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CONTEMPT FINES AND THE ELEVENTH AMENDMENT

*By Professor John Sanchez**

The Eleventh Amendment confirms the sovereign status of the States by shielding them from suits by individuals absent their consent.[1] The Supreme Court has made clear that under the Eleventh Amendment, prospective relief is recoverable against a state official acting in his or her official capacity[2] while retrospective remedies are not recoverable.[3] Eleventh Amendment immunity is triggered when a declaration or injunction calls for the payment of state funds as a form of compensation for past breaches of legal duties by state officials.[4] So, for example, money damages awards are barred by the Eleventh Amendment but injunctive relief is not.

There are three types of contempt: two civil, compensatory and coercive, and one criminal. Fines may be imposed in all three types of contempt. While there is consensus that both compensatory and criminal contempt fines are retrospective and therefore unavailable under the Eleventh Amendment, courts are in disarray over how to label civil coercive contempt fines—although clearly prospective, coercive fines can morph into criminal fines and such fines may result in money coming out of state funds. When such fines are deemed ancillary to prospective

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1. Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 54 (1996), *superseded by statute as stated in* Huff v. Office of the Sheriff, 2013 U.S. Dist. LEXIS 161954 (W.D. Va. Nov. 13, 2013).

2. Ex parte Young, 209 U.S. 123 (1908), *superseded by statute as stated in* Presbyterian Church (U.S.A) v. United States, 870 F.2d 518 (9th Cir. 1989). The rationale of *Ex parte Young*, however, is inapplicable to suits brought against state officials on the basis of state law, whether prospective or retroactive. *See also* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984), *superseded by statute as stated in* Raygor v. Univ. of Minn., 604 N.W.2d 128 (Minn. App. 2000).

3. Edelman v. Jordan, 415 U.S. 651, 668 (1974), *rev'd by* Jordan v. Trainor, 551 F.2d 152 (7th Cir. 1977).

4. *See, e.g., Pennhurst*, 465 U.S. at 102-03.

equitable relief, courts generally enforce such fines against state officials acting in their official capacities.

Although other remedies, such as reinstatement[5] and declarative relief, are also prospective remedies for purposes of the Eleventh Amendment,[6] this essay focuses solely on fines flowing from violations of injunctions which themselves can be labeled mandatory or prohibitory. Problems arise, however, because there is overlap between compensatory and coercive civil contempt sanctions and between coercive and criminal contempt sanctions in that each type of contempt contains remedial and punitive traits to varying degrees.

This essay begins by looking at exceptions to Eleventh Amendment immunity enjoyed by states. Next, I survey the three types of contempt, concentrating on the fine sanction available under each type of contempt rather than on imprisonment as a contempt sanction—imprisonment does not trigger Eleventh Amendment immunity. For good measure, I review the major Supreme Court cases that shed light on distinguishing between civil and criminal contempt and examine the myriad theories aimed at aiding courts in deciding whether the contempt before them is civil or criminal (or both). While most cases and law review articles focus on the more stringent constitutional procedures and protections available for criminal contempt than for civil contempt, this essay looks at the differences for purposes of Eleventh Amendment immunity.

I. ELEVENTH AMENDMENT IMMUNITY ENJOYED BY STATES FROM MONETARY DAMAGES AWARDS

The Eleventh Amendment applies to a suit brought against a state by one of its own citizens, as well as to a suit brought by a citizen of another state.[7] The Amendment applies only to those suits in which the state is a party on the record. However,

5. However, front pay is unavailable as an alternative to reinstatement in an official-capacity suit against a state official where it will be paid from a state treasury. *See, e.g.*, Nelson v. University of Texas at Dallas, 535 F.3d 318, 322 (5th Cir. 2008). By contrast, wages sought between the reinstatement order and actual reinstatement, are treated as prospective and thus not barred by *Ex parte Young*. *See, e.g.,* Barnes v. Bosley, 828 F.2d 1253 (8th Cir. 1987).

6. Requests for reinstatement constitute prospective equitable relief within the definition of *Ex parte Young*. Just because reinstatement would require the state to pay a former employee's salary does not trigger Eleventh Amendment protection. "Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *See, e.g.,* Lane v. Cent. Ala. Cmty. College, 768 F.3d 1357 (11th Cir. 2014) (just because the reinstatement would require the state to pay Lane's salary did not trigger Eleventh Amendment protection).

7. Hans v. Louisiana, 134 U.S. 1 (1890).

> It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment, to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of the Amendment.[8]

The Supreme Court has expanded the scope of Eleventh Amendment immunity to include claims filed in state, as well as federal court.[9]

There are three types of exceptions to Eleventh Amendment immunity: (1) states are not immune from suit by the federal government when Congress has stripped them of immunity under Section 5 of the Fourteenth Amendment;[10] (2) when the state has consented to suit by accepting federal money conditioned upon consent (e.g., the Rehabilitation Act of 1973, Title IX, and Title VII.);[11] and (3) the *Ex parte Young*[12] exception, which permits official-capacity suits where the plaintiff seeks "prospective equitable relief to end continuing violations of federal law."[13] This essay sets its sights solely on the *Ex parte Young* exception to the Eleventh Amendment. The theory behind *Ex parte Young* is that an unconstitutional statute is void[14] and therefore does not impart to [the official] any immunity from responsibility to the supreme authority of the United States."[15] *Ex parte Young* has been applied in cases in which violations of federal law by a state official are ongoing as opposed to cases in which federal law has been violated one time or over a period of time in the past. *Ex parte Young* also held that the Eleventh Amendment does

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8. Smyth v. Ames, 169 U.S. 466, 518-19 (1898). *See* Scheur v. Rhodes, 416 U.S. 232 (1974) (money damages are permissible against the state officer, so long as the damages are attributable to the officer himself and are not paid from the state treasury). However, even if the official is entitled to indemnification from the state, it is not considered a suit against the state. *E.g.,* Ashker v. California Dept. of Corrections, 112 F.3d 392, 395 (9th Cir. 1997).

9. Alden v. Main, 527 U.S. 706, 711 (1999).

10. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1977) ("The Eleventh Amendment, and the principle of state sovereignty, which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.").

11. Under the Spending Clause waiver theory, a state may waive its sovereign immunity by accepting federal funds. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 note 1 (1985), *superseded by statute as stated in* Sacca v. Buffalo State College, 2004 U.S. Dist. LEXIS 9134 (W.D.N.Y Feb. 13, 2004), *superseded by statute as stated in* Ohta v. Muraski, 1993 U.S. Dist. LEXIS 12693 (D. Conn. Aug. 19, 1993) ("A state may effectuate a waiver of its constitutional immunity by. . .waiving its immunity to suit in the context of the particular federal program."). Removal of a case by a state from state court to a federal court also amounts to a waiver of Eleventh Amendment immunity. Lapides v. Board of Regents, 535 U.S. 613 (2002).

12. Ex parte Young, 209 U.S. 123 (1908).

13. Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326 (1999). ("We do not . . .question the continuing validity of the *Ex parte Young* doctrine.") *See also* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 269 (1997).

14. *Ex parte Young*, 209 U.S. at 159.

15. *Id.* at 160.

not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law.[16] Thus, *Ex parte Young* applies to cases in which the relief against the state official directly ends the violation of federal law, as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or simply to compensate the victim. "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interest are insufficient to overcome the dictates of the Eleventh Amendment."[17] "[I]ndividual suits that seek prospective relief for ongoing violations of federal law. . .may be levied against state officials."[18]

A. Ancillary Monetary Relief

Another well-recognized exception to the Eleventh Amendment that bears on the differences between prospective and retrospective relief is known as ancillary monetary relief. For example, in *Libby v. Marshall*,[19] the court ruled that the Eleventh Amendment does not prevent a court from entering an injunction requiring state officials to spend state funds to improve prison conditions in order to comply with a prior preliminary injunction imposing a limit on the jail's population. The court referred to the additional relief as ancillary to a "substantive prospective injunction" and necessary to ensure future compliance with the prior injunction.[20] In *Milliken v. Bradley*, the Supreme Court noted that the Eleventh Amendment "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury."[21]

Cases that involve attorney fees yield yet another example of ancillary monetary relief recoverable from the state despite the Eleventh Amendment. In *Hutto v. Finney*, the Supreme Court ruled that the "line between retroactive and prospective relief cannot be so rigid that it defeats the effective enforcement of prospective relief."[22] In *Hutto*, plaintiffs were awarded attorney's fees, paid for by the state, rooted on the bad faith

16. *Id.* at 155-56, 159.
17. Papassan v. Allain, 478 U.S. 265, 278 (1986).
18. Sandoval v. Hagan, 197 F.3d 484, 492 (11th Cir. 1999). *See Ex parte Young*, 209 U.S. at 159.
19. Libby v. Marshall, 653 F. Supp. 359 (D. Mass. 1986).
20. *Id.* at 363.
21. Milliken v. Bradley, 433 U.S. 267, 289 (1977).
22. Hutto v. Finney, 437 U.S. 678, 690 (1979).

refusal of a litigant to obey a court order. The Court compared the award to a civil contempt fine and made clear that the award was "properly treated as ancillary to the federal court's power to impose injunctive relief."[23]

B. Injunctions

An injunction is an equitable remedy available only when the legal remedy is inadequate. While the inadequacy of the legal remedy may be proved many ways, the most common is to show that irreparable harm will result unless the court issues the injunction. Injunctive relief may be cast as either a retrospective or prospective remedy,[24] depending on whether the injunction serves to cure a past wrong or weighs on future relations between the parties. Injunctions cannot be issued against the state—only against the official-capacity-state-officer defendant. Confusion arises, however, when a court issues injunctive relief prohibiting future conduct to remedy past violations.

Equity acts in personam and enforces its decrees through contempt. Equitable remedies, especially injunctions, are enforced against the person of the defendant, either by fine, imprisonment, or both. Federal Rules of Civil Procedure 65(d), governing the elements necessary for an enforceable injunction, requires specificity: "[the] command of specificity is a reflection of the seriousness of the consequences which may flow from a violation of an injunctive order."[25] An injunction must be framed so that those enjoined know exactly what conduct the court has prohibited and what steps they must take to conform their conduct to the law.[26] For example, injunctions which merely say "obey the law" are unenforceable.[27]

The distinction between preliminary and permanent injunctions may also bear on whether relief is prospective or retrospective: a permanent injunction does not become prospective merely because it is intended to redress past violations of an earlier preliminary injunction. Declarative relief and reinstatement are two other prospective, equitable remedies available against state officials in federal court despite the Eleventh Amendment.[28] Plaintiffs' efforts to twist the facts to turn retrospective

23. *Id.* at 691.

24. A law is prospective when it applies only to cases which are filed after its enactment.

25. Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 897 (5th Cir. 1978).

26. Int'l Longshoremen's Assoc. v. Phila. Marine Trade Assoc., 389 U.S. 64, 76 (1967).

27. *See, e.g.,* Burton v. City of Belle Glade, 178 F.3d 1175, 1201 (11th Cir. 1999).

28. However, when issuance of a declarative judgment would have the same effect as an award of damages or restitution by the federal court, it is barred by the Eleventh Amendment. Green v.

relief into prospective relief have been unavailing. For example, in 2000, the Eleventh Circuit ruled:

> [W]e are aware of no federal court that has upheld against Eleventh Amendment scrutiny a final judgment requiring a state to pay money for illegal conduct which *pre-dates* the judgment on the theory that the conduct violated an earlier preliminary injunction and therefore the remedy was prospective.[29]

C. *Monetary Damages*

Monetary damages, by contrast, are a legal remedy measured by the plaintiff's loss. Damages are retrospective in tort cases where they aim to restore the plaintiff to his/her pre-tort position. Similarly, fines in compensatory civil contempt cases are retrospective in that they aim to compensate the plaintiff for past injuries sustained. If the prospective relief sought is "measured in terms of a monetary loss resulting from a past breach of a legal duty," it is the functional equivalent of monetary damages and *Ex parte Young* does not apply.[30]

Judgements that result in monetary damages, unlike equitable decrees, are enforced three ways: by (1) judgment liens, (2) writs of execution, or (3) garnishment. The law acts in rem; equity acts in personam. Suits seeking retrospective equitable restitution are also barred by the Eleventh Amendment.[31]

II. CONTEMPT

Section 17 of the First Judiciary Act made clear that federal courts "shall have power to. . . punish by fine or imprisonment, at the discretion of said courts, all contempt of authority of any cause or hearing before the same."[32] The authority to hold individuals in contempt of court is one of the least regulated areas of judicial power.[33] It is essentially unlimited

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Mansour, 474 U.S. 64 (1985).

29. Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dept. of Health and Rehab. Serv., 225 F.3d 1208, 1222 (11th Cir. 2000). *See* Kostok v. Thomas, 105 F.3d 65, 69 (2d Cir. 1997) ("Any claim for retroactive monetary relief, under any name, is barred . . . . When state funds are awarded to compensate for past wrongdoing by state officials, or to deter future wrongdoing, the Eleventh Amendment bars the payment as retrospective.").

30. Edelman v. Jordan, 415 U.S. 651, 668 (1974); Papasan v. Allain, 478 U.S. 265, 278 (1986) ("Compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.").

31. *See* Green v. Mansour, 474 U.S. 64, 68 (1985).

32. Establishment of the Judicial Courts of the United States, ch. 20, §17, 83, 1 Stat. 73, (1789).

33. "[W]hile the exercise of the contempt power is subject to reasonable [legislative] regulation, the attributes that inhere in that power and are inseparable from it can neither be abrogated

power granted to the judge and therefore there is grave danger of bias stemming from the court's conflicted role in vindicating its own authority. "The traditional justification for the relative breadth of the contempt power has been necessity."[34] "Few legal concepts have bedeviled courts, judges, lawyers, and legal commentators more than contempt of court."[35] The contempt powers fuse legislative, executive and judicial powers and is therefore subject to abuse.

> Courts use contempt to control disruptive or disrespectful courtroom behavior, to compel testimony by reluctant witnesses, to enforce child support and alimony awards, to ensure obedience to injunctions in private law disputes, to police behavior in labor-management relations, and to enforce structural injunctions.[36]

A recurring problem, when it comes to distinguishing between civil and criminal contempt, is that "the nature and character of a contempt proceeding, whether civil or criminal, is determined at its end in the stage of review, rather than, as it should be . . . at the beginning."[37] As the Fifth Circuit said:

> The simple fact is that no one, simply no one, is able to determine whether this was begun, tried, or ended as a case for criminal contempt, civil contempt, or both, or whether some place down the trail, begun as one, it transmuted into the other. This is, of course, one thing about which there may not be any doubt if a contempt order is to stand.[38]

A court has power to hold a party in civil contempt when (1) there is a clear and unambiguous court order; (2) there is clear and convincing proof of noncompliance; and (3) the contemnor has not attempted to comply in a reasonably diligent manner.[39] By contrast, to hold a contemnor in criminal contempt, the court must prove noncompliance beyond a reasonable doubt.

A. *Contempt Governed by State Statute*

When a State's proceedings are involved, state law provides strong guidance about whether or not the State is exercising its authority "in a

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nor rendered practically inoperative. Michaelson v. United States, 266 U.S. 42, 66 (1924).

34. Int'l Union v. Bagwell, 512 U.S. 821, 831 (1994).

35. *Id*. at 827n.3.

36. West's (R) Pennsylvania Practice Series TM 16 PAPRAC § 13:1.

37. United States v. United Mine Workers, 330 U.S. 258, 368 (1947) (Rutledge, J., dissenting).

38. Clark v. Boynton, 362 F.2d 992, 994 (5th Cir.1966). *See also* Cliett v. Hammonds, 305 F.2d 565 (5th Cir. 1952).

39. Playboy Enters. v. Chuckleberry Publ'g Inc., 939 F. Supp. 1032 (S.D. N.Y. 1996).

nonpunitive, noncriminal manner," and how one who challenges the State's classification of the relief imposed, as "civil" or "criminal," may be required to show "the clearest proof" that it is not correct as a matter of federal law.[40] Courts defer to a legislature's determination whether a sanction is civil or criminal.[41] By contrast, "when a single judge, rather than a legislature, declares a particular sanction to be civil or criminal, such deference is less appropriate."[42] This essay confines itself to non-legislative contempt sanctions resting upon a court's inherent power to identify, prosecute, adjudicate, and sanction the contumacious conduct.

B. Direct v Indirect Contempt

Direct contempt take place in the courtroom while indirect occur outside the courtroom. A judge enjoys summary power in the face of direct contempt, justified by the judge's personal observation of the contumacious conduct. Sanctions for direct contempt may be civil or criminal. Summary punishment for direct contempt is an exception to the general rule that criminal sanctions may not be imposed without affording the accused all the protections of the Bill of Rights.[43] More procedural rights are granted in cases of indirect contempt than in direct. While I can imagine situations where a state attorney might be held in direct contempt, thus triggering the Eleventh Amendment if civil or criminal fines are imposed, this essay focuses on fines imposed for indirect contempt of court.

C. Contempt Sanctions

The sole sanction available for compensatory civil contempt is a fine payable to the plaintiff. This fine is clearly retrospective and resembles monetary damages. For this reason, compensatory civil contempt fines are not recoverable against a state official acting in her official capacity because of the Eleventh Amendment. Civil coercive contempt sanctions come in the form of fines and/or imprisonment.[44] Both sanctions are

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40. Allen v. Illinois, 478 U.S. 364, 368-69 (1986).

41. *See, e.g.*, United States v. Ward, 448 U.S. 242, 248 (1980).

42. Int'l Union v. Bagwell, 512 U.S. 821, 838 (1994).

43. *See, e.g.*, Sacher v. United States, 343 U.S. 1 (1952). Even where the contempt is direct, however, courts may not impose severe criminal sanctions without a jury trial. *See also* Bloom v. Illinois, 391 U.S. 194, 109-10 (1968).

44. Where a recalcitrant witness is imprisoned for coercive contempt, imprisonment cannot continue beyond the time when the ordered testimony is useful. Shillitani v. United States, 384 U.S. 364, 371 (1966). Similarly, the contemnor cannot be held once the plaintiff's underlying action has been terminated. 28 U.S.C.A. § 1826(a)(1).

prospective and are thus recoverable against state officials because of *Ex parte Young*. The distinction between coercive and punitive imprisonment has been extended to the fine context. A contempt fine is considered civil and remedial if it either "coerce[s] the defendant into compliance with the court's order, [or]. . .compensates the complainant for losses sustained."[45]

Criminal contempt sanctions also consist of fines or imprisonment but are retrospective because they are determinate and cannot be purged. Criminal contempt fines are not recoverable against state officials because of the Eleventh Amendment.

Imprisonment is an appropriate remedy for either civil coercive or criminal contempt, depending on how it is assessed. If the prison term is conditional and coercive, the character of the contempt is civil; if it is backward-looking and unconditional it is criminal.[46] Unlike criminal contempt where imprisonment and a fine cannot be combined,[47] a finding of civil contempt allows the coercive imposition of both fine and imprisonment.

D. Compensatory Civil Contempt

Compensatory or remedial civil contempt "compensate[s] a party who has suffered unnecessary injuries or costs because of contemptuous conduct."[48] Though compensatory civil contempt proceedings are nominally those of contempt, they are really proceedings to award damages to the plaintiff. For this reason, a compensatory fine must rest on evidence of the injured party's actual loss.[49] In measuring a compensatory fine, the actual loss must be directly related to the violation proven. "Like criminal contempt, remedial civil contempt is backward-looking."[50] But remedial contempt is civil because it remedies the consequences of defiant conduct on an opposing party rather than punishing the defiance per se. Unlike criminal contempt, however, compensatory civil contempt does not require mens rea and proof beyond a reasonable doubt.[51]

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

46. *See Shillitani*, 384 U.S. at 366, 368 (holding that prison sentence for two years with automatic release upon compliance with court's decree indicated civil contempt).

47. In re Bradley, 318 U.S. 50 (1943).

48. Travelhost, Inc. v. Blandford, 68 F.3d. 958, 962 (5th Cir. 1996).

49. *E.g.*, *United Mine Workers*, 330 U.S. at 303-304 (fines here were not intended "to compensate the complainant for losses sustained"). Coercive civil contempt fines must take into account the amount of the contemnor's financial resources.

50. Ingalls v. Thompson (In re Bradley), 588 F.3d 254, 263 (5th Cir. 2009)

51. *See* McComb v. Jacksonville Paper Co., 336 U.S. 187, 193 (1949) (holding that remedial civil contempt does not require proof of criminal intent).

E. Coercive Civil Contempt

Coercive civil contempt fines aim at persuading the contemnor to obey the injunction. Coercive fines can be purged when the contemnor obeys the court order. A fixed fine that is imposed and suspended pending future compliance with the court's prior orders is considered a purgeable sanction.[52] The contemnor carries the key to the jail in his own pocket.[53] Unlike compensatory fines, however, coercive fines aim not to determine what would compensate the plaintiff, but rather the court must determine what is necessary to force the contemnor into compliance with the injunction. No matter what, though, coercive fines cannot be used to enforce the payment of damages.

In *United States v. Mine Workers*,[54] the Supreme Court squarely addressed the judicial power to impose coercive civil contempt fines. The Court ruled that fixed fines may also be deemed purgable and civil when imposed and suspended pending future compliance.

In *Hicks v Feiock,*[55] the Supreme Court ruled that in order for a contempt order imposing a determinate sentence to be civil in nature, it must contain a purge clause. The two hearings, an initial contempt proceeding and a purge hearing, are distinct. A purge hearing is not a new contempt proceeding but a conclusion of the original contempt hearing—its aim is to determine whether the contemnor has satisfied the purge conditions. If the original contempt sanction is civil, a purge hearing retains the civil nature of that proceeding.

1. Overlap Between Compensatory and Coercive Civil Contempt

Evidence of overlap between compensatory and coercive civil contempt is when both types of fines may serve to compensate the injured party for losses sustained and coerce the contemnor into compliance with a previously issued court order. If the case is civil and the punishment is solely remedial, there is also vindication of the court's authority.[56]

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52. Int'l Union v. Bagwell, 512 U.S. 821, 823 (1994). ("[F]ixed fines also may be considered purgable [sic] and civil when imposed and suspended pending future compliance.") *But see* Reina v. United States, 364 U.S. 507, 515 (1964) (Black, J., dissenting) (noting with discomfort his opinion that a suspended civil contempt sentence "seems to represent a present adjudication of guilt for a crime to be committed in the future").

53. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442 (1911).

54. United States v. United Mine Workers, 330 U.S. 258 (1947).

55. Hicks v. Feiock, 485 U.S. 624, 640 (1988), *overruled in part as stated in* In re Ivey, 85 Cal. App. 4th 793 (2000).

56. *Gompers*, 221 U.S. at 443.

2. Criminal Contempt Fines

"Criminal contempt is a crime in the ordinary sense."[57] A fine is criminal if "the contemnor has no subsequent opportunity to reduce or avoid the amount of the fine through compliance" (e.g., a per diem fine).[58] Any "flat, unconditional fine" is criminal because it does not afford an opportunity to purge the contempt through compliance.[59] "A fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a 'completed act of disobedienceFalse'"[60] Criminal contempt charges can become separate charges from the underlying case. Criminal contempt charges may live on after resolution of the underlying case. The purpose of criminal contempt fines (e.g., an unconditional and determinate fine) is to punish the contemnor and to "vindicate the authority of the court."[61] In *Hicks v. Feiock*, the Supreme Court ruled that a suspended or probationary sentence is criminal.[62]

When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction does not have a coercive effect. "If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense."[63]

Criminal contempt in federal courts is governed by 18 U.S.C.A § 401, which allows punishment of "[d]isobedience or resistance to" a court's "lawful writ, process, order, rule, decree, or command."[64] "Punishment in criminal contempt cannot undo or remedy the thing which has been done. . . ."[65]

As Justice Scalia made clear, concurring in *Bagwell*:

> The criminal contempt sanction, is "punitive, to vindicate the authority of the court." Unlike the civil contemnor, who has refused to perform some discrete, affirmative act commanded by the court . . . the criminal contemnor has "done that which he has been commanded not to do." The criminal contemnor's disobedience is past, a "completed act" . . . Accordingly, the criminal contempt sanction operates not to coerce a future act from the defendant for the benefit of the complainant, but to

57. Bloom v. Illinois, 391 U.S. 194, 201 (1968).
58. Int'l Union v. Bagwell, 512 U.S. 821, 829 (1994).
59. Penfield Co. of Cal. v. SEC, 330 U.S. 585, 588 (1947).
60. *Bagwell*, 512 U.S. at 828.
61. *Gompers*, 221 U.S. at 441.
62. *Hicks*, 485 U.S. at 639, note 11.
63. *Gompers*, 221 U.S. at 442.
64. 18 U.S.C. § 401 (2002).
65. In re Fox, 96 F.2d 23, 25(3d Cir. 1938).

> uphold the dignity of the law, by punishing the contemnor's disobedience.[66]

Criminal contempt proceedings arising out of civil litigation are between the public and the defendant and are not part of the original cause.[67] Moreover, criminal contempt requires proof of willfulness while civil contempt does not.[68]

a. Overlap Between Compensatory Civil and Criminal Contempt

The categories of compensatory civil and criminal contempt are not altogether neat and tidy. Compensatory "civil contempt proceedings, although primarily remedial, also 'vindicate . . . the court's authority'; and criminal contempt proceedings, although designed to 'vindicate the authority of the law,' may bestow 'some incidental benefit' upon the complainant, because 'such punishment tends to prevent a repetition of the disobedience.'"[69] But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or vice versa.[70] Despite this overlap, there are some differences: (1) while the criminal contempt power is limited by 18 U.S.C.A. § 401, civil contempt remains a creature of inherent power.[71] (2) coercive civil fines cannot be appealed until the end of litigation.[72]

b. Overlap Between Coercive Civil and Criminal Contempt

The same contemptuous conduct may give rise to both criminal and coercive civil contempt.[73] In *Hicks*, the Supreme Court noted:

> [W]hen a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it

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66. *Bagwell*, 512 U.S. at 845 (Scalia, J., concurring).
67. *Gompers*, 221 U.S. at 445.
68. *E.g.,* McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).
69. *Bagwell*, 512 U.S. at 845.
70. *Id*. at 828.
71. *See* Spallone v. United States, 493 U.S. 265, 276 (1990) (referring to "the axiom that courts have inherent power to enforce compliance with their lawful orders through civil contempt").
72. A trial court's contempt order is reviewed on appeal with a presumption of correctness and will not be reversed "unless a clear showing is made that the trial court either abused its discretion 'or departed so substantially from the essential requirements of law as to have committed fundamental error.'" Lewis v. Nical of Palm Beach, Inc., 10 So. 3d 159, 163 (Fla. Dist. Ct. App. 4th Dist., 2009).
73. *See* In re Marriage of Betts, 558 N.E.2d 404, 431 (Ill. App. Ct. 1990).

is also seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order.[74]

A fine is punitive when it is paid to the court but becomes remedial or civil when the contemnor can avoid paying the fine simply by performing the affirmative act required by the court's order.[75]

The Supreme Court in *Hicks v. Feilock* ruled that conclusions about the civil or criminal nature of a contempt sanction are properly drawn, not from "the subjective intent of a State's laws and its courts," but "from an examination of the character of the relief itself."[76] Because civil contempt sanctions are deemed non-punitive and avoidable, fewer procedural protections for such fines are required.

In *International Union, United Mine Workers of America v. Bagwell*, the Supreme Court states, "most contempt sanctions . . . to some extent punish a prior offense as well as coerce an offender's future obedience

Justice Scalia noted that the Supreme Court had earlier attempted to address this issue in *Hicks*: "A suspended sentence with a term of probation is not equivalent to a conditional sentence that would allow the contemnor to avoid or purge these sanctions."[77]

Another example of the overlap between civil coercive and criminal contempt occurs when the judge levies a fine with a purge clause against the contemnor but the contemnor never agrees to obey the injunction. Civil coercive contempt turns into criminal contempt when the judge is convinced that further fines will not change the contemnor's mind. At that point, the judge must impose a determinate and fixed criminal contempt fine. Similarly, a civil contempt fine cannot extend beyond the point at which the contemnor can no longer comply with the underlying injunction.[78]

Despite the overlap, differences remain: (1) civil contempt is a facet of the original cause of action, while criminal contempt is a separate cause of action brought in the name of the United States;[79] (2) in criminal contempt, some of the sanctions imposed do not terminate upon the contemnor's compliance with the terms of the decree; and (3) one hallmark of civil contempt is that the sanction imposed is only contingent and coercive.[80]

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74. *Hicks*, 485 U.S. at 635.
75. *Bagwell*, 512 U.S. at 847 (Ginsburg, J., concurring).
76. *Hicks*, 485 U.S. at 635-36.
77. *Id*. at 639.
78. *Id*.
79. *Gompers*, 221 U.S. at 441-45.
80. Int'l Bus. Mach. Corp. v. United States, 493 F.2d. 112, 115 (2d Cir. 1973).

D. Different Tests for Distinguishing Civil and Criminal Contempt

The courts and commentators have struggled over the years to find a bright-line test for distinguishing between civil and criminal contempt.[81] The following tests have been used:

- Whether a contempt is civil or criminal turns on the "character and purpose" of the sanction involved.[82] This test is easy to state but difficult to put into practice. Rather than providing a solution, it merely restates the issue.

- Prohibitory versus mandatory injunctions: In *Gompers*, the Supreme Court said that civil contempt seeks to coerce future compliance with a previously violated mandatory court order while criminal contempt seeks to punish a past violation of a prohibitory injunction.[83] The problem with this test is that most injunctions can be manipulated to appear either prohibitory or mandatory.[84] The distinction between mandatory and prohibitory is difficult to apply "when conduct that can recur is involved, or when an injunction contains both mandatory and prohibitory provisions."[85]

- Focus on the severity of the sanctions imposed.[86] The more severe the sanction, the more likely it is criminal contempt.

- Favor civil sanctions over criminal fines in order to apply the least amount of power possible required to the proposed end. Dictum in an 1821 Supreme Court case, *Anderson v. Dunn*,[87] requires the choice of civil sanctions over criminal where feasible. The problem with this test is that civil sanctions often impose greater burdens on the contemnor than criminal ones.

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81. *Bagwel*l, 512 U.S. at 839-40 (Scalia, J., concurring) ("Our cases have employed a variety of not easily reconcilable tests for differentiating between civil and criminal contempts.").

82. *Gompers*, 221 U.S. at 441.

83. *Id*. at 443.

84. *E.g*., *Bagwel*l, 512 U.S. at 835 (An injunction ordering the union: "Do not strike," would appear to be prohibitory and criminal, while an injunction ordering the union: "Continue working," would be mandatory and civil.").

85. *Id*. at 835.

86. *Id*. (Where "a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the evenhanded exercise of judicial power.").

87. Anderson v. Dunn, 19 U.S. 204 (1821).

- When both civil and criminal relief is imposed, "the criminal feature of the order is dominant and fixes its character for purposes of review."[88]

- When sanctions are announced in advance, such sanctions are coercive and civil, not criminal. Just because a court establishes a prospective fine schedule does not make the fines civil. Also, at the outset of the proceeding, the judge has not yet heard evidence about the contempt. A judge cannot decide on a sanction before the proceeding without offending due process.

- *Bagwell* factors: In *Bagwell*, the majority opinion set forth several factors that identify a contempt sanction as criminal: (1) did the contemnor's sanctionable conduct implicate the court's ability to maintain order and adjudicate the proceedings before it?; (2) did the contemnor's contumacy involve simple, affirmative acts?;[89] (3) did the court levy contempt fines for widespread, ongoing, out-of-the-court violations of a complex injunction? If so, the sanction is criminal.[90]

- Focus on the motivation of the contumacy: Justices Black and Douglas, dissenting in *United Mine Workers,*[91] suggested that the choice between civil and criminal sanctions should take account of "the question of intent—the motivation of the contumacy." Where the contemnor believes in good faith, though erroneously, that he was acting within his legal rights, the fine is civil. If the contemnor acted in bad faith, the fine is criminal.

- Disobedience of a court order amounts to civil contempt, while acts hindering the administration of justice are criminal.

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88. *Hicks*, 485 U.S. at 638 n.10.

89. *Id*. at 842 (Scalia, J., concurring) ("When an order governs many aspects of a litigant's activities, rather than just a discrete act, determining compliance becomes much more difficult. Credibility issues arise, for which the fact-finding protections of the criminal law (including jury trial) become much more important.").

90. *Bagwell*, 512 U.S. at 838.

91. *United Mine Workers*, 330 U.S. 258, 333 (1947).

- The trial court judge controls the nature of the contempt fine imposed. This is an overstatement—the contemnor controls whether to obey the injunction.

- Contempt fines that contain a purge clause are always civil.[92] For example, in *United States v. Mine Workers*, the Supreme Court imposed and suspended a coercive civil fine, conditioned on the union's ability to purge the fine through full, timely compliance with the trial court's order. The Court concluded, in light of the purge clause, that the civil fine operated as "a coercive imposition upon the defendant union to compel obedience with the court's outstanding order."[93]

- Ancillary monetary relief can only be awarded in civil contempt but not in criminal contempt. Funds are simply ancillary to a valid, prospective injunction. This is a compelling argument but courts hotly debate what constitutes ancillary monetary relief.

- Ongoing violations versus completed violations: ongoing violations calls for coercive civil contempt while completed violations call for criminal contempt.[94] The Eleventh Amendment allows prospective equitable relief to end continuing violations of federal law.

- Abolish the distinction between civil and criminal contempt.[95] Commentators argue that contempt generally, whether civil or criminal, is sufficiently serious that contemnors should be entitled to all the constitutional protections afforded criminal defendants. Adopting this approach would mean that contempt fines would never be recoverable from a state official because criminal contempt

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92. *See, e.g.*, Shillitani v. United States, 384 U.S. 364, 370 (1966) (upholding as civil a determinate (two year) sentence which includes a purge clause").

93. *United Mine Workers*, 330 U.S. at 307.

94. *See, e.g. Bagwell*, 512 U.S. at 842 (Scalia, J., concurring) ("Where specific performance of contracts was sought, it was the categorical rule that no decree would issue that required ongoing supervision.").

95. Paul A. Grote, *Purging Contempt: Eliminating the Distinction between Civil and Criminal Contempt*, 88 WASH. UNIV. L. REV. 1247, 1275 (2011) ("Generally, all indirect contempts should be treated like former indirect criminal contempts.").

> fines are barred by the Eleventh Amendment as they are always retrospective.

One approach for distinguishing civil and criminal contempt would be to apply as many of these tests as feasible and if all of them point in the same direction, courts may rest assured that they have arrived at the correct one. Another possible solution, as it relates to the Eleventh Amendment's ban on retrospective fines, is for the judge to only impose a jail sentence instead of any fines. Jail time, rarely, if ever, entails requiring the state to pay money out of the state treasury. In conclusion, the ongoing debate surrounding the three types of contempt and the Eleventh Amendment is unlikely to be settled until the Supreme Court arms lower courts with more helpful guidance.