

Unraveling the Uncertainties of the Separation of Powers Between Pennsylvania’s General Assembly and the Judiciary in the Field of Criminal Contempt: The Constitutionality of Pennsylvania’s Criminal Contempt Statutes After *Commonwealth v. McMullen*

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INTRODUCTION

In connection with crimes in general, the separation of powers doctrine creates a natural tension between the General Assembly and the courts. Under the police power,¹ the General Assembly has

1. Under the United States Constitution, the powers not delegated to the federal government by the Constitution are reserved to the States or to the people. U.S. CONST. amend. X. The Pennsylvania Supreme Court recognized the General Assembly's police power in *Gambone v. Commonwealth*, 101 A.2d 634, 636–37 (Pa. 1954). “State legislatures and local governments have a police power to enact laws for the benefit of public safety, health, welfare, and even morality. But those laws are subject to judicial review as to whether the legislation is reasonably related to those purposes.” Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511, 528 (1999–2000). For an excellent general discussion of the police power as well as its applicability to local government, see *What Is The “Police Power”?*, PA. LEGISLATOR'S MUN. DESKBOOK 87–88 (3d ed. 2006), available at http://www.lgc.state.pa.us/deskbook06/Issues_Health_Welfare_and_Safety_01_Police_Power.pdf.

the power² to make substantive criminal laws that proscribe conduct from minor offenses to murder³ and to set the penalties⁴ for their violation.⁵ In contrast, the Pennsylvania Supreme Court, through its rulemaking authority, has the power to create the procedure that the courts will follow during prosecutions for violations of criminal laws.⁶ The courts also have the power to enter orders⁷ that impose sentence.⁸ The tension that arises from the legislative power to create substantive crimes and the judicial power to create

2. “Power . . . means the ability of a decision-making body to order or effect a certain result.” *Riedel v. Human Relations Comm’n of City of Reading*, 739 A.2d 121, 124 (Pa. 1999) (citing *Del. River Port Auth. v. Pa. Pub. Util. Comm’n*, 182 A.2d 682, 686 (Pa. 1962)). Judges and lawyers often confuse “power” and “jurisdiction,” as the terms are not interchangeable. *Id.* “Jurisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs.” *Id.* Power or jurisdiction may confer “authority” to act. *Cf.* BLACK’S LAW DICTIONARY 152 (9th ed. 2009) (“supervisory authority”).

3. See 18 PA. CONS. STAT. ANN. §§ 101–9352 (West 2000) (the “Crimes Code”); see also *id.* § 107(a) (providing that preliminary provision of Title 18 are applicable to offenses defined by Title 18 or any other statute).

4. See *id.* § 1102 (penalties for murder); *id.* § 1103 (felony offenses); *id.* § 1104 (misdemeanor offenses); *id.* § 1105 (summary offenses); see also 42 PA. CONS. STAT. ANN. §§ 9701–9799.41 (West 2014) (the “Sentencing Code”).

5. There is no specific provision in the Pennsylvania Constitution that confers upon the General Assembly the power to establish crimes and penalties. “The General Assembly is treated by the Pennsylvania courts as a body of general legislative powers except where there are express or implied constitutional limits.” Bruce Ledewitz, *Summary of Pennsylvania (PA) Constitutional Law*, <http://www.duq.edu/academics/gumberg-library/pa-constitution/summary-of-pa-constitutional-law-by-bruce-ledewitz/> (last visited Feb. 27, 2014). “It is . . . settled ‘that the legislature has the exclusive power to pronounce which acts are crimes, to define crimes, and to fix the punishment for all crimes. The legislature also has the sole power to classify crimes’” *Commonwealth v. Eisenberg*, 98 A.3d 1268, 1283 (Pa. 2014) (quoting *Commonwealth v. Church*, 522 A.2d 30, 35 (Pa. 1987)). It should be noted, however, that in cases prior to the adoption of the 1968 Pennsylvania Constitution, the courts recognized the power of the General Assembly to establish criminal procedure in addition to making substantive criminal laws and fixing penalties. See, e.g., *Commonwealth v. Cano*, 133 A.2d 800, 805 (Pa.), *cert. denied, appeal dismissed*, 355 U.S. 182 (1957); *Van Swartow v. Commonwealth*, 24 Pa. 131, 134 (1854) (“There is nothing to forbid the legislature from creating a new offence and prescribing what mode they please of ascertaining the guilt of those who are charged with it.”).

6. PA. CONST. art. V, § 10(c).

7. The jurisdiction of a court to enter and enforce an order derives from a legislative statute within the Judicial Code:

Every court shall have power to issue, under its judicial seal, every lawful writ and process necessary or suitable for the exercise of its jurisdiction and for the enforcement of any order which it may make and all legal and equitable powers required for or incidental to the exercise of its jurisdiction, and, except as otherwise prescribed by general rules, every court shall have power to make such rules and orders of court as the interest of justice or the business of the court may require.

42 PA. CONS. STAT. ANN. § 323 (West 2004).

8. A court’s power to impose sentence is conferred by the Sentencing Code. 42 PA. CONS. STAT. ANN. § 9703. The power was also conferred by section 9751 (Sentencing Judge), but the Supreme Court subsequently suspended section 9751 as being inconsistent with Pennsylvania Rule of Criminal Procedure 700 (Sentencing Judge). See PA. R. CRIM. P. 1101(6).

related procedural law is exacerbated when contempt is in play because criminal contempt is a crime,⁹ yet one that would exist even if the legislature never entered the field, as the power to define and punish contempt is inherent in the courts. Thus, contempt statutes reduce the power of the courts while any overly restrictive contempt statute has the potential to render the courts powerless.¹⁰ The overarching constitutional issue is the authority of the General Assembly to legislate substantive and procedural contempt provisions.

For almost two hundred years, the Pennsylvania courts tolerated legislative incursions into their inherent contempt power.¹¹ Whether by indifference to separation of powers or by design, Pennsylvania's lower appellate courts even embraced certain aspects of the General Assembly's statutory sentencing scheme as applying to judges when sentencing defendants convicted of criminal contempt.¹² Then, by chance—in a case in which the Pennsylvania Superior Court *sua sponte* raised an issue of constitutional dimension—the Pennsylvania Supreme Court, in *Commonwealth v. McMullen*,¹³ was constrained to address the constitutionality of a criminal contempt statute that defined one form of contempt and fixed the maximum penalty for violation of it. A decisive majority held that the General Assembly could not legislate the crime of contempt,¹⁴ limit the power of a court to punish for contempt,¹⁵ or create a right to a jury trial,¹⁶ which would give twelve citizens the power to nullify a judge's authority to take action that the judge deems reasonably necessary for the efficient administration of justice.

Part I of this article begins with a definition of contempt, followed, in Part II, by a synopsis of the types, origin, underpinnings, and nature of a court's contempt power. Against this backdrop, which is essential to understanding Pennsylvania contempt law pre- and post-*McMullen*, Part II presents the historical development of contempt from a chronological perspective, highlighting the

9. *Crozer-Chester Med. Ctr. v. Moran*, 560 A.2d 133, 137 (Pa. 1989); *Matter of Johnson*, 359 A.2d 739, 742 (Pa. 1976); *Commonwealth v. Newton*, 1 Grant 453, 454 (Pa. 1857) ("substantive criminal offense"); *In re Williamson's Case*, 26 Pa. 9, 19 (1855); *Diamond v. Diamond*, 715 A.2d 1190, 1195 n.6 (Pa. Super. Ct. 1998); *Cipolla v. Cipolla*, 398 A.2d 1053, 1055 (Pa. Super. Ct. 1979); *Borough of Beaver v. Steckman*, 728 A.2d 418, 421 (Pa. Commw. Ct. 1999).

10. *See Williamson's Case*, 26 Pa. at 18.

11. *See infra* Part II; *Ricci v. Geary*, 670 A.2d 190, 191 (Pa. 1996) (citing to section 4131 in Title 42, which was amended and renumbered in 1982 to section 4132).

12. *See infra* notes 122–27 and accompanying text.

13. 961 A.2d 842 (Pa. 2008).

14. *Id.* at 850.

15. *Id.*

16. *Id.* at 848.

separation of power issues and constitutional clash between the General Assembly and the courts. Part III discusses and analyzes the *McMullen* Court's multiple opinions. Finally, in Parts IV and V, this article surveys the current state of the law of contempt post-*McMullen* and offers an opinion about the constitutionality of the remaining contempt statutes.

I. CONTEMPT BACKGROUND

A. *Definition of and Distinction Between Civil and Criminal Contempt*

Substantively, contempt is a broad concept that can cover a multitude of conduct; the definition of contempt can be complicated and the outer contours of contemptuous behavior can be difficult to discern.¹⁷ Contempt of court has been described as “the Proteus of the Legal World, assuming an almost infinite diversity of forms.”¹⁸ A simple definition of contempt is “an affront to legal authority”¹⁹ In general²⁰ and under Pennsylvania law,²¹ contempt encompasses two separate and distinct concepts: (1) violation of an official order; or (2) interruption or interference with an official proceeding.

Contempt is either civil or criminal, although the same facts or conduct may constitute both.²² Although the dividing line between

17. Ronald Goldfarb, *The Varieties of the Contempt Power*, 13 SYRACUSE L. REV. 44, 44 (1961–1962) [hereinafter *Varieties*]. See generally Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L. REV. 1 (1961).

18. *Varieties*, *supra* note 17, at 44 n.1 (citing Joseph Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780 (1943)). In 1792, Lord Hardwicke divided contempt into three categories:

There are three different sorts of contempt. One kind of contempt is, scandalizing the court itself. There may be a contempt of this court, in abusing parties who are concerned in causes here. There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard.

Id. at 44 (citing *St. James Evening Post Case*, 26 Eng. Rep. 683, 684 (Ch. 1742)).

19. *Cnty. Election Bd. of Phila. v. Rader*, 58 A.2d 187, 189 (Pa. Super. Ct. 1948).

20. See Edward M. Dangel, *Contempt* § 1, at 2 (1939):

Contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.

21. *Commonwealth ex rel. Roviello v. Roviello*, 323 A.2d 766, 772 (Pa. Super. Ct. 1974) (“The basis for contempt is to provide punishment for contemptuous disregard of a court’s authority.”); see *Slater v. Rimar Inc.*, 338 A.2d 584, 589 & n.11 (Pa. 1975) (explaining that a trial judge has inherent supervisory power to control litigation over which he is presiding, which is distinct from the inherent contempt power, and stating that “[g]enerally speaking, one is guilty of contempt when his conduct tends to bring the authority and administration of the law into disrespect.”) (citation omitted); *Commonwealth ex rel. Litz v. Litz*, 154 A.2d 420, 422 (Pa. Super. Ct. 1959); *Commonwealth v. Peters*, 113 A.2d 327, 330 (Pa. Super. Ct. 1955).

22. *Stahl v. Redcay*, 897 A.2d 478, 486 (Pa. Super. Ct. 2006) (citing *Brocker v. Brocker*, 241 A.2d 336, 339–40 (Pa. 1968)).

civil and criminal contempt has been described as “sometimes shadowy or obscure,”²³ the distinction depends upon the purpose sought by the court in its use.²⁴

Generally, a sentence of civil contempt will be imposed “to prospectively coerce the contemnor to comply with an order of the court.”²⁵ In the case of civil contempt, the contemnor has “the key to the jail house” and may be released by the court as soon as the contemnor complies with the order.²⁶ The court may advance a party’s private interests by imposing remedial punishment, such as a fine payable to the aggrieved party, as compensation for actual loss.²⁷

In contrast, a court uses criminal contempt to maintain order in the courtroom, vindicate the court’s authority, and protect the interests of the public.²⁸ In terms of judicial use, a judge uses civil contempt to compel a party to comply with specific rules or orders and uses criminal contempt to punish a contemnor’s completed act for which there is no reversal.²⁹

B. *Direct Versus Indirect Criminal Contempt*

Criminal contempt can be characterized as one of two types: direct or indirect.³⁰ Direct criminal contempt “consists of misconduct

23. *Id.*

24. *Commonwealth v. McMullen*, 881 A.2d 841, 845 (Pa. Super. Ct. 2005).

25. *In re Martorano*, 346 A.2d 22, 28 (Pa. 1975); *see also McMullen*, 881 A.2d at 846 (“Civil contempt is . . . an available remedy for obstruction in the presence of the court and may be used to compel obedience by imposing fine or imprisonment conditioned on obedience to the court’s order.”).

26. *McMullen*, 881 A.2d at 846.

27. *Stahl*, 897 A.2d at 486–87.

28. *See Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 441 (1911) (stating that the sentence for criminal contempt is punitive and is used to vindicate the authority of the court); *Commonwealth v. Marcone*, 410 A.2d 759, 762 (Pa. 1980) (citing *United States v. United Mine Workers of America*, 330 U.S. 258, 302–03 (1947)) (“Criminal contempts . . . have as a dominant purpose the vindication of the dignity and authority of the court and to protect the interests of the general public.”); *In re Aungst*, 192 A.2d 723, 725 (Pa. 1963) (“[T]he court . . . should be the primary protector of its judicial dignity and conscience . . . and is, therefore, empowered to protect itself from insult.”); *Schlesinger v. Musmanno*, 81 A.2d 316, 318 (Pa. 1951) (quoting *In re Myers & Brei*, 83 Pa. Super. 383, 387–88 (1924)) (“Courts undoubtedly have the power to punish contempts and necessarily must have it to protect themselves from insult and enforce obedience to their process.”); *In re Petition of Start*, 142 A.2d 449, 452 (Pa. Super. Ct. 1958) (“The power of a court to punish for contempt is essential to the administration of justice; it enables the court to protect itself from insult and to enforce obedience to its process.”).

29. *McMullen*, 881 A.2d at 845.

30. *Knaus v. Knaus*, 127 A.2d 669, 671 (Pa. 1956).

of a person in the presence of the court, or so near thereto to interfere with its immediate business”³¹ Indirect criminal contempt “consists of the violation of an order or decree of a court which occurs outside the presence of the court.”³² Each has its own distinct procedures and confers distinct procedural rights.³³ A contemnor charged with indirect criminal contempt will be afforded the traditional or usual procedural safeguards required to convict him of the crime,³⁴ which includes notice of the order,³⁵ notice of the hearing,³⁶ and an opportunity to be heard.³⁷

A judge may adjudicate and punish direct contempt summarily, which means that the court acts instantly to suppress and punish the misconduct.³⁸ The judge ignores the traditional steps involved in an adjudication, such as the issuance and service of process, conducting an evidentiary hearing, receiving briefs, and any other procedural steps and substantive rights attendant to a conventional court trial.³⁹ Adherence to the panoply of procedural protections is deemed unnecessary because the judge is a witness⁴⁰ to the contemptuous conduct.⁴¹ Summary punishment allows the judge immediately to vindicate his authority in front of those observing the court proceeding.⁴² Unless the contemptuous conduct is apparent, such as profanity directed at the court, the notice requirement of

31. *Id.* (citing Act of June 16, 1836 (P.L. 784), §§ 23, 24 (codified as amended at 17 P.S. §§ 2041, 2042 (1930) (repealed 1976))). The nonappearance of a party, witness, or attorney who is properly summoned is considered “in the presence of the court” and a direct criminal contempt. *See Williams v. Williams*, 721 A.2d 1072, 1073 (Pa. 1998); *Stewart v. Foxworth*, 65 A.3d 468, 472 (Pa. Super. Ct. 2013); *Himes v. Himes*, 833 A.2d 1124, 1127 (Pa. Super. Ct. 2003) (citing *Williams*, 721 A.2d at 1073; *Commonwealth v. Odom*, 764 A.2d 53, 54 (Pa. Super. Ct. 2000)).

32. *Id.* at 672.

33. *Bruzzi v. Bruzzi*, 481 A.2d 648, 651 (Pa. Super. Ct. 1984).

34. *In re Martorano*, 346 A.2d 22, 29 (Pa. 1975) (citing cases and statute).

35. *Commonwealth v. Garrison*, 386 A.2d 971, 980 (Pa. 1978); *Commonwealth v. Jackson*, 532 A.2d 28, 32 (Pa. Super. Ct. 1987).

36. *Jackson*, 532 A.2d at 32.

37. *Id.*

38. *Commonwealth v. Marcone*, 410 A.2d 759, 763 (Pa. 1980) (citing *Cooke v. United States*, 267 U.S. 517, 536 (1925)).

39. *Id.* (citing *Sacher v. United States*, 343 U.S. 1, 9 (1952)).

40. A judge may find a person in direct criminal contempt even if the judge does not personally witness the contemptuous conduct because the phrase “in the presence of the court” has “not [been] so narrowly interpreted to include only those acts that the judge sees with his or her own eyes.” *Commonwealth v. Brown*, 622 A.2d 946, 948 (Pa. Super. Ct. 1993).

41. *Crozer-Chester Med. Ctr. v. Moran*, 560 A.2d 133, 136 (Pa. 1989) (“It is summary because its proofs are evident; the authority and orderly process of the court are directly confronted upon its open record and the evidence is plain and usually self-accusing.”).

42. *See supra* note 28 and accompanying text.

due process might require the judge to give a warning⁴³ or enter an order that is definite and precise.⁴⁴

II. THE ORIGIN AND HISTORY OF, AND LEGISLATIVE INCURSION INTO, THE PENNSYLVANIA COURTS' INHERENT CONTEMPT POWER

It is well settled that Pennsylvania courts have the inherent power to punish individuals for contempt.⁴⁵ The contempt power's exact origin is unknown; however, the power can most accurately be traced back to very early English common law⁴⁶ but applied only to courts of record.⁴⁷ One court suggested that inferior courts could exercise contempt power if the legislature granted the power.⁴⁸ A

43. Ricci v. Geary, 670 A.2d 190, 193 n.1 (Pa. 1996).

44. Commonwealth v. Baker, 766 A.2d 328, 332 (Pa. 2001).

45. See Commonwealth v. Bowden, 838 A.2d 740, 760 (Pa. 2003) ("Courts possess an inherent power to enforce their orders by way of the power of contempt."); Commonwealth v. Marcone, 410 A.2d 759, 763 (Pa. 1980) ("In . . . a criminal contempt, the law has long recognized the need to provide the courts with the power to impose summary punishment for such conduct in appropriate situations."); Commonwealth v. Haefner, 368 A.2d 686, 688 (Pa. 1977) ("The right to punish for . . . contempt is inherent in all courts.") (quoting Appeal of Levine, 95 A.2d 222, 225 (Pa. 1953)); Bocker v. Bocker, 241 A.2d 336, 338 (Pa. 1968) ("The Courts have always possessed the inherent power to enforce their Orders and Decrees by imposing penalties and sanctions for failure to obey or comply therewith."); *In re Williamson's Case*, 26 Pa. 9, 18 (1855) ("Does anybody doubt the jurisdiction of the District Court to punish contempt? Certainly not. All courts have this power, and must necessarily have it . . . Without it, they would be utterly powerless.").

46. See *Green v. United States*, 356 U.S. 165, 189 (1958) (Frankfurter, J., concurring) ("[T]he most authoritative student of the history of contempt of court has impressively shown that from the reign of Edward I it was established that the Court had the power to punish summarily contempt committed in the actual view of the Court.") (quoting SIR JOHN C. FOX, *THE HISTORY OF CONTEMPT OF COURT* 49–52 (1927)); see also *Penn Anthracite Mining Co. v. Anthracite Miners of Pa.*, 174 A. 11, 13 (Pa. Super. Ct. 1934) ("Courts of constitutional origin have inherent common-law power, independent of statute, to punish for contempt.").

The common law of England, as to crimes, became the law of Pennsylvania except insofar as it has been abrogated by statute. See *Commonwealth v. Mochan*, 110 A.2d 788, 790 (Pa. Super. Ct. 1955) (citing 15 AM. JUR. *Common Law* § 4 (1937); 22 C.J.S. *Criminal Law* § 19 (current version at 22 C.J.S. *Criminal Law* § 29 (2006)); cf. 1 PA. CONS. STAT. ANN. § 1503 (West 2008) (declaring that common law of England shall be deemed to have been in force from and after February 10, 1777).

47. See *Albright v. Lapp*, 26 Pa. 99, 101 (1856) (finding that [the 1836 summary contempt law] applies only to "the higher courts, which are in every sense courts of record" and not to justices of the peace); *Cnty. Election Bd. of Phila. v. Rader*, 58 A.2d 187, 189 (Pa. Super. Ct. 1948) (explaining that the power of common pleas courts to punish contempt does not, in the absence of specific legislation, extend to a board or an officer whose authority is not derived from a court); *Case of Llewellyn*, 2 Pa. D. 631, 632 (Ct. Com. Pl. Luzerne Cnty. 1893) ("It may be stated, as a legal principle fully and firmly established, that the power to inflict summary punishment by imprisonment for contempt, is limited to courts of record . . ."). But see *Fitler v. Probasco*, 2 Browne 137, 143 (Pa. Commw. Ct. Phila. Cnty. 1811) (finding that a justice of the peace does possess the power to summarily punish for contempt but only when exercised in his *judicial* capacity and not when he is acting ministerially).

48. See *Llewellyn*, 2 Pa. D. at 632 (citing *Albright*, 26 Pa. at 101) ("The [General Assembly] intended to define, with all possible precision, the cases in which higher courts might exercise the power, and to restrain its exercise in all other cases. If they had intended to give

court's authority to punish for contempt is found in Pennsylvania appellate jurisprudence beginning in 1788.⁴⁹ For two decades thereafter, the courts exercised their contempt power without legislative encroachment.⁵⁰

A. *Judicial Code (Title 42) Statutes*

1. *Statutory Limitations and Expansions of the Contempt Power*

The General Assembly's initial incursion into the inherent contempt power appears to have occurred in 1809. That year, the General Assembly enacted a statute⁵¹ stating that the power of judges to issue attachments⁵² and to impose summary punishments⁵³ would be restricted⁵⁴ to certain types of contempt:

SECT. I. BE it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That from and after the passing of this act, the power of the judges of the several courts of this commonwealth to issue attachments and inflict summary punishments for contempts of court shall be restricted to the following cases, that is to say, To the official misconduct of the officers of such courts respectively, to the negligence or disobedience of officers, parties, jurors, or witnesses against the lawful process of the court, to the misbehavior of any person in the presence of the court, obstructing the administration of justice.⁵⁵

it to justices of the peace they would have said so."); *see also* *Brooker v. Commonwealth*, 12 Serg. & Rawle 175, 176 (Pa. 1824).

49. *See* *Respublica v. Oswald*, 1 Dall. 319, 326 (Pa. 1788); *Mifflin v. Bingham*, 1 Dall. 272, 274 (Pa. 1788) (explaining, without citing to statute, that witness was subject to contempt of court by disobeying subpoena process).

50. *See* *Blackburn v. Markle*, 12 Serg. & Rawle 143, 144 (Pa. 1824); *Blaine's Lessee v. Chambers*, 1 Serg. & Rawle 169, 171 (Pa. 1814); *Bayard v. Passmore*, 3 Yeates 438, 440 (Pa. 1802); *Penn v. Messinger*, 1 Yeates 2, 2 (Pa. 1791).

51. Act of Apr. 3, 1809 (5 Sm. L. 55, ch. 3080 (1812)) (An act concerning contempts of court) (reenacted 1836).

52. An attachment is "[t]he arrest of a person who either is in contempt of court or is to be held as security for the payment of a judgment." BLACK'S LAW DICTIONARY 145 (9th ed. 2009).

53. *See supra* notes 38–44 and accompanying text.

54. The margin to the text of the published statute contains a summary stating: "Powers of the courts to inflict summary punishments for contempts of court, restricted. To what cases." Act of Apr. 3, 1809 (5 Sm. L. 55, ch. 3080 (1812)).

55. *Id.*

Importantly, the General Assembly did not create a new substantive criminal offense, which is consistent with Pennsylvania law that recognizes that contempt statutes are simply declaratory of common law.⁵⁶ Rather, this initial contempt statute imposed a procedural restriction on the exercise of the power of the courts, in that the statute limits summary punishment to the forms of contempt in the statute.⁵⁷ The courts apparently endorsed the statute as a legitimate exercise of legislative power because pre-*McMullen* Pennsylvania jurisprudence provided that the manner of a court's exercise of contempt power could be "regulated" by statute.⁵⁸

Furthermore, the language of section I does not limit summary punishment to misconduct "in the presence of the court." For example, an officer of the court could commit "official misconduct" outside the court's presence. Because the statutory language would allow judges to punish summarily for contemptuous conduct committed outside the presence of the court, section I's restriction does not depend upon the distinction between direct and indirect contempt. The direct versus indirect distinction that applies to the current test for determining when summary punishment is available⁵⁹ is a due process restriction imposed by the courts and not the result of legislative fiat.⁶⁰

Section III of the Act provided for imprisonment for contempts committed in open court, with all other contempts to be punished by fine only.⁶¹

In section IV of the Act, the General Assembly provided that the courts would have the power to make rules allowing the courts to

56. P.L.E. Contempt § 21, 370–71 (1980) (citing C.J.S. *Contempt* § 43 (current version at 17 C.J.S. *Contempt* § 76 (2011))); see also *In re Johnson*, 359 A.2d 739, 744 (Pa. 1976) (Pomeroy, J., dissenting) ("The Act of 1836 [successor statute to Act of 1809] serves as a restriction on the inherent power of the courts to uphold the dignity and authority of their proceedings through punishments for contempt. . . . The language of the Act does not purport to grant to courts a new power, but rather acts to restrict the power courts inherently possess . . .").

57. *Commonwealth v. Newton*, 1 Grant 453, 456 (Pa. 1857) ("[T]o prevent oppression, through abuse of the [contempt] power, the legislature have [sic] carefully defined . . . the cases in which [summary punishment] may be exercised . . .").

58. P.L.E.2d Contempt § 21, 332 (2009); see *Commonwealth v. Stevenson*, 393 A.2d 386, 389 (Pa. 1978) ("The power to impose summary punishment for contempt, while inherent in all courts, . . . is limited by [statute].") (citations omitted); *Appeal of Marks*, 20 A.2d 242, 245 (Pa. Super. Ct. 1941) ("The Right to punish for contempt is inherent in all courts, but the manner of its exercise is regulated [by statute].") (citations omitted).

59. See *supra* notes 38–44 and accompanying text.

60. See *supra* text accompanying notes 34–37.

61. Act of Apr. 3, 1809 (5 Sm. L. 55, ch. 3080 (1812)) (An act concerning contempts of court) (reenacted 1836).

issue attachments to compel sheriffs and coroners to return writs and produce a body after a return of *cepi corpus*⁶² to an execution.⁶³

In 1836, the General Assembly reenacted the 1809 statute using almost identical language and used Roman numerals to subdivide the limiting language into three types of contempt.⁶⁴ Like the 1809 Act, the 1836 Act restricted punishment by imprisonment to contempts committed in open court, with all other contempts punishable by fine only.⁶⁵ In indirect criminal contempt matters, the pre-*McMullen* cases have adhered to the “fine only” restriction.⁶⁶ Another provision in the 1836 Act provided that a court could order the county sheriff to jail any person fined for contempt until the fine was paid, although the jail term could not exceed three months.⁶⁷

The current version of the 1836 Act was reenacted by the General Assembly in July 1976 and appears in Title 42 as sections 4132,⁶⁸

62. Historically, “[c]epi was often used in a *capias* return by an arresting sheriff, as in *cepi corpus et est in custodia* (‘I have taken the defendant [or body] and he is in custody’).” BLACK’S LAW DICTIONARY 254 (9th ed. 2009).

63. Act of Apr. 3, 1809 (5 Sm. L. 55, ch. 3080 (1812)).

64. 17 P.S. § 2041 (1930) (originally enacted as Act of June 16, 1836 (P.L. 784), § 23) (repealed 1976):

SECTION 23. The power of the several courts of this commonwealth to issue attachments, and to inflict summary punishments for contempts of court, shall be restricted to the following cases, to wit:

I. To the official misconduct of the officers of such courts, respectively:

II. To disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court:

III. To the misbehaviour of any person in the presence of the court, thereby obstructing the administration of justice.

65. *Id.* § 2042 (originally enacted as Act of June 16, 1836 (P.L. 784), § 24) (repealed 1976). The Pennsylvania Supreme Court has deemed “open court” within the meaning of the contempt statute to be a proceeding with “any ceremony.” *Albright v. Lapp*, 26 Pa. 99, 101 (1856).

66. *Phila. Marine Trade Ass’n v. Int’l Longshoreman’s Ass’n Local Union*, 140 A.2d 814, 819 (Pa. 1958) (stating that “all other contempts,” which is synonymous with indirect criminal contempt, may be punished by fine only); *Commonwealth v. Newton*, 1 Grant 453, 457 (Pa. 1857) (holding that a lawyer who was found in contempt for purportedly failing to obey a witness subpoena could not be suspended from practicing law as an attorney because the statute limited the penalty to fine only).

67. 17 P.S. § 2043 (originally enacted as Act of June 16, 1836 (P.L. 784), § 25) (repealed 1976).

68. 42 PA. CONS. STAT. ANN. § 4132 (West 2004):

The power of the several courts of this Commonwealth to issue attachments and to impose summary punishments for contempts of court shall be restricted to the following cases:

(1) The official misconduct of the officers of such courts respectively.

(2) Disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court.

(3) The misbehavior of any person in the presence of the court, thereby obstructing the administration of justice.

4133,⁶⁹ and 4134.⁷⁰ At the same time, the General Assembly passed a statute, section 4136,⁷¹ affording various procedural protections—including the right to bail,⁷² the right to notice and to present a defense,⁷³ and the right upon demand to a jury trial⁷⁴—in cases in which a person is charged with indirect criminal contempt for violation of a restraining order or injunction issued by a court. Section 4136 also limited the punishment to a fine not exceeding \$100 or imprisonment in the county jail for a term not exceeding fifteen days, or both.⁷⁵ These statutes passed after heated debate on the floor of the House of Representatives over the division of power between the legislature and the judiciary.⁷⁶

69. *Id.* § 4133:

Except as otherwise provided by statute, the punishment of commitment for contempt provided in section 4132 (relating to attachment and summary punishment for contempts) shall extend only to contempts committed in open court. All other contempts shall be punished by fine only.

70. *Id.* § 4134:

The court may order the sheriff or other proper officer of any county to take into custody and commit to jail any person fined for a contempt until such fine shall be paid or discharged. If unable to pay such fine, such person may be committed to jail by the court for not exceeding three months.

71. *Id.* § 4136:

(a) General rule.—A person charged with indirect criminal contempt for violation of a restraining order or injunction issued by a court shall enjoy:

- (1) The rights to bail that are accorded to persons accused of crime.
- (2) The right to be notified of the accusation and a reasonable time to make a defense, if the alleged contempt is not committed in the immediate view or presence of the court.
- (3) (i) Upon demand, the right to a speedy and public trial by an impartial jury of the judicial district wherein the contempt is alleged to have been committed. . . .

72. *Id.* § 4136(a)(1).

73. *Id.* § 4136(a)(2).

74. 42 PA. CONS. STAT. ANN. § 4136(a)(3)(i) (West 2004).

75. *Id.* § 4136(b):

Except as otherwise provided in this title or by statute hereafter enacted, punishment for a contempt specified in subsection (a) may be by fine not exceeding \$100 or by imprisonment not exceeding 15 days in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail for the non-payment of such a fine, he shall be discharged at the expiration of 15 days, but where he is also committed for a definite time, the 15 days shall be computed from the expiration of the definite time.

76. Some members of the House took the position that the contempt power of the court should be carefully restricted as to not encroach on legislative power, as shown by the following passages:

I think every member of this House now knows of the problems that we believe exist in this doctrine of separation of powers and that there has been an erosion of the powers of this legislative body in and through the interpretation of Article V of the constitution.

I believe if we adopt Senate bill No. 935 [hereinafter the “contempt statutes”], we will in large measure be ratifying many of the court rules which have been adopted and which have, in effect, repealed laws which we have enacted.

In 1994, the General Assembly passed three statutes that conferred contempt power on district justices,⁷⁷ Pittsburgh Magistrates

LEGISLATIVE JOURNAL OF THE HOUSE OF REPRESENTATIVES FOR THE COMMONWEALTH OF PENNSYLVANIA, 160th Sess., Vol. 1, No. 149, at 5863 (June 29, 1976) (statement of Rep. William H. Eckensberger).

None of us, particularly as lawyers, questions that the Supreme Court should have the right to make rules. But that right must be more carefully circumscribed than is found in this conference report. . . .

[T]his bill as it now stands . . . could very well be used . . . to vary and change the intent of this legislature in establishing the jurisdiction of the courts and many, many other things. . . .

All I want to have happen is that . . . this bill . . . does not of itself give to the courts the power to make laws, which is the power of this General Assembly and not of the courts. We are supposed to do the legislating and not the courts.

Id. at 5863–64 (statement of Rep. Samuel W. Morris).

There were some pretty serious questions raised in the balance of power between the legislature and the court. This House has several times in this past month spoken out, through its voting, to hopefully reform and rectify the problems where we feel the court has begun to invade the legislative prerogative. To vote for [the contempt statutes] would be to accelerate that process wherein the legislature has less and less to say about these matters.

Id. at 5864 (statement of Rep. Stephen R. Reed).

The position of other House members was that any restriction of the court's inherent contempt power was a violation of the separation of powers and could not be accomplished by legislation, as demonstrated in the following remarks:

[T]his argument I do not believe can be settled by any legislation. It is going to have to go to the Supreme Court, because there is a conflict now whereby the constitution allows the Supreme Court to issue all procedural rules of law and the legislature occasionally gets into the procedural field. It is a very delicate question of what is procedure and what is not, and I think that cannot be resolved by legislation but only in court cases, which will be many years forthcoming.

Id. at 5863 (statement of Rep. Warren H. Spencer).

[T]he conference committee, during its very brief meeting held this past Monday morning, removed, among other things, from [the contempt statutes] the definition of what it meant by 'otherwise provided by law.' This House overwhelmingly in the previous week had decided that the term 'law' shall not include rules promulgated by the Supreme Court.

Id. at 5864 (statement of Rep. Stephen R. Reed).

[Mr. Spencer] has amended a bill . . . which was a constitutional amendment to increase the size of the Superior Court, by requiring that the Supreme Court submit all of its rules to this General Assembly prior to their approval.

That is the way and the only way, in my judgment, that that matter can be properly dealt with. It must be dealt with by a constitutional amendment, because the constitution of this Commonwealth grants to the Supreme Court the power to promulgate rules within its sphere—okay?—and those rules do have the force of law It cannot be dealt with in a bill. We could not by statute expand their rule-making capacity nor can we contract it. It must be done by constitutional amendment.

Id. (statement of Rep. Norman S. Berson).

77. 42 PA. CONS. STAT. ANN. § 4137:

(a) General rule.—A magisterial district judge shall have the power to issue attachments and impose summary punishments for criminal contempts of a magisterial district judge court in the following cases:

- (1) Misbehavior of any person in the presence of the court, thereby obstructing the administration of justice.
- (2) Failure of a person to obey lawful process in the nature of a subpoena issued by a magisterial district judge.

Court judges,⁷⁸ and Philadelphia Traffic Court judges.⁷⁹ In 1997, the Pennsylvania Supreme Court adopted Rules of Criminal Procedure 140,⁸⁰ 141,⁸¹ and 142⁸² to implement the procedure of all three statutes. Rule 140 establishes a uniform procedure at the trial level, Rule 141 establishes a uniform procedure for appeal, and Rule 142 establishes a procedure governing defaults in payment of a fine.

In 1995, the General Assembly passed a statute allowing a district judge or judge of the minor judiciary with jurisdiction to hear summary offenses of persons under 18 years of age to issue an order specifically requiring the parent, legal guardian, or other person with whom the child resides if other than the parent or guardian, "to be present and ready to participate in the proceedings with the juvenile."⁸³ The statute further provides that a person failing to

(3) Failure to comply with an order of a magisterial district judge directing a defendant in a criminal proceeding to compensate the victim of the criminal conduct for the damage or injury sustained by the victim.

(4) Failure to comply with an order of a magisterial district judge directing a defendant in a criminal proceeding to pay fines and costs in accordance with an installment payment order.

(5) Violation of an order issued pursuant to 23 Pa.C.S. § 6110 (relating to emergency relief by minor judiciary). . . .

(c) Punishment.—Punishment for contempt specified in subsection (a)(1) or (3) may be a fine of not more than \$100 or to imprisonment for not more than 30 days, or both. Punishment for contempt specified in subsection (a)(2) shall be a fine of not more than \$100. Failure to pay within a reasonable time could result in imprisonment for not more than ten days. Punishment for contempt specified in subsection (a)(5) shall be in accordance with that specified in 23 Pa.C.S. § 6114(b) (relating to contempt for violation of order or agreement). Punishment for contempt in subsection (a)(4) would be imprisonment for not more than 90 days.

78. *Id.* § 4138. Pittsburgh Magistrates Justices have the power to issue attachments and impose summary punishments for criminal contempts in the following cases:

(1) Misbehavior of any person in the presence of the court thereby obstructing the administration of justice.

(2) Failure of a person to obey lawful process in the nature of a subpoena issued by a judge of the Pittsburgh Magistrates Court

(3) Failure to comply with an order of a judge of the Pittsburgh Magistrates Court directing a defendant in a criminal proceeding to pay fines and costs in accordance with an installment payment order.

Id. § 4138(a). Punishment may be imposed as follows:

Punishment for contempt specified in subsection (a)(1) or (3) may be a fine of not more than \$100 or to imprisonment for not more than 30 days, or both. Punishment for contempt specified in subsection (a)(2) shall be a fine of not more than \$100. Failure to pay within a reasonable time could result in imprisonment for not more than ten days.

Id. § 4138(c).

79. *Id.* § 4139. The Philadelphia Traffic Court judges' powers to issue attachments and impose summary punishments for criminal contempts are identical to those set out in the Pittsburgh statute. *Id.* § 4139(a); *see supra* note 78. The range of punishments is also identical. *Id.* § 4139(c).

80. PA. R. CRIM. P. 140.

81. *Id.* 141.

82. *Id.* 142.

83. 42 PA. CONS. STAT. ANN. § 1523(a) (West 2004).

comply with an order of participation may be found in contempt of court “as outlined in section 4137 [of Title 42].”⁸⁴ If the person under order fails to appear at any proceeding, the district justice or judge shall issue a bench warrant for the person’s arrest; however, the district justice or judge “may waive any fine or other punishment if the person is . . . ready to participate in the proceedings with the juvenile after a bench warrant is issued.”⁸⁵

2. *The Investigating Grand Jury Contempt Statute*

In 1978, the General Assembly enacted the Investigating Grand Jury Act.⁸⁶ Prior to the passage of the Act, the investigative and inquisitorial powers of the grand jury were clearly established in the common law of Pennsylvania since 1791.⁸⁷ Although investigations are a function of the executive branch, the investigating grand jury was considered to be “an arm of the court,” and “in this Commonwealth . . . judicially supervised from its inception contrary to the practice in most jurisdictions”⁸⁸ The Pennsylvania Supreme Court regulated the grand jury by imposing certain standards, which became known or referred to as “common law standards,”⁸⁹ as prerequisites to the calling of an investigating grand jury.⁹⁰

The Act superseded the common law.⁹¹ In the first appellate decision from a civil contempt conviction under the Act, the Pennsylvania Supreme Court, in a footnote, pointed out that the contemnor had not asserted that the General Assembly was without authority to supersede “the common law standards” imposed by the Court’s decisions on grand jury investigations.⁹² Two months thereafter, the Court rejected a constitutional challenge to the Investigating

84. *Id.* § 1523(b); *see supra* note 77.

85. 42 PA. CONS. STAT. ANN. § 1523(c).

86. Act of Nov. 22, 1978 (P.L. 1148), §§ 1–12 (currently codified at 42 PA. CONS. STAT. ANN. §§ 4541–4553 (West 2004)).

87. *Commonwealth v. McCloskey*, 277 A.2d 764, 771 & n.21 (Pa.), *cert. denied*, 404 U.S. 1000 (1971). For a discussion of the history of the investigating grand jury in Pennsylvania, *see id.* at 771 n.21. *See also* *Petition of McNair*, 187 A. 498, 502 n.1 (Pa. 1936) (“The history of the inquisitorial powers of the grand jury is lost in the obscurity surrounding the origin of that body.”); *Lloyd & Carpenter’s Case*, 5 PA. L.J. 55, 3 Clark 188 (Ct. Qtr. Sess. Phila. 1845). *See generally* Bernard L. Segal, Gerald W. Spivack & Barry L. Costilo, *Obtaining A Grand Jury Investigation In Pennsylvania*, 35 TEMP. L.Q. 73, 75 (1961).

88. *McCloskey*, 277 A.2d at 775.

89. *Robert Hawthorne, Inc. v. Cnty. Investigating Grand Jury*, 412 A.2d 556, 558 n.7 (Pa. 1980).

90. *In re Investigating Grand Jury of Phila.*, 415 A.2d 17, 19 (Pa. 1980).

91. *Robert Hawthorne, Inc.*, 412 A.2d at 559.

92. *Id.* at 559 n.8.

Grand Jury Act on the basis that the Act constituted an impermissible infringement of the power of the judiciary.⁹³ The Court also interpreted an earlier case, *Petition of McNair*,⁹⁴ to “clearly impl[y] [that] the [General Assembly] could broaden the scope of allowable investigation by a grand jury” beyond that allowed by the common law.⁹⁵

Section 4549(b) of the Act provides, in part, that “[jurors, attorneys, interpreters, stenographers, operators of recording devices, or any typists] shall be sworn to secrecy, and shall be in contempt of court if they reveal any information which they are sworn to keep secret.” After a hearing “for cause shown,” the supervising judge can prevent a witness from disclosing his or her testimony.⁹⁶ The grand jury’s power to investigate “shall include the investigative resources of the grand jury which shall include but not be limited to the power of subpoena, the power to obtain the initiation of civil and criminal contempt proceedings, and every investigative power of any grand jury of the Commonwealth.”⁹⁷ The attorney for the Commonwealth or the supervising judge may bring such alleged offenses to the attention of the grand jury.⁹⁸

The manner in which the court swears participants to secrecy is covered in the Pennsylvania Rules of Criminal Procedure.⁹⁹ A violation of the secrecy oath is an indirect criminal contempt.¹⁰⁰ Secrecy is indispensable to the effective functioning of a grand jury’s investigation and is designed: “(1) to prevent the escape of persons whose indictment is contemplated; (2) to ensure the freedom of grand jury deliberations; (3) to prevent subornation of perjury or witness tampering; (4) to encourage free disclosure of information by witnesses; and (5) to protect an innocent accused from disclosure that he or she was being investigated and from the expense of standing trial where there was no probability of guilt.”¹⁰¹

Under section 4549(c)(3), the supervising judge has the power to remove a witness’s counsel from the grand jury room if the counsel makes objections or arguments or otherwise addresses the grand

93. *Investigating Grand Jury of Phila.*, 415 A.2d at 19.

94. 187 A. 498 (Pa. 1936).

95. *Investigating Grand Jury of Phila.*, 415 A.2d at 19 n.2.

96. 42 PA. CONS. STAT. ANN. § 4549(d) (West 2004).

97. *Id.* § 4548.

98. *Id.*

99. PA. R. CRIM. P. 224, 225, 231(C). For comparison purposes, “a violation of [an indicting] grand jury secrecy rules may be punished as a contempt of court” under *id.* 556.10(A)(2).

100. Recent Case, *Grand Jury—Secrecy of Proceedings—Refusal to Take Oath of Secrecy Held Contempt of Court*, 53 HARV. L. REV. 680, 680 (1939–1940).

101. 26A STANDARD PA. PRACTICE 2d, *General Rule of Secrecy* § 133:38 (citing *In re Dauphin Cnty. Fourth Investing Grand Jury*, 19 A.3d 491 (Pa. 2011) (citations omitted)).

jury or the attorney for the Commonwealth. The subsection provides that “[v]iolation of this paragraph shall be punishable as contempt by the supervising judge.” A violation of this subsection would be a direct criminal contempt.

The Supreme Court has exclusive jurisdiction over orders entered in regard to grand juries, including orders of civil and criminal contempt.¹⁰²

B. Crimes Code (Title 18) Statutes

In 1939, the General Assembly adopted the Penal Code.¹⁰³ Section 5101 of that Code preserved common law offenses not specifically provided for by the Code.¹⁰⁴

In 1973, the General Assembly replaced the Penal Code with the Crimes Code.¹⁰⁵ The General Assembly abolished all common law crimes¹⁰⁶ with the exception of a court’s power to declare forfeitures, to punish for contempt, or “to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree”¹⁰⁷ Thus, the Crimes Code preserved criminal contempt as a common law crime.

In 1980, the General Assembly enacted a statute, section 4954 in Title 18, that gave a court with jurisdiction over any criminal matter the authority to enter a protective order, including geographic distance and communication stay-away provisions.¹⁰⁸ Another statute, section 4955, which is titled “Violation of orders,” provides that any person who violates the protective order “may be punished in any of the following ways:” (1) for any substantive offense described in that subchapter of Title 18;¹⁰⁹ (2) “[a]s a contempt of the court making such order”;¹¹⁰ and (3) by revocation of any form of

102. *In re Fourth Statewide Investigating Grand Jury*, 509 A.2d 1260, 1261 & n.2 (Pa. 1986) (citing PA. R. APP. P. 702(c), 3331); *see also* Note to PA. R. APP. P. 3331.

103. 18 P.S. §§ 4101–5201 (1945) (originally enacted as Act of June 24, 1939 (P.L. 872), §§ 101–1201) (repealed 1973).

104. *Id.* § 5101 (originally enacted as Act of June 24, 1939 (P.L. 872), § 1101) (repealed 1973). *See generally* 1972 Official Comment to 18 PA. CONS. STAT. ANN. § 107 (West 1998).

105. 18 PA. CONS. STAT. ANN. §§ 101–9352 (West 2000).

106. *Id.* § 107(b).

107. *Id.* § 107(c).

108. 18 PA. CONS. STAT. ANN. § 4954 (West 1983).

109. The substantive offenses include intimidation of witnesses or victims, *id.* § 4952; retaliation against witness, victim or party, *id.* § 4953; retaliation against prosecutor or judicial official, *id.* § 4953.1; protection of employment of crime victims, family members of victims and witnesses, *id.* § 4957; and intimidation, retaliation or obstruction in child abuse cases, *id.* § 4958. *Id.* § 4955(a)(1).

110. *Id.* § 4955(a)(2).

pretrial release, including forfeiture of bail.¹¹¹ Section 4955 appears to make it a crime to violate the protective order, although section 4955 does not provide any crime classification (felony, misdemeanor, or summary offense) as permitted by another provision of the Crimes Code¹¹² and does not set any penalties for the contempt.¹¹³ Section 4955 was amended in 1993 to provide that a person held in contempt is entitled to credit “for any punishment imposed therein against any sentence imposed on [a] conviction”¹¹⁴ for the crimes of harassment,¹¹⁵ stalking,¹¹⁶ intimidation of witnesses or victims,¹¹⁷ or retaliation against a witness or a victim.¹¹⁸ A conviction or acquittal for a substantive offense under Title 18 bars a court from subsequently punishing the offender for contempt arising out of the same act.¹¹⁹

The 1980 version of section 4955 did not contain any procedural provisions. The statute might have given prosecutors, who have prosecutorial discretion to charge, the ability to nullify a court’s contempt power by not charging a violation of section 4955. The 1993 version of section 4955 provides that an arrest can be made without a warrant upon probable cause whether or not the violation is committed in the presence of a law enforcement officer¹²⁰ and the defendant is to be taken without unnecessary delay before the court that issued the protective order, when available, and before other specified judicial officers, when the court that issued the order is unavailable.¹²¹

Pertinent to this Title 18 discussion is some sentencing law that appears in Title 42. In 1974, the General Assembly adopted the Sentencing Code.¹²² In contempt matters, the Pennsylvania Supe-

111. *Id.* § 4955(a)(3). *See generally* 14 West’s Pa. Practice § 1:429 (Victim and witness intimidation—Protective orders and violations); SUMMARY PA. JUR. 2d *Criminal Law* §§ 19:52 to 19:61.

112. 18 PA. CONS. STAT. ANN. § 106(a) (West 1998).

113. It should be noted that section 106(d) of the Crimes Code provides that “[a]ny offense declared by law to constitute a crime, without specification of the class thereof, is a misdemeanor of the second degree, if the maximum sentence does not make it a felony under this section.” *Id.* A person convicted of a misdemeanor of the second degree may be sentenced to imprisonment of not more than two years, *id.* § 1104(2), and a fine not exceeding \$5,000, *id.* § 1101(5).

114. 18 PA. CONS. STAT. ANN. § 4955(a)(2)(i) (West 1983).

115. 18 PA. CONS. STAT. ANN. § 2709 (West 2000).

116. *Id.* § 2709.1.

117. 18 PA. CONS. STAT. ANN. § 4952.

118. *Id.* § 4953.

119. *Id.* § 4955(a)(2)(ii).

120. 18 PA. CONS. STAT. ANN. § 4955(b) (West 1983).

121. *Id.* § 4955(c).

122. 42 PA. CONS. STAT. ANN. §§ 9701–9799.41 (West 2014).

rior Court self-imposed statutory restrictions contained in the Sentencing Code and applicable to crimes in general. One panel of Pennsylvania Superior Court judges said that while direct criminal contempt was punishable by fine or imprisonment,¹²³ the trial court could choose among the sentencing alternatives authorized by the Sentencing Code,¹²⁴ including probation.¹²⁵ Because the Sentencing Code requires that a sentence of confinement contain a minimum and a maximum term and that the minimum not exceed one-half of the maximum,¹²⁶ another Superior Court panel *sua sponte* held that a flat sentence for contempt was illegal.¹²⁷

C. Protection From Abuse Act (Title 23)

In 1976, the General Assembly passed the Protection From Abuse Act (PFAA).¹²⁸ The purpose of the PFAA “is to protect victims of domestic abuse, and it does so through numerous provisions that enable courts to respond quickly and flexibly to both early signs and subsequent acts of abuse with the issuance of protection orders.”¹²⁹ Those provisions are both substantive and procedural, and they involve different purposes and powers as the proceeding evolves.

The substantive and procedural provisions prior to any exercise of a court’s contempt power are designed to protect and prevent further abuse by removing the perpetrator of the abuse from the household and contact with the victim for a period of time,¹³⁰ are civil in nature,¹³¹ and invoke the equitable powers of the court.¹³² The

123. See 42 PA. CONS. STAT. ANN. § 4133 (West 2004); *supra* note 69.

124. 42 PA. CONS. STAT. ANN. § 9721.

125. *In re Adams*, 645 A.2d 269, 273 (Pa. Super. Ct. 1994) (upholding trial court’s sentence of fine plus two concurrent 90-day terms of probation with condition that appellant undergo a drug, alcohol, and psychological evaluation). See generally *Commonwealth v. Falkenhan*, 452 A.2d 750, 758 (Pa. Super. Ct. 1982) (stating generally that a sentence for contempt must comply with the Sentencing Code).

126. 42 PA. CONS. STAT. ANN. §§ 9756(a)–(b).

127. *Commonwealth v. Cain*, 637 A.2d 656, 658–59 (Pa. Super. Ct. 1994) (one-year term of imprisonment); *cf.* *Commonwealth v. Moody*, 46 A.3d 765, 770 n.4 (Pa. Super. Ct. 2012) (observing that trial court granted the contemnor’s request to modify the sentence to five to ten days to conform to the Sentencing Code).

128. 23 PA. CONS. STAT. ANN. §§ 6101–6122 (West 2010).

129. *Commonwealth v. Snell*, 737 A.2d 1232, 1235 (Pa. Super. Ct. 1999) (citing *Snyder v. Snyder*, 629 A.2d 977, 981 (Pa. Super. Ct. 1993)). See generally Deborah Flynn, Note, *DOMESTIC RELATIONS—The Protection From Abuse Act*, 51 TEMP. L.Q. 116 (1978).

130. *McCance v. McCance*, 908 A.2d 905, 908 (Pa. Super. Ct. 2006) (quoting *Viruet ex rel. Velasquez v. Cancel*, 727 A.2d 591, 595 (Pa. Super. Ct. 1999)).

131. *Boykin v. Brown*, 868 A.2d 1264, 1266 (Pa. Super. Ct. 2005) (the PFAA does not seek to determine criminal culpability); see also 1977 Explanatory Comment to PA. R. CIV. P. 1901.7 (indicating that the PFAA “introduces a new civil remedy”).

132. *Boyle v. Boyle*, 12 Pa. D. & C.3d 767, 775–76 (Ct. Com. Pl. Allegheny Cnty. 1979).

PFAA defines "abuse,"¹³³ requires law enforcement agencies to provide the abused person with notice of the availability of safe shelter and of domestic violence services in the community,¹³⁴ confers jurisdiction over all proceedings on a court,¹³⁵ gives a plaintiff who is in immediate and present danger of abuse the ability to file a petition¹³⁶ to obtain a temporary order,¹³⁷ creates a structure of available hearing officers to issue *ex parte* temporary emergency orders when the courts are closed,¹³⁸ provides that the temporary order is to expire at the end of the next business day that the court is available but allows a court to maintain the *status quo* until a hearing,¹³⁹ and requires a hearing within ten business days of the petition.¹⁴⁰ Some of the procedural provisions require legislative and judicial sharing, in that the court may order the sheriff or other designated agency or individual to serve the petition and order,¹⁴¹ and the General Assembly mandated that the court "adopt a means of prompt and effective service in those instances where the plaintiff avers that service cannot be safely effected by an adult individual other than a law enforcement officer where the court orders."¹⁴² The Pennsylvania Supreme Court acceded to the General Assembly's mandate by adopting multiple service of process provisions in the Pennsylvania Rules of Civil Procedure.¹⁴³ Unlike the General Assembly, the Pennsylvania Supreme Court explicitly provided a procedure for commencement of an action by presenting a petition to the court or filing a petition with the prothonotary.¹⁴⁴

The General Assembly gave the courts the authority to hold a defendant who violates a PFAA order in indirect criminal contempt.¹⁴⁵ After the entry of an order and a violation, the proceedings are criminal in nature and the purpose is to punish the violator.¹⁴⁶ The po-

133. 23 PA. CONS. STAT. ANN. § 6102(a) (West 2010).

134. *Id.* § 6105(b).

135. *Id.* § 6103(a).

136. *Id.* § 6105(b) (by implication).

137. *Id.* § 6107(b).

138. *Id.* § 6110.

139. 23 PA. CONS. STAT. ANN. § 6110(b) (West 2010).

140. *Id.* § 6107(a).

141. *Id.* § 6106(f).

142. *Id.* § 6106(e).

143. PA. R. CIV. P. 1901.4(a), 1930.4.

144. *Id.* 1901.3.

145. *Commonwealth v. Haigh*, 874 A.2d 1174, 1176 (Pa. Super. Ct.), *appeal denied*, 887 A.2d 1240 (Pa. 2005).

146. *Wagner v. Wagner*, 564 A.2d 162, 164 (Pa. Super. Ct. 1989) (Kelly, J., dissenting), *appeal denied*, 578 A.2d 415 (Pa. 1990); *Cipolla v. Cipolla*, 398 A.2d 1053, 1055 (Pa. Super. Ct. 1979).

lice or sheriff can arrest the contemnor without warrant upon probable cause whether or not the violation is committed in the presence of the police officer or sheriff,¹⁴⁷ at which time the defendant is to be brought without unnecessary delay before a judicial officer for preliminary arraignment.¹⁴⁸ The procedure for preliminary arraignment is established by Supreme Court rule.¹⁴⁹ A hearing must be scheduled within ten days of the filing of criminal charges or complaint of indirect criminal contempt.¹⁵⁰ The defendant is entitled to counsel¹⁵¹ but has no right to a jury trial.¹⁵²

When there is a noneconomic violation, a plaintiff may file a private criminal complaint against a defendant, alleging indirect criminal contempt.¹⁵³ The General Assembly did not exercise complete power over procedure, as the General Assembly deferred to local court rule for the procedure for filing and service of a private criminal complaint.¹⁵⁴

The General Assembly also gave the court the authority to impose punishment for the indirect criminal contempt “in accordance with law.”¹⁵⁵ The General Assembly limited a sentence to imprisonment of up to six months, supervised probation not to exceed six months, a fine of not less than \$300 but not more than \$1,000, and an order for other relief as set forth in the PFAA.¹⁵⁶ In one Superior Court panel decision, two judges held that a minimum and maximum sentence was not required,¹⁵⁷ while the dissenting judge held that the Sentencing Code did apply.¹⁵⁸

147. 23 PA. CONS. STAT. ANN. § 6113(a) (West 2010).

148. *Id.* §§ 6113(c), (d).

149. PA. R. CRIM. P. 519. The Comment to Rule 519 contains the following statement and citations: “By statute, a defendant may not be released but must be brought before the issuing authority for a preliminary arraignment . . . when a police officer has arrested the defendant in a domestic violence case, *see* 18 Pa.C.S. § 2711. *See also* 23 Pa.C.S. § 6113(c) of the Protection from Abuse Act.”

150. 23 PA. CONS. STAT. ANN. § 6113(f).

151. *Id.* § 6114(b)(3).

152. *Id.*; *see* Hill v. Randolph, 24 A.3d 866, 873 (Pa. Super. Ct. 2011) (looking to Commonwealth v. McMullen, 961 A.2d 842, 847 (Pa. 2008), and holding that defendant’s two indirect criminal contempt charges for violating a PFAA order, which exposed him to an aggregate sentence greater than six months, did not afford him a jury trial, as the determining factor is whether any single offense can result in a term of incarceration greater than six months).

153. 23 PA. CONS. STAT. ANN. § 6113.1(a) (West 2010).

154. *Id.* § 6113.1(b).

155. *Id.* § 6114(a).

156. *Id.* § 6114(b)(1).

157. Wagner v. Wagner, 564 A.2d 162, 165 (Pa. Super. Ct. 1989); *accord* 24 STANDARD PA. PRACTICE 2d, *Domestic Relations Actions* § 126:131.

158. Wagner, 564 A.2d at 165 (Kelly, J., dissenting). The dissenting judge said that: Because the legislature has not specifically exempted sentences for criminal contempt under the Protection From Abuse Act from the general mandate that all sentences must have a minimum and a maximum, I would not imply such an exemption. . . . Rather, in absence of an express exemption I am of the opinion that we must enforce the

D. Vehicle Code (Title 75) Statute

In 1976, the General Assembly also passed the Vehicle Code.¹⁵⁹ Chapter 41, titled "Equipment Standards,"¹⁶⁰ establishes minimum standards for vehicle equipment, the performance of which is related to vehicle safety, noise control, and air quality, and makes unlawful the sale and use of items that do not comply with the minimum standards.¹⁶¹ Another statute provides for criminal penalties in the form of a fine per violation and the maximum permissible fine,¹⁶² the particulars of which are not relevant to this article. Another statute provides that, upon petition by the Commonwealth's Department of Transportation, any court of competent jurisdiction may restrain violations of Chapter 41 by issuing "an injunction or restraining order."¹⁶³ The same statute provides that the court shall sit without a jury in any proceeding for criminal contempt for violation of the injunction or restraining order.¹⁶⁴

E. The Pennsylvania Constitution

After a constitutional convention from 1967 to 1968, article V, section 10 of the Pennsylvania Constitution was adopted.¹⁶⁵ That provision provided, in relevant part, that "[t]he Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . [and] justices of the peace All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions."¹⁶⁶ Section 10(c) grants the Pennsylvania Supreme Court the power to prescribe general rules governing practice, procedure, and conduct of all courts, thereby giving the judiciary the sole power to establish the rules of the court.¹⁶⁷ This constitutional grant of authority is exclusive to the judiciary, and the General Assembly is precluded

provisions of the sentencing code, including the requirement of both a minimum and a maximum term for imprisonment.

Id. (Kelly, J., dissenting) (citations omitted).

159. 75 PA. CONS. STAT. ANN. §§ 101-9901 (West 2008).

160. *Id.* §§ 4101-4108.

161. *Id.* § 4101.

162. *Id.* § 4107(d).

163. *Id.* §§ 4108(a), (c).

164. *Id.* § 4108(c).

165. Adopted in 1968 as proposed by Proposal No. 7, 1968, effective January 1, 1969.

166. PA. CONST. art. V, § 10(c). For commentary on how article V, section 10(c) has made the Pennsylvania judiciary a stronger branch compared to its sister branches, see Jason Bologna, *An Abuse of Power: How the Pennsylvania Supreme Court Uses Article V, 10(c) of the Pennsylvania Constitution to Dominate Procedural Lawmaking, and Why Pennsylvania Should Amend This Constitutional Provision*, 71 TEMP. L. REV. 711 (1998).

167. *Bergdoll v. Kane*, 694 A.2d 1155, 1158 (Pa. Commw. Ct. 1997).

from exercising limitations on the powers entrusted in the judiciary by the constitution.¹⁶⁸ The second sentence of section 10(c), which suspends all statutes inconsistent with court rules, played a prominent part in the Pennsylvania Supreme Court's decision in *McMullen*.¹⁶⁹ All of the Supreme Court's criminal procedural rules are adopted under the authority of article V, section 10(c).¹⁷⁰

After the General Assembly's enactment of sections 4137, 4138, and 4139 of Title 42, which provide that any punishment for contempt will be "automatically stayed for a period of ten days"¹⁷¹ during which time an appeal of an action of a district justice, a Pittsburgh Magistrates Court judge, or a Philadelphia Traffic Court judge may be filed, the Pennsylvania Supreme Court suspended that provision "only insofar as [those provisions are] inconsistent with the 30-day appeal period and 30-day automatic stay period set forth in Rule 141."¹⁷²

In summary, the contempt power derived from common law and is inherent in the courts. The General Assembly passed statutes limiting the exercise of the contempt power by courts of record while extending the power to inferior courts. The General Assembly also created not less than four statutory forms of indirect criminal contempt: the Investigating Grand Jury (Title 42) contempt statute, the Crimes Code contempt statute, the PFAA contempt statute, and the Vehicle Code contempt statute. The Pennsylvania Superior Court promoted the General Assembly's influence by applying general criminal statutes to contempt crimes. The pre-*McMullen* legal landscape therefore consisted of a patchwork of statutes and court rules affecting a court's power of contempt. However, in 2008, Pennsylvania's own *Marbury v. Madison*¹⁷³ would restrict the General Assembly's ability to legislate in the field of criminal contempt.

III. THE FACTS & PROCEDURAL HISTORY OF *McMULLEN*

Over a two-year period, Richard McMullen improperly communicated with the female complainant by following the complainant, sending the complainant letters, and threatening her.¹⁷⁴ In October

168. L.J.S. v. State Ethics Comm'n, 744 A.2d 798, 802 (Pa. Commw. Ct. 2000).

169. See *infra* text accompanying notes 206–07.

170. See PA. R. CRIM. P. 102.

171. 42 PA. CONS. STAT. ANN. §§ 4137(d), 4138(d), 4139(d) (West 2004).

172. PA. R. CRIM. P. 1101(1).

173. 5 U.S. 137 (1803).

174. Brief for Appellee at 4, Commonwealth v. McMullen, 961 A.2d 842 (Pa. 2008) (Nos. 43 EAP 2006, 44 EAP 2006).

2001, McMullen pled guilty to stalking, terroristic threats, harassment by communication, and harassment.¹⁷⁵ The court subsequently sentenced McMullen to eleven and one-half to twenty-three months of incarceration, granted McMullen immediate parole to house arrest followed by two years of reporting probation, and ordered McMullen to stay away from the complainant.¹⁷⁶ A year later, McMullen violated his parole and the “stay away” order by leaving the jurisdiction without permission, by contacting the complainant, and by threatening to kill the complainant.¹⁷⁷ McMullen, who was then residing in Florida, was arrested and extradited to Pennsylvania.¹⁷⁸

As a result of violating his parole, the trial court judge revoked McMullen’s probation and re-sentenced him to a total term of imprisonment of three to six years.¹⁷⁹ The trial court also found McMullen guilty of six counts of contempt of court for violations of the stay-away order, and for each contempt count the trial court sentenced McMullen to two months and twenty-eight days to five months and twenty-nine days of imprisonment, totaling a maximum sentence of almost three years.¹⁸⁰

McMullen appealed to the Pennsylvania Superior Court, claiming that the terms of imprisonment accompanying the six consecutive contempt sentences exceeded the statutory maximum for indirect criminal contempt,¹⁸¹ thereby violating his right to due process under both the United States¹⁸² and Pennsylvania¹⁸³ Constitutions. Furthermore, McMullen argued that his contempt sentences were punishable by fine only, and not imprisonment, pursuant to section 4133.¹⁸⁴ The Pennsylvania Superior Court, however, did not consider McMullen’s section 4133 argument and instead raised section 4136’s constitutionality *sua sponte*.¹⁸⁵

The Pennsylvania Superior Court found that although the trial court was in fact authorized to impose punishment for indirect

175. Commonwealth v. McMullen, 881 A.2d 841, 844 (Pa. Super. Ct. 2005).

176. *Id.*

177. Commonwealth v. McMullen, 961 A.2d 842, 845 (Pa. 2008).

178. *Id.*

179. *Id.*

180. *Id.*

181. See *supra* notes 66, 75 and accompanying text.

182. McMullen contended he was entitled to a jury trial under the Sixth Amendment of the United States Constitution. Commonwealth v. McMullen, 881 A.2d 841, 845 (Pa. Super. Ct. 2005) (quoting McMullen’s brief).

183. McMullen contended he was entitled to a jury trial under article I, sections 6 and 9 of the Pennsylvania Constitution. *Id.*

184. *Id.* at 846; see *supra* note 66 and accompanying text, and note 69.

185. See Commonwealth v. McMullen, 961 A.2d 842, 850 (Pa. 2008) (Castille, C.J., concurring).

criminal contempt, each of the sentences exceeded the fifteen-day maximum set forth in section 4136(b) and were therefore illegal.¹⁸⁶ The Superior Court also determined that McMullen was entitled to a jury trial under section 4136(a)(3)(i).¹⁸⁷ The Pennsylvania Superior Court reversed the trial court's contempt order and remanded for further proceedings.¹⁸⁸

The Commonwealth filed a petition for allocatur,¹⁸⁹ which was granted by the Pennsylvania Supreme Court to resolve the following constitutional issue: "Did the Legislature unconstitutionally usurp [the Supreme Court's] authority when it enacted a statute that grants a jury trial in all indirect criminal contempt cases involving the violation of a restraining order or injunction, and limits any sentence of imprisonment to [fifteen] days?"¹⁹⁰

A. *The Majority Opinion*

In a majority opinion authored by Justice Eakin and joined by four of the seven Justices,¹⁹¹ the Court reviewed under a *de novo* standard of review the purely legal question as to whether the General Assembly usurped the court's inherent authority by passing section 4136(a)(3)(i) and section 4136(b).¹⁹² Applying the strong presumption that statutes are constitutional,¹⁹³ the Court determined that section 4136 violated the Supreme Court's exclusive authority under the Pennsylvania Constitution to establish rules of procedure and a court's inherent authority to punish for indirect criminal contempt.¹⁹⁴

First, the Court reasoned that McMullen did not enjoy a constitutional right to a jury trial because the due process provisions of the United States and Pennsylvania Constitutions apply to criminal defendants facing a sentence of imprisonment exceeding six

186. *Id.* at 849 (majority opinion); *see supra* note 75.

187. *McMullen*, 881 A.2d at 850–51; *see supra* note 71.

188. *Commonwealth v. McMullen*, 881 A.2d 841, 853 (Pa. Super. Ct. 2005).

189. "This word formally indicated that a writ, bill, or other pleading was allowed. It is still used today in Pennsylvania to denote permission to appeal." BLACK'S LAW DICTIONARY 88 (9th ed. 2009).

190. *McMullen*, 961 A.2d at 846 (quoting Petition for Allowance of Appeal).

191. *Commonwealth v. McMullen*, 961 A.2d 842, 845 (Pa. 2008).

192. *Id.* at 846.

193. *Id.* (noting that under the Statutory Construction Act of 1972, 1 PA. CONS. STAT. ANN. § 1922(3) (West 2008), there is a presumption that the legislature does not intend to violate federal and state constitutions when enacting legislation).

194. *Id.* at 849–50.

months.¹⁹⁵ The Court noted that because section 4136(b) only allows for a maximum sentence of fifteen days, the constitutional right to a jury trial did not apply to any single count of contempt.¹⁹⁶ Furthermore, the Court explained that consecutive sentences could not be combined to meet the constitutional requirement; therefore, McMullen's six consecutive sentences could not be aggregated to create a sentence greater than six months and provide McMullen with a constitutional right to a jury trial.¹⁹⁷

Second, the Court determined that based on Pennsylvania precedent, a criminal defendant's right to a trial by jury was a procedural right and not a substantive right.¹⁹⁸ The majority explained that the legislature was restricted to creating substantive law while the Court's rulemaking authority extended to procedural law.¹⁹⁹ To determine whether a statute violates article V, section 10(c) of the Pennsylvania Constitution, the Court simply inquires whether the statute is substantive or procedural in nature.²⁰⁰ In a prior decision, *Commonwealth v. Sorrell*,²⁰¹ the Pennsylvania Supreme Court ruled that "the right to trial by jury is not a 'substantive right,' but a right of procedure through which rights conferred by substantive law are enforced."²⁰² The Court reaffirmed the ruling of *Sorrell*²⁰³ that a jury trial is a procedural right.²⁰⁴

After determining that section 4136(a)(3)(i) was a procedural statute enacted by the legislature, the Court found the statute unconstitutional. The Court explained that a procedural statute would be unconstitutional even if the Court has not promulgated a rule inconsistent with the statute.²⁰⁵ The majority looked to the

195. *Id.* at 847 (citing *Lewis v. United States*, 518 U.S. 322, 327–28 (1996); *Commonwealth v. Mayberry*, 327 A.2d 86, 89 (Pa. 1974)).

196. *Id.*

197. *Commonwealth v. McMullen*, 961 A.2d 842, 847 (Pa. 2008) (citing *Lewis*, 518 U.S. at 327–28).

198. *See id.* at 847–48.

199. *Id.* (citing PA. CONST. art. V, § 10(c); *Payne v. Commonwealth Dep't of Corr.*, 871 A.2d 795, 801 (Pa. 2005)). The majority opinion explains the difference between procedural and substantive law: "As a general rule, substantive law creates, defines, and regulates rights; procedural law addresses the method by which those rights are enforced." *Id.* at 847.

200. *Id.* (citing *Payne*, 871 A.2d at 801).

201. 456 A.2d 1326 (Pa. 1982).

202. *McMullen*, 961 A.2d at 847–48 (citing *Sorrell*, 456 A.2d at 1329).

203. Citing *Mishoe v. Erie Ins. Co.*, 824 A.2d 1153, 1156 (Pa. 2003), and *Wertz v. Chapman Twp.*, 741 A.2d 1272, 1279 (Pa. 1999), the majority noted that there are post-*Sorrell* decisions that find that a jury trial may be a substantive right; the majority explained, however, that those decisions do not overrule or mention *Sorrell* nor do they hold that a jury trial is a substantive right. *Commonwealth v. McMullen*, 961 A.2d 842, 848 (Pa. 2008).

204. The *McMullen* court's position was that the *Sorrell* court's pronouncement that a jury trial was a procedural right was not limited to the context of the jury-enlarging statute at issue in *Sorrell*. *Id.* at 848.

205. *Id.*

Pennsylvania Constitution for support, noting that article V, section 10(c) allows the Court automatically to suspend a procedural statute that conflicts with the Court's procedural rules.²⁰⁶ The Court reasoned that these concepts must be so, because otherwise "a clearly unconstitutional statute would be constitutional unless this Court promulgated a rule inconsistent with it."²⁰⁷

Furthermore, the Court found section 4136(b), which sets forth the punishment for indirect criminal contempt, to be unconstitutional under the same test applied to the jury trial provision.²⁰⁸ In determining the question whether section 4136(b) was procedural or substantive, the majority repeated former Justice Roberts' recognition that "substantive law declares what acts are crimes and prescribes the punishment for their commission, while procedural law provides the means by which the substantive law is enforced."²⁰⁹ The majority noted that the legislature's actions in prescribing punishment for many crimes were consistent with former Justice Roberts' distinction between substantive law and procedural law.²¹⁰ Without any further discussion about the distinction between substantive law and procedural law, the Court determined that contempt of court was unlike other substantive crimes and derived not from a statute the legislature had created, but rather from the inherent power of the courts.²¹¹

Lastly, the majority found section 4136(b) to unconstitutionally restrict a court's authority to punish for indirect criminal contempt because section 4136(b) imposes a maximum fine and incarceration. The Court found that in adopting section 4136(b) the legislature created a form of indirect criminal contempt.²¹² Pursuant to case law and the Pennsylvania Constitution, the Court held that only the judiciary has the authority to punish individuals in violation of

206. *Id.*; see also *supra* notes 166–69 and accompanying text.

207. *McMullen*, 961 A.2d at 848.

208. *Id.* at 848–49.

209. *Commonwealth v. McMullen*, 961 A.2d 842, 849 (Pa. 2008) (citing *Commonwealth v. Wharton*, 435 A.2d 158, 160 (Pa. 1981) (Roberts, J., opinion in support of affirmance)).

210. *Id.* (citing *Commonwealth v. Ward*, 568 A.2d 1242, 1244 (Pa. 1990) (burglary and robbery); *Commonwealth v. Bell*, 516 A.2d 1172, 1179 (Pa. 1986) (voluntary manslaughter); *Commonwealth v. Wright*, 494 A.2d 354, 362 (Pa. 1985) (third degree murder, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery, aggravated assault and/or kidnapping); *Commonwealth v. Glover*, 156 A.2d 114, 116 (Pa. 1959) (illegally giving away drugs); *Commonwealth v. Redline*, 137 A.2d 472, 473–74 (Pa. 1958) (first degree murder and armed robbery)).

211. *Id.* at 849.

212. *Id.* at 849–50 ("Since courts have the authority to punish individuals in violation of their orders under the case law described above and [18 PA. CONS. STAT. ANN.] § 107(c) [(West 1998)], the legislature cannot create a form of indirect criminal contempt and restrict a court's ability to punish individuals who commit contempt of court.").

a court order and that the legislature overstepped its bounds by enacting a form of indirect criminal contempt and restricting a court's ability to punish individuals found in contempt.²¹³ The majority explained that "[w]hile the legislature generally may determine the appropriate punishment for criminal conduct, *indirect criminal contempt is an offense against the court's inherent authority*, not necessarily against the public."²¹⁴ Because section 4136(b) restricts the Court by setting maximum penalties for indirect contempt of court, the statute is unconstitutional.²¹⁵

B. Chief Justice Castille's Concurring Opinion

Chief Justice Castille agreed with the majority opinion in its entirety. The Chief Justice wrote a concurring opinion to address two points: (1) the supervisory rule violated by the Pennsylvania Superior Court; and (2) the separation of powers implicated by section 4136(b).²¹⁶

According to Chief Justice Castille, the Pennsylvania Superior Court overstepped its role as an appellate court by *sua sponte* raising the issue of a right to a jury trial under section 4136.²¹⁷ Chief Justice Castille pointed out that the Commonwealth and McMullen disagreed about the basis for the Pennsylvania Superior Court's decision to remand the case to the trial court to give McMullen the option to elect a jury trial for the contempt violation.²¹⁸ The Superior Court's "unnecessary holding" regarding McMullen's right to a jury trial created a circumstance where the court was required to address an avoidable constitutional issue in the first instance.²¹⁹

Chief Justice Castille also elaborated on his take of the majority's reasoning for finding section 4136(b) unconstitutional. Chief Justice Castille echoed the majority, stating, "It is axiomatic that the General Assembly can legislate crimes, including appropriate punishment. Generally, it is the province of the General Assembly to prescribe punishment for criminal conduct."²²⁰ The Chief Justice

213. *Id.*

214. *Id.* at 850 (emphasis added).

215. *Commonwealth v. McMullen*, 961 A.2d 842, 850 (Pa. 2008). The Court further noted that the legislature could address the prohibited and punished behaviors in section 4136 by criminalizing and setting punishments for their commission. *Id.* However, this approach would not apply to contempt because contempt is a violation of a court order and is unique to the courts. *Id.*

216. *Id.* (Castille, C.J., concurring).

217. *Id.* at 851.

218. *Id.* at 853.

219. *Id.*

220. *Id.*

pointed out, however, that contempt of court is different from other crimes and “different in a way that implicates the fundamental separation of powers of the branches of government.”²²¹ As explained by Chief Justice Castille, individuals charged with indirect criminal contempt are afforded the procedural safeguards under the United States and Pennsylvania Constitutions as well as under Pennsylvania statutory law and criminal procedure.²²² More generally, however, criminal contempt is *sui generis*, or unique in its characteristics, because it implicates fundamental judicial authority.²²³ Explaining that “the courts have the inherent power to enforce compliance with lawful orders through contempt, including the power to impose punishment for non-compliance,” Chief Justice Castille agreed with the majority’s reasoning.²²⁴

To aid in explaining why the General Assembly’s authority to fix the appropriate punishment for criminal conduct does not extend to the separate and distinct crime of criminal contempt, Chief Justice Castille employed a useful comparison: criminal contempt is an offense against the court, while other offenses are against the public and codified in the “Crimes Code, Vehicle Code, drug offenses and the like.”²²⁵ Chief Justice Castille’s view was that only a court that is violated is in the position to set the appropriate punishment; the legislature “cannot dictate to the courts what is adequate punishment to vindicate a court’s authority.”²²⁶ Allowing the legislature to do so, in Chief Justice Castille’s view, would “destroy the judiciary’s ability to address contempt.”²²⁷ Chief Justice Castille firmly believes that the trial courts must be able to freely exercise their contempt power, subject to judicial review,²²⁸ which review will prevent trial court abuses of the contempt power.

221. *Commonwealth v. McMullen*, 961 A.2d 842, 853 (Pa. 2008) (Castille, C.J., concurring).

222. *Id.* (citing *Crozer-Chester Med. Ctr. v. Moran*, 560 A.2d 133, 137 (Pa. 1989); *Commonwealth v. Charlett*, 391 A.2d 1296, 1298 (Pa. 1978)).

223. *Id.* at 853.

224. *Id.* at 853–54 (citing *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *Commonwealth v. Bowden*, 838 A.2d 740, 760 (Pa. 2003); *Commonwealth v. Marccone*, 410 A.2d 759, 763 (Pa. 1980); *Commonwealth v. Haefner*, 368 A.2d 686, 688 (Pa. 1977); *In re Martorano*, 346 A.2d 22, 27 (Pa. 1975); *East Caln Twp. v. Carter*, 269 A.2d 703, 705 (Pa. 1970); *Brocker v. Brocker*, 241 A.2d 336, 338 (Pa. 1968)).

225. *McMullen*, 961 A.2d at 854.

226. *Id.*

227. *Commonwealth v. McMullen*, 961 A.2d 842, 854 (Pa. 2008) (Castille, C.J., concurring) (“[F]or what would there be to prevent the General Assembly from limiting punishment to something completely toothless such as, for instance, a five dollar fine?”).

228. *Id.*

C. *Justice Greenspan's Concurring Opinion*

Justice Greenspan joined the majority opinion and Chief Justice Castille's concurring opinion. Echoing Chief Justice Castille's criticism of the Pennsylvania Superior Court panel, Justice Greenspan also believed that "[t]he panel was not authorized to convert appellant's constitutional claim into one based on the statutory right to a jury trial apparently granted by [section 4136]."²²⁹

Using a footnote that consists of dicta, Justice Greenspan calls into question the constitutionality of another contempt statute.²³⁰ Justice Greenspan points out that McMullen initially claimed that his contempt sentences violated section 4133, because section 4133 permits a "fine only" for indirect criminal contempt but the trial court imposed multiple sentences of imprisonment.²³¹ Justice Greenspan suggested that under the majority's reasoning, section 4133 could also be found to unconstitutionally infringe on a court's authority to enforce its own orders.²³² However, because section 4133 was not in front of the Pennsylvania Supreme Court, the Court could not rule on that issue.²³³ Justice Greenspan's concurrence provides a window of opportunity for future litigants to challenge section 4133's constitutionality.

Justice Greenspan expresses the view, in other dicta, that the General Assembly is not prohibited from authorizing court orders in particular areas of the law:

The General Assembly certainly may legislate in a given area of the law (such as in the case of Protection From Abuse matters), and may authorize court orders and punishments for their violation in the context of those areas. The resulting court orders in such cases are legislatively authorized by statute.²³⁴

This theme will be explored in Part V, *infra*.

229. *Id.* (Greenspan, J., concurring).

230. *Id.* at 855 n.2.

231. *Id.*

232. *Id.* at 855.

233. *Commonwealth v. McMullen*, 961 A.2d 842, 855 n.2 (Pa. 2008) (Greenspan, J., concurring).

234. *Id.* at 855.

D. Justice Saylor's Concurring and Dissenting Opinion

Looking solely to *Sorrell*,²³⁵ Justice Saylor agreed with the majority that a jury trial was a procedural right.²³⁶ Diverging from the majority, Justice Saylor interpreted section 4136 as having “significant substantive aspects and, thus, [as] not [being] violative of [a]rticle 5, [s]ection 10(c) of the Pennsylvania Constitution.”²³⁷ Justice Saylor strayed from the majority in that he would allow some flexibility in the legislature’s creating rules of procedure where the Pennsylvania Supreme Court has not yet ruled as long as those rules “are reasonable and do not unduly impinge on [the] Court’s constitutionally prescribed powers and prerogatives.”²³⁸ Ultimately, Justice Saylor concluded that section 4136 is a reasonable statute because it operates as a restriction on the contempt power, which can be susceptible to abuse.²³⁹

IV. THE LEGAL LANDSCAPE POST-*McMULLEN* (CURRENT TO DECEMBER 31, 2014)

After *McMullen*, there has been only one Pennsylvania appellate court decision addressing the question whether a lower court judge properly exercised contempt power. In *Commonwealth v. Moody*,²⁴⁰ which was decided three years and seven months after *McMullen*, the Pennsylvania Superior Court, with no mention of *McMullen*, restated that a court has the inherent power to summarily punish for contempt but stated that the power was limited by section 4132.²⁴¹ The constitutionality of section 4132 was not addressed.

A little more than three years after *McMullen*, the Comment to Rule 140 of the Pennsylvania Rules of Criminal Procedure was amended to include, in part, the following language: “42 Pa.C.S. §§ 4137(c), 4138(c), and 4139(c) contain limitations upon the punishment that a minor court may impose for contempt. Such statutory

235. 456 A.2d 1326 (Pa. 1982); see *supra* notes 201–04 and accompanying text.

236. *McMullen*, 961 A.2d at 855 (Saylor, J., concurring and dissenting).

237. *Id.* (citing *Commonwealth v. Sorrell*, 456 A.2d 1326, 1330–31 (Pa. 1982) (Nix, J., dissenting) (quotation omitted)).

238. *Id.* at 855–56 (citing *Commonwealth v. Morris*, 822 A.2d 684, 702 (Pa. 2003) (Saylor, J., concurring)).

239. *Commonwealth v. McMullen*, 961 A.2d 842, 856 (Pa. 2008) (Saylor, J., concurring and dissenting) (quoting Justice Scalia’s statement in his concurring opinion in *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 840 (1994), that the contempt power is “out of accord with our usual notions of fairness and separation of powers.”).

240. 46 A.3d 765 (Pa. Super. Ct. 2012), *petition for allowance of appeal granted*, 79 A.3d 1093 (Pa. 2013).

241. *Id.* at 772.

limitations were held to be unconstitutional in *Com. v. McMullen*, 599 Pa. 435, 961 A.2d 842 (2008).²⁴²

On June 19, 2013, the General Assembly abolished the Philadelphia Traffic Court²⁴³ through a law that transferred the court's jurisdiction for moving violations to the Philadelphia Municipal Court.²⁴⁴ The same piece of legislation allows for the appointment of hearing officers.²⁴⁵ Section 4139 remains unaltered following the Traffic Court's abolishment; however, the Court amended the comments to Rules 140, 141, and 142 of the Pennsylvania Rules of Criminal Procedure to provide that the contempt power previously granted to Traffic Court judges does not apply to the new hearing officers.²⁴⁶

On March 21, 2014, the General Assembly adopted legislation, effective July 1, 2015, that permits a victim of sexual violence or intimidation to petition a court for protection from a defendant.²⁴⁷ After the victim files the petition, the court issues a protection order and directs service of the petition and protection order on the defendant.²⁴⁸ The court must schedule a hearing within ten business days of the filing of the petition.²⁴⁹ After the hearing, "[t]he court may issue an order or approve a consent agreement to protect the plaintiff, as appropriate, from the defendant,"²⁵⁰ which order or consent agreement may include stay-away provisions.²⁵¹ The order must include a notice that violations of the order will subject the

242. See *supra* text accompanying notes 77–79.

243. A constitutional amendment will be necessary to abolish the traffic court in its entirety. Philadelphia Traffic Court Abolition Final Report, 1 n.2, available at <http://www.pacourts.us/assets/opinions/Supreme/out/450crim-rpt.pdf?cb=1?cb=/> (last visited Jan. 3, 2015).

244. See 42 PA. CONS. STAT. ANN. § 1123(a)(9) (West Supp. 2014) (jurisdiction over summary offenses under the Vehicle Code).

245. *Id.* § 1127.

246. PA. R. CRIM. P. 140, 141, 142:

Pursuant to Act 17 of 2013, P.L. 55, No. 17 (June 19, 2013), the jurisdiction and functions of the Philadelphia Traffic Court were transferred to the Philadelphia Municipal Court Traffic Division. The terminology is retained in these rules because the Philadelphia Traffic Court, which is created by the Pennsylvania Constitution, has not been disestablished by constitutional amendment. Hearing officers of the Philadelphia Municipal Court Traffic Division do not have contempt powers of Philadelphia Traffic Court judges under 42 Pa.C.S. § 4139.

247. 42 PA. CONS. STAT. ANN. §§ 62A01–62A20 (West, Westlaw through 2014 Regular Session) (effective July 1, 2015).

248. *Id.* §§ 62A05(a), (d)(2).

249. *Id.* § 62A06(a).

250. *Id.* § 62A07(a).

251. *Id.* § 62A07(b)(1).

defendant to arrest or contempt of court.²⁵²

In the event of a violation of the order, a police officer or sheriff is to arrest the defendant and bring him without unnecessary delay before a court for preliminary arraignment; a hearing is to be scheduled within ten business days.²⁵³ The “court may hold the defendant in indirect criminal contempt and punish the defendant in accordance with law.”²⁵⁴ The new law provides that the defendant shall not have the right to a jury trial on the charge of indirect criminal contempt “[n]otwithstanding section 4136(a) (relating to rights of persons charged with certain indirect criminal contempts).”²⁵⁵ The possible punishments are identical to those of the PFAA: a fine of not less than \$300 but not more than \$1,000, and supervised probation or imprisonment not to exceed six months.²⁵⁶ “Disposition of a charge of indirect criminal contempt shall not preclude the prosecution of other criminal charges associated with the incident giving rise to the contempt,” and vice versa.²⁵⁷ If a defendant receives a sentence of incarceration, the appropriate releasing authority or other official as designated by local rule is to use all reasonable means to notify the victim sufficiently in advance of the release of the offender.²⁵⁸

In December 2014, the Minor Court Rules Committee published for comment proposed changes to the Pennsylvania Rules of Civil Procedure relating to procedures for protection of victims of domestic violence to include victims of sexual violence or intimidation.²⁵⁹

V. ANALYSIS OF *McMULLEN* AND ITS CONSTITUTIONAL IMPLICATIONS

In *McMullen*, the Pennsylvania Supreme Court preserved the power of the courts to exercise their inherent contempt power. Four of the six justices were emphatic that “the legislature cannot create

252. *Id.* § 62A07(e).

253. *Id.* §§ 62A12(b)(1), (c), (e).

254. *Id.* § 62A14(a).

255. 42 PA. CONS. STAT. ANN. § 62A14(d)(1) (West, Westlaw current through 2014 Regular Session) (effective July 1, 2015). Section 4136(a)(3)(i) of the Judicial Code, which granted the right of a jury trial upon demand, was ruled unconstitutional in *Commonwealth v. McMullen*, 961 A.2d 842, 848 (Pa. 2008). *See supra* notes 205–07. The reference to section 4136(a) is likely the result of the General Assembly’s not yet having amended section 4136(a) to reflect the *McMullen* decision.

256. *Compare* 42 PA. CONS. STAT. ANN. § 62A14(d)(2), *with* 23 PA. CONS. STAT. ANN. § 6114(b) (West 2010).

257. 42 PA. CONS. STAT. ANN. § 62A14(f).

258. *Id.* § 62A14(e)(1).

259. Proposed amendments to Rules 1201–1211 of the Rules of Civil Procedure before Magisterial District Judges, 44 Pa. Bull. 7642 (Dec. 13, 2014).

a form of indirect criminal contempt and restrict a court's ability to punish individuals who commit contempt of court;"²⁶⁰ "the legislature cannot legislate indirect criminal 'contempt,' as it is a violation of a court order, which the court inherently has the authority to punish for its violation;"²⁶¹ and "the legislature cannot enact procedural law."²⁶² Certainly, the majority opinion sends a strong message that legislative incursions into the inherent contempt power of the courts would not be welcome. Two Justices were inclined to permit limited legislative action.²⁶³

Although the "dividing lines among the three [coequal] branches [of government] 'are sometimes indistinct and are probably incapable of any precise definition,'"²⁶⁴ the balance of powers with respect to the inherent contempt power as codified in the Title 42 statutes is set forth in the following chart:

Authority of the General Assembly To Enact A Law That:	Pre- <i>McMullen</i>		Post- <i>McMullen</i>	
	Crimes Other Than Contempt	Criminal Contempt	Crimes Other Than Contempt	Criminal Contempt
Creates A Crime	Yes ²⁶⁵	Yes ²⁶⁶	Yes ²⁶⁷	No ²⁶⁸
Fixes the Penalty	Yes ²⁶⁹	Yes ²⁷⁰	Yes ²⁷¹	No ²⁷²
Sets the Procedure	Yes ²⁷³	Yes ²⁷⁴	No ²⁷⁵	No ²⁷⁶

260. *McMullen*, 961 A.2d at 850.

261. *Commonwealth v. McMullen*, 961 A.2d 842, 850 (Pa. 2008).

262. *Id.* at 847.

263. *Id.* at 854–55 (Greenspan, J., concurring); *id.* at 855–56 (Saylor, J., concurring and dissenting).

264. *Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977) (quoting *Stander v. Kelley*, 250 A.2d 474, 482 (Pa. 1969) (plurality opinion)).

265. *See supra* note 3 and accompanying text.

266. *See supra* Part II.A.

267. *See supra* note 3 and accompanying text.

268. *See supra* notes 212–14, 260–61 and accompanying text.

269. *See supra* note 4 and accompanying text.

270. *See supra* Part II.A.

271. *See supra* note 4 and accompanying text.

272. *See supra* notes 213–15, 260 and accompanying text.

273. *See supra* note 5; *Commonwealth v. Church*, 522 A.2d 30, 35 (Pa. 1987); *Commonwealth v. Cano*, 133 A.2d 800, 804 (Pa.), *cert. denied, appeal dismissed*, 355 U.S. 182 (1957).

274. *See supra* Part II.A.

275. *See supra* note 199 and accompanying text.

276. *See supra* notes 199, 205 and accompanying text.

McMullen left unanswered the question whether and to what extent the General Assembly can legislate indirect criminal contempt in police power areas. *McMullen* does not answer the question because *McMullen* involved a general contempt statute under the Judicial Code (Title 42), which covers judicial procedure, not a police power statute outside Title 42. As discussed above in Part II, prior to *McMullen* the General Assembly legislated three forms of indirect criminal contempt in traditional police power areas: the Crimes Code (Title 18) contempt statute, the PFAA (Title 23) contempt statute, and the Vehicle Code (Title 75) contempt statute. The General Assembly legislated within Title 42 one form of direct criminal contempt—section 1523(a), which relates to the presence in court of the parent or guardian of a juvenile charged with a summary offense—and one form of indirect criminal contempt—the Investigating Grand Jury contempt statute. After *McMullen*, the General Assembly legislated one form of indirect criminal contempt in a police power area by enacting the Sexual Victim Protection (Title 42) contempt statute.

McMullen also left unanswered the related question whether the inherent contempt power naturally extends into areas within the General Assembly's police power, such that courts can issue orders of protection and restraint in those areas without a specific grant of legislative authority. Courts do not need the permission of the legislature to adopt rules of procedure that allow courts to issue protective and restraining orders in civil²⁷⁷ and criminal²⁷⁸ cases to control the proceedings before the court.²⁷⁹ One Pennsylvania Superior Court decision, however, suggests that a specific grant of legislative authority is necessary for a court to issue a protective order in a police power area. In *In re R.A.*,²⁸⁰ a panel held that under section 4954 of Title 18, the General Assembly authorized only judges with jurisdiction over any *criminal* matter to enter a protective order; therefore, a juvenile court judge lacked statutory authority to issue a protective order.²⁸¹ The protective order in *In re R.A.* stated that no person shall take any adverse action of any kind against the assault victim, who was a teacher, as well as all teachers and staff

277. PA. R. CIV. P. 1531 (Injunctions); *id.* 4012 (Protective Orders).

278. PA. R. CRIM. P. 110 (Special Orders Governing Widely-Publicized or Sensational Cases); *id.* 569(c) (Examination of Defendant by Mental Health Expert); *id.* 573(F) (Pretrial Discovery and Inspection Protective Orders).

279. See PA. CONST. art. V, § 10(c); 42 PA. CONS. STAT. ANN. § 343 (West 2004) (quoted *supra* note 7).

280. 761 A.2d 1220 (Pa. Super. Ct. 2000).

281. *Id.* at 1225 (emphasis added).

employed by the school district who find themselves as victims of crime.²⁸²

McMullen's broad holdings and various opinions permit three possible interpretations. One interpretation is that no legislative action is permitted in the field of contempt. Under this interpretation, the General Assembly's police power is limited to legislating substantive crimes other than indirect criminal contempt and fixing the penalties for their violation. The General Assembly could still authorize courts to issue orders of protection and restraint. The General Assembly need not, or should not, use the term "contempt" because once a violation of a court order occurs, the inherent power of the court commences and the courts get to determine, through their own procedural rules, how to use the power and what the penalty will be.

A second interpretation is that *McMullen* is limited to the general contempt powers in Title 42 and does not apply to police power areas. The police power statutes are an exception to *McMullen's* precepts in that the General Assembly can legislate indirect criminal contempt and fix the penalty for its violation. This is the view stated by Justice Greenspan, who would even allow the General Assembly to fix the penalty for contempt.²⁸³ Justice Greenspan distinguishes protective and restraining orders in police power areas from a "court's general orders of injunction and restraint" on the basis that the former "are legislatively authorized by statute" and finds no fault with that legislative authorization because "[t]he General Assembly certainly may legislate in a given area of law (such as in the case of Protection From Abuse matters) and may authorize court orders and punishments for their violation in the context of those areas."²⁸⁴

Two other *McMullen* opinions could be read to suggest that indirect criminal contempt statutes in police power areas are constitutional because they are aimed at the public welfare rather than the authority of the court. The majority opinion and Chief Justice Cas-

282. *Id.* A court does not need a specific grant of legislative authority to exercise its inherent contempt power during proceedings before the court. In *In re Crawford*, 519 A.2d 978 (Pa. Super. Ct. 2000), a juvenile delinquency case, a panel held that a judge could find a juvenile in contempt when the juvenile did not obey a subpoena and court order to appear in court. The panel said that the contempt finding was "properly within the inherent and statutory power of the court . . . irrespective of the Juvenile Act," which did not authorize contempt. *Id.* at 980. The panel cited section 323 of the Judicial Code for the statutory support. *Id.* Section 323 is a general powers statute that applies to all courts. See *supra* note 7.

283. See *supra* note 233 and accompanying text.

284. *Commonwealth v. McMullen*, 961 A.2d 842, 855 (Pa. 2008) (Greenspan, J., concurring).

tille's concurring opinion recognize the public-welfare and authority-of-the-court distinction. The majority opinion notes that "indirect criminal contempt is an offense against the court's inherent authority, not necessarily against the public."²⁸⁵ In his concurring opinion, Chief Justice Castille recognizes that criminal contempt "is not the same as offenses against the public encompassed by the Crimes Code, Vehicle Code, drug offenses and the like."²⁸⁶

In her concurring opinion, Justice Greenspan does not specify the extent of the penalty that the General Assembly can fix, which leads to a third possible interpretation. The third interpretation is that the General Assembly can legislate indirect criminal contempt and fix the penalty as long as the General Assembly does not diminish the sentencing power of a judge sitting without a jury. The Constitution allows a judge to jail a contemnor for up to six months without providing a jury trial.²⁸⁷

Regardless of which of the three interpretations a court might endorse, indirect criminal contempt statutes in police power areas should be constitutional because any grant of legislative authority to act within the General Assembly's domain *extends* the inherent power into new territory rather than limits it. The General Assembly's authorization of protective and restraining orders adds another weapon to the General Assembly's arsenal of police powers. No one branch of government has the money, manpower, or resources to protect society. In police power areas, the General Assembly may enlist the indirect criminal contempt power of the courts to protect society, and the courts should be willing to assist the General Assembly in the exercise of police power. By the same token, violations of court orders that protect the general public occur outside the presence of the court at all times of the day and night. Therefore, courts must rely on the police and prosecutors to bring violators before the court. Because the General Assembly is extending the power of the courts, the legislature should have some authority to fix the possible punishments, even if the contempt power is restricted.

Indirect criminal contempt statutes in police power areas should also be constitutional because they differ from the contempt statute found unconstitutional in *McMullen* in purpose, which is to protect society by authorizing the courts to issue protective and restraining orders. The Investigating Grand Jury contempt statute protects by preventing the premature disclosure of information that could

285. *Id.* at 850.

286. *Id.* at 854 (Castille, C.J., concurring).

287. See *supra* text accompanying note 195.

harm, the Crimes Code contempt statute protects by keeping defendants away from victims and witnesses, the PFAA and the Sexual Victim Protection contempt statutes protect by removing the abuser from the abused, and the Vehicle Code contempt statute protects by removing unsafe vehicles from the highways.

In summary, the General Assembly and the courts can join forces to protect society in police power areas, as “the constitutional construct [of the separation of powers principle] permits ‘a degree of interdependence and reciprocity between the various branches.’”²⁸⁸ In contrast, the general contempt statute found unconstitutional in *McMullen* had no protective features and restricted the ability of the courts to punish for contempt.

The only remaining task is to assess the constitutionality of current contempt statutes within the General Assembly’s domain as well as the remaining statutes that address a court’s general contempt powers within Title 42.

A. *Judicial Code (Title 42) Contempt Statutes*

1. *Section 4132*

As mentioned above, section 4132 does not legislate contempt as a substantive crime; it merely fixes the types of contempt that a court may summarily punish.²⁸⁹ Although section 4132 restricts a court’s summary contempt power and is procedural in nature, section 4132 should survive a constitutional challenge because the first version of what is now section 4132 was enacted 159 years before the adoption of article V, section 10(c) of the Pennsylvania Constitution.²⁹⁰ Moreover, it would be unreasonable and a violation of due

288. *Robinson Twp., Washington Cnty. v. Commonwealth*, 83 A.3d 901, 991 (Pa. 2013) (quoting *Commonwealth v. Sutley*, 378 A.2d 780, 783 (Pa. 1977)).

289. *See supra* notes 56–57 and accompanying text. It should not be overlooked that courts view section 4132 as more substantive than procedural. Courts have interpreted section 4132 and its predecessor statute as legislating the substantive crime of contempt, thereby allowing contemptuous acts to be punished under section 4132’s and its predecessor statute’s subsections. *See, e.g.*, *Williams v. Williams*, 721 A.2d 1072, 1073 (Pa. 1998) (section 4132); *Commonwealth v. Falana*, 696 A.2d 126, 128 (Pa. 1997) (section 4132); *Commonwealth v. Stevenson*, 393 A.2d 386, 389 (Pa. 1978) (Act of 1836); *In re Johnson*, 359 A.2d 739, 741–42 (Pa. 1976) (Act of 1836). The substantive side of section 4132 does not raise a constitutional issue because the first version of what is now section 4132, the Act of 1809, was passed 199 years before *Commonwealth v. McMullen*, 961 A.2d 842 (Pa. 2008), was decided; section 4132 provides notice of the general types of conduct that could be punished as contempt, and the general classes of contempt give the courts great leeway in deciding what specific conduct fits within each class. *See Johnson*, 359 A.2d at 741–42. As a backup, however, courts could prosecute individuals under the court’s inherent contempt power in addition to section 4132.

290. *See supra* text accompanying notes 51–55, 165–68.

process to allow a judge to impose summary punishment for contemptuous conduct outside the presence of the court. There is a whole body of case law that requires notice, a hearing, and other procedural protections for indirect criminal contempt.²⁹¹

Even if a court were to find section 4132 unconstitutional, there would not be any significant effect because summary punishment would continue to exist; the majority opinion in *McMullen* made clear that summary punishment would continue to exist because it is a right inherent in courts and incidental to the grant of judicial power under article V of the Pennsylvania Constitution.²⁹²

2. Section 4133

As suggested by Justice Greenspan in her concurring opinion in *McMullen*, section 4133 is likely unconstitutional because it limits the power of the court to set an appropriate penalty for contempt.²⁹³ Some acts of contempt committed outside the court could be so serious that limiting the punishment to a fine would be unreasonable. Furthermore, if the contemnor receives notice, a hearing, and the other procedural protections, there does not appear to be any reason why the contemnor should not be subject to a term of imprisonment. If the term is to exceed six months, other constitutional law requires that the state give the contemnor a jury trial.²⁹⁴ Additionally, the contemnor has a right to an appeal, and the sentence is subject to review on a clear abuse of discretion standard.²⁹⁵

291. See *supra* notes 34–37 and accompanying text; see also *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 834 (1994) (finding that the procedural protections are necessary to protect due process rights of parties and prevent arbitrary exercise of the contempt power); *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632 (1988) (observing that penalties may not be imposed in criminal proceedings absent the protections afforded by the Constitution); *Bloom v. Illinois*, 391 U.S. 194, 201–02 (1968) (holding that jury trial provisions of the Constitution apply to criminal contempt); *Cooke v. United States*, 267 U.S. 517, 537 (1925) (finding that prosecuting indirect criminal contempt requires contemnor to be given notice and a reasonable opportunity to be heard, which includes the right to counsel and the right to call witnesses); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444 (1911) (citing cases) (holding that in criminal contempt proceedings contemnor is presumed to be innocent, must be proven guilty beyond a reasonable doubt, and cannot be compelled to testify against himself).

292. *Commonwealth v. McMullen*, 961 A.2d 842, 849 (Pa. 2008).

293. *Id.* at 855 n.2 (Greenspan, J., concurring).

294. See *supra* note 195 and accompanying text; see also *Commonwealth v. Falkenhan*, 452 A.2d 750, 758 (Pa. Super. Ct. 1982) (citing *Commonwealth v. Mayberry*, 327 A.2d 86, 90 (Pa. 1974)).

295. See *Ricci v. Geary*, 670 A.2d 190, 191 (Pa. Super. Ct. 1996); see also *McMullen*, 961 A.2d at 854 (Castile, C.J., concurring) (explaining that orderly judicial function and compliance with court orders is ensured by giving trial courts free exercise of inherent contempt power, subject to judicial review).

3. Section 4134

Section 4134 is not unconstitutional because the statute only applies after a person is convicted and sentenced. Therefore, section 4134 is not a restriction on the court's inherent contempt power.

4. Sections 4137–4139

Citing to *McMullen*, the Comment accompanying Rule 140 of the Pennsylvania Rules of Criminal Procedure has already strongly suggested that these statutes are an unconstitutional limitation on the scope of the punishment for contempt.²⁹⁶ The unconstitutional subsections²⁹⁷ in each statute “contain limitations upon the punishment that a minor court may impose for contempt.”²⁹⁸ The Comment notes that such statutory limitations were ruled unconstitutional in *McMullen*.²⁹⁹ A court might decide not to find sections 4137–4139 unconstitutional in their entirety, but instead may choose to rule unconstitutional only the subsections that limit the court's scope of punishment for contempt.

5. Section 1523

Since section 1523 incorporates the contempt power and possible punishments from section 4137 of Title 42,³⁰⁰ the analysis applicable to section 4137³⁰¹ applies here.

296. Comment to PA. R. CRIM. P. 140; *see supra* text accompanying note 242.

297. 42 PA. CONS. STAT. ANN. § 4137(c) (West 2004):

Punishment for contempt specified in subsection (a)(1) or (3) may be a fine of not more than \$100 or to imprisonment for not more than 30 days, or both. Punishment for contempt specified in subsection (a)(2) shall be a fine of not more than \$100. Failure to pay within a reasonable time could result in imprisonment for not more than ten days. Punishment for contempt specified in subsection (a)(5) shall be in accordance with that specified in 23 Pa.C.S. § 6114(b) (relating to contempt for violation of order or agreement). Punishment for contempt in subsection (a)(4) would be imprisonment for not more than 90 days.

Id. §§ 4138(c), 4139(c):

Punishment for contempt specified in subsection (a)(1) or (3) may be a fine of not more than \$100 or to imprisonment for not more than 30 days, or both. Punishment for contempt specified in subsection (a)(2) shall be a fine of not more than \$100. Failure to pay within a reasonable time could result in imprisonment for not more than ten days.

298. Comment to PA. R. CRIM. P. 140.

299. *Id.*

300. *See supra* text accompanying note 84.

301. *See supra* Part V.A.4.

6. Section 4549(b)

By enacting section 4549(b), the General Assembly legislated indirect criminal contempt but did not create a new form because a violation of a secrecy order was indirect criminal contempt under common law. Section 4549(b) is a legitimate exercise of the General Assembly's police power. The Pennsylvania Supreme Court has already held that the investigating grand jury "serves identifiable and legitimate state interests."³⁰² The statute does not create any specific procedure for prosecuting indirect contempt violations and therefore the contempt provisions of section 4549(b) do not violate article V, section 10(c). There is no basis for finding this indirect criminal contempt statute to be unconstitutional.

7. Section 62A14

Since section 62A14 of Title 42, which relates to victims of sexual violence or intimidation, and the PFAA have similar procedures³⁰³ and identical punishments,³⁰⁴ the analysis applicable to the PFAA³⁰⁵ applies here.

B. Crimes Code (Title 18) Contempt Statute

Section 4955 does not legislate the crime of indirect criminal contempt because indirect criminal contempt is already a crime.³⁰⁶ Section 4955 merely moves the crime of indirect criminal contempt into Title 18, thereby expanding the inherent contempt power into an area occupied by the General Assembly's police power.

Section 4955 does not contain any obvious limitations on how a court may punish for the contempt.³⁰⁷ Section 4955's procedural requirement of prompt arraignment is not inconsistent with Rule 519(A)(1) of the Pennsylvania Rules of Criminal Procedure,³⁰⁸ so there is no issue under article V, section 10(c) of the Pennsylvania

302. *Commonwealth v. McCloskey*, 277 A.2d 764, 774 (Pa.), *cert. denied*, 404 U.S. 1000 (1971).

303. *See supra* text accompanying notes 147–50, 253.

304. *See supra* text accompanying notes 156, 256.

305. *See infra* Part V.C.

306. *See supra* note 9 and accompanying text.

307. Any double jeopardy issues that might arise when punishment is imposed for the same conduct that violates one or more substantive crimes and the protective order is beyond the scope of this article. *But see generally* Ryan J. Cassidy, *United States v. Dixon: The "Jeopardizing" of Judicial Contempt Power*, 5 WIDENER J. PUB. L. 179 (1995–1996).

308. "[W]hen a defendant has been arrested without a warrant in a court case, a complaint shall be filed against the defendant and the defendant shall be afforded a preliminary arraignment by the proper issuing authority without unnecessary delay." PA. R. CRIM. P. 519(A)(1).

Constitution. Under *McMullen*, sections 4954 and 4955 should withstand constitutional challenge.

C. Protection From Abuse Act (Title 23) Contempt Statute

The PFAA's contempt statute (section 6114) is similar to the statute held unconstitutional under *McMullen*. Unlike the general contempt statute in Title 42, the PFAA contempt statute is part of a package of statutes to protect the public at large from domestic abuse, which also falls under the General Assembly's police power. Like the Crimes Code contempt statute, section 6114 also involves a legislative grant of authority to the courts, as the PFAA "confers upon courts the power to hold a defendant who violates a PFA order in 'indirect criminal contempt and punish the defendant in accordance with the [sic] law.'"³⁰⁹

The Pennsylvania Supreme Court, through its Rules of Civil Procedure, gave approval to the PFAA's contempt statute.³¹⁰ Subsections (a), (c), and (e) of Rule 1905 of the Pennsylvania Rules of Civil Procedure provide that the Notices of Hearing and Order to the defendant shall be substantially in a form that contains essentially the following language: "Violation of this order may subject you to a charge of indirect criminal contempt which is punishable by a fine of up to \$1,000 and/or a jail sentence of up to six months in jail under 23 Pa.C.S.A. § 6114."³¹¹ The inclusion of section 6114 in the Notices suggests that the pre-*McMullen* Court had no qualms with the constitutionality of that statute. The 1997 Explanatory Comment after Rule 1905 of the Pennsylvania Rules of Civil Procedure explains that the forms are substantially based on those proposed by members of the Pennsylvania Coalition Against Domestic Violence, indicating that the Notices were drafted after collaboration with at least one organization interested in the cessation of abuse of the plaintiff or minor children.³¹²

In addition, a comment to one of the Rules of Criminal Procedure relating to contempt proceedings before the minor judiciary, which was amended after *McMullen*, states that the procedures to implement the minor judiciary contempt statutes "is not intended to supplant the procedures set forth in 23 Pa.C.S. [s]ections 6110 *et seq.*

309. *Commonwealth v. Haigh*, 874 A.2d 1174, 1176 (Pa. Super. Ct. 2005) (quoting 23 PA. CONS. STAT. ANN. § 6114(a) (West 2010)).

310. PA. R. CIV. P. 1905.

311. *Id.* 1905(a); *see also id.* 1905(c), (e).

312. *See* PA. COALITION AGAINST DOMESTIC VIOLENCE, <http://www.pcadv.org> (last visited Jan. 3, 2015).

concerning violations of protection from abuse orders.”³¹³ This is another indication of judicial approval of section 6114.

Section 6114 is another instance in which the General Assembly expanded the indirect contempt power rather than limited it. Section 6114’s penalty provisions could be problematic under *McMullen* albeit the six-month term of incarceration is the maximum permissible without a jury trial.³¹⁴ Any fine is limited to \$1,000. The Rules of Civil Procedure, however, provide advance notice to the defendant of the sentencing limits;³¹⁵ it might be unconstitutional for a court to impose a greater sentence.

Section 6114’s procedural requirement of prompt arraignment is consistent with Rule 519(A)(1) of the Pennsylvania Rules of Criminal Procedure, and the PFAA’s requirement of a hearing within ten days is less than the fourteen-day requirement under Rule of Criminal Procedure 540(G)(1) for a preliminary hearing when the defendant is in custody. There is no constitutional issue under article V, section 10(c).

D. Vehicle Code (Title 75) Contempt Statute

The Vehicle Code’s contempt statute, section 4108, raises a concern because it pertains to an indirect criminal contempt proceeding for violation “of an injunction or restraining order,” which is the same language of the statute found unconstitutional in *McMullen*. Nonetheless, section 4108 should be constitutional because safety on the Commonwealth’s highways falls within the General Assembly’s police power. Once again, the General Assembly has expanded the contempt powers of the courts into an area within the General Assembly’s domain.

Section 4108 does not set any penalty and thus does not limit a court’s ability to punish the contemnor. Section 4108 does not set any procedure for determining a contempt violation. The Department of Transportation could file a petition for contempt with the judge who issued the injunction or restraining order. This procedure would not violate article V, section 10(c) of the Pennsylvania Constitution because it would not be inconsistent with existing court rules.

313. Comment to PA. R. CRIM. P. 140.

314. See *supra* note 195 and accompanying text.

315. See *supra* note 311 and accompanying text.

CONCLUSION

The separation of powers doctrine does not require perfect separation of duties between the three coequal branches of government, and the branches may share some power. Historically, the General Assembly has encroached on the inherent power of the courts by legislating contempt, but has also expanded the contempt power of the courts into police power areas. In *McMullen*, the Pennsylvania Supreme Court held that the General Assembly cannot create a form of indirect criminal contempt and restrict a court's ability to punish individuals who commit contempt of court because indirect criminal contempt is an offense against the court's inherent authority, not necessarily against the public. None of the justices' opinions in *McMullen* restricts the General Assembly's power to authorize courts to enter orders of protection, restraint, or injunction. A reasonable interpretation of *McMullen* is that the General Assembly can continue to legislate indirect criminal contempt in police power areas, as it does with all other crimes, as long as the purpose of the statute is to protect society and the statute does not unduly restrict the court's inherent power to punish. *McMullen* left unanswered the extent to which the General Assembly can set the penalties for indirect criminal contempt in police power areas.