a father to “shut up,” but when the father at-

281. Letter from Chris Craft, Chair of Tenn. Bd. of Jud. Conduct, to Robert Newell, Judge 2 (Feb. 25, 2015), <https://bit.ly/3StG5Zg> [<https://perma.cc/YC2P-R7MF>].

282. Public Reprimand and Order of Additional Education at 5, *In re Joe Henry Garza* (Tex. Comm’n on Jud. Conduct 2010) (No. 08-0085-MU), <https://bit.ly/3fy7Cub> [<https://perma.cc/9PWT-44QX>].

283. TEX. COMM’N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARIES, FY 2000 TO PRESENT 66 (2020), <https://bit.ly/3UUIthF> [<https://perma.cc/W84F-6KXS>].

284. W. VA. JUD. INVESTIGATION COMM’N, WEST VIRGINIA JUDICIAL INVESTIGATION COMM’N ANNUAL REPORT – 2006 (2007), <https://bit.ly/3rhHnuC> [<https://perma.cc/VNY2-DBGA>].

285. *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001).

286. 21 U.S.C. § 841(b).

287. *United States v. Jackson*, 390 F.3d 393, 396 n.3 (5th Cir. 2004).

288. *In re Michelson*, 591 N.W.2d 843, 845 (Wis. 1999).

289. *Id.*

290. See also Richard H. Underwood, *What Gets Judges in Trouble*, 23 J. NAT’L L.J. 101 (2003) (cataloguing numerous examples of judges saying and doing inappropriate things without mentioning a single one being held in contempt).

291. CAL. COMM’N ON JUD. PERFORMANCE, 1988 ANNUAL REPORT 11 (1988), <https://bit.ly/3SN8R6U> [<https://perma.cc/LC6E-F4XB>].

tempted to speak, the judge sent him to jail for three days.²⁹² After being convicted and fined in a bench trial, a Louisiana defendant asked how he might appeal. Judge Robin Free flippantly told him to talk to the governor about changing the law. Annoyed with this answer, the defendant said courts were “apparently not” about safeguarding people’s rights, and for that, the judge held him in contempt and sentenced him to five days in jail.²⁹³ Separately, Judge Free sentenced a defendant to 15 days in jail for muttering something under his breath so quietly that the court reporter could not even hear it (but the judge believed was “this is some stupid sh*t”), and then the judge proceeded to call someone in the courtroom a “dumb a-double-s.”²⁹⁴ Judge Marian Shelton screamed at a defendant’s wife for no apparent reason. She muttered “a**hole” as she left, and the judge had her arrested while telling her to “shut up” and “shut your mouth.”²⁹⁵

Double standards are an accepted part of contempt. If a citizen walks into court drunk, there is an excellent chance they will not be sleeping in their own bed that evening.²⁹⁶ If a judge walks into court drunk, jail time is not on the table.²⁹⁷ A Missouri judge held a law enforcement officer in contempt for criticizing him in the press, and

292. Public Reprimand at 1, *In re Conley* (Ky. Jud. Conduct Comm’n 2020), <https://bit.ly/3dWtTRS> [<https://perma.cc/2TNG-LMZU>].

293. *In re Free*, 199 So. 3d 571, 585 (La. 2016).

294. *Id.* at 588.

295. Notice of Formal Written Complaint, *In re Shelton* (N.Y. Comm’n on Jud. Conduct 2007), <https://on.ny.gov/3UTTk74> [<https://perma.cc/NG82-H2NB>].

296. Determination at 5–6, *In re Beers* (N.Y. Comm’n on Jud. Conduct 2008) <https://bit.ly/3y56GUt> [<https://perma.cc/94SX-C2US>] (judge held defendant in contempt and sentenced him to 15 days without following proper procedures because the defendant was drunk); *In re Curda*, 49 P.3d 255, 256 (Alaska 2002) (judge jailed witness for contempt for being drunk).

297. Order, *In re Joseph Lodge* (Ariz. Comm’n on Jud. Conduct 2012) (No. 12-176). Judge Scott Kenney was drunk during court hours, but his disciplinary case was dismissed. Notice of Formal Charges, *In re Scott A. Kenney* (Fla. Jud. Qualifications Comm’n 2002) (No. 98-198); *In re Kenney*, 828 So. 2d 386 (Fla. 2002). Judge Gisele Pollack resigned several months after taking the bench while drunk multiple times, so no disciplinary sanctions were imposed against her. Notice of Formal Charges, *In re Gisele Pollack* (Fla. Jud. Qualifications Comm’n 2014) (No. 14-985); Inquiry Concerning a Judge, *In re Pollack*, 163 So. 3d 510, 2015 Fla. LEXIS 252 (Fla. 2015). Ditto for Judge Jacqueline Schwartz. Notice of Formal Charges, *In re Jacqueline Schwartz* (Fla. Jud. Qualifications Comm’n 2016) (No. 16-135); *In re Jacqueline Schwartz*, No. SC16-655, 2016 Fla. LEXIS 2090 (Sept. 26, 2016). Ditto for Judge Day. Formal Complaint, *In re John T. Day* (Wash. Jud. Qualifications Comm’n 1984) (No. 83-259-F-6); Stipulation, *In re John T. Day* (Wash. Jud. Qualifications Comm’n 1985) (No. 83-259-F-6). And ditto for Judge George Colby. Stipulation, Agreement and Order of Censure, *In re George W. Colby* (Wash. Comm’n on Jud. Conduct 2000) (No. 2511-F-85); *see also In re Cope*, 848 So. 2d 301 (Fla. 2003) (judge reprimanded for showing up drunk to a judicial conference).

then immediately went to the press to criticize the officer.²⁹⁸ Normal people can get in big trouble for insulting juries,²⁹⁹ but not judges.³⁰⁰ Judges have even gotten away with insulting other judges without being held in contempt.³⁰¹ Judges justify contempt for attorneys who do not show up to court because “[w]hen an attorney fails to appear in court with his client, the wheels of justice must temporarily grind to a halt.”³⁰² The system also grinds to a halt when judges do not do their job. But it is not labeled as contempt and punished; everyone else is supposed to just endure intemperate judges.

It is not unheard of for judges to work a few hours in the morning, schedule long lunches, and then go golfing, all while litigants wait years for decisions on cases.³⁰³ In 1997, an Arkansas inmate filed a petition for post-conviction relief.³⁰⁴ Over the next three years, the state supreme court issued a writ of mandamus directing the judge to rule on it, along with multiple letters and phone calls that the judge did not respond to.³⁰⁵ Only in the year 2000 did the judge finally rule, the only punishment they received was an admonishment.³⁰⁶ Other examples of multi-year delays include a Kansas judge who took two and a half years to render a decision in a divorce case,³⁰⁷ a Kentucky judge who fell several years behind on several cases,³⁰⁸ and a Pennsylvania judge who had dozens of overdue opinions going back years.³⁰⁹ In jurisdictions that require

298. *In re Conard*, 944 S.W.2d 191, 197–99 (Mo. 1997).

299. *E.g.*, *Comm’n for Law. Discipline v. Benton*, 980 S.W.2d 425, 428 (Tex. 1998); Thomas M. Keck, Brandon T. Metroka & Richard S. Price, *The Judicial Protection of Anti-Judicial Speech*, 33 AM. U. INT’L L. REV. 693, 730–31 (2018) (contempt for insulting a grand jury).

300. Settlement Stipulation at 2, *In re Young* (Utah Jud. Conduct Comm’n 2000) (No. F00-D3-037), <https://bit.ly/3Cn4oCB> [<https://perma.cc/J8VP-L27W>] (reprimanded for disparaging a jury verdict in open court).

301. W. VA. JUD. INVESTIGATION COMM’N, WEST VIRGINIA JUDICIAL INVESTIGATION COMMISSION ANNUAL REPORT – 2017, at 15 (2018), <https://bit.ly/3Cqqnsg> [<https://perma.cc/M4ZF-7VDL>].

302. *Arthur v. Superior Ct. of L.A. Cnty.*, 398 P.2d 777, 782 (Cal. 1965).

303. STEVE WEINBERG, *THE REPORTER’S HANDBOOK: AN INVESTIGATOR’S GUIDE TO DOCUMENTS & TECHNIQUES* 227 (Suzanne P. Weir ed., 3d ed. 1996).

304. Letter from James Badami, Exec. Dir., Ark. Sup. Ct., to Fred D. Davis, III, Cir. Ct. J., Eleventh Jud. Dist. (Jan. 1, 2001), <https://bit.ly/3O8NBaS> [<https://perma.cc/F9A9-UEXQ>].

305. *Id.*

306. *Id.* at 1–2.

307. KAN. COMM’N ON JUD. QUALIFICATIONS, 1997 ANNUAL REPORT 23 (1997), <https://bit.ly/3fAucSV> [<https://perma.cc/5XKL-K345>].

308. KY. JUD. CONDUCT COMM’N, ORDER OF PRIVATE REPRIMAND 1 (2016), <https://bit.ly/3SnLBN7> [<https://perma.cc/5FZ8-UY3N>].

309. *In re Younge*, No. 2 JD 19, at 4–5 (Pa. Ct. Jud. Discipline Dec. 1, 2020), <https://bit.ly/3C4E6DF> [<https://perma.cc/WT4C-DELN>].

judges to file reports verifying they are staying on top of their docket, several judges have filed falsified reports³¹⁰ or have been chronically negligent in filing them.³¹¹ None of these judges went to jail for any of this.

Lying in court is a serious matter. So serious that some judges inflict punishment without regard to context. Over in Kentucky, a domestic violence victim recanted on her allegations, and the judge ordered prosecutors to charge her with making false statements, over the objection of the prosecutors. When the prosecutor asked that she be released, the judge refused.³¹² When an Alabama woman filed a domestic complaint against her husband and then could not remember details of it in court, the judge had her handcuffed and taken to jail without any formal charges. The judge did the same thing to the next litigant.³¹³

But when judges lie, they remain out of jail and gainfully employed. Judge Joseph Wright did not disclose he received a private reprimand when he applied for an open seat on the Maryland Circuit Court, and he only received a public reprimand for his failure to disclose.³¹⁴ A West Virginia magistrate lied about having a high school diploma, a prerequisite for his job.³¹⁵ He was allowed to get a GED and then rehired.³¹⁶ A Florida trial judge got a speeding ticket on her way to an interview for an appellate judge job, lied about the ticket, and did not get fired.³¹⁷ An Arizona justice of the peace³¹⁸ cheated on a workplace exam and got censured but not terminated.³¹⁹

310. *In re* Robert Moore, No. 99-648 (Iowa 1999).

311. *In re* Carstensen, 316 N.W.2d 889, 893–94 (Iowa 1982); *cf.* Letter from Chris Craft, Chair, Tenn. Bd. of Jud. Conduct, to Robert Newell, J. (retired) 2 (Feb. 25, 2015), <https://bit.ly/3A1TctB> [<https://perma.cc/323U-W5AB>] (describing judge's case management as a "procedural train wreck").

312. Findings of Fact, Conclusions of Law and Final Order at 4, *In re* Sheila A. Collins (Ky. Jud. Conduct Comm'n 2016), <https://bit.ly/3TyE2TG> [<https://perma.cc/93SR-KU9T>].

313. *In re* Steensland, Jr., No. 39, at 3–5 (Ala. Ct. Jud. May 2, 2011), <https://reut.rs/3y9Itfz> [<https://perma.cc/J28B-EGP7>].

314. *In re* Wright, No. CJD 2016–148 (Md. Comm'n on Jud. Disabilities Sept. 24, 2018).

315. W. VA. JUD. INVESTIGATION COMM'N, WEST VIRGINIA JUDICIAL INVESTIGATION COMMISSION ANNUAL REPORT – 2019, at 21 (2020), <https://bit.ly/3fFLu16> [<https://perma.cc/44RP-XAKR>].

316. *Id.*

317. Inquiry Concerning a Judge (Jessica J. Recksiedler), 161 So.3d 398, 399 (Fla. 2015).

318. In Arizona, a justice of the peace handles minor civil and criminal court matters.

319. *In re* Aboud, No. 17–019, at 2, 5, 18 (Ariz. Comm'n on Jud. Conduct Dec. 4, 2018).

F. Judges Frequently Ignore Rules of Contempt

What rules do exist for contempt commonly fall by the way-side. Take the rule that a judge must personally observe misconduct to punish it summarily. A New Jersey defendant was accused of threatening court staff outside of the presence of the judge. The defendant denied it, but the judge summarily found her guilty and sentenced her anyway to a \$500 fine.³²⁰ Ohio judge Daniel Gaul held someone in contempt for conduct that occurred outside of the presence of the court without evidence. A Texas judge held a defendant in contempt in absentia,³²¹ and a second judge “failed to appreciate the distinction between criminal versus civil contempt, direct versus constructive contempt, and the proper procedures to follow in each.”³²² Judges might prejudge matters, such an anonymous Texas judge who told an attorney they intended to find an attorney in contempt at an upcoming hearing.³²³ What are litigants to do when judges are the ones breaking the rules?

Fines are a common feature of the criminal justice system. But what happens if a defendant cannot pay? The U.S. Supreme Court’s answer is clear: a person cannot be imprisoned unless they willfully choose not to pay, and the court must determine whether someone does, in fact, have the ability to pay.³²⁴

But these rules are routinely ignored by lower courts, wittingly or not.³²⁵ Louisiana judges have circumvented the rule against

320. *In re Sasso*, No. ACJC 2007–162, at 10 (N.J. Adv. Comm. on Jud. Conduct Mar. 31, 2009), <https://bit.ly/3O4PlSg> [<https://perma.cc/5R6P-HWHM>]; see also Determination at 4, *In re Hamel* (N.Y. Comm’n on Jud. Conduct 1995), <https://on.ny.gov/3G0tDwH> [<https://perma.cc/GQJ3-3BPB>] (judge held a litigant in contempt and sentenced them to 15 days in jail without verifying allegations the judge heard).

321. Public Admonition, *In re Bob Wall* (Tex. Comm’n on Jud. Conduct 2007) (No. 06-0451-JP), <http://bit.ly/3LWYOKt> [<https://perma.cc/CR37-5AW4>].

322. TEX. COMM’N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARIES, FY 2000 TO PRESENT 53 (2016), <https://bit.ly/3SLsVqZ> [<https://perma.cc/74HE-TX25>].

323. TEX. COMM’N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARIES, FY 2000 TO PRESENT 30 (2016), <https://bit.ly/3SLsVqZ> [<https://perma.cc/74HE-TX25>]; CAL. COMM’N ON JUD. PERFORMANCE, 1993 ANNUAL REPORT (1993), <https://bit.ly/3C0wTob> [<https://perma.cc/3PA9-6TBY>]; cf. Letter from Don R. Ash, Presiding J., Tenn. Ct. of the Judiciary, to A. Andrew Jackson, J., Dickson Cnty. Ct. (May 16, 2008), <https://reut.rs/3rpdkkH> [<https://perma.cc/QKE5-FTPK>] (prejudged Hispanics as being in the country illegally).

324. *Bearden v. Georgia*, 461 U.S. 660, 662 (1983) (can only punish someone for nonpayment if they have not made bona fide efforts to pay); see also *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970) (cannot punish people more harshly based on their inability to pay); *Turner v. Rogers*, 564 U.S. 431, 449 (2011) (courts must ensure a person has the ability to pay at a civil contempt proceeding).

325. See generally AM. CIV. LIBERTIES UNION, *IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTOR’S PRISON* (2010), <https://bit.ly/3SNpVtB> [<https://perma.cc/3SNp-VtB>].

debtor prisons by holding people in contempt for failure to pay fines and sending them to jail.³²⁶ A number of courts have used contempt with the threat of jail to force the payment of fees.³²⁷ Traffic offenders are often held in contempt and imprisoned for failure to pay fines with no inquiry into their ability to pay, why they did not pay, or possible alternatives to confinement.³²⁸ A California judge offered an 83-year-old defendant to serve two days in jail when he said he could not pay a \$106 traffic ticket.³²⁹ When the defendant mildly protested, the judge held him in contempt and sentenced him to six days of incarceration.³³⁰ Some jurisdictions shift the burden to the defendant to prove they lack the ability to pay to avoid punishment.³³¹

Due process-lite is par for the course in contempt cases.³³² For “there is nothing one could accurately describe as clear law specify-

perma.cc/4A6B-X3HR]; AM. CIV. LIBERTIES UNION, *A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT* 14 (2018), <https://bit.ly/2oCOQEx> [<https://perma.cc/2SQU-6W79>]; see also *In re Birchall*, 913 N.E.2d 799, 803 (Mass. 2009) (defendant held in contempt and incarcerated for failure to pay without reasonable time to pay or fair hearing); *Cnty. of Durham ex rel. Wilson v. Burnette*, 821 S.E.2d 840, 843–44 (N.C. Ct. App. 2018) (ignoring substantial evidence of the father’s inability to pay).

326. AM. CIV. LIBERTIES UNION, *A POUND OF FLESH*, *supra* note 325, at 18.

327. Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L. J. 355, 367 (2006) (citing cases).

328. *E.g.*, *In re Hayes III*, No. 49, at 3 (Ala. Ct. Jud. Jan. 5, 2017), <https://reut.rs/3SxK5YK> [<https://perma.cc/PS75-M5RW>]; MICH. JUD. TENURE COMM’N, ANNUAL REPORT 2014, at 19–20 (2014), <https://bit.ly/3CrNpPC> [<https://perma.cc/G9K3-MSUT>]; *In re Gordon*, No. ACJC 2003-264, at 2–3 (N.J. Adv. Comm. on Jud. Conduct Apr. 23, 2007), <https://bit.ly/3SStIWH> [<https://perma.cc/ZBE5-CFX2>]; *State Bar Ass’n v. Goldie*, 894 N.E.2d 1226, 1229 (Ohio 2008); *In re Vance*, No. 18.019, at 4 (Vt. Jud. Conduct Bd. May 28, 2019), <https://reut.rs/3Mfb0Xf> [<https://perma.cc/8V3C-T8XZ>].

329. CAL. COMM’N ON JUD. PERFORMANCE, 1992 ANNUAL REPORT 11–12 (1992), <https://bit.ly/3BUZZVW> [<https://perma.cc/4Z64-PYQC>].

330. *Id.*

331. Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 CORNELL J. L. & PUB. POL’Y 95, 119 (2008).

332. MISS. COMM’N ON JUD. PERFORMANCE, 2014 ANNUAL REPORT 5 (2014), <https://bit.ly/3RA2FhE> [<https://perma.cc/2NDE-UKXA>]; see Post-Hearing Memorandum at 1, *In re McGuire* (N.Y. Comm’n on Jud. Conduct 2019), <https://on.ny.gov/3y9doc5> [<https://perma.cc/HH9W-FV2F>]; see also Determination at 5, *In re Meacham* (N.Y. Comm’n on Jud. Conduct 1993), <https://on.ny.gov/3dZE2ND> [<https://perma.cc/87JS-X3LV>]; Public Admonition and Order of Additional Education, *In re Lonnie Jim Dulin* (Tex. Comm’n on Jud. Conduct 2001) (No. 01-8053-JP), <https://bit.ly/3UUIo9k> [<https://perma.cc/M9T6-9BSP>]; *Private Reprimand of a District Judge*, TEX. COMM’N ON JUD. CONDUCT (Jan. 26, 2011), <https://bit.ly/3rpJQTD> [<https://perma.cc/47N8-Y4MU>].

ing the due process constraints on the contempt power.”³³³ Justice Hugo Black called it “the most ill-defined and elastic [of] contours in our law.”³³⁴ Written orders rationalizing a finding of contempt might be required, but that does not mean they are always made.³³⁵ Illegal punishments are ordered.³³⁶ Judges violate rules by holding people in contempt without appointing counsel when required.³³⁷ Judges violate rules requiring a jury before a person is held in contempt.³³⁸ Judges violate rules requiring that defendants be given adequate notice of contempt proceedings.³³⁹ Judges violate rules

333. John A. Pottow & Jason S. Levin, *Rethinking Criminal Contempt in the Bankruptcy Courts*, 91 AM. BANKR. L.J. 311, 367 (2017). Note that normally, if government officials have “unguided” and “unchecked” authority, that is a constitutional violation. See *Gundy v. United States*, 139 S. Ct. 2116, 2123–24 (2019).

334. *Green v. United States*, 356 U.S. 165, 200 (1958) (Black, J., dissenting).

335. CAL. COMM’N ON JUD. PERFORMANCE, 1992 ANNUAL REPORT 14 (1992), <https://bit.ly/3UWtRdj> [<https://perma.cc/GX9W-QZCC>]; see also Public Reprimand at 1, *In re Conley* (Ky. Jud. Conduct Comm’n 2020), <https://bit.ly/3rpSdi3> [<https://perma.cc/7N8L-YCRE>]; see also *In re Jaspersen*, No. 2018-053-P, at 2 (Nev. Comm’n on Jud. Discipline July 23, 2019), <https://bit.ly/3EdOc7W> [<https://perma.cc/7YHL-F985>]; *In re Hafen*, No. 2016-070, at 2–3 (Nev. Comm’n on Jud. Discipline Feb. 23, 2017), <https://bit.ly/3yzMACb> [<https://perma.cc/25ER-B7GZ>]; TEX. COMM’N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARIES, FY 2000 TO PRESENT 49 (2020), <https://bit.ly/3CruG6Q> [<https://perma.cc/Y24E-CTSF>].

336. See *In re Benoit*, 487 A.2d 1158, 1166 (Me. 1985); TEX. COMM’N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARIES, FY 2000 TO PRESENT 42 (2016), <https://bit.ly/3Swwxsn> [<https://perma.cc/FN9R-ECXF>] (fined people in excess of \$100 statutory limit); see also *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1113 (9th Cir. 2005) (imposing a lifetime ban on an out-of-state attorney appearing in the court); *Smith v. Whatcom Cnty. Dist. Ct.*, 147 Wn. 2d 98, 101 (Wash. 2002) (woman was jailed for nonpayment of fines over two years old, even though state law deprived the courts of jurisdiction over unpaid fines that are over two years old).

337. *E.g.*, *Miss. Comm’n on Jud. Performance v. Willard*, 788 So.2d 736, 743 (Miss. 2001); KAN. COMM’N ON JUD. QUALIFICATIONS, 2011 ANNUAL REPORT 22 (2011), <https://bit.ly/3e0Ny31> [<https://perma.cc/P2UV-93TQ>]; *Determination at 25, In re Jutkofsky, Jr.* (N.Y. Comm’n on Jud. Conduct 1985), <https://on.ny.gov/3SxMhj5> [<https://perma.cc/94BR-T4QJ>]; Letter from Chris Craft, Presiding J., Tenn. Ct. of the Judiciary, to A. Andrew Jackson, J. (Jan. 30, 2012), <https://reut.rs/3fGAy2X> [<https://perma.cc/3WWN-5GRR>]; TEX. COMM’N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARIES, FY 2000 TO PRESENT 13 (2016), <https://bit.ly/3STpe20> [<https://perma.cc/VVD7-BMXB>].

338. See, *e.g.*, *In re Rich*, 62 P. 715, 716 (Kan. Ct. App. 1900); see also KAN. COMM’N ON JUD. QUALIFICATIONS, 1999 ANNUAL REPORT 27 (1999), <https://bit.ly/3EdHvmj> [<https://perma.cc/PAF7-4HF5>].

339. See *In re Ellender*, 16 So. 3d 351, 356 (La. 2009); see also *Miss. Comm’n on Jud. Performance v. Willard*, 788 So.2d 736, 743 (Miss. 2001); *Miss. Comm’n on Jud. Performance v. Vess*, 10 So.3d 486, 488 (Miss. 2009); *Miss. Comm’n on Jud. Performance v. Skinner*, 119 So.3d 294, 297 (Miss. 2013); see generally PA. JUD. CONDUCT BD., ANNUAL REPORT 2019 (2020), <https://bit.ly/3e05aMD> [<https://perma.cc/3NK2-BHYL>]; TEX. COMM’N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARIES, FY 2000 TO PRESENT 42 (2016), <https://bit.ly/3RrHEWx> [<https://perma.cc/GS5Z-TD5Z>].

requiring that people be advised of their rights in contempt.³⁴⁰ And judges violate rules requiring that defendants be heard and can present evidence.³⁴¹ Further examples of the laws of contempt being ignored are as numberless as stars in the sky.³⁴²

340. MINN. BD. ON JUD. STANDARDS, ANNUAL REPORT 2008, at 9 (2008), <https://bit.ly/3CvJ12g> [<https://perma.cc/4F6S-25YX>].

341. See *Taylor v. Hayes*, 418 U.S. 488, 490 (1974); see also Miss. Comm'n on Jud. Performance v. Harris, 131 So. 3d 1137, 1141 (Miss. 2013); Nev. Comm'n on Jud. Discipline, No. 2016-113-P, at 3 (Nev. 2018), <http://bit.ly/3rrSwZP> [<https://perma.cc/8CWH-8JXW>]; Oklahoma v. Delapp, No. CJTD-2018, at 3 (Okla. Ct. Jud. 2018), <https://reut.rs/3e5hhbc> [<https://perma.cc/ZND2-WBGP>]; see generally Vermont Jud. Conduct Bd., No. 09.010, at 5 (April 18, 2011), <https://reut.rs/3SP-PESf> [<https://perma.cc/J3WF-CE6Z>].

342. See, e.g., KAN. COMM'N ON JUD. QUALIFICATIONS, 2015 ANNUAL REPORT 23 (2015), <https://bit.ly/3VfO4v2> [<https://perma.cc/3SLN-Y2YF>] (judge was chided for "failing to follow settled law regarding the imposition of sanctions in said contempt," and a separate judge was found to have arrested a person for contempt of court without following appropriate civil contempt procedures); see also *In re Palmeto*, 51 P. 288, 289 (Kan. 1897) (police judges were holding people in contempt without statutory authority to do so); KAN. COMM'N ON JUD. QUALIFICATIONS, 2006 ANNUAL REPORT 21 (2006), <https://bit.ly/3g4oFEF> [<https://perma.cc/L76H-2U6V>] (judge told to not "make threats of contempt unless both the underlying facts and the law support such a sanction"); Miss. Comm'n on Judicial Performance v. Patton, 57 So.3d 626, 628–29 (Miss. 2011); Stipulation and Order of Consent to Public Reprimand at 2, *In re Kimberly Wanker* (Nev. Comm'n on Jud. Discipline 2016) (No. 1501-1147), <http://bit.ly/3SzVveP> [<https://perma.cc/7872-WMZF>]; Stipulation and Order for Public Reprimand at 2, *In re Michelle Leavitt* (Nev. Comm'n on Jud. Discipline 2015) (No. 2012-112), <http://bit.ly/3M5v9yB> [<https://perma.cc/6QDR-QXGR>]; Decision and Order, *In re Douglas E. Smith* (Nev. Comm'n on Jud. Discipline 1999) (No. 9804-255) (1999), <http://bit.ly/3SzL0rG> [<https://perma.cc/FGJ5-DLVH>]; Presentment at 17, *In re Scattergood* (N.J. Adv. Comm. on Jud. Conduct 2015), <https://bit.ly/3Ccx1X0h> [<https://perma.cc/EP46-TPV6>]; Presentment at 9, *In re Sasso* (N.J. Adv. Comm. on Jud. Conduct 2009), <https://bit.ly/3C6kkkK> [<https://perma.cc/U7FU-5ZKQ>] (judge illegally sentenced a defendant to a longer term of incarceration for contempt than allowed); Determination at 2, *In re Popeo* (N.Y. Comm'n on Jud. Conduct 2015), <http://on.ny.gov/3RzROo6> [<https://perma.cc/8MFX-UU5L>] (held defendants in contempt and jailed them without following procedures); Determination at 2, *In re Singer* (N.Y. Comm'n on Jud. Conduct 2009), <https://bit.ly/3SCpumh> [<https://perma.cc/3MUY-NNM9>] (improperly using contempt power in a case); Determination at 2, *In re Griffin* (N.Y. Comm'n on Jud. Conduct 2008), <http://on.ny.gov/3e9sO9t> [<https://perma.cc/BUW8-XXPB>] (held litigants in contempt in violation of statutory requirements); *State v. Goeller*, 263 N.W.2d 135, 139 (N.D. 1978) (it was "over-kill" to sentence a person to ten days for giggling, laughing, and smirking); *Disciplinary Counsel v. Squire*, 876 N.E.2d 933, 948 (Ohio 2007) (judge engaged in "a pattern of judicial over-reaction and abuse of judicial power to hold or threaten to hold lawyers in contempt of court"); *Disciplinary Couns. v. Elum*, 979 N.E.2d 289, 293 (Ohio 2012) (judge threatened contempt but later admitted it was inappropriate to do so); PA. JUD. CONDUCT BD., ANNUAL REPORT 2014, at 13 (2015), <http://bit.ly/3SxFNRC> [<https://perma.cc/5CER-HK8Y>]; Letter from Don R. Ash, Presiding J., to Dennis W. Humphrey, J. (Mar. 28, 2008), <https://reut.rs/3RERVhY> [<https://perma.cc/BP86-QRW7>] (judge found a person in contempt after only serving them by publication, not personal service); *Private Admonition and Order of Additional Education of a District Court Judge*, TEX. COMM'N ON JUD. CONDUCT

G. *Judiciary Disciplinary Systems Do Not Use Incarceration to Deal With Contemptuous Conduct by Judges*

If one doubts the ability of courts to enforce their edicts without jail, they need look no further than how the legal system treats intransigence by judges. All states have some kind of judicial discipline commission that hears complaints against judges and metes out punishment.³⁴³ Before any punishment may be meted, however, a complaint must survive a *Ninja Warrior*-inspired bureaucratic obstacle course. A flow chart illustrating Kansas' system, by way of example, could not fit into a single page and contains 39 possible steps or outcomes.³⁴⁴ To merely *recommend* that a judge be removed from office, Rhode Island's disciplinary body heard from 55 witnesses over five weeks, held 17 meetings to deliberate, and issued a 244-page opinion.³⁴⁵ Summary punishment does not exist in this world.³⁴⁶

These commissions are empowered to remove incompetent judges from office, but this sanction is exceedingly rare.³⁴⁷ More commonplace are verbal sanctions, which are essentially strongly worded letters. Most commonplace of all is simply dismissing a complaint without investigation or punishment.³⁴⁸

(2020), <http://bit.ly/3ryjUW9> [<https://perma.cc/Z2BG-EJ8Y>] (judge held person in contempt without following proper procedures); Public Warning and Order of Additional Education at 2, *In re Fred Buck* (Tex. Comm'n on Jud. Conduct 2018) (No. 17-1006-JP), <http://bit.ly/3C6PFdB> [<https://perma.cc/P96S-TVQ3>]; *Private Admonition of a Justice of the Peace*, TEX. COMM'N ON JUD. CONDUCT (Nov. 1, 2013), <http://bit.ly/3C797ac> [<https://perma.cc/XHA8-FZYV>]; Private Reprimand and Order of Additional Education of a District Court Judge, TEX. COMM'N ON JUD. CONDUCT (Dec. 19, 2013), <http://bit.ly/3M7pxUP> [<https://perma.cc/96MC-NMY8>].

343. See Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245, 1245 n.1 (2004).

344. See KAN. COMM'N ON JUD. QUALIFICATIONS, 2018 ANNUAL REPORT 15–16 (2018), <https://bit.ly/3RvAws2> [<https://perma.cc/Z873-L3YC>].

345. See Report and Recommendation of the Commission on Judicial Tenure and Discipline to the Rhode Island Supreme Court at 2, *In re Ovalles* (R.I. Comm'n on Jud. Tenure & Discipline 2017) (No. 15-001), <https://reut.rs/3O0SpyP> [<https://perma.cc/VCN8-JXEB>].

346. The author examined judicial disciplinary systems in every state and the federal government, and none of them have summary punishment.

347. Am. Judicature Soc'y, *Thirteen Judges Removed*, 22 JUD. CONDUCT REP. 1, 4 (2000), <https://bit.ly/3E6LXmV> [<https://perma.cc/VB8H-4DMV>] (noting only 13 judges were removed from office by the commission in 1999).

348. See, e.g., HAW. COMM'N ON JUD. CONDUCT, 30TH ANNUAL REPORT 2019–2020, at 2 (2020), <https://bit.ly/3Rtvyw4> [<https://perma.cc/V6NP-UML4>] (showing that 99 percent of complaints were not acted upon or dismissed); see also IDAHO JUD. COUNCIL, REPORT TO THE LEGISLATURE, GOVERNOR, AND SUPREME COURT 14 (2019), <https://bit.ly/3EfnrjB> [<https://perma.cc/WQ5Q-RJRY>] (showing

Judicial disciplinary systems recognize that verbal sanctions are still a mark that a judge has besmirched the reputation of their office. Arkansas, for example, defines a censure as a “stern rebuke that finds the conduct of the judge violates a rule of judicial conduct, detrimentally affects the integrity of the judiciary, and undermines public confidence in the administration of justice.”³⁴⁹ This sort of definition—saying that an inept judge *impinges the integrity of the court system* and undermines public confidence—is seen in virtually all jurisdictions.³⁵⁰ Ohio’s supreme court explicitly declared that abuse of contempt power “not only throws doubts on [a judge’s] impartiality, but also weakens the public’s perception of the integrity of the judiciary.”³⁵¹ California’s judicial conduct commission claims in “no other area [than contempt] has the Supreme Court insisted so vehemently on high judicial standards.”³⁵² It makes sense that such strong language is used, since “[j]udicial misconduct, or the inability of a judge to perform judicial functions,

that zero percent of complaints received so much as a preliminary investigation into their veracity).

349. See Letter of Censure from Ark. Jud. Discipline & Disability Comm’n to Doug Martin (Nov. 21, 2014), <https://bit.ly/3dXS3eO> [<https://perma.cc/DA8W-MJ3B>].

350. E.g., Letter from Don R. Ash, Presiding Judge, to Durwood G. Moore, Judge (May 1, 2009), <https://reut.rs/3SwveOd> [<https://perma.cc/58D8-X9SQ>] (telling a judge, “Your conduct in this matter has detrimentally affected the integrity of the Tennessee Judiciary and undermines public confidence in the administration of justice.”); see also Agreed Order of Suspension at 2, *In re Prewitt* (Ky. Jud. Conduct Comm’n 2015), <https://bit.ly/3EuiWC7> [<https://perma.cc/2KTP-34C8>] (declaring judge failed “to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary”); Public Reprimand at 3, *In re Wright* (Md. Comm’n on Jud. Disabilities 2016) (No. CJD 2016-148), <https://bit.ly/3RroeB7> [<https://perma.cc/Q27J-BP4E>] (concluding a judge did not act in a way that promotes “public confidence in the independence, integrity, and impartiality of the judiciary”); *In re Inquiry Concerning a Judge*, 832 S.E.2d 684, 688 (N.C. 2019) (holding the judge “failed to conduct herself in a manner that promotes public confidence in the integrity . . . of the judiciary”); *In re Hopkins*, 566 A.2d 1011, 1015 (Del. 1989) (judge’s actions would bring the judicial office into disrepute) (citing *In re Rowe*, 566 A.2d 1001, 1006 (Del. 1989)); *In re James D. Heiple*, 97 Ill. Cts. Com. 1, 5 (1997), <https://bit.ly/3EP8o0k> [<https://perma.cc/E8GX-C6NN>] (determining that a judge’s conduct “was prejudicial to the administration of justice and brought the judicial office into disrepute”); State Comm’n on Jud. Performance v. Gunter, 797 So. 2d 988, 992 (Miss. 2001) (judge committed “conduct prejudicial to the administration of justice which brings the judicial office into disrepute”); *Disciplinary Couns. v. Parker*, 876 N.E.2d 556, 561 (Ohio 2007) (“Respondent [judge] stained the integrity of that system with his intemperate, unreasonable, and vindictive decision to eject this spectator from the courtroom and jail her for contempt.”).

351. See *Off. of Disciplinary Couns. v. Karto*, 760 N.E.2d 412, 417 (Ohio 2002).

352. See CAL. COMM’N ON JUD. PERFORMANCE, 1989 ANNUAL REPORT 32 (1989), <https://bit.ly/3rssTbk> [<https://perma.cc/3TNQ-3DVR>].

represents a greater threat to the public interest than do personnel problems among public officers in general,” in the words of Idaho’s judicial council.³⁵³ Judges must therefore be held to a “much higher” standard than the rest of society.³⁵⁴

Judge Michael McSpadden wrote “young black defendants . . . are not receiving good advice from their parents as did my generation, to cooperate with law enforcement at all times, and respect the laws.”³⁵⁵ He got a warning. Judge Bill Turner quoted the Bible at a prosecutor to say, “[t]he man who shows contempt for the judge or for the priest who stands ministering there to the LORD your God must be put to death” and compared the prosecutor to “an Auschwitz camp guard.”³⁵⁶ He got a reprimand. Surely, these things are worse than wearing a hat to court, yet the punishments were much lighter.

Plainly, judges have found alternatives to incarceration when it comes to punishing their own. When a California judge imposed contempt with inadequate grounds, they were sent to attend a program on fairness by a judicial education center.³⁵⁷ Judge Charles L. Cunningham managed to rack up 29 violations from the judicial code of conduct and was dealt with by a reprimand.³⁵⁸ A Maryland judge retaliated against an attorney who filed a complaint against him and was let off with no punishment because he was scheduled to retire.³⁵⁹ Judge Robert Richter had an attorney arrested for not

353. IDAHO JUD. COUNCIL, REPORT TO THE LEGISLATURE, GOVERNOR, AND SUPERIOR COURT (YEAR 2019), at 11 (2019), <https://bit.ly/3VaUDiv> [<https://perma.cc/YTW9-4L58>]; see also *In re Ross*, 428 A.2d 858, 861 (Me. 1981) (“[A] lack of judicial accountability may itself be the greatest danger to judicial independence.”).

354. *In re Kuehnel v. Comm. on Jud. Conduct*, 403 N.E.2d 167, 168 (N.Y. 1980); see also *Opinion at 3, In re Chacon* (Tex. Comm’n on Jud. Conduct 2004), <http://bit.ly/3CtdUUJ> [<https://perma.cc/LZ2U-RLVC>] (“The Texas jurist must be held to the highest standards of integrity and ethical conduct, much more so than the standards to which members of the executive and legislative branches are held accountable.”).

355. See Public Warning, *In re McSpadden* (Tex. Comm’n on Jud. Conduct 2019) (No. 18-0682), <http://bit.ly/3Cq1aOJ> [<https://perma.cc/756V-X4EJ>].

356. See *In re Davis*, 82 S.W.3d 140, 145 (Tex. 2002).

357. See CAL. COMM’N ON JUD. PERFORMANCE, 1991 ANNUAL REPORT 9–10 (1991), <https://bit.ly/3CvkgTR> [<https://perma.cc/XT7P-GENR>].

358. See Public Reprimand at 1–2, *In re Cunningham* (Ky. Jud. Conduct Comm’n 2018), <https://bit.ly/3fsN7yO> [<https://perma.cc/YUD6-4V5H>].

359. Notice of Hearing Cancellation, *In re Goetzke* (Md. Comm’n on Jud. Disabilities 2018) (No. CJD 2016-083), <https://bit.ly/3C4dnHx> [<https://perma.cc/49SX-PFR2>]. Judicial disciplinary systems often allow malfeasant judges to escape punishment so long as they resign. *E.g.*, *In re Martinek*, 881 N.W.2d 85, 89–90 (Iowa 2016); *In re Inquiry Concerning Holien*, 612 N.W.2d 789, 798 (Iowa 2000); *Miss. Comm’n on Jud. Performance v. Martin*, 995 So.2d 727, 731 (Miss. 2008).

showing up to a hearing they were not told about; Richter had to receive two hours of instruction by a mentor.³⁶⁰ Sometimes, allegations of abuse of contempt power are shrugged off as outside the scope of judicial misconduct review.³⁶¹

Judges get away with saying all sorts of horrible things without being jailed. Judge Alfred Nance bragged about how he found the defense attorney in contempt and sent her to jail for a weekend “so that she can live amongst those she supposedly represents.”³⁶² A Kansas judge told an attorney “[n]ow you’re starting to sound like a woman” during a settlement conference.³⁶³ In a death penalty case, Judge Martin McDonald told a defense attorney “[i]f you ever call me on my cell phone again, I’ll strangle you.”³⁶⁴ When a man in D.C. collapsed in a courtroom and later died, the judge turned to his attorney and joked “[y]ou’re unlucky. I’ve got to be careful about who I appoint to your cases in the future.”³⁶⁵

Judges may even flout superior courts’ orders with near impunity. Chancellor Jeffrey Atherton thought none too highly of the Supreme Court’s decision in *Obergefell v. Hodges*. Voicing his displeasure, he said the ruling was an example of “kryptocracy” and “judidiocracy,” and the Court enforced it “with its iron fist and limp wrist.”³⁶⁶ He was reprimanded.³⁶⁷ Judge Michael Hinson failed to follow COVID-19 guidelines set by the State Chief Justice and had his courtroom so packed that all the seats were filled and people

360. See Public Admonition and Order of Additional Education at 1, 3, *In re Richter* (Tex. Comm’n on Jud. Conduct 2020) (No. 18-1426), <http://bit.ly/3EccfEy> [<https://perma.cc/ND52-44HH>].

361. See *In re Disciplinary Proceedings of Coleman*, 454 P.3d 1280, 1284 (Okla. 2019) (stating that the judge’s threatened use of contempt was not misconduct because the judge “was acting to preserve order and decorum, even if she did so incorrectly”).

362. See Findings of Fact, Conclusions of Law, Order and Recommendations at 8, *In re Nance* (Md. Comm’n on Jud. Disabilities 2016) (No. CJD 2015-121), <https://bit.ly/3e2hsEa> [<https://perma.cc/LR38-UYW8>].

363. See KAN. COMM’N ON JUD. QUALIFICATIONS, 1993 ANNUAL REPORT 23 (1993), <https://bit.ly/3E8Kxsf> [<https://perma.cc/PSS2-H4RW>].

364. See Findings of Fact, Conclusions of Law, and Final Order at 4, *In re McDonald* (Ky. Jud. Conduct Comm’n 2013), <https://bit.ly/3LXLHIY> [<https://perma.cc/2VDU-PFDU>].

365. See Determination and Undertaking at 2, *In re Tim Murphy* (D.C. Comm’n on Jud. Disabilities & Tenure 2001), <https://bit.ly/3SUctUV> [<https://perma.cc/674V-AYNR>].

366. See Letter from Chris Craft, Chair, Tennessee Bd. of Jud. Conduct, to Jeffrey Atherton, Chancellor 2 (Dec. 18, 2015), <https://reut.rs/3fBTWOM> [<https://perma.cc/RE9E-344J>].

367. *Id.* at 3.

had to stand.³⁶⁸ He also said that if the Chief Justice won an award for his COVID precautions, the pandemic would suddenly end.³⁶⁹ Judge Jere Ledsinger, similarly, ran a crowded courtroom and said “the Grand Wizard of our Supreme Court said we have to wear these masks,” in reference to COVID guidelines.³⁷⁰ In other words, both men defied an order of a higher court and implied the chief justice was corrupt or evil. These are the very things contempt is supposed to be used to punish, yet all they got were reprimands.³⁷¹

Roy Moore, erstwhile Chief Justice of Alabama, was removed from office twice for openly defying federal court orders—once for failing to remove the Ten Commandments from his courtroom, and once for refusing to issue marriage licenses to gay couples.³⁷² Moore not only failed to comply with federal law, he also directed lower court judges to not comply with the law.³⁷³ Although he lost his job, he never lost his liberty.

Occasionally, misconduct by judges is truly macabre, but jail is never seen as the answer. Kentucky Judge Timothy Langford routinely sentenced defendants to 300 hours of community service, and then encouraged them to perform the hours at his church (where he held a leadership position), personally observing the work and signing paperwork verifying their service.³⁷⁴ Judge Mitchell Nance issued an order declaring “under no circumstance” would adoption by a gay couple be in a child’s best interest.³⁷⁵ Judge A. Andrew Jackson consistently determined that children of undocumented immigrants—or of people he perceived to be undocumented immigrants based on their race—were neglected on that basis.³⁷⁶ When

368. See Letter from Dee David Gay, Chair, Bd. of Jud. Conduct, to Michael E. Hinson, J. (Dec. 15, 2020), <http://bit.ly/3V7jyU2> [<https://perma.cc/DUS8-YZUY>].

369. *Id.*

370. See Letter from Dee David Gay, Chair, Bd. of Jud. Conduct, to Jere Ledsinger, J. (Sept. 28, 2020), <http://bit.ly/3E6Ha53> [<https://perma.cc/GX5R-9B6K>].

371. See Letter from Dee David Gay, *supra* note 368.

372. See Mark Berman, *Alabama Supreme Court Chief Justice Roy Moore Suspended for Defiance over Same-Sex Marriage*, WASH. POST (Sept. 30, 2016), <https://wapo.st/3y52WCr> [<https://perma.cc/PC4Z-3YEY>].

373. *Id.*

374. See Notice of Formal Proceedings and Charges at 1–3, *In re Langford*, at 1–3 (Ky. Jud. Conduct Comm’n 2017), <https://bit.ly/3ybscqX> [<https://perma.cc/XZF5-75B7>].

375. See Findings of Fact, Conclusions of Law, and Final Order at 3, *In re Hon. W. Mitchell Nance* (Ky. Jud. Conduct Comm’n 2017), <https://bit.ly/3SShH3c> [<https://perma.cc/AW6J-J63U>].

376. See Letter from Dee David Gay, Chair, Bd. of Jud. Conduct, to A. Andrew Jackson, Judge 1 (May 16, 2008), <https://reut.rs/3rnbsbZ> [<https://perma.cc/MYL2-WQEL>].

told this was inappropriate, he determined a child to be unruly and had them jailed as a result of their status or their parent's immigration status (real or perceived).³⁷⁷ Judge Alfred Villa attempted to have an exorcism performed on an anti-social teenage boy.³⁷⁸

Mr. Jawaan McCullough and Ms. Jaleesa Martin had a child together, though they were not married.³⁷⁹ Jaleesa already had two sons: Micah and Maison.³⁸⁰ She named her third son "Messiah," since she liked the way the three names sounded together.³⁸¹ Judge Lu Ann Ballew was not pleased. When Jaleesa and Jawaan went before the judge to settle a dispute over the child's *last* name, Judge Ballew took it upon herself to change the child's *first* name. She changed a child's name from "Messiah Deshawn McCullough" to "Martin Deshawn McCullough," because, in her own words "Messiah means Savior, Deliverer, the One who will restore God's kingdom, and that Messiah is a title that is held only by Jesus Christ."³⁸² She also said the name "Messiah" would offend many residents of the county.³⁸³

The mind labors to conceive something worse than state-sanctioned eugenics. International law defines it as genocide.³⁸⁴ But that did not stop Judge Sam Bennington of Tennessee. Bennington wanted to break the "vicious cycle" of drug offenders having children.³⁸⁵ To this end, he offered 30 days jail credit to any female inmate who received a Nexplanon implant and any male inmate who got a vasectomy.³⁸⁶ Dozens of inmates signed up for the procedures—which can be irreversible—and at least one did not even get the promised jail credit.³⁸⁷

377. *Id.*

378. See Jud. Inquiry & Rev. Bd. of Sup. Ct. v. Fink, 532 A.2d 358, 368 (Pa. 1987) (citing *In re Villa*, No. 9 of 1981 (C.P. Potter Cnty. 1981)).

379. See Amy Burgess, *Parents Can Name their Baby "Messiah" After All*, *Tenn. Judge Rules*, CBS NEWS (Sept. 18, 2013), <https://cbsn.ws/3UHfs3Y> [<https://perma.cc/4J6W-LUSD>].

380. *Id.*

381. *Id.*

382. See Formal Opinion at 2, *In re Ballew* (Tenn. Bd. of Jud. Conduct 2014) (No. B13-5426), <https://reut.rs/3RzgzjZ> [<https://perma.cc/CR7W-R5W2>].

383. Burgess, *supra* note 379.

384. G.A. Res. 260 (III) A, Convention on the Prevention and Punishment of the Crime of Genocide, at art. II(d) (Dec. 9, 1948).

385. Derek Hawkins, *Tenn. Judge Reprimanded for Offering Reduced Jail Time in Exchange for Sterilization*, WASH. POST (Nov. 21, 2017, 4:45 AM), <https://wapo.st/3RtActG> [<https://perma.cc/T2X3-HEX9>].

386. Letter from Chris Craft, Chair of Tenn. Bd. Jud. Conduct, to Sam Benningfield, Cir. Ct. Judge 4 (Nov. 15, 2017), <https://reut.rs/3Rr4s8Q> [<https://perma.cc/MSH7-J3BR>].

387. Hawkins, *supra* note 385.

Bennington was reprimanded.³⁸⁸

All this leads to a natural question. If the purpose of contempt is to maintain the integrity of the judiciary, and misbehaving judges impugn the integrity of the judiciary, why not hold misbehaving judges in contempt? Yet this almost never happens. The simplest explanation is that it's good to be king—or in this case, judge.

In the stupendously rare occasion where a judge is held in contempt, their punishment is, at worst, a fine, not detention.³⁸⁹ In the examination of hundreds of cases from every state, the author could only locate one time where a judge was jailed for contempt, and that was for defying a county zoning ordinance through “unauthorized storage of junk” on his property.³⁹⁰ Abuse of power is not, evidently, aailable offense.

III. REFORMS

As courts tell it, the courtroom will devolve into primordial chaos if they do not have nigh unchecked contempt power. But there is a medium between anarchy and the current overuse of contempt. Additional clarifying opinions on contempt power would be helpful but insufficient. There are already innumerable examples of appellate courts trying to emphasize judges cannot punish people for mere insults, but they have amounted to little.³⁹¹ Recognizing the danger of contempt, courts emphasize that contempt should be used “sparingly, wisely, temperately and with judicial self-restraint.”³⁹² It is not a “comprehensive device for redressing private

388. See Letter from Chris Craft, *supra* note 386, at 3.

389. Opinion and Order at 10, 20, *In re Nocella* (Pa. Ct. Jud. Discipline 2013) (No. 7 JD 12), <https://reut.rs/3Cqt2Cs> [<https://perma.cc/W9T5-CDWZ>] (holding judge in contempt—but not jailed—for submitting false statements about his finances on a judicial questionnaire); Public Reprimand at 1, *In re Lucas* (S.C. 2009) (No. 26693), <https://reut.rs/3dZGGmv> [<https://perma.cc/2HSS-2QVD>] (holding judge in contempt for committing crimes, with no punishment beyond a public reprimand); *In re Kading*, 246 N.W.2d 903, 907 (Wis. 1976).

390. *In re Disciplinary Proc. Against Staeger*, 476 N.W.2d 876, 877 (Wis. 1991).

391. *E.g.*, *Craig v. Harney*, 331 U.S. 367, 376 (1947) (“The law of contempt is not made for the protection of judges who may be sensitive to the whims of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hearty climate.”); *Williams v. Williams*, 681 A.2d 181, 183 (Pa. Super. Ct. 1996) (“[A] mere affront to the trial judge is not sufficient to sustain a conviction for criminal contempt.”); *In re Turner*, 174 N.W.2d 895, 901 (Mich. Ct. App. 1969)

[W]e conclude that inaccurate comment, false comment, even vicious comment regarding the court which does not affect pending litigation must not be dealt with by the contempt power as a means of assuring the just exercise of the judicial process.

Id.

392. *In re Est. of Dothage*, 727 S.W.2d 925, 927 (Mo. Ct. App. 1987).

injuries.”³⁹³ In using contempt, judges should use the “least possible power adequate to the end proposed.”³⁹⁴ And the “rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge.”³⁹⁵ Bench books also counsel restraint when it comes to contempt, but these too are often unheeded.³⁹⁶

Reforms need to go bigger. Judges should be able to do their job without being able to lock people up on command—something everyone else in society and every other institution of government is already expected to do. Taking away the power to incarcerate people without due process would not transform courts into the Wild West; judges and courts have all of the tools they need to enforce order without instantaneous incarceration being on the menu.

A. *Removing Disruptive Individuals From the Courtroom*

Most disruptive behavior could be dealt with through removing a person from the courtroom. This power is explicitly given to judges already.³⁹⁷ For people in the gallery, this is a no-brainer: putting a rambunctious spectator outside the courthouse restores order just as well as putting them inside a jail cell. For litigants, something is lost if they are removed, but if they are represented, the attorney can still argue on their behalf. If the litigant is unrepresented, they could be given appointed counsel (in a criminal matter) or have their case dismissed, defaulted, or continued (in a civil matter) as the circumstances warranted. Modest fines could also be considered. All of these things would punish the disruptor and maintain decorum without the need for jail.

B. *Referring a Disruptive Person for Disciplinary Sanctions or Criminal Prosecution*

What if the attorney is the one being rude? If a lawyer misbehaves in the courtroom, a judge cannot order that they be hauled out without impeding the business of the court and leaving the attorney’s client out in the cold. But in this case, the judge could simply refer the attorney’s conduct to the state bar. The lawyer would

393. *McBride v. Coleman*, 955 F.2d 571, 577 (8th Cir. 1992).

394. *United States v. Wilson*, 421 U.S. 309, 319 (1975) (quoting *Anderson v. Dunn*, 19 U.S. 204, 248 (1821)).

395. *Cooke v. United States*, 267 U.S. 517, 539 (1925).

396. *E.g.*, JUD. COUNS. CAL., CALIFORNIA JUDGES BENCHGUIDE 3, COURTROOM CONTROL: CONTEMPT AND SANCTIONS § 3.7 (Jud. Council Cal. 2017) (“Many judges believe that they should exercise contempt power as a last resort. Experienced judges rarely, if ever, use contempt to control their courtrooms.”)

397. *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

be subject to potentially biting sanctions (though not incarceration), and the matter will be adjudicated by an impartial body. This has already been used before.³⁹⁸ It is also worth noting that judges already incarcerate attorneys on the spot for perceived rudeness, which is even more harmful to their clients and slows down proceedings.³⁹⁹

But what if the misbehaving individual is truly nasty? Suppose they threaten the judge, engage in physical violence, or do something else beyond the pale? In that case, the person can be arrested by security, and the matter can be turned over to the prosecutor's office, with their guilt or innocence to be adjudicated at a later date. This ensures (1) the victim is not the one prosecuting the crime and (2) the full suite of due process rights will be available to the defendant.

Attorney Tamara Honore made a threatening statement about a judge outside of the courtroom. She was later convicted of disorderly conduct.⁴⁰⁰ An individual in Texas was arrested for contempt of court after arguing with a justice of the peace, but the charge was later converted to disorderly conduct.⁴⁰¹ Criminal prosecution, not summary contempt, is how we deal with things like obstructing a public official, making false official statements, or obstructing justice. There is no reason direct contempt cannot be handled the same way.

C. *Alternative, Superior Systems Already Exist*

Even for conduct that cannot simply be taken outside and does not violate any other law, summary contempt makes little sense. In Maine, a prosecutor made a plea offer moments before trial began. The defense attorney asked for a brief moment to discuss the plea with her client. Judge Joan Gordon said no, telling the defendant to plead guilty or go to trial at once. The attorney repeatedly objected and asked for a moment, until the judge finally held her in con-

398. *E.g.*, *In re Westfall*, 808 S.W.2d 829, 833 (Mo. 1991) (disciplinary proceeding used for prosecutor who accused judge of dishonesty); *In re Landrith*, 124 P.3d 467, 476 (Kan. 2005) (similar); *In re Estiverne*, 99-0949 (La. 09/24/99); 741 So. 2d 649, 649 (disciplinary process used for attorney who insulted workers' compensation hearing officer).

399. Determination and Undertaking, *In re Bayly* (D.C. Comm'n on Jud. Disabilities & Tenure 2008), <https://reut.rs/3RJjiHU> [<https://perma.cc/WQ23-UW27>].

400. Chris Bonjean, *Illinois Supreme Court Disbars 10 Lawyers, Suspends 32*, ILL. ST. BAR ASS'N. (Sept. 24, 2009), <https://bit.ly/3UTzid5> [<https://perma.cc/D37P-P7TF>].

401. TEX. COMM'N ON JUD. CONDUCT, PRIVATE SANCTION SUMMARY FY 2000 TO PRESENT 34 (2016), <https://bit.ly/3SNaWzJ> [<https://perma.cc/UPG9-F3Z8>].

tempt and ordered her arrested. Later at the contempt hearing, the judge found her guilty without giving her a chance to present evidence or address the court.⁴⁰²

Imagine a better system. If the judge truly believed that asking for a moment to confer with a client about a new plea offer was contemptuous and worthy of arrest, the judge should be able to refer the matter to a detached and impartial judge, or perhaps a jury, for adjudication at a later date. The aggrieved judge could testify as a “victim” at the hearing, if upon reflection, they still thought punishment was in order and worth their time. The impartial judge would then decide what, if any, punishment is appropriate.

This is precisely what we do for every other crime under the sun. If a police officer cites someone for speeding, that is only the first step in a process where the prosecutor can choose not to file charges, the defense attorney can poke holes in the case, and an impartial, detached judge or jury can weigh the evidence. If it works well enough for everyone else, it can be made to work for judges.

Indeed, many court systems already do things like this in certain contexts. In Leland Grove, Illinois, when a judge or judge’s family member gets a traffic ticket, a special setting and special prosecutor are required.⁴⁰³ If the defendant contests the ticket, the special prosecutor would try the case, and an out-of-circuit judge would preside.⁴⁰⁴ In New Hampshire, a judge cannot rule on contempt if they “become personally embroiled in criticism from a party,” meaning it has to be referred to another judge.⁴⁰⁵ That same rule could be extended to require judges to refer all direct contempt cases to another judge before incarceration is authorized. Courts can appoint special prosecutors to handle cases of contempt.⁴⁰⁶ Under Oklahoma law, when someone contemptuously disobeys an order by the Council on Judicial Complaints, the council can certify the issue to the chief justice of the state supreme court, who shall assign the matter to a trial judge, and the general counsel for the state bar association serves as prosecutor.⁴⁰⁷

Perhaps most elegant of all, direct contempt defendants could be granted the same level of due process as indirect contempt de-

402. Charges at 4–6, 9, *In re Judge Joan B. Gordon* (Md. Comm’n on Jud. Disabilities 2020) (No. CJD 2019-147), <https://bit.ly/3SPD9WJ> [<https://perma.cc/9ZAY-MLJJ>].

403. Order at 2, *In re Perrin* (Ill. Cts. Comm’n 2011) (No. 10-CC-2), <https://bit.ly/3Csp2kE> [<https://perma.cc/GEY9-YLAH>].

404. *Id.* at 2.

405. *State v. Fennelly*, 461 A.2d 1090, 1092 (N.H. 1983).

406. *United States v. Cutler*, 6 F.3d 67, 69 (2d Cir. 1993).

407. OKLA. STAT. tit. 20, § 1658(E) (1999).

endants. Kim Davis was a Kentucky county clerk who was jailed for indirect contempt after stridently refusing to issue marriage licenses to gay couples. Consider her story.

The U.S. Supreme Court plainly ruled that gay marriage was legal, and the Governor of Kentucky issued explicit orders to county clerks to enforce the ruling—Davis was well aware of both.⁴⁰⁸ On June 26, 2015, hours after the Supreme Court decision, Davis announced she would not obey.⁴⁰⁹ Gay couples sued to force compliance, and a preliminary hearing was held in July.⁴¹⁰ In August, the district court issued a lengthy, scrupulous opinion considering all of Davis’s arguments, ultimately directing her to issue the marriage licenses.⁴¹¹ She still refused and was taken into custody in September.⁴¹² The court rapidly worked out a deal to get her deputy clerks to agree to issue the marriage licenses, and Davis was released the moment the issue was resolved: six days after being incarcerated.⁴¹³ In sum, she got (1) clear guidance on what she needed to do to comply, (2) months’ worth of opportunity to correct her deficiency, (3) full hearings with a written opinion, (4) the least possible punishment to accomplish the court’s goal, and (5) the people who were directly hurt by her defiance were not the ones sitting in judgment of her.

She is not alone. Contempt power hits regular people like a ton of bricks, but elites get silken treatment. When individuals so much as balk at a judge’s order, they can be summarily corralled into jail. But when government actors do not like a court order, it is “just the beginning of a long and delicate negotiation between the judge and the agency” that can drag on for years.⁴¹⁴ Courts may insist on compliance with their orders but “give agencies a degree of flexibility

408. *Miller v. Davis*, 123 F. Supp. 3d 924, 932 (E.D. Ky. 2015).

409. *Id.* at 929.

410. *Id.* at 930.

411. *Id.* at 944.

412. Emma Margolin, *Kentucky Clerk Kim Davis Jailed for Contempt of Court*, MSNBC (Sept. 2, 2015, 9:31 PM), <https://on.msnbc.com/3e2Rv7t> [<https://perma.cc/9J3D-FWZJ>].

413. Emily Shapiro, *Kentucky Clerk Kim Davis Released From Jail*, ABC NEWS (Sept. 8, 2015, 4:52 PM), <https://abcn.ws/3e0Wky8> [<https://perma.cc/9X3Q-ZWHC>].

414. Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 767 (2018). Sometimes, courts openly admit they are more reluctant to hold the government in contempt. *In re Att’y Gen.*, 596 F.2d 58, 64 (2d Cir. 1979); *Ornelas v. Heckler*, 598 F. Supp. 1089, 1090 (D. Colo. 1984); *In re United States*, 985 F.2d 510, 513 (11th Cir. 1993); *In re FDIC*, 58 F.3d 1055, 1060 n.7 (5th Cir. 1995); *In re SEC*, 374 F.3d 184, 188 (2d Cir. 2004).

and do not demand that they act tomorrow or the day after.”⁴¹⁵ Prison terms for contempt are liberally dispensed to poor, unrepresented defendants⁴¹⁶ but parceled out with a miserly hand to bureaucrats.⁴¹⁷ Even when lower courts are simply imposing fines, higher courts will swoop in to block sanctions against government actors.⁴¹⁸ Large corporations, unlike small businesses or unions, rarely face the threat or reality of jail for contempt either.⁴¹⁹

Why doesn't everyone get that?

CONCLUSION

At 7:45 a.m., on September 4th, 2018, Cassandra Jackson entered the Hamilton County Common Pleas Court in Cincinnati, Ohio, trying to get a protective order.⁴²⁰ But the justice system was not terribly interested in helping her that day. By the time she finished filling out the necessary paperwork, she had missed the deadline of 8:10 a.m.⁴²¹ She would need to come back the next day.⁴²² Undeterred, Jackson headed towards the courtroom.⁴²³ For a few minutes, she stood outside of the courtroom talking with an employee, growing increasingly frustrated.⁴²⁴ Eventually, a second employee came out and raised his hand to end the conversation.⁴²⁵ Overcome with emotion, Jackson screamed for about a second and left.⁴²⁶ Unfortunately for her, Magistrate Michael Bachman heard the scream, rushed out of his courtroom, and upon seeing Jackson leaving, started pointing at her, called after her, jogged to catch up

415. Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions*, 103 GEO. L.J. 158, 181 (2014).

416. Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 CORNELL J. L. & PUB. POL’Y 95, 117, 138–39 (2008) (noting that most people being held in contempt for child support nonpayment are indigent and that about half of jurisdictions do not give a right to an attorney in child support contempt hearings).

417. Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 746 (2018) (“[T]he judiciary is adamantly averse to imprisoning federal officials for contempt.”).

418. *Id.* at 697–98.

419. *Id.* at 740; see also *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) (corporate officers repeatedly disobeying court orders without being incarcerated).

420. *Disciplinary Couns. v. Bachman*, 168 N.E.3d 1178, 1180 (Ohio 2020).

421. *Id.* at 1180.

422. *Id.*

423. *Id.*

424. Kevin Grasha, *Ohio Supreme Court: Ex-magistrate’s Conduct ‘Appalling,’ Harmed Integrity of the Judiciary*, CINCINNATI ENQUIRER (Dec. 18, 2020, 1:20 PM), <https://bit.ly/3CB9ziF> [<https://perma.cc/CF8R-AKYY>].

425. *Disciplinary Couns. v. Bachman*, 168 N.E.3d 1178, 1180 (Ohio 2020).

426. Grasha, *supra* note 424.

with her, and seized her by the elevators.⁴²⁷ He clasped her by the shoulder and marched her back into his courtroom and put her in the jury box.⁴²⁸ Bachman sentenced her to three days in jail, and when she resisted being handcuffed and pleaded with Bachman to explain why she was being jailed, he raised it to ten days.⁴²⁹ Although she did not strike at anyone, roughly a dozen police officers escorted her out.⁴³⁰ Jackson was crying and asked “[w]hy every time I come here to get help, you always send me to jail? You didn’t even hear what it was that I had to say and now I got to go to jail.”⁴³¹

Most judges are honest public servants. Maintaining good order in a courtroom full of surly people is hard work. But judges should not be able to impose jail sentences in the heat of passion and without second thought for offenses that amount to no more than rudeness. Many professionals must deal with unruly audiences. Teachers must educate students who are more interested in their phones. Service workers are forced to suffer insults from customers with a smile on their face. Cabbies, social workers, and waiters had best be prepared for uncooperative clientele. Yet somehow these professionals do their job without being able to sentence anyone to jail on a whim.

The fact that many of the examples of judges abusing contempt power were reversed on appeal or resulted in discipline for the judge is of no moment. First, it can be a slow road to justice. It took two years for the Mississippi Supreme Court to reverse a contempt finding and incarceration of a journalist who published an accurate article about an open session of court.⁴³² Another year passed before the judge was punished for it, and she only got a reprimand and a fine.⁴³³ Second, the people who were jailed are not getting their time back for being wrongfully incarcerated. Third, the fact

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Disciplinary Couns. v. Bachman*, 168 N.E.3d 1178, 1180–81 (Ohio 2020). The judge ultimately quit under threat of termination (he was not in a life-tenured position), but two longtime judges interviewed about the incident stated that he acted within his authority. Craig Cheatham, *Judge Magistrate Michael Bachman Resigns After Incident in Courthouse*, WCPO 9 CINCINNATI (Sept. 12, 2018, 3:31 PM), <https://bit.ly/2CSH0Vv> [<https://perma.cc/U2X6-BCNF>].

432. *Jailed Reporter’s Contempt Conviction Overturned*, REP. COMM. FOR FREEDOM PRESS (Jan. 11, 1999), <https://bit.ly/3Rt3atP> [<https://perma.cc/3AKN-ERTR>].

433. *Miss. Comm’n on Jud. Performance v. Byers*, 757 So. 2d 961, 973 (Miss. 2000).

that the offending judge receives a reprimand shows that jail for the unruly citizen was never essential to begin with—they could have been given the same verbal reprimand as the judge. Fourth, it is anyone's guess how many more cases of contempt abuse go unreported and uncorrected. And fifth, the way summary contempt gets used ensures that judges will continue to violate the rules no matter how many corrective opinions come out.

In summary contempt, judges act in response to a real or perceived slight against the dignity of the court (i.e. themselves). Contempt might be used against a represented party, but it can just as easily be directed at an unrepresented party or spectator without a lawyer to defend them. Immediate punishment means no opportunity to consult rules or precedent or marinate on the best course of action. Rarely do good decisions come from times of anger. The judge is still fuming from the insult when they pass judgment, and no clear rules exist on the use of contempt or the calculation of a proper sentence. No system could be better designed to lead to worse outcomes.

When explaining the need for unencumbered contempt power, courts often say it is “necessary” to make the system work.⁴³⁴ But looking at how contempt is used throughout America, why would anyone want the system to keep working like this?

434. *See, e.g.*, *Cooke v. United States*, 267 U.S. 517, 534 (1925); *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 333 (1904); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–44 (1991); *see also* *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 798 (1987); *State v. Martina*, 600 A.2d 132, 135 (N.H. 1991).