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International Union United Mine Workers v. Bagwell: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt

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INTERNATIONAL UNION, UNITED MINE WORKERS V. BAGWELL: A PARADIGM SHIFT IN THE DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPT

INTRODUCTION

The distinction between civil and criminal contempt has proved to be notoriously difficult for courts to apply[1] and has been roundly criticized by scholarly commentators.[2] Although there has been a consensus on the conceptual basis for the distinction,[3] its application has yielded little but confusion and inconsistency. The uncertainty resulting from attempts to distinguish civil from criminal contempt is particularly troubling in light of the fact that, apart from judicial self-discipline, the classification of contempts has been virtually the sole means of constraining the contempt power.[4] Because a court's classification of a contempt determines the extent to which procedural due process protects an accused contemnor, the distinction is of vital concern: it is practically the sole bulwark against biased use of the virtually unlimited contempt power.[5] The development of procedural protections for criminal contempt has failed to provide an adequate check on the contempt power because the Court's overly conceptual approach to distinguishing contempts has invited confusion and created the potential for manipulation and abuse.[6] By virtue of the labile

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1 Courts themselves frequently allude to the difficulty of this enterprise. *See, e.g.*, Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911) ("Contempts are neither wholly civil nor altogether criminal."); Bessette v. W.B. Conkey Co., 194 U.S. 324, 329 (1904) ("It may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both."); United States v. Rylander, 714 F.2d 996, 998 (9th Cir. 1983) ("Courts frequently have difficulty distinguishing between civil and criminal contempt."), *cert. denied*, 467 U.S. 1209 (1984); United States v. Powers, 629 F.2d 619, 626 (9th Cir. 1980) (venturing, with understatement bordering on litotes, that "confusion is not uncommon").

2 *See, e.g.*, RONALD GOLDFARB, THE CONTEMPT POWER 49 (1963) ("Nowhere else is there such recurring confusion and mistake as [in the classification of contempts]."); Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 245 (1971) ("The confusion surrounding the criminal/civil distinction is an unfortunate one, and costly as well. . . . [T]he effort by reviewing courts to label the case as a criminal or as a civil one is often an exercise in futility."); Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1033 (1993) ("[T]he distinction has become a major source of the confusion that is endemic to the contempt process.").

3 *See* Dobbs, *supra* note 2, at 235, 239.

4 *See* Dudley, *supra* note 2, at 1034.

5 *See id.* at 1026-27.

6 *See* Dobbs, *supra* note 2 at 185 ("[O]ur system [of classifying contempts] has few doctrines precise enough to permit adequate control of immoderate impulses."); Dudley,

nature of the civil–criminal distinction, and its tendency to be employed as a post-hoc rationalization for trial courts' actions, courts have been able to avoid these procedural protections by labeling contempt sanctions as civil.[7]

Until its recent decision in *International Union, United Mine Workers v. Bagwell*,[8] the Supreme Court failed to move beyond an abstract and ultimately unworkable formula for classifying contempts. In *Bagwell*, the Court held that violations of complex injunctions occurring out of court are to be treated as criminal contempts, subject to federal criminal procedure. In doing so, the Court shifted its analysis from a formalistic jurisprudence of labels to one that addresses the due process rights of contemnors and the problems inherent in the contempt power.

This Note analyzes the Supreme Court's decision in *Bagwell* in a historical context. Part I outlines the history and broad contours of contempt doctrine and sets forth the rule-of-law concerns raised by the contempt power. Part II discusses the Supreme Court's articulation of standards for distinguishing between the two types of contempt and the differing approaches taken by the lower federal courts in their application of these standards, with particular emphasis on their treatment of fines levied for violations of injunctions.[9] Part II concludes with a preliminary analysis of the state of the law in this area. Part III sets forth the facts of the *Bagwell* case, summarizes the opinions below, and discusses the Supreme Court's treatment of the case. Part III goes on to analyze the case's holding in light of the difficulties presented by the Court's civil–criminal contempt jurisprudence and assesses how well the opinion addresses the rule-of-law concerns raised by the contempt power. Part III concludes that *Bagwell* represents a paradigm shift[10] in the Court's approach to the distinc-

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supra note 2, at 1032-33 ("[T]he civil/criminal distinction, while a significant advance in curbing abuses, is not ultimately a satisfactory means of regulating the power of courts to sanction indirect contempts.").

7 *See* Green v. United States, 356 U.S. 165, 208 (1958) (Black, J., dissenting) (Civil contempt "has become a common device for by-passing the constitutionally prescribed safeguards of the regular criminal law in punishing public wrongs.").

8 114 S. Ct. 2552 (1994).

9 Because the distinction between civil and criminal contempts is a question of federal law, Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 630 (1988), this Note confines its analysis to cases from the Supreme Court and the lower federal courts.

10 By invoking the term "paradigm shift," this Note adopts the approach to intellectual historiography developed by Thomas Kuhn in his influential work, *The Structure of Scientific Revolutions*. Kuhn argued that science does not progress in an even, linear fashion; instead, the scientific community develops an explanatory paradigm to which all in the community acquiesce. This acquiescence, which Kuhn terms "normal science," continues until independent research uncovers enough anomalies—phenomena that cannot be explained by the dominant paradigm—to unsettle the reigning consensus. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS *passim* (1970). This mode of analysis is particularly appropriate for tracing common-law development, as Kuhn himself noted in

tion between civil and criminal contempt. Within the ambit of the case's holding, the Court has moved from the abstract to the operational; the Court's methodology in *Bagwell* pays due regard to the interests at stake in contempt proceedings and addresses the developments in the nature of adjudication that make the received paradigm anachronistic. Part IV suggests the possibility that the analysis the Court used in *Bagwell* be applied to other contempt contexts as well, thereby rationalizing the law of contempt.

I
AN OUTLINE OF THE LAW OF CONTEMPT

A. Overview of the Principal Contempt Distinctions

Scholars and judges have generally agreed that the conceptual distinction between civil and criminal contempt is based on the purposes to be served by the sanction.[11] Civil contempt sanctions can be employed for "remedial" or "coercive" ends.[12] Remedial contempt sanctions fit comfortably with traditional notions of civil relief. Such sanctions are intended to be compensatory, to make whole the party aggrieved by the contemnor's conduct.[13] Accordingly, in remedial contempt cases, a court levies a fine keyed to a determination of the aggrieved party's damages and payable to that party.[14]

The analogy between coercive civil sanctions and traditional civil remedies is more attenuated. Coercive contempt sanctions are designed to compel obedience to a court's order.[15] Typically, the sanction for disobedience is imprisonment until the contemnor complies with the order.[16] Thus in civil contempt cases, imprisonment is for an indefinite term; in such cases, according to the overly worn saw, civil contemnors are said to "carry the keys to their prison in their own pockets."[17] Civil contempts can also be sanctioned by fines; in *United*

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his discussion of "normal science": "[L]ike an accepted judicial decision in the common law, [a paradigm] is an object for further articulation and speculation under new or more stringent conditions." *Id.* at 23.

11 3 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 704, at 823-24 (2d ed. 1982).

12 *See* Dobbs, *supra* note 2, at 235.

13 *Id.*

14 *See, e.g.*, NLRB v. Local 825, Int'l Union of Operating Eng'rs, 430 F.2d 1225, 1229 (3d Cir. 1970) (civil fine to compensate complaining party for losses is appropriate contempt remedy), *cert. denied*, 401 U.S. 976 (1971); Yanish v. Barber, 232 F.2d 939, 944 (9th Cir. 1956) (civil fine payable to the complainant can be levied against contemnor, provided that the fine is based upon evidence of damage).

15 *See* Dobbs, *supra* note 2, at 235.

16 *See* United Mine Workers v. Bagwell, 114 S. Ct. 2552, 2557 (1994) (describing incarceration conditioned on compliance as "[t]he paradigmatic coercive, civil contempt sanction").

17 *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902). This rationale has been justly condemned in the literature. *See, e.g.*, GOLDFARB, *supra* note 2, at 59-61 (criticizing the keys-to-

States v. United Mine Workers,[18] the Supreme Court authorized the use of fines as coercive remedies for a party's disobedience of an injunction. This technique has since become relatively common.[19]

With a few notable exceptions, the procedures for civil contempt are the same as those that apply to civil actions in general. The alleged contemnor must be given notice of charges and an opportunity to be heard.[20] In federal courts, the Federal Rules of Civil Procedure control the proceedings.[21] Unlike most civil actions, however, civil contempt must be proven by clear and convincing evidence,[22] and, most importantly, the civil contemnor has no right to a jury trial.[23] Civil contempt judgments are not appealable until a final judgment in the underlying action is entered.[24]

Although there is ordinarily no limit to a court's civil sanctioning authority,[25] three rules peculiar to coercive contempt sanctions pro-

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the-prison rationale as an unrealistic legal cliché). Because of the limitless and open-ended nature of coercive sanctions, coercive contempt can be extremely harsh, particularly for those whose disobedience is predicated on ethical or religious principles, or a desire to protect either themselves (as in the case of witnesses in organized crime prosecutions) or third parties (as illustrated by the *Morgan* case discussed below). *See* Linda S. Beres, *Civil Contempt and the Rational Contemnor*, 69 IND. L.J. 723, 731-32 (1994). The notorious case of Morgan v. Foretich, 564 A.2d 1 (D.C. Ct. App. 1989), illustrates the fatuousness of the keys-to-the-prison adage. In *Morgan*, a Washington, D.C. Superior Court judge, Herbert Dixon, ordered Dr. Elizabeth Morgan imprisoned for refusing to allow her ex-husband to visit their daughter as ordered. *Id.* at 2. Dr. Morgan believed that her ex-husband had sexually assaulted their daughter and thus refused to allow visitation to protect the child. *Id.* After 16 months in prison, Judge Dixon stated that "coercion had just begun." *Id.* at 9. After nearly two years in prison, the appellate court ordered Dr. Morgan released on the ground that the imprisonment had ceased to be coercive. *Id.* at 2. In a further twist, the appeals court, sua sponte, voted to rehear the case en banc and accordingly vacated the release order. *Id.* at 20. Before rehearing, however, Congress passed the District of Columbia Civil Contempt Imprisonment Limitation Act of 1989, Pub. L. No. 101-97, 103 Stat. 633 (codified at D.C. CODE ANN. § 11-944 (Supp. 1990)), requiring release under the circumstances of the case, and the appellate court remanded to the trial court with instructions to order Dr. Morgan's release. *Id.* at 21; *see also* Beres, *supra*, at 729 n.46. On remand, the trial court, absent Judge Dixon, ordered her release, but by this time, Dr. Morgan had spent more than two years in prison. *See* Barton Gellman, *Elizabeth Morgan Freed After 759 Days in Jail*, WASH. POST, Sept. 26, 1989, at A1. For thoughtful discussion of the predicament faced by many parents who fear for their children's safety when a court orders custody and visitation rights, see Melinda L. Moseley, Comment, *Civil Contempt and Child Sexual Abuse Allegations: A Modern Solomon's Choice?*, 40 EMORY L.J. 203 (1991).

18 330 U.S. 258 (1946).

19 *See infra* Part II.B.

20 Blackmer v. United States, 284 U.S. 421, 440 (1932).

21 WRIGHT, *supra* note 11, § 705, at 829.

22 *Id.* at 830.

23 Shillitani v. United States, 384 U.S. 364 (1966).

24 *See* IBM v. United States, 493 F.2d 112, 119 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

25 The Eighth Amendment's prohibitions on excessive fines and cruel and unusual punishment, although applicable to criminal contempt, do not apply to civil contempt sanctions. Spallone v. United States, 487 U.S. 1251, 1257 (1988) (coercive fine); Ingraham v. Wright, 430 U.S. 651, 667-78 (1977) (coercive imprisonment). A nebulous limiting prin-

vide some check on this power. First, if the underlying controversy giving rise to a civil contempt action is settled or is otherwise terminated, the contempt proceeding becomes moot, and the sanctions must end.[26] Second, a coercive civil sanction cannot continue once it has become impossible for the contemnor to comply.[27] Third, if it becomes clear that a court's efforts to compel compliance are ineffectual, the sanction becomes punitive and thus can no longer be considered civil.[28]

The purpose of criminal contempt is avowedly punitive; criminal contempt is a public wrong and is punished in order to vindicate the court's authority.[29] Criminal contempts can be punished by fines or imprisonment. In contrast to the open-ended sentencing characteristic of civil contempt cases, however, a criminal contempt sentence is determinate.[30] With the exception of "petty direct contempts," criminal contempts now warrant almost all of the procedural protections afforded by the Constitution: the right to a jury trial;[31] the rights to notice of charges and assistance of counsel;[32] the privilege against self-incrimination; and the requirement of proof beyond a reasonable doubt.[33] Notably, however, the criminal contemnor has no right to a grand jury indictment,[34] and, as Professor Dudley points out, the protection against double jeopardy "applies at best in a watered-down fashion."[35]

Another important distinction in contempt doctrine is that between "direct" and "indirect" contempts. Direct contempts are "those which are committed within the presence of the court . . . or so near

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ciple can be found in Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230-31 (1821), a contempt-of-Congress case in which the Court stated, in dictum, that the contempt power should be limited to "the least possible power adequate to the end proposed." Although this principle has been "elevated . . . to the status of a general standard," it is too vague to serve the immense task assigned it. *See* Dudley, *supra* note 2, at 1060.

26 Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 452 (1911).

27 Shillitani v. United States, 384 U.S. 364 (1966).

28 WRIGHT, *supra* note 11, § 704, at 828-29 (citing cases). As Professor Dudley notes, however, "[t]he question of when a coercive sanction has lost its potential effect . . . is one of exquisite complexity." Dudley, *supra* note 2, at 1054 n.113. Indeed, as the *Morgan* case, discussed *supra* note 17, demonstrates, such relief as this difficult rule offers can be quite belated.

29 WRIGHT, *supra* note 11, § 704, at 824-25 (citing cases).

30 *See* Dobbs, *supra* note 2, at 237.

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

32 Cooke v. United States, 267 U.S. 517, 537 (1925).

33 Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 444 (1911).

34 Green v. United States, 365 U.S. 165, 185 (1958).

35 Dudley, *supra* note 2, at 1073 n.190. In Yates v. United States, 355 U.S. 66, 74 (1957), the Court held that the prohibition against double jeopardy is not offended simply because a court can impose both civil and criminal sanctions for a particular act. The Second Circuit, in United States v. Hughey, 571 F.2d 111, 114-15 (2d Cir. 1978), read *Yates* to authorize an individual's imprisonment for criminal contempt despite his or her earlier coercive imprisonment for the same conduct.

to the court as to interrupt its proceedings."[36] Conversely, indirect contempts "embrace all contemnous acts which do not take place in the presence of the court, and of which the court itself has no knowledge."[37]

Historically, direct contempts have been punished by summary procedures while indirect contempts have required a greater degree of procedural protection.[38] The modern American law of contempt has preserved this distinction although it has limited the use of the summary contempt power. Rule 42(a) of the Federal Rules of Criminal Procedure allows summary punishment only for contempts in the actual presence of the court. The Supreme Court has further limited the use of summary contempt powers by requiring that "serious" criminal contempts be tried by jury; accordingly, use of the summary contempt power is confined to cases of direct "petty" contempt.[39]

B. A Brief History of the Contempt Power

The tradition of all the dead generations weighs like a nightmare on the brain of the living.[40]

—*Karl Marx*

1. *History's Long Shadow*

The inherent power of common-law courts to punish disobedience and affronts to their authority is an ancient one. In a pathbreaking treatise on contempt, Sir John Fox traced contempt in English law to the twelfth century[41] and found the principles of contempt doctrine "firmly established" by the fourteenth century.[42]

The early English courts represented the king, and thus contempt of court was, by extension, contempt of the king.[43] As Professor

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36 STEWART RAPALJE, A TREATISE ON CONTEMPT 26 (1884).

37 CROMWELL H. THOMAS, PROBLEMS OF CONTEMPT OF COURT 3 (1934).

38 *See infra* note 175.

39 Bloom v. Illinois, 391 U.S. 194, 209-10 (1968). The Court did not set the "dividing line" between petty and serious offenses for another six years; in Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974), the Court announced that "those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes." The Court has drawn no such line with regard to fines. *Compare* Muniz v. Hoffman, 422 U.S. 454 (1975) ($10,000 fine against union not serious) *with* Penfield Co. v. SEC, 330 U.S. 585, 595 (1947) (determinate fine of $50 triggers heightened procedures). The *Bagwell* decision left this question open. International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552, 2562 n.5 (1994).

40 KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 15 (International Publishers 1963).

41 SIR JOHN FOX, THE HISTORY OF CONTEMPT OF COURT: THE FORM OF TRIAL AND THE MODE OF PUNISHMENT 46 (1927).

42 *Id.* at 1.

43 GOLDFARB, *supra* note 2, at 12.

Goldfarb aptly put it: "Though the king acted through others, in a mystical way he was presumed to be present and subject to being contemned."[44] With no constraints on the power to punish, retribution was often severe, if not brutal. Contemnors were often imprisoned indefinitely "to abide the King's will,"[45] and dismemberment, dispossession, and execution of contemnors were not unknown to the common law.[46]

The early history of the contempt power sheds light on an important, lasting feature of the law of contempt. The power to punish contemnors was assumed by a judiciary whose authority was coextensive with that of the monarch. Accordingly, the contempt power was, and to a great extent still is, exercised without any external constraints. Although in the political sphere, England and the United States had moved away from absolutism by the eighteenth century, judges in the common-law countries remained to some degree clothed in the robes of royal prerogative. The image of Bobby Seale bound and gagged in federal court[47] testifies to the fact that archaic measures deployed in

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44 *Id.*

45 *See, e.g.*, Y.B. 30 Edw. 3, pl. 19 (1356), *quoted in* Fox, *supra* note 41, app. at 237 (Defendant who called judge a traitor was "found guilty [of contempt of the king] and imprisoned to abide the King's will."); Sir William Waller's Case, Y.B. 9 Cbarles 1 (1633), *quoted in* Fox, *supra* note 41, at 241 (Defendant indicted for assault in the Palace of Westminster was sentenced to "imprisonment during the King's pleasure, fine of £1,000 and binding to good behavior.").

46 *See, e.g.*, Anon. Y.B. 19 Edw. 452 (1345), *quoted in* Fox, *supra* note 41, app. at 235-36 (For threatening and striking jurors, the court "gives judgment that the offender's right hand be struck off and his land and chattels forfeited and that he be imprisoned for life; but execution is afterwards stayed until the King has siguified his pleasure."); Y.B. 22 Edw. 13, pl. 26 (1348), *quoted in* Fox, *supra* note 41, app. at 236. In this case, "[a] Knight and an Esquire [were] indicted for raising strife before Thorpe, C.J." *Id.* For attempting to rescue a defendant, the Knight and Esquire were both disinherited, and the Esquire's hand was cut off. The original defendant was "disinherited and sentenced to perpetual imprisonment." *Id.* Goldfarb recounted a 17th Century case in which "a man threw a brickbat at the Chief Justice after being convicted of a felony. Though he missed the judge, his right hand was cut off and fixed to the gibbet, and he was immediately hanged in the presence of the court." GOLDFARB, *supra* note 2, at 15.

47 See United States v. Seale, 461 F.2d 345, app. 381-88 (1972), for an excerpt from the Chicago 8 trial record chronicling Judge Hoffman's order that federal marshals gag Seale and bind him to his chair. The 16 contempt citations that Judge Hoffman imposed on Seale were reversed on appeal. *Id.* at 371-73. The Supreme Court provided the authority for such physically intrusive measures in the still-vigorous case of Illinois v. Allen, 397 U.S. 337 (1970):

> It is essential to the proper administration of criminal justice that diguity, order, and decorum be the hallmarks of all court proceedings in our country. . . . We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. . . . We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

Id. at 343-44.

the name of orderly proceedings have survived into the twentieth century.

Because of the historical connection between judicial power and royal prerogative, and the consequent creation of contempt by the Royal Courts rather than by Act of Parliament, contempt has remained almost exclusively a concern of the judiciary, policed only by the judiciary itself.[48] Thus the judiciary has come to view contempt as an inherent power of the courts, neither dependent on, nor bounded by, any extramural legal norms.

Blackstone, and generations of jurists following him, maintained that all contempts were tried summarily at common law. According to Blackstone, judicial power to punish contempt "by an immediate attachment of the offender results from the first principles of judicial establishments and must be an inseparable attendant upon every superior tribunal."[49] This assumption, however, was soundly refuted by the British scholar Sir John Fox who marshalled a wealth of authority, dating back to the thirteenth century, for the proposition that historically only direct contempts were punished by summary process; those contempts occurring outside of the court's presence were tried by a jury at law.[50] Fox argued that Blackstone's view was based solely on Justice Wilmot's undelivered opinion in *The King v. Almon*.[51] Whether based on incomplete scholarship or prescriptive impulse,[52] this view nonetheless proved influential. From the time of Blackstone through the early twentieth century, courts in both Britain and the United States routinely used summary process for both kinds of contempt.[53] This practice, which is still the rule in Great Britain,[54] was not significantly curtailed in the United States until 1968 when the Supreme Court granted jury trials for "serious" criminal contempts in *Bloom v. Illinois*.[55]

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48 *See* Dobbs, *supra* note 2, at 185 ("The law of contempt is largely judge-made law."); Dudley, *supra* note 2, at 1045-46 ("[C]ontempt . . . [is] a process largely internal to the judicial branch and wholly lacking in meaningful constraints.").

49 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 282.

50 FOX *supra* note 41, at 49-55; *accord* Green v. United States, 356 U.S. 165, 202-04 (1958) (Black, J. dissenting); Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1042-46 (1924).

51 FOX, *supra* note 41, at 18-21; *accord Green*, 356 U.S. at 211 (Black, J., dissenting) ("Blackstone in his Commentaries incorporated Wilmot's erroneous fancy that at common law the courts had immemorially punished all criminal contempts without regular trial."); Frankfurter & Landis, *supra* note 50.

52 For a view of Blackstone's *Commentaries* as tendentious apologetics rather than empirical exposition, see generally Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209 (1979).

53 *See* FOX, *supra* note 41, at 16-33, 202-26.

54 *See* CHRISTOPHER J. MILLER, CONTEMPT OF COURT 5 (1989).

55 391 U.S. 194 (1968).

The judicial contempt power came to the United States with the common-law system.[56] The Judiciary Act of 1789, which created the lower federal courts, was the first federal statute recognizing the contempt power.[57] Section seventeen of the Judiciary Act states that the federal courts "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."[58] The Court has read the statute to do no more than acknowledge courts' historical common-law power. Recalling the image of Athena springing forth fully armed from the head of Zeus, Chief Justice Field stated:

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the . . . due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.[59]

Congress has seen fit to allow the judiciary to keep contempt within the judicial bailiwick. Congress's first, and practically sole, effort to constrain the contempt power came in 1831, with the passage of a bill intended to limit federal courts' power to punish contempt by publication; this statute survives as the general federal contempt statute, 18 U.S.C. § 401.[60]

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56 *See Ex parte* Grossman, 267 U.S. 87 (1925) (holding that presidential pardon vacates criminal contempt judgment because at common law, such punishment was for contempt of the king, but opining in dictum that a pardon cannot so operate with regard to civil contempt). In *Grossman*, Chief Justice Taft offered a classic explanation of the importation of the English common law into the Constitution:

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention . . . were born and brought up in the atmosphere of the common law and thought and spoke in its vocabulary. . . . [W]hen they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

Id. at 107-08. *But see* Green v. United States, 365 U.S. 165, 210 (1958) (Black, J., dissenting) ("Those who formed the Constitution struck out anew free of previous shackles in an effort to obtain a better order of government more congenial to human liberty and welfare. It cannot be seriously claimed that they intended to adopt the common law wholesale.").

57 Judiciary Act of 1789, § 17, 1 Stat. 83.

58 *Id.*

59 *Ex parte* Robinson, 86 U.S. 505, 510 (1873); *see also* Green v. United States, 356 U.S. 165, 169 (1958) (Judiciary Act is merely declarative of common law.).

60 *See* Dudley, *supra* note 2, at 1034 n.32. The statute reads:

> 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 . . .

Informed by the contempt power's royal origins, the view that it is "inherent" and "necessary" has served to keep contempt doctrinally detached from ordinary procedures. In 1925, the Supreme Court bluntly expressed the view that contempt is unique and thus not subject to the usual constitutionally mandated process constraints: "Contempt proceedings are *sui generis* because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction."[61] This view persisted through the first half of this century. In *Green v. United States*, the Court stated that the cases "establish[ed] beyond peradventure that criminal contempts are not subject to jury trial as a matter of Constitutional right."[62]

The Supreme Court eventually ameliorated this stark and absolutist view, but only with respect to criminal contempts. Through a gradual process, akin to that by which the Court applied federal criminal procedures to the states by incorporating the Bill of Rights' protections into the Fourteenth Amendment's Due Process Clause, the Supreme Court has required that criminal contempt proceedings be conducted with many of the procedural protections afforded criminal defendants.[63] Although the Court began this process as early as 1911, when it extended the Fifth Amendment privilege against self-incrimination to criminal contempt proceedings,[64] it was not until the late 1960s that the Court was willing to grant alleged criminal contemnors jury trials and consider criminal contempt to be a "crime in the ordi-

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(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401 (1994). Congress's other forays into the realm of limiting the contempt power were limited ones. *See id.* § 402 (limiting fines for contempts that are also crimes to $1,000); *id.* § 1509 (limiting fines for obstruction of court orders to $1,000); *id.* § 3691 (guaranteeing jury trials for indirect contempts that are also crimes). Only §§ 402 and 3691 apply in state as well as federal courts.

61 *Ex parte* Grossman, 267 U.S. 87, 117 (1925). This passage is notable for its circularity; because contempt is not "hedged about" by the Constitution, it is *sui generis*. Nowhere did the Court explain how it is that the contempt power evaded such hedging *ab initio*. Thus the contempt power has remain mystified. Cromwell Thomas acerbically commented that "the members of the judiciary have been so well pleased with their summary powers that they seem never to have undertaken a searching investigation into the history of the contempt power." THOMAS, *supra* note 37, at 5.

62 356 U.S. 165, 183 (1954).

63 *See* Bloom v. Illinois, 391 U.S. 194 (1968) (trial by jury); Cooke v. United States, 267 U.S. 517, 537 (1925) (notice of charges and assistance of counsel); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 444 (1911) (privilege against self-incrimination and right to proof beyond a reasonable doubt). Despite the Court's (belated) insistence that criminal contempt is a "crime in the ordinary sense," *Bloom*, 391 U.S. at 201, and that the question of what procedures are appropriate in contempt proceedings is a question of federal law, Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 630 (1988), the Court has not required grand jury indictments in criminal contempt proceedings. *See Green*, 356 U.S. at 183-87.

64 *Gompers*, 221 U.S. at 444.

nary sense."[65] With this development, the distinction between civil and criminal contempt assumed a new importance— it became the means by which the Court allocated constitutional protections.

2. *Two Modern Contempt Arenas*

Contempt has played a particularly prominent role in two contexts: labor disputes and public law litigation. In these two arenas, issues concerning the procedural protections to be afforded contemnors, and even the legitimacy of the contempt power itself and the underlying equity powers of the courts, have assumed particular urgency.

No history of contempt in the United States can be complete without reference to its intersection with organized labor, for the law of contempt was, and remains, deeply imbricated with the history of the American labor movement. Labor has both shaped and been shaped by the law of contempt.

From the late nineteenth century until the passage of the Norris-LaGuardia Act[66] in 1932, contempt, in conjunction with the federal district courts' equitable power to grant injunctive relief, provided management and a complaisant federal judiciary with a potent weapon against organized labor. During this period, decried as the era of "government by injunction,"[67] federal (and state) courts regularly policed labor disputes by issuing injunctions and subsequently enforcing them via contempt proceedings.[68]

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65 *Bloom*, 391 U.S. at 201.

66 47 Stat. 72 (1932) (codified at 29 U.S.C. § 101 (1988)). Section four of the statute expressly denied the federal courts jurisdiction to issue temporary restraining orders or injunctions forbidding strike activity "in a case involving or growing out of labor dispute." 29 U.S.C. § 101 (1988). It is worth noting that this was Congress's second attempt to rein in the federal courts. Its first effort, the Clayton Act, 38 Stat. 730, § 20 (1914) (codified as amended at 15 U.S.C. § 52 (1994)), was frustrated by the Supreme Court's decision in Duplex Printing Co. v. Deering, 254 U.S. 443 (1921) (effectively nullifying Congress's effort to exempt lahor organizations from antitrust prohibitions and reading the Clayton Act's anti-labor-injunction provisions to apply only to "lawful" concerted activity by those in a proximate employer–employee relationship).

67 *See* FELIX J. FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 1 (1930).

68 In 1929, Frankfurter and Greene wrote:

> Of the reported cases in the federal courts since 1901, there were one hundred and eighteen applications for injunctive relief, of which one hundred were successful. But this affords no index of the extent of such equitable intervention. For only decrees that are challenged by motions for discontinuance, on appeal or through contempt proceedings, normally find their way into the reports. . . . We know enough to know that the unreported proceedings must be voluminous.

Id. at 49-50. William Forbath and Craig Becker reported that from 1880 to 1930, federal and state courts issued some 4,300 antistrike orders. William E. Forbath & Craig Becker, *Labor, in* THE OXFORD COMPANION TO THE SUPREME COURT 490 (Kermit L. Hall ed., 1992).

The federal courts' liberal use of the injunctive decree, backed by the contempt power, proved devastating to labor's efforts to organize and take collective action throughout the first half of this century: courts' issuance of strike- and boycott-enjoining orders often resulted in broken unions.[69] Accordingly, issues concerning prosecution of contempt for violations of injunctions have been of especially vital interest to organized labor. Labor leader Eugene V. Debs argued to the Supreme Court for the right to a jury trial in criminal contempt proceedings more than seventy years before the Court recognized the right.[70] Labor's interest in this area has not abated, particularly since the Supreme Court, in *Boys Market, Inc. v. Retail Clerks' Local 770*,[71] took much of the force out of the anti-injunction provisions of the Norris-LaGuardia Act, thereby putting the federal courts back into the business of enjoining strikes. Furthermore, as the *Bagwell* case itself demonstrates, sweeping labor injunctions are not a thing of the past. Given labor's interest in contempt issues, and the fact that many of the Court's most important contempt rulings concern labor disputes, it is fitting that the *Bagwell* case, guaranteeing alleged contemnors the procedural protections of the criminal law when alleged violations of complex injunctions are at issue, itself arose out of a labor dispute.

Although labor has had an especially acute interest in ensuring fairness and impartiality in contempt proceedings, such issues are of

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69 The famous Pullman strike of 1894 provides a striking example (no pun intended). After George Pullman rebuffed workers' demands to discuss a 25-40% pay cut, the American Railway Union, led by Eugene V. Debs, called for a strike and boycott of the Pullman Company. 2 AMERICAN SOCIAL HISTORY PROJECT, WHO BUILT AMERICA? 141 (1992). An estimated 260,000 workers united in the action, which succeeded in "bringing most of the nation's rail traffic to a halt." *Id.* at 141-42. A railroad managers' association then enlisted the aid of the federal government. *Id.* at 142. Thereupon, Attorney General Richard C. Olney (a former railroad lawyer) took what Felix Frankfurter called "the extraordinary step" of "direct[ing] the United States Attorney in Chicago to apply to the United States Court for a writ of injunction." FRANKFURTER & GREENE, *supra* note 67, at 18. The district court then issued a "sweeping injunction . . . effectively outlawing the boycott." AMERICAN SOCIAL HISTORY PROJECT, *supra*, at 142. Federal and state troops were deployed against the strikers, and Debs was imprisoned for contempt of the injunction. *Id.* at 142. Consequently, the strike, and with it the American Railroad Union, were broken. As Debs himself put it in testimony before the United States Strike Commission: "[T]he ranks were broken, and the strike was broken up . . . not by the army, and not by any other power, but simply and solely by the action of the United States Courts in restraining us from discharging our duties as officers and representatives of the employees." United States Strike Commission, Report on the Chicago Strike of June-July 1894, 143-44 (1895) (testimony of Eugene Debs), *quoted in* FRANKFURTER & GREENE, *supra* note 67, at 17.

70 *See In re* Debs, 158 U.S. 564 (1895) (rejecting Debs's argument that his criminal contempt conviction should have been tried before a jury). The *Debs* holding against the right to a jury trial in criminal contempt proceedings was not rejected until 1968 in Bloom v. Illinois, 391 U.S. 194 (1968).

71 398 U.S. 235 (1970) (holding that, despite the Norris-LaGuardia Act and former Supreme Court precedent, federal courts can issue injunctions against strikes if the strike is in contravention of a no-strike clause in a collective bargaining agreement with arbitration provisions).

great general concern as well. Contempt proceedings can arise in a dizzying array of contexts, from child support proceedings[72] to systemic reform litigation.[73] In the words of a major commentator, "Contempt is the Proteus of the legal world, assuming an almost infinite diversity of forms."[74] Since the 1960s, contempt has become increasingly important in what has come to be known as "public law" or "structural reform" litigation.[75] Such litigation, typified by school desegregation or prison reform actions,[76] aims at systemic reform, places judges in a long-term supervisory role, and relies heavily on the courts' equity powers.[77] Accordingly, contempt sanctions, or at least the threat thereof, have assumed importance in the enforcement of the complex injunctions and consent decrees generated by this form of litigation.[78]

The near-ubiquity of the contempt power, as well as its use against labor and in furtherance of structural reform efforts, make the question of the process that a contemnor is due an urgent one. Furthermore, the serious issues that contempt raises with regard to the principle of legality and the separation of powers makes contempt a locus of disquiet for anyone concerned with the rule of law. The following section discusses these considerations.

C. Contempt and the Rule of Law

> *[Contempt] is not to be made an offence on arguments drawn from necessity, unless the law has made it so. Power was ever silently stealing its way along that path. It was first necessary—then inherent—then implied—then expedient—then adopted—then demonstrated on precedent as well as princi-*

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72 *See, e.g.*, Hicks *ex rel.* Feiock v. Feiock 485 U.S. 624, 630 (1988).

73 *See* OWEN FISS & DOUG RENDLEMAN, INJUNCTIONS 528-30 (2d ed. 1984).

74 Joseph Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 781 (1943).

75 The former term was coined by Abram Chayes; the latter bears the stamp of Owen Fiss. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

76 *See* FISS & RENDLEMAN, *supra* note 73, at 528.

77 *See* System Fed'n No. 91, Ry. Employees' Dep't v. Wright, 364 U.S. 642, 647 (1961) ("An injunction often requires continuing supervision by the issuing court . . . ."); Chayes, *supra* note 75, at 1292-93.

78 *See, e.g.*, United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988) (affirming coercive contempt sanctions against municipality for violation of consent decree obligating city to remedy its highly segregated housing), *cert. denied*, 489 U.S. 1065 (1989); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 839 F.2d 1296 (8th Cir. 1988) (affirming civil contempt sanctions against school district for failure to comply fully with desegregation order), *cert. denied*, 488 U.S. 869 (1988); Ruiz v. McCotter, 661 F. Supp. 112 (S.D. Tex. 1986) (finding Texas Department of Corrections in civil contempt for its failure to comply with single-celling order in timely manner).

ple—and finally established, defended and learnedly and eloquently vindicated.[79]

—Henry Storrs

The rule of law is a central concept in the Western political-legal tradition.[80] This ideal, summed up by Justice John Marshall's statement that ours is "a government of laws, and not of men,"[81] is based on the notion that the enactment of rules by a legislature will prevent the exercise of arbitrary power. Britain and the United States are two nations with the self-image as exemplars of the rule of law; yet in both countries, the judicial contempt power, at considerable odds with the rule of law, is considered necessary and inherent.

In his celebrated commentary on the English Constitution, A.V. Dicey advanced, as a cardinal principle of the rule of law, the notion that the citizen should not be subject to the exercise of arbitrary power; accordingly, under a rule-of-law system, a citizen should be punished only for violations of predetermined and bounded law.[82] Insofar as Anglo-American legal culture can be identified with Dicey's concepts, the commentator who described the contempt power as a "jurisdiction . . . foreign to the whole spirit of Anglo-American jurisprudence"[83] was not indulging in dramatic overstatement. Indeed, the existence of a judicial contempt power runs counter to two related features of rule-of-law systems: the principle of legality and the separation of powers.

The principle of legality "is widely recognized as the cornerstone of the penal law."[84] This principle, summed up in the maxim *nulla poena sine lege,* laid to rest the creation of common-law crimes.[85] It involves two precepts: first, crimes should only be defined by the legis-

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79 ARTHUR STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 402 (1833).

80 *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 292-94 (1983) (tracing the rule-of-law ideal back to the 13th Century). Although the rule of law is usually associated with, and invoked by, those who embrace the classical liberal or modern conservative tradition, *see, e.g.,* Antonin Scalia, *The Rule of Law as a Law of Rules,* 56 U. CHI. L. REV. 1175 (1989), it can have salience for those in the radical political tradition as well. Consider the words of the late E.P. Thompson:

> If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just.

EDWARD P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 263 (1975).

81 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

82 A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 24-28 (10th ed. 1959).

83 THOMAS, *supra* note 37, at 4-5.

84 PETER W. LOW ET AL., CRIMINAL LAW: CASES AND MATERIALS 34 (1986).

85 *Id.* at 33-34.

lature; and second, criminal punishments should be meted out only for violations of prospectively defined criminal acts.[86]

The contempt power is problematic on both fronts. By its very nature, the criminal contempt power violates legislative exclusivity in crime definition; in criminal contempt proceedings, the court itself defines the proscribed conduct and exercises its punitive powers without meaningful statutory regulation.[87] Criminal contempt sanctions, furthermore, are by their very nature retrospective in operation, and thus violate the second precept as well.[88] Recognizing this contravention of the principle of legality, the Supreme Court announced in *United States v. Hudson & Goodwin*[89] that contempt stood out as an exception to the otherwise extinct power of common-law crime creation.[90]

These concerns are also implicated in civil contempts. Although compensatory fines are in line with traditional notions of civil remedies, coercive fines and imprisonment have a distinctly criminal cast; a court imposes such sanctions retrospectively in response to a party's disobedient act or omission, but they are not calibrated to any specific damages. Moreover, the contempt context is virtually the only context in which imprisonment, the paradigmatic criminal punishment, is considered a civil remedy.[91]

Related to the legality principle's requirement of legislative exclusivity in crime definition are concerns about the proper allocation of powers among the branches of government. The contempt power is in considerable tension with the doctrine of separation of powers, especially when a court exercises its power for violations of its own or-

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86 *Id.* at 34.

87 *See* Dudley, *supra* note 2, at 1027-28 n.6.

88 As discussed *infra* part II.B, some courts have announced contempt sanctions before the expected contumacy occurs. Such tactics constitute an exception to the generally retrospective nature of contempt sanctions. The prospective sanction, however, still violates the legislative exclusivity precept and the separation-of-powers principles underlying it. *See* discussion *infra* part I.B. Furthermore, courts have employed the prospectively announced sanctions in order to classify determinate penalties as civil contempt sanctions and thus avoid the procedural protections afforded the criminal contemnor. *See* discussion *infra* part II.B.

89 11 U.S. 32 (1812).

90 *Id.* at 33.

91 Although an individual can be deprived of liberty by civil commitment or quarantine procedures, such sanctions, like coercive contempt, are not considered punitive, but rather based on a "'treatment' or 'control' model." *See generally* LOW ET AL., *supra* note 84, at 183-91 (contrasting theory and goals of civil commitment with those of the penal law). Like coercive contempt, civil commitment raises serious due process issues. However, whether such commitment can be meaningfully distinguished from criminal penalties is an issue outside the scope of this Note. In the contempt context, it is important to bear in mind that the Supreme Court has, at least on one occasion, conceded that coercive contempt operates in a punitive manner. *See* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911).

ders. In such cases, the roles of legislator, adjudicator, prosecutor, enforcer, and, in civil contempt proceedings, fact finder are conflated and devolve upon the judge. Montesquieu's classic statement of separation-of-powers doctrine points out the dangers inherent in the collapsing of these roles:

> [T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[92]

When a court imposes contempt sanctions for the violation of its own injunction, both of Montesquieu's dire scenarios merge; the judge-fashioned injunction serves as legislation, which the judge then adjudicates and executes.[93]

These rule-of-law concerns are not merely important for the political scientist; they also raise grave practical problems for litigants and potential litigants. Montesquieu's fears of "violence and oppression" due to judicial bias remain relevant, particularly in the civil contempt context where there is no impartial fact finder. Justice Black eloquently made this point in his argument for jury trials in criminal contempt proceedings: "When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause."[94]

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92 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 152 (Thomas Nugent trans., 1897). It is worth noting that Alexander Hamilton quoted this passage in his famous defense of the courts as "the least dangerous branch." THE FEDERALIST No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For a modern separation-of-powers-based critique of the contempt power that borders on the fanatic, see Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 815-25 (1987) (Scalia, J., concurring in the judgment) (arguing that, to he consistent with the Constitution's limited grant of implied powers, the contempt power can only be employed against one who interferes with the business of the court or when its exercise is necessary for the conduct of the court's business).

93 See Justice Scalia's concurrence in *Young*:

> In light of the broad sweep of modern judicial decrees, which have the binding effect of laws for those to whom they apply, the notion of judges in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions, summons forth . . . the prospect of the most tyrannical licentiousness.

481 U.S. at 822 (Scalia, J., concurring in the judgment) (citations and internal quotation marks omitted).

94 Green v. United States, 356 U.S. 165, 199 (1958) (Black, J., dissenting). Ten years later, the Court came around to Black's way of thinking: "Contemptuous conduct . . . often strikes at the most vulnerable and human qualities of a judge's temperament." Bloom v. Illinois, 391 U.S. 194, 202 (1968). The Court went on to hold that due process requires a jury trial in criminal contempt proceedings.

Also of practical importance is the uncertainty resulting from the ad hoc, retrospective nature of contempt sanctions. Absent predefined standards for punishment and—in cases not involving injunctions or prospective penalties—advance warning of what conduct is proscribed, the potential contemnor has little to guide his or her conduct. Exacerbating this uncertainty is the indeterminacy of the civil–criminal distinction itself. Because the distinction that determines appropriate procedure is indefinite, a potential contemnor has virtually no way of knowing the procedures by which his or her conduct will be tried.[95]

Traditional justifications of the contempt power rest on the power's deep historical roots and on its putative necessity.[96] As demonstrated above, little doubt exists as to its antiquity, although age alone provides scant justification for so extraordinary a power.[97] The necessity of the contempt power is also questionable. As Professor Goldfarb argued:

> [T]o the lawyer from a non-common-law country the contempt power is a legal technique which is not only unnecessary to a working legal system, but also violative of basic philosophical approaches to the relations between government bodies and people. Neither Latin American nor European civil law legal systems use any device of the nature or proportions of our contempt power.[98]

Whether contempt is necessary or not, it is a power that is so fully entrenched in Anglo-American law as to be a permanent feature of the legal landscape. The important question, then, is not whether the contempt power should exist but rather how to control the uncertainty and abuses endemic to it. The Supreme Court has sought to curb the contempt power largely through the civil–criminal distinction,[99] to which this Note now turns.

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95 *See* United States v. United Mine Workers, 330 U.S. 258, 368 (Rutledge, J., dissenting) (The contemnor is "thus placed in continuing dilemma throughout the proceedings in the trial court concerning which set of procedural rights he is entitled to stand upon.").

96 *In re* Debs, 158 U.S. 564, 594-95 (1895) provides a classic example of these twin justifications. Brushing aside Eugene V. Debs's argument that the Constitution requires a jury trial in criminal contempt proceedings, the Court stated:

> [T]he power of a court to make an order, carries with it the equal power to punish for disobedience of that order and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof.

Id.

97 Torture, for instance, also has a considerable pedigree, *see generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 3-69 (Alan Sheridin trans., 1979), but few would justify punitive physical mutilation on such a ground.

98 GOLDFARB, *supra* note 2, at 1-2.

99 As Professor Dudley explains:

II
THE DEVELOPMENT OF THE CIVIL–CRIMINAL CONTEMPT DISTINCTION

A. Supreme Court Cases

The Supreme Court's leading case on the civil–criminal contempt distinction is *Gompers v. Buck's Stove & Range Co.*[100] In *Gompers*, the Court reversed civil contempt orders against labor leader Samuel Gompers and two other defendants stemming from their violation of an injunction prohibiting boycott activity. In the course of a dispute over working hours, the American Federation of Labor (AFL) declared a boycott of Buck's Stove and Range Co.[101] The company sought and received an order enjoining the boycott.[102] Gompers and two other leaders, however, continued to name Buck's Stove in the AFL newspaper's "Unfair" and "We Don't Patronize" lists.[103] The trial court found them in contempt and sentenced the three men to fixed terms of imprisonment.[104] On appeal, the Supreme Court held that the contempt orders, issued in an equity proceeding, were actually criminal; as such they required a separate proceeding at law in which the defendants would have the benefit of the privilege against self-incrimination and the requirement of proof beyond a reasonable doubt.[105]

In reaching this conclusion, the Court enunciated conceptual principles for distinguishing the two types of contempt in a passage that has become a mantra in later decisions, reverently intoned but rarely examined with any critical scrutiny.[106] After acknowledging the difficulty inherent in the classification of contempts, Justice Lamar wrote for the Court:

> In the absence of meaningful legislative guidance, the Supreme Court has sought to guard against potential judicial bias and to cabin the power to adjudicate indirect contempts by imposing protective procedural constraints. The Court's principal vehicle for limiting the judicial contempt power has been the distinction between civil and criminal contempt.

Dudley, *supra* note 2, at 1031.

100 221 U.S. 418, 441 (1911). The Court treated the issue in Bessette v. W.B. Conkey Co., 194 U.S. 324 (1904), but because the case involved the contumacious act of a non-party, and because the Court limited its holding to the facts of the case, 194 U.S. at 338, the articulation of the distinction in *Bessette* is dictum with regard to contempts committed by litigants.

101 *Gompers*, 221 U.S. at 420.

102 *Id.*

103 *Id.*

104 *Id.* at 424-25.

105 *Id.* at 444.

106 *See, e.g.*, Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 635 (1988); Shillitani v. United States, 384 U.S. 364, 369 (1966); United States v. United Mine Workers, 330 U.S. 258, 297 (1947); *In re* Power Recovery Sys., Inc., 950 F.2d 798, 802 (1st Cir. 1991).

> It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.[107]

The Court's test for distinguishing the two types of contempt is notable for what it did *not* address: it did not focus on the conduct itself, the contemnors' due process rights, or the potential for arbitrary or biased adjudication. Instead, the *Gompers* Court chose to base its determination on such vague and slippery concepts as character and purpose.

In its effort to render these abstract principles concrete, the Court was driven to garner what it could from the record to anchor its decision on facts. It began its quest for facts relevant to its "character and purpose" inquiry by examining the phrasing of the underlying order. The Court opined that imprisonment for civil contempt is appropriate when the contemnor violates a mandatory order, whereas if punishment is meted out for the violation of a prohibitory order, the sanction is criminal.[108] Because Gompers and his colleagues violated an order worded in prohibitory terms, the Court reasoned that the only appropriate sanction was a criminal one.[109] To justify its conclusion that the proceedings were criminal, the Court also looked to the petition's caption and to the wording of the prayer for relief.[110]

What emerges from the *Gompers* case is not so much a test as a conceptual potpourri, made up of categories with a great deal of overlap. The Court itself acknowledged that the boundary between remedial and punitive sanctions is blurred: "[I]f the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority."[111] The Court attempted to reason this difficulty away by maintaining that such effects are "indirect consequences."[112] This reasoning, however, is circular; the question of what is an "indirect consequence" of a sanction as opposed to the "purpose" of the sanction is purely a function of how the sanction has been defined in the first place. Falling back on the mandatory–prohibitory distinction is of no help either. As commentators have pointed out, whether an order's wording falls into one or the other category is not always discernible, and any order can be phrased in either mandatory or pro-

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107 *Gompers*, 221 U.S. at 441.
108 *Id.* at 441-42.
109 *Id.* at 444-45.
110 *Id.* at 446, 448.
111 *Id.* at 444.
112 *Id.*

hibitory terms.[113] The remedial–punitive distinction that *Gompers* articulated does not offer airtight categories.

Further undermining the *Gompers* Court's attempt to draw a meaningful distinction between civil and criminal contempt was its acknowledgment that contempt sanctions, in both forms, work as punishment. The Court conceded the punitive nature of civil contempt sanctions: "It is not the fact of *punishment* but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt, the *punishment* is remedial."[114] The Court then went on, rather inconsistently, to say that "[i]mprisonment in [civil contempt] cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do."[115]

Ultimately, the *Gompers* principles raised more problems than they solved. According to *Gompers*, the distinction between civil and criminal contempt turns on the character and purpose of the contempt sanction, yet the Court conceded that both civil and criminal contempt work in a punitive manner. Since, by concession, both types of contempt have common purposes, how then is a trial court, a reviewing court, or an alleged contemnor to understand the distinction? Like the Sorceror's Apprentice, the Court would continue to be bedeviled by its creation in *Gompers*.

In *United States v. United Mine Workers*,[116] the Supreme Court applied what has charitably been called the "*Gompers* framework"[117] to contempt fines. In this case, the district court held John L. Lewis and the United Mine Workers in contempt for violating a Temporary Restraining Order (TRO) enjoining strikes throughout the coal industry, which was then controlled by the federal government.[118] Lewis and the Union argued that the Norris-LaGuardia Act deprived the court of jurisdiction to enjoin the strike.[119] Ruling against the union on its jurisdictional challenge, the trial court fined Lewis $10,000 and the Union a staggering $3.5 million. The court levied these fines as lump sums for both civil and criminal contempt without any differentia-

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113 *See, e.g.*, Moskovitz, *supra* note 74, at 792-93. Justice Blackmun echoed this criticism in *Bagwell*. International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552, 2561 (1994); *see also* Dobbs, *supra* note 2, at 239-40 (characterizing mandatory–prohibitory dichotomy as a "deviant test").

114 *Gompers*, 221 U.S. at 441 (emphasis added).

115 *Id.* at 442.

116 330 U.S. 258 (1947).

117 International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552, 2567 (1994) (Ginsburg, J., concurring in part and concurring in the judgment).

118 *United Mine Workers*, 330 U.S. at 269.

119 *Id.*

tion,[120] despite the clear holding in *Gompers* that civil and criminal contempts must be tried separately.

The Supreme Court upheld the contempt judgments but modified the sanctions, converting Lewis's fine into one for criminal contempt only and altering the Union's fine by levying a $700,000 fine for criminal contempt and a $2.8 million fine for civil contempt, to be imposed if the Union did not comply within five days.[121] The Court based its rationale for characterizing the $2.8 million fine as civil on *Gompers*, resting on the notion that the sanction was conditioned on future compliance and thus appropriate as a coercive "remedial" measure.[122]

The *United Mine Workers* opinion further blurred the civil–criminal contempt distinction in three ways. First, it approved the use of fines as a means of coercing compliance with court orders by analogizing such fines to coercive imprisonment. By so doing, the Court made it possible for courts to set out prospective fine schemes and then levy fixed fines in subsequent civil, rather than criminal, contempt proceedings. The *United Mine Workers* decision thus allowed courts to punish past conduct with determinate sanctions while avoiding criminal procedural safeguards by simply announcing fines in advance. As explained in Part II.B, several federal courts (and the state trial court in the *Bagwell* case) have seized upon this opportunity. Second, despite the clear mandate of *Gompers*, the Court invited confusion by allowing civil and criminal contempts to be tried in single proceeding, notwithstanding the different procedures required for each.[123]

Third, the *United Mine Workers* Court exacerbated the already considerable uncertainties in this area by altering the trial court's sanctions well after the fact and thus saving otherwise unlawful proceedings. Already, under *Gompers*, the civil–criminal distinction is considered a function of the character and purpose of the sanction, and thus is determined only at the end of the proceedings; under *United Mine Workers*, both the nature and the classification of the sanction are indeterminate until ultimate review in the court of last resort.[124]

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120 *Id.*

121 *Id.* at 305.

122 *Id.* at 303.

123 In a highly perceptive dissent, Justice Rutledge found that this "admixture of civil and criminal procedures in one" ran afoul not only of the *Gompers* precedent but also of the constitutional guarantee of due process. *United Mine Workers*, 330 U.S. at 362-67 (Rutledge, J., dissenting).

124 Presaging much of the modern criticism of the civil–criminal distinction, Justice Rutledge made this point most eloquently:

> This case is characteristic of the long-existing confusion concerning contempts and the manner of their trial . . . in that most frequently the ques-

The Court revisited the civil–criminal distinction in *Shillitani v. United States*[125] and *Hicks ex rel. Feiock v. Feiock*.[126] The *Shillitani* case throws into high relief the confusion inherent in the *Gompers* formula, particularly with respect to the overlap between coercive and punitive sanctions. In *Shillitani*, the district court found the defendant in criminal contempt for failing to answer a grand jury's questions and sentenced him to a two-year prison term without employing all of the requisite criminal procedural protections.[127] Despite its characterization of the sanction as criminal, however, the trial judge made the sentence conditional: "Should [the defendant] answer those questions before the expiration of said sentence, or the discharge of the said grand jury, whichever may first occur, the further order of this court may be made terminating the sentence."[128] The Supreme Court, reciting both the *Gompers* "character and purpose" formula and its mandatory–prohibitory dichotomy, decided that the contempt was in fact civil in nature.[129]

Untroubled by both the district court's and the court of appeals' classification of the contempt as criminal, the Supreme Court found the purpose of the sanction determinative.[130] The Court emphasized the mandatory nature of the order (citing the mandatory–prohibitory test from *Gompers*) as well as its construction of the sentence as a conditional one, concluding that the sentence was "clearly intended to operate in a prospective manner—to coerce rather than to punish."[131] Having upheld the sanction as civil, the Court nevertheless vacated the judgment because the civil contempt sanction could not outlive the possibility of compliance; because the grand jury's term expired one year before the Court's decision, no further coercive pressure could be exerted.[132]

However, the conclusion that the district court's intent was "primarily" coercive[133] does not follow as clearly as the Court maintained. The saving "opportunity to purge" was merely a post-hoc appellate construction of the district judge's ambiguous directive. When sen-

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> tion of the character of the proceeding . . . is determined at its end in the stage of review rather than, as it should be and as in my opinion it must be, at the beginning. And this fact itself illustrates the complete jeopardy in which rights are placed when the nature of the proceeding remains unknown and unascertainable until the final action on review.

Id. at 368 (Rutledge, J., dissenting) (citation omitted).

125 384 U.S. 364 (1966).

126 485 U.S. 624 (1988).

127 *Shillitani*, 384 U.S. at 365-66.

128 *Id.* at 369.

129 *Id.*

130 *Id.*

131 *Id.* at 369-70.

132 *Id.* at 371-72.

133 *Id.* at 370.

tencing the defendant, the trial judge stated that if the defendant complied, "the further order of the court *may* be made terminating the sentence;"[134] although the court of appeals construed this statement to grant "an unqualified right to be released,"[135] the district judge's use of the word "may" rather than "will" fairly exudes qualification. The Court could have more persuasively reasoned that the determinate nature of the sentence and its duration beyond the period during which the defendant could purge rendered the sanction criminal.

In *Hicks,* the Court was called upon to decide whether a suspended jail sentence with probation conditioned on the defendant's compliance constituted civil or criminal contempt.[136] The Court relied on *Gompers,* but shied away from assessing the purposes of the proceedings—which were, the Court noted, "wholly ambiguous"[137]—and chose instead to examine the "character of the relief."[138] The Supreme Court declined to determine whether the sanction was civil or criminal because there was no finding below as to whether the contempt would be purged by compliance, in which case the lower court's characterization of the sanction as civil could be sustained.

Hicks and *Shillitani* thus added a new element to the distinction: the saving "purge clause." The effect of these two decisions was to augment rather than reduce the indeterminacy of the distinction. Read together, the cases stand for the proposition that fixed sanctions can be meted out using only civil procedures so long as the court employs a "purge clause"—regardless of the trial court's own classification, the ambiguity of the proceedings, or the equivocal wording of the purge clause.

B. Civil Contempt Fines in the Lower Federal Courts

The lower federal courts have generally employed the character-and-purpose inquiry,[139] but have been no more successful than the Supreme Court in developing clear, dispositive standards for distinguishing contempts. Thus, although the lower courts have employed the same general formulae, at times emphasizing one or more of the

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134 *Id.* at 366 (emphasis added).

135 *Id.* at 369.

136 485 U.S. 624, 630.

137 *Id.* at 638.

138 *Id.* at 636.

139 *See, e.g., In re* Dinnan, 625 F.2d 1146 (5th Cir. 1980); United States v. North, 621 F.2d 1255 (3d Cir. 1980), *cert. denied,* 449 U.S. 866 (1980); United States v. Asay, 614 F.2d 655 (9th Cir. 1980); United States v. Hughey, 571 F.2d 111 (2d Cir. 1978).

Supreme Court's standards, no tidy doctrinal lines can be drawn from the cases.[140]

A serious consequence of the lack of clarity in the contempt arena has been the liberal use of civil contempt proceedings to impose determinate fines. Before *Bagwell*, many lower federal courts read the Supreme Court's contempt cases to permit contempt fines to be classified as civil, coercive remedies when the fines are fixed prospectively. The Second Circuit upheld civil contempt fines levied against abortion clinic demonstrators for their violations of a district court's TRO in *New York State NOW v. Terry* (*Terry I*).[141] The *Terry I* plaintiffs sued in state court, obtaining a TRO prohibiting the defendants from obstructing access to New York abortion clinics; after the defendants removed the case to federal court, the district court continued the TRO and added to the order a provision setting out "coercive sanctions of $25,000 for each day that defendants violated the TRO."[142] The district court subsequently found the defendants in civil contempt and fined them according to the prospective schedule. The Second Circuit affirmed; after reciting the "character and purpose" formula, the court said: "The prospectively fixed penalties were plainly intended to coerce compliance. . . ."[143] The court read *United Mine Workers* and *Hicks* to authorize determinate civil fines when the sanction was announced in advance.[144] Judge Cardamone flatly summed up: "Faced . . . with a choice between compliance or non-

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140 Consider, for example, two illustrative cases, one from the Seventh Circuit and one from the Fifth Circuit. Both cases essentially canvass the same corpus of decisional law, yet employ radically different analyses. In Shakman v. Democratic Org. of Cook County, 533 F.2d 344 (7th Cir. 1976), *cert. denied*, 429 U.S. 858 (1976), the court gave substantial weight to the purpose aspect of the *Gompers* standards, yet rejected the mandatory–prohibitory test, which also finds support in *Gompers*. *Id.* at 348, 349 n.7. The court attempted to ascertain the plaintiff's purpose by examining, as did the *Gompers* Court, the pleadings and the prayer for relief. *Id.* at 358. Finding neither to he dispositive, the court examined the "circumstances leading up to the . . . filing of the plaintiff's petition." *Id.* at 350. Because the plaintiffs sought to enjoin improper election activity shortly before city elections, the court rather unconvincingly reached "the inescapable conclusion" that the contempts were intended to be coercive. *Id.* at 350. The Fifth Circuit addressed the distinction issue in Lamar Financial Corp. v. Adams, 918 F.2d 564 (5th Cir. 1990), but found the "key determinant" to he whether the sanction was conditional (and thus civil) or determinate (and thus criminal). *Id.* at 566.

141 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).

142 *Id.* at 1344.

143 *Id.* at 1351.

144 *Id.* This approach was not new to the Second Circuit. In Sunbeam Corp. v. Golden Rule Appliance Co., 252 F.2d 467, 470 (2d Cir. 1958), the circuit affirmed the district court's fixing of prospective civil fines. In reaching this conclusion, the majority incorporated Judge Hand's concurrence, 252 F.2d at 470, which read *United Mine Workers* to authorize "in terrorem" civil fines on the ground that such fines are "imposed only conditionally and depended upon the contemnor's future conduct." *Id.* at 472 (Hand, J., concurring).

compliance with the district court's order, defendants chose the latter course."[145]

The Second Circuit was not alone in holding that prospectively fixed fines could operate as civil contempt sanctions; both the Third and Ninth Circuits have taken the same approach in similar contexts. In *Roe v. Operation Rescue*,[146] the Third Circuit, with startlingly little discussion (and no case citations), upheld prospective civil fines, reasoning that the trial court "made the contemnors' obligation to pay these fines contingent on a future violation of its orders. In so doing, the court obviously was trying to ensure that the contemnors would not disobey its orders again."[147] Revisiting the issue the following year in *Northeast Women's Center, Inc. v. McMonagle*,[148] the Third Circuit upheld this principle. In similar litigation, the Ninth Circuit, citing *Terry I*, also upheld prospective civil contempt fines.[149]

The District Court for the District of Columbia also adopted the view that prospectively fixed fines could be levied as civil contempt sanctions. The court first used this approach in *United States v. Professional Air Traffic Controllers Organization*,[150] which arose out of the air traffic controllers' strike of 1981. The United States obtained a TRO prohibiting the air traffic controllers from striking in violation of 5 U.S.C. § 7311.[151] After the strike commenced, the United States applied to the court for an order to show cause, and the court found the defendants in civil contempt. The court "imposed an escalating schedule of fines beginning twenty-four hours after the issuance of the order."[152]

As the strike continued, the court assessed fines totaling $752,000.[153] The defendants then moved to vacate the fines, arguing that they were criminal in nature.[154] The court refused to vacate, stressing the twenty-four hour lag time between the announcement of the fine schedule and the actual assessment of fines against the union: "The Court intended the delay . . . to afford the two defendants the

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145 *Terry I*, 886 F.2d at 1351.

146 919 F.2d 857 (3d Cir. 1990).

147 *Id.* at 869.

148 939 F.2d 57, 68 (3d Cir. 1991).

149 Aradia Women's Health Ctr. v. Operation Rescue, 929 F.2d 530, 532 (9th Cir. 1991).

150 110 L.R.R.M. (BNA) 2858 (D.D.C. 1982).

151 *Id.* at 2859. 5 U.S.C. § 7311 (1994) reads, in pertinent part, "[a]n individual may not . . . hold a position in the Government of the United States . . . if he . . . participates in a strike, or asserts the right to strike, against the Government of the United States . . . or . . . is a member of an organization of employees of the Government of the United States . . . that he knows asserts the right to strike against the Government of the United States."

152 *Professional Air Traffic Controllers*, 110 L.R.R.M. at 2859.

153 *Id.* at 2860.

154 *Id.*

opportunity to purge themselves of contempt by complying."[155] Thus the court used the "purge clause" rationale to justify imposing fixed fines for completed conduct on one day's notice without affording the defendants the safeguards of criminal procedure.[156]

More recently, the District Court for the District of Columbia imposed prospective civil fines in the abortion clinic demonstration context. In *National Organization for Women v. Operation Rescue (NOW II)*,[157] the court imposed fines based on a prospective fine schedule previously announced by the court. In *NOW I*, the court had issued a permanent injunction prohibiting the defendants from barring access to abortion clinics.[158] After continued violations of the injunction, the court issued its first contempt order in which it assessed compensatory fines and set up a schedule of escalating fines for any further violations.[159] Despite labeling the sanctions as coercive, the court made the fines payable to the clinics irrespective of any determination of damages.[160] In its second contempt proceeding, the court found the defendants in contempt and assessed a total of $145,000 in noncompensatory civil contempt fines.[161] The court relied principally on the *Gompers* mandatory–prohibitory dichotomy in classifying the sanctions.

A credible application of the Supreme Court's pre-*Bagwell* contempt classification jurisprudence in the fine context came in *Local 28 of Sheet Metal Workers' International Ass'n v. EEOC*.[162] In this case, the District Court for the Southern District of New York had enjoined the union from operating its apprenticeship program in ways that violated

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155 *Id.*

156 Although the "purge" language suggests the influence of the *Hicks-Shillitani* purge clause requirement, the court cited no cases in its contempt discussion. The court seems to have been more concerned with what it perceived as the gravity of the contemnors' conduct than with the legal distinction between civil and criminal contempt. Throughout the opinion, the court repeatedly emphasized the "flagrant" nature of the defendants' conduct. Near the end of the opinion, the court stated that it "will not exercise its discretion to vacate the civil contempt fines . . . because of their highly contumacious conduct." *Id.* at 2864. In its apparent outrage at the gravity of the defendants' conduct, the court seems to have lost sight of the fact that the civil–criminal distinction is not a matter of judicial discretion hinging on a court's perception of the outrageousness of the contemnor's conduct, but an important legal distinction that determines what procedures the Constitution requires.

157 816 F. Supp. 729 (D.D.C. 1993), *aff'd in part, vacated in part*, 37 F.3d 646 (D.C. Cir. 1994).

158 National Org. for Women v. Operation Rescue (NOW I), 747 F. Supp. 760, 770 (D.D.C. 1990).

159 National Org. for Women v. Operation Rescue (NOW II), 816 F. Supp. 729, 735-36 (D.D.C. 1993), *aff'd in part, vacated in part*, 37 F.3d 646 (D.C. Cir. 1994).

160 *NOW I*, 747 F. Supp. at 772.

161 *NOW II*, 816 F. Supp. at 736.

162 478 U.S. 421 (1986).

Title VII.[163] Having found the union in civil contempt, the court, applying the *Hicks-Shillitani* requirement that a determinate sentence for civil contempt must include a purge clause, imposed determinate civil contempt fines payable into a fund that financed minority access to the sheet metal trades, but provided that the contemnor union would be reimbursed if it complied.[164] Under this scheme, the union could recover any of its money remaining in the fund by ceasing to operate its apprenticeship program to the detriment of non-whites.[165] The Supreme Court affirmed. Justice Brennan, writing for the Court, held that because of the possibility of (at least partial) reimbursement, "the sanctions . . . were clearly designed to coerce compliance . . . rather than to punish petitioners for their contemptuous conduct."[166]

The creative approach taken by the district court in *Sheet Metal Workers*, although certainly not available in all contexts, offered a sensible solution within a less than sensible framework. By requiring that fines be paid into the fund and providing for reimbursement on compliance, the sanction served both remedial and coercive ends. Furthermore, the reimbursement provision gave credibility to the idea that the fine would be "purged" by compliance.

The abstract and conceptual approach to classifying contempts offered by *Gompers* and its progeny has given courts little guidance. The indeterminate standards based on "nature" and "purpose" have fostered confusion. When courts have sought to anchor these standards in concrete circumstances, they have determined the civil–criminal contempt distinction, and hence the appropriate due process protections due an alleged contemnor, by such crude expedients as examining the caption of the action[167] and the wording of the complainant's prayer.[168] The indeterminacy of the tests also permitted trial judges to avoid the procedural protections granted to criminal contemnors by reading the doctrine to allow them to levy punitive fines in civil proceedings.[169]

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163 *Id.* at 440.

164 *Id.* at 442-44.

165 *Id.* at 444.

166 *Id.*

167 Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 445-46 (1911); DeParcq v. United States Dist. Court, 235 F.2d 692, 699 (8th Cir. 1956).

168 Nye v. United States, 313 U.S. 33, 43 (1941); Lamb v. Cramer, 285 U.S. 217, 220 (1932). As noted *supra* part II.A, this approach finds support in *Gompers*.

169 *See* discussion of Second, Third, and Ninth Circuit cases, *supra* part II.B.

III
UNITED MINE WORKERS V. BAGWELL

A. Background

The *Bagwell* litigation arose out of a 1989 strike by the United Mine Workers Union against two coal companies in southwestern Virginia.[170] Shortly after the strike commenced, the companies sought and received an injunction in a Virginia state court prohibiting unlawful activity in connection with the strike.[171] On the companies' motion, the court subsequently modified and strengthened the injunction; as modified, the injunction prohibited, among other things, blocking access to the mines, throwing rocks, and placing tire-puncturing devices on roads leading to and from the mines.[172] The injunction also required the Union to place supervisors at picket sites and to limit the number of picketers at designated sites.[173] As the strike continued, the trial court held a contempt hearing in which it set out a prospective schedule of civil fines, varying according to the nature of the violations.[174] The trial court announced that the fines were civil.[175] In a series of subsequent contempt hearings, the trial court found the Union in civil contempt. The court fined the Union a total of $64 million for some 400 separate violations of the injunction; $12 million of the fine was payable to the companies and the remaining $52 million was payable to the Commonwealth of Virginia and the two counties in which the mines were located.[176] Having classified the sanctions as civil, the court tried the contempts without a jury.[177]

The Union appealed the contempt orders. While the Union's appeals were pending, the parties settled the dispute that gave rise to the strike, and the parties accordingly moved to vacate the fines and dismiss the case.[178] The trial court granted the motion and vacated the fines payable to the companies, but refused to vacate the $52 million fine, all the while maintaining that the fines were civil and coercive.[179] The companies withdrew from the case, but the trial judge,

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170 International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552, 2555 (1994).

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.* (The court announced that it would "fine the Union $100,000 for any future violent breach of the injunction and $20,000 for any future nonviolent infraction.").

175 *Id.*

176 *Id.* at 2555-56.

177 *Id.* at 2555.

178 *Id.* at 2556.

179 *Id.*; International Union, United Mine Workers v. Clinchfield Coal Co., 402 S.E.2d 899, 901 (Va. Ct. App. 1991).

determined to collect the fines, appointed John Bagwell as a Special Commissioner to collect the fines on behalf of the two counties and the Commonwealth.[180]

The Virginia Court of Appeals reversed without deciding whether the fines were civil or criminal; assuming that the fines were coercive civil ones, the court held that the settlement of the underlying dispute required the contempt sanctions to be set aside.[181] The Virginia Supreme Court reversed, holding that the settlement of the case did not moot the contempt proceedings and that the fines levied according to the prospective schedule were valid civil, coercive remedies.[182] Citing *United Mine Workers* and the Second and Ninth Circuits' clinic-demonstration cases, the court reasoned that the trial court's "clear intent" was to coerce compliance with the injunction, and that the fines were thus conditional because the Union could have avoided them by obeying the injunction.[183]

B. The U.S. Supreme Court Decision

In its appeal to the Supreme Court, the Union made three arguments: (1) the imposition of determinate, noncompensatory fines for completed acts of disobedience to a prohibitory injunction was a criminal contempt sanction and as such could not have been imposed without a jury trial and other criminal procedural protections; (2) the survival of the contempt sanction beyond the settlement of the underlying dispute rendered the sanction criminal and thus constitutionally defective for want of the requisite procedures; and (3) the fines violated the Excessive Fines Clause of the Eighth Amendment.[184]

The U.S. Supreme Court reversed the Virginia Supreme Court's reinstatement of the fines without reaching either the settlement-of-the-underlying-dispute or the excessive-fine issue.[185] After acknowledging, albeit in understated terms, the difficulties inherent in the civil–criminal distinction as articulated in the Court's prior cases,[186] the Court ultimately held that "out-of-court violations of complex in-

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180 *Bagwell*, 114 S. Ct. at 2556.

181 International Union, United Mine Workers v. Clinchfield Coal Co., 402 S.E.2d 899, 904-05 (Va. Ct. App. 1991).

182 Bagwell v. International Union, United Mine Workers, 423 S.E.2d 349, 356-59 (Va. 1992).

183 *Id.* at 357.

184 Brief for Petitioners at 7, International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552 (1994) (No. 92-1625).

185 International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552, 2563 (1994).

186 *Id.* at 2557 ("Although the procedural contours of the two forms of contempt are well established, the distinguishing characteristics of civil versus criminal contempts are somewhat less clear.").

junctions" require criminal procedural protections.[187] Writing for the Court, Justice Blackmun stated that in such cases, a court "police[s] . . . compliance with an entire code of conduct" thus making "disinterested factfinding and even-handed adjudication . . . essential."[188] In so holding, the Court rejected both the respondent's argument that the prospective fine schedule rendered the fines civil under *United Mine Workers* and the petitioner's reliance on the mandatory–prohibitory distinction gleaned from among *Gompers'* many loose ends.[189] The Court also held that contempt fines are not rendered civil simply because a court announces them in advance.[190]

Justice Scalia concurred separately. After acknowledging that the Court's prior cases "employed a variety of not easily reconcilable tests" for determining the civil–criminal distinction, Justice Scalia expressed some reservations regarding the use of the *Bagwell* case, "a case so extreme on its facts," as a vehicle for announcing which test would control.[191] He nevertheless made a strong argument, based on the putatively changed character of the modern injunction, for requiring criminal procedural protections when violations of complex injunctions are at issue:

> Contemporary courts . . . . routinely issue complex decrees which involve them in extended disputes and place them in continuing supervisory roles over parties and institutions. . . . As the scope of injunctions has expanded, they have lost some of the distinctive features that make enforcement through civil process acceptable. It is not that the times, or our perceptions of fairness, have changed . . . but rather that the modern judicial order is in its relevant essentials not the same device that in former times could always be enforced by civil contempt.[192]

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187 *Id.* at 2560-61. Contrary to Professor Mullenix's assertion that the *Bagwell* opinion "further complicates this already categorically challenged domain by introducing three new analytical classifications: direct contempt, indirect contempt and 'contempts of complex injunctions,'" Linda S. Mullenix, *Court Sets New Rules in Key Areas*, NAT'L L.J., Aug. 15, 1994, at C7, the direct–indirect distinction has been a staple of contempt jurisprudence for centuries. The distinction is featured in the first American treatise on the subject. *See* STEWART RAPALJE, A TREATISE ON CONTEMPT 26-27 (1884). Goldfarb noted that differentiation between direct and indirect contempts determined procedural protections before the Eighteenth Century. GOLDFARB, *supra* note 2, at 15-16. Indeed, Sir John Fox, in his exhaustive history of the contempt power, found voluminous authority for the proposition that observance of the substance of the distinction, if not the name, has medical roots. Since the reign of Edward I (1272-1307), contempts committed in the face of the court were tried summarily, while those committed away from the court's presence were "only punishable after trial in the ordinary course of law." FOX, *supra* note 41, at 50-52.

188 *Bagwell*, 114 S. Ct. at 2562.

189 *Id.* at 2561-62.

190 *Id.* at 2562.

191 *Id.* at 2563 (Scalia, J., concurring).

192 *Id.* at 2565 (Scalia, J., concurring).

Justice Scalia closed, observing the need for line-drawing decisions to decide "which modern injunctions sufficiently resemble their historical namesakes to warrant the same extraordinary means of enforcement."[193]

Justice Ginsburg, joined by Chief Justice Rehnquist, concurred in all but Part II.B of the opinion (holding that indirect contempts of complex injunctions merit criminal procedures) and concurred in the judgment. Justice Ginsburg's concurrence maintained that despite the considerable criticism launched against the *Gompers* formulae, "the Court has repeatedly relied upon *Gompers*' delineation of the distinction."[194] The concurrence offered two grounds to support the classification of the contempt proceedings as criminal. The concurrers first simply rejected Bagwell's argument that the conditional and coercive nature of the sanctions rendered them civil, without offering a test for finding otherwise. Second, the concurrers determined that the survival of the contempt fines past the settlement of the underlying dispute rendered the fines criminal penalties.[195]

C. The *Bagwell* Rule, Rationale, and Application

1. *Primary Holding: Indirect Contempts of Complex Injunctions*

Although *Bagwell* preserved the Court's precedents on the civil–criminal contempt distinction,[196] the rule that emerges from the case, and the methodology by which the Court arrived at that rule, both represent a departure from prior decisions. The *Bagwell* holding on violations of complex injunctions is the first determinate rule the Court has issued on the civil–criminal contempt distinction, an area historically notable for loose standards. The *Bagwell* Court's approach focuses on the circumstances of a case, not the nature or purpose of the sanction. Rather than indulging in abstract musings on purpose or focusing unduly on the form of the proceedings to determine the character of the sanction after the fact, the Court instead examined the interests at stake in the contempt proceedings with particular emphasis on the degree of procedural safeguards necessary for accurate fact finding. Thus the Court utilized a balancing approach to fashion a rule that is readily applicable to a class of cases.

Part II.B of the *Bagwell* opinion suggests that the procedural law of contempt, both civil and criminal, is the product of a balancing of interests, thus connecting the Court's procedural contempt jurisprudence with its analysis of the civil–criminal contempt distinction. After noting that the contempt power is justified on the basis of

193 *Id.* (Scalia, J., concurring).
194 *Id.* at 2566 (Ginsburg, J., concurring).
195 *Id.* at 2567 (Ginsburg, J., concurring).
196 *See infra* part III.C.2.

necessity but that it is also "liable to abuse," Justice Blackmun went on to say: "Our jurisprudence in the contempt area has attempted to balance the competing concerns of necessity and potential arbitrariness by allowing a relatively unencumbered contempt power when its exercise is most essential, and requiring greater procedural protections when other considerations come into play."[197]

Thus "necessity" is implicated when an individual obstructs judicial proceedings in the presence of the court, as in the case of a recalcitrant witness.[198] In such instances of direct contempt, the court's interests are high, and the risk of error is low. Accordingly, summary civil procedures are appropriate, provided that the punishment is not serious.[199] Similarly, the Court reasoned that "indirect contempts involving discrete, readily ascertainable acts properly may be adjudicated through civil proceedings."[200]

For contempts on the other side of the spectrum, the *Bagwell* Court fashioned a categorical rule:

> Contempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable fact finding. . . . Such contempts do not obstruct the court's ability to adjudicate the proceedings before it, and the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial. Under these circumstances, criminal procedural protections . . . are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power.[201]

By focusing on the competing interests involved in contempt adjudication generally and the fact finding demands particular to a specific contempt context, the Court employed a far more pragmatic approach to the civil–criminal contempt distinction. In so doing, the Court fashioned a categorical rule that injects some determinacy—at least with regard to the cases that fall within its holding—into an area of the law previously dominated by indeterminate standards.

The *Bagwell* opinion also differs from *Gompers* and its progeny by bringing concerns about due process and the rule-of-law-problems inherent in the contempt power into the distinction analysis.[202] The Court's retrospective reading of its prior cases as weighing due process

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197 *Bagwell*, 114 S. Ct. at 2559.

198 *Id.* at 2559-60.

199 *Id.* at 2560.

200 *Id.*

201 *Id.* at 2560-61 (citation omitted).

202 *Cf.* Dudley, *supra* note 2, at 1081-96 (arguing for a cost-benefit balancing approach to the allocation of procedural protections in contempt based on Matthews v. Eldridge, 424 U.S. 319 (1976)).

concerns against the necessity justification for the contempt power[203] reflects a shift in analytic approach. The Court's acknowledgment of the contempt power's inherent potential for abuse[204] also brought rule-of-law concerns to the fore for the first time in a contempt classification case.

The Court's subsidiary holding, that contempt sanctions are not rendered civil simply because a court announces them in advance, appears to have been motivated by unease with some courts' cavalier imposition of civil contempt fines. The Court expressed its concern regarding such practices at the end of Part II.A of the opinion: "Lower federal courts and state courts such as the trial court here . . . have relied on *United Mine Workers* to authorize a relatively unlimited judicial power to impose noncompensatory civil contempt fines."[205] Without naming names, the Court here is addressing the approach to civil contempt fines taken by the Second, Third, and Ninth Circuits and by the District Court for the District of Columbia.[206]

The Court flatly rejected the idea that a court can avoid the procedural protections required for criminal contempt adjudication merely by announcing punitive sanctions in advance:

> [T]he fact that the trial court announced the fines before the contumacy, rather than after the fact, does not in itself justify [the] conclusion that the fines are civil or meaningfully distinguish these penalties from the ordinary criminal law. . . . 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.[207]

The Court's categorical ruling that disobedience of a complex injunction merits criminal procedural protections responds well to these concerns; as noted above, the rule-of-law concerns are most urgent when judges adjudicate and enforce commands of their own making.[208] Indeed, the *Bagwell* case provided a compelling example of the dangers inherent in a relatively unlimited contempt power. The enormity of the fines that Judge McGlothlin imposed raises ques-

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203 *Bagwell*, 114 S. Ct. at 2559. This is a generous reading of the prior case law. Although solicitude for the due process rights of a contemnor figured prominently in the cases that required the use of criminal procedures in criminal contempt proceedings, *e.g.*, Bloom v. Illinois, 391 U.S. 194, 201-02 (1968), such concerns seemed of little moment in the decisions focusing on classification alone, *e.g.*, Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624 (1988); United States v. United Mine Workers, 330 U.S. 258 (1947). In the latter class of cases, the due process protections available followed from the application of the distinction formulae, rather than informing the distinction analysis itself.

204 *Bagwell*, 114 S. Ct. at 2559.

205 *Id.*

206 *See supra* part II.B.

207 *Bagwell*, 114 S. Ct. at 2562.

208 *See supra* notes 87-93 and accompanying text.

tions of propriety and biased adjudication. According to organized labor representatives, the fines would have been enough to bankrupt the Union.[209] United Mine Workers' president Richard Trumka saw the fine as an effort to destroy the Union.[210] Furthermore, Judge McGlothlin had refused to recuse himself from the case, despite the fact that his father, an incumbent in the Virginia state legislature, had just been defeated by write-in candidate Jackie Stump, the president of the UMW Local, in an election polarized by the strike.[211]

Given the immensity of the fines, Judge McGlothlin's apparently conflicted interests, and his determination to collect the fines despite the settlement of the underlying dispute, the inference of judicial bias, and with it a recollection of courts' historical hostility to organized labor,[212] is difficult to resist. Thus *Bagwell* was an apt case in which to advance rule-of-law concerns as a part of contempt-distinction analysis.

The *Bagwell* opinion's approach represents a functionalist, checks-and-balances response to the separation-of-powers problems raised by the contempt power.[213] A jury trial in situations like that presented in *Bagwell* provides a needed check against arbitrary or interested judicial power.[214] A jury trial can help curb the contempt power without abandoning contempt as a means of enforcing injunctions or challenging the legitimacy of structural injunctions in public

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209 John P. Furfaro & Maury B. Josephson, *Supreme Court Review*, N.Y. L.J., Aug. 5, 1994, at 3. The article also characterized the sanction as "one of the largest ever imposed." *Id.*

210 *Supreme Court Votes Unanimously to Vacate $52 Million Contempt Fine Against Mine Workers*, DAILY LAB. REP. (BNA), July 1, 1994, at A-1.

211 *Va. Judge Fines Miners Union $33.4 Million for Strike Action*, WASH. POST, Dec. 9, 1989, at B2.

212 *See supra* notes 66-77 and accompanying text. Indeed the strike-breaking labor injunction in the federal courts is not a purely historical curiosity. During the Eastern Airlines strike of 1989, for example, the airline, after filing for Chapter 11, successfully applied to the bankruptcy court for an injunction against strike activities, despite the apparently clear prohibitions of the Norris-LaGuardia Act. *In re* Ionosphere Clubs, Inc., 108 B.R. 901, 937-39 (S.D.N.Y. 1989), *vacated sub nom.* International Ass'n of Machinists & Aerospace Workers v. Eastern Airlines, 121 B.R. 428 (S.D.N.Y. 1990), *aff'd*, 923 F.2d 26 (2d Cir. 1991). Although the district court subsequently vacated the injunction on Norris-LaGuardia grounds, this relief did not come until nearly a year after the injunction issued. *Id.* Because the efficacy of strikes is time-sensitive, such injunctions, even after appellate correction, can irremediably damage a union's efforts; *see, e.g.*, Elsinore Assocs. v. Local 54, Hotel Employees and Restaurant Employees Int'l Union, 820 F.2d 62 (3d Cir. 1987) (similar facts, different industrial context). The author thanks Bruce W. Simon, Esq. for bringing these cases to his attention.

213 *See* Fiss, *supra* note 75, at 32 ("Traditional separation of powers doctrine . . . does not require that the differentiation be along *formal* as opposed to *functional* lines . . . .").

214 *See* Reid v. Covert, 354 U.S. 1, 10 (1957) ("Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness.").

law litigation, as the formalist approach to separation of powers would dictate.[215]

The holding responds to the fact finding difficulties inherent in such circumstances, that is, the fact that the actions at issue occur away from the court's presence and can also be numerous. Indeed, in the course of deciding contempt issues in the context of public law adjudication, a labor dispute, or mass civil disobedience, the fact finder must not only determine whether violations have occurred, but often must also determine whether an entity, like the union in *Bagwell*, was truly responsible. Submitting such issues to an impartial body, with full criminal procedural protections, is an appropriate practical, as well as political, safeguard in such situations.

The jury also serves important democratic values, intertwined with its function as a deliberative fact finder.[216] It not only guards against error, but, as Professor Dudley explains, "allows a microcosm of the community to stand between the defendant and what the microcosm perceives as unduly harsh law enforcement."[217] Hence, it is not only the problem of fact finding reliability that *Bagwell*'s jury requirement helps to ameliorate, but also the limitless sanctioning authority that a court has once the fact of disobedience is found. The added precaution of a jury trial can limit the court's broad sanctioning authority as a practical matter, for a judge will have to assess sanctions with the knowledge that a jury must vote unanimously to impose them.[218] This check should not only help keep sanctions within the

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215 Justice Scalia would limit the contempt power exclusively to the enforcement of orders either involving the litigation process or judicial self-defense. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 821 (1987) (Scalia, J., concurring in the judgment). For an argument against judges' involvement in the business of vindicating public rights in general, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 393-404 (1978). It is this Note's position that adherence to the rule of law does not require abandonment of public law adjudication.

216 *See* Green v. United States, 356 U.S. 165, 215-16 (1958) (Black, J., dissenting) ("The jury injects a democratic element into the law."); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Henry Reeve trans., 1988); V. HANS & N. VIDMAR, JUDGING THE JURY 249 (1986) ("In brief, the political functions of the jury are not to be ignored. They coexist with the fact-finding functions and should be considered in judging the jury's role in society.").

217 Dudley, *supra* note 2, at 1085.

218 In their defense of the constitutionality of the Clayton Act's provisions limiting the availability of the injunction in labor disputes and requiring jury trials for contempts of injunctions issued in labor disputes, Frankfurter and Landis made the following observation, equally forceful as a defense of *Bagwell*'s constitutional mandate:

> [T]he jury is the indispensable element in the popular vindication of the criminal law. Since the restraining order of a single judge may bind large numbers, we are dealing with law enforcement *en masse*. Certainly Congress may be of the opinion that under these circumstances protection against abuse and the necessary confidence in the processes of the lower Federal courts may only be had if a jury coöperates with the judge in finding the facts on which punishment is based.

Frankfurter & Landis, *supra* note 50, at 1054 (citation omitted).

bounds of reason, giving effect to the Court's *Anderson v. Dunn* dictum that contempt power is to be confined to "the least possible power adequate to the end proposed,"[219] but also perform a legitimizing function by allowing a jury to pass on liability.[220]

The overall analytic method of *Bagwell* works a salutary change as well. The *Bagwell* inquiry looks to circumstances that are relatively easy to identify at the beginning of the process rather than at the end: the complexity of the injunction and the location of the allegedly disobedient acts. In addition to according alleged contemnors of complex injunctions the procedural protection of the criminal law, then, the *Bagwell* decision clears up some of the confusion inherent in the civil–criminal contempt distinction, at least with respect to cases that fall within its holding, by limiting the use of civil contempt to enforce injunctions.

As Justice Blackmun's opinion conceded, the new rule "imposes some procedural burdens on courts' ability to sanction widespread, indirect contempts of complex injunctions,"[221] but the decision should also reduce much wrangling over the civil–criminal contempt distinction in the long run. With the advent of a relatively clear, intelligible and readily applicable rule, extensive litigation over the distinction in public law and other complex adjudication should be reduced. It is true, as Justice Scalia pointed out,[222] that future courts will have to decide the line between those injunctions that are sufficiently complex to fall within *Bagwell* ambit, but as the discussion below indicates, some courts have already begun to outline the contours of the rule.[223]

2. Bagwell *and the Civil–Criminal Distinction*

The *Bagwell* opinion, while announcing a sweeping new rule, also engaged in a Herculean effort at reconciling the Court's prior cases, both *inter se* and with the opinion itself. This heroic attempt to harmonize the cases, however, leaves some tensions and inconsistencies.

As noted above, the opinion leaves intact summary process for petty, direct contempts and civil procedures for compensatory con-

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219 Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230-31 (1821).

220 In his eloquent and scholarly plea for jury trials in criminal contempt cases, Justice Black stated: "[The democratic element of jury trial] is vital to the effective administration of criminal justice, not only in safeguarding the rights of the accused, but in encouraging popular acceptance of the laws and the necessary general acquiescence in their application." *Green*, 56 U.S. 215-16 (Black, J., dissenting); *see also The Supreme Court—Leading Cases*, 108 HARV. L. REV. 139, 209 (1994) (suggesting that *Bagwell*'s jury requirement "serves . . . as a validator of the enforcement of the injunction").

221 *Bagwell*, 114 S. Ct. at 2563.

222 *Id.* at 2565 (Scalia, J., concurring).

223 *See infra* part II.C.3. *But see The Supreme Court—Leading Cases*, *supra* note 220, at 207 (criticizing the *Bagwell* decision for its "failure to articulate clear standards for its complexity test").

tempt. Civil contempt procedures also still apply to indirect contempt when a court is trying "to police the litigation process,"[224] or to deal with disobedience to orders "involving discrete, readily ascertainable acts, such as turning over a key or pay[ing] a judgment."[225] Such contempts can still be sanctioned by coercive imprisonment or coercive daily fines.[226] *Bagwell* dealt with fixed, prospective fines levied on a per-violation basis, rather than daily fines. Consequently, the opinion leaves the status of coercive daily fines in complex injunction cases unclear. The Court's reasoning certainly applies to such fines, and the rule that the Court announced does not carve out an exception for coercive daily fines. The reach of *Bagwell*'s holding is, however, in tension with the pains the Court took to distinguish the fines that the Virginia trial judge had levied from per diem fines as well as from suspended ones.[227] But because the Court's primary concern—the reliability of the fact finding process—does not evaporate by virtue of the fact that the sanction is a daily fine, or for that matter daily imprisonment, the opinion is best understood to require jury trials on *Bagwell*-type facts, irrespective of the form of the sanction.

A similar tension is evident in the Court's treatment of suspended fines. The Court managed to rescue the *United Mine Workers* case as precedent by distinguishing prospective, determinate fines as set forth by the Virginia trial court from the "suspended" fine that the Supreme Court fashioned in *United Mine Workers*.[228] Despite its acknowledgement that the analogy between suspended fines and coercive imprisonment is "less comfortable" than that between daily fines and civil incarceration,[229] the *Bagwell* Court nonetheless reconciled *United Mine Workers* with its holding.

The majority reasoned that "conduct required of the union [in *United Mine Workers*] . . . was relatively discrete,"[230] thus placing the earlier opinion squarely within the category of "indirect contempts involving discrete, readily ascertainable acts" created by *Bagwell*.[231] In its retrospective harmonization of the case law, the Court also viewed the

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224 *Bagwell*, 114 S. Ct. at 2560. Civil contempt makes much sense in this area, not only because, as the Court notes, the interests on the side of the judicial process are weighty, but also because "litigation process" orders—such as those relating to discovery—are not meant to be appealable orders. To make such orders enforceable only through criminal contempt would, in effect, make discovery orders appealable, because criminal contempt judgments are immediately appealable while civil contempt judgments cannot be appealed until the controversy in which the contempt arose is reduced to a final judgment. *See supra* note 24 and accompanying text.

225 *Id.*

226 *Id.*

227 *Id.* at 2562.

228 *Id.*

229 *Id.* at 2558.

230 *Id.* at 2558 n.4.

231 *Id.* at 2560.

United Mine Workers opinion through the lens of the Court's later reasoning in *Hicks*, explaining that in the former case, the union had an opportunity to purge through compliance with the order: "[i]n light of this purge clause" the sanction could be deemed coercive and civil.[232] Thus, as with daily fines, *Bagwell* should be read to require jury trials in complex injunction cases where the sanction is a suspended fine.

In its equivocal attitude toward the civil fine aspect of *United Mine Workers*, however, the Court weakened its disapproval of prospective, determinate civil fines. The $2.8 million civil fine in *United Mine Workers* was nothing if not a prospective, determinate fine. Justice Black's comment on suspended civil contempt sentences applies with equal force to the suspended fines: "[such sentencing] seems to represent a present adjudication of guilt for a crime to be committed in the future."[233] Given that *Hicks* held that the mere suspension of a sentence without an opportunity to purge does not render a sanction civil, there is no good reason to continue to hold that suspended fines can so operate.[234] In practical terms, there is no difference between a court establishing a prospective fine schedule for future violations of an injunction and a court imposing suspended fines conditioned on a party's future compliance with an injunction. Consequently, serious, prospective, indirect contempt fines should be considered criminal sanctions, irrespective of the complexity of the injunction.

Finally, and most importantly, the concerns about the reliability of the fact finder and the rights of alleged contemnors that *Bagwell* so powerfully articulates are applicable well beyond the cases within its ambit.[235] The possibility of erroneous deprivation from judicial bias can be acute in noncomplex-injunction cases as well. *Bagwell* still allows civil contempt sanctions to be meted out absent a jury trial provided the allegedly violated order is noncomplex; as noted above, the sanctions that can flow from an adjudication of civil contempt are po-

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232 *Id.* at 2558-59. It bears noting that the *United Mine Workers* opinion nowhere mentioned a purge clause as such and that the opportunity to purge was simply the opportunity to comply with the order. This reasoning is rejected by the Court when the fine is labeled a "fixed, determinate retrospective criminal fine[ ]," leaving the contemnor "no opportunity to purge once imposed." *Id.* at 2562. Query whether there is any real distinction here; certainly once the initially suspended fine is imposed, the contemnor has no chance to avoid payment. *Cf.* Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (upholding prospective fine where the contemnor union had an opportunity to recoup some of its fine upon compliance).

233 Reina v. United States, 364 U.S. 507, 515 (1960) (Black, J., dissenting).

234 In fairness, it bears noting that the majority did display some unease with civil "suspended" fines and noted the tension with *Hicks* by way of a "but see" reference. *Bagwell*, 114 S. Ct. at 2558. The Court, however, would have done well to overrule this aspect of *United Mine Workers* overtly.

235 *See The Supreme Court—Leading Cases*, *supra* note 220, at 206 (stating that the *Bagwell* rule is "underinclusive").

tentially limitless. The risks a defendant faces from a biased fact finder are thus enormous and distressingly difficult to predict given the wide latitude that judges have in fashioning sanctions.[236] "It would be no overstatement," wrote Justice Black in a dissent that was later vindicated, "to say that the offense with the most illdefined and elastic contours in our law is now punished by the harshest procedures known to that law."[237] Furthermore, the simple injunction case often raises complex issues. Although, as the Court suggests, fact finding may be simpler in some noncomplex injunction cases, the adjudication of a support-order violation, for instance, (indisputably a simple injunction case) involves not only a finding of nonpayment, but also a finding of ability to pay. Such issues do not necessarily lend themselves to determination by a judge. The risk to the defendant from erroneous adjudication due to judicial bias—indefinite imprisonment for failing to pay a judgment the defendant cannot afford to pay—is no less weighty in such cases than the risk of bias in complex injunction cases.

3. *Lower Courts' Applications of* Bagwell

The *Bagwell* opinion has sent a clear message to judges to refrain from the casual imposition of substantial fines through civil contempt proceedings. On the day the Court decided *Bagwell*, it also reversed the Second Circuit's affirmance of prospective civil fines in *Terry I* and remanded the case for reconsideration in light of the *Bagwell* decision.[238] On remand, the Second Circuit, in a per curiam opinion, vacated the $500,000 civil fines.[239] After extensively quoting both *Bagwell* holdings, the court determined that the fines, imposed without a jury trial, were issued for out-of-court violations of an injunction of sufficient complexity to bring it within the Court's mandate.[240]

The Court of Appeals for the District of Columbia Circuit has also paid heed to the *Bagwell* decision. After the Court's decision in *Bagwell*, the *NOW v. Operation Rescue*[241] litigation reached the appeals

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236 The *Morgan* case, discussed *supra* note 17, starkly illustrates this potential. Indeed cases such as *Morgan* call into serious question the efficacy of such coercive sanctions to accomplish compliance rather than simply retribution. *See generally* Beres, *supra* note 17, at 724 (arguing that the "rational contemnor" either complies immediately or not at all).

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

238 Pearson v. Planned Parenthood Margaret Sanger Clinic, 114 S. Ct. 2776 (1994).

239 New York State Nat'l Org. for Women v. Terry (Terry II), 41 F.3d 794 (2d Cir. 1994).

240 *Id.* at 796-97.

241 National Org. for Women v. Operation Rescue [NOW I], 747 F. Supp. 772 (D.D.C. 1990); National Org. for Women v. Operation Rescue [NOW II], 816 F. Supp. 729 (D.D.C. 1993). The facts of these cases are set forth above. *See supra* text accompanying notes 158-61.

court. In the appellate opinion, *NOW II*,[242] the court upheld the district court's first contempt order, which had assessed compensatory fines against Operation Rescue, but vacated the noncompensatory fines that the trial court had levied pursuant to a prospective fine schedule in its second contempt order.[243]

In so doing, the court applied the *Bagwell* opinion with circumspection, finding that the contempts "fall into that broad category . . . involving out-of-court disobedience to complex injunctions."[244] "In these circumstances," the court went on, "the protections of criminal procedure are necessary under the principles enunciated in *Bagwell*."[245] The court allowed that "the injunction here may be somewhat less complex than that in Bagwell, ... But on a scale of complexity ranging from simple affirmative acts . . . to highly complex *Bagwell*-type prohibitory injunctions barring broad classes of illegal acts . . . the out-of-court acts prohibited by the court's order here fall closer to the *Bagwell* end of the spectrum."[246]

Both *Terry II* and *NOW II* demonstrate the relative ease with which the *Bagwell* principles can be applied to a case. Rather than attempting to divine the purposes for which contempt sanctions are meted out, the courts need only determine whether an injunction is a complex one, "akin to an entire code of conduct,"[247] and whether the contemptuous acts were committed in the court's presence in order to ascertain the appropriate procedures the court should apply. The *Operation Rescue II* court in fact had copious evidence of the complexity of the fact finding demands involved in the contempt proceedings at issue: "Indeed," the court stated, "the district court required ten pages of opinion just to summarize the findings of fact upon which these contempt citations were based."[248]

IV
A New Paradigm?

History . . . is a nightmare from which I am trying to awake.[249]

—James Joyce

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242 National Org. for Women v. Operation Rescue, 37 F.3d 646 (D.C. Cir. 1994).

243 *Id.* at 660-61.

244 *Id.* at 661.

245 *Id.*

246 *Id.* Unfortunately, as the passage above demonstrates, the mandatory–prohibitory analysis dies hard despite the *Bagwell* opinion's disapproval of it as a test.

247 *Terry II*, 41 F.3d 794, 797 (1994) (internal quotation marks omitted) (quoting *Bagwell*, 114 S. Ct. at 2562).

248 *NOW II*, 37 F.3d at 661.

249 James Joyce, Ulysses 28 (Hans W. Gabler ed., 1986).

According to Justice Scalia's concurring opinion in *Bagwell*, it is the nature of the injunction that has changed, not the times nor our notions of fairness.[250] Consequently, Justice Scalia reasons, heightened procedures are appropriate to tame those decrees that do not "resemble their historical namesakes," and he assures us that "a careful examination of historical practice will ultimately yield an answer."[251]

Such an examination, however, uncovers the dark history of the labor injunction, the nineteenth and twentieth centuries' "sweeping" decree[252] and the liberal use of the summary contempt power.[253] Hence it is difficult to see the "sweeping" decree as an entirely new phenomenon[254] or the use of criminal procedures for violations of such decrees as anything but a departure—albeit a necessary and arguably constitutionally compelled one—from historical practice.[255]

The *Bagwell* opinion can thus be read as an attempt to deal with this history, to fashion a contemporary approach to correct the anachronisms with which contempt doctrine is riddled. A contempt power unlimited by the procedural safeguards that, since the criminal procedure revolution of the 1960s and 1970s, define our current model of procedural fairness, is truly an anomaly. As an adjunct of monarchy, the contempt power fit the dominant political–legal paradigm of an absolutist age. Justice Wilmot, author of the dictum that brought summary procedures to indirect contempts, captured this understanding

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250 *Bagwell*, 114 S. Ct. at 2565 (Scalia, J., concurring).

251 *Id.* at 2563, 2565 (Scalia, J., concurring).

252 For two archetypal examples of the labor injunction, see Frankfurter & Landis, *supra* note 50, at 1101-13 app. II (comparing the texts of the injunction that gave rise to the *Debs* case and the "Wilkerson restraining order" from the Railroad Shopmen's strike of 1922. *See* United States v. Ry. Employees, Dep't of AFL, 283 Fed. 479 (N.D. Ill. 1922).

253 See discussion *supra* Part II.

254 In 1923, a federal judge reported:

> During the 30 years that courts have been dealing with strikes by means of injunctions, these orders have steadily grown in length, complexity and the vehemence of their rhetoric. They are full of the rich vocabulary of synonyms which is a part of our English language. They are also replete with superlative words and the superlative phrases of which the legal mind is fond. The result is that such writs have steadily become more and more complex and prolix.

Great N. Ry. v. Brosseau, 286 F. 414, 415 (D.N.D. 1923). In 1924, Frankfurter and Landis reported: "A detailed study of the terms of the injunctions in the Federal courts in industrial disputes, during the last thirty years, will show a steady extension from carefully limited injunctions in the earlier days to sweeping orders granted almost *pro forma*." Frankfurter & Landis, *supra* note 50, at 1057 n.171.

255 Justice Scalia may be looking to the eighteenth century for his golden age of the simple injunction when, by implication, procedures were appropriate to the fact finding demands facing courts. But it should be remembered that it was in the eighteenth century that the English courts expanded the scope of the summary contempt power to embrace indirect as well as direct contempts. *See* Fox, *supra* note 41; Frankfurter & Landis, *supra* note 50, at 1046.

of the contempt power: "[T]he Principle upon which Attachments issue for Libels upon Courts, is of a more enlarged and important nature,—it is to keep a blaze of Glory around them . . . ."[256] But as Frankfurter and Landis, commenting on this passage, queried, "Can it be that 'the blaze of Glory' meet for Tory judges of George III is to be kept forever burning by the Constitution of the United States?"[257]

Answering this question in the negative, the Supreme Court began to look at contempt differently in *Bloom v. Illinois*, and *Bagwell* follows *Bloom*'s due process logic, applying it to the classification of contempt. *Bagwell* thus represents a shift in analysis that can serve as a paradigm for analyzing other categories of contempt. By reexamining coercive contempt and other contempt contexts using *Bagwell*'s due process and separation-of-powers predicates, the Court can fulfill the decision's potential to be the new paradigm by which contempt is understood, one that brings the contempt power in line with contemporary notions of procedural fairness.

CONCLUSION

The contempt power, although widely believed to be necessary to the functioning of our judicial system, is an extraordinary one. Because of the magnitude of judicial contempt authority and its uneasy position in a system that purports to conform to the rule of law and to a model of procedural fairness, the regulation of this power is of vital importance. Employing a characteristically process-based approach, the Supreme Court sought to reign in the scope of the power by guaranteeing criminal procedural protections in criminal contempt proceedings.

With this development, the distinction between civil and criminal contempt assumed greater importance, for the classification of contempts became the means of allocating procedural protections rather than a doctrinal technicality. Unfortunately, however, the Court's civil–criminal distinction jurisprudence adhered to the overly conceptualized analysis of the *Gompers* decision. At best, the *Gompers* formula was confusing and at worst it allowed courts to circumvent the increased procedural protections by manipulating the distinction.

The Court's decision in *Bagwell* helped further the goal of procedural fairness that the Court sought to achieve by according alleged contemnors criminal procedural protections in cases like *Bloom*. Although *Bagwell* did not effect a root-and-branch overhaul of contempt doctrine, it can serve as a first step toward rationalizing the con-

256 Sir John Eardley Wilmot, NOTES OF OPINIONS AND JUDGMENTS 270 (1802), *quoted in* Frankfurter & Landis, *supra* note 50, at 1048.

257 Frankfurter & Landis, *supra* note 50, at 1048.

tempt process. In the short term, the decision should help to curb the awesome power of judges by providing safeguards and enforcement legitimacy in litigation over public rights, labor disputes, and mass civil disobedience.

In *Bagwell*, the Court struck the proper balance with regard to the class of contempts that the opinion embraces. Rather than reasoning backward by inquiring into the purposes sought by the contempt proceedings and thereby determining what constitutional procedures attach, the Court in *Bagwell* properly reversed the inquiry: It asked what procedures are appropriate in cases of the kind before it and determined the classification of the contempt sanction by its resolution of this important question. By showing solicitude for the due process rights of alleged contemnors, the Court has done much to further the interest of vindicating courts' authority in a broad sense. As Justice White stated in *Bloom*, in a passage that Justice Blackmun invoked in his peroration: "Genuine respect, which alone can lend true dignity to the judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries."[258]

Philip A. Hostak

258 Bloom v. Illinois, 391 U.S. 194, 208 (1968).