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Disobedience and Contempt

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Abstract: A court's power to impose contempt sanctions on recalcitrant individuals is essential to ensure orderly judicial proceedings and obedience of judicial decrees. Despite repeated efforts to distinguish between civil and criminal contempt and the procedures required for each, the U.S. Supreme Court arguably has failed to delineate a precise demarcation between the two that considers both the due process interests of alleged contemnors and the remedial needs of party plaintiffs. This Article suggests that the Court's latest major decision on the differences between civil and criminal contempt, *International Union, United Mine Workers v. Bagwell*, represents the high water mark in the Court's emphasis on affording heightened procedural protections to alleged contemnors. This Article observes that by implicitly expanding the definition of criminal contempt, the U.S. Supreme Court has neglected to consider adequately plaintiffs' remedial entitlements and has unduly restricted litigants from obtaining equitable relief promptly and reliably. This Article proposes a return to the more traditional definitions of civil and criminal contempt coupled with additional procedural reforms that would enhance the rights of both civil and criminal contemnors while protecting plaintiffs' and courts' ability to have lawful decrees enforced.

For centuries Anglo-American courts have assumed an inherent power to cite individuals for contempt for disobedience of court orders, disruption of court proceedings, and other affronts to courts' dignity and authority. Courts use contempt citations to compensate injured parties, coerce reluctant defendants and witnesses, and punish defiant individuals. Contempt sanctions normally involve either a fine, a term of imprisonment, or both. Most recently, courts have levied or threatened to levy contempt sanctions against the President of the United States,[1] a recalcitrant witness in a proceeding to investigate possible presidential

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1. *See* Jones v. Clinton, 36 F. Supp. 2d 1118, 1132 (E.D. Ark. 1999) (imposing compensatory contempt sanctions under Federal Rule of Civil Procedure 37 for President's perjury during deposition in civil suit); Neil A. Lewis, *Judge Orders Clinton to Pay $90,000 to Jones' Lawyers*, N.Y. Times, July 30, 1999, at A13 (noting that President was ordered to pay plaintiff's attorneys $90,000 for extra work performed because of President's perjury).

wrongdoing,[2] striking commercial airline pilots,[3] and one of America's largest corporations.[4]

Over the years courts have struggled to find the exact parameters of contempt, both procedurally and substantively. The result of this struggle has been a cauldron of confusion, particularly concerning the appropriate procedures to be followed when imposing a contempt sanction.[5] The U.S. Supreme Court purportedly answered the procedural question in a recent case, *International Union, United Mine Workers v. Bagwell*.[6]

The Court in *Bagwell* held that fines imposed on a labor union for disobeying a court order growing out of a coal miners' strike were essentially criminal in nature and therefore required a criminal proceeding before their imposition.[7] The Court so held even though the trial court had announced in advance that certain fines would be imposed

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2. *See* United States v. McDougal (*In re* Grand Jury Subpoena), 97 F.3d 1090, 1092 (8th Cir. 1996) (concerning witness subpoenaed by Independent Counsel who refused to testify before grand jury regarding Whitewater investigation and was imprisoned indefinitely as coercive civil contempt).

3. *See* American Airlines, Inc. v. Allied Pilots Ass'n, No. 7:99-CV-025-X, 1999 U.S. Dist. LEXIS 1376, at *5–7 (N.D. Tex. Feb. 13, 1999) (ordering striking pilots' union to pay compensatory civil contempt to airline).

4. According to news reports, Microsoft Corp. barely averted coercive contempt fines of $1,000,000 per day for disobeying a preliminary injunction by agreeing to a settlement with the Justice Department in the department's antitrust suit against the software manufacturer. *See* Julia Angwin, *Microsoft Makes Deal to Avoid Contempt Fines*, S.F. Chron., Jan. 23, 1998, at A1; Pat Widder, *Microsoft Concedes, for Now; But Fight over Internet Software Far from Over*, Chi. Trib., Jan. 23, 1998, at 1.

5. Several commentators have remarked upon the murkiness of contempt jurisprudence. *See, e.g.*, Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 Va. L. Rev. 1025, 1025 (1993) ("The literature on contempt of court is unanimous on one point: the law is a mess."); Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. Cin. L. Rev. 677, 677 (1981) ("Few legal concepts have bedeviled courts, judges, lawyers and legal commentators more than contempt of court."); Robert B. Patterson, *Criminal Contempt: A Proposal for Reform Providing "The Least Possible Power Adequate to the End Proposed,"* 17 S.D. L. Rev. 41, 62 (1972) ("Perhaps the only certainty in criminal contempt is that it is a theoretical and procedural morass."); W. Gregory Rhodes, *The Distinction Between Civil and Criminal Contempt in North Carolina*, 67 N.C. L. Rev. 1281, 1281 (1989) ("[A]ttempts to distinguish between civil and criminal contempt have resulted in a legal morass, perplexing lawyers, judges, and commentators."). In 1890, the leading contempt scholar of the era remarked that attempting to formulate a uniformly applicable rule distinguishing between civil and criminal contempt was "impracticable." Stewart Rapalje, *A Treatise on Contempt* 25 (1890). Seventy years later Ronald Goldfarb observed, "Time has proved this evaluation to be an understatement. It is impossible." Ronald L. Goldfarb, *The Contempt Power* 52 (1963).

6. 512 U.S. 821 (1994).

7. *See id.* at 837–38.

if the union continued to violate the injunction.[8] The trial court and the Supreme Court of Virginia considered these fines to be in the nature of coercive civil contempt because of their conditional nature.[9] Civil contempts are prosecuted as part of the main equitable action and do not require the heightened protections afforded a criminal defendant.[10]

The confusion about the distinction between civil and criminal contempt has plagued the courts for decades.[11] The U.S. Supreme Court's latest foray into the debate in *Bagwell* represents a concession by the Court that it is almost impossible to make a rational and meaningful distinction between the two. In attempting to draw the line between them, the Court pushed most substantial contempts into the criminal category and thereby mandated the use of criminal procedures, as opposed to traditional civil procedures, at the contempt hearing.

This Article posits that the historic efforts to distinguish between criminal and civil contempts have failed to develop sufficiently the policy rationale for the differing procedural requirements. Traditionally, the purpose of the contempt has distinguished between the two types of contempt. Civil contempt serves to benefit the plaintiff to the action by providing compensation or coercion. Criminal contempt functions to punish defendants for their disobedience of the court and the flouting of the court's authority. Thus remedial or coercive contempts necessitated only ordinary civil procedures whereas punitive contempts required criminal procedures. Focusing on purpose, however, has not provided a clear-cut answer to the problem of classification. A single contempt citation can often serve more than one purpose,[12] and therefore the question becomes whether criminal procedures should always be required where the contempt is at least arguably punitive in nature.

This Article argues that by pushing the majority of what were traditionally viewed as coercive civil contempts into the criminal category, the U.S. Supreme Court has eviscerated lower courts' ability to

8. *See id.* at 829–30.

9. *See id.* at 825–26.

10. *See id.* at 831.

11. Some courts have foundered more than others in their attempts to distinguish meaningfully between civil and criminal contempt: "In brief, civil contempt is the failure to obey a court order or decree, while criminal contempt arises from the doing of some forbidden act." *Ex parte* Powell, 883 S.W.2d 775, 778 (Tex. Ct. App. 1994).

12. *See, e.g.*, Mitchell v. Stevenson, 677 N.E.2d 551, 559–60 (Ind. Ct. App. 1997) (noting that 90 day jail sentence had both coercive and punitive effects).

use contempt as an enforcement tool in aid of a litigant.[13] Almost all published scholars on this topic have emphasized the need to protect the due process rights of alleged contemnors. But although alleged contemnors are certainly entitled to adequate procedures before the court may impose sanctions, successful plaintiffs are equally deserving of an effective remedy without undue delay.[14] Therefore, this Article posits a remedial theory of contempt that attempts to balance alleged contemnors' due process interests against plaintiffs' remedial interests. This Article proposes five specific reforms that will protect the accused from arbitrary and biased imposition of contempt fines while furthering the judicial system's announced goal of providing relief to deserving litigants. These reforms include: (1) statutory caps on criminal contempt penalties; (2) creation of a jury-trial right in equity; (3) adoption of a preference for non-contempt enforcement mechanism; (4) revival of the traditional definition of coercive civil contempt; and (5) the immediate appealability of coercive civil contempt sanctions.

Each reform by itself does not address all of the due process and remedial concerns voiced by those critical of the current contempt jurisprudence. But collectively these proposals respond to the most pressing questions regarding protecting alleged contemnors' due process rights, while at the same time ensuring that plaintiffs are able to achieve the remedial satisfaction to which they are legally entitled. Although each proposal could be enacted separate from the others, together they strive toward a proper balance of plaintiffs' and defendants' interests while recognizing the inherent potential for judicial bias in administering contempt sanctions.

This Article begins with a review of the historic distinction between criminal and civil contempt. It then traces the U.S. Supreme Court's gradual embracing of heightened procedural protections for accused criminal contemnors. Part II analyzes the U.S. Supreme Court's decision in *Bagwell* and notes several difficulties with the majority opinion's attempt to redraw the dividing line between civil and criminal contempt. Furthermore, Part II explores the impact of the *Bagwell* decision on subsequent state and federal appellate courts and reveals that lower courts have tended either to ignore *Bagwell* completely or to distinguish it in problematic cases. Part III examines the proposed approach to the distinction between civil and criminal contempt and justifies that

13. *See infra* notes 359–66 and accompanying text.

14. *See infra* notes 367–84 and accompanying text.

approach in light of the competing interests of the parties, the court, and the public. Part III also outlines several procedural and substantive reforms that would safeguard the due process rights of contemnors while effectuating the remedial rights of litigants.

I. WHY THE LAW OF CONTEMPT IS SO CONFUSING

A. The Modern Contempt Categories

By the twentieth century contempts were divided into at least four categories: direct contempt, indirect criminal contempt, coercive civil contempt, and remedial civil contempt. Direct contempts consisted of disruptive or disrespectful behavior committed in the presence of the court or so near the court's presence as to disrupt the administration of justice.[15] Courts were thought to have inherent power to punish summarily outlandish conduct that threatened to interfere with ongoing proceedings or represented an affront to the court's dignity.[16]

Both the court's inherent punitive power and the summary procedures are still viewed as necessary to the effective administration of justice.[17] A court must be able to punish shouting, cursing, interruptions, and other disruptive behavior to keep control over the proceedings before it.[18] Furthermore, by punishing disrespectful comments or actions the court reminds those in the courtroom of the dignity not only of the judge's position but also of the principles being administered.[19]

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15. *See* Catholic Social Servs. v. Howard, 666 N.E.2d 658, 660 (Ohio Ct. App. 1995).

16. English scholars have questioned the legitimacy of the English courts' assumed power to punish individuals summarily for criminal contempt. *See* Sir John C. Fox, *The History of Contempt of Court* 34–44 (1927); Christopher J. Miller, *Contempt of Court* 20–23 (1976). The practice of summary punishment became firmly established in the early nineteenth century in Great Britain on the basis of the 1802 publication of a decision by Justice Wilmot of the Court of King's Bench. Wilmot's opinion assumed that the court possessed the authority since time immemorial to punish both in-court and out-of-court contempts in a summary proceeding without a right to jury trial. *See* Fox, *supra*, at 5–7.

17. The U.S. Supreme Court recently noted, "Longstanding precedent confirms the power of courts to find summary contempt and impose punishment." Pounders v. Watson, 521 U.S. 982, 987 (1997).

18. In justifying summary adjudication of direct contempt, one court observed that "unless such an open threat to the orderly procedure of the court is not instantly suppressed and punished, demoralization of the court's authority may follow." State v. Conliff, 401 N.E.2d 469, 473 (Ohio 1978).

19. *See In re* Contempt of Morris, 674 N.E.2d 761, 764 (Ohio Ct. App. 1996).

Direct contempt even after *Bagwell* can still be punished contemporaneously by means of summary proceedings.[20] Immediately after the offending action, the judge can make a finding that an individual is in contempt of court and can order punishment by a fine, a jail term, or both. Although direct contempt is undoubtedly criminal in nature, a full-blown criminal trial is thought unnecessary for two reasons. First, criminal-type protections are directed largely at redressing the imbalance of resources between the state and the defendant in the judicial process to ensure that the truth emerges. In instances of direct contempt, the judge presumably saw or heard the contumacious conduct and need not adduce and weigh additional evidence.[21] More importantly, however, the necessity for an orderly process dictates the abbreviated nature of the proceedings. The judge should not be required to interrupt the ongoing proceeding to hold a separate criminal trial on the issue of contempt. Even a criminal trial deferred to the end of the present proceeding would undercut the court's ability to maintain decorum.[22]

Although the procedural requirements for direct contempts are fairly well established, this type of contempt still produces its own set of litigable issues. Contemnors question whether the alleged contempt occurred in the presence of the court,[23] whether the conduct at issue constituted an affront to the court's authority or dignity,[24] and whether the court imposed an excessive punishment.[25] These issues point towards

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20. *See* International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 838 (1994) ("Our holding . . . leaves unaltered the longstanding authority of judges to adjudicate direct contempts summarily . . . ."); *see also* United States v. Winter, 70 F.3d 655, 663 (1st Cir. 1995).

21. Federal Rule of Criminal Procedure 42(a) allows a judge to punish a contempt summarily only if the judge "certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court."

22. Even Justice Frankfurter, who generally disfavored summary proceedings, acknowledged their occasional necessity: "When . . . action is necessary for the decorous continuance of a pending trial, disposition by another judge of a charge of contempt is impracticable. Interruption for a hearing before a separate judge would disrupt the trial and thus achieve the illicit purpose of a contemnor." Sacher v. United States, 343 U.S. 1, 37 (1952) (Frankfurter, J., dissenting).

23. *See In re* Parker, 663 N.E.2d 671, 674–75 (Ohio Ct. App. 1995); Federal Land Bank Ass'n v. Walton, 651 N.E.2d 1048, 1050–51 (Ohio Ct. App. 1995); Varley v. Varley, 934 S.W.2d 659, 664 (Tenn. Ct. App. 1996).

24. *See* Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974); People v. Minor, 667 N.E.2d 538, 542–43 (Ill. App. Ct. 1996); State v. Martin, 555 N.W.2d 899, 901 (Minn. 1996); State v. Turner, 914 S.W.2d 951, 961 (Tenn. Crim. App. 1996).

25. *See, e.g.*, Scaife v. Associated Air Ctr., Inc., 100 F.3d 406, 412 (5th Cir. 1996); Tyler v. City of Milwaukee, 740 F.2d 580, 582 (7th Cir. 1984); City of Chicago v. Chicago Fire Fighters Union, 425 N.E.2d 1071, 1078 (Ill. Ct. App. 1981).

the source of the law's basic uneasiness about the contempt power—the possibility that a court may abuse its authority to punish an individual to whom it simply has an aversion.[26] Appellate courts are often reluctant to second-guess a trial court's handling of a potentially disruptive situation.[27] Yet there remains the possibility that a trial judge, unsympathetic to a particular party or attorney, may use the contempt power to stifle that individual's expression in the courtroom.[28]

Indirect contempts—those occurring outside the court's presence—do not present the same threat to an ongoing judicial proceeding nor do they present the same potential for the immediate suppression of a party's expression while before the court. But they do raise the same specter of abuse of judicial power: the same judge who issues an injunction may later be called upon to enforce that injunction against a disobedient defendant. In cases involving equitable remedies, the trial judge often acts as both lawgiver and law enforcer without the aid of a jury.

Like direct contempts, indirect contempts can be either civil or criminal. Indirect civil contempts are generally divided into two categories: remedial and coercive. Remedial civil contempts serve to compensate plaintiffs for damages suffered because of the defendant's disobedience of a court order.[29] For example, a court might order a defendant not to cut down a one-hundred-year-old oak tree, which the court has determined is located on the plaintiff's land just over the defendant's property line. In response, the defendant violates the injunction by cutting down the oak tree. The plaintiff then seeks

26. Justice Black once described a court's power to try direct contempts summarily "'as perhaps, nearest akin to despotic power of any power existing under our form of government.'" Green v. United States, 356 U.S. 165, 193–94 (1957) (Black, J., dissenting) (quoting State *ex rel.* Ashbaugh v. Circuit Court, 72 N.W. 193, 194–95 (Wis. 1887)). Our justice system also eschews in general the idea of punishment without the availability of a jury trial. *See* U.S. Const. amend. VI.

27. "Whether [summary criminal contempt] is necessary in a particular case is a matter [Rule 42] wisely leaves to the discretion of the trial court." United States v. Wilson, 421 U.S. 309, 316–17 (1975).

28. Arguing for the availability of jury trials in criminal contempt cases, Justice Black described the all-too-human failings of judges: "Judges are not essentially different from other government officials. Fortunately they remain human even after assuming their judicial duties. Like the rest of mankind they may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal." *Green*, 356 U.S. at 198 (Black, J., dissenting).

29. In some states compensatory damages are not allowed as part of a civil contempt proceeding. *See, e.g.*, Atassi v. Atassi, 470 S.E.2d 59, 61–62 (N.C. Ct. App. 1996). For an overview of compensatory civil contempt, see generally Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy When Defendant Violates an Injunction*, 1980 U. Ill. L.F. 971.

compensation for the loss of the tree through the imposition of remedial civil contempt.

Remedial civil contempt is merely another form of compensatory damages, and plaintiffs must ordinarily prove their pecuniary loss as they would in any legal action for damages.[30] In the oak tree example, the plaintiff would have the burden to show either the replacement cost of the tree or the diminution of the fair market value of the land because of the tree's destruction.[31] Remedial civil contempt is prosecuted as part of the main action in equity. Defendants are entitled to the ordinary due process (with the exception of a jury trial) afforded parties in a civil action[32] and no more—for example, the standard of proof is usually preponderance of the evidence.[33]

Coercive civil contempt, like remedial civil contempt, exists primarily for the benefit of the plaintiff. It is designed to force a reluctant defendant to comply with a court order.[34] For example, if the court orders the defendant to disclose the whereabouts of his child and he refuses, the court might impose a per diem fine or indeterminate prison term to induce the defendant to comply with the order.[35] In the case of either a daily fine or open-ended prison sentence, the defendant can end the penalty by complying with the court order. Thus it is said that defendants incarcerated in this situation have the "keys to their prison in their own pockets."[36]

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30. *See In re* Marriage of Hunt, 933 S.W.2d 437, 449 (Mo. Ct. App. 1996).

31. Plaintiffs seeking remedial civil contempt often find it difficult to prove their damages. Normally, an injunction is issued only where the remedy at law—that is, damages—is inadequate. Inadequacy of the legal remedy frequently translates into an inability to calculate damages precisely. An old oak tree on a residential parcel may be essentially irreplaceable in the marketplace, and the loss of value to the land without the tree may be hard to ascertain. Professor Rendleman refers to this puzzle as the "irony" of compensatory contempt. Rendleman, *supra* note 29, at 985.

32. *See In re* Marriage of Lamutt, 881 P.2d 445, 446–47 (Colo. Ct. App. 1994); Mower County Human Servs. v. Swancutt, 551 N.W.2d 219, 223 (Minn. 1996).

33. *See In re* Harvey, 464 S.E.2d 34, 36 (Ga. Ct. App. 1995); Sinaiko v. Sinaiko, 664 A.2d 1005, 1009 (Pa. Super. Ct. 1995). In some jurisdictions the burden of proof is clear and convincing evidence. *See* New York State Org. for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989); Carroll v. Detty, 681 N.E.2d 1383, 1384 (Ohio Ct. App. 1996).

34. *See* Landingham v. Landingham, 685 So. 2d 946, 951 (Fla. Dist. Ct. App. 1996); People v. Shukovsky, 538 N.E.2d 444, 447 (Ill. 1988); Lynch v. Lynch, 677 A.2d 584, 589 (Md. 1996); Richland Township v. Prodex, Inc., 646 A.2d 652, 654 (Pa. Commw. Ct. 1994).

35. *See, e.g.*, Sanders v. Shepard, 645 N.E.2d 900, 903 (Ill. 1995) (concerning confinement of contemnor in prison until he agreed to disclose his child's location).

36. *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902).

Because the purpose is to assist the plaintiff in obtaining enforcement of the court order, coercive contempt has always been considered civil in nature. As such, it mandates only an ordinary civil hearing, and it falls away if the underlying order is vacated or the parties settle.[37] Because coercive contempt is imposed as an adjunct to an action in equity, equitable procedures are followed, and no jury trial is available.[38]

Finally, indirect contempt can be criminal in nature. Indirect criminal contempt like direct contempt serves to vindicate the court's authority and to punish defendants who disregard that authority. It usually consists of a fixed fine or fixed term of imprisonment. Unlike civil contempt, it requires full-blown criminal procedures,[39] including the privilege against self-incrimination,[40] right to counsel,[41] the presumption of innocence,[42] proof of the violation beyond a reasonable doubt,[43] and the right to a jury

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37. One court has outlined the necessary procedural requirements for imposition of coercive civil contempt:

(1) [T]he court has jurisdiction over the subject matter and the person;

(2) a clear definition of the acts to be performed;

(3) notice of the acts to be performed and a reasonable time within which to comply;

(4) an application by the party seeking enforcement giving the specific grounds for complaint;

(5) a hearing, after due notice, to give the nonperforming party an opportunity to show compliance or the reasons for failure;

(6) a formal determination by the court of the failure to comply, and if so, whether conditional confinement will aid compliance;

(7) an opportunity for the nonperforming party to show inability to comply despite a good faith effort; and

(8) the contemnor's ability to gain release through compliance or a good faith effort to comply.

Hopp v. Hopp, 156 N.W.2d 212, 216–17 (Minn. 1968).

38. *See In re* Department of Hous. Preservation & Dev. v. Deka Realty Corp., 620 N.Y.S.2d 837, 843–44 (N.Y. App. Div. 1995); *Richland Township*, 646 A.2d at 654–55. *But see* Johansen v. State, 491 P.2d 759, 762 (Alaska 1971) (requiring jury trial before coercive confinement).

39. Despite a line of U.S. Supreme Court cases equating criminal contempts with other criminal offenses for the purposes of determining alleged contemnors' due process rights, some states continue to hold that indirect criminal contempt is *sui generis* and does not necessarily mandate full criminal procedural protections. *See, e.g.*, State *ex rel.* Chassaing v. Mummert, 887 S.W.2d 573, 579 n.3 (Mo. 1994) ("The United States Supreme Court has never extended all the protections afforded a criminal defendant to an alleged contemnor.").

40. *See In re* Marriage of Gibbs, 645 N.E.2d 507, 515 (Ill. App. Ct. 1994); United Steelworkers of Am. v. Newport News Shipbuilding & Dry Dock Co., 260 S.E.2d 222, 225 (Va. 1979).

41. *See* Ingebrethsen v. Ingebrethsen, 661 A.2d 403, 405 (Pa. Super. Ct. 1995).

42. *See In re* Marriage of Hunt, 933 S.W.2d 437, 448 (Mo. Ct. App. 1996).

43. *See* Lindman v. Ellis, 658 So. 2d 632, 634 (Fla. Dist. Ct. App. 1995); Attorney Gen. v. Montoya, 968 P.2d 784, 789 (N.M. Ct. App. 1998); Poston v. Poston, 502 S.E.2d 86, 89 (S.C. 1998);

trial for serious sanctions.[44] Criminal contempt is also prosecuted separately from the underlying equitable action and can be appealed immediately.[45] Unlike civil contempt, it requires a showing of willful disobedience of the court order.[46]

A single defendant can be subject to all three types of indirect contempt sanctions as part of the same suit. For instance, in the oak tree hypothetical, suppose the defendant were ordered not to cut down the tree and also to remove his construction equipment from the plaintiff's land. In violation of the injunction, the defendant cuts down the tree and refuses to remove his equipment. The plaintiff could seek remedial civil contempt to compensate her for the loss of her tree and coercive civil contempt to force the defendant to comply with the part of the injunction ordering him to remove his equipment. The remedial contempt should approximate the value of the lost oak tree. The coercive contempt would likely involve some sort of daily fine until the defendant removed his equipment.[47] Also, the court could refer the defendant's violation to the prosecutor, who might choose to bring an action for criminal contempt. The criminal contempt could consist of either a fine or a term of imprisonment or both, depending on the circumstances.

State *ex rel.* Richardson v. Richardson, No. 01-A-01-9706-CV-00274, 1998 Tenn. App. LEXIS 638, at *19 (Tenn. Ct. App. Sept. 23, 1998).

44. The defendant can also be pardoned for a criminal contempt. *See Ex parte* Grossman, 267 U.S. 87, 122 (1925). Furthermore, the government cannot appeal an acquittal. *See* United States v. Lynch, 162 F.3d 732, 735 (2d Cir. 1998); United States *ex rel.* West Virginia-Pittsburgh Coal Co. v. Bittner, 11 F.2d 93, 95 (4th Cir. 1926). The jury-trial right is afforded only for more serious criminal contempts where the actual penalty imposed is more than six months in prison or a substantial fine. *See* Muniz v. Hoffman, 422 U.S. 454, 475–76 (1975). What constitutes a "substantial fine" varies depending on the financial resources of the contemnor. *See* Crowe v. Smith, 151 F.3d 217, 228 n.13 (5th Cir. 1998) (holding $75,000 contempt fine against individual "manifestly non-petty"); United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 665 (2d Cir. 1989) (holding $100,000 fine against organization triggers right to jury trial and below that level court should consider whether fine will have "significant financial impact" on organization); Douglass v. First Nat'l Realty Corp., 543 F.2d 894, 902 (D.C. Cir. 1976) (holding that contempt fines on individual in excess of $500 require jury trial); *see also* Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wis. L. Rev. 133, 157–59.

45. Civil contempts are appealable at the conclusion of the main action or whenever there is a final appealable order. *See In re* Rimsat, Ltd., 98 F.3d 956, 963 (7th Cir. 1996); Seattle Northwest Sec., Corp. v. SDG Holding Co., 61 Wash. App. 725, 732, 812 P.2d 488, 493 (1991).

46. *See* People v. Minor, 667 N.E.2d 538, 542 (Ill. App. Ct. 1996). Willfulness normally involves the defendant's deliberate choice to disobey the decree, frequently with a "bad faith disregard for authority and the law." Forte v. Forte, 309 S.E.2d 729, 730 (N.C. Ct. App. 1983).

47. It would likely be counterproductive to put the defendant in jail to coerce compliance since the removal of the equipment might require his personal labors.

This brief overview of the various types of contempt suggests a certain neatness to the categories that does not exist in reality. Lower courts often mislabel the contempt sanctions that they impose, for example, denominating a fine coercive when it is really punitive.[48] The mislabeling by itself is not fatal, but when the court then uses ordinary civil procedures to impose what is essentially a criminal penalty, it violates the defendant's constitutional rights.

The lower courts' confusion is readily understandable.[49] Coercive civil contempt and criminal contempt tend to run together. The imposition of successive criminal contempt fines on recalcitrant defendants may convince them that compliance is a cruel necessity and thus have a coercive effect.[50] On the other hand, coercive civil contempt—for example, in the form of an indeterminate jail sentence—may tend to have a punitive effect on a defendant who cannot[51] or simply will not comply with the court order.

Particularly troublesome for the courts have been prospective fine schedules for contempt. Sometimes courts, as in the *Bagwell* case, have told defendants in advance of their disobedience that if they violate the court order, the court will levy a fine of a specified amount.[52] When the defendants subsequently violate the order, the courts have then imposed the announced fine. Many lower courts consider such fines to be coercive civil contempt analogous to traditional per diem fines, and therefore

48. *See* United States v. Powers, 629 F.2d 619, 626 (9th Cir. 1980); Southern Ry. Co. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968).

49. California adds to the confusion by denominating as "civil contempt" penalties that are clearly criminal in nature and then affording most of the criminal procedural protections in proceedings in which these penalties are assessed. *See* People v. Gonzalez, 38 Cal. Rptr. 2d 235, 239–40 (Cal. Ct. App. 1995), *rev'd on other grounds*, 910 P.2d 1366 (Cal. 1996).

50. *See, e.g.*, Warner v. Second Judicial Dist. Court, 906 P.2d 707, 709 (Nev. 1995) (noting coercive and punitive effects of contempt sanction).

51. Inability to comply is a defense to an injunction, but a court could conceivably misjudge a defendant's ability to comply or that ability might diminish over time. *See* Drake v. National Bank of Commerce, 190 S.E. 302, 308 (Va. 1937) (stating that court disbelieved defendant's unimpeached testimony that he could not comply with order); Owen M. Fiss & Doug Rendleman, *Injunctions* 1083–97 (2d ed. 1984) (discussing injustices sometimes produced by interminable coercive sentences). In some cases courts have refused to excuse the defendant's professed inability to comply. *See* Moss v. Superior Court, 950 P.2d 59, 61 (Cal. 1998) (holding that defendant who failed to comply with order to pay child support could be adjudged in contempt where his noncompliance resulted from willful failure to obtain employment).

52. *See* Hawaii Pub. Employee Relations Bd. v. United Pub. Workers, 667 P.2d 783, 795 (Haw. 1983).

afford the defendant only an ordinary civil proceeding.[53] Some appellate courts have disagreed, arguing that at the time the fine is imposed, it is backward-looking and therefore punitive and not coercive.[54] It was this issue that the U.S. Supreme Court confronted in *Bagwell*.

B. The Historic Evolution of Contempt Procedures

The history of contempt procedures[55] reveals an ongoing and overt tension between the view of contempt as an inherent and necessary weapon of courts to enforce their orders and the fear that courts will misuse their authority to punish unpopular individuals or groups.[56] A review of the U.S. Supreme Court precedents and federal statutes on this topic reflects this tension.

1. The Post-Revolutionary Law of Contempt: Early Signs of Distrust of Judicial Power

Although there is much debate about the origins and nature of the contempt power in the early English and American courts,[57] it is clear

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53. *See* Marks v. Vehlow, 671 P.2d 473, 480 (Idaho 1983); Mahoney v. Commonwealth, 612 N.E.2d 1175, 1179 (Mass. 1993).

54. *See* Commonwealth v. Charlett, 391 A.2d 1296, 1300 (Pa. 1978); *In re* Schei, No. 37441-9-I, 1997 Wash. App. LEXIS 2019, at *13–14 (Wash. Ct. App. Dec. 8, 1997).

55. For a comprehensive discussion of contempt generally, see Dan B. Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev. 183 (1971).

56. The United States has always had a rich tradition of civil disobedience dating back to pre-Revolutionary times and reaching the present day. Dissidents have protested and refused to obey laws that denied religious liberty, promoted slavery, excluded women from the political process, discriminated against African-Americans and other minorities, supported the Vietnam War, and allowed women to have abortions. In many cases protesters suffered fines, imprisonment, or both for the exercise of their views. *See generally Civil Disobedience: Theory and Practice* (Hugo Adam Bedau ed., 1969); *Civil Disobedience in America* (David R. Weber ed., 1978); Robert T. Hall, *The Morality of Civil Disobedience* (1971).

Many of the contempt cases involve contemnors who strongly believed that the court order directed against them sprang from unjust or oppressive laws. Perhaps the paradigmatic case is *Walker v. City of Birmingham*, 388 U.S. 307, 310 (1967), in which the defendants declared their intention to disobey the state court injunction because it was "'raw tyranny under the guise of maintaining law and order.'" Given the almost accepted tradition of such behavior, one might question to what extent the law should punish or coerce recalcitrant individuals motivated by a sincere desire to change what they perceive as an unjust system.

57. *Compare* Joseph H. Beale, Jr., *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 170 (1908) (asserting that until nineteenth century chancery courts used fines and imprisonment purely to coerce compliance with court orders, not punish), *with* Note, *Civil and Criminal Contempt*

that post-Revolutionary American courts claimed an inherent authority to enforce their orders and punish contemnors through monetary fines and prison terms.[58] There is some evidence that even colonial American courts imposed sanctions on defiant individuals equivalent to modern direct criminal contempt and coercive civil contempt.[59] Throughout the early days of the Republic, courts recognized that contempt was essential to preserving the court's integrity and to insuring respect and obedience of court decrees.[60]

At the same time, judges have always been aware on some level of the enormous potential for abuse inherent in the contempt power.[61] Legislative regulation of the contempt power commenced almost immediately following ratification of the Constitution. In the Judiciary Act of 1789, Congress purported to grant the federal courts "the power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any case or hearing before

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in the Federal Courts, 57 Yale L.J. 83, 90–91 (1947) (noting that before 1869 civil contempt did not exist; all contempts were criminal).

58. *See, e.g.*, *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873) (holding that power to punish for contempt is inherent in Article III courts); Spalding v. New York *ex rel.* Backus, 45 U.S. (4 How.) 21 (1846); United States v. Smith, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342); Olmstead v. The Active, 18 F. Cas. 680 (D. Pa. 1803) (No. 10,503A); Garretson v. Cole, 1 H. & J. 370 (Md. 1802).

59. *See, e.g.*, 9 William W. Hening, *The Statutes at Large (Virginia)* 414 (1818) (reprinting 1777 Virginia statute allowing court to commit to jail indefinitely any person who refused to give testimony); J. Hammond Trumball, *Public Records of the Colony of Connecticut, From 1665–78*, at 60 (1852) (noting court could punish for contemptuous or disorderly behavior). For an overview of colonial contempt laws, see *United States v. Barnett*, 376 U.S. 681, 701–24 (1964).

60. *See* Voss v. Luke, 28 F. Cas. 1302, 1302 (C.C.D.C. 1806) (No. 17,014); Johnston v. Commonwealth, 4 Ky. 598, 602 (1809); State v. Trumbull, 4 N.J.L. 161, 162 (1818).

61. Many courts have cited as a caution to judges imposing contempt penalties language in an early U.S. Supreme Court case, *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821), to the effect that judges should exercise "the least possible power adequate to the end proposed." *See, e.g.*, Spallone v. United States, 493 U.S. 265, 276 (1990); United States v. City of Yonkers, 856 F.2d 444, 454 (2d Cir. 1988); Cook v. Rockwell Int'l Corp., 935 F. Supp. 1452, 1463 (D. Colo. 1996). In fact, the Court in *Anderson* was considering whether the House of Representatives, not a court, could cite an individual for contempt, and the Court held that it could and extolled in no uncertain terms the absolute necessity for the contempt power:

> The argument [against recognizing Congressional contempt power] obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it. . . . [T]hat such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.

Anderson, 19 U.S. (6 Wheat.) at 228–29.

same . . . ."[62] In 1831, in response to popular antagonism to judicial suppression of published criticism of the courts through use of the contempt power,[63] Congress enacted restrictions on judicial punishment of constructive contempts in a statute that remains the principal legislation definition of contempt.[64] It allowed courts to punish only misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice, disobedience of court writs and orders, and contemptuous conduct by court officers.[65] These restrictions reduced the courts' use of the contempt power to punish out-of-court criticism of judges and judicial proceedings.[66]

At the end of the nineteenth century, the necessity view of contempt among the judiciary perhaps reached its high water mark.[67] Courts viewed themselves as having free rein to punish disobedience of their

62. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

63. The public outcry against the contempt power stemmed from the actions of Judge James H. Peck, who was impeached for summarily punishing an attorney for contempt for writing an article critical of the judge's conduct and rulings in several land-grant cases. The attorney persuaded Congress to impeach Peck, who was acquitted by a vote of 22–21 after a year of hearings. Although Peck was acquitted, the public sentiment in favor of freedom of speech and press resulted in the enactment of the 1831 statute. *See* Goldfarb, *supra* note 5, at 20–21.

64. Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487 (codified as amended at 18 U.S.C. § 401).

65. Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487 (codified as amended at 18 U.S.C. § 401). The modern version of this statute states:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401 (1994). Many states have used the federal act as the core of their own contempt statutes. *See, e.g.*, Ala. Code § 12-1-8 (1995); Idaho Code § 7-601 (1998); Mo. Ann. Stat. § 476.110 (West 1987); Va. Code Ann. § 18.2-456 (Michie 1996).

66. *See Ex parte* Poulson, 19 F. Cas. 1205, 1208 (C.C.E.D. Pa. 1835) (No. 11,350) (holding that misbehavior in presence of or near court required actual physical, not merely causal, proximity). The U.S. Supreme Court, however, in a controversial decision in 1918 held that a newspaper could be punished for contempt for a publication tending to obstruct the administration of justice regardless of the publication's or the newspaper's geographic proximity to the court. *See* Toledo Newspaper Co. v. United States, 247 U.S. 402, 419 (1918).

67. While acknowledging the potential for abuse of the contempt power, the U.S. Supreme Court observed in 1888: "That power cannot be denied [the courts], without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community." *Ex parte* Terry, 128 U.S. 289, 309 (1888).

orders as well as disruptive courtroom behavior.[68] Although out-of-court contempts required a separate adversarial hearing,[69] courts were not bound by the Bill of Rights protections afforded the typical criminal defendant,[70] and appeal rights were strictly limited.[71] Criminal contempt was regarded as sui generis, neither criminal nor civil in nature.[72]

2. *The Effect of the Labor Movement on Contempt Jurisprudence at the Turn of the Century*

By the start of the twentieth century, the U.S. Supreme Court began voicing its concerns over the unbridled use of the contempt power by lower federal courts. No doubt a large part of this concern stemmed from the excesses practiced on labor unions under the guise of judicial authority.[73] The lower federal courts came to be widely regarded as the captives of industry in its struggle with the burgeoning labor movement.[74] Injunctions and contempt penalties were used to stifle strikes and labor organizing at their inception.[75] The antipathy towards

68. "[F]or direct contempts committed in the face of the court... the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual trial knowledge of what ocurred...." *Id.* at 313.

69. *See, e.g., In re* Savin, 131 U.S. 267 (1889); *Ex parte* Terry, 128 U.S. 289.

70. *See* Eilenbecker v. District Court, 134 U.S. 31, 39 (1890) (holding that Fourteenth Amendment due process clause does not prohibit state courts from imposing sanctions for indirect criminal contempt in summary proceedings with no jury-trial right).

71. At common law, criminal contempts were unreviewable by appeal or writ of error. *See* Bessette v. W.B. Conkey Co., 194 U.S. 324, 335 (1904). On occasion, the Court reviewed contempts through the use of habeas corpus and certiorari. *See id.*

72. *See id.* at 326; O'Neal v. United States, 190 U.S. 36, 38 (1903).

73. *See, e.g.*, United States v. Railway Employees' Dep't of AFL, 283 F. 479 (N.D. Ill. 1922); United States v. Debs, 64 F. 724 (N.D. Ill. 1894); Toledo A.A. & N.M. Ry. Co. v. Pennsylvania Co., 54 F. 746 (N.D. Ohio 1893).

74. *See* Felix Frankfurter & Nathan Greene, *The Labor Injunction* 5–46 (1930).

75. One British jurist observed the effect of class schisms on the outcome in litigated labor disputes:

> [T]he habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. This is one of the great difficulties at present with Labour. Labour says, "Where are your impartial Judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?" It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.

the use of judicial power to snuff out workers' protests culminated in Congress' passage of the Norris-LaGuardia Act,[76] which essentially eliminated the federal district courts' ability to enjoin strikes.[77]

Thus the Court began its slow voyage towards recognition of criminal contempt as a crime entitling the accused to the full extent of criminal procedural protections. This voyage encompassed both indirect and direct contempts, although the issues were somewhat different for each. The Court over time seemingly became convinced of the underlying similarities between criminal contempt and ordinary felonies and misdemeanors. Merely because a court, rather than the legislature, defines the parameters of acceptable behavior and the penalties for deviance does not alter the fact that accused criminal contemnors face the possibility of substantial loss of liberty and property at the hands of what is essentially a government prosecution. As such, alleged contemnors should be entitled to all of the safeguards afforded criminal defendants under the Bill of Rights. In many respects, the potential for unjustified or arbitrary punishment is greater in the criminal contempt arena than in other areas of criminal law because the transgression alleged involves an affront to judicial authority. Any judge, even one who did not issue the injunction that was allegedly disobeyed, will undoubtedly be sensitive to such affronts.

3. Gompers v. Bucks Stove & Range Co.: *The Pivotal Contempt Case Until* Bagwell

In 1911, the U.S. Supreme Court's decision in *Gompers v. Bucks Stove & Range Co.*[78] marked the Court's first definitive statement that criminal contempts could not be tried in ordinary civil proceedings. It

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Lord Justice Scrutton, An Address to the University Law Society, *reprinted in The Work of the Commercial Courts*, 1 Cambridge L.J. 6, 8 (1921).

76. Section 4 of the Norris-LaGuardia Act, which was passed in 1932, states:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating in or interested in such dispute . . . from . . . [c]easing or refusing to perform any work or to remain in any relation of employment . . . .

Norris-LaGuardia Act, ch. 90, § 4, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. § 104(a) (1994)).

77. For a discussion of the history and purpose of the Norris-LaGuardia Act, see *Boys Market, Inc. v. Retail Clerks Union*, 398 U.S. 235, 250–52 (1970). Because of federal preemption doctrine, the Norris-LaGuardia Act also has the effect of eliminating state court jurisdiction in labor disputes.

78. 221 U.S. 418 (1911).

also formulated definitions of criminal and civil contempt that guided lower courts throughout most of the remainder of the century. In *Gompers*, the American Federation of Labor (AFL) had instituted a boycott against the Bucks Stove and Range Co. because of alleged unfair labor practices.[79] The company in turn sought and obtained an injunction against the AFL and certain of its officers restraining them from assisting the boycott or publishing the company's name on an "unfair" or "we don't patronize" list.[80] Several months later at the company's instigation the individual defendants were found guilty of contempt for conspiring to continue the boycott by publishing statements that the company was on the "unfair" list, and they were sentenced to prison terms ranging from six to twelve months.[81]

On appeal to the U.S. Supreme Court, the defendants attacked both the injunction and the contempt citations. Quickly rejecting the defendants' substantive attack on the injunction as an unconstitutional restraint on free speech, the Court viewed the injunction not as an abridgement of speech, but as a prohibition against continuing a boycott that caused irreparable harm.[82] Because equity traditionally has the power to prevent actions that threaten damage to property interests, the injunction was proper.[83]

But the Court was not so forgiving of the contempt citations. The Court stated that the procedures used by the trial court must match the type of sanction imposed.[84] Criminal contempts require at least some of the aspects of criminal procedure, such as the presumption of innocence, the proof of guilt beyond a reasonable doubt, and the privilege against self-incrimination.[85] The Court also catalogued several other important procedural distinctions between civil and criminal contempt, including appealability,[86] the identity of the prosecuting party,[87] and the survivability of the sanction.[88]

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79. *See id.* at 436.

80. *See id.*

81. *See id.* at 435.

82. *See id.* at 437–38.

83. *See id.*

84. *See id.* at 449.

85. *See id.* at 444.

86. Defendants enjoyed only limited rights of appeal from criminal contempts, with the appellate court restricted to reviewing only questions of law. On the other hand, civil contempts could be appealed as part of the main action and reconsidered in their entirety on appeal. *See id.* at 441.

Thus, distinguishing between civil and criminal contempts is an essential task for the trial and appellate courts. The Court in *Gompers* stated that the "character and purpose" of the contempt sanction often determine its classification.[89] Civil contempt benefits the plaintiff either by providing compensation for damages or by coercing defendant's compliance.[90] Criminal contempt vindicates the judicial authority by punishing the defendant for past disobedience.[91] The Court acknowledged that the two forms of sanction overlap in the sense that each incidentally serves the purpose of the other:

> [I]f the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience.[92]

But the Court also emphasized that despite these incidental side effects, each form of contempt retains its essential character.[93]

The Court then proceeded to create what may be characterized as an overly simplistic categorization of contempts based on the wording of the underlying decree. If the decree is mandatory and requires the defendant to perform an affirmative act, such as conveying a parcel of property, then the corresponding contempt for disobedience is coercive civil.[94] If the decree is prohibitory and forbids the defendant from engaging in certain acts, then any sanction imposed must be criminal.[95] This link between mandatory orders and coercive civil contempt and between prohibitory orders and criminal contempt endures to this day and was

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87. Criminal contempts are prosecuted in the government's name independently of the original equitable action. However, the party plaintiff brings the motion for civil contempt sanctions as part of its equitable case against the defendant. *See id.* at 446.

88. If the original injunction is found invalid for any reason or the parties agree to settle the underlying litigation, civil contempt falls away but criminal contempt survives. *See id.* at 451.

89. *See id.* at 441.

90. *See id.* at 442–43.

91. *See id.*

92. *Id.* at 443.

93. *See id.*

94. *See id.* at 442.

95. *See id.* at 442–43.

implicitly adopted by the majority opinion in *Bagwell*, the U.S. Supreme Court's most recent decision on civil and criminal contempt.[96]

The Court in *Gompers* ultimately determined that because the prison terms were fixed and were imposed for past disobedience of the injunction, they had to be characterized as criminal.[97] However, the trial court had used only ordinary civil procedures at the contempt hearing.[98] Given this procedural defect, the criminal convictions were overturned.[99] In dictum, the Court noted that civil contempt was not available at this point because the parties had settled the main action.[100]

The *Gompers* case reappeared before the Court three years later after the original case was remanded and after the lower court had appointed a committee that prosecuted the defendants for criminal contempt.[101] The defendants interposed the three-year criminal statute of limitations as a defense, but the lower court ruled it inapplicable to criminal contempt.[102] Writing for the Court, Justice Holmes held that criminal contempt did fall within the three-year statute of limitations applicable to criminal offenses.[103] Even though those accused of criminal contempt had no right to jury trial, Holmes stated that criminal contempt was a crime in every meaningful sense of the word:

> These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure.[104]

96. *See* International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 827–29 (1994).

97. *See Gompers*, 221 U.S. at 444.

98. The Court noted that the party plaintiff instituted the contempt proceedings and that the court obviously treated those proceedings as part of the original equitable action. *See id.* at 445.

99. The Court left open the possibility that the lower court could still institute a separate prosecution for criminal contempt against the defendants. *See id.* at 451–52.

100. *See id.*

101. *See* Gompers v. United States, 233 U.S. 604, 606 (1914).

102. *See id.*

103. *See id.* at 612.

104. *Id.* at 610–11.

4. *The Supreme Court's Leisurely Procedural Criminalization of Contempt*

After *Gompers*, the U.S. Supreme Court's recognition of greater procedural protections in criminal contempt proceedings continued in a careful and often uneven manner. Eleven years after the first *Gompers* decision, the Court held that when a trial court imposed a mixed civil and criminal contempt, the criminal aspects fixed the character of the contempt for purposes of appellate review.[105] This holding allowed contemnors to appeal the contempt immediately as opposed to being forced to wait until the conclusion of the equitable action. But two years later in an opinion by Justice McReynolds, the Court reiterated its position that criminal contempt is sui generis and does not constitute a criminal prosecution within the Sixth Amendment or within "common understanding."[106]

Almost immediately there followed three cases in which the U.S. Supreme Court indicated its unease with the lack of procedural protections given to criminal contemnors. In *Michaelson v. United States*,[107] the Court held that Congress could constitutionally grant jury trial rights in certain types of criminal contempts.[108] A portion of the Clayton Act, passed in 1914, provided that in the federal district courts the accused had the right to trial by jury when the action constituting the criminal contempt was also a criminal offense under state or federal law.[109] The Court stated the statutory provision was clearly within Congress' constitutional power to regulate the inferior federal courts.[110] Although the imposition of contempt was undoubtedly an inherent power of the federal courts, Congress still had the authority to regulate it in limited ways, such as granting a jury trial right for criminal contempts that also constitute crimes.[111]

In two opinions by Chief Justice Taft, the Court continued its gradual acceptance of the appropriateness of putting criminal contempt on a

105. *See* Union Tool Co. v. Wilson, 259 U.S. 107, 110–11 (1922). Once the appellate court had jurisdiction over the contempt, it could review all of the sanctions, civil and criminal. *See id.* at 111. In this case, the Court of Appeals had reversed the punitive portion of the contempt. *See id.* at 109.

106. *See* Myers v. United States, 264 U.S. 95, 104–05 (1924).

107. 266 U.S. 42 (1924).

108. *See id.* at 67.

109. *See* Clayton Act, §§ 21–22, 38 Stat. 738 (1914).

110. *See Michaelson*, 266 U.S. at 65–66.

111. *See id.*

procedural par with other criminal prosecutions. For the first time, the Court adverted to the dangers of biased and arbitrary imposition of contempt sanctions. In *Ex parte Grossman*,[112] the Court held that the President had the power to pardon criminal contempts, rejecting arguments that a Presidential pardon power unduly interfered with the courts' inherent ability to compel obedience to their orders.[113] Justice Taft observed that the contempt power, while necessary, was vulnerable to judicial abuse:

> [I]t is . . . exercised without the restraining influence of a jury and without many of the guaranties which the bill of rights offers to protect the individual against unjust conviction. Is it unreasonable to provide for the possibility that the personal element may sometimes enter into a summary judgment pronounced by a judge who thinks his authority is flouted or denied? May it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial?[114]

Taft carried forward this theme in *Cooke v. United States*,[115] also decided in 1925. An attorney had been convicted of criminal contempt for writing a letter to a judge in a pending case accusing him of bias.[116] Although Chief Justice Taft agreed that the letter in its tone and wording was contemptuous, he found that the lower court had failed to afford the attorney due process in finding him in contempt.[117] Because the contempt was not committed in open court, summary proceedings were not warranted.[118] The accused was entitled to have advance notice of the charges against him and a reasonable opportunity to defend against them.[119] Opportunity to defend included "the assistance of counsel, if

112. 267 U.S. 87 (1925).

113. *See id.* at 122.

114. *Id.*

115. 267 U.S. 517 (1925).

116. The attorney stated in his letter that before the trial began, "I had believed that your honor was big enough and broad enough to overcome the personal prejudice against the defendant . . . but I find that in this fond hope I was mistaken . . . ." *Id.* at 520.

117. *See id.* at 538.

118. The lower court had the defendant-attorney arrested and brought to court without any advance notice of the charges against him. The court refused him the opportunity to retain and consult counsel or to call witnesses in his defense. *See id.* at 537–38.

119. *See id.* at 537.

requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."[120]

The next major U.S. Supreme Court case involving contempt, *United States v. United Mine Workers*,[121] marked a retreat in the recognition of procedural rights for contemnors. The case, long a classic formulation of a court's authority to compel obedience and to punish disobedience of its orders, involved a post-World War II strike by coal miners against the federal government, which had taken control of the most of the country's coal mines pursuant to an executive order.[122] The United States had obtained an *ex parte* temporary restraining order (TRO) forbidding the union and its leaders from encouraging the mine workers to strike.[123] While the TRO was in effect, the federal district court considered whether the Norris-LaGuardia Act deprived it of jurisdiction to entertain the government's request for a preliminary injunction.[124] The district court ultimately concluded that the Norris-LaGuardia Act did not apply to the case because of plaintiff was a government entity, and it issued a preliminary injunction against the defendants.[125] In the meantime, the defendants allegedly violated the TRO and were tried for contempt.[126] They were found guilty beyond a reasonable doubt of both civil and criminal contempt, and the court fined the individual union president $10,000 and the union $3.5 million.[127]

Taking the case directly from the district court on certiorari, the U.S. Supreme Court upheld the contempt convictions with one modification.[128] The Court held that the Norris-LaGuardia Act did not apply to the case, and as a result the court did have jurisdiction over the dispute.[129] As an alternative holding, the Court stated that even if the Norris-

120. *See id.*

121. 330 U.S. 258 (1947).

122. Executive Order No. 9728 directed the Secretary of the Interior to operate the coal mines and to negotiate with the miners' representatives regarding the terms and conditions of their employment. President Truman was concerned that labor disputes in the coal industry might disrupt the fragile post-war economy. *See* Exec. Order No. 9728, 11 Fed. Reg. 5593 (1946).

123. *See United Mine Workers*, 330 U.S. at 266–67.

124. *See id.* at 290.

125. *See id.* at 268.

126. *See id.* at 269.

127. *See id.*

128. *See id.* at 304–05.

129. *See id.* at 289.

LaGuardia Act had applied to deprive the court ultimately of jurisdiction, the court had authority to decide the jurisdictional issue and could preserve the status quo between the parties by means of a TRO while it considered that issue.[130]

The U.S. Supreme Court then examined the procedures employed in imposing the contempt sanctions and found that they conformed to Rule 42(b) of the newly enacted Federal Rules of Criminal Procedure.[131] The defendants were given sufficient advance notice of the allegedly contemptuous acts and "enjoyed during the trial itself all the enhanced protections accorded defendants in criminal contempt proceedings."[132] The Court went on to find that the trial court properly adjudicated civil and criminal contempts in the same proceeding.[133] Although the Court conceded that it is preferable to try civil and criminal contempts separately so that defendants clearly receive the required procedural protections, the use of a combined proceeding is acceptable unless the defendant shows "substantial prejudice."[134]

Finally, the majority opinion modified the fine imposed on the defendant union on the basis that the existing sanction constituted excessive punishment.[135] It split the $3.5 million fine into two parts: an unconditional fine of $700,000 for criminal contempt and a conditional fine of $2.8 million as coercive civil contempt.[136] The larger fine was suspended pending full compliance with the lower court's orders within five days.[137]

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130. *See id.* at 293.

131. Federal Rule of Criminal Procedure 42(b) provides that all criminal contempts, except those in the court's presence, have to be tried only after notice to the defendant. The notice "shall state the time and place of hearing, allowing a reasonable time for the preparation of a defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such." Fed. R. Crim. P. 42(b).

132. *United Mine Workers*, 330 U.S. at 298.

133. *See id.* at 298–99. Although the entire fine was paid to the United States, a portion of it could still be considered civil because the United States was the party plaintiff.

134. *Id.* at 300.

135. *See id.* at 304–05.

136. *See id.*

137. The defendant union could comply with the court's decrees by withdrawing its previously issued notice terminating the union's agreement with the government regarding the miners' working conditions and by notifying the union members of the withdrawal of the notice. *See id.* at 305.

Four justices dissented in *United Mine Workers* asserting various grounds,[138] but Justice Rutledge in particular excoriated the majority's blithe acceptance of the procedures used at the contempt proceedings: "In any other context than one of contempt, the idea that a criminal prosecution and a civil suit for damages or equitable relief could be hashed together in a single criminal-civil hodgepodge would be shocking to every American lawyer and to most citizens."[139] Rutledge's procedural critique centered on three points. First, the mixing of civil and criminal contempts in a single proceeding increased the possibility that full-blown criminal safeguards would not be accorded the defendant.[140] Second, there was no indication in this case that such safeguards were in fact granted to the defendants.[141] Finally, the unitary fines imposed made it impossible for the defendants and for the appellate court to discern which portion of the fine was criminal and which civil.[142]

Rutledge underscored his view that criminal contempts constitutionally required all of the procedural protections afforded to defendants in ordinary criminal proceedings, with the possible exception of trial by jury.[143] He also noted that the practice of many courts (including the district court in this case) of not identifying the nature of the contempt until it is imposed left defendants in the dark about their procedural rights until the appellate stage.[144] Furthermore, in a case like this where a unitary fine was imposed, the appellate court has no way of evaluating whether the civil portion was appropriately remedial or coercive or whether the criminal portion was properly punitive.[145]

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138. Justices Douglas and Black believed that the unconditional contempt fine, even as reduced by the majority, was excessive and that coercive sanctions should have been used first to induce compliance. *See id.* at 332–34 (Douglas & Black, JJ., dissenting in part and concurring in part). Justice Murphy argued that the Norris-LaGuardia Act clearly applied to this dispute and thus deprived the district court of jurisdiction in the matter; therefore, as an order issued without jurisdiction the TRO was void, and the defendants could not be cited for contempt for disobeying it. *See id.* at 335–42 (Murphy, J., dissenting).

139. *Id.* at 364 (Rutledge, J., dissenting).

140. *See id.* at 368 (Rutledge, J., dissenting).

141. *See id.* at 368 n.34 (Rutledge, J., dissenting).

142. "We can only speculate upon what portion of each 'fine' may have been laid to compensate for damages, what for punishment, and what, if any, for civil coercion." *Id.* at 379 (Rutledge, J., dissenting) (footnote omitted).

143. *See id.* at 374 (Rutledge, J., dissenting).

144. "One who does not know until the end of litigation what his procedural rights are, or may have been, has no such rights. He is denied all by a hide-and-seek game between those that are criminal and those that are civil." *Id.* at 374 (Rutledge, J., dissenting).

145. *See id.* at 370–71 (Rutledge, J., dissenting).

Although Rutledge's views did not carry the day in *United Mine Workers*, they did set the stage for further development of procedural rights in contempt cases under the Warren Court. Beginning in the mid-1950s until the late 1960s, a minority of justices began to argue for recognition of a constitutional right to a jury trial in criminal contempt proceedings. The jury-trial advocates on the Court observed that historically, serious criminal contempts were tried before juries, both in America and England.[146] Most of the thirteen original colonies, both during the colonial period and subsequently during statehood, had numerous statutory limits on criminal contempt penalties, resulting in relatively trivial fines or short-term confinements.[147] Because of the petty nature of the punishment, most early courts did not feel constitutionally compelled to make a jury trial available for criminal contemnor.[148] Although the English practice was not as clear, there was substantial evidence that jury-trial rights were accorded defendants in criminal contempt proceedings where the contempt was committed outside the court's presence.[149]

In 1968, this position finally gained a majority of the Court in *Bloom v. Illinois*,[150] at least with respect to serious, nonpetty criminal contempts. The Court's jury-trial supporters saw the need to interpose the jury between the court and the accused as a matter of fundamental fairness. Speaking for the Court, Justice White stated that "[c]ontemptuous conduct . . . often strikes at the most vulnerable and human qualities of a judge's temperament. . . . [I]t frequently represents a rejection of judicial authority, or an interference with the judicial process . . . ."[151] Although a good judge will try to be dispassionate, it is often difficult for a judge, especially one who issued the original injunction, to be completely impartial in adjudicating allegedly contemptuous conduct.[152]

Furthermore, a majority of the Court ultimately concluded that criminal contempt is not unlike an ordinary criminal offense, the trial of

146. *See, e.g.*, United States v. Barnett, 367 U.S. 681, 740–53 (1964) (Goldberg, J., dissenting); Green v. United States, 356 U.S. 165, 202–06 (1958) (Black, J., dissenting).

147. *See Barnett*, 376 U.S. at 740–53 (Goldberg, J., dissenting).

148. *See, e.g.*, Respublica v. Oswald, 1 U.S. 319, 329 (1788).

149. *See Green*, 356 U.S. at 202–06 (Black, J., dissenting).

150. 391 U.S. 194 (1968).

151. *Id.* at 202.

152. *See id.* at 203–05.

which, if serious, must include a jury-trial right under the Sixth and Fourteenth Amendments.[153] Criminal contempt is imposed as a punishment for disobedience of a legal commandment, as embodied in an equitable decree. It is an offense against judicial authority and as such a public wrong. It can result in lengthy imprisonment and substantial fines.[154]

In the years following *Bloom*, the Court continued to work out the details of its application, but the Court had made the basic decision that serious criminal contempts constitutionally require the availability of a jury trial. Despite the Court's changing composition in the post-Warren era and its increasingly conservative bent, it has not retreated from *Bloom* and has in fact proceeded to refine the procedural protections afforded contemnors. The Court's 1987 decision in *Young v. United States ex rel. Vuitton et Fils, S.A.*,[155] however, revealed the extreme divergence of views as to exactly what those protections should be.

In *Young*, the plaintiff leather manufacturer sued the defendants for federal trademark violations.[156] The parties ultimately settled the suit, with the defendants' agreeing to entry of a permanent injunction prohibiting them from manufacturing or selling goods bearing plaintiff's registered trademark.[157] Several months later, having reason to believe that the defendants were violating the injunction, the plaintiff petitioned the trial court to have its attorneys appointed as special prosecutors to investigate the defendants and possibly prosecute them for criminal contempt.[158] The court granted the plaintiff's petition, and the plaintiff's attorneys prosecuted the defendants for criminal contempt.[159] After a jury trial, the defendants were convicted and sentenced to terms of imprisonment ranging from six months to five years.[160]

On appeal, the defendants argued that the district court improperly appointed the plaintiff's attorneys rather than a disinterested attorney as

153. *See* Duncan v. Louisiana, 391 U.S. 145, 161–62 (1968).

154. *See* Cheff v. Schnackenberg, 384 U.S. 373, 384–85 (1966) (Douglas, J., dissenting).

155. 481 U.S. 787 (1987).

156. *See id.* at 790.

157. *See id.* at 790–91.

158. *See id.* at 791–92.

159. The U.S. Attorney's Office, although informed of plaintiff's attorney's appointment as special prosecutor, expressed no interest in pursuing the case. *See id.* at 792.

160. *See id.* at 790 n.1.

special prosecutors to prosecute the criminal contempt.[161] After the court of appeals affirmed the convictions, the U.S. Supreme Court reversed and held that the district court should not have appointed the attorneys of an interested party to prosecute the contempt.[162] Although eight of the nine justices concurred in this view, their reasoning was remarkably diverse.

Justice Brennan, joined by three others in his plurality opinion, held that lower courts may not appoint an interested party's attorney to prosecute a possible criminal contempt.[163] Brennan rested his decision not upon due process grounds, but upon the Court's inherent supervisory power over the lower federal courts.[164] Trial courts may appoint a disinterested private attorney to prosecute the contempt, but plaintiffs' attorneys do not have the requisite impartiality to serve as prosecutors and would normally experience unacceptable conflicts of interest between their pursuit of their clients' interests and a prosecutor's mandate to seek justice.[165]

Brennan's opinion was careful to balance the supposedly inherent self-defense powers of the judiciary against the procedural rights of the accused contemnors. The courts could not ensure obedience to their orders if they had to await prosecution of criminal contempts by the U.S. Attorney. This undercutting of the judicial power of self-defense would dangerously diminish the viability of the courts as adjudicators and lawgivers.[166] At the same time, a disinterested prosecutor presumably will not pursue criminal contempts in weak cases and will litigate those contempts that it does pursue with an eye towards justice, not vengeance.[167]

Two justices, while concurring in the finding of error in the court below, would have pushed the fairness/impartiality argument even further. Justice Blackmun believed that the conflict-of-interest concerns required appointment of a disinterested prosecutor as a matter of

161. *See id.* at 793.

162. *See id.* at 814.

163. *See id.* at 790.

164. *See id.* at 802.

165. *See id.* at 804–05.

166. "The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Id.* at 796.

167. *See id.* at 803.

constitutional due process.[168] And Justice Scalia advanced the novel view that at least the federal courts do not possess inherent authority to prosecute individuals for disobedience of their orders.[169] The Constitution contemplates that only the "judicial power of the United States" may be vested in the federal courts.[170] According to Scalia, the "judicial power" is "the power to decide, in accordance with the law, who should prevail in a case or controversy."[171] It does not include what is essentially part of the executive function, the prosecution of those who have allegedly violated the law. Prosecution and neutral adjudication cannot coexist in the same sphere.[172]

While radical and arguably unprecedented, Scalia's views are a natural extension of the Court's and commentators' basic discomfort with the conflated judicial roles of conflict adjudicator and law enforcer. When issuing an injunction, a court basically declares what the law is in a specific context and demands that the parties conform their behavior to that standard. If they do not and are punished for their disobedience, that punishment is not significantly different from the sanctions imposed on a defendant in a criminal proceeding based on the violation of a criminal statute or ordinance. If a defendant in an ordinary criminal prosecution is entitled to the benefits of a prosecutor selected by an elected executive, then an alleged contemnor arguably should have those benefits as well.

Following *Young*, the U.S. Supreme Court has continued to adhere to the view expressed in *Bloom* that criminal contempt is a crime in the ordinary sense. In *United States v. Dixon*,[173] the Court held that the Double Jeopardy Clause of the Fifth Amendment barred the subsequent criminal prosecution of a defendant who had already been held in criminal contempt for violation of a civil protection order.[174] In that case the civil protection order, among other things, had ordered the defendant not to use illegal drugs or to assault his wife.[175] He was convicted of

168. *See id.* at 814–15 (Blackmun, J., concurring).

169. *See id.* at 815–16 (Scalia, J., concurring).

170. U.S. Const. art. III, § 1.

171. *Young*, 481 U.S. at 816 (Scalia, J., concurring).

172. Scalia conceded, however, that the courts may use criminal contempt to punish disruption of ongoing proceedings and disobedience of orders necessary to the court's functioning as an adjudicator, such as an order to produce litigation-related documents. *See id.* at 820–21 (Scalia, J., concurring).

173. 509 U.S. 688 (1993).

174. *See id.* at 711.

175. *See id.* at 692.

criminal contempt based on his violation of those terms of the order.[176] Later the state sought to prosecute him based on the same incidents for violation of criminal statutes relating to drug use and assault.[177] In a plurality opinion, Justice Scalia stated that because the later criminal charge contained the same elements as the earlier contempt conviction, the Double Jeopardy Clause prohibited the subsequent prosecution.[178]

Dissenting in part, Justice Blackmun raised the specter that the Court had gone too far in equating criminal contempt with ordinary criminal offenses. Although he agreed that criminal contempts required the full procedural safeguards afforded defendants in ordinary criminal proceedings, he foresaw a dangerous weakening of the judicial power in regarding criminal contempt as a subset of the criminal law.[179] Criminal contempt in Justice Blackmun's view is "one of the very few mechanisms available to a trial court to vindicate the authority of its orders."[180] Without criminal contempt, trial courts will find it difficult, if not impossible, to ensure respect of their orders and to provide redress "to those who have sought the court's protection."[181] In other words, if the state's attorney prefers to prosecute contemnors for their criminal offenses instead of for criminal contempt, the court's orders will become virtually meaningless, and deserving plaintiffs will not receive an adequate remedy for the wrong done to them.[182]

Justice Blackmun's dissent brings to the fore once again an idea that has been obscured by the Court's continuing focus on the due process issues surrounding criminal contempt—the idea that contempt is intended as a remedial mechanism as well as a punishment for an offense against the state. Injunctions, whatever their form, find their teeth in the court's ability to impose fines and prison terms for violations of them. As explored in greater detail below,[183] contempt or some alternative

176. *See id.* at 693.

177. *See id.*

178. *See id.* at 700; *see also Ex parte* Busby, 921 S.W.2d 389, 391–93 (Tex. Ct. App. 1996).

179. *See Dixon*, 509 U.S. at 742–43 (Blackmun, J., concurring in the judgment and dissenting in part).

180. *Id.* at 742 (Blackmun, J., concurring in the judgment and dissenting in part).

181. *Id.* at 743 (Blackmun, J., concurring in the judgment and dissenting in part).

182. One could argue, of course, that a criminal prosecution of a defendant would be as effective, if not more so, at reforming the defendant's behavior than a criminal contempt citation. The criminal penalties for drug-related offenses, for example, may be much more substantial than the maximum permissible sanction for criminal contempt for violation of a civil protection order.

183. *See infra* notes 359–84 and accompanying text.

enforcement mechanism is vital to the courts' function as a dispenser of civil justice.

5. *Civil Contempt in Front of the Supreme Court: The Neglected Stepchild*

As the U.S. Supreme Court moved steadily throughout the twentieth century towards increasing recognition of procedural rights for criminal contempts, it remained curiously static in its treatment of civil contempt, both remedial and coercive. Two primary issues confronted the court in the few civil contempt cases that it considered. First, the Court was asked on occasion to examine the defining characteristics of coercive civil contempt as opposed to criminal contempt. Second, it faced the question of whether to enlarge the procedural protections afforded civil contemnors to match those eventually given criminal contemnors. Until *Bagwell* in 1994, the Court seemed reluctant to increase procedural safeguards in civil contempt cases.

The distinction between criminal contempt and coercive civil contempt developed in the first *Gompers* case in 1911 was cited repeatedly by the Court in subsequent cases.[184] Criminal contempt serves to vindicate the court's authority and to punish the contemnor for the affront to that authority. Civil contempt serves the interests of the party plaintiff and is either compensatory or coercive in character. Criminal contempt is most often linked to past disobedience of a prohibitory decree whereas coercive civil contempt induces compliance with a prospective mandatory court order.

Many of the coercive civil contempt cases considered by the Court within the last century involved decrees ordering production of evidence or property in conjunction with an ongoing proceeding—that is, compelling the defendant to testify before a court or administrative agency,[185] requiring the defendant to furnish books and records,[186] or directing the defendant to turn over property to the court in a creditors' or bankruptcy proceeding.[187] In these cases, the U.S. Supreme Court has

184. *See* Shillitani v. United States, 384 U.S. 364, 368 (1966); Penfield Co. v. SEC, 330 U.S. 585, 590 (1947); United States v. United Mine Workers, 330 U.S. 258, 302–04 (1947).

185. *See, e.g.*, Gelbard v. United States, 403 U.S. 41 (1972); *Shillitani*, 384 U.S. 364; McCrone v. United States, 307 U.S. 61 (1939); Fox v. Capital Co., 299 U.S. 105 (1936); Alexander v. United States, 201 U.S. 117 (1906).

186. *See, e.g.*, United States v. Rylander, 460 U.S. 752 (1983); *Penfield Co.*, 330 U.S. 585.

187. *See, e.g.*, Maggio v. Zeitz, 333 U.S. 56 (1947); Lamb v. Cramer, 285 U.S. 217 (1932).

held consistently that an indeterminate fine or term of imprisonment to compel obedience of an affirmative order is a coercive civil contempt that may be imposed in ordinary civil proceedings.[188]

In the litigation-related cases and also in those involving orders to perform some other type of affirmative act, the Court has focused almost exclusively on "purgability" as the key feature of coercive civil contempt. For example, in *Local 28, Sheet Metal Workers' International Ass'n v. EEOC*,[189] the district court had ordered the defendant union to achieve twenty-nine-percent nonwhite membership by a particular date.[190] When the union did not reach the required goal, the court ordered it to pay fines into a fund designed to increase minority union membership.[191] Although the union argued that the fines were punitive and had been imposed without criminal procedures, the U.S. Supreme Court held that they were civil and both remedial and coercive in nature.[192] The contempt's coercive aspect flowed from its purgability: "[P]etitioners could purge themselves of the contempt by ending their discriminatory practices and by achieving the court-ordered membership goal; they would then be entitled, with the court's approval, to recover any moneys remaining in the Fund."[193]

Similarly, in *Hicks v. Feiock*,[194] the Court held that the defining characteristic of coercive civil contempt was whether the defendant could avoid the sanction altogether by complying with the court order. In *Hicks*, the defendant had been ordered to make child support payments.[195] When he failed to do so, he was adjudged in contempt and sentenced to a total of twenty-five days in jail.[196] The sentence was suspended, and he was placed on probation for three years.[197] Probation could be revoked and the jail sentence could be reinstituted if the

188. *See Shillitani*, 384 U.S. at 365; *Maggio*, 333 U.S. at 67–68; Doyle v. London Guarantee & Accident Co., 204 U.S. 599, 604–05 (1907).

189. 478 U.S. 421 (1986).

190. *See id.* at 432.

191. *See id.* at 435.

192. *See id.* at 443–44.

193. *Id.* at 444.

194. 485 U.S. 624 (1988).

195. *See id.* at 627.

196. *See id.* at 628.

197. *See id.*

defendant did not make his support payments, including payments on arrearages, in a timely fashion.[198]

Before the U.S. Supreme Court, the *Hicks* defendant argued that California law impermissibly imposed on him the burden of proving his inability to comply with the support order.[199] After acknowledging that consistent with Fourteenth Amendment due process the state cannot impose on a criminal defendant the burden of proving an element of a criminal offense,[200] the Court then faced the task of deciding whether the contempt sanction in this case was civil or criminal. Once again citing *Gompers*, the Court stated that "the substance of the proceeding and the character of the relief that the proceeding will afford" creates a method to determine the nature of the contempt.[201] The Court emphatically rejected any attempt to classify contempts based on their underlying purpose, noting that any given contempt serves both remedial and punitive purposes to some extent.[202]

According to the Court, the "character" of coercive civil contempt is defined by its conditional nature. The imposition of the contempt sanction is conditioned upon the defendant's continuing failure to comply with the court order:

> The critical feature that determines whether the remedy is civil or criminal in nature is not when or whether the contemnor is physically required to set foot in jail but whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order.[203]

Ultimately, the Court could not determine the purgability of the contempt sanction from the record below—it was unclear whether the defendant could end his three-year probation term by making up all of the child support arrearages that he owed.[204] If so, then the "relief

198. *See id.*

199. *See id.*

200. "If applied in a criminal proceeding, [the California] statute would violate the Due Process Clause because it would undercut the State's burden to prove guilt beyond a reasonable doubt." *Id.* at 637.

201. *Id.* at 631.

202. "[T]his Court has never undertaken to psychoanalyze the subjective intent of a State's laws and its courts, not only because that effort would be unseemly and improper, but also because it would be misguided." *Id.* at 635.

203. *Id.* at 635 n.7.

204. *See id.* at 639–40.

imposed here is in fact a determinate sentence with a purge clause [and] civil in nature."[205] If the contempt were civil, then the state could constitutionally require that the defendant carry the burden of proof on his inability to comply with the order.[206]

At the same time that the U.S. Supreme Court was adhering to the *Gompers* definitions of criminal and coercive civil contempt, it showed no inclination until the *Bagwell* decision to increase the procedural safeguards accorded contemnors at civil contempt hearings. Before *Bagwell*, the Court had uniformly held that civil contempt sanctions may be imposed in ordinary civil proceedings,[207] that a prosecuting plaintiff need not prove contempt beyond a reasonable doubt,[208] that a jury trial is not available because the action is in equity,[209] that a defendant has no constitutional right to be confronted by his accusers or to refuse to testify,[210] and that double jeopardy does not apply.[211] Civil contempt, unlike criminal contempt, was held not to require willfulness on the defendant's part[212] and not to be appealable apart from the main equitable action.[213]

The U.S. Supreme Court has also held that the Fifth Amendment privilege against self-incrimination cannot necessarily be invoked to block enforcement of an injunction by means of civil contempt. In *Baltimore City Department of Social Services v. Bouknight*,[214] the Court held that a mother who was ordered to produce her child in conjunction with his removal from her home could not invoke the Fifth Amendment privilege against self-incrimination in resisting civil contempt sanctions for her failure to comply with the order.[215] Although Justice O'Connor in

205. *Id.* at 640. Three dissenting justices thought that the contempt sanction was undeniably civil. A suspended determinate sentence coupled with a period of probation is conditional and thus coercive in nature: "[A]s long as [the defendant] meets the conditions of his informal probation, he will never enter jail." *Id.* at 650 (O'Connor, J., dissenting).

206. *See id.* at 645–46.

207. *See* Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 442–43 (1986).

208. *See Hicks*, 485 U.S. at 645 (O'Connor, J., dissenting).

209. *See* Shillitani v. United States, 384 U.S. 364, 365 (1966).

210. *See* United States v. Rylander, 460 U.S. 752, 758 (1983).

211. *See* Rex Trailer Co. v. United States, 350 U.S. 148, 150 (1956).

212. *See* McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).

213. *See* Fox v. Capital Co., 299 U.S. 105, 107 (1936).

214. 493 U.S. 549 (1990).

215. *See id.* at 561; *see also Rylander*, 460 U.S. at 758 (asserting that defendant could be held in civil contempt for his refusal to produce records pursuant to IRS summons even though he invoked Fifth Amendment self-incrimination privilege).

her majority opinion conceded that the mother's act of producing her child might be considered testimonial in nature and possibly incriminating, she emphasized that the state had an overriding interest in the child's welfare as part of "a regulatory regime . . . unrelated to the enforcement of its criminal laws."[216] Thus the defendant could be imprisoned via coercive civil contempt until she agreed to produce her child or disclose his whereabouts.[217]

This historical review of the U.S. Supreme Court's treatment of civil and criminal contempt reveals that until the *Bagwell* decision in 1994, the lines between civil and criminal contempt were fairly well drawn (at least in the Court's mind), and the procedural schism between the two had been reasonably delineated and accepted. The Court's 1994 decision in *Bagwell*, like *Gompers* eighty years previously, represents a watershed in the Court's thinking about contempt and shows a sharpened awareness of the potential judicial abuse of the contempt power as distinguished from the necessity for contempt as an enforcement tool.

II. *BAGWELL* AND ITS IMPACT ON LOWER COURTS

A. International Union, United Mine Workers v. Bagwell: *Is There Anything Left of Coercive Civil Contempt?*

On April 4, 1989, the International Union and the Local District 28 Union of the United Mine Workers of America began a strike against two Virginia mining companies, Clinchfield Coal Company and Sea "B" Mining Company.[218] The unions charged the companies with certain unfair labor practices, and the companies in turn sought an injunction against the unions to prohibit various actions associated with the strike.[219] The circuit court of Russell County, Virginia, issued the injunction, which established picketing guidelines and prohibited certain disruptive activities, such as placing tire-puncturing devices ("jackrocks") on roads

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216. *Bouknight*, 493 U.S. at 556.

217. Justice O'Connor suggested, however, that if the defendant's production of her child proved to be incriminating (that is, because the child was injured or deceased), the state might be limited in its ability to use her self-incriminating act in subsequent criminal proceedings. *See id.* at 561–62.

218. *See* International Union, United Mine Workers v. Clinchfield Coal Co., 402 S.E.2d 899, 900 (Va. Ct. App. 1991), *rev'd sub nom.* Bagwell v. International Union, United Mine Workers, 423 S.E.2d 349 (Va. 1992), *rev'd*, 512 U.S. 821 (1994).

219. *See id.*

used by company vehicles, blocking entrances to the companies' facilities, and physically threatening company employees.[220]

Union members apparently violated the terms of the order on numerous occasions. The circuit court held an initial show cause hearing on May 16, 1989, and found seventy-two separate violations of the injunction.[221] On May 18, 1989, the court found the unions in contempt and imposed fines on them totaling $616,000 payable to the Commonwealth of Virginia.[222] On the condition that the unions pay $212,000 of the fines within ten days and comply with the injunction in the future, the circuit court suspended $400,000 of the fines.[223] The court also indicated that future nonviolent and violent violations of the injunction would result respectively in $20,000 and $100,000 in "civil" fines.[224]

Ultimately, the trial court held seven subsequent contempt hearings and found that the defendants had committed over four hundred separate violations of the injunction.[225] The court levied a total of $64 million in contempt fines against the unions, $12 million of which was to be paid to the plaintiff companies.[226] The remainder was made payable to the Commonwealth of Virginia and the two Virginia counties most affected by the strike activities.[227] The fines payable to the governmental units were designed to compensate them for their law-enforcement expenses incurred in dealing with the strikers.[228]

At the various contempt proceedings, the circuit court afforded the defendants the normal rights of civil litigants, including the right to introduce evidence, conduct discovery, and call and cross-examine witnesses.[229] Believing that the contempt proceedings were civil in nature, however, the court did not invoke any of the heightened

220. *See* Bagwell v. International Union, United Mine Workers, 423 S.E.2d 349, 351 (Va. 1992), *rev'd*, 512 U.S. 821 (1994).

221. *See Clinchfield Coal*, 402 S.E.2d at 900.

222. *See id.*

223. *See id.*

224. *See id.*

225. *See* International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 824 (1994).

226. *See id.*

227. *See id.*

228. *See id.*

229. *See id.*

protections required in a criminal proceeding, with the exception of the weightier burden of proof.[230]

While the unions' appeals of the contempt sanctions were pending, the unions and the companies settled the underlying dispute.[231] As part of the settlement, they agreed that the companies would move to vacate the contempt fines and to dismiss the lawsuit.[232] The circuit court granted the motions and vacated the $12 million portion of the fines payable to the companies.[233] However, the court refused to vacate the fines payable to the two counties and the Commonwealth of Virginia, even though the counties also joined in the motion to vacate the fines.[234] The judge stated that the remaining fines were coercive and civil in nature and for the benefit of the public, not the litigants.[235]

The Virginia Court of Appeals reversed the trial court's decision and vacated the remainder of the contempt fines.[236] The court stated that it need not decide whether the fines were criminal or civil in nature because the law in either situation required their dismissal.[237] If the fines were considered criminal, they were invalid because the trial court did not afford the defendants a criminal trial in violation of the U.S. Constitution and various U.S. Supreme Court precedents.[238]

According to the Virginia Court of Appeals, if the fines were denominated civil, they still had to be vacated because of the settlement of the underlying litigation.[239] Recognizing this issue to be one of state law, the court noted that Virginia case law suggests that the courts should "rigidly adhere to procedures that maintain the distinction between civil and criminal contempt."[240] Traditionally, all civil contempt sanctions,

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230. The trial court stated the burden of proof to be "beyond a reasonable doubt," but apparently applied the criminal standard only "out of an abundance of caution," as opposed to necessity. International Union, United Mine Workers v. Clinchfield Coal Co., 402 S.E.2d 899, 901 (Va. Ct. App. 1991), *rev'd sub nom.* Bagwell v. International Union, United Mine Workers, 423 S.E.2d 349 (Va. 1992), *rev'd*, 512 U.S. 821 (1994).

231. *See id.*

232. *See id.*

233. *See id.* at 902 n.1.

234. *See id.*

235. *See* International Union, Union Mine Workers v. Bagwell, 512 U.S. 821, 825 (1994).

236. *See Clinchfield Coal*, 402 S.E.2d at 905.

237. *See id.* at 903.

238. *See id.*

239. *See id.* at 905.

240. *Id.* at 904.

whether compensatory or coercive, fall with the settlement or dismissal of all issues involved in the litigation.[241] Consequently, the coercive civil fines in *Bagwell* disappeared when the parties settled the case.

The Virginia Court of Appeals conceded that coercive civil fines, besides benefiting the party plaintiffs, also in part vindicate the court's authority and serve the public interest in obedience of lawful judicial orders.[242] But their primary purpose is to coerce compliance with court orders so that plaintiffs will obtain the relief that they seek.[243] Vindication of the court's authority can be accomplished directly by a court's imposing a criminal contempt penalty after the appropriate criminal trial.[244]

Further appeals to the Supreme Court of Virginia resulted in reversal of the Virginia Court of Appeals decision.[245] The Virginia high court agreed with the portion of the appellate court's opinion labeling the contempt fines as coercive and civil.[246] The court analogized the prospective fines schedule announced by the trial court to the per diem fines that are the hallmark of coercive civil contempt.[247] In each instance, defendants know that a fine of a certain amount will be imposed for violations of the court order and that they can avoid the fines by complying with the order.[248] Per diem fines are commonly used for mandatory injunctions—for example, a situation where defendants are fined $1000 per day until they produce a certain document. The prospective fine schedule, the court observed, is more suited to the prohibitory injunction—for example, a situation where the defendants will be subject to a $10,000 fine if they cross plaintiff's property again.[249]

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241. This conclusion assumes that the parties in their settlement agree that all contempt fines will be waived. Presumably, the plaintiff could insist that the defendant pay all or some of the remedial civil contempt fines as compensation for losses occasioned by the defendant's disobedience of the court order.

242. *See id.* at 905.

243. *See id.*

244. *See id.* Of course, the court that suffered the affront to its dignity will sometimes not be the one imposing the criminal contempt sanction. Often the State's Attorney will bring a separate criminal prosecution before another judge.

245. *See* Bagwell v. International Union, United Mine Workers, 423 S.E.2d 349, 360 (Va. 1992), *rev'd*, 512 U.S. 821 (1994).

246. *See id.* at 357.

247. *See id.*

248. "[T]he Union controlled its own fate." *Id.*

249. *See id.*

The Supreme Court of Virginia also focused on the trial court's avowed purpose in setting the prospective fine schedule. The trial court repeatedly announced its desire to coerce the defendants into complying with the court order.[250] At the second contempt hearing at which the judge found numerous violations of the injunction, he imposed the previously announced fines and expressed his hope that they would be sufficient to deter future violations of the court order.[251]

Finding the fines to be coercive and civil, the Supreme Court of Virginia then held that settlement of the underlying litigation did not automatically vacate the fines.[252] Preserving such fines is necessary "if the dignity of the law and public respect for the judiciary are to be maintained."[253] If coercive civil fines were automatically mooted upon settlement of the underlying litigation, a recalcitrant litigant could simply defer paying the fines until the case was settled and thereby avoid their coercive effect.[254] The trial court thus would lose an important tool by which it ensures respect for its authority and obedience to its orders.[255]

The U.S. Supreme Court, on a writ of certiorari to the Supreme Court of Virginia, reversed the holding that the fines in question were civil in nature and thus the trial court could impose them without affording the defendant a criminal trial.[256] Writing for a unanimous court,[257] Justice Blackmun held that the sanctions imposed were criminal and that without a criminal proceeding the defendants did not receive due process.[258]

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250. The trial court stated, "I firmly believe that the fate of the union with regard to these violations is in the hands of those members and leadership that we have seen here in court today. . . . I sincerely hope that you will be able to conduct yourself in a law abiding manner . . . ." *Id.*

251. *See id.*

252. *See id.* at 358.

253. *Id.*

254. *See id.*

255. The Supreme Court of Virginia noted that its decision was consistent with U.S. Supreme Court precedent—specifically, the decision in *Gompers*. *See id.* 359–60. In *Gompers*, the Court set aside civil contempt sanctions against a union because the underlying dispute was settled, but unlike *Bagwell*, the civil contempt was compensatory in nature and not coercive.

256. International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 839 (1994).

257. All justices concurred in the Court's judgment with Justice Scalia writing a separate opinion. Joined by Chief Justice Rehnquist, Justice Ginsburg also concurred separately, but did not join in the portion of Justice Blackmun's opinion that called for criminal procedures for all indirect contempts of complex injunctions. *See id.* at 848 (Ginsburg, J., concurring).

258. *See id.* at 837–38.

Justice Blackmun started by reviewing the basic distinction between criminal and civil contempt first enunciated in *Gompers* and subsequently embraced by state and lower federal courts. Justice Blackmun observed that *Gompers* Court had used the "character and purpose" of the contempt sanction imposed as the linchpin of the civil/criminal distinction.[259] A sanction that is remedial in nature and benefits the party plaintiff is civil in nature; one that is punitive and vindicates the court's authority is criminal.[260] Even the *Gompers* opinion, however, recognized that the stated purpose of the contempt sanction by itself cannot be ultimately determinative of its classification.[261] An avowedly punitive sanction also has the effect of inducing compliance with an ongoing judicial decree whereas an overtly remedial or coercive sanction tends in some respect to ensure respect for the court's authority as well.[262]

Relying primarily on *Hicks*, Justice Blackmun stated that the character of the sanction is critical for determining whether it is civil or criminal.[263] By character, Justice Blackmun apparently meant "purgability" of the contempt. After reviewing several forms of contempt sanctions such as determinate fines, fixed prison terms, per diem fines, and indefinite imprisonment,[264] Justice Blackmun concluded that the ability of the contemnor to avoid the sanction once imposed through compliance with the court order is essential for classifying the sanction as coercive civil contempt.[265] In applying that standard to the facts of *Bagwell*, he then found that the fine schedule previously announced by the trial court was not purgable in the classic sense:

> The union's ability to avoid the contempt fines was indistinguishable from the ability of any ordinary citizen to avoid a criminal sanction by conforming his behavior to the law. The fines are not coercive day fines, or even suspended fines, but are more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed. We therefore

259. *Id.* at 827.

260. *See id.* at 827–28.

261. *See id.* at 828.

262. "Most contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce an offender's future obedience." *Id.*

263. *See id.*

264. *See id.* at 828–30.

265. *See id.* at 837.

> decline to conclude that the mere fact that the sanctions were announced in advance rendered them coercive and civil as a matter of constitutional law.[266]

Justice Blackmun then went on to examine the need for additional criminal procedure protections for the accused contemnors. He concluded that because the injunction at issue was complex and far-reaching, proscribing and mandating numerous behaviors by the defendants over a long period of time and over a wide geographical area, the fact-finding process was fraught with danger and the consequences to the defendants of violations extremely serious.[267] In that situation, "disinterested factfinding and evenhanded adjudication were essential, and petitioners were entitled to a criminal jury trial."[268]

In his majority opinion, Justice Blackmun attempted to carry forward the historic judicial balancing of two competing policy concerns surrounding the imposition of contempt: "necessity and potential arbitrariness."[269] Traditionally, a judge can use the contempt power with few procedural constraints where "its exercise is most essential"[270]—in other words, in instances where an ongoing judicial proceeding is being disrupted by violent, offensive, or recalcitrant behavior. There, the case law uniformly acknowledges that judges can use summary procedures to restore order and to enforce respect for the court's authority.[271]

Justice Blackmun averred that as the necessity for swift punishment diminishes, the U.S. Supreme Court has imposed greater procedural requirements to guard against biased and arbitrary adjudication of contempts.[272] Thus if a court chooses to punish a litigant for a direct contempt at the conclusion of a trial, the court must afford the alleged contemnor notice and hearing.[273] Furthermore, severe criminal sanctions, even for direct contempt, always require the availability of a jury trial.[274]

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266. *Id.*

267. *See id.*

268. *Id.* at 838.

269. *Id.* at 832.

270. *Id.*

271. *See id.* (citing United States v. Wilson, 421 U.S. 309, 315–16 (1975); Codispoti v. Pennsylvania, 418 U.S. 506, 513 (1974); Harris v. United States, 382 U.S. 162, 164 (1965)).

272. *See id.*

273. *See id.*

274. *See id.* at 833.

Finally, if indirect contempts are sanctioned with criminal penalties, they require the protections of a full criminal trial.[275]

On one level, Justice Blackmun's opinion can be viewed as a simple classification of previously announced fine schedules for future violations of an existing court order as criminal contempt, requiring criminal procedures for their imposition. On that level, the opinion breaks little new ground. It simply carries forward the classic criminal/civil dichotomy developed by *Gompers* and its progeny and states that prospective fines are no different from determinate criminal penalties in a previously enacted criminal statute. In either case, would-be offenders know in advance the punishment to which they may be subject. Even though the sanction is known in advance and can be avoided by not violating the statute or court order, it is still punishment when it is imposed, and thus criminal procedures are required.

Even on this relatively straightforward level, one can quarrel with the U.S. Supreme Court's conclusion about prospective fine schedules. Justice Blackmun seemed to concede that per diem fines and even suspended fines may be classified as civil contempts. In both cases, the defendant can avoid the fine by complying with the court order. For example, if the defendant is ordered to pay $1000 a day until it turns over certain documents to a government agency, it can escape any monetary sanction whatsoever by relinquishing the documents immediately.[276] Similarly, in *Bagwell* the defendants could have avoided the $52 million in fines by obeying the injunction. Immediate and continued compliance "purges" or avoids the sanction. In the case of the classic coercive sanction consisting of a daily fine, the defendant knows in advance what the penalty for noncompliance will be.

Thus one can argue that the analogy between the prospective fine schedule in *Bagwell* and per diem fines is just as tight, if not tighter, as that between the *Bagwell* fine schedule and traditional fixed fines levied for criminal contempt. Classic coercive contempt is forward-looking; it anticipates future disobedience by the defendant and imposes a sanction until the defendant complies. The *Bagwell* trial court's fine schedule also anticipated possible prospective noncompliance by the defendants, and when the violations occurred, the court imposed the fines as announced.

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275. *See id.*

276. Justice Blackmun also observed that control of the litigation process is essential to a court's basic function, and consequently, the court could properly impose coercive sanctions through civil proceedings. *See id.*

Traditionally, criminal contempt is backward-looking; the defendant has already violated the court order and is now being punished for its disrespect of the court's authority. In that sense alone, the *Bagwell* fines were more analogous to coercive civil rather than criminal contempt.

On another level, Justice Blackmun did not simply classify one particular type of contempt sanction as criminal. He attempted to do what some scholars have advocated for years: apply the idea that courts should stop focusing mechanically on the civil/criminal distinction and instead examine the policy justifications for requiring certain procedural protections for specific sanctions.[277] Why does criminal contempt require heightened procedural protections including the right to jury trial, the privilege against self-incrimination, the ban on double jeopardy, and so forth? Justice Blackmun concluded that it was not only the purpose or nature of the penalty that determined the appropriate procedures, but also the type of injunction involved and the absence or presence of complex factfinding.[278]

As the majority observed, the decree in *Bagwell* was lengthy, elaborate, and far-reaching.[279] It aimed to control a wide variety of behaviors by numerous individuals in an extensive geographic area over a period of many months. Because of the numerous violations ultimately found, the fines imposed were substantial. Given the broad code of conduct created by the injunction, the large number of alleged contemptuous acts, and the severity of the penalty, "disinterested factfinding and evenhanded adjudication were essential, and petitioners were entitled to a criminal jury trial."[280]

In his opinion, Justice Blackmun took pains to elaborate his "complexity" thesis. In *Gompers*, the U.S. Supreme Court in defining civil contempt had postulated an affirmative decree, such as an order to pay alimony or to surrender property to a receiver.[281] If the defendant refuses to do the required act, he can be imprisoned or fined until he does so. According to *Gompers*, this penalty is a coercive civil contempt.[282] Justice Blackmun distinguished the simple affirmative decree described

277. *See id.* at 837–38.

278. *See id.*

279. *See id.* at 837.

280. *Id.* at 838.

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

282. *See id.*

in *Gompers* from the complex order issued in *Bagwell*.[283] In the former case, the potential facts in dispute at the contempt hearing are many fewer than those in a case like *Bagwell*. Presumably, in a simple case the judge can be trusted to determine the essential facts, such as whether the defendant received notice of the decree, whether the defendant violated it, and whether the defendant had the ability to comply. If the judge makes an egregious error in factfinding, then the appellate court can correct it. In the complex case, these same facts must be determined over a longer period of time and in a variety of contexts. One can assume that the risk of error and bias increase proportionately.

In his concurrence, Justice Scalia expressed support for Justice Blackmun's complexity thesis mainly on historical grounds.[284] He reviewed the history of injunctions and noted that the modern equitable decree is totally different from its ancestors.[285] Traditionally, equitable decrees were straightforward resolutions of property disputes—for example, a case where the chancery court ordered the defendant to convey a piece of land to the plaintiff.[286] Equity strictly eschewed any order that would place the court in a position of ongoing supervision of the dispute and the parties. Today courts often issue complex decrees governing the operation of large institutions such as schools, hospitals, and prisons.[287] By their nature, these decrees necessitate continued judicial involvement in their enforcement. They impose an entire code of conduct on the parties, not unlike a criminal statutory scheme. Consequently, defendants accused of violating such an order deserve full criminal protections at the contempt hearing.[288]

Critical scrutiny reveals some difficulties with Justice Blackmun's effort to link the need for criminal protections with the complexity of the decree. There seems to be just as much need for unbiased factfinding in the case of simple decrees as in the case of complicated ones. Merely because a court order is relatively simple in form does not mean that the defendant will not hotly contest any asserted contempt or that the court

283. *See Bagwell*, 512 U.S. at 833–34.

284. *See id.* at 840 (Scalia, J., concurring).

285. *See id.* at 841–43 (Scalia, J., concurring).

286. *See id.* at 841–42 (Scalia, J., concurring).

287. *See id.* at 842–43 (Scalia, J., concurring).

288. *See id.* (Scalia, J., concurring).

will be less inclined to bias or irrational adjudication.[289] Consider a defendant who is ordered to pay child support—a concededly simple order. The plaintiff alleges that certain payments were not made according to the order's terms and has the court issue a show cause order as to why the defendant should not be held in contempt. At the show cause hearing, the defendant argues that she did not have the ability to comply because she lost her job. The plaintiff then asserts that the defendant is in fact working in her uncle's business, is being paid "off the books," and has the ability to comply with the court order. To resolve the factual issue of whether the defendant has sufficient income to comply with the decree, the judge, if no jury trial is afforded, must consider the credibility of a number of witnesses. In addition, the court, despite its best efforts to be impartial, may fall prey to the weaknesses of human nature and find itself repelled by the idea that the defendant is not supporting her children, whatever her excuse. If one believes in the jury's ability to leaven the potential bias and narrow-mindedness of a single judge,[290] then the defendant in this hypothetical situation should have the right to a jury trial along with the other criminal protections at her contempt hearing.

Justice Ginsburg, joined by Chief Justice Rehnquist, was more comfortable in resting her classification of the contempt as criminal on the traditional *Gompers* formula. She specifically rejected the portion of Justice Blackmun's opinion arguing for criminal procedures wherever the contempt flows from a "complex" order.[291] According to Justice Ginsburg, the *Bagwell* contempt fines are criminal because they were not

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289. In *Walters v. Glasure*, 690 N.E.2d 937, 941 (Ohio Ct. App. 1997), for example, the trial judge displayed what might be characterized as a hostile attitude toward the alleged contemnor based on the judge's belief that the defendant questioned the court's ability to enforce its own orders. The injunction in that case simply restrained the defendant from interfering with the plaintiffs' use of their real property. *See id.* at 938.

290. There is no question that judges may become emotionally involved in the suits before them. Consider the comments of a judge holding the pilots' union in contempt for refusing to obey a return-to-work order:

> The ridiculousness of [the Union's position] is only surpassed by its outrageousness. . . . The Union is responsible for the damages these passengers have suffered. It is also clear that the Union leadership could care less about these people. . . . It is this Court's view that a minor labor dispute has been transformed into nothing more than a shakedown.

American Airlines, Inc. v. Allied Pilots Ass'n, No. 7:99-CV-025-X, 1999 U.S. Dist. LEXIS 1376, at *2–4 (N.D. Tex. Feb. 13, 1999). The court also made passing reference to "all the macho chest beating and mouthing off by anonymous pilots . . . ." *Id.* at *5.

291. *See Bagwell*, 512 U.S. at 848 (Ginsburg, J., concurring in part and concurring in the judgment).

purgable by the defendant and because the Supreme Court of Virginia held that they survived the settlement of the underlying dispute.[292] Both of these characteristics are hallmarks of criminal contempt. Thus, at least two members of the Court saw no need to discard the *Gompers* criteria in this or perhaps in any case.

Justice Blackmun's opinion also leaves many unanswered questions that the Court may have to confront in the future. One obvious question flowing from Justice Blackmun's complexity concept is where the lower courts should draw the line between simple and complex decrees. A single affirmative order like the ones described in *Gompers* is simple; the multi-provision injunction in *Bagwell* is complex. But does the *Bagwell* order derive its complexity from the number of its provisions, the extent of its geographic reach, its duration, the number of parties and nonparties bound by it, or a combination of all of the above factors? Is complexity defined not so much by the scope of the decree but its impact on society as a whole? An injunction requiring the defendant to pay child support arguably affects no one but the family involved—the mother, the father, and the children entitled to support. An order to cease certain activities in conjunction with a strike arguably can affect an entire county, a state, or even the nation.

Another unresolved issue concerns the type of sanction imposed. Justice Blackmun implied that if the injunction is complex enough, even the classic forms of coercive civil contempt—per diem fines or indefinite imprisonment—might require criminal procedures for their imposition.[293] Suppose a court orders a defendant prison to make certain reforms in prison operation by a certain date—for example, the defendant is ordered to provide recreational opportunities for prisoners, to create a prison law library, to upgrade the nutritional quality of the food served, and so forth. The date arrives, and the plaintiffs allege that the defendant has not complied with the court order. The court then imposes a daily $10,000 fine until the defendant complies. Traditionally, such a fine would be considered coercive civil contempt and would require only ordinary civil procedures. After *Bagwell*, the court order is arguably complex enough to warrant the use of criminal procedures.[294] The question then becomes

292. *See id.* at 846–47 (Ginsburg, J., concurring in part and concurring in the judgment).

293. *See id.* at 833–34.

294. Justice Blackmun was careful to state that the holding in *Bagwell* "leaves unaltered the longstanding authority of judges to adjudicate direct contempts summarily, and to enter broad

whether there is anything left of coercive civil contempt in complex injunction cases. Do all contempts, other than compensatory civil contempts, become essentially criminal and thus require use of criminal procedures?

B. Subsequent Lower Court Reaction (or Non-Reaction) to Bagwell: *Do All Civil Contemnors Get Two Bites of the Apple?*

The U.S. Supreme Court decided *Bagwell* in mid-1994. Since then both lower federal and state courts have reacted to it in a decidedly "ho-hum" fashion. Some courts have sidestepped it in cases that arguably required its application as a matter of constitutional due process.[295] Others have distinguished it primarily on the purgable[296] or compensatory[297] nature of the contempt sanction at issue. Several courts have relied on *Bagwell* in cases where the sanctions clearly would have been classified as criminal even before *Bagwell*.[298] And finally, a few courts have scrupulously applied it and required use of criminal procedures for the imposition of contempt sanctions that before *Bagwell* some courts might have classified as civil.[299] All in all, the predominant

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compensatory awards for all contempts through civil proceedings." *Id.* at 838. Notably absent from this comment are coercive civil contempt sanctions.

295. *See, e.g.*, NLRB v. Ironworkers Local 433, 169 F.3d 1217, 1220–21 (9th Cir. 1999) (classifying previously announced sanctions as civil rather than criminal); Evans v. Williams, 35 F. Supp. 2d 88, 98 (D.D.C. 1999) (denying defendants' demand for criminal jury trial and levying over five million dollars in fines for violation of lengthy order); Labor Relations Comm'n v. Salem Teachers Union, 706 N.E.2d 1146, 1150 (Mass. App. Ct. 1999) (holding substantial fine announced in advance was civil); Jessen v. Jessen, 567 N.W.2d 612, 619–20 (Neb. Ct. App. 1997) (holding suspended determinate fine to be civil contempt).

296. *See, e.g.*, United States v. Ayres, 166 F.3d 991, 995 (9th Cir. 1999) (holding per diem fines to be coercive civil contempt because of defendant's ability to purge); United States v. Barnette, 129 F.3d 1179, 1182 n.7 (11th Cir. 1997) (holding indefinite incarceration to be coercive civil contempt because of defendant's ability to purge); Santibanez v. Wier McMahon & Co., 105 F.3d 234, 243 (5th Cir. 1997) (same); United States v. McDougal (*In re* Grand Jury Subpoena), 97 F.3d 1090, 1094–95 (8th Cir. 1996) (same).

297. *See, e.g.*, Daniels v. Pipe Fitters Ass'n Local 597, 113 F.3d 685, 688 (7th Cir. 1997); Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (*In re* Terrebonne Fuel & Lube, Inc.), 108 F.3d 609, 613–14 (5th Cir. 1997); Mother African Union First Colored Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church, C.A. No. 12055, 1998 Del. Ch. LEXIS 239, at *26 (Del. Ch. Dec. 11, 1998).

298. *See, e.g.*, Consolidated Rail Corp. v. Yashinsky, 170 F.3d 591, 596 (6th Cir. 1999) (holding per diem fine to be criminal contempt when underlying order became moot); Crowe v. Smith, 151 F.3d 217, 227 (5th Cir. 1998) (holding flat, unconditional fines to be criminal contempt).

299. *See, e.g.*, Bush Ranch, Inc. v. E.I. DuPont de Nemours & Co. (*In re* E.I. DuPont de Nemours & Co.-Benlate Litig.), 99 F.3d 363, 369 (11th Cir. 1996) (holding monetary sanctions imposed on

reaction of the lower courts, particularly state courts, has been a *sub rosa* rejection of the *Bagwell* holding. These courts may resist, perhaps subconsciously, the imposition of additional procedural restrictions upon what they view as an inherent judicial prerogative and a mechanism of self-preservation.

Several federal and state appellate courts have seemingly ignored the possible application of *Bagwell* to contempt sanctions appealed to them.[300] In *Webster v. State*,[301] for example, the Indiana Court of Appeals held that a ninety-day suspended jail sentence imposed on a contemnor for violating a restraining order was a civil contempt requiring only basic civil procedures.[302] The contemnor had violated a court order requiring him to stay away from his wife's residence.[303] The lower court sentenced the contemnor to ninety days in jail.[304] The jail sentence was suspended pending future compliance with the restraining order and certain conditions imposed by the court.[305] Without citing *Bagwell*, the Indiana Court of Appeals rejected the contemnor's argument that the suspended jail sentence was a criminal contempt penalty.[306] The court noted that the defendant could avoid the sanction by complying with the court order in the future and that therefore the contempt had a coercive, rather than a punitive, effect.[307]

Arguably, at least one prong of the *Bagwell* decision would require classification of the contempt in *Webster* as criminal.[308] In *Bagwell*,

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defendants for violation of discovery orders to be criminal even though defendants could avoid fines by performing certain acts); Jove Eng'g, Inc. v. IRS (*In re* Jove Eng'g, Inc.), 92 F.3d 1539, 1559 (11th Cir. 1996) (classifying fixed monetary sanction to induce IRS not to violate automatic stay in bankruptcy as punitive); DiSabatino v. Salicete, 671 A.2d 1344, 1349–51 (Del. 1996) (holding previously announced fines as criminal contempt under *Bagwell*).

300. *See supra* note 295.

301. 673 N.E.2d 509 (Ind. Ct. App. 1996).

302. *See id.* at 512.

303. *See id.* at 510–11.

304. *See id.*

305. *See id.* at 511.

306. *See id.* at 512.

307. *See id.*

308. In an effort to harmonize its opinion with *United States v. United Mine Workers*, 330 U.S. 258 (1947), the Court in *Bagwell* suggested that the suspended determinate fines in *United Mine Workers* were coercive civil contempt for two reasons: (1) the union could purge the fine by complying with the court order, and (2) the order itself was relatively simple and straightforward, requiring clearcut discrete acts by the union. *See* International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 830 (1994). In the *Webster* case, the suspended determinate jail sentence resembled somewhat the sanctions in *United Mine Workers*: in both cases, the contemnor could

Justice Blackmun suggested that the previously announced fines imposed on the union were criminal because "[t]he union's ability to avoid the contempt fines was indistinguishable from the ability of any ordinary citizen to avoid a criminal sanction by conforming his behavior to the law."[309] In *Webster*, the appellate court implied that the previously announced sanction of ninety days in jail could be imposed upon the defendant at any time in the future when it was shown that the defendant had violated the restraining order.[310] Presumably, the defendant would have no opportunity to avoid the jail sentence through compliance once the court determined that a violation had occurred. In this sense, the sanction in *Webster* was no different from the fine schedule set up by the lower court in *Bagwell*.

Obviously, the extensive order in *Bagwell* governing numerous union activities was much more complex than the relatively straightforward order in *Webster*. But Justice Blackmun never indicated that he was relying solely on the complexity element to distinguish criminal from civil contempt.[311] Part of the complexity analysis, moreover, rested on the need for "disinterested factfinding and evenhanded adjudication" by a jury in cases where the order was detailed, where the alleged contumacious acts took place over a long period of time, and where the fines were extensive.[312] However, one could argue that the need for disinterested factfinding and evenhanded adjudication is just as compelling in the context of the restraining order in *Webster*: there are likely to be hotly disputed factual issues as to whether the defendant violated the order and the judge may be naturally sympathetic to the

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avoid the sanctions by complying with the court order. In *United Mine Workers*, however, the contemnor was required to perform three defined acts involving issuance of public statements to the union membership within a limited period of time. *See United Mine Workers*, 330 U.S. at 305. In *Webster*, on the other hand, the contemnor was required to obey the various terms of a restraining order for an indefinite period into the future. *See Webster*, 673 N.E.2d at 511. Furthermore, although the U.S. Supreme Court in *Bagwell* alludes to the continued viability of *United Mine Workers*, it is not at all clear that the Court would have permitted the imposition of contempt sanctions in the form of substantial suspended fines without the use of criminal procedures.

309. *Bagwell*, 512 U.S. at 837.

310. *See Webster*, 673 N.E.2d at 512.

311. Justice Blackmun stated explicitly, "We therefore decline to conclude that the mere fact that the sanctions were announced in advance rendered them coercive and civil as a matter of constitutional law." *Bagwell*, 512 U.S. at 837.

312. *Id.* at 837–38.

plaintiff wife's privacy interests.[313] Nevertheless, the *Webster* decision made no reference to the Court's reasoning in *Bagwell.*

Other post-*Bagwell* courts have avoided classifying certain contempts as criminal by distinguishing *Bagwell* from the facts before them. Several courts have easily sidestepped *Bagwell* by finding the contempts at issue to be compensatory in nature,[314] daily coercive fines,[315] or coercive indeterminate imprisonment.[316] According to these courts, the U.S. Supreme Court in *Bagwell* left untouched compensatory civil contempts[317] and traditional coercive civil contempts consisting of per diem fines or indefinite incarceration.[318] Other courts have recognized that even traditional coercive fines once imposed tend to be punitive in nature, and that these fines if substantial might require criminal procedures for their imposition after *Bagwell.*[319]

In its 1998 decision in *New York State National Organization for Women v. Terry (Terry V),*[320] the Court of Appeals for the Second Circuit discussed at length whether the *Bagwell* holding required criminal procedures where the lower court had imposed daily fines on defendants who violated an order prohibiting them from interfering the operation of several abortion clinics.[321] The original court order had provided that

313. Of course, a 90 day jail sentence would not entitle the contemnor to a jury trial even if it were classified as a criminal contempt, as opposed to a civil contempt. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974) (holding that contemnor has no right to jury trial where sentence imposed is confinement for six months or less). It would entitle the contemnor, however, to the other protections of criminal proceedings, such as the higher burden of proof, the right to counsel, and the presumption of innocence. *See supra* notes 39–45 and accompanying text.

314. *See, e.g.*, Daniels v. Pipe Fitters Ass'n, 113 F.3d 685, 688 (7th Cir. 1997); Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (*In re* Terrebonne Fuel & Lube, Inc.), 108 F.3d 609, 613–14 (5th Cir. 1997).

315. *See* Bartel v. Eastern Airlines, No. 96-5105, 1998 U.S. App. LEXIS 71, at *5–6 (2d Cir. Jan. 6, 1998).

316. *See* Euromed, Inc. v. Gaylor, No. 3-97-CV-0322-H, 1999 U.S. Dist. LEXIS 218, at *3 (N.D. Tex. Jan. 6, 1999); Hipschman v. Cochran, 683 So. 2d 209, 212 (Fla. Dist. Ct. App. 1996).

317. The Court stated explicitly in *Bagwell*, "Our holding, however, leaves unaltered the longstanding authority of judges to adjudicate direct contempts summarily, and to enter broad compensatory awards for all contempts through civil proceedings." *Bagwell*, 512 U.S. at 838.

318. *See id.* at 828–30.

319. *See supra* note 299.

320. 159 F.3d 86, 92–95 (2d Cir. 1998) (*Terry V*).

321. The order permanently enjoined the defendants from:

[T]respassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester counties [and] physically abusing or tortiously harassing persons entering, leaving, working at, or using

contemnors would be subject to "civil damages of $25,000 per day for the first violation," with the fine doubling with each successive violation.[322]

Subsequently, the trial court found that several defendants had violated the court's orders and fined them in amounts ranging from $25,000 to $100,000.[323] Ultimately, after several procedural twists and turns, the defendants sought a writ of certiorari to the U.S. Supreme Court on the grounds that the contempt fines were criminal in nature and under *Bagwell* required the use of criminal procedures.[324] The Court granted certiorari and remanded the case for further consideration in light of *Bagwell*.[325] The Second Circuit Court of Appeals then in turn vacated the contempt fines and remanded the case to the district court, holding that the nonpurgable fines were criminal in nature and had been imposed without criminal procedural protections.[326] The district court reinstated the original fines, but gave the defendants the opportunity to purge the fines if they obeyed the injunction and published within sixty days an affirmation of intent to abide by its terms.[327]

In considering the defendants' appeal from the reinstated fines, the Second Circuit Court of Appeals held that the fines constituted coercive civil contempt and did not require criminal procedures for their imposition even after *Bagwell*.[328] The court emphasized that the district court by including a purge provision "clearly indicated its intent that the fines serve a coercive, rather than a punitive, purpose."[329] By obeying the injunction, the defendants could avoid the fines completely.[330] The court

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any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester counties.

New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1251 n.3 (S.D.N.Y. 1989), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989).

322. *See id.* at 1252.

323. *See* New York State Nat'l Org. for Women v. Terry, 732 F. Supp. 388, 413–14 (S.D.N.Y. 1990).

324. *See Terry V*, 159 F.3d at 91.

325. *See* Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan), 512 U.S. 1249, 1249 (1994).

326. *See* New York State Nat'l Org. for Women v. Terry, 41 F.3d 794, 796–97 (2d Cir. 1994).

327. *See* New York State Nat'l Org. for Women v. Terry, 952 F. Supp. 1033, 1046 (S.D.N.Y. 1997).

328. *See Terry V*, 159 F.3d at 95.

329. *Id.*

330. *See id.*

of appeals briefly noted that the amount of the fines was "large enough to warrant concern with the adjudication process," but that the "strong indications" of a coercive purpose were enough to outweigh any argument that the fines were punitive and thus required criminal procedures.[331]

In a case almost identical to *Terry V* on its facts, *National Organization of Women v. Operation Rescue*,[332] the District of Columbia Court of Appeals held that at least a portion of previously announced contempt sanctions was punitive and required a criminal proceeding for its imposition.[333] The district court had enjoined the defendants from blocking access to several abortion clinics.[334] Upon later finding that the defendants had disobeyed the injunction, the court set up a fine schedule for future violations, with the fines payable to the plaintiffs.[335] Defendants again violated the injunction, and the court imposed the fines as previously announced.[336]

The District of Columbia Court of Appeals ruled that under *Bagwell* these fines, to the extent that they were noncompensatory, were criminal contempt penalties imposed without affording the alleged contemnors a full criminal trial. Rather than focusing on the nonpurgability of the fines, the court suggested that their relatively large size[337] and the somewhat complex nature of the order mandated use of criminal procedures under *Bagwell*.[338] The *Operation Rescue* court also observed that the case in question did not fall into any of the exceptions mentioned in *Bagwell*—that is, contempt sanctions serving the court's need "to

331. *See id.*

332. 37 F.3d 646 (D.C. Cir. 1994).

333. The court conceded that some of the contempt fines could be compensatory and therefore civil in character, and the court remanded the case to the district court for clarification of whether any portion of the fines served to compensate the plaintiffs for damages incurred as a result of the defendants' violation of the injunction. *See id.* at 661.

334. *See id.* at 649.

335. *See id.* at 650.

336. *See id.*

337. Although not as large as the sanctions in *Bagwell*, "the fines here are large enough to invite our scrutiny under the principles enunciated in *Bagwell*." *Id.* at 660.

338. "[O]n a scale of complexity ranging from simple affirmative acts... to highly complex *Bagwell*-type prohibitory injunctions barring broad classes of illegal acts where criminal process is required, the out-of-court acts prohibited by the court's order here fall closer to the *Bagwell* end of the spectrum." *Id.* at 661.

adjudicate the proceedings [immediately] before it" or an order directing performance of "discrete, readily ascertainable acts."[339]

One interesting side note to *Operation Rescue* is that the court accepted without question the civil nature of a per diem fine levied against one of the defendants for failure to appear in court. Because the defendant had not appealed this fairly substantial fine,[340] the court did not discuss the issue at length, but it clearly believed that the fine was a coercive civil contempt not subject to heightened procedures.[341] One may speculate that the *Operation Rescue* court viewed the fine as civil either because it was avoidable by the defendant or because it sanctioned the defendant for conduct that threatened the court's ability to adjudicate the case.

Not surprisingly, other post-*Bagwell* federal and state cases divide along the lines reflected by *Webster*, *Terry V*, and *Operation Rescue*, either by ignoring, distinguishing, or following *Bagwell*. Perhaps the most salient feature of the cases distinguishing *Bagwell* is the purgability of the contempt sanctions. The *Bagwell* opinion's ultimate impact may be to give defendants two bites of the apple. For instance, in *Mower County Human Services v. Swancutt*,[342] the Supreme Court of Minnesota found a sixty-day jail sentence imposed upon a recalcitrant defendant who had failed to pay his court-ordered child support to be a coercive civil contempt.[343] Finding the defendant in contempt, the lower court had sentenced him to sixty days in jail but had suspended the sentence provided that he make up the arrearages and pay future support in a timely manner.[344] On appeal, the Minnesota high court held that "the trial court mistakenly ordered Swancutt to serve 60 days in . . . jail, rather than up to 60 days, which would entitle Swancutt to be released before 60 days upon compliance with the court ordered conditions."[345] The court

339. *Id.* at 660 (quoting International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 833 (1994)).

340. One defendant was fined $41,600 ($100 per day for 416 days) for disobeying the court's order to appear in court. *See id.* at 650.

341. "The Bagwell Court discussed but did not call into question the traditional classification of *some* categories of contempt sanctions—compensatory fines, coercive imprisonment, and *per diem fines* to coerce compliance with affirmative court orders—as civil in nature." *Id.* at 659 (second emphasis added).

342. 551 N.W.2d 219 (Minn. 1996).

343. *See id.* at 222.

344. *See id.* at 221–22.

345. *Id.* at 221 n.2.

went on to review the trial court's order "as corrected"[346] and to hold that the contempt was coercive civil, primarily because the defendant could avoid the jail sentence in whole or in part by complying at any time with the court order.[347]

According to *Terry V*, *Swancutt*, and other similar post-*Bagwell* cases, a lower court may use ordinary civil procedures to impose contempt sanctions so long as the defendant may avoid the sanctions at any time by obeying the court's decree. But what happens if the defendant continues to be disobedient? In *Swancutt*, for example, if the sixty-day jail sentence contained no purge clause, then it would have been classified as criminal contempt. The same is true for the fines in *Terry V*. If the *Swancutt* defendant had failed to obey the court order, he would have suffered immediate execution of the previously announced penalties. By adding a purge clause, the same sanctions become coercive civil contempt, even applying *Bagwell* strictly. In that instance, the court would inform the recalcitrant defendant that he had again violated the court order and would then impose the previously announced sanctions, again affording the defendant the opportunity to avoid them by now obeying the order.

Many courts seem to assume that most defendants will now come to their senses and avoid the sanction through compliance. But the evidence shows that in many cases, for whatever reason—stubbornness, passionate devotion to a cause, a somewhat marginal ability to comply with the order—defendants continue to disobey.[348] In that case the defendant would suffer the full force of the previously announced fines or jail sentence, all without the benefit of a criminal trial. In sum, disobey once and one cannot be sanctioned consistent with constitutional due process without criminal proceedings; disobey twice and one can.

Although the *Bagwell* Court undoubtedly desired to protect alleged contemnors from biased adjudication and arbitrary punishment, it left a large loophole for the lower courts to sanction disobedient defendants

346. *Id.*

347. *See id.* at 222.

348. Susan McDougal, one of the witnesses subpoenaed by Independent Prosecutor Kenneth Starr to appear before the Whitewater grand jury, refused to testify and served 18 months in prison for civil contempt. She asserted that she would never cooperate with Starr's investigation because he wanted her to implicate falsely President and Mrs. Clinton. *See Susan McDougal Released from Prison*, Star Trib. (Minneapolis–St. Paul), June 26, 1998, at 1A.

severely without affording them a criminal trial.[349] Justice Blackmun's focus on the severity of the sanctions, the complexity of the order, and the need for dispassionate and careful factfinding by a jury seemingly becomes irrelevant once the trial court adds a purge clause to the contempt order. The argument that purgable contempts are less deserving of criminal procedures because the defendant can avoid them through compliance is revealed as circular. All contempts, fixed or indeterminate, purgable or nonpurgable, can be avoided through compliance. As long as a defendant never disobeys the court order, she will not be subject to any contempt sanction.

Perhaps at bottom, the U.S. Supreme Court was willing to leave untouched traditional coercive civil contempts because of its belief in a basic trait of human nature: it is one thing to contemplate the imposition of a severe fine or term of imprisonment; it is quite another to actually experience the stinging effect of such sanctions. If a contempt sanction is nonpurgable, the defendant, if found guilty, will go to prison or suffer a fine. In that case, the alleged contemnor arguably should have the full panoply of criminal procedural protections. If the contempt sanction is purgable, defendants at any time after imposition can terminate their confinement or the accruing fines by complying with the jural command. As mentioned previously, many courts seem to think that the typical defendant will do whatever it takes to stay out of prison or to avoid substantial fines.[350]

The problem with this assumption, however, is that defendants may think that they are complying with a court order, but the court upon the plaintiff's motion for contempt sanctions may find that the defendant has

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349. A recent Supreme Court of South Carolina case sharply illuminates the difficulties of applying the *Bagwell* analysis. In *Poston v. Poston*, 502 S.E.2d 86, 88 (S.C. 1998), the respondent had been ordered not to visit or have contact with her children. The family court later found her in willful contempt and sentenced her to 120 days in prison. *See id.* She could "purge" herself of the contempt by future strict compliance with the court order. By implication, however, if she violated the order in the future, the prison sentence would be reinstated without any opportunity to purge at that point. On appeal the Supreme Court of South Carolina said that it simply could not determine under *Bagwell* and other authorities whether or not the contempt was civil or criminal: "[I]t is a hybrid because the sanction has characteristics of both civil and criminal contempt." *Id.* at 91. The court remanded the case to family court for a clarification of the contempt sanction. *See id.* at 92.

350. One scholar has asserted that the rational contemnor, subject to a coercive confinement, will comply with the court order immediately or not at all. She argues that the current legal standard mandating release of confined contemnors—that there is no "substantial likelihood" of compliance through continued confinement—rewards hardened criminals, encourages dishonesty, burdens judges, and is generally unworkable. Linda S. Beres, *Civil Contempt and the Rational Contemnor*, 69 Ind. L.J. 723, 756–58 (1994).

not complied and consequently issue a sanction in a proceeding without full criminal safeguards. In *Terry V*, for example, the lower court allowed the defendants to purge the contempt fines by obeying the injunction not to blockade abortion clinics and by publishing an affirmation of intent to obey the decree within sixty days.[351] Suppose that the plaintiffs subsequently allege that during the defendants' continued protests in front of the plaintiffs' abortion clinics the defendants blocked access to the clinics in violation of the injunction. The post-*Bagwell* cases imply that the trial court, if it found continued violations, could then impose the previously announced contempt fines after an ordinary civil proceeding with the lower civil burden of proof and no jury trial. The defendants in this hypothetical might have believed that they were complying with the order and that their actions did not constitute a blockade of the clinics. In other words, the defendants might have tried to purge the contempt through compliance and yet been unsuccessful in the court's opinion in so doing.[352]

In the end, the *Bagwell* Court's concern about due process in cases involving large monetary penalties or long-term incarceration may not have been fully satisfied by the complexity and purgability criteria set forth in that case as the touchstone for distinguishing criminal and civil contempts. The Court's most recent slice into the Gordian knot that constitutes this eternally vexing area of law has produced some frayed edges without really severing the knot. The next section of this Article attempts to tease out some strands that will at least loosen the knot.

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351. *See* New York State Nat'l Org. for Women v. Terry, 952 F. Supp. 1033, 1046 (S.D.N.Y. 1997).

352. It is perhaps easier to understand how the purge clause would operate to prevent sanctions where the defendants are ordered to perform some affirmative act. For example, in *Terry V*, the defendants were ordered to publish an affirmation of intent to abide by the court's decree within a 60 day period to avoid the coercive contempt fines. *See* New York State Nat'l Org. for Women v. Terry, 159 F.3d 86, 91 (2d Cir. 1998). If the defendants published something in an attempt to comply but the court found it insufficient, the court could presumably give the defendants a few more days to conform their published statement to the order's requirements. The court could indulge the defendants' good faith misunderstanding of the order's commands to allow them one final attempt to purge the contempt. At some point, however, even with affirmative orders, the court may find that the defendants have not complied and that coercive sanctions must be assessed. *See, e.g.*, United States v. Darwin Constr. Co., 680 F. Supp. 739 (D. Md. 1988) (imposing coercive fines at rate of $5000 per day for six days for defendant's failure to produce all records demanded in IRS summons even though defendant had produced most requested documents in timely fashion).

III. A REMEDIAL THEORY OF CONTEMPT

Much of the modern literature on the law of contempt—both U.S. Supreme Court cases and scholarly works—has focused on theories of procedural due process and the rule of law.[353] These theories emphasize the potential for arbitrary and biased adjudication at contempt hearings and the inadequacies of the procedures employed to impose contempt penalties. In the nineteenth century, alleged contemnors, even those punished for criminal contempt, had their compliance or noncompliance with a court order adjudged by the same judge who issued the order.[354] They had no right to a jury trial, no right to confront their accusers, and no privilege against self-incrimination. They had no advance knowledge of the extent of the penalty that might be imposed, and the penalties themselves, in most cases, had no statutory caps. Appeal rights were also strictly limited, and often factual issues were not reviewed at all on appeal.

Contempt was the one area in Anglo-American law in which the functions of the legislative, executive, and judicial branches were seemingly merged. A single judge created a legal rule, oversaw its enforcement, prosecuted any violations of it, adjudged the innocence or guilt of the accused violator, and imposed the sanction. This affront to traditional separation-of-powers notions was justified by necessity and history. The judicial system arguably could not survive as an effective institution unless it could punish disobedience of orders or disruption of its proceedings through the exercise of the contempt power. Furthermore, criminal contempt was never viewed as a crime in the ordinary sense, and thus it was not treated as requiring criminal proceedings.[355] Because chancery courts historically never used juries, the jury trial issue was never really considered.

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353. *See, e.g.*, Goldfarb, *supra* note 5; Richard C. Brautigam, *Constitutional Challenges to the Contempt Power*, 60 Geo. L.J. 1513 (1972); Dudley, Jr., *supra* note 5; Richard B. Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 Yale L.J. 39 (1978); Luis Kutner, *Contempt Power: The Black Robe—A Proposal for Due Process*, 39 Tenn. L. Rev. 1 (1971); Robert Allen Sedler, *The Summary Contempt Power and the Constitution: The View from Without and Within*, 51 N.Y.U. L. Rev. 34 (1976); Philip A. Hostak, Note, International Union, United Mine Workers v. Bagwell: *A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 Cornell L. Rev. 181 (1995).

354. *See, e.g.*, *In re* Wilson, 17 P. 698, 699 (Cal. 1888).

355. *See In re* Terry, 37 F. 649, 650 (N.D. Cal. 1889); Chipman v. Barron, 2 Ga. 220, 230 (1847).

Unquestionably, modern ideas[356] of due process require that accused contemnors be afforded greater procedural safeguards than they had at the beginning of the twentieth century. Advocates of more procedural protections for defendants accused of contempt have been rightly concerned about the absence of effective checks on a single judge's power and the inherent potential for arbitrariness and abuse.[357] But the U.S. Supreme Court's decision in *Bagwell* signals a new direction in the quest for protection of defendants' rights: it suggests that more and more civil contempts will be put into the criminal category and require criminal proceedings for their imposition.[358]

This inclusion of greater numbers of traditionally civil contempts on the criminal side of the procedural ledger, however, fails to consider the remedial underpinnings of coercive civil contempt.[359] The focus on accused contemnors' rights has neglected to some extent the legitimate needs of plaintiffs in whose favor a court order has been issued.[360] Plaintiffs who receive injunctions or other equitable decrees presumably have demonstrated that they have no adequate remedy at law.[361] In other

356. Justice Scalia, however, would quarrel with any suggestion that changing notions of justice should affect what is constitutionally required of due process: "It is not that the times, or our perceptions of fairness, have changed (that is in my view no basis for either tightening or relaxing the traditional demands of due process)...." International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 843–44 (1994) (Scalia, J., concurring).

357. *See* Dudley, *supra* note 5, at 1079; Kuhns, *supra* note 353, at 62–63; Patterson, *supra* note 5, at 41.

358. One scholar has advocated confronting directly the due process problems of coercive civil contempt. Rather than re-categorizing civil contempts as criminal, he argues for statutory caps on coercive civil contempt and a right of expedited appeal from a sentence of coercive confinement. *See* Doug Rendleman, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor*, 48 Wash. & Lee L. Rev. 185, 212–16 (1991).

359. Regarding the efficacy of equitable remedies, one commentator has remarked:

> It is no more than a commonplace to note that the value of a right, to a litigant, is no greater than the available remedy, and the remedy in equity is the injunction. This insight, however, should be worked to capacity, and we have not done so until we realize that the remedy, the injunction, is worth no more than its sanction, contempt.

Joseph Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 Colum. L. Rev. 780, 780 (1943).

360. One court aptly described the weighing of interests that should shape contempt procedures: "Contempt jurisprudence must attempt to balance the need of a court to enforce its orders with the doctrine that a court's power to obtain compliance should be tempered by safeguards that ensure fundamental fairness." Pompey v. Cochran, 685 So. 2d 1007, 1014 (Fla. Dist. Ct. App. 1997).

361. Traditionally, chancery courts would not provide relief unless the plaintiff showed that its remedy at law was inadequate or that it suffered irreparable injury—that is, an injury for which money damages would be an insufficient remedy. *See* Terrace v. Thompson, 263 U.S. 197, 214 (1923). Modern courts almost inevitably recite the inadequacy or irreparable-injury rule as a prerequisite to equitable relief. *See, e.g.*, Knaebel v. Heiner, 663 P.2d 551, 553 (Alaska 1983);

words, money damages will not make them whole. Assuming the court orders are legally valid, these plaintiffs are entitled to the relief they seek. Defendants who continually disobey valid court orders presumably cause irreparable harm to the affected plaintiffs. Plaintiffs may try to seek compensatory civil contempt as part of the main action before the court. Even after *Bagwell*, such contempts can be prosecuted using ordinary civil procedures.

To receive compensatory civil contempt, plaintiffs are faced with the prospect of quantifying the harm that they suffer as a result of the defendant's disobeying the order. They must prove actual damages by a preponderance of the evidence.[362] Because their injury is by definition difficult if not impossible to measure in money terms, some plaintiffs may not be able to recover any damages or they may recover less than full compensation.[363] Therefore, coercive civil contempt may be necessary for some plaintiffs to receive complete relief.

By requiring that coercive civil contempts in complex injunction cases be tried with criminal procedures, the courts potentially diminish the effectiveness of that enforcement mechanism. Defendants gain the protection of the presumption of innocence, the heightened burden of proof, and the availability of a jury trial.[364] In the federal courts, criminal contempt procedures require prosecution by the U.S. Attorney or a special independent prosecutor appointed by the court.[365] Such

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Brownfield v. Daniel Freeman Marina Hosp., 256 Cal. Rptr. 240, 243 (Cal. Ct. App. 1989); *In re* Marriage of Strauss, 539 N.E.2d 808, 812 (Ill. App. Ct. 1989); Borom v. City of St. Paul, 184 N.W.2d 595, 598 (Minn. 1971). Notwithstanding the courts' standard reference to the inadequacy or irreparable-injury rule, one noted commentator has argued persuasively that the rule does not operate as a significant barrier to equitable relief—courts denying equitable remedies do so for reasons other than the rule. *See* Douglas Laycock, *The Death of the Irreparable Injury Rule* 20–23 (1991).

362. *See* Graves v. Kemsco Group, Inc., 864 F.2d 754, 755 (Fed. Cir. 1988).

363. In *Ashcraft v. Conoco, Inc.*, No. 7:95-CV-187-BR(3), 1998 U.S. Dist. LEXIS 4092, at *10–13 (E.D.N.C. Jan. 21, 1998), the defendant journalists violated the confidentiality of a settlement agreement between Conoco and plaintiffs in a toxic tort case—an agreement sealed by order of the court. Although Conoco estimated that the publication of the terms of the settlement agreement would cost it millions of dollars in additional litigation expenses and higher settlement and verdict amounts in the other toxic tort cases it was defending, the court ultimately assessed the journalists only $500,000 as compensatory civil contempt damages. *See id.* at *31–32.

364. *See* Bloom v. Illinois, 391 U.S. 194, 202 (1968); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911).

365. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787 (1987). But the Court in *Young* held that the court could not appoint the plaintiff's attorney as a special prosecutor. *See id.* at 814; *cf.* Wilson v. Wilson, 984 S.W.2d 898, 903–04 (Tenn. 1998) (holding that plaintiff's attorney may be appointed to prosecute criminal contempt).

procedures necessarily entail delay,[366] expense, and an increased likelihood that the defendant will be found not to have violated the injunction.

It is useful to compare the position of plaintiffs seeking damages for a tort or breach of contract with plaintiffs desiring equitable relief. Plaintiffs in a typical tort or contract action must prove their substantive claim and their monetary loss by a preponderance of the evidence. Theoretically, restrictions on the recoverability of damages exist, such as the certainty requirement,[367] the foreseeability doctrine,[368] and the avoidable consequences rule.[369] In practice, modern courts have tended to find ways around these restrictions that have benefited plaintiffs.[370]

Once plaintiffs receive a judgment for money damages, enforcement of the judgment is done extrajudicially. Plaintiffs can employ a variety of techniques to ensure that the judgment is paid in the event that the defendant does not pay it voluntarily. Garnishment of wages and bank accounts, levy on real and personal assets, and creation of liens on real estate are among the typical enforcement mechanisms.[371] Assuming the

366. Over 150 years ago, the U.S. Supreme Court noted that criminal prosecution of contemnors "is oftentimes found too tardy for the exigency of the case." Spalding v. New York *ex rel.* Backus, 45 U.S. (4 How.) 21, 24 (1846).

367. Plaintiffs must prove their damages to a reasonable certainty. *See* Ware v. United States, 971 F. Supp. 1442, 1471 (M.D. Fla. 1997); Kuffel v. Seaside Oil Co., 90 Cal. Rptr. 209, 216 (Cal. Ct. App. 1970).

368. To be recoverable, consequential damages must have been reasonably foreseeable at the time the contract was entered into. *See* Mohler v. Jeke, 595 A.2d 1247, 1250 (Pa. Super. Ct. 1991); Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 816 (Tex. 1997).

369. Plaintiffs must take reasonable steps to mitigate their damages post-injury; damages that could have been avoided through reasonable mitigation are not recoverable. *See* Bank One, Tex., N.A. v. Taylor, 970 F.2d 16, 29 (5th Cir. 1992); Cobo v. Raba, 481 S.E.2d 101, 107 (N.C. Ct. App. 1997).

370. *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931) (holding that if defendant's wrongdoing prevents exact calculation of damages, plaintiff may still recover damages reasonably inferred); Parker v. Twentieth Century Fox Film Corp., 474 P.2d 689, 693 (Cal. 1970) (holding that plaintiff did not need to mitigate her damages by accepting different film role); Strate v. Cambridge Tel. Co., 795 P.2d 319, 322 (Idaho Ct. App. 1990) ("Consequential damages need not be precisely and specifically foreseen . . . ."); Fera v. Village Plaza, Inc., 242 N.W.2d 372, 374 (Mich. 1976) (holding new-business rule does not bar recovery of anticipated lost profits by recently created business); Williams v. Bright, 658 N.Y.S.2d 910, 915 (N.Y. App. Div. 1997) (holding that jury should be instructed to consider plaintiff's religious beliefs in determining whether she properly mitigated her damages).

371. *See* Pierre R. Loiseaux, *Cases on Creditors' Remedies* 7–84 (1966).

defendant has some non-exempt assets,[372] successful plaintiffs will receive at least part, if not all, of their judgment.[373]

One might question why a plaintiff receiving an injunction should be in any weaker position than one obtaining a judgment at law. Coercive civil contempt is in large part equity's equivalent to the post-judgment enforcement mechanisms available at law. If a judgment creditor at law is entitled to effective enforcement of its judgment, why should a successful plaintiff in equity not have the same ability to obtain relatively swift and certain enforcement of the court order in its favor?

Part of our discomfort with contempt sanctions and the procedures employed in imposing them may stem from the fact that equity does not use juries. There is no constitutional right to a jury trial in equitable proceedings.[374] Thus the injunction antecedent to any contempt proceeding will have been issued by a judge who alone has found the relevant facts and applied the law. In a tort or contract suit at law, either litigant has the right to demand a jury trial. Despite the periodic criticism of the use of juries in civil proceedings, most courts, commentators, and citizens apparently consider juries an essential part of the judicial process.[375] Perhaps reflecting the popular mood, the U.S. Supreme Court over the course of time has increased the availability of jury trials in civil actions in its decisions interpreting the Seventh Amendment.[376]

A further comparison of legal and equitable remedies may illuminate more sharply the inconsistency in affording criminal procedures for all

372. This is an unwarranted assumption in many cases. Judgment debtors, depending on the applicable state law, can protect from levy everything from tools of their trade to a six-month supply of food and fuel to their homestead to an unlimited number of household pets. Under the Consumer Credit Protection Act, furthermore, no more than 25% of a worker's take-home pay may be garnished. *See* 15 U.S.C. §§ 1671–1677 (1994).

373. Of course, this description of enforcement tools ignores the considerable difficulties that some judgment creditors experience in trying to find and collect assets from their judgment debtors. Judgment debtors routinely hide assets, flee the jurisdiction, or put their wealth into intangibles, like stock certificates and Treasury bills, that are hard to locate and collect. *See, e.g.*, Knapp v. McFarland, 462 F.2d 935, 940 (2d Cir. 1972) (noting sheriff failed in attempt to levy on judgment debtor's treasury bills because of custodian bank's refusal to cooperate).

374. *See* Lewis & Clark Marine, Inc. v. Lewis, 196 F.3d 900, 910 (8th Cir. 1999); Dardovitch v. Haltzman, 190 F.3d 125, 134 (3d Cir. 1999); Calabi v. Government Employees Ins. Co., 728 A.2d 206, 209 (Md. Ct. App. 1999).

375. *See infra* notes 412–415.

376. *See, e.g.*, Chauffeurs Local No. 391, Int'l Bhd. of Teamsters v. Terry, 494 U.S. 558 (1990); Lytle v. Household Mfg., 494 U.S. 545 (1990); Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc., v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc., v. Westover, 359 U.S. 500 (1959).

coercive civil contempts. Consider a situation similar to that in the abortion-protest cases: a large-scale gathering of anti-abortion protestors outside an abortion clinic. Protestors picket in front of the clinic's facilities. At some point the picketing becomes violent—the tires on clinic workers' vehicles are slashed by "jackrocks" placed in access roads by picketers; picketers cross onto clinic property without permission and damage it; clinic employees and patients are physically threatened and assaulted.

If the clinic and its workers and patients wish to pursue their legal remedies, they have two options: have the protestors arrested and prosecuted for their criminal acts and sue for damages for trespass, willful destruction of property, assault, battery, and other torts. In any criminal prosecution, of course, the accused protestors would have all of the normal criminal procedural protections. Their alleged crimes and the corresponding penalties would be defined by statute. And they would certainly have the right to a jury trial for all serious crimes.

In any tort suit for damages, the defendants would be entitled only to a civil proceeding. Many of the procedural safeguards for defendants overlap between civil and criminal proceedings: the right to notice and the opportunity to be heard; the right to subpoena witnesses; the right to be represented by counsel; the right to a jury trial in actions at law.[377] But many of the criminal protections are absent in the ordinary civil trial: the privilege against self-incrimination; an indigent's right to appointed counsel; the presumption of innocence; and the requirement that the state prove guilt beyond a reasonable doubt.[378]

Despite the lower level of procedural protection in civil trials, the defendants in this hypothetical situation could be liable for substantial compensatory and punitive damages. They might face a judgment for thousands, if not millions, of dollars, representing the value of the plaintiffs' destroyed personal property, the fair rental value of their real property, lost business profits, their medical bills, lost wages, and pain and suffering. If the defendants' conduct fits the applicable state standard for punitive damages, the award could increase considerably.

The plaintiffs, on the other hand, might chose to seek an injunction restraining the anti-abortion group and its members' activities. As a threshold matter, the plaintiffs would have to show that their remedy at

377. *See* United States v. Anderson, 553 F.2d 1154, 1155 (8th Cir. 1977); *In re* Bianchi, 542 F.2d 98, 101 (1st Cir. 1976).

378. *See* United States v. City of Miami, 195 F.3d 1292, 1298 (11th Cir. 1999).

law was inadequate. They could clear this remedial barrier in at least two ways. First, they could argue that criminal law remedies are not sufficient in this situation. Although picketers theoretically could be arrested for trespass, assault and battery, destruction of property, and so forth, the law enforcement agencies may not have sufficient resources to police the strikers' ongoing and widespread activities. The penalties for some of these infractions, moreover, may be relatively light and operate as an insufficient deterrent to future transgressions. And finally, assuming the arrested protestors are released pending trial, they are free to resume their former activities; their ultimate punishment may be many months away.

Second, the plaintiffs will argue that monetary damages are also not a satisfactory remedy. Individual protestors who committed trespasses or put "jackrocks" in the roadway may be difficult to identify. Even if they are identified, they may have insufficient assets to make a tort suit worthwhile. Assuming the anti-abortion organization itself will be found liable for some of the wrongful activities, the plaintiffs may still have problems proving all of the intangible damages suffered by the continual interference with their business and their employees. The plaintiffs may end up undercompensated for the interruption of their business, lost profits, and their employees' mental and physical pain and suffering. Lastly, the plaintiffs will assert that money damages will not necessarily prevent a recurrence of the wrong, that they should not continually have to return to court as additional damages accrue, and that they should not be forced to suffer an ongoing invasion of their personal and property rights.

Suppose the court issues an injunction forbidding the defendant group and its members from trespassing on clinic property, placing "jackrocks" in the access roads around the clinic property, blocking ingress and egress to the clinic's facilities, and assaulting clinic employees and patients. The order also requires the defendant organization to issue a statement that all picketing shall be done in a peaceful manner and that no picketer may interfere with clinic employees or patients entering or leaving the facilities. The organization is also ordered to place supervisors at all picketing sites and to report any violations of the order to the court.

A few days pass, and the plaintiffs assert that the defendants are violating all of the injunction's provisions. One course open to the court is to refer the matter to the public prosecutor for prosecution or to appoint its own special prosecutor, with a view towards imposition of criminal contempt sanctions. In many respects, a prosecution for criminal contempt is analogous to the prosecution of the defendants for the

statutory offenses described earlier. Like punishment for a felony or misdemeanor, criminal contempt may not be imposed without a criminal hearing, and in many states, the sanctions for criminal contempt are statutorily defined. In other words, the ultimate punishment of the defendants for violation of the injunction is procedurally and remedially similar to their punishment for commission of a crime.[379]

Plaintiffs may also seek compensatory civil contempt based on the defendants' violation of the injunction. This approach brings them full circle back to a legal-type damages remedy. The losses sustained because of the defendants' disobedience of the injunction will be similar to those alleged in the tort action described earlier.[380] In addition, both a tort suit and a civil contempt hearing will follow the same civil procedures, with one major exception. Because the civil contempt hearing is part of an equitable proceeding, neither litigant has the right to a jury trial.[381] Additionally, punitive damages are not allowed in civil contempt proceedings unlike a typical tort suit.[382]

If criminal contempt finds rough analogues to statutory crimes and compensatory civil contempt to compensatory damages at law, then coercive civil contempt seems to exist in some kind of jurisprudential no-

379. One significant difference between criminal contempt and statutory criminal punishment is the magnitude of the penalty. Some states severely limit the sanctions for criminal contempt. *See, e.g.*, Ark. Code Ann. § 16-10-108 (Michie 1987) (providing no fine in excess of $50 or imprisonment for more than 10 days); Cal. Civ. Proc. Code § 1218(a) (West 1982) (providing no fine in excess of $1000 or imprisonment for more than five days); 42 Pa. Cons. Stat. Ann. § 4137(c) (West 1995) (providing no fine in excess of $100 or imprisonment for more than 30 days). Other jurisdictions such as Massachusetts, Nebraska, and the federal courts either have no limits on criminal contempt penalties or the statutory limits exceed the corresponding criminal penalties for similar activity.

380. The underlying basis for the damages may be different, however. Compensatory damages in the legal action are premised on an injury caused by defendants' tortious conduct. Compensatory civil contempt flows from defendants' violation of a term in the injunction, a term that may or may not relate to tortious activity. For example, the hypothetical injunction required the anti-abortion group to place supervisors at all picket sites. Failure to do so would probably not constitute a common law tort, though it would violate the injunction.

381. *See* Shillitani v. United States, 384 U.S. 364, 370–71 (1966). One advantage for the defendant in equity is that historically equity will not award punitive damages. In a case involving repeated unlawful conduct by the defendants, some of whom have substantial resources, punitive damages could dwarf the compensatory component of the award. *See* TXO Production Corp. v. Alliance Resources, 509 U.S. 443, 451 (1993) (noting jury awarded $19,000 compensatory damages and $10 million punitive damages).

382. *See* Elkin v. Fauver, 969 F.2d 48, 52 (3d Cir. 1992); NLRB v. Laborers' Int'l Union, 882 F.2d 949, 955 (5th Cir. 1989); Costa v. Welch (*In re* Costa), 172 B.R. 954, 964 (Bankr. E.D. Cal. 1994). One scholar has argued convincingly for the imposition of punitive damages along with awards of compensatory contempt in some cases. *See* Rendleman, *supra* note 29, at 992.

man's land. Theoretically, it does not exist to punish the defendant for disobeying the court order or to compensate the injured plaintiff for its losses. Its purpose is to induce compliance with the court's decree. For some plaintiffs, coercion may be the only effective means of obtaining full relief. Because of the severe statutory caps on criminal contempt in many jurisdictions and the constitutionally mandated procedures, criminal contempt arguably provides little incentive for many defendants to comply with the injunction. A thirty-dollar fine, even imposed multiple times for repeated contempts, does not rend the corporate pocket book to any meaningful extent. Prosecution for criminal contempt also may come long after the principal litigation has ended.

Similarly, compensatory civil contempt does little for plaintiffs where damages are difficult to quantify,[383] or where the defendants have few assets. If the defendant refuses to obey a court order to disclose the whereabouts of her child so that the child's father can exercise his court-approved visitation rights, compensatory damages do not afford a satisfactory remedy to a father.[384] The father needs and deserves compliance with the court order.

At the same time, courts and scholars have been justly concerned with the potential open-endedness of coercive civil contempt and its lack of heightened procedural protections.[385] Because of the statutory caps on criminal contempt, coercive imprisonment or fines can greatly exceed any penalty that a defendant might suffer by way of criminal contempt.

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383. "In civil contempt proceedings, the plaintiff is not entitled to compensation for damages that it did not actually experience." Time Warner Cable v. U.S. Cable T.V., Inc., 920 F. Supp. 321, 329 (E.D.N.Y. 1996).

384. In wrongful death actions, of course, our system provides a monetary remedy for the death of a child. *See* Howard v. Seidler, 689 N.E.2d 572, 578 (Ohio Ct. App. 1996). But that remedy is acknowledged to be only a necessary approximation of the actual loss suffered by the parents.

385. One court observed the procedural deficiencies and the potentially severe impact of civil contempt on defendants in family law cases:

> The consequences of a civil contempt in the area of child support enforcement are potentially greater than those of a criminal contempt. Yet there are few procedural safeguards. Many individuals are unrepresented and may be unaware of their rights—such as the right to periodic review of the contempt order and the right to request a hearing to demonstrate that they no longer possess the ability to pay. The consequences are even more dire for an indigent individual caught in a "Catch-22" situation: he cannot afford to hire an attorney, yet he has no right to an attorney because the court indulges in the assumption that no incarceration can take place unless the contemnor possesses the present ability to pay.

Pompey v. Cochran, 685 So. 2d 1007, 1014 (Fla. Dist. Ct. App. 1997).

A defendant could potentially be assessed thousands of dollars or spend years in jail for refusing to comply with an injunction.

While focusing on the potential for biased enforcement, the procedural critics have neglected, however, to consider the plaintiff's interests. Plaintiffs seeking an equitable order presumably have no adequate remedy at law. Their need for an injunction is palpable and possibly urgent. Procedural constraints on coercive civil contempt potentially will reduce the instances in which plaintiffs obtain the relief to which they are entitled.

Part of the inherent problem with equitable decrees is the personal command to defendants. Defendants are personally ordered to convey property, give over documents, provide testimony, and so forth. Unlike enforcement of money judgments, injunctions supposedly require some affirmative cooperation on the part of the defendants. If defendants do not cooperate, the court imposes sanctions by way of contempt. A better enforcement system might employ mechanisms that do not require defendants' cooperation—in other words, making enforcement of equitable decrees more like that for legal judgments.

Currently, courts have a variety of techniques at their disposal to accomplish the desired remedial result.[386] If litigants refuse to produce documents pursuant to a discovery order, the opposing party's version of the information contained in those documents can be assumed to be true.[387] If defendants refuse to pay child support in a timely fashion, courts may order garnishment of a percentage of their wages.[388] If a public institution such as a prison or a mental hospital refuses to institute reforms, the court may appoint a receiver to run it for the period necessary to implement the court-ordered changes.[389]

386. Even in cases of disruptive parties in the courtroom, the U.S. Supreme Court has suggested that the trial court has options open to it besides criminal contempt. In lieu of (or in addition to) citing obstreperous defendants for criminal contempt, the judge could bind and gag them or remove them from the courtroom until they promise to conduct themselves properly. *See* Illinois v. Allen, 397 U.S. 337, 344 (1970).

387. *See, e.g.*, Bonaventure v. Butler, 593 F.2d 625, 626 (5th Cir. 1979) (holding court may enter default judgment against party who deliberately refuses to comply with discovery order).

388. *See, e.g.*, Patton v. State Dep't of Health & Rehabilitative Servs., 597 So. 2d 302, 302 (Fla. Dist. Ct. App. 1991) (noting that trial court issued income deduction order for child support that resulted in garnishment of father's wages).

389. *See, e.g.*, Graddick v. Newman, 453 U.S. 928, 931 (1981) (noting trial court's appointment of governor as receiver for state prison system).

The advantage of these devices is that they do not require the defendants' appreciable cooperation. As such, the court does not end up policing the defendants' compliance or noncompliance with the injunction. The court does not have to worry about whether contempt procedures should be civil or criminal, and the plaintiffs obtain the relief to which they are lawfully entitled.[390]

The central procedural critique that may hamper plaintiffs in their attempt to obtain a satisfactory remedy has been the plea for the alleged contemnor's jury trial rights. Critics of contempt procedures have always argued for the defendant's right to a jury trial at the contempt hearing.[391] Certainly, they argue, the judge who issued the original court order cannot be dispassionate in adjudicating an alleged violation of it. But the argument seems to go further—that even a different judge at a separate proceeding cannot be completely objective, that the judge will automatically, perhaps unconsciously, be offended by the alleged affront to the court's authority. Therefore, the defendant deserves the right to have a jury decide the factual issues because of this systemic bias.

There are several difficulties with this argument. Although a judge may be naturally affronted by a defendant's disobedience of a court order,[392] it does not necessarily follow that the judge will be eager to find evidence of that disobedience. In *Bagwell*, what incentive did the trial judge have to find that the defendants were still blocking access to the mines and putting tire-puncturing devices in the roadways?[393] It is certainly less burdensome to the court to find that the defendants are largely or completely complying with the decree and to minimize the plaintiffs' complaints about non-compliance than to face repeated demands by plaintiffs for contempt sanctions.

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390. Presumably the ultimate relief more closely tracks the court order when it is supplied by a neutral party (such as an employer garnishing wages) or a sympathetic party (such as a receiver appointed to oversee a prison) than when it is furnished by a reluctant party (such as the defendant).

391. *See* United States v. Barnett, 367 U.S. 681, 739 (1964) (Goldberg, J., dissenting); Green v. United States, 356 U.S. 165, 194–95 (1958) (Black, J., dissenting); Dudley, *supra* note 5, at 1085–87.

392. The U.S. Supreme Court has noted:

> Contemptuous conduct . . . often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court.

Bloom v. Illinois, 391 U.S. 194, 202 (1968).

393. In fact, the danger of bias is seemingly much greater in cases of disrespectful or disruptive courtroom behavior where summary procedures are permitted out of necessity than it is where the defendant allegedly violates an injunction out of the court's presence.

Furthermore, at some contempt hearings there will be few factual issues for the jury to decide. In cases involving the passionate protest of social injustice, such as strikes, civil rights marches, and abortion clinic rallies, the defendants often will admit to having violated the court order as a way to move their cause forward.[394] In many of these instances, the defendants are not so much disputing whether or not they violated the order but whether the order itself is worthy of obedience.[395] The collateral bar rule in most jurisdictions prohibits litigation of the validity of the underlying decree at the contempt hearing.[396]

Finally, creating a jury trial right for civil contempts does nothing to alleviate the critics' main concern—that the penalty imposed may be inappropriate or too severe. Even in the criminal contempt context, where the jury trial right is available for serious penalties, the judge alone still fixes the punishment.[397] To coerce compliance, the court could imprison the defendant indefinitely or impose a substantial daily fine. Under current law, the coercive penalty would be reviewable only on appeal at the end of the principal litigation.[398]

In considering possible solutions to the threat of judicial abuse of the contempt power, this Article suggests that increased procedural protections at the contempt stage of the proceedings are not necessarily the answer, especially where coercive civil contempt is involved. Instead this Article proposes five reforms to address the potential for arbitrariness in imposition of contempt sanctions while at the same time protecting plaintiffs' remedial rights.[399] First, the current procedural

394. In *United States v. United Mine Workers*, 330 U.S. 258, 303 (1947), the defendant union president "stated openly in court that defendants would adhere to their policy of defiance." Similarly, in *Bagwell* itself, the Supreme Court of Virginia observed: "Notwithstanding the large fines, the Union never represented to the court that it regretted or intended to cease its lawless actions. To the contrary, its utter defiance of the rule of law continued unabated." Bagwell v. International Union, United Mine Workers, 423 S.E.2d 349, 359 (Va. 1992), *rev'd*, 512 U.S. 821 (1994).

395. In *United States v. City of Yonkers*, 856 F.2d 444, 450–51 (2d Cir. 1988), the city council defiantly refused to comply with a court order to enact an ordinance requiring the construction of public housing in white neighborhoods.

396. *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307, 320–21 (1967); Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan, 559 N.W.2d 740, 748 (Neb. 1997); State v. Bailey, 882 P.2d 57, 59 (N.M. Ct. App. 1994); State v. Coe, 101 Wash. 2d 364, 369, 679 P.2d 353, 357 (1984); *cf. In re* Berry, 436 P.2d 273, 281 (Cal. 1968) (rejecting collateral bar rule).

397. *See, e.g.*, Codispoti v. Pennsylvania, 418 U.S. 506, 537 (1974) (Rehnquist, J., dissenting).

398. *See* Fox v. Capital Co., 299 U.S. 105, 107 (1936); Bingman v. Ward, 100 F.3d 653, 655 (9th Cir. 1996).

399. Conceivably, reforms to the exercise of the contempt power could be implemented either judicially or legislatively. Florida represents a recent example of judicial reform of civil contempt in

protections accorded criminal contemnors should remain in place, but additionally, state legislatures and Congress should enact limits on the punishment that may be imposed for criminal contempt. Second, a provision for jury trials in equitable proceedings with certain exceptions should be legislatively created. Third, in enforcing equitable decrees, courts should be required to explore methods other than contempt to produce the desired outcome. Fourth, coercive civil contempt should be expansively defined to include any pre-announced fine or term of imprisonment that the defendant may avoid by complying with the court order in the future. Fifth, a coercive civil contempt should be appealable upon its imposition even if the underlying action is still not final.

A. Statutory Limits on Criminal Contempt Sanctions

Much of the impetus behind the U.S. Supreme Court's growing concern in the 1950s and 1960s about the procedural deficiencies attendant to criminal contempt hearings can be traced to the increased penalties for criminal contempt. Both federal and state courts began to impose multi-year prison sentences on convicted contemnors.[400] These severe sentences were a far cry from the relatively trivial punishments given criminal contemnors in the early days of the Republic, during

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family law cases. *See* Amendments to the Florida Family Law Rules of Procedure, 723 So. 2d 208, 212–15 (Fla. 1998). Legislative restrictions on contempt, however, may run afoul of state constitutional provisions regarding separation of powers. Some state courts have held that legislative curtailment of the judicial exercise of the contempt impermissibly infringes on the courts' inherent judicial power under the state constitution. *See, e.g.*, Walker v. Bentley, 660 So. 2d 313, 316–17 (Fla. Dist. Ct. App. 1995) (holding that state statute barring use of criminal contempt in domestic violence cases unconstitutional); People v. Warren, 671 N.E.2d 700, 711–12 (Ill. 1996) (holding that state statute prohibiting use of civil contempt in certain child visitation cases unconstitutional); Hardin v. Summitt, 627 S.W.2d 580, 582 (Ky. 1982) (declaring unconstitutional statute limiting punishment for contempt). Other state courts, however, have held that although the legislature may not deprive the courts of their inherent authority to issue contempt sanctions, it may regulate the exercise of that authority within reasonable limits. *See, e.g.*, Walker v. Bentley, 678 So. 2d 1265, 1267 (Fla. 1996); State v. Jenkins, 950 P.2d 1338, 1343 (Kan. 1997); State *ex rel.* Holland v. Miesen, 108 N.W. 513, 513 (Minn. 1906).

At the federal level, the U.S. Supreme Court has held that Congress may place restrictions on the exercise of the contempt power. *See* Bessette v. W.B. Conkey Co., 194 U.S. 324, 326–27 (1904). However, the power may "neither be abrogated nor rendered practically inoperative." Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry. Co., 266 U.S. 42, 66 (1924). Arguably, none of the proposed reforms in this Article would nullify or effectively curtail the courts' ability to punish, coerce, or compensate through the exercise of the contempt power.

400. *See, e.g.*, United States v. Green, 140 F. Supp. 117 (S.D.N.Y. 1956) (three-year prison term); People v. Bloom, 220 N.E.2d 475 (Ill. 1966) (two-year prison term).

which a contemptuous individual might be placed in the stocks for up to two hours or fined no more than five dollars.[401]

One of the primary criticisms of contempt, therefore, has been that the punishments have been excessive. Availability of procedural safeguards at the trial level, such as a jury trial, will not necessarily cure that problem.[402] Such safeguards ensure that the conviction of contempt is grounded in fully adequate procedural due process, not that the punishment imposed will be appropriate. While appellate review is available to curb truly egregious punishments, the deferential standard of that review may not produce many reversals.[403]

Much of our unease with the judicial imposition of contempt sanctions might be removed if the state and federal legislatures set forth specific caps on criminal contempt penalties. If criminal contempt is truly a crime in the ordinary sense of the word, then the legislature should mark the parameters of permissible punishment for contempt as it does for all other crimes. Although federal law does not cap criminal contempt,[404] most states currently have in place legislative limits on criminal contempt fines and prison terms.[405] Some of those statutes restrict

401. *See, e.g.*, An Act Concerning Delinquents, 1 Conn. Pub. Stat. Laws 231–32 (1808).

402. *See, e.g.*, Codispoti v. Pennsylvania, 418 U.S. 506, 537 (1974) (Rehnquist, J., dissenting) ("The guarantee of jury trial . . . in no way limits the sentence which may be imposed by the trial judge in those cases where a guilty verdict is returned by the jury.").

403. *See, e.g.*, Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 515 (9th Cir. 1992) (holding that contempt sanctions are reviewed to determine whether district court abused its discretion); Halaco Eng'g Co. v. Costle, 843 F.2d 376, 379 (9th Cir. 1988) (holding that amount and appropriateness of civil contempt should not be reversed "absent a definite and firm conviction that the district court made a clear error of judgment"); Crawford v. Gay, 703 So. 2d 368, 371 (Ala. Civ. App. 1996) (holding that civil contempt is reviewed to see whether trial court abused discretion); Erickson v. Erickson, 385 N.W.2d 301, 304 (Minn. 1986) (same); Endersbe v. Endersbe, 555 N.W.2d 580, 581 (N.D. 1996) (same); *see also* Etoch v. State, 964 S.W.2d 798, 800 (Ark. 1998) (holding that criminal contempt is reviewed to determine whether it was supported by substantial evidence and reasonable inferences); Eldridge v. Eldridge, 710 A.2d 757, 760 (Conn. 1998) (holding that grounds for appeal from civil contempt are more restricted than for ordinary civil judgment); Sharpe v. Nobles, 493 S.E.2d 288, 291 (N.C. Ct. App. 1997) (holding that civil contempt is reviewed to determine whether there is competent evidence to support findings of fact and whether those findings support conclusions of law). However, an appellate court will often review any legal issues relative to contempt *de novo*. *See, e.g.*, *In re* Welfare of K.E.H., 542 N.W.2d 658, 660 (Minn. Ct. App. 1996).

404. Federal law does limit the civil coercive confinement for recalcitrant witnesses to the life of the relevant court proceeding, the term of the grand jury, or a total period of 18 months. *See* 28 U.S.C. § 1826(2) (1994).

405. *See, e.g.*, Alaska Stat. § 09.50.010 (Michie 1998) (maximum of $300 fine or six months' imprisonment); Cal. Civ. Proc. Code § 1218(a) (West 1982) (maximum of $1000 fine and five days' imprisonment); Conn. Gen. Stat. § 51-33a(a) (1988) (maximum of $500 fine and six months' imprisonment); Haw. Rev. Stat. Ann. § 710-1077(7) (Michie 1999) (maximum of $5000 fine and six

contempt sanctions to relatively nominal fines and minimal terms of imprisonment.[406]

The legislatures, in restricting the possible sanctions for criminal contempt, could create different categories of contempt based on the perceived wrongfulness of the defendant's conduct.[407] An individual who disrupted a court proceeding could be subject to relatively light penalties whereas those who hinder the litigation process by refusing to answer a subpoena, for example, might be subject to more severe sanctions. The most severe sanctions might be reserved for disobedience of court orders, especially those with a strong public interest, or for misbehavior of a court officer.

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months' imprisonment); Iowa Code Ann. § 665.4 (West 1998) (maximum fine of $500 and six months' imprisonment); Minn. Stat. Ann. § 588.10 (West 1997) (maximum fine of $250 and six months' imprisonment); Okla. Stat. Ann. tit. 21, § 566 (West 1994) (maximum fine of $500 and six months' imprisonment); Or. Rev. Stat. Ann. § 33.105(2) (LEXIS Supp. 1998) (maximum fine of $500 or one percent of defendant's annual gross income, whichever is greater, and six months' imprisonment); Tex. Gov't Code Ann. § 21.002(b) (West 1988) (maximum fine of $500 and six months' imprisonment); Wash. Rev. Code § 7.21.040(5) (1998) (maximum fine of $5000 and one year's imprisonment); Wis. Stat. Ann. § 785.04(2) (West 1981) (maximum fine of $5000 and one year's imprisonment).

In some states there are limits on criminal contempt sanctions only where a jury trial is not available. For example, under Illinois court rules the court may sentence the contemnor to a maximum of six months in prison, a fine not to exceed $500, or both, if the contemnor has not been afforded a jury trial. If a jury trial has been made available, then the court "may impose a reasonable fine or sentence of incarceration." Illinois Sixth Judicial Cir. Ct. R. 8.1(c)(8) (West 1995); *see also* Code Me. R. § 66(c)(2)(D) (1994) (providing that if prison term of more than 30 days or "serious punitive fine" is imposed, then jury trial must be afforded the contemnor); Va. Code Ann. § 18.2-457 (Michie 1997) (providing that without jury trial, maximum contempt penalty is $50 fine or ten days' imprisonment).

406. *See, e.g.*, Ala. Code § 12-11-30(5) (1995) (maximum of $100 fine or five days' imprisonment); Ark. Code Ann. § 16-10-108(b)(1) (Michie 1996) (maximum of $50 fine and 10 days' imprisonment); Ga. Code Ann. § 15-7-4(5) (1994) (maximum of $500 fine and 20 days' imprisonment); Miss. Code Ann. § 9-1-17 (1991) (maximum of $100 fine and 30 days' imprisonment); Tenn. Code Ann. § 29-9-103 (1997) (maximum of $50 fine and 10 days' imprisonment); Wyo. Stat. Ann. § 1-21-902 (Michie 1996) (maximum of $20 fine and two days' imprisonment).

Of course, a defendant found guilty of multiple instances of contempt could be sentenced separately for each offense, resulting in an aggregate sentence considerably longer than the statutory maximum. *See, e.g.*, State *ex rel.* Richardson v. Richardson, No. 01-A-01-9706-CV-00274, 1998 Tenn. App. LEXIS 638, at *18 n.5 (Tenn. Ct. App. Sept. 23, 1998) (sentencing contemnor to nine counts of contempt for aggregate jail sentence of 90 days); *Ex parte* Whitehead, 908 S.W.2d 68, 69 (Tex. Ct. App. 1995) (sentencing contemnor on 26 separate acts of contempt for aggregate jail sentence of 26 months).

407. A few states provide different maximum penalties for different types of contemptuous acts. *See, e.g.*, Alaska Stat. § 09.50.010 (Michie 1998); La. Rev. Stat. Ann. tit. 13, § 4611 (West 1991); 42 Pa. Cons. Stat. Ann. § 4137 (West 1995).

The proposed statutory limits on criminal contempt sanctions would reduce substantially the potential for arbitrariness in sentencing currently associated with criminal contempt. At the same time, they would still allow the courts the flexibility to peg sanctions at the upper or lower limit of the legislative parameters based on the perceived degree of the contemnor's willfulness, the existence of prior similar offenses, the extent of the public interest, and other aggravating or mitigating factors. In this way, the courts would retain criminal contempt as one of their principal methods of self-defense, albeit within prescribed legislative parameters.

B. Creation of a Jury-Trial Right in Equity

It is commonly understood that historically the British chancery courts did not use juries; the Chancellor sitting alone made all relevant findings of fact and conclusions of law.[408] That tradition came to colonial America and found its way into the Bill of Rights. The Seventh Amendment provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[409] Although commentators from time to time have argued that the common law jury has outlived its usefulness, costs too much, and cannot cope with the complex issues raised in many modern lawsuits,[410] there has been no serious movement to amend the Constitution to eliminate the Seventh Amendment.[411] U.S. Supreme Court precedents

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408. There is some dispute as to whether the English Chancellor in fact eschewed the use of juries in 1791, the year that the Bill of Rights was enacted. Some historical evidence indicates that the late eighteenth to early nineteenth century represented a transition period for the English equity courts from reliance on juries as factfinders to the Chancellor's deciding all factual issues by himself. *See* Harold Chesnin & Geoffrey C. Hazard, Jr., *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 Yale L.J. 999, 999–1000 (1974).

409. U.S. Const. amend. VII.

410. *See, e.g.*, Patrick Devlin, *Equity, Due Process, and the Seventh Amendment: A Commentary on the* Zenith *Case*, 81 Mich. L. Rev. 1571 (1983); Benjamin Landis, *Jury Trials and the Delay of Justice*, 56 A.B.A. J. 950 (1970); David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachel v. Hill, 85 Harv. L. Rev. 442 (1971).

411. The U.S. Supreme Court has consistently held that the Seventh Amendment is not incorporated into the Fourteenth Amendment and is therefore not applicable to the states. *See* Walker v. Sauvinet, 92 U.S. 90, 92 (1876). Most states have their own version of the Seventh Amendment in their constitutions that preserves the right to jury trial in actions at law. *See, e.g.*, Cal. Const. art. I, § 16; Del. Const. art. I, § 4; Ill. Const. art. I, § 13; Md. Dec. of R. art. V; Ohio Const. art. I, § 5.

A few years ago, Kentucky enacted a rule eliminating jury trials in cases deemed too complex for the jury's ability to understand. The Supreme Court of Kentucky, however, held that the rule

have also largely favored extension rather than contraction of the jury trial right in borderline cases.[412]

Unquestionably, the first Congress, which created the Bill of Rights, viewed the jury-trial right both in civil cases at law and in criminal cases as an absolutely essential buffer between the individual and the state. Although it was primarily the anti-federalists who vociferously advocated a constitutional guarantee of the right to a jury trial in civil cases,[413] even the federalists recognized the importance of the civil jury as a check on corrupt judges.[414] Jury-trial supporters viewed a single judge as much more readily corrupted by outside influences than an ever-changing jury of twelve citizens.

In the early days of the Republic, juries were also regarded as a repository of community wisdom and a protector of the downtrodden. Although it was recognized that juries might sometimes give sway to local prejudices and disregard the law to favor a local litigant or a particularly sympathetic one, it was this very quality that commended civil juries to some supporters. On the federal level, the primary lawmakers and lawgivers—Congress and the federal judges—were held to be especially suspect because of their natural allegiance to the monied classes as opposed to the "average" citizen and their orientation toward national, rather than local, policy.[415] It was hoped that juries would

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violated the state constitutional right to a jury trial. *See* Steelvest, Inc. v. Scansteel Serv. Ctr., 908 S.W.2d 104, 109 (Ky. 1995).

412. *See, e.g.*, City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687 (1999); Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998); Markham v. Westview Instruments, Inc., 517 U.S. 370 (1996); Chauffeurs Local No. 391, Int'l Bhd. of Teamsters v. Terry, 494 U.S. 558 (1990); Tull v. United States, 481 U.S. 412 (1987); Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc., v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

413. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295–99 (1966); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579, 598–600 (1993); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 667–73 (1973).

414. Alexander Hamilton, the most widely published federalist, observed that both proponents and opponents of the new constitution believed that the civil jury trials were essential in a democratic society:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represents it as the very palladium of free government.

The Federalist No. 83, at 614 (Alexander Hamilton) (John C. Hamilton ed., 1909).

415. The anti-federalists were fond of quoting Blackstone's homage to the jury as a guardian of the rights of the poor and downtrodden:

ultimately do "justice" in a given case, rather than mechanically applying the law to the facts, as a judge might feel bound to do.

Critics of contempt procedures often favor the creation of a jury-trial right for all contempts, civil and criminal. In lieu of that solution, some advocate enlarging the definition of criminal contempt to include some arguably civil contempts to increase the availability of jury trials.[416] But the protections against corruption and classism that juries may offer are best introduced at the order-issuing stage as opposed to the order-enforcing stage of the proceedings. There is a strong argument that litigants seeking or defending against imposition of injunction should have a right to a jury trial as much as those seeking a judgment for damages.[417]

Historically, the English law courts' use of juries never took hold in the chancery courts, but there is no compelling reason why that ancient practice should continue to control today.[418] One might argue that equity cases necessarily involve the exercise of discretion that lay juries are ill-equipped to handle. Juries, however, are well designed to make findings of fact relative to the dispute.[419] Judges could then use their equitable

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> The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature that *the few* should be always attentive to the interests and good of *the many*.

3 William Blackstone, *Commentaries* *379; *see Letters of Centinel, No. II*, from *Freeman's Journal*, Oct. 24, 1787, in *Pennsylvania and the Federal Constitution 1787–1788*, at 584 (J. McMaster & F. Stone eds., 1888) (Judge Samuel Bryan quoting above passage from Blackstone).

416. *See* Patterson, *supra* note 5, at 63.

417. In lieu of amending the Constitution, Congress could authorize jury trials by statute in cases involving equitable issues. *See, e.g.*, 18 U.S.C. § 3692 (1994) (creating right to jury trial in contempt cases "arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute"); *see also* Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry. Co., 266 U.S. 42, 65–66 (1924) (holding constitutional Clayton Act provision providing for jury trials in criminal contempts arising under Act).

418. The Texas Constitution, following the Spanish practice, provides for a jury trial right in all civil actions, whether at law or in equity. *See* Tex. Const. art. V, § 10. Texas juries, however, only adjudicate factual issues; they do not "determine the expediency, necessity, or propriety of equitable relief." Casa El Sol-Acapulco, S.A. v. Fontenot, 919 S.W.2d 709, 716 (Tex. Ct. App. 1996). This Article's proposal for jury trials in equity would allow juries to decide, at least in an advisory capacity, the appropriateness of equitable relief as well as the factual issues.

419. Even in the current system, juries often end up deciding the factual issues underlying a request for injunctive relief. In cases involving claims for damages and injunctive relief, many states and the federal courts provide that the jury first decide the issues relating to the legal claims. The

discretion to deny an injunction or to grant it according to appropriate terms. Even in complex cases, it is not clear that juries could not exercise their own discretion in deciding whether or not particular relief was appropriate. The jury's findings of fact could be made binding on the judge, and its recommendation as to the appropriateness of equitable relief could be made advisory.[420] To avoid undue delays for plaintiffs seeking emergency relief, the jury-trial right could extend only to the permanent-injunction stage of the proceedings. Defendants would not be entitled to a jury trial at hearings for temporary restraining orders or preliminary injunctions.

By incorporating juries into the order-issuing stage, the process of imposing injunctions gains credibility. The jury would decide whether the plaintiff had demonstrated serious harm likely of repetition, whether the harm was compensable in money damages, and ultimately whether the public interest favored some sort of injunctive relief. The first two issues are primarily factual inquiries similar to those made in an ordinary case at law. The third issue is arguably one that a jury is ideally suited to adjudge—whether an injunction appropriately serves the public interest.[421] The jury, as the representatives of the community, will assess perhaps more accurately than a single judge the relative importance of various public concerns. For example, in a labor dispute, the jury could weigh the benefit conferred on the public by allowing labor

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jury's factual findings are then binding on the judge in the determination of whether or not to issue an injunction. *See, e.g.*, Lytle v. Household Mfg., 494 U.S. 545, 552–53 (1990); Lee v. Aiu, 936 P.2d 655, 665 (Haw. 1997); Zions First Nat'l Bank v. Rocky Mountain Irrigation, Inc., 795 P.2d 658, 662 (Utah 1990).

420. The Federal Rules of Civil Procedure provide for the use of advisory juries and binding jury trials with the parties' consent in cases that are not triable to a jury as of right. *See* Fed. R. Civ. P. 39(c). Thus under current procedure a federal district court with an equitable action before it could empanel either an advisory jury or, with the parties' consent, a jury whose findings would be binding on the court. Professor Rendleman, a leading injunctions scholar, favors leaving juries out of the injunction-issuing stage of the proceeding. *See* Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. Fla. L. Rev. 346, 355 (1981).

421. The U.S. Supreme Court has indicated at least provisionally its faith in a jury's ability to decide sophisticated issues regarding the public interest:

> The jury's role in determining whether a land-use decision substantially advances legitimate public interests within the meaning of our regulatory takings doctrine presents a more difficult question. . . . In this case, the narrow question submitted to the jury was whether, when viewed in light of the context and protracted history of the development application process, the city's decision to reject a particular development plan bore a reasonable relationship to its proffered justifications. . . . Under these circumstances, we hold that it was proper to submit this narrow, factbound question to the jury.

City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 721 (1999).

demonstrations against the public interest in protecting private property rights and community tranquility. Particular legal principles, as explained to the jury by the judge, would necessarily guide the jury's judgment of this issue, but the ultimate decision would reflect, it might be hoped, the community's consensus about particular disputes.

C. *Use of Enforcement Mechanisms Other Than Contempt*

A court can avoid the procedural thicket surrounding contempt by employing other enforcement mechanisms when a court order is violated.[422] The goals of punishment, coercion, and compensation can be served as well or better in certain cases by these other enforcement mechanisms.[423] Rather than fining or imprisoning a recalcitrant defendant who refuses to convey a piece of property, the court could execute the conveyance itself and have the deed issued in the plaintiff's name. Rather than finding a noncustodial parent who fails to pay back due child support in contempt, the judge could permit garnishment of the parent's wages or bank account in the appropriate amounts.[424] In cases where a party to litigation refuses to produce certain documents, the court could assume the contents of those documents to be adverse to the party's position in court. Courts currently use all of these methods to ensure compliance with a court order without resorting to the contempt power.[425]

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422. The Federal Rules of Civil Procedure allow the court to appoint agents to perform acts on behalf of recalcitrant defendants:

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act so when done has like effect as if done by the party.

Fed. R. Civ. P. 70.

423. The Supreme Court of Michigan, recognizing the desirability of preferring other enforcement mechanisms to contempt, stated that coercive imprisonment cannot be used when "execution, attachment or garnishment may issue, or there is *any other* adequate remedy." Burton v. Wayne Circuit Judge, 37 N.W.2d 899, 902 (Mich. 1949) (emphasis added).

424. *See, e.g.*, Minn. Stat. Ann. § 270A/10 (West 1997) (providing for revenue recapture and income withholding in child support cases).

425. *See, e.g.*, Bonaventure v. Butler, 593 F.2d 625, 626 (5th Cir. 1979) (holding trial court may enter default judgment against party who deliberately refuses to comply with discovery orders); Clarke v. Chicago B & Q Ry. Co., 62 F.2d 440, 441 (10th Cir. 1932) (noting that trial court appointed master to abate nuisance after parties refused to obey court order); Patton v. State Dep't of

These enforcement mechanisms offer several advantages over contempt. First, they result in more certain enforcement of the underlying order. When the court uses contempt sanctions to coerce obstreperous individuals, the sanctions are inevitably imprecise—it is difficult to ascertain what amount of fine or term of imprisonment will induce compliance with the court order. If the court simply creates the desired result through other means, enforcement is guaranteed.

A second advantage of noncontempt enforcement mechanisms is that they avoid a contest of wills between the court and the contemnor. Contempt often presupposes willful disobedience of a court order.[426] Both criminal and coercive civil contempt potentially can engender the unsightly spectacle of an individual resisting the court's lawful command. The contemnor is repeatedly punished or subjected to coercive sanctions but still refuses to obey the court order. This contest of wills is not only inefficient, it also promotes a view of the court as impotent and ineffectual. Assuming the legitimacy of the court's actions, it should not have to engage in a tug of war with parties before it. Self-executing enforcement mechanisms allow the court to achieve the desired outcome without having to wrestle with the party subject to the order.

Third, such enforcement methods may be used more efficiently than contempt sanctions. Unlike criminal contempt, they would not require a separate prosecution before a different judge and the availability of a jury trial. Unlike coercive contempt, they would not necessitate indeterminate fines and prison terms, both of which may involve repeated challenges by the contemnor. Furthermore, criminal contempt and coercive civil contempt both entail sanctions that ultimately may impede successful enforcement of the underlying court order. Imprisoned defendants may be hindered from complying with the court order because of their lack of physical liberty—for example, they may be unable to produce documents or to monitor striking workers at a picket site. Defendants subjected to extensive fines may not have the resources to obey the court order—for example, payment of child support.

Health & Rehabilitative Servs., 597 So. 2d 302, 302 (Fla. Dist. Ct. App. 1991) (noting that trial court issued income deduction order for child support that resulted in garnishment of father's wages).

426. To convict a defendant of criminal contempt, the prosecutor must ordinarily show that the defendant willfully disobeyed the court order. Although coercive civil contempt does not technically require a showing of willful disobedience, it is seldom used unless the defendant has shown a deliberate resistance to the court's command. *See, e.g.*, New York State Nat'l Org. for Women v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988); *cf. Ex parte* Ramon, 821 S.W.2d 711, 713 (Tex. Ct. App. 1991) (holding coercive contempt invalid where contemnor was unable to pay).

And finally, use of noncontempt enforcement mechanisms avoids possible lengthy confinement of a defendant who has not had the protections of a criminal trial. A number of scholars have argued that the real procedural shortfall exists in civil, not criminal, contempt.[427] Because so many contempt statutes strictly limit the fines and prison terms available for criminal contempt, the prospect of a prolonged incarceration, arguably without sufficient due process, is much more palpable where coercive civil contempt is imposed.

Of course, not every order lends itself to noncontempt enforcement mechanisms. If striking airline pilots are ordered to return to work, the court might find it difficult to execute the commands of the order without the defendants' participation.[428] In some cases, the defendants' personal performance will be required to ensure that the proper result is attained. If the defendants simply refuse to comply and other enforcement mechanisms are not practicable, contempt sanctions may be the only route for achieving enforcement of the order. A judge-made or legislative rule, however, that noncontempt enforcement mechanisms be used first if possible would reduce or eliminate many of the difficulties associated with contempt while ensuring that plaintiffs receive the full benefit of the court-ordered relief.

D. The Definition of Coercive Civil Contempt

As discussed previously, the U.S. Supreme Court has nearly eviscerated the category of coercive civil contempt.[429] The Court in *Bagwell* suggested that imposition of any previously announced fines or prospective prison terms may be classified as criminal contempt, particularly if alleged violations of complex decrees are involved.[430] As explored earlier, this conflating of criminal and coercive civil contempts has potentially adverse consequences for the judicial system and for individual plaintiffs.[431] Because of these consequences, this Article advocates a renewed adoption of the traditional definition of coercive

427. *See* Moskovitz, *supra* note 359, at 824; Rendleman, *supra* note 358, at 212–16; Note, *The Coercive Function of Civil Contempt*, 33 U. Chi. L. Rev. 120, 129–30 (1965).

428. As one court succinctly put it, "No one can make someone else go fly an airplane." American Airlines, Inc. v. Allied Pilots Ass'n, No. 7:99-CV-025-X, 1999 U.S. Dist. LEXIS 1376, at *5 (N.D. Tex. Feb. 13, 1999).

429. *See supra* notes 218–294 and accompanying text.

430. *See* International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 833–37 (1994).

431. *See supra* notes 359–384 and accompanying text.

civil contempt as any sanction resulting from a previously announced penalty that the defendant could have avoided by complying with the court order.[432]

A return to the traditional definition of coercive civil contempt would provide more effective and more flexible enforcement of injunctive orders than the recasting of coercive civil contempts into criminal contempts. At the same time, given proper safeguards, the use of coercive civil contempt need not seriously diminish defendants' due process rights. Criminal contempt as a punishment for disobedience of a court order certainly has a place in our jurisprudence, but its purpose and manner of application are significantly different from the enforcement of those orders through civil remedies. Criminal contempt, relatively severely cabined by statutory and procedural constraints, can express societal and judicial disapproval of those who flout the court's authority, but it often cannot provide meaningful relief to litigants who are entitled to it.

Because criminal contempts require a separate prosecution before a different court and full criminal-type procedural protections, they are necessarily less quickly imposed than coercive civil contempts. Because of statutory caps on criminal contempt penalties, they often do not sufficiently coerce obdurate defendants into complying with the court order. Arguably a properly set coercive sanction can induce compliance more quickly and more readily than criminal penalties. Assuming the validity of the original court order, the party plaintiff is entitled to have the order promptly enforced.

The hallmark of coercive civil contempt, as traditionally defined, is purgability.[433] Penalties that the defendant can avoid or reduce through compliance with the court order have been classified historically as coercive civil contempt.[434] Fixed prison terms or fines imposed retroactively to punish contemnors have always been regarded as

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432. *See* State Div. of Family Servs. v. Bullock, 904 S.W.2d 510, 513–14 (Mo. Ct. App. 1995); Bowman v. Tufts, No. 96 CA 6, 1996 WL 664866, at *2 (Ohio Ct. App. Nov. 12, 1996); Ingebrethsen v. Ingebrethsen, 661 A.2d 403, 405 (Pa. Super. Ct. 1995).

Coercive civil contempt should also necessitate a judicial finding of the defendant's present ability to comply with the court order; otherwise the contempt sanctions become punitive in nature. *See* Gregory v. Rice, 727 So. 2d 251, 256 (Fla. 1999).

433. *See, e.g., In re* Marriage of Gibbs, 645 N.E.2d 507, 515 (Ill. App. Ct. 1995) (stating that "person held in civil contempt must be given an opportunity to purge himself of the contempt").

434. *See* Lynch v. Lynch, 677 A.2d 584, 589–90 (Md. 1996).

criminal contempts.[435] In *Bagwell*, the Court suggested that once the judge has announced in advance of a future violation that certain sanctions will be imposed for the next contemptuous act, those sanctions are no different from legislatively created penalties for criminal contempt.[436]

But the inevitable overlapping of punitive and coercive effects in both types of contempt should not obscure the essential differences between the two. First, the need to resort to coercive sanctions results from the defendant's refusal to obey the court order. Rarely, if ever, will a court announce coercive contempt sanctions if the defendant has not previously disobeyed the order and either is continuing to disobey it or is likely to disobey it in the future. Criminal contempt may be imposed regardless of whether the defendant is now in compliance with the order as long as there was a prior willful violation of it.[437] Second, the amount of the coercive sanction can be more finely tuned to achieve compliance than a criminal penalty. Because of the statutory caps on criminal contempt and the relatively narrow range of penalties available, it is more difficult to tailor criminal contempt to fit the nature of the violation and the resources of the defendant. Coercive contempt fines can be set at a particular level based on the egregiousness of the violation, the need for prompt compliance, and the defendant's ability to pay. As such, they are more likely to result in immediate obedience by the defendant than criminal sanctions.

The U.S. Supreme Court in *Gompers* first suggested that contempt sanctions should be classified differently depending on whether the underlying injunction was prohibitory or mandatory.[438] With mandatory

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435. A federal appeals court has noted that at the moment that coercive fines are assessed, they are necessarily backward-looking, but that fact does not alter their essential character as civil sanctions:

> [I]nevitably, wherever a compliance fine is assessed and an opportunity given to purge, the failure to purge will bring about a due date. The due date occurs because the actor has failed to use the key to the jail which the court provided. The occurrence of the due date does not transform civil proceedings, whose sole aim is to secure compliance, into a criminal proceeding. Were it otherwise, compliance with laws or orders could never be brought about by fines in civil contempt proceedings. Always the final order requiring payment will follow the act or omission which constitutes the failure to purge.

Hoffman *ex rel.* NLRB v. Beer Drivers, Local Union No. 888, 536 F.2d 1268, 1273 (9th Cir. 1976) (citation omitted).

436. *See* International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 836–37 (1994).

437. *See* United States v. DiMauro, 441 F.2d 428, 432 (8th Cir. 1971).

438. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442–43 (1911).

decrees, the coercive effect of an avoidable contempt sanction is more apparent. For example, if the defendant is ordered to produce certain documents by a particular date and fails to do so, a daily fine assessed by the court clearly has the purpose of inducing compliance. If defendants wish to avoid imposition of the sanction, they can simply produce the required documents. With prohibitory decrees, arguably any sanction for violation has a punitive rather than a coercive effect. For example, if the defendant is ordered not to place tire-puncturing devices on public and private roadways, a fine imposed by the court after a violation appears to punish the defendants for their offending act.

But if the fine is announced in advance of the violation and is imposed for each occurrence, it arguably has the same effect as the coercive daily fine described above. In other words, every additional violation of the prohibitory injunction produces another fine just as every additional day that passes without compliance with the mandatory injunction results in another fine. In either case the defendant can avoid the fine by complying with the court order. Thus, the imposition of any sanction announced by the court in advance of a violation should be considered as coercive, not punitive, in nature, regardless of the mandatory or prohibitory character of the underlying decree.

E. Appealability of Coercive Civil Contempt

One of the traditional criticisms of civil contempt has been its non-appealability until the court has issued a final order in the main equitable action. Case law has generally held that, unlike criminal contempt, civil contempt cannot be appealed apart from the underlying action.[439] Thus if a defendant is ordered to produce documents in the middle of litigation, the defendant has the choice of either complying with the order or facing coercive fines or even an indeterminate prison term.[440] It may be months before the court issues a final, appealable order or judgment, and in the

439. *See, e.g.*, Fox v. Capital Co., 299 U.S. 105, 107 (1936); Doyle v. London Guarantee & Accident Co., 204 U.S. 599, 603 (1907); Bingman v. Ward, 100 F.3d 653, 655 (9th Cir. 1996); *In re* Attorney Gen. of the United States, 596 F.2d 58, 61 (2d Cir. 1979); Goldblum v. National Broad. Corp., 584 F.2d 904, 906 n.2 (9th Cir. 1978); Jessen v. Jessen, 567 N.W.2d 612, 615 (Neb. Ct. App. 1997).

440. The U.S. Supreme Court has recognized that if the contempt order cannot be reviewed until the court has issued a final decree, the appeal "may come too late to be of any benefit to the party aggrieved." *Doyle*, 204 U.S. at 607. But the Court justified this result as the necessary price paid by citizens subject to "a community governed by law regulated by orderly judicial procedure." *Id.*

interim the defendant must essentially give up its resistance to the court order or take the risk that coercive sanctions imposed for noncompliance will eventually be overturned on appeal.[441]

The impetus toward enlarging the definition of criminal contempt to include contempts that would be classified as coercive civil under the traditional approach stems in part from dislike of the Hobson's choice that many defendants face when subject to a nonappealable interim order. Rather than importing wholesale into the criminal contempt category most coercive civil contempts, one could afford contemnors the right to appeal immediately the imposition of coercive civil sanctions. Although conceivably this proposal would add some burdens to already overworked appellate courts and create additional delays in the litigation process,[442] the burdens and delays are arguably outweighed by the benefits of additional due process afforded contemnors subject to coercive sanctions. For one thing, it is not clear how many additional civil contempts would become appealable by virtue of allowing interim appeals. At present, a civil contempt judgment against a nonparty in a pending suit is final and immediately appealable.[443] Preliminary injunctions, moreover, are appealable orders,[444] and presumably any coercive sanctions imposed for violation of a preliminary injunction could be appealed along with the order itself.

Additionally, long-term coercive sanctions, given their potential for extreme penalties, should bear the scrutiny of an appellate court immediately upon imposition. Otherwise contemnors could face lengthy prison terms or enormous fines without any ability to have those

441. One commentator has detailed the hardships imposed upon defendants who face the Hobson's choice of either complying with a court order or facing harsh coercive sanctions. *See* Thomas J. André, Jr., *The Final Judgment Rule and Party Appeals of Civil Contempt Orders: Time for a Change*, 55 N.Y.U. L. Rev. 1041, 1084–100 (1980).

442. Professor André has also argued that the appealability of contempt sanctions imposed for violation of discovery orders would produce in actuality a more efficient litigation system. Knowing that coercive civil contempts imposed for failure to comply with discovery orders are appealable, parties would have incentives to make their discovery requests more reasonable. As a result, fewer deponents would resist the orders, producing fewer contempt citations. *See id.* at 1077–80.

443. *See* Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 877 F.2d 787, 789 (9th Cir. 1989); *In re* United States Catholic Conference, 824 F.2d 156, 160 (2d Cir. 1987).

444. United States v. Bayshore Assoc., Inc. 934 F.2d 1391, 1395 (6th Cir. 1991); *see also* 28 U.S.C. § 1292(a)(1) (1994) (providing for right of appeal of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions").

sanctions lifted until the underlying litigation is settled.[445] In fact, coercive civil contempts can greatly exceed criminal contempt penalties in both size and duration, and criminal contempts are always appealable independent of the underlying claim. Allowing coercive civil contempts to be immediately appealable would guard against potential arbitrariness and bias by the trial court that may be too wedded to the order it has issued to be entirely objective in imposing appropriate coercive sanctions.

IV. CONCLUSION

All four of the traditional categories of contempt have their proper role in equitable proceedings. Concededly, judges can engage in punishment of contemnors under the guise of coercive sanctions, thus producing a degradation of due process rights. The U.S. Supreme Court in *Bagwell* was rightly concerned that lower courts may impose huge fines on alleged violators of injunctions without according them their full procedural rights. On the other hand, successful plaintiffs are deserving of effective and expeditious fulfillment of their substantive rights, particularly in cases where important public policy concerns are implicated. By recasting most coercive civil contempts as criminal contempts requiring criminal procedures for their imposition, the U.S. Supreme Court has implicitly undermined the lower courts' ability to ensure enforcement of their orders and the plaintiffs' rights to receive prompt and satisfactory relief. Because of the additional procedural constraints imposed by criminal trials, many plaintiffs may have to wait months, even years, before significant sanctions are imposed upon violators of court decrees in their favor.[446]

Rather than conflating the categories of coercive civil and criminal contempt, the courts and the legislatures at both the federal and state levels should enact several procedural and substantive reforms to provide greater protections to accused contemnors facing either criminal or

445. Obviously, in some cases the contemnor may attempt to refuse to pay the accruing coercive fine until after an appeal may be heard. But the lower court, in response to nonpayment, may then feel compelled to incarcerate the contemnor as further coercion. Unless the court agrees to stay the sanction pending an appeal, the contemnor may end up serving a considerable length of time in prison.

446. *See* United States *ex rel.* Vuitton et Fils, S.A. v. Karen Bags, Inc., 602 F. Supp. 1052, 1054 (S.D.N.Y. 1985) (imposing criminal contempt sanctions over one year after violations of order asserted).

coercive civil sanctions. Statutory caps on criminal contempt penalties will guard against excessive punishments by lower courts. Creation of a statutory right to jury trial at the order-issuing stage of an equitable proceeding will provide a relatively unbiased factfinder that reflects, on some level, the conscience of the community. Requiring judges to use initially noncontempt enforcement mechanisms will reduce the instances in which the judge and the party subject to the order end up in a contest of wills requiring the imposition of contempt. A return to the traditional definition of coercive civil contempt will acknowledge the necessity for this weapon in the court's arsenal in certain cases as the only mechanism for guaranteeing that successful plaintiffs obtain satisfactory relief. And finally, allowing contemnors subject to coercive penalties to prosecute an immediate appeal will eliminate the Hobson's choice currently faced by many defendants of either disobeying a potentially invalid order and suffering extensive fines or prison time or obeying the order and enduring a different set of harms.

Ultimately, the continuing debate about the different categories of contempt might be advanced by renaming civil contempt. In reality, civil contempt serves remedial, not punitive or retributory, goals. As such, perhaps it should more properly be labeled "equitable enforcement" or "sanctions in aid of a litigant."[447] A different name might assist the courts in understanding that civil contempt, although denominated a form of "contempt," does not in the end rest upon the defendant's contemptuous attitude toward the court or its willful disobedience of a judicial order, but instead upon the need to afford plaintiffs the remedy that the court has determined they deserve.[448]

447. One court has suggested revision of the nomenclature for contempt: "For the purpose of clarity, we advise the use of the terms 'remedial' and 'punitive,' rather than 'civil' and 'criminal.' The latter are defined by the former, and extinguishing at least one layer of terminology will help simplify the law of contempt." State v. Tatum, 556 N.W.2d 541, 544 n.2 (Minn. 1996).

448. Two hundred years ago Blackstone observed that many contempts, especially those for nonpayment of costs and nonperformance of awards, should "be looked upon rather as a civil execution for the benefit of the injured party." 4 William Blackstone, *Commentaries* *285.