IN CONTEMPT OF CONTEMPT? RELIGIOUS MOTIVATION AS A REASON TO MITIGATE CONTEMPT SANCTIONS

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I
INTRODUCTION

Judges generally enjoy broad power both to find individuals in contempt of court for violating valid court orders and to punish them accordingly with fines or imprisonment. Recently, however, some courts have suggested that religiously motivated violators are exempt from the sanctions that would ordinarily apply.

Hunt v. Hunt[1] arose in the state courts of Vermont, and concerned the collection of monthly court-ordered child support payments from a divorced father. The father belonged to a religious commune that forbade him from earning money outside of his religion. He provided his children with shoes he made in his religious sect's cobbler shop, but the lower court found that he violated the court order by not making the required child support payments. The Supreme Court of Vermont, however, vacated the lower court's finding of contempt, noting that the state's mode of enforcing this valid order by way of a contempt finding "compelled [the] defendant to choose between jail time and violation of [a] religious belief: that he not earn an independent income outside the church community."[2] Applying the compelling state interest test then required by the Religious Freedom Restoration Act ("RFRA"),[3] the court found that while contempt and incarceration

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1. 648 A.2d 843 (Vt. 1994).

2. *Id.* at 853.

3. Section III.C. of this Note will explore the Religious Freedom Restoration Act ("RFRA") and similar state statutory schemes. For the present context, it is sufficient to note that although *City of Boerne v. Flores*, 521 U.S. 507 (1997), de-

are means to further the compelling interest in parental support of children, the state failed to satisfy its burden of proving "that they are the means least restrictive of [the] defendant's religious freedom."[4]

Similarly, in *United States v. Lynch*,[5] abortion protesters previously convicted of violating the Freedom of Access to Clinic Entrances Act stipulated that they had knowingly violated a permanent injunction by blocking access to a clinic's driveway. Despite this violation of a court order, the trial judge found them not guilty of criminal contempt. Specifically, he found that their conduct did not satisfy the willfulness element of criminal contempt:

> [A]s a matter of fact . . . [the defendants'] sincere, genuine, objectively based and, indeed, conscience-driven religious belief precludes a finding of willfulness. Willful conduct, when used in the criminal context, generally means deliberate conduct done with a bad purpose either to disobey or to disregard the law.[6] That kind of conduct is not present here.[7]

These cases raise the question of whether courts should treat religious motives differently than other motives when assessing

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clared RFRA unconstitutional as applied to the states, the *Hunt* court suggested that the state constitution "essentially duplicates the strict scrutiny standard" mandated by RFRA. 648 A.2d at 852. The court, therefore, would have applied strict scrutiny to the court order even in the absence of RFRA and the analysis arguably would have been indistinguishable.

4. *Hunt*, 648 A.2d at 854. Note, however, that the court did not find that contempt and jail were per se impermissible burdens on free exercise; it merely found that the state failed to demonstrate that in this case they were the least restrictive means available. *See id.*; *infra* note 168 and accompanying text.

5. 952 F. Supp. 167 (S.D.N.Y. 1997) [hereinafter "*Lynch I*"].

6. It is important to note that the Second Circuit on appeal stated that this definition of willfulness was in error and restated the more conventional definition of willfulness as "a specific intent to consciously disregard an order of the court." United States v. Lynch, 162 F.3d 732, 735 (2d Cir. 1998) [hereinafter *"Lynch II*"]. *See* discussion *infra* Section III.B.2. However, the Second Circuit found that the trial court's definition was factual error, and thus double jeopardy prevented a retrial of the acquitted defendants. *See id.* The Second Circuit recently denied a petition for rehearing en banc. *See* United States v. Lynch, No. 97-1092, 1999 WL 493948, at *1 (2d Cir. July 14, 1999) [hereinafter "*Lynch III*"]. Although subsequent cases brought in the Second Circuit likely are bound by *Lynch II* and could not employ *Lynch I*'s definition of willfulness, other Circuits have not ruled on this precise issue. Thus although *Lynch I* likely is not good law in the Second Circuit, I use its facts to illustrate how some judges view their discretionary contempt power. This Note considers the question that it raises, namely, whether judges may ever treat religious motives differently from other motives for contempt, but does not suggest that it is binding precedent.

7. *Lynch*, 952 F. Supp. at 170 (internal citation omitted).

sanctions for noncompliance with court orders. In neither case did the court exempt the defendants from the applicable underlying laws (concerning child support and trespass, respectively) because of their religious motives. To the contrary, both courts upheld the validity of the court orders compelling the defendants to obey these laws. Yet both courts declined to find the defendants in contempt for violating these valid court orders;[8] the courts expressly predicated that conclusion on the defendants' religious motivations.

This Note addresses whether individuals' religious motivations should excuse them from being held in contempt of court. Section II summarizes the jurisprudence of contempt sanctions and civil disobedience, observing that courts generally have not mitigated punishments for noncompliance with court orders by civil disobedients. Section III evaluates three theories that may justify mitigating punishments for noncompliance with court orders where the motivation for noncompliance is religious: (i) the necessity defense, (ii) Free Exercise Clause protection, and (iii) statutory rights under the Religious Freedom Restoration Act. Section IV concludes that none of these three theories justifies treating religious contemnors differently than individuals with secular motives.

II
BACKGROUND

A. Contempt

Individuals who obstruct the administration of justice through misbehavior in the court's presence or who ignore valid court orders or rules may be found in contempt of court and subjected to additional punishments ranging from fines to imprisonment.[9] Contempt is considered an inherent power of the judiciary with

8. Although *Lynch II* upheld *Lynch I* only on a procedural issue, namely double jeopardy, *see supra* note 6, appellate courts often grant much discretion to trial courts' contempt decisions, *see infra* Section II.A.2. Thus, the point to be taken from *Lynch I* is that this particular trial judge declined to find the defendants in contempt even though they knowingly violated a binding court order. That the Second Circuit disagreed is a formal matter which does not detract from the trial judge's exercise of discretion.

9. *See, e.g.*, 18 U.S.C. § 401 (1994) (declaring that "[a] court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command").

roots dating back to fourteenth century common law.[10] The most common justification for the breadth of judges' contempt power is that it is necessary to ensure compliance with the courts' lawful mandates,[11] and to preserve order in judicial proceedings and the general administration of justice.[12]

Courts and commentators nevertheless admit that the contempt power is uniquely susceptible to abuse.[13] To begin with, the contempt power raises separation of powers concerns because it empowers a single judge as legislator, prosecutor, and adjudicator of the issue. Furthermore, while all punishments are retrospective in that they punish past bad acts, contempt is retrospective in a different respect because it may punish behavior that was not prospectively defined by the legislature as illegal. Because it may be administered in an arbitrary and ad hoc fashion, the contempt power may be somewhat inconsistent with our rule of law system.

1. Balancing the Need for the Contempt Power with Its Susceptibility to Abuse

Despite the apparent tension between the contempt power and our rule of law, the contempt power has a long history and important function, and is unlikely to be abolished.[14] Thus, as they have done for a long time, courts will continue attempting to balance the competing concerns of contempt as a necessary power of the courts and the danger of abuse of that power. The courts' current balanc-

10. *See* Philip A. Hostak, Note, International Union, United Mine Workers v. Bagwell: *A Paradigm Shift in the Distinction between Civil and Criminal Contempt*, 81 CORNELL L. REV. 181, 186, 189 (1995).

11. *See* International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 831 (1994).

12. *See Ex parte* Robinson, 86 U.S. 505, 510 (1873). In an oft-quoted passage from Justice Frankfurter's concurrence in *United States v. United Mine Workers*, "[n]o man, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for." 330 U.S. 258, 308-09 (1947) (Frankfurter, J., concurring). Further, "[i]f one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process . . . . [T]his Court . . . is the trustee of law and charged with the duty of securing obedience to it." *Id.* at 311-12.

13. *See, e.g.*, *Bagwell*, 512 U.S. at 831 ("Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct. Contumacy 'often strikes at the most vulnerable and human qualities of a judge's temperament.'"); Hostak, *supra* note 10, at 194 (noting the irony that a country ostensibly having the highest dedication to the rule of law would also find the contempt power "necessary and inherent").

14. *See* Hostak, *supra* note 10, at 197.

ing test, as summarized by Justice Blackmun, is to allow "a relatively unencumbered contempt power when its exercise is most essential, and [to require] progressively greater procedural protections when other considerations come into play."[15]

Courts have developed two main distinctions to aid their balancing of the need for the contempt power against the power's susceptibility to abuse. To begin with, courts distinguish between direct and indirect contempt: that is, contemptuous behavior in the court's presence and that which occurs out of court.[16] Because the former most threatens the respect for and functioning of court proceedings and because there is no need for further factfinding, judges may summarily find direct contempt.[17] However, the attenuated effect on the courts' ability to function and the need for more extensive factfinding represent "other considerations" that come into play to make summary contempt findings inappropriate for indirect contempt.[18]

Additionally, courts distinguish between civil and criminal contempt; this distinction provides a further "consideration" that influences the balance between the necessity and its potentially arbitrary administration of the contempt power.[19] Generally, the penalty for civil contempt is a fine or imprisonment imposed until an individual obeys a court order.[20] Its purpose is either to coerce compliance with a court order or to compensate complainants for their losses.[21] Ignoring an affirmative court order to pay alimony or creating disorder in the courtroom are examples of civil contempt.[22] On the other hand, criminal contempt penalties of a fine or imprisonment punish an individual for a past violation of a court order, and are normally imposed for a fixed period of time.[23]

The court's classification of behavior as civil or criminal contempt determines the level of procedural due process protection to which a defendant is entitled. Ordinarily, courts may impose civil

15. *Bagwell*, 512 U.S. at 832.

16. *See id.* at 827 n.2.

17. *See id.* at 832, 838.

18. *Id.* at 833.

19. *See, e.g.*, Hostak, *supra* note 10, at 181 (concluding that "apart from judicial self-discipline, the classification of contempts [as criminal or civil] has been virtually the sole means of constraining the contempt power").

20. *See* Bruce Ledewitz, *Perspectives on the Law of the American Sit-In*, 16 WHITTIER L. REV. 499, 551 (1995) [hereinafter Ledewitz, *Perspectives*].

21. *See* United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947).

22. *See Bagwell*, 512 U.S. at 828; *United States v. United Mine Workers*, 330 U.S. at 330-31.

23. *See* Ledewitz, *Perspectives*, *supra* note 20, at 551.

contempt "upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required."[24] Criminal contempt, on the other hand, demands almost all of the procedural guarantees specific to our criminal justice system.[25] As one commentator concluded, the distinction between civil and criminal contempt "is of vital concern: it is practically the sole bulwark against biased use of the virtually unlimited contempt power."[26]

As courts admit, it is difficult to distinguish between criminal and civil contempt.[27] Any given contemptuous action may "partake of the characteristics of both" civil and criminal behavior.[28] This blurry distinction substantially limits the efficacy of the procedural protections of criminal contempt proceedings, for judges are often poorly guided by unclear precedent and thus free to define a given defendant's behavior as either criminal or civil contempt.[29] As a result, the potential remains for defendants to receive substantial penalties for allegedly contemptuous behavior without also receiving the procedural protections required in traditional criminal contempt proceedings.

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24. *Bagwell*, 512 U.S. at 827.

25. *See* Hostak, *supra* note 10, at 222. Specifically, all but minor direct criminal contempt warrants the right to notice of charges, assistance of counsel, and a jury trial; the privilege against self-incrimination; and the requirement of proof beyond a reasonable doubt. *See id.* at 185; Hicks v. Feiock, 485 U.S. 624, 632 (1988) (requiring proof beyond a reasonable doubt); *Bagwell*, 512 U.S. at 827 (requiring jury trials for punishments greater than six months). *See generally Bagwell*, 512 U.S. at 826 ("Criminal contempt is a crime in the ordinary sense . . . and criminal penalties may not be imposed on someone who may not be afforded the protections that the Constitution requires of such criminal proceedings.").

26. Hostak, *supra* note 10, at 181.

27. *See, e.g.*, *Hicks*, 485 U.S. at 631 ("the 'civil' and 'criminal' labels of the law have become increasingly blurred"); *see also Bagwell*, 512 U.S. at 828 n.3 (referencing numerous articles criticizing civil/criminal distinction as "unworkable"). *Compare* Gompers v. Buck Stove and Range Co., 221 U.S. 418, 441 (1911) (focusing on character and purpose of the punishment, drawing line between remedial sanctions for benefit of the complainant, i.e., civil contempt, and punitive sanctions intended "to vindicate the authority of the court," i.e., criminal contempt) *with Bagwell*, 512 U.S. at 828, 831 (recognizing, in Court's most recent treatment of civil/criminal distinction, that stated purpose of contempt sanction is not determinative of judicial classification of contempt as criminal or civil and declaring that "underlying" the question of whether contempt sanction is civil or criminal is practical inquiry of "what procedural protections are due before any particular contempt penalty may be imposed"). While these line-drawing questions are important, they are beyond the scope of this Note.

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

29. *See* Hostak, *supra* note 10, at 207.

2. Judicial Discretion in the Contempt Context

Perhaps the most troublesome aspect of the contempt power is the considerable discretion that judges have in wielding it, which can produce inconsistent results.[30] To begin with, most state statutes do not define with precision what constitutes contempt, leaving it to individual judges to give substance to general words like "misbehavior" and "contemptuous behavior."[31] Similarly, the federal contempt statute states that judges may punish misbehavior in their presence or disobedience or resistance to a lawful court order, but does not define the substantive content of these terms.[32] Accordingly, trial judges have great discretion in defining the substantive parameters of the contempt power.[33]

In addition to the discretion they give courts to define contempt, many contempt statutes leave it mostly within the court's discretion to determine how much to punish contemptuous behavior by fine or imprisonment.[34] Rule 42(b) of the Federal Rules of Criminal Procedure, for example, merely instructs that "[u]pon a verdict or finding of guilt (of criminal contempt) the court shall enter an order fixing the punishment."[35] Accordingly, there is often no upper limit on jail sentences for ordinary criminal contempt.[36]

30. As one commentator summarizes, judges retain discretion "not merely to find the facts but to define the offense, to initiate the enforcement proceeding, to determine both the form and the severity of the sanction, and, by the former choice, to fix what procedural protections the defendant will receive." Earl C. Dudley Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1066 (1993).

31. *See, e.g.*, Louis S. Raveson, *A New Perspective on the Judicial Contempt Power: Recommendations for Reform*, 18 HASTINGS CONST. L.Q. 1, 4-6 (1990) ("The vast majority of the use of the contempt power by trial courts goes largely unchecked . . . . Presently, the standards governing both the limits of acceptable advocacy and the substantive scope of the contempt power are terribly haphazard and imprecise.").

32. *See* 18 U.S.C. § 401 (1994).

33. *See* Raveson, *supra* note 31, at 6.

34. The court's discretion is limited in certain instances. Summary criminal contempt cannot be punished by jail time exceeding six months and jail time for civil contempt ends whenever the defendant complies or the opportunity to comply ceases to exist. *See* Robert H. Whorf, *The Boundaries of Contempt: Must the Court's Power Yield to Due Process?* 46 MAY-R.I. B.J. 10, 49 (1998) (citing cases).

35. FED. R. CRIM. P. 42(b).

36. *See* Whorf, *supra* note 34, at 49. For example, Congress provided no upper limit on punishment for contempt in the general federal statute, 18 U.S.C. § 401. *See* Dudley, *supra* note 30, at 1026-27. A few federal and state statutes, however, do provide more guidance to judges concerning permissible punishments of particular contempt. *See, e.g.*, 10 U.S.C. § 848 (1994) (limiting punishment for contempt before a court-martial, provost court, or military commission for using

The wide discretion judges enjoy in the contempt context is all the more troubling because of the presiding judge's potential conflict of interest in the contempt proceeding.[37] Contemnors either misbehave in the presence of, or violate the order of, the same judge who will punish their contempt. As discussed above, the judge thus serves as the prosecutor, legislator, and factfinder for the contempt issue.[38] While many judges will be able to remain impartial despite affronts to their authority, it is certainly possible that some judges will sentence more harshly, or find individuals in contempt when they might not have otherwise, due to their personal involvement in the contempt proceeding.[39]

The Supreme Court has attempted to provide guidance to lower courts concerning how to exercise judicial discretion in the contempt context. In *United States v. United Mine Workers*, the Court enumerated factors that are relevant when determining an appropriate punishment for contempt: "the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the

"any menacing word, sign, or gesture in its presence," or for disturbing its proceedings "by any riot or disorder" to confinement for 30 days, fine of $100, or both); Dyke v. Taylor Implement Mfg. Co., Inc., 391 U.S. 216, 220 (1968) (noting that "the maximum penalty which Tennessee statutes permitted the chancellor to impose [for criminal contempt] was 10 days in jail and a fine of $50").

37. *See, e.g.*, Dudley, *supra* note 30, at 1027-28 (observing that "judges wielding this vast and unlimited power suffer from an obvious and ineradicable conflict of interest").

38. *See id.* at 1028.

39. *See, e.g.*, Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 91 (1990) [hereinafter Ledewitz, *Civil Disobedience*] (remarking that "judges feel an obligation to take necessary steps to vindicate their orders"). Conversely, judges can exercise their discretion to treat particular defendants more favorably than others, perhaps because the judges are sympathetic to their motivations. In *Lynch I*, the judge noted that he would have exercised "the prerogative of leniency" and refused to find the defendants in contempt even if he had found their conduct willful. 952 F. Supp. 167, 171 (S.D.N.Y. 1997); *see supra* notes 5-7 and accompanying text. Specifically, he reasoned that when the judge sits as factfinder in criminal contempt, "the Court, which has issued the Order, must and should have the broadest possible discretion to determine whether the conduct at issue is such that a finding of criminal contempt is necessary to vindicate its authority." *Id.* at 171-72. As Justice Black warned in *Green v. United States*, "[judges] remain human even after assuming their judicial duties. Like all the rest of mankind they may be affected from time to time by pride and passion, pettiness and bruised feelings, by improper understanding or by excessive zeal." 356 U.S. 165, 198 (1958) (Black, J., dissenting).

future."[40] These factors are highly context- and fact-specific, however, and thus do not greatly constrain judges' sentencing discretion. Remarkably, even the Federal Sentencing Commission, whose express mission was to promulgate the Federal Sentencing Guidelines to rein in the sentencing discretion of federal judges, chose to maintain judges' enormous sentencing discretion in cases of contempt.[41]

Appellate review provides a potential check on trial judges' discretion and potential conflicts of interest,[42] but it is of limited efficacy. The severity of both civil and criminal contempt is only reviewable on appeal for abuse of discretion regardless of whether a jury decided the case.[43] Further, some states do not provide for appeal of contempt proceedings as a matter of right, thus forcing defendants to petition for certiorari or a writ of habeas corpus.[44] Even in the federal system and in those states that do permit appeal of convictions as a matter of right, a defendant's access to appellate review depends upon the form of contempt for which he has been found guilty. For example, both criminal[45] and civil contempt by third parties[46] are treated as separate final judgments and thus may

40. 330 U.S. 258, 303 (1947).

41. *See* U.S. SENTENCING GUIDELINES MANUAL § 2J1.1 and application note 1:

> Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent, the Commission has not provided a specific guideline for [contempt].

42. *See, e.g.*, Codispoti v. Pennsylvania, 418 U.S. 506, 517 (1974) (stating that "summary convictions during trial that are unwarranted by the facts will not be invulnerable to appellate review").

43. *See* Dudley, *supra* note 30, at 1027 n.6; Raveson, *supra* note 31, at 16. Appellate courts traditionally have been deferential to trial courts concerning both the decision to find a defendant in contempt and how to punish the behavior. *See, e.g.*, Fisher v. Price, 336 U.S. 155, 161 (1949) (concluding that "[r]eliance must be placed upon the fairness and objectivity of the presiding judge" because the record inadequately detailed the defendant's expressions, attitude, and other behavior relevant to whether his behavior was contemptuous); United States v. Gracia, 755 F.2d 984, 990 (2d Cir. 1985) (finding no abuse of discretion when one defendant received a significantly different sentence than two other codefendants for substantially similar contemptuous behavior, choosing to limit its review to "gross disparities").

44. *See* Raveson, *supra* note 31, at 16 & n.57 (citing cases).

45. *See* In re Christensen Eng'g Co., 194 U.S. 458 (1904); Bessette v. W.B. Conkey Co., 194 U.S. 324 (1904).

46. *See* United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988).

be appealed immediately. Civil contempt by parties to the underlying suit, however, is not reviewable until there is a final judgment in the underlying suit.[47] This produces a "troubling asymmetry" in appellate review of contempt citation sanctions, for the individual must either back down or gamble that the sanctions will be successfully challenged on appeal at the end of the case, which may be more than a year in the future.[48]

Unfortunately, Justice Black's observation over forty years ago thus remains largely true today: "[T]here are no limits on the punishment a judge can impose on a defendant whom he finds guilty of contempt except for whatever remote restrictions exist in the Eighth Amendment's prohibition against cruel and unusual punishments or in the nebulous requirements of 'reasonableness.'"[49] Deferential appellate review promises that many questionable exercises of judicial discretion in the contempt context will go unchecked.[50]

B. Civil Disobedience and Contempt

Civil disobedients often challenge the authority of courts and government generally, and thus many contempt cases are also civil disobedience cases. In order to understand how the cases overlap, it is important to understand civil disobedience in the context of our legal system and culture. Defined broadly, civil disobedience is illegal but predominantly nonviolent activity that expresses individual opposition to a law or policy.[51] Civil disobedience has a long legacy and vital role in our nation, and includes acts of protest ranging from the Boston Tea Party to sit-ins at lunch counters in the South during the Civil Rights movement.[52]

Civil disobedience may be characterized as either direct or indirect.[53] The former, like the lunch counter sit-ins, includes acts that express disagreement with the law that is being violated.[54] In-

47. *See* Doyle v. London Guarantee & Accident Co., 204 U.S. 599, 608 (1907).

48. Dudley, *supra* note 30, at 1037.

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

50. *See* Raveson, *supra* note 31, at 21.

51. *See* Ledewitz, *Civil Disobedience, supra* note 39, at 69.

52. *See id.* at 73-78.

53. It is important not to confuse indirect and direct civil disobedience with indirect and direct contempt, defined *supra* in the text accompanying notes 16-18.

54. *See, e.g.*, Bouie v. City of Columbia, 378 U.S. 347 (1964) (considering the prosecution of two African-Americans who protested segregation laws by refusing to leave a luncheonette counter of a department store). Note that *Hunt v. Hunt*, 648 A.2d 843 (Vt. 1994), discussed *supra* notes 1-2 and accompanying text, is not an example of direct civil disobedience. Although the father in *Hunt* did not com-

direct civil disobedience, on the other hand, includes acts that express disagreement with a law or policy by violating another law.[55] For example, the abortion protesters in *Lynch* trespassed on a clinic's property in a symbolic show of opposition not to the trespass laws, but rather to the laws protecting a woman's right to have an abortion.[56]

By definition, civil disobedience is illegal, and therefore, absent an independent justification for the behavior, is punishable.[57] While most acts of civil disobedience involve minor legal violations and result in minimal, if any, punishment,[58] this is not the case in the context of civil disobedience of court orders. The Supreme Court has held that even if an underlying court order violates a defendant's free speech rights under the First Amendment, the need for the fair administration of justice precludes a defendant from using the Constitution as a defense in a contempt proceeding.[59] The Court has also declined to find a constitutional justification for recognizing civil disobedience as a defense to a contempt citation.[60]

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ply with an order of the court, he was not trying to express his opposition to child support laws. To the contrary, he demonstrated his support for the general policy of child support by providing his children with shoes. He failed to comply not in a show of civil disobedience but rather because he believed his religion compelled his noncompliance. I explore the distinction between religiously compelled noncompliance and religiously-motivated civil disobedience in Section III.A.2. *infra*.

55. *See* United States v. Schoon, 971 F.2d 193, 195-96 (9th Cir. 1992).

56. *See* United States v. Lynch, 952 F. Supp. 167 (S.D.N.Y. 1997); *supra* notes 5-7 and accompanying text.

57. *See, e.g.*, Ledewitz, *Perspectives*, *supra* note 20, at 505 (restating popular argument against legal protection of civil disobedience: "in a democratic state, with basically fair treatment of minorities and with mass political participation, it is not justifiable to break the law to effect social change"). Ronald Dworkin argues that this legal duty reflects a more basic moral duty of all citizens to obey our laws:

> [a] man must honor his duties to his God and to his conscience, and if these conflict with his duty to the States, then he is entitled, in the end, to do what he judges to be right. If he decides that he must break the law, however, he must submit to the judgment and punishment that the State imposes, in recognition of the fact that his duty to his fellow citizens was overwhelmed but not extinguished by his religious or moral obligation.

RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 186 (1978).

58. *See* Ledewitz, *Civil Disobedience*, *supra* note 39, at 105-06 (observing that while "the criminal law does not literally accept violations, it does, nevertheless, tend to tolerate, even expect, a large amount of illegal conduct with regard to minor crimes . . . . The protester . . . gains the benefit of the general lethargy of the criminal justice system").

59. *See* Walker v. City of Birmingham, 388 U.S. 307 (1967).

60. *See id.* at 320-21 ("This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the

Accordingly, civil disobedience is not an accepted defense to contempt charges, and individuals seeking to challenge these charges may resort in the courts only to a direct challenge of the underlying order.[61]

III
DEFENSES TO CONTEMPT CHARGES FOR RELIGIOUSLY MOTIVATED DEFENDANTS

The review of contempt and civil disobedience in Section II makes clear that individuals who violate a court order may not avoid a finding of contempt solely because they have a moral objection to that order.[62] This Section explores three alternative theories under which defendants might avoid traditional sanctions for noncompliance with court orders when their contempt was religiously motivated or religiously compelled.

A. The Necessity Defense

1. The History, Elements, and Rationales of the Necessity Defense

Courts have recognized necessity as a defense to various charges, including contempt.[63] Courts find the necessity defense applicable when illegal action is "necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense."[64] Necessity is an affirmative defense, commonly requiring the defendant to make a factual showing on four elements: (1) the

streets. . . . [R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.").

61. *See* Ledewitz, *Civil Disobedience*, *supra* note 39, at 103.

62. For an interesting argument that would substantially decrease the opportunities for religiously-motivated individuals to ignore court orders (that is, by limiting the number of court orders that will issue in the first instance), see *id.* at 121-26 (arguing for limited First Amendment protection against the use of injunctions to stop civil disobedience).

63. While some jurisdictions have codified the necessity defense, others, including the federal judiciary, rely on the common law tradition to determine its content. *See* Laura J. Schulkind, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 83 (1989). Traditionally, the necessity defense was limited to situations in which physical forces beyond the control of individuals presented them with an immediate threat and no legal alternatives to avoid this harm. However, recent cases recognize that the necessity defense has been blurred with the related, though historically distinct, defense of duress. In duress situations, defendants seek a pardon for their illegal acts on the theory that an unlawful threat of imminent death or serious bodily harm forced them to violate the law and that no reasonable person would have been able to resist the threat. *See* United States v. Bailey, 444 U.S. 394, 409-10 (1980).

64. *Bailey*, 444 U.S. at 410.

defendant acted to avoid an imminent harm; (2) the defendant had no reasonable legal alternative to the illegal act; (3) the harm caused by the illegal act was not greater than the harm that the defendant sought to avoid by the act; and (4) the defendant reasonably anticipated a direct causal relationship between the act and the harm to be avoided.[65] Necessity is also a justification defense;[66] that is, on a balancing of harms, the defendant's conduct is deemed justified as the lesser of two evils.[67] The rationale for the defense is that the drafters of the law in question would have crafted the same exception if they had foreseen the specific circumstances faced by the defendant.[68] Reasonableness is a touchstone of the defense;[69] consequently, the defense promotes majoritarian values and is not a route to liberating minority-held beliefs, such as religious beliefs, unless a reasonable drafter would have granted the exemption had she foreseen this particular application of the law or order.[70]

65. *See* Joseph E. Broadus, *Use of the "Choice of Evils" Defense in Religious Deprogramming Cases Offends Free Exercise While Ignoring the Right to Be Free from Compelled Treatment*, 1 GEO. MASON U. CIV. RTS. L.J. 171, 195 (1990); Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1186 (1987).

66. Justification defenses, such as necessity, are distinct from excuses, such as duress. When an illegal act is excused, it is forgiven even though it is seen by society as a wrong choice with harmful consequences. Mistake of fact is an example: an individual may be forgiven for this mistake, but society does not sanction it as the appropriate choice. Self-defense, on the other hand, is a justification because society deems the action to be the right choice given the circumstances; an otherwise illegal act is thus justified—and not merely excused—in the eyes of society. *See* Schulkind, *supra* note 63, at 85.

67. *See generally* James L. Cavallero, Jr., Note, *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and* United States v. Schoon, 81 CALIF. L. REV. 351, 352-53 (1993) (tracing origin of necessity defense "as a means of avoiding the injustice of punishing a defendant who violated the letter of the law in order to prevent a greater evil than that which the law sought to punish"); Schulkind, *supra* note 63, at 82 (describing necessity defense as balancing test); Bauer & Eckerstrom, *supra* note 65, at 1174 ("Its utilitarian basis allows a jury to approve an act committed for a greater good, on the ground that society should allow the individual moral actor some discretion to maximize social utility. Its deontological basis recognizes that when a tremendous wrong may occur, a moral imperative requires action no matter what the legal consequences.").

68. *See* United States v. Schoon, 971 F.2d 193, 196-97 (9th Cir. 1992); Ledewitz, *Perspectives*, *supra* note 20, at 539.

69. *See* Schulkind, *supra* note 63, at 84-85.

70. *See, e.g.*, Broadus, *supra* note 65, at 181 (remarking that limits on use of the necessity defense "prevent appeals to prejudice, which might lead juries to forgive offenses against members of unpopular groups"); Schulkind, *supra* note 63, at 106 n.185 (suggesting that "if there is no moral consensus in the community, then an actor cannot claim to be acting on the basis of shared social values; in areas of moral controversy an actor cannot act on behalf of the community").

Courts do not readily permit defendants to invoke the necessity defense. The few cases in which the courts allow defendants to present the necessity defense to a jury demonstrate the strict application of its elements. For example, several cases recognize the necessity defense to permit the violation of a law that prohibits felons from possessing firearms, but only where the defendant was faced with a serious and imminent threat to life or limb and possessed the firearm only as long as necessary to avoid the evil.[71] In *United States v. Newcomb*, for example, the court allowed the defense because the harm averted, death, was greater than the harm caused by the defendant's temporary possession of a firearm; the threat of serious harm was impending and thus did not allow for alternative, legal solutions such as contacting the police; the action clearly bore a direct causal relationship to averting the harm; and the criminal behavior lasted mere minutes.[72]

Examples of successful invocations of the necessity defense, as in *Newcomb*, are consistent with the rationale for the defense. First, they involve fact patterns that the drafters likely did not foresee in enacting the general law. For example, a legislature may express a general judgment that felons should not possess firearms, but this does not imply a judgment concerning a felon who averts a murder by briefly violating the general law. Second, the harms averted in these cases are grave, imminent, and judged to be more serious than the harms caused by the illegal action. The averted harms are also transient, illustrating that the defense is limited in context *and* duration. This requirement of transience is critical because it reins in the ability of factfinders to second-guess drafters; serious harms that are not fleeting are more likely to be anticipated, and thus

71. *Compare* United States v. Paolello, 951 F.2d 537 (3d Cir. 1991) (allowing necessity defense where defendant wielded gun only to abate danger to his life and relinquished possession of it as soon as police arrived), *and* United States v. Gomez, 92 F.3d 770 (9th Cir. 1996) (allowing necessity defense where government cooperator—after receiving death threats, hearing that contract was out on his life, unsuccessfully begging government to protect him and being chased by attacker—possessed gun only as long as imminent threat persisted), *with* United States v. Singleton, 902 F.2d 471 (6th Cir. 1990) (disallowing necessity defense where defendant continued to possess gun after threat to his life ceased and defendant had an opportunity to disarm himself).

72. 6 F.3d 1129, 1134-36 (6th Cir. 1993). Specifically, the defendant, while watching television with his girlfriend and not engaging in activity that would reasonably increase his risk of confronting a choice of evils, witnessed his girlfriend's son race from their home and declare his intention to kill someone. When the defendant tried to convince the son not to kill the intended victim, the son volunteered the gun and bullets to him. *See id.* at 1131.

within the institutional competence of the drafter to consider and weigh.

2. The Necessity Defense and Religiously Motivated Contemnors

Religiously motivated contemnors might seek to bring their conduct within the ambit of the necessity defense in two distinct ways. First, they might claim that religiously motivated civil disobedience is necessary to prevent some grave harm to society as a whole. Second, these contemnors might claim that their noncompliance with a court order is necessary in order to save themselves from some grievous spiritual harm that would result if they were unable to honor their personal religious obligations. In other words, they might claim that their religious beliefs compelled their noncompliance. The conduct of these contemnors does not challenge the existence of the law in general and thus is not civil disobedience; rather, their claim is that they individually cannot comply in this instance because of a religious conflict. I will evaluate each potential claim in turn.

a. The Necessity Defense and Religiously-Motivated Civil Disobedience

The first manner in which religiously-motivated contemnors may seek to use the necessity defense is to claim that their religiously motivated disobedience of a court order was necessary to prevent a serious harm to society.[73] *United States v. Lynch* illustrates a

73. Several courts, normally in dicta, conclude summarily that religious motive alone does not warrant a necessity defense instruction. *See, e.g.*, United States v. Turner, 44 F.3d 900, 903 (10th Cir. 1995) ("To allow the personal, ethical, moral, or religious beliefs of a person, no matter how sincere or well-intended, as a justification for criminal activity aimed at preventing a law-abiding citizen from exercising her legal and constitutional rights would not only lead to chaos but would be tantamount to sanctioning anarchy."); United States v. Komisaruk, 874 F.2d 686, 689 (9th Cir. 1989) (precluding introduction of evidence of individual's political, religious, or moral beliefs to justify violation of law because "personal disagreement with national defense policies could not be used to establish a legal justification for violating federal law nor as a negative defense to the government's proof of the elements"); United States v. Kabat, 797 F.2d 580, 583 (8th Cir. 1986) (rejecting invocation of necessity defense by individuals claiming that their nuclear protest was required by higher law of God; judge instructed jury that "neither good motive alone nor moral, religious, or political belief is a defense to [the] crime"). However, these cases generally lack judicial discussion of their reasons and rather conclusorily deny defendants' efforts to invoke the necessity defense. Accordingly, this section systematically considers whether religious civil disobedients should have greater access to the necessity defense than morally motivated civil disobedients.

potential setting for the use of this defense. There, defendants ignored a court order not to trespass at abortion clinics in order to express disagreement, motivated by their religious beliefs, with the general social problem of abortion and not with the trespass laws.[74] They might have claimed that their religious motives justified their indirect civil disobedience of the court order.[75] This claim is analogous to the common attempts by political protestors to use the necessity defense to excuse their indirect civil disobedience which was motivated by politics or moral obligation. Accordingly, this section uses the analogy of morally- or politically-motivated indirect civil disobedience[76] to assess the applicability of the necessity defense to religiously-motivated civil disobedience.

i. Indirect Civil Disobedience and the Necessity Defense

Courts almost unanimously reject defendants' efforts to invoke the necessity defense in indirect civil disobedience political protest cases.[77] As discussed above, courts generally do not excuse conduct that violates a law simply because the defendant wishes to express moral or political opposition to a law or policy.[78] More specifically, in applying the four elements of the necessity defense to indirect civil disobedients, many courts find the defendants' evidence insufficient as a matter of law to establish the second and fourth elements of the necessity defense. That is, the defendants cannot establish a lack of reasonable legal alternatives or a reasonable belief that there will be a direct causal relationship between their actions and the avoidance of the greater harm.[79] Because these two

74. 952 F. Supp. 167 (S.D.N.Y. 1997); *see supra* notes 5-7 and accompanying text.

75. Note, however, that the court in *Lynch I* did not decide the necessity defense claim, resting instead on the willfulness element of criminal contempt. *See id.* at 170. Rather, the facts in *Lynch I* are useful here as an example of when defendants might seek to invoke this defense.

76. *See supra* Section II.B.

77. *See* Planned Parenthood v. Maki, 478 N.W.2d 637, 640 (Iowa 1991); James O. Pearson, Jr., Annotation, *"Choice of Evils," Necessity, Duress, or Similar Defenses to State or Local Criminal Charges Based on Acts of Public Protest*, 3 A.L.R. 5th 521 (1999).

78. *See supra* Section II.B.

79. *See* Bauer & Eckerstrom, *supra* note 65, at 1178-79; Cavallero, *supra* note 67, at 358. In applying the four elements of the necessity defense to indirect civil disobedients, many courts find, or at least assume *arguendo*, that they can satisfy the first and third elements, namely, that the harm they seek to prevent (such as nuclear proliferation) is imminent and causes less harm than their illegal behavior (often trespass). *See* Bauer and Eckerstrom, *supra* note 65, at 1182; Cavallero, *supra* note 67, at 357. *See, e.g.*, United States v. Dorrell, 758 F.2d 427 (9th Cir.

prongs most commonly frustrate indirect civil disobedients, this discussion will focus on them.

The Supreme Court has defined the "no reasonable legal alternatives" inquiry as whether the defendant had "'a chance both to refuse to do the criminal act and also to avoid the threatened harm.'"[80] One commentator describes this element as a safety valve, intended to distinguish necessary from unnecessary illegality.[81] For example, in *United States v. Aguilar*, the court refused to allow a necessity defense because the defendants did not establish that there were no legal alternatives to smuggling aliens out of Central America in violation of Immigration and Naturalization Service ("INS") regulations.[82] Specifically, the defendants had the reasonable legal alternative of appealing to the judiciary to police the INS and the immigration courts, and "[t]his legal alternative nullifies the existence of necessity."[83]

Courts also tend to be skeptical about the reasonableness of a belief that a defendant's indirect civil disobedience will avert the harm challenged by convincing the government to change its policy or law. As two commentators conclude, "[f]ew acts can meet this standard, given the myriad of political influences, the relative powerlessness of the average citizen, and the hazards of retrospective judicial analysis."[84] Many political protest cases fail for this reason.[85]

1985) (rejecting the necessity defense on the legal alternatives and causal link prongs but not finding a lack of imminence or a greater harm).

80. United States v. Bailey, 444 U.S. 394, 410 (1980) (internal citation omitted).

81. *See* Schulkind, *supra* note 63, at 91.

82. 871 F.2d 1436, 1467 (9th Cir. 1989).

83. *Id.* at 1468.

84. Bauer & Eckerstrom, *supra* note 65, at 1181. The Ninth Circuit has gone further and explicitly declared that the defense is inapplicable to cases of indirect civil disobedience. *See* United States v. Schoon, 971 F.2d 193, 196 (9th Cir. 1992). In *Schoon*, defendants claimed that their illegal violation of a court order to protest United States policy in El Salvador was necessary to "avoid further bloodshed in that country" and aimed to reverse that policy. *See id.* at 195. The court, however, found that indirect civil disobedients may never satisfy the direct causal relationship element of the necessity defense because "it takes another volitional actor not controlled by the protestor to take a further step; Congress must change its mind." *Id.* For an argument that *Schoon*'s reasoning is not limited to cases of indirect civil disobedience, *see* Cavallero, *supra* note 67, at 367; Ledewitz, *Perspectives*, *supra* note 20, at 543.

85. *See* Ledewitz, *Perspectives*, *supra* note 20, at 592; United States v. Kroncke, 459 F.2d 697, 702 (8th Cir. 1972) (rejecting application of necessity defense because destruction of draft records did not bear reasonable causal relationship to purported aim of ending the Vietnam War).

Two New York cases, *People v. Archer*[86] and *People v. Gray*,[87] signal a greater willingness to allow the necessity defense in cases of indirect civil disobedience, but careful scrutiny reveals that these cases are likely outliers.[88] Both cases involved defendants who violated laws in protest over government policies, and both are inconsistent in two distinct ways with the rationale for the necessity defense. First, both denied that legal alternatives existed for the defendants even though there was no evidence in either case that the defendants were denied access to the democratic decisionmaking process. As we have seen, however, illegal activity cannot be vindicated by necessity solely because defendants disagree with a lawful decision of the democratic process but have failed in their efforts to change that decision. The cases are also mistaken in allowing the necessity defense because neither case involved an emergency unforeseen by the drafter. In *Archer*, involving abortion protesters, it is not reasonably likely that the legislature failed to foresee moral opposition to abortion when it made abortion legal. Nor is it likely that the city council in *Gray* failed to foresee the pollution

86. 537 N.Y.S.2d 726 (Rochester City Ct. 1988). The defendants in *Archer* claimed that their trespass on hospital grounds was necessary to prevent the greater evil of abortion; the court ruled that defendants would be permitted to present a necessity defense if they provided evidence that they were protesting second (and not solely first) trimester abortions.

87. 571 N.Y.S.2d 852 (N.Y. Crim. Ct. 1991). The court in *Gray* allowed the defendants to mount a necessity defense to charges of disorderly conduct involving a protest over the closure during construction of a bridge's pedestrian and bicycle lane. The court recognized that the harms posed by increased traffic (and thereby pollution) on a bridge were imminent and grave, and clearly greater than the harms caused by the protests. Further, the court found that the defendants had no reasonable alternatives enabling them to change the city's policy, and that it was reasonable for them to believe that their efforts would have a direct causal relationship to averting the harm because they had recently been successful in changing policy through protest. *See id.* at 856-63.

88. Cavallero notes that efforts to invoke the necessity defense in civil disobedience cases have been much more successful in state than federal courts. Cavallero, *supra* note 67, at 362, 361 nn. 59-62 (citing cases). *But see* Pearson, *supra* note 77, at 521 (reporting that state courts have rejected defendants' efforts to invoke the defense in political protest cases except in *Archer* and *Gray*). The disparity in this analysis likely results from the fact that the cases cited by Cavallero allowed the defendant to present the defense to the jury and resulted in acquittals or dropped charges—thus avoiding a reported decision. *See, e.g.*, Schulkind, *supra* note 63, at 81 n.13 (remarking that most cases wherein the defense has been permitted involve acquittals that normally are unpublished). While it is possible that judges permit the defense in more cases than it might appear from an examination of reported accounts, the overwhelming number of reported decisions recounting the stringent requirements of the necessity defense suggests that the defense is likely denied more often than it is permitted.

and safety concerns raised by its policy choice to create an extra lane for cars at the cost of pedestrians and cyclists. As the Ninth Circuit summarized, although "[t]hose who wish to protest in an unlawful manner frequently are impatient with less visible and more time-consuming alternatives," this "impatience does not constitute the 'necessity' that the defense of necessity requires."[89] Accordingly, neither *Archer* nor *Gray* represents a principled or defensible application of the necessity defense.

ii. The Applicability of the Necessity Defense to Religiously-Motivated Civil Disobedience

There is no reason for courts to grant religiously-motivated civil disobedients greater access to the necessity defense than morally- or politically-motivated civil disobedients. Implicit in the near-unanimous denial of the necessity defense in indirect civil disobedience cases is the fear that accepting it would introduce chaos into our government by empowering individual beliefs to undermine general laws—and this fear exists whether the motivating beliefs are political, moral, or religious.[90] When individuals express disagreement with policies on moral or religious grounds by violating the law, courts do not excuse these civil disobedients from the laws, as discussed in Section II.B. above. To allow the necessity defense to pardon their violation of a court order for the same behavior would frustrate this judgment balancing the needs of a rule-based society against the need to permit expression of disagreement. While civil disobedience permits the expression of dissent, it does not undermine the rule of law because the action admits the legitimacy of the law by challenging its existence—if the law were not binding, there would be nothing to protest. Recognizing the necessity defense in civil disobedience cases, however, "cloak[s] the violation of an unchallenged law with the veneer of legality," and thus represents a uniquely powerful way to undermine the law.[91] The application of the elements of the necessity defense to civil disobedience motivated by religious beliefs, like that of the abortion protests in *Lynch*,

89. United States v. Dorrell, 758 F.2d 427, 431 (9th Cir. 1985).

90. For example, one court reasoned that "[t]o allow the personal, ethical, moral, or religious beliefs of a person, no matter how sincere or well-intended, as a justification for criminal activity . . . would not only lead to chaos but would be tantamount to sanctioning anarchy." United States v. Turner, 44 F.3d 900, 903 (10th Cir. 1995); *see also* United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969) ("To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos.").

91. *Dorrell*, 758 F.2d at 435-36 (Ferguson, J., concurring).

thus seems both precluded by precedent and contrary to the rationale of the necessity defense.

b. The Necessity Defense and Religiously Compelled Noncompliance

Religiously motivated individuals may also seek to invoke the necessity defense when their noncompliance was an *obligation* of their faith. Religiously required noncompliance with valid laws or policies is distinguishable from religiously-motivated civil disobedience, as discussed in Section III.A.2.a., in that it does not challenge the validity of the underlying law or policy. For example, the defendant in *Hunt v. Hunt*[92] did not object to the parental support laws. He was willing to support his children by means that would not violate his religious beliefs, such as living with them in the commune or supplying them with shoes that he made. But he claimed that his religious beliefs required him not to comply with the court order for child-support payments. Just as the defendant in *Newcomb*[93] violated the law not to object to its existence but rather to avert a great harm, the defendant in *Hunt* violated the law only when confronted with an imminent threat of harm to his spiritual life. In other words, the defendants in *Hunt* and *Newcomb* did not commit civil disobedience, and thus the trend against permitting necessity to justify civil disobedients' illegal behavior[94] does not preclude such efforts by religiously compelled contemnors. Because the necessity defense is limited to cases of imminent and unforeseeable harms, however, we must consider how religiously-compelled noncompliance satisfies both the elements and rationale of the necessity defense[95] in order to assess whether courts are likely to permit defendants to invoke the defense here.

At first glance, *Hunt*'s facts satisfy certain elements of the necessity defense. Although it may not be immediately clear what imminent harm the defendant faced, courts are hesitant "to presume to determine the place of a particular belief in a religion or the

92. 648 A.2d 843 (Vt. 1994). *See supra* notes 1-2 and accompanying text. Note that the defendant in *Hunt* did not invoke the necessity defense; the case is discussed here only to illustrate a fact pattern in which similarly situated defendants might seek to use the defense to justify their behavior.

93. 6 F.3d 1129, 1134-45 (6th Cir. 1993); *see supra* note 72 and accompanying text.

94. *See supra* Section III.A.2.a.i.

95. *See supra* section II.A.1. for a review of the elements of and rationales for the necessity defense.

plausibility of a religious claim."[96] Given the court's finding that the defendant's beliefs were sincere,[97] it is plausible to conclude that violating a sincere religious belief would be a great evil for purposes of the defense. Further, the defendant had already appealed the court order, claiming that it was an unconstitutional burden on his free exercise rights, but the court had denied his claim.[98] In these circumstances, no legal alternatives remained and the defendant had only two choices: obey the order and suffer grave spiritual harm, or violate it and avert the harm. Additionally, it is reasonable to believe that the defendant's act of disobedience would avert the harm because the only way that the harm would occur was if he complied with the order. The most difficult element of the defense to satisfy here is the balancing of evils, as it is not clear that a reasonable drafter would conclude that the spiritual harm to the defendant would exceed the harm that his noncompliance would cause his children. It is certainly conceivable, however, that this difficulty is specific to the facts of the case, and that on other facts the balance could weigh more clearly in the defendant's favor. Accordingly, it may seem that religious obligation cases like *Hunt* warrant the necessity defense more strongly than religiously-motivated civil disobedience cases.

Despite the force of this argument, defendants who fail to comply with court orders because of religious requirements should not be permitted to invoke the necessity defense. These defendants' claims differ in two crucial respects from the successful claims reviewed above: the harm they seek to avert is neither transient nor unanticipated. There is arguably no time at which the defendants' religious necessity will cease, as religious belief is generally nontransient. The defendant in *Hunt* is thus completely unlike the defendant in *Newcomb* who illegally possessed a weapon in order to save a life, for the latter could cease violating the law as soon as the threat of harm passed.[99]

Even if a defendant's religious belief was transient, the necessity defense is inappropriate because the defendant's one-time noncompliance with the court order is not an unanticipated application of that order. As discussed above,[100] factfinders may second-guess the drafter only when it is likely that the drafter did not anticipate this particular application of the law. In the con-

96. Employment Div. v. Smith, 494 U.S. 872, 887 (1990).

97. *See Hunt*, 648 A.2d at 851; *see supra* notes 1-2 and accompanying text.

98. *See id.* at 853.

99. *See* United States v. Newcomb, 6 F.3d 1129, 1134-45 (6th Cir. 1993).

100. *See* discussion *supra* Section III.A.1.

tempt context, the judge issues the binding "law" in the form of a court order, so the necessity defense would be justified only when that order applied in a context unanticipated by the judge. This could only occur in the unlikely event that the issuing judge was totally unaware of the impact of the order on the defendant's religion. In *Hunt*, for example, the trial judge must have anticipated and considered the burden of the court-ordered payments on the defendant's religious beliefs because he denied appeal of the order. Just as the necessity defense is not an opportunity for the judiciary to reweigh the harms balanced by the legislature (as drafter), the necessity defense is inappropriate when the judge, as drafter, has anticipated and balanced the harms and issued a binding order.

Accordingly, because the necessity defense is only appropriate to excuse illegal conduct when it is the lesser of two evils, the greater of which is transient and unanticipated by the drafter of the law, religiously compelled noncompliance does not warrant the application of the necessity defense in contempt cases.

B. The Free Exercise Clause and Religious Exemption from Contempt: Discretion and the Threat of Discrimination

This section explores whether the Constitution demands heightened scrutiny of judicial sanctions imposed for religiously compelled or religiously motivated noncompliance with court orders. Specifically, if judges' discretion under the contempt power is viewed as a state-constructed mechanism for individualized exemptions, and if judges use this discretion to grant exemptions to secular but not to religious interests, then *Employment Division v. Smith*[101] and its progeny may demand strict scrutiny review of judges' contempt decisions.

1. Religious Exemptions

Religiously motivated individuals generally cannot turn to the Free Exercise Clause for an exemption from general and neutral laws that incidentally burden their religious exercise.[102] In *Employment Division v. Smith*, however, the Supreme Court distinguished laws targeting religious beliefs and practices from laws that are neutral and generally applicable.[103] While the former may violate the Free Exercise Clause,[104] the latter apply equally to all individuals

101. 494 U.S. 872 (1990).

102. *See id.* at 879.

103. *See id.* at 877-79.

104. *See, e.g.,* David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201, 201-02 (1997) ("[T]he First Amendment protects expression

regardless of religious belief and generally do not violate the Free Exercise Clause.[105]

Although *Smith* held that generally applicable and neutral laws may burden religious exercise, the Court stated in dictum that if a state provides for individualized exemptions from a neutral law's application, that state's failure to consider 'religious hardship' without compelling reason may violate the Free Exercise Clause.[106] In a later case, the Court held that a statute which is not neutral or of general applicability will receive strict scrutiny review. When the government is allowed to make individualized exemptions, the potential for abuse of this discretion, whether invidious or not, arises because the government may grant exemptions on grounds it favors but refuse to do so for causes it finds contrary to its interests.[107]

This constitutional protection does not assume that religion is special in the sense that religious motives deserve exemptions from generally applicable laws when secular reasons do not; instead, as some commentators have discussed, "[w]hat properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value. . .[W]hat is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns."[108] Furthermore,

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and religious exercise from impairment by laws that are not generally applicable. The Court will carefully scrutinize laws that apply only to activities involving speech, press or the exercise of religion. . . . Similarly, the Court will invoke First Amendment standards when a law applies to behavior that is engaged in exclusively for religious or expressive purposes.").

105. 494 U.S. at 879 ("The right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"). Section III.C. explores the effect of the enactment of the Religious Freedom Restoration Act and similar state statutes on the Court's holding in *Smith*.

106. *Id.* at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

107. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537-38 (1993); *see also* Rader v. Johnston, 924 F. Supp. 1540, 1550 (D. Neb. 1996) (building on *Smith*'s dictum to find that "if a law is not neutral or of general applicability, the government may justify its infringement upon the particular religious practice only by demonstrating that the infringement is narrowly tailored to further a compelling government interest"); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 772 (1998) [hereinafter Laycock, Conceptual Gulfs] (concluding that "[w]here a law has secular exceptions or an individualized exemption process, any burden on religion requires compelling justification under a reasonable interpretation of *Smith* and *Lukumi*").

108. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994) [hereinafter Eisgruber & Sager, *Vulnerability*]. Religion is

religious discrimination can be very subtle; it may be characterized as a tone-deafness to the serious commitments of non-mainstream religions.[109]

Therefore, there are two distinct ways in which government exemptions from facially neutral and generally applicable laws may trigger strict scrutiny: categorical exemptions and individualized assessments of motives. When the government exempts a category of individuals to accommodate secular interests but refuses to create a comparable category to accommodate religious interests, courts subject the law to strict scrutiny to police the risk of discrimination against religious interests.[110] The courts also apply strict scrutiny to cases where certain government actors, empowered to grant exemptions from a law based upon their assessment of an individual's motives or interests, may have discriminated against religious beliefs.[111]

An example of the first type of exemption case, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,[112] involves the granting of categorical secular exemptions and the denial of comparable religious exemptions. There, the police department exempted officers with medical reasons for not shaving from a longstanding policy forbidding officers to wear beards, but declined to exempt officers who were religiously compelled not to shave. The court held that "[b]ecause the Department makes exemptions from its policy for secular reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons. . .the Department's policy violates the [Free Exercise Clause]."[113]

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deeply personal and often occupies a very significant and defining role in believers' lives. Further, often believers of one faith contend that their beliefs are right and that other faiths are misguided or not "found." "It is the group identity of the faithful that mobilizes pity, distrust, or even hatred for those who are not believers." *Id.* at 1249. Recent surveys report that religious intolerance is not merely a historical fact of our nation's founding. Rather, "[i]n 1993, 45% of Americans admitted to 'mostly unfavorable' or 'very unfavorable' opinions of 'religious fundamentalists,' and 86% admitted to mostly or very unfavorable opinions of 'members of religious cults or sects.'" Laycock, *Conceptual Gulfs*, *supra* note 107, at 773.

109. *See* Eisgruber & Sager, *Vulnerability*, *supra* note 108, at 1283.

110. *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir 1999); Horen v. Commonwealth, 23 Va. App. 735 (1997).

111. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

112. 170 F.3d 359.

113. *Id.* at 360. Similarly the Court of Appeals of Virginia found that a law that prohibited the possession of feathers was not neutral toward religion. Although state law permitted categorical exceptions to the ban on possession for

The second type of exemption case is exemplified by *Sherbert v. Verner* (implicitly affirmed by *Employment Division v. Smith*),[114] in which the Court applied strict scrutiny review to unemployment commission decisions.[115] In *Sherbert*, bureaucrats had discretion to award or deny unemployment insurance to applicants based on their assessment of whether unemployed individuals had good cause to refuse a replacement job.[116] This standard allowed them to determine which motives constituted (and which motives failed to constitute) good cause and to award unemployment accordingly. The fear of discrimination against religious motives led the Court to use heightened review of the bureaucrats' exercise of discretion.[117]

In sum, the courts insist on parity for religious motives; if the government grants an exemption from a neutral and generally applicable rule for secular reasons, it must have a compelling reason not to grant a similar exemption for religious reasons.

2. Individualized Exemptions and Contempt

The key question in determining whether the Constitution requires strict scrutiny review of government action in the free exercise context is whether the state authorizes individual exemptions that exempt secular but not religious motives. The discretionary contempt power, however, is not similar enough to the discretionary nature of individualized exemptions to warrant strict scrutiny

taxidermists, museums, and academics, the state law did not except possession for religious use. Thus, because the state created a mechanism for individual exemptions and did not legitimate religious uses, the court inferred discriminatory intent and found that the law was not neutral. *See Horen*, 23 Va. App. at 735, 748-49.

114. 494 U.S. 872 (1990).

115. 374 U.S. 398 (1963).

116. *See id.* at 401.

117. *See id.* at 406. Likewise, in *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996), the United States District Court for the District of Maryland subjected the individualized assessments of a zoning commission to strict scrutiny because the Commission could exempt property owners when they would experience financial hardship, but the Commission did not exempt the Church when the zoning requirements burdened its free exercise, for example. The court observed that this legislated system of exemptions "acknowledges that [the city's] interest in enforcement is not of paramount concern" and the City must have compelling reasons not to exempt religious interests when they are burdened. *Id.* at 886. As Professors Eisgruber and Sager summarized, "[a] state that puts in place a discretionary process to assess reasons for quitting work, and then turns a deaf ear to adherence to religious commandments as good cause, opens itself to the conclusion that it is not giving equal regard to the deep religious commitments of nonmainstream religious believers." Eisgruber & Sager, *Vulnerability*, *supra* note 108, at 1280.

review of judges' decisions in the contempt context. First, contempt doctrine, unlike the doctrine considered in *Fraternal Order of Police*, does not provide categorical exemptions from binding court orders to meet secular needs and then deny similar exemptions to religious claimants. Instead, judicial discretion applies equally to all alleged contemnors. Because no one enjoys a general right to avoid punishment for contemptuous behavior, denying mitigation for religious motives is not likely to discriminate unfairly against religion.

As discussed in Section III.B.1., courts also worry about the risk of de facto discrimination when government agents have state-sanctioned power to decide on a case-by-case basis which motives deserve exemption and which do not, as was the case in *Sherbert*. Contempt law, however, does not empower judges to evaluate individual motives for contemptuous behavior, as the judges' discretion does not include a review of alleged contemnors' motives or reasons. For example, when the trial court in *United States v. Lynch* claimed that willful contempt required a finding of bad purpose,[118] the Second Circuit emphatically disagreed.[119] Unlike the unemployment context, where bureaucrats are empowered to weigh the motives for an individual's conduct and have discretion to value some motives more highly than others, a finding of willfulness involves neither an assessment of an individual's reasons for acting nor a requirement of bad intent. Instead, willfulness is shown where there is "a specific intent to consciously disregard an order of the court."[120] Further, civil contempt generally does not demand a finding of willfulness,[121] so it entails no inquiry at all into the individual's motive for acting.

While it is true that, in practice, consideration of the defendant's motives may influence both the judge's decision to find the defendant in contempt as well as the judge's determination of an appropriate sentence for contempt, as *Lynch I* attests, the judge's discretion is not the kind with which free exercise cases are concerned. Free exercise jurisprudence is concerned with discrimina-

118. 952 F. Supp. 167, 170 (S.D.N.Y. 1997); *see supra* notes 5-7 and accompanying text.

119. *See* United States v. Lynch, 162 F.3d 732, 735 (2d Cir. 1998).

120. *Id.*

121. *See Lynch*, 952 F. Supp. at 171; *see also* Stotler and Co. v. Able, 870 F.2d 1158, 1163 (7th Cir. 1989) (stating that "[a] district court ordinarily does not have to find that the violation was 'willful' to find a party in contempt, and it may find a party in civil contempt if he has not been 'reasonably diligent and energetic in attempting to accomplish what was ordered'").

tion against religion. Judicial discretion in the contempt context, however, is not limited to a consideration of religious motives. Rather, judges may be influenced by defendants' political or moral motives just as easily as by defendants' religious inspirations. Absent evidence that religiously motivated contemnors are disproportionately subject to misuse of the doctrine, the Free Exercise Clause is not the appropriate tool to rein in judicial discretion in the contempt context.

In sum, contempt as a discretionary power involves neither categorical exemptions for secular or mainstream religious needs discussed in *Fraternal Order of Police*, nor the assessment of individual motives discussed in *Sherbert*. Because neither characteristic that makes religious belief more susceptible to discriminatory treatment is present in the contempt context, discretionary contempt power is not sufficiently analogous to discretionary power in systems of individualized exemptions to warrant strict scrutiny review of its exercise. Rather, contempt is facially neutral and generally applicable, and its incidental burdens on religious exercise do not trigger strict scrutiny under *Employment Division v. Smith*.[122]

C. Statutory Protection: The Religious Freedom Restoration Act ("RFRA") and State RFRAs

Even if the Constitution does not require strict scrutiny of contempt findings or sanctions for religiously motivated contemnors, some federal and state statutes require government to demonstrate that a substantial burden on religious exercise is the least restrictive means to further a compelling government interest. This section considers whether these statutes apply to religious contemnors and, if so, whether they are likely to provide exemptions from the broad contempt power for religious motivations.

1. Background of RFRA Legislation

After the Supreme Court decided in *Employment Division v. Smith* that laws that are generally applicable and neutral towards religion apply to religious observers even if they incidentally burden the observers' free exercise rights,[123] it became clear that legislatures could exempt religious exercise from neutral and generally

122. 494 U.S. 872 (1990).

123. *Id.* at 872; *see* discussion *supra* Section III.B.1.

applicable laws,[124] but that the Free Exercise Clause does not require review of these laws under heightened scrutiny.[125]

In 1993, Congress heeded the Court's invitation to legislate exemptions by passing the Religious Freedom Restoration Act ("RFRA").[126] In language echoing Justice O'Connor's concurrence in *Smith*,[127] Congress recognized that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[128] The Act called for the courts to grant exemptions to any law that substantially burdens religious exercise unless the state demonstrates that the law is the least restrictive means to further a compelling state interest.[129] In other words, although *Smith* held that the Free Exercise Clause did not require the compelling state interest test to evaluate incidental burdens on religious exercise, Congress imposed a statutory requirement that all federal and state laws pass strict scrutiny before the government may impose substantial religious burdens. RFRA appears to embody the idea that religious beliefs and activities are special and ought to be privileged above other beliefs and activities.[130]

Although in *City of Boerne v. Flores* the Supreme Court held RFRA unconstitutional as applied to the states as an invalid exercise of Congressional enforcement powers under section five of the Fourteenth Amendment,[131] RFRA arguably applies to federal laws.[132] Further, several states in the wake of *Boerne* passed compa-

124. *See id.* at 890 (observing that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well").

125. *See, e.g.*, Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1468 (1999) (summarizing *Smith* as holding that "[t]he Free Exercise Clause . . . does not require exemptions; whether an exemption is available should be up to the legislature").

126. 42 U.S.C. § 2000bb (1994).

127. 494 U.S. at 901 (observing that "[t]here is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion") (O'Connor, J., concurring in part and dissenting in part).

128. 42 U.S.C. § 2000bb(a)(2).

129. *See* 42 U.S.C. § 2000bb-1.

130. As one commentator summarizes, "[t]he premise is that government should not do anything that discourages the free exercise choices of individuals and groups without strong justification." *See* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1, 23 (1994).

131. 521 U.S. 507 (1997).

132. *See, e.g.*, In re Young, 141 F.3d 854, 856, 863 (8th Cir.) (concluding "that, under the Bankruptcy Clause and the Necessary and Proper Clause of Article I of

rable legislation requiring strict scrutiny of laws imposing substantial burdens on religious exercise.[133] As a result, federal and many state laws that incidentally burden religious exercise must either survive strict scrutiny or else the government must provide a religious exemption from the law's reach.[134]

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the Constitution, RFRA is constitutional as applied to *federal law*" and RFRA does not violate the Establishment Clause), *cert. denied*, 528 U.S. 811 (1998); *see also* Ira C. Lupu, *Why the Congress was Wrong and the Court was Right—Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 793, 808 (1998) [hereinafter Lupu, *Why*] (observing that "RFRA remains in effect against the federal government unless and until the courts decide" Establishment Clause and separation of powers challenges to its constitutionality); Volokh, *supra* note 125, at 1473 (observing that "*Boerne* left RFRA in place as a restraint on federal action"). *But see* United States v. Grant, 117 F.3d 788, 792 n.6 (5th Cir. 1997) (expressing doubt as to the continued constitutionality of RFRA as applied to federal law).

133. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-571b(b) (West Supp. 2000) (stating that "the state or any political subdivision of the state may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest"); FLA. STAT. ANN. §§ 761.03(1)(a)-(b) (West Supp. 2000) (stating that "[t]he government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (a) Is in furtherance of a compelling governmental interest; and (b) Is the least restrictive means of furthering that compelling governmental interest"); 775 ILL. COMP. STAT. ANN. 35/15 (West Supp. 2000) (stating that "Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest"); R.I. GEN. LAWS § 42-80.1-3 (1998) (permitting the restriction of one's free exercise of religion only if it "is essential to further a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest"); *see also* Alabama Religious Freedom Amendment, ALA. CONST. of 1901, amend. no. 622 § V(b)(1)-(2) (Michie Supp. 1999) (1998 state constitutional amendment) (declaring that "Government may burden a person's freedom of religion only if it demonstrates that application of the burden to the person (1) Is in furtherance of a compelling governmental interest; and (2) Is the least restrictive means of furthering that compelling governmental interest").

134. Several commentators argue that both RFRA as applied to the federal government and state legislation similar to RFRA are unconstitutional, mainly as either violations of separation of powers principles or of the Establishment Clause. *See, e.g.*, Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really was Unconstitutional*, 95 MICH. L. REV. 2347 (1997) (arguing that RFRA violates the Establishment Clause "[b]y seeking to dictate church-state relations"); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994) (arguing that "RFRA is unconstitutional on three distinct but related grounds: it violates principles of religious freedom, exceeds the bounds of legitimate federal authority, and conscripts the judiciary in a constitu-

While RFRA is a statutory right, judges retain the power to determine when to grant religious exemptions due to the inconsistent application of the strict scrutiny test in the free exercise context. If the judge finds that a law substantially burdens a claimant's free exercise of religion, the judge must then evaluate whether the state has sufficiently proven that its law is the least restrictive means to further a compelling state interest.

Congress did not define these standards in RFRA, but rather referred the courts to existing case law to give content to them.[135] The pre-*Smith* case law applying strict scrutiny to claims of substantial burdens on religion, however, proved to be an inconsistent and ambiguous guide for courts.[136] While strict scrutiny usually invalidates laws in the free speech and racial discrimination contexts,[137] the test generally has been applied more inconsistently in free exercise jurisprudence.[138] Some free exercise cases have applied the test "only half-heartedly, finding it satisfied without a searching inquiry of the asserted need to regulate the particular religious conduct."[139] Other courts have interpreted the "substantial burden" prong of the test so narrowly that virtually nothing triggered the strict scrutiny test.[140] As a result of these applications of the test, courts rarely invalidated laws under strict scrutiny review in the free exercise domain; for example, one survey found that eighty-five out

tional charade"). Although these arguments are important in any discussion of RFRA's vitality for religious claimants, they are beyond the scope of this Note, and I will assume that these statutes are constitutional.

135. *See, e.g.*, Berg, *supra* note 130, at 3 (observing that "the statute does not further define the central 'compelling interest' requirement or the 'substantial burden' threshold that triggers it. Instead, Congress simply returned a number of important issues to the courts").

136. *See, e.g.*, *id.* at 19, 27 (noting that "[w]hen the Court has actually applied the 'compelling interest' test to free exercise exemptions from general laws, it has sent conflicting signals at best" and concluding that "it is impossible to find a uniform standard in the pre-*Smith* cases, given the differing degrees of review applied before *Smith* under the moniker of 'compelling interest' analysis").

137. *See id.* at 18-19. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (strict scrutiny results in invalidation of remedial affirmative action program).

138. *See* Eisgruber & Sager, *Vulnerability*, *supra* note 108, at 1247.

139. Berg, *supra* note 130, at 10. *See, e.g.*, United States v. Lee, 455 U.S. 252, 254-61 (1982) (finding compelling interest in requiring Amish employers to pay Social Security taxes even though their religion forbids them from receiving payments).

140. *See* Berg, *supra* note 130, at 10-11, 20. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (using deferential review to uphold prison's restrictions on Muslim inmate's religious services, and not requiring that restrictions be narrowly tailored means to further a compelling interest).

of ninety-seven free exercise claims brought in the 1980s, before *Smith*, failed in the federal courts of appeals.[141] RFRA explicitly states, however, that its purpose is "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*,"[142] two of the high water marks for free exercise protection.[143] Accordingly, it became unclear how courts would apply strict scrutiny under RFRA: would they continue the deference that tended to sustain government action, or would they apply strict scrutiny more rigorously in order to be consistent with RFRA's language and the application of the strict scrutiny test in free speech and racial discrimination cases?[144]

2. Applying RFRA

Building on these confusing foundations, courts have applied RFRA in inconsistent ways. RFRA was most successful in the zoning and prison contexts. For example, three separate courts used RFRA to grant injunctive relief from general zoning laws to churches that sponsored programs for the poor.[145] Further, several courts used RFRA to exempt inmates from general prison requirements that substantially burdened their religious exercise despite courts' traditional deference to prison administrators on matters of prison security.[146] On the whole, however, while RFRA was billed as

141. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1416-17 (1992); *cf.* Berg, *supra* note 130, at 11 n.40 (questioning accuracy of Ryan's survey and concluding that "the win-loss ratio for religious claimants is about 1:4 rather than 1:8—admittedly, still not a strong record of free exercise protection").

142. 42 U.S.C. § 2000bb(b) (1994).

143. *See* Berg, *supra* note 130, at 26 (arguing that courts ought to "emulate the way the compelling interest test was used in *Sherbert* and *Yoder*" because Congress explicitly referred to these cases in stating RFRA's aim to restore compelling interest test); *see also* Lupu, *Why*, *supra* note 132, at 801 (observing that "RFRA's provisions in many respects went cosmically beyond the pre-*Smith* law. That body of free exercise law had diluted the compelling interest test and had refused to apply it to government-controlled enclaves, including prisons and the military. RFRA purported to restore the compelling interest standard in its fullest and fiercest incarnation.").

144. *See* Berg, *supra* note 130, at 26 (noting that "[b]ecause the Court did not uniformly apply the compelling interest test before *Smith*, however, it is difficult to follow any general standard of previous case law").

145. *See* Stuart Circle Parish v. Board of Zoning Appeals, 946 F. Supp. 1225 (E.D. Va. 1996); Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994); Jesus Center v. Farmington Hills Zoning Bd. of Appeals, 215 Mich. App. 54 (1996).

146. *See, e.g.*, Estep v. Dent, 914 F. Supp. 1462, 1464 (W.D. Ky. 1996) (granting preliminary injunction preventing prison from cutting Hasidic inmate's

a sweeping source of protection for religious exercise, relatively few religiously motivated claimants have prevailed under the law. For example, one survey of state and federal RFRA cases prior to *Boerne* found that courts denied RFRA claims in 143 of 168 cases decided on the merits.[147]

a. Substantial Burden on Religion

Much of the reason for RFRA's inconsistent record is that courts have had little guidance concerning how to apply its standards. As one court noted, "whether a 'substantial burden' may be quantified is at the heart of the current constitutional religious debate."[148] There has been much uncertainty about how substantial a burden would have to be to trigger strict scrutiny. For example, one court stated that a plaintiff may make out a prima facie claim of substantial burden upon showing "that the policy burdens a religious belief, rather than a philosophy or a way of life, and that the plaintiff sincerely holds the burdened belief."[149] This is a relatively easy threshold to satisfy.[150] Other courts find a substantial burden, however, when the law impinges on a central belief.[151] Still others

earlocks); Luckette v. Lewis, 883 F. Supp. 471, 474, 483 (D. Ariz. 1995) (granting preliminary injunction permitting inmate to wear headcovering and to grow beard, as required by his religion); Campos v. Coughlin, 854 F. Supp. 194, 197-98 (S.D.N.Y. 1994) (granting injunctive relief to permit inmates to wear religious beads under their clothing).

147. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 585-591 (1998) [hereinafter Lupu, *Failure*] (concluding that "RFRA did not prove to be the guarantor of religious liberty its proponents promised").

148. Jasniowski v. Rushing, 287 Ill. App. 3d 655, 664 (1997), *vacated on other grounds*, 174 Ill. 2d 563 (1997). Courts have long recognized the importance of the substantial burden threshold. *See, e.g.,* Smith v. Fair Employment and Housing Commission, 12 Cal. 4th 1143, 1168 (1996) (cautioning that "to abandon the threshold requirement of a substantial burden would considerably alter the nature and efficacy of legal duties in our constitutional system").

149. Davie v. Wingard, 958 F. Supp. 1244, 1248 (S.D. Ohio 1997).

150. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (stating that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds"); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834 (1989) (stating that courts must find a religious claim genuine and sincere unless it is patently "bizarre or incredible" and finding defendant's claim "religious" even though he did not belong to a particular Christian sect); Welsh v. United States, 398 U.S. 333 (1970) (adopting broad definition of religion under draft exemption statutes).

151. *See generally* Mack v. O'Leary, 80 F.3d 1175, 1178-80 (7th Cir. 1996) (a substantial burden "forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is

raise the threshold by refusing to find a substantial burden unless the claimants demonstrate that the government forced them to violate specific requirements of their faith.[152] Because courts use such different standards, it is hard to predict when they will find a substantial burden.[153]

b. Least Restrictive Means to Further a Compelling State Interest

Even in cases where courts find strict scrutiny triggered by substantial burdens on a claimant's free exercise, courts often find that the government carries its burden of proving that its actions were the least restrictive means to achieve a compelling state interest. Part of the confusion arises here because RFRA does not define how courts should review government's asserted compelling interest. Some courts have scrutinized the asserted interest carefully, demanding specificity and not simply acceding to the government's broad claim of a compelling interest.[154] Other courts have often deferred to the government's summary claim of a compelling interest. Even in *Jasniowski*, which stated that courts ought to scrutinize

contrary to those beliefs"). *See, e.g.*, United States v. Hugs, 109 F.3d 1375, 1378 (9th Cir. 1997) (stating that because eagles and eagle parts play central role in Native American religions, court did "not question that the [law] imposed a substantial burden on the practice of such religions by restricting the ability of adherents to obtain and possess eagles and eagle parts"); Blanken v. Ohio Department of Rehabilitation and Correction, 944 F. Supp. 1359, 1364-65 (S.D. Ohio 1996) (adopting as test of substantial burden whether government substantially burdens central tenet of religion and denying that a religion must mandate the burdened religious expression).

152. *See* Berg, *supra* note 130, at 11; *see also* Lupu, *Failure*, *supra* note 147, at 594 (stating that "[t]he most common device has been to limit RFRA's coverage to . . . those cases in which government required action forbidden by religion or prohibited action compelled by religion," thus excluding "from statutory coverage a huge amount of behavior which is motivated, in whole or in part, by religious belief"). *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 449-51 (1988) (refusing to apply strict scrutiny because government's building of road through sacred Native American sites did not require claimants to violate their religion).

153. *Compare Jasniowski*, 287 Ill. App.3d 655, *vacated on other grounds*, 17 Ill.2d 563 (1997) (finding substantial burden where defendant-landlord was forced to choose between violation of housing ordinance prohibiting discrimination based on marital status and violation of his religious beliefs) *with Smith*, 12 Cal. 4th at 1170-76 (holding, on facts nearly identical to those in *Jasniowski*, that there was not a substantial burden on landlord's free exercise).

154. *See e.g., Jasniowski*, 287 Ill. App.3d at 665 (refusing generalized assertion of city's compelling interest in prohibiting housing discrimination and requiring city to demonstrate compelling interest in prohibiting housing discrimination against unmarried couples specifically).

the government's asserted interests carefully, the dissent noted that the court found a compelling interest in prohibiting housing discrimination against unmarried, cohabitating couples absent any evidence of the number of people affected by the discrimination or any other evidence relevant to the city's need for the ordinance.[155] Similarly, courts have generally deferred to government's claimed compelling interest in broad goals, like prison safety,[156] disease prevention in prison,[157] or endangered species preservation.[158] At least one court has suggested that the government had a compelling interest because the law served "public health, safety and morals,"[159] language more commonly associated with deferential rational basis review. As two commentators opined, RFRA's compelling interest test may well "have erected a threshold test that subjects a religious burden to prevailing political preferences"[160] such that courts are likely to validate a compelling interest in most state action. Accordingly, as with the substantial burden prong, courts have been inconsistent, making it difficult to generalize about the content of the compelling interest prong.

Courts have also been rather inconsistent in reviewing whether the government has proven that there are no less restrictive means to achieve its compelling state interest. Under pre-*Smith* case law, this prong generally meant that the "limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[161] Courts have not, however, always applied such searching scrutiny to government's choice of alternatives. For example, even when less restrictive means were available, some courts have asked whether

155. 155 *See id.* at 673 (O'Brien, J., dissenting).

156. *See, e.g.*, Davie v. Wingard, 958 F. Supp. 1244 (S.D. Ohio 1997) (finding that regulation of hair length furthered compelling interest in prison safety, security, and discipline).

157. *See, e.g.*, Karolis v. New Jersey Department of Corrections, 935 F. Supp. 523, 527 (D.N.J. 1996) (finding compelling state interest in administering the Mantoux Test in prisons to prevent spread of tuberculosis).

158. *See, e.g.*, United States v. Hugs, 109 F.3d 1375, 1378 (9th Cir. 1997) (finding "compelling interest in protecting eagles as a threatened or endangered species").

159. City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc., 302 Ill. App. 3d 564, 572 (1998) (finding that "[t]he city has a cognizable compelling interest to enforce its zoning laws. . . .[W]e conclude that public health, safety and morals are served by the ordinance.").

160. John W. Whitehead and Alexis I. Crow, *The Religious Freedom Restoration Act: Implications for Religiously-Based Civil Disobedience and Free Exercise Claims*, 33 WASHBURN L.J. 383, 394, 396 (1994).

161. Procunier v. Martinez, 416 U.S. 396, 413 (1974).

these alternatives were too expensive for it to be reasonable to expect the government to use them.[162] This is far from a demanding standard of scrutiny. Courts generally have required, however, more than simply a bald assertion that there are no less restrictive means to achieve government interests. Even in areas of customary deference, at least some courts demand more detailed proof for the government to sustain its burden.[163]

A review of RFRA litigation reveals few predictable trends in application of the statute's test. Accordingly, judges have enormous influence over whether religious claimants will find relief under the RFRA statutory rights model.[164] The lack of congressional guidance means that religious believers often cannot predict in advance whether courts are more likely than not to grant them exemptions under RFRA. As such, while RFRA holds out the promise of exemption of religious defendants from general laws that substantially burden their religious beliefs, it is unclear how powerful or consistent the statutory protection is as applied.

3. RFRA as a Defense to Contempt

As several cases illustrate, religiously motivated individuals in jurisdictions governed by a RFRA statute may seek to invoke RFRA for an exemption from contempt. The defendant in *Hunt v. Hunt*,[165] for instance, invoked RFRA in defense to the lower court's contempt finding for nonpayment of child support. First, because the court order to pay child support made the defendant choose

162. *See* Lupu, *Failure*, *supra* note 147, at 596 (citing cases).

163. *See, e.g.*, Cheema v. Thompson, 67 F.3d 883, 885 (9th Cir. 1995) (refusing to find "that nothing short of a wholesale ban [on students carrying traditional kirpans] would adequately protect student safety" because "the school district refused to produce any evidence whatsoever to demonstrate the lack of a less restrictive alternative"); Jesus Center v. Farmington Hills Zoning Bd., 215 Mich. App. 54, 67-68 (1996) (finding that the zoning board did not pursue its compelling state interest in protecting property interests and accommodating competing property uses by the least restrictive means where the church shelter "exhibited a willingness and an ability to work with city officials . . . to mitigate community concerns").

164. As one commentator observes, "[b]oth the strict scrutiny test's literal terms and the case law that has emerged under it in religious freedom cases are so vague that they don't meaningfully constrain a judge's range of options, leaving almost unlimited room for judges' own moral and practical judgments about the propriety of granting an exemption." Volokh, *supra* note 125, at 1494.

165. 648 A.2d 843 (Vt. 1994); *see supra* notes 1-2 and accompanying text. Note that absent RFRA, the state did not have to justify its substantial burden on the defendant's free exercise, as the child support laws were neutral and generally applicable. The Vermont Supreme Court, however, applied RFRA to the court's contempt finding.

between violating his faith or risking substantial penalties such as imprisonment and fines, the court found that the defendant made a showing that the support order substantially burdened his free exercise of religion.[166] The court found that the state failed to meet its burden of showing that the contempt order, as distinguished from the support order,[167] was the least restrictive means available to further the compelling interest in protecting children; the state had not presented any evidence at all on this point at the contempt hearing.[168]

A recent decision of the United States Court of Appeals for the Third Circuit, *In re the Grand Jury Empanelling of the Special Grand Jury*,[169] also presents a defendant's invocation of RFRA as a defense to a finding of contempt. The defendants in that case violated a court order requiring compliance with a subpoena to testify before a grand jury with immunity; the defendants claimed that testifying against their father would violate their deeply held Orthodox Jewish beliefs.

Despite some skepticism that their faith actually prohibited their testimony, the district judge assumed that the defendants demonstrated a substantial burden on their free exercise rights.[170] The burden then shifted to the government to prove that enforcing the subpoena was the least restrictive means to further a compelling state interest. The appellate court found that while the Supreme Court has not stated that ensuring compliance with grand jury subpoenas is always a compelling interest, "[t]he District Court correctly recognized that the duty to prosecute persons who commit serious crimes is part and parcel of the government's 'paramount responsibility for the general safety and welfare of all its citizens.'"[171] Because many nonviolent crimes, like white-collar

166. *See id.* at 853.

167. The court found that promoting the health and welfare of children is a compelling state interest and that the order to pay child support was the least restrictive means available to further this interest because the state lacks "any other practical means to impose the support obligation." *Id.* at 851.

168. *See id.* at 854.

169. 171 F.3d 826 (3d Cir. 1999).

170. *See id.* at 830.

171. *Id.* at 832 (internal citation omitted). The district court found that the government had a compelling interest in investigating and prosecuting crime and that this interest encompassed securing grand jury testimony of witnesses. *See id.* at 830-31. On appeal, the defendants claimed that the court should not have found a compelling interest based on this generalized need and that the court should be obliged to consider the relationship between the testimony sought and the nature of the crime being investigated before determining whether the government's interest is compelling. *See id.* at 831.

crimes, "seriously impact the public welfare," it is an interest of the highest order for the government to investigate them.[172]

The toughest prong for the government to establish was that enforcing the subpoenas constituted the least restrictive means of advancing its compelling interest in investigating serious crimes. The defendants alleged that the government could serve its interests equally well through other witnesses and sources.[173] Both the district and appellate courts concluded that the government satisfied its burden of proving that there were no less restrictive means of achieving its compelling interest because its affidavit revealed that "[t]here [wa]s substantial reason to believe that the witnesses possess relevant information necessary for the prosecution of serious crimes."[174] Rather than employ the majority's low threshold (that is, a "substantial reason to believe" the defendants possessed relevant information needed to prosecute), the dissent would have required the government much more explicitly to prove the need for the testimony as well as the testimony's unavailability through less restrictive means.[175]

As these cases illustrate, the extent to which courts will exempt religiously motivated individuals from findings of contempt under RFRA remains unclear. The substantial burden, compelling interest, and least restrictive means inquiries are fact-specific, and thus whether a defendant will be exempt from generally applicable contempt findings will turn on the facts of the contemptuous behavior and a balancing of the particular state interests at stake. Further, as a comparison of the opinions in *Special Grand Jury* vividly illustrates, there is wide variance in judicial application of RFRA's prongs; because RFRA builds on conflicting and ambiguous case law, widely divergent judicial applications may all find support in the jurisprudence regarding the degree of scrutiny required. Accordingly, the ability of religious claimants to successfully invoke RFRA as a defense depends not only upon the degree of religious burden, the

172. *Id.* at 832.

173. *See id.*

174. *Id.* at 832-33.

175. The dissent warned against "the unintended consequence of creating a per se rule that will preclude a court from ever concluding that there is a less restrictive means for obtaining information than actually compelling grand jury testimony." *Id.* at 842 (McKee, J., dissenting). The dissent also stated that the district court on remand ought to probe the nature of the investigation, the specific testimony sought, and the availability of other witnesses and documentary evidence in determining if the government had proven that enforcing the subpoena despite the substantial burden on the defendants' free exercise of religion was the least restrictive means of furthering a compelling state interest. *See id.* at 839 n.3.

nature of the government interest, and the availability of less restrictive means to achieve the compelling interest, but also upon the judicial philosophy of the court before which the claims are litigated.

Despite these inconsistencies, it is possible to generalize to a limited degree about the likelihood that contempt sentences, even if deemed a substantial burden on religion, will be the least restrictive means of furthering a compelling state interest. To begin with, religious contemnors often will succeed in demonstrating a substantial burden even under the exacting tests that have blocked many RFRA claims. When individuals are willing to risk substantial fines or imprisonment in the name of their religion, their motivations will often be central to their religion, if not required by it. Second, there is a long line of cases finding that "the effective operation of a court of justice is a compelling state interest."[176] As a result, the purpose of contempt as a means to promote order and the achievement of justice increases the likelihood that courts will find the government's interest compelling. Several courts have indeed been quite deferential to the government's claim that its interest is compelling.[177]

As this analysis indicates, the real battleground for religious contemnors is the least restrictive means prong.[178] Because contempt is a highly discretionary power, it is certainly arguable that in some cases its invocation may not be the least restrictive means of furthering a compelling state interest. Instead, judges may be required to exhaust less religiously burdensome alternatives before exercising their discretionary power.

Despite this argument, it is unlikely in practice that appellate courts will second-guess trial courts' judgments about alternatives to contempt. Although the Constitution protects religion, our jurisprudence has zealously guarded judges' contempt power as an inherent and necessary power to ensure obedience to court orders.[179] This tradition of deference strongly suggests that courts will continue to defer to trial courts' judgments regarding the need for con-

176. State v. Bing, 253 S.E.2d 101, 102 (S.C. 1979); *see, e.g.,* In re Williams, 269 N.C. 68, 80 (1967) (remarking that "[t]he effective operation of its courts of justice is obviously a 'compelling State interest'").

177. *See supra* notes 155-60 and accompanying text.

178. Two commentators opine that "[t]his prong of the test offered the most potential for free exercise claimants and is, perhaps, the only hope for claimants and defendants under the Religious Freedom Restoration Act." Whitehead and Crow, *supra* note 160, at 389.

179. *See* discussion *supra* Section II.A.

tempt and the lack of less restrictive alternatives. RFRA's broad mandate to scrutinize government's ends and means is not likely to unravel the long history of judges' discretion in the contempt context.

While conceivable circumstances would prompt courts to find that the government failed to meet either or both prongs of the RFRA standard, religious exemptions from contempt will not be easily granted using RFRA. As with all RFRA claims, the outcome of using the statute to defend against contempt will turn on the individual facts of each case and how the court applies RFRA's ambiguous standards. In view of the traditional deference granted to judges regarding their use of the contempt power, claimants are likely to face extremely unpredictable and uncertain journeys in attempting to invoke RFRA to exempt them from the burdens of contempt on their religious beliefs.

IV
CONCLUSION

Our system has long recognized contempt as a vital power of courts, one that is necessary to protect order and the due administration of justice. When individuals violate court orders, judges have the power to find them in contempt and generally will not mitigate punishment simply because the noncompliance was motivated by the individuals' politics or morals. Court orders may incidentally burden religious exercise, but none of the three theories explored in this Note—the necessity defense, Free Exercise Clause protection, or statutory rights under the Religious Freedom Restoration Act—justify treating religious motives in a categorically different fashion from secular motives in the contempt context. While this does not eliminate the very real burden on religion that contempt charges may inflict, existing law simply does not offer a framework for relief. Like all individuals subject to the jurisdiction of the courts, religious contemnors are bound to follow court orders as they are bound to follow any law. To vindicate their religious beliefs, claimants will have to attack the underlying laws that serve as the basis for the court order or else convince legislators to limit judges' discretionary contempt power. Once courts validate a court order, however, even religiously motivated contemnors will face a difficult uphill battle to find an exemption.