

RETHINKING CIVIL CONTEMPT INCARCERATION

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INTRODUCTION

Indefinite incarceration, without trial, counsel, jury or appeal, for civil contempt represents the pinnacle of judicial power. Theoretically, that power is necessary to remedy the injuries of litigants and to affirm the authority of the court. The potency of the remedy stems from both the curtailed hearing process and the potentially unlimited duration of confinement. Only the contemnor's control over his/her own treatment mitigates the power of contempt. Compliance with the court ends civil contempt, and so it is often said that contemnors "carry the keys of their prison in their own pockets."¹ The contemnor's ability to purge him or herself of wrongdoing is what is thought to justify their indefinite incarceration.

This logic is fundamentally flawed. Should we condone the common use of torture, because its victims could avoid maltreatment if they simply cooperated with their interrogators? The indefinite deprivation of liberty without the normal protections of criminal due process is a matter of public controversy in the case of suspected terrorists. The indefinite incarceration without trial of an embezzler, a child support delinquent, or party to bankrupt debtor, should generate similar outrage. Preserving the authority of the court is certainly no greater a justification for violating civil liberties than national security.

Even if we were to decide that some acts of contempt warrant the full force of the court's contempt power, not all civil contempts carry the same threat to the court's credibility. A father refusing to pay child support does not threaten the court's authority in the same way as a reporter protecting a confidential source. Yet federal courts treat

¹ See *Penfield Co. of Cal. v. SEC*, 330 U.S. 585, 590 (1947) (*citing* *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)).

civil contemnors almost identically, regardless of the nature of their defiance.² Not all violations of court orders require the full weight of the contempt power. Moreover, not all contempt proceedings are equally susceptible to judicial abuse, which historically has plagued certain areas of contempt more than others.³ Federal courts have struggled to develop a principled application of civil contempt. Before joining the Supreme Court, Justice Alito wrote that “a temporal benchmark should be adopted to determine when contempt incarceration becomes impermissibly punitive” by the Supreme Court.⁴

Civil contemnors fall into three basic categories: parents who refuse to produce their children for custody adjudications; litigants who fail to pay court ordered sums (fines, settlements, judgments and assets in bankruptcy); and grand jury and criminal trial witnesses who refuse to cooperate either by refusing to appear in response to a subpoena or refusing to answer a specific question. By approaching civil contempt from a subject sensitive perspective, procedure and length of incarceration can be tailored to better meet the goals of contempt incarceration, while affording greater safeguards against abuse.

Given evidence that the average contemnor spends less than two weeks in jail before complying,⁵ it appears that civil contempt incarceration is a successful doctrine,

² *Cf.* Recalcitrant Witness Statute, 28 U.S.C. §1826 (1984) (limits incarceration of civil contemnors to eighteen months or the length of the underlying proceeding, whichever is shorter. Outside disobedient witnesses, the federal courts are free to hold civil contemnors until they comply with the court’s orders).

³ *See Ex parte Terry*, 128 U.S. 289, 313 (1888) (recognizing that civil contempt is an “arbitrary” power which is “liable to abuse” particularly with regard to libel against the court).

⁴ *Chadwick v. Janecka*, 312 F. 3d 597, 600 (3d Cir. 2002).

⁵ Although no national statistics for federal contemnors are available, the numbers compiled by the 101st Congress in preparation for legislation on civil contempt in the District of Columbia provides a useful frame of reference. In 1989, the Committee on Governmental Affairs together with the Committee on the District of Columbia commissioned a study of civil contempt in the District of Columbia and found that the

effectively remedying violations of courts orders and thereby reaffirming the courts' authority over litigants and witnesses. However, the use of summary proceedings and the difficulty of appeal potentially hide current abuses of the contempt power. Meanwhile, there exist outliers to this general success rate, who remain in jail for years without complying.⁶

This Article contends that each category of contempt presents different arguments for procedural protections and incarceration limitations. Some contempts are more susceptible to error or abuse. Other contempts do not justify indefinite incarceration even when the contemnor is able to comply with the court's wishes. The Article proposes a new civil contempt scheme in which the treatment of each category is sensitive to those concerns. First, the Article details the current treatment of contempt under the federal system. Second, the Article describes how the contention that contempt should be subject-sensitive has been reflected in the treatment of contemnors throughout its long history. Next the Article presents evidence that state law already has evolved beyond federal law to be more subject-sensitive. Finally the Article proposes a subject-sensitive

majority of cases arose out of the Family and Criminal Divisions. Out of a total population of approximately 570,000 people, the district incarcerated an average of 165 contemnors per year for an average stay of 12.6 days. S. Rep. No. 101-554 at 4 (1990).⁶ *See, e.g.*, *S.E.C. v. Armstrong*, 88 Fed. Appx. 460 (2d Cir. 2004) (denying Martin Armstrong appeal from civil contempt after six years in jail); *Chadwick*, *supra* not 4, reversing lower court's granting of habeas relief after eight years in jail); *Morgan v. Foretich*, 564 A.2d 1 (D.C., 1989) (Dr. Elizabeth Morgan spent two years in jail before Congress legislated her release through the District of Columbia Civil Contempt Imprisonment Act of 1989, Pub.L.No. 101 (1989), *In re Grand Jury Subpoena, Duces Tecum*, 112 F.3d 910 (8th Cir. 1997) (Susan McDougal was held in contempt for eighteen months, including seven weeks in solitary confinement, and released pursuant to the Recalcitrant Witness Statute in connection with the Grand Jury, convened by Special Prosecutor Kenneth Starr, investigating the Whitewater Scandal during the Clinton administration. Upon her release, McDougal was prosecuted and convicted of criminal contempt).

treatment of civil contempt and addresses the new problems that such a system would create.

I. CURRENT FEDERAL PRACTICES

In federal courts, contempt is an inherent power of the judiciary, subject to limited legislative restraints.⁷ The Judiciary Act of 1789 first codified the federal courts' contempt power. That statutory authorization remains intact and fundamentally unchanged. Today the Federal Rules of Criminal Procedure, 18 U.S.C. §§42, 401, and 402 grant federal courts broad authority to punish criminal contempt. Unlike criminal contempt, civil contempt has no legislation specifically authorizing or restricting it.⁸ The Federal Rules of Civil Procedure govern civil contempt generally as they do all civil law proceedings.⁹

A. DISTINGUISHING CIVIL CONTEMPT FROM CRIMINAL CONTEMPT

Modern contempt litigation scholarship revolves around the difference between civil and criminal contempt. The distinction is significant, because the procedural laws governing civil and criminal contempt differ dramatically. The courts describe the dividing line between the two contempts in three ways. First, contempt divides in terms of the order violated: mandatory or prohibitory.¹⁰ If the court issues an affirmative order to do something, e.g. pay child support, and there is a failure to comply, then the

⁷ *See, e.g.*, *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873) (holding that the contempt power is inherent in Article III); *Spalding v. New York ex rel. Backus*, 45 U.S. (4 How.) 21 (1846).

⁸ *Cf.* The Recalcitrant Witness Act, *supra* note 2.

⁹ Given the great judicial discretion required in civil contempt proceedings, this lack of Congressional rule making has been questioned by some scholars. *See, e.g.*, Joel Androphy and Keith Byers, *Federal Contempt of Court*, 61 Tex. B. J. 16 (1998).

¹⁰ *See, e.g.*, *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911).

contempt is civil. If on the other hand the court warns a party *not* to do something, like leak grand jury information, and that order is ignored, then that contempt is criminal. The line between mandatory and prohibitory directives is unclear, and easily manipulated. It is hard to argue that the difference between a judge ordering a parent to pay child support and a judge ordering a parent not to be delinquent in those payments warrants a procedural distinction. In *International Union v. Bagwell*, 114 S.Ct. 2552 (1994), the Supreme Court rejected a related view of civil contempt which would distinguish it from criminal contempt on the basis of prior notice of the penalty involved. The Court in *Bagwell* held that prior notice of a fine schedule attached to the out of court violation of a complex injunctive scheme did not make it civil and therefore subject to fewer procedural requirements. Though the prior notice rule is not the same as the mandatory rule, the decision in *Bagwell* reflects an inquiry beyond the language and form of contempt, into its substantive merits.

As an alternative to the mandatory/prohibitory test, the court also uses a purposive test to differentiate criminal and civil contempt.¹¹ If the purpose of the contempt is remedial or coercive, then it is civil. If the contempt is intended to punish a contemnor for the violation, then it is criminal. So incarceration to induce the divulgence of the identity of a reporter's source or a fine schedule to compensate the government for continued violation of an injunction is civil, while imprisonment for six days as punishment for failing to appear for trial is criminal. This definition is also susceptible to confusion, since punishments are generally thought to carry a deterrent value, i.e. a

¹¹ *See, International Union, United Mine Workers of America v. Bagwell*, 114 S.Ct. 2552, 2561 (1994) (recognizing the limitations of the mandatory/prohibitory test and rejecting a fourth characterization of civil contempt as an order which contains notice of possible contempt upon failure to comply).

coercive effect. Likewise, the fine or imprisonment exacts a permanent cost to the contemnor, which is hard to characterize as not being punitive.

Because of the shortcomings of these first two contempt delineations, courts implement a third definition of contempt based on the contemnor's ongoing ability to purge the contempt.¹² If a contemnor can purge the contempt, by making the ordered payment or disclosing the requested information, then it is civil. If there is no way to correct the violation, e.g. the contemnor has disrupted the court proceeding, then it is criminal. The ability to purge, though a simple concept, has proved to be an area of difficult and complicated analysis, because civil contempt can become criminal. The Supreme Court has held that civil contempt can become punitive after a certain period of incarceration or above a certain fine, and therefore criminal under the purposive test.¹³ Most courts have equated punitive contempt with contempt imposed despite an *inability to purge*, collapsing the last two delineations into one inquiry.¹⁴ Some lower courts interpret the possibility of a shift from civil to criminal to mean that when there is "no realistic possibility or no substantial likelihood that additional confinement will coerce," continued incarceration will be criminal.¹⁵ Determining the moment at which civil

¹² See Bagwell, *supra* note 11; Local 28 of Sheet Metal Workers' Intern'l. Ass'n v. E.E.O.C., 478 U.S. 421, 444 (1986).

¹³ See *id.*

¹⁴ See Chadwick, *supra* note 4, at 609 (reading *Maggio v. Zeitz*, 333 U.S. 56 (1948) to limit the judicial inquiry for habeas review to ability to comply not willingness to comply).

¹⁵ See, e.g., *Lambert v. Montana*, 545 F.2d 87, 89-91 (9th Cir. 1976); *In re Farr*, 36 Cal.App.3d 577, 584, 111 Cal.Rptr. 649, 653; *Catena v. Seidi*, 65 N.J. 257, 264, 321 A.2d 225, 229; *In re Grand Jury Investigation*, 600 F.2d 420, 425 (3rd Cir. 1979); *Simkin v. U.S.*, 715 F.2d 34, 37 (2d Cir. 1983).

contempt becomes punitive under this test is a practical impossibility, which has led to extensive criticism of the standard both by scholars and courts.¹⁶

The most recent case on point, *Chadwick v. Jenecka*, authored by Judge Alito, rejected the “no substantial likelihood test” for turning on a factor other than inability to comply.¹⁷ Since the decisions in *Chadwick* and *Bagwell*, the ability to purge as an indicator of the purpose has emerged as the dominant approach to defining contempt.¹⁸

B. PROCEDURAL PROTECTIONS

The distinction between criminal and civil contempt became an area of debate and development following the expansion of procedural protections for criminal defendants, because the distinction determines whether or not the contemnor will be guaranteed those new procedural protections.¹⁹ If a contempt is criminal then the contemnor enjoys the right to a full criminal trial by jury, the presumption of innocence, the right to an attorney, the speedy resolution of the matter such that final judgment may be immediately appealed, and the protection against double jeopardy.²⁰ In addition, the Federal

¹⁶ See, e.g. Dour Rendlemand, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor*, 48 Wash & Lee L. Rev. 185, 200 (1991); Linda S. Beres, *Civil Contempt and the Rational Contemnor*, 69 Ind. L. J. 723, 724 (1994); Chadwick, *supra*, note 4.

¹⁷ *Id.* at 608-609

¹⁸ See, e.g., Bradley v. American Household Inc., 378 F.3d 373 (4th Cir. 2004); In re Lucre Management Group, LLC, 365 F.3d 874 (10th Cir. 2004); Kirkland v. Legion Ins. Co., 343 F.3d 1135 (9th Cir. 2003).

¹⁹ Note though that under U.S. v. Wilson, 421 U.S. 309, 318 (1975) and Bloom v. Illinois, 391 U.S. 194, 290 (1968), the summary power is still available in criminal contempt cases where it is deemed necessary, i.e. where there is an immediate need to reassert the court’s dignity and authority, a non-serious contempt at issue, and a maximum penalty of less than six months.

²⁰ Federal Rule of Criminal Procedure, 18 U.S.C. §42.

Sentencing Guidelines limit a court's discretion to impose sentence on a criminal contemnor.²¹

In contrast, a civil contemnor enjoys many fewer safeguards against injustice or error. The civil contemnor must be on notice of his or her contempt and given an opportunity to be heard.²² Though the standards of proof vary slightly from one circuit to another, they can generally all be described as requiring a showing by clear and convincing evidence²³ that the underlying order was valid and clear. Some courts also require that the contemnor be shown to have the ability to comply.²⁴ Others require a finding that the contemnor has not diligently attempted to comply in a reasonable manner.²⁵ The burden of proof is on the contemnor to prove lack of ability to purge the contempt.²⁶ The civil contemnor has no right to a jury determination of these facts.²⁷ For many civil contempts it would seem inefficient to replace the judge, who has been intimately involved in the development of the contempt, with a jury, who is totally unfamiliar with the situation. But even when a district judge is adjudicating the facts of contempt of a magistrate judge and has no direct knowledge of the order and conduct in question, no jury is available. Throughout the hearing process the civil contemnor has no right to counsel.²⁸

²¹ Federal Sentencing Guidelines are issued by the United States Sentencing Commission pursuant to 28 U.S.C. §994(p).

²² Bagwell, *supra* note 11, at 2557.

²³ *Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392, 401 (5th Cir. 1987).

²⁴ *See, e.g.*, *U.S. v. Koblitz*, 803 F.2d 1523, 1527 (11th Cir. 1986).

²⁵ *See, e.g.*, *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995).

²⁶ *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 643 (1988).

²⁷ Bagwell, *supra* note 11 at 2557; *Shillitani v. U.S.*, 384 U.S. 364, 365 (1966).

²⁸ *See Argersinger v. Hamlin*, 407 U.S. 25 (1972).

In addition to the curtailed procedural protections afforded by the initial hearing, civil contemnors also face a more difficult appeals process than criminal contemnors. First there is the difficulty of even securing appellate review. Unlike criminal contempt, civil contempt does not constitute a final judgment for parties to litigation.²⁹ A contemnor must wait until the conclusion of litigation to appeal. Similarly, collateral attack, including habeas corpus, are barred for non-final court orders like civil contempt.³⁰ When a civil contemnor does finally reach the review process the standard is highly deferential.³¹ Only abuse of discretion will invalidate civil contempt on direct review.³² Finally, if a civil contempt expires, either by judicial invalidation or by the contemnor finally complying with the original order, there is no protection against double jeopardy, so the contemnor may be immediately tried for criminal contempt. So for instance, Susan McDougal, who was held in civil contempt for her refusal to testify to the grand jury investigating President Clinton's Whitewater scandal, was released from her incarceration after it expired under the Recalcitrant Witness Statute guidelines, only to be prosecuted and sent back to jail for criminal contempt. It could have been worse for

²⁹ See *International Business Machines Corp. v. U.S.*, 493 F.2d 112, 114, 115 (2d Cir. 1974), cert. denied, 416 U.S. 995 (1974). For non-parties it is the general rule that civil contempt constitutes an immediately appealable final judgment. See *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988).

³⁰ John Palmer, *Collateral Bar and Contempt*, 88 Cornell. L. Rev. 215 (2002).

³¹ See *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1062 (2d Cir. 1995) (recognizing that the district court possesses "broad discretion in fashioning remedies").

³² See Chadwick, *supra* note 4; *Santibanez v. Wie McMahon & Co.*, 105 F.3d 234 (5th Cir. 1995). Note that the scope of review on collateral attack would be governed by Anti-Terrorism and Effective Death Penalty Act, 18 U.S.C. §2254 (1996) and its jurisprudence.

McDougal had she not been covered by the Recalcitrant Witness Statute, which substantially curtails the court's civil contempt powers.³³

C. THE SPECIAL TREATMENT OF RECALCITRANT WITNESSES

For all recalcitrant witnesses in federal grand jury or court proceedings, Title III of the Organized Crime Control Act of 1970³⁴ imposes a limit on the duration of civil contempt incarceration of eighteen months or the length of the underlying proceeding, whichever is shorter. While trial proceedings may often end before the eighteen-month expiration, in the case of grand juries the eighteen-month limit is significant. Grand juries themselves must usually conclude within 25 months; however, they can be reconvened upon conclusion and potentially continue on indefinitely. So the eighteen-month limit on civil contempt incarceration is particularly relevant to grand jury witnesses.³⁵

Although the contempt occurs in court, raising no evidentiary uncertainty as to the ability of a witness to comply, before a contemnor may be incarcerated they have the opportunity in a summary proceeding to show just cause why they refuse to testify. Just cause has excused recalcitrant witnesses in cases where the witness lacked sufficient time to prepare³⁶, was questioned on the basis of illegally collected electronic information³⁷, or

³³ McDougal fared better than other civil contemnors in another respect: President Clinton pardoned her criminal contempt conviction as well as her convictions for fraud during his final days in office.

³⁴ 28 U.S.C. §1826.

³⁵ *See, e.g.*, In re Grand Jury Subpoena, *Duces Tecum*, *supra* note 6.

³⁶ *See* In re Grand Jury Investigation (Bruno), 545 F.2d 385 (3d Cir. 1976).

³⁷ *See* U.S. v. McNulty (In re Askin), 47 F.3d 100 (4th Cir. 1995); Grand Jury v. Gassiraro, 918 F.2d 1013 (1st Cir. 1990).

was questioned outside the scope of their immunity agreement.³⁸ Though some states recognize a journalistic privilege³⁹ the federal interpretation of the First Amendment does not, and journalists are not justified in refusing to testify for the protection of their sources.⁴⁰ Likewise, there is generally no showing of just cause by a recalcitrant witness who refuses to testify out of fear for their safety.⁴¹

In addition to limiting the length of confinement and specifying the available defenses to contempt, the Act also provides for an appeal of the contempt order within thirty days of the order. Because witnesses are non-parties to the underlying proceeding, their contempt would be treated as a final judgment and subject to appeal anyway. The statute provides them with a speedier review process. Finally, Title III also establishes a standard of discretionary bail during appeal.

All of the peculiarities of the treatment of recalcitrant witnesses represent an effort by Congress to treat contemnors relative to the nature of their violation. The Recalcitrant Witness statute is but one part of a web of conscious and unconscious moves to differentiate contempt according to its purpose and character. The criminal-civil distinction is only one such differentiation.

II. RUMBLINGS OF SUBJECT-SENSITIVITY

A. HISTORICAL TREATMENT

³⁸ See *In re Vericker*, 446 F.2d 244 (2d Cir. 1971). Just cause is not satisfied by invoking a Fifth Amendment privilege against self-incrimination for questions within an immunity agreement. See *Kastigar v. U.S.* 406, U.S. 441 (1972); *In re Grand Jury Subpoena*, 97 F.3d 1090 (8th Cir. 1996).

³⁹ See, e.g. Cal. Const., art I, §2, subd. (b).

⁴⁰ See *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972).

⁴¹ See *Androphy*, *supra* note 9, (describing anomalous cases refusing to find contempt in the absence of a direct request by the grand jury foreman in light of the witness' fear for his safety).

The recalcitrant witness legislation is significant as one of two explicit statutory subject-sensitive treatments of civil contempt at the federal level. The first was the culmination of a many centuries debate among jurists and legislators over the use of the summary proceeding against indirect contemnors who questioned the authority of the court by criticizing it in the press. A long history of treating contempt relative to its subject matter has been forgotten in the modern era as scholarship and litigation has focused instead on the distinction between criminal and civil contempt. In the English Common Law and early American jurisprudence the focus of contempt controversy was on the difference between direct and indirect contempt. Direct contempts were generally those that occurred in the physical presence of the court, and therefore warranted only a summary proceeding.⁴² Direct contempt was primarily concerned with reestablishing order in the courthouse after a disturbance, traditionally a disrespectful attorney or an unruly party to the proceedings. Indirect contempts were those committed without the court as witness, and therefore required a more involved finding of fact.⁴³ Indirect contempts were aimed at reaffirming the authority of the court, as say over a mocking editorial, unruly litigants, or a disrespectful attorney.⁴⁴

In the nineteenth century the summary treatment of direct contempt generated heated controversy and eventually led to the impeachment trial of Judge Peck and the

⁴² See *Nye v. U.S.*, 313 U.S. 33, 50-52 (1941); *Sacher v. U.S.*, 343 U.S. 1, 9 (1952) (defining summary proceedings as dispensing with the requirements of notice, service of complaints and answers, hearings, etc.).

⁴³ Bagwell, *supra* note 11, at 2557, n.2.

⁴⁴ See *Almon's Case* (1765), *Wilmot's Notes*, 243.

Contempt of Court Act of 1831.⁴⁵ The U.S. Senate impeached Judge Peck for summarily sentencing an attorney in his court to a night in jail and a fine for publishing an unflattering representation of Judge Peck in a newspaper.⁴⁶ Judge Peck found the publication libelous and punishable by contempt.⁴⁷ In response, Congress passed the Contempt of Court Act of 1831, which limited summary contempt punishments to persons in the presence of the court or “so near thereto as to obstruct the administration of justice.”⁴⁸ These events are significant in that Congress distinguished for the first time between common law authority and inherent authority in contempt. In doing so, Congress approached the question from the perspective that the line could be drawn according to the subject matter of the contempt, i.e. libel was not a contempt necessitating summary proceeding. Today the distinction codified by the 1831 legislation between direct and indirect contempt remains, but is applicable only to criminal contempt, whose procedural requirements are governed by statute.⁴⁹

Since the nineteenth century the legislature and courts have found other ways to limit and expand the contempt power with regard to different subject areas. In the early

⁴⁵ The 1831 legislation remains predominantly intact today as the principle legislative definition of the judicial contempt power as part of 18 U.S.C. §401. *See generally*, SIR JOHN FOX, THE HISTORY OF CONTEMPT OF COURT, OXFORD, (1927) 202-209.

⁴⁶ *Id.* at 202. (A one-vote majority in the House of Representatives acquitted Judge peck).

⁴⁷ *Id.*

⁴⁸ *Id.* at 208 (quoting the Contempt of Court Act of 1831).

⁴⁹ Bagwell, *supra* note 11, could be read to call this into question, too. The court seemed to revive the in court/out of court distinction.

The drift from predicating procedural protections on a civil/criminal distinction rather than a direct/indirect distinction has been gradual, and no case ever completely broke civil contempt apart from the direct/indirect analysis that still applies through the Federal Rules of Criminal Procedure to criminal contempt. Federal Rule of Criminal Procedure, *supra* note 20. Civil contempt proceedings rely on the Federal Rules of Civil Procedure generally, and the requirements of case law in defining which of those procedures apply. It is possible that some civil contempts could be characterized as either direct or indirect in the future.

twentieth century, in response to courts' continued frustration of the labor movement through injunction and contempt, Congress passed the Norris-LaGuardia Act. Rather than limit the contempt power, the act cut even deeper into the court's authority, prohibiting injunctions of labor strikes altogether.⁵⁰ After *Gompers v. Bucks Stove & Range Co.*⁵¹, criminal contempt litigation focused on securing equal procedural protections for those proceedings as for all other criminal prosecutions.⁵²

In *Bagwell*, the court was once again confronting union labor injunctions, in this case so complex and invasive the court deemed them criminal despite the defendant's ability to avoid them.⁵³ Read for all it is worth, *Bagwell* could be interpreted as undermining civil contempt power altogether.⁵⁴ A narrower interpretation would limit *Bagwell* to its facts, or at least its subject. *Bagwell* limited judges' discretion in imposing contempt for violation of far reaching complex injunctions proscribing numerous behaviors over a long period of time and a wide geographical area. These cases present an increased danger of error in the fact-finding process, and therefore require a jury trial and other criminal procedural protections. In this way *Bagwell* can be read as proscribing specific procedural protections for a certain class of injunction. The significance of *Bagwell* then is the move away from the dichotomy of the criminal/civil distinction in determining procedural protections toward a subject-by-subject

⁵⁰ See generally, *Boys Market, Inc. v. Retail Clerks Union*, 398 U.S. 235, 250-252 (1970). The labor movement also gave rise to the distinction between criminal and civil contempt in *Rompers*, *supra* note 10.

⁵¹ *Id.*

⁵² See Margit Livingston, *Disobedience and Contempt*, 75 Wash. L. Rev. 345, 364 (2000).

⁵³ *Bagwell*, *supra* note 11.

⁵⁴ See Livingston, *supra* note 32 (arguing that there may be nothing left of coercive civil contempt in the wake of *Bagwell*).

determination of the guaranteed protections.⁵⁵ Such an interpretation of *Bagwell* would be in keeping with recent developments in the states.

B. STATE TREATMENTS

Like the federal judiciary and legislature, and the English courts and parliament before it, state governments have differentiated contempt on the basis of the subject of the underlying order. In particular, states have been proactive in limiting the judicial sentencing discretion of civil contempt. Three have limited the duration of civil contempt confinement altogether.⁵⁶ Eleven states have limited the maximum length of incarceration in specific areas of contempt.⁵⁷ Of the eleven, most target domestic or family law litigants. Finally, a few states have identified areas of civil contempt which

⁵⁵ *Cf., id.* (decrying the move to a case-by-case adjudication as a disaster in terms of judicial economy).

⁵⁶ *See, In re Neff*, 254 N.E.2d at 38 (holding that in Ohio, when incarceration is a possible sentence, the accused is afforded the rights of a criminal defendant, but is judged under a clear and convincing evidence standard of proof-abuse of discretion not weigh of the evidence standard on appeal); ORS §33.105 (Oregon's six month limit on all remedial contempt incarceration); W.S.A. §785.04 (Wisconsin's six month limit on civil contempt incarceration).

⁵⁷ *See, Cal. Const., supra* note 39; CGSA §46 (Connecticut's six month or five hundred dollar limit on contempt of court sentence for parent/guardian who will not produce the whereabouts of a child for the court); DC St §11-741 (The District of Columbia's twelve month limit in child custody civil contempt was passed in reaction to the case of Dr. Elizabeth Morgan, *supra*); Fla. Stat. 90.5015(4) (2001) (Florida's journalists' privilege); IC 34-46-4 (Indiana's Journalist's Privilege Against Disclosure of Information Source); N.H. Rev. Stat. §265:93-c (New Hampshire courts may sentence civil contemnors for up to six months to bring about compliance for violations of Alcohol Ignition Interlock Program); N.J.S.A. §5:2A-10 (New Jersey limits confinement to eighteen months for refusal to testify before the state's gaming commission); McKinney's Family Court Act §440 (in New York the failure to pay child support may result in 6 month imprisonment; Pa. C.S.A. §4603 (in Pennsylvania, willful disobedience of orders for Relative's Liability may result in up to six months incarceration; V.T.C.A. Family Code §105.006 (Texas's 6 month limit on incarceration for failure to pay support or produce child); V.T.C.A. §21.002 (Texas's eighteen month limit on incarceration); W.Va Code §48 (West Virginia's six month limit to incarceration for civil contempt in domestic relations cases).

require greater procedural protections.⁵⁸ In sum, there seems to be growing consensus that all civil contempts do not warrant the same procedural treatment or threatened length of incarceration. What is missing is a coherent direction of reform. Despite the lack of a nationally articulated policy, the developments have consistently chosen different civil procedure for contempt depending on whether it stemmed from libel, a refusal to testify, a payment delinquency, a failure to obey a structurally complex injunction, or a domestic law dispute. This pattern reflects the ability of the subject matter of contempt to predict the necessary procedural protections.

III. SUBJECT-SENSITIVE TREATMENT

This Article recommends duration limits for civil contempt and procedural protections for civil contempt hearings. In analyzing how contempt implicates procedural due process concerns, the risk of error, the legitimacy of the proceedings, and the correlation between the severity of the deprivation and the protections guaranteed are all-important factors. Legitimacy, both the litigants and to the public at large, is of particular concern in the case of civil contempt, since it is the preservation of the court's authority that justifies the proceedings. Because of the coercive goal of civil contempt is to coerce, the discussion of the impact of the proposal considers psychological impacts as well. The Article suggests that the right to counsel may be introduced to civil contempt

⁵⁸ See McKinney's Family Court Act §440 (In New York there is a right to counsel at the hearing to determine contempt for the failure to pay child support); N.H. Rev. Stat. §265:93-c (New Hampshire applies a preponderance of the evidence standard for violations of the Alcohol Ignition Interlock Program contempt proceedings); *cf.* In re Neff, *supra* note 36 (holding that Ohio limits summary proceedings to thirty day sentences) while this is not a subject-sensitive treatment, it does indicate a hesitancy on the part of courts to impose long-term incarceration for civil contempt on litigants who are not afforded procedural protections.

proceedings as much to ensure rigorous advocacy and adjudication as to provide stubborn litigants with reasonable advice about their decision to disobey the court. In proposing alternative procedures the Article also tries to anticipate new costs incurred by their adoption.

A. CHILDREN

Unlike other litigation, the main goal of child custody proceedings is to secure the best possible outcome not for the adversaries, but for the child in question. Therefore, civil contempt in child custody battles is appropriately characterized as remedial only to the extent that it helps the child, not the parent. In determining what procedures and incarceration lengths should accompany the refusal to produce a child for adjudication, the child's interests frame the discussion.

Contempt proceedings due to the failure of a parent to present a child for custody cases do not present difficult factual determinations. If the contemnor were to argue that they could not produce the child there might be a factual determination. However, a parent refusing to produce a child is not arguing that they are unable to do so or that they are not supposed to do so, but that they are unwilling to do so.⁵⁹ The fact that they have not complied with the court's order is clear. The risk of error is extremely low, and does not justify increasing procedural protections.

At the same time, child custody cases, especially those in which one parent refuses to cooperate, are characterized by bitter and emotional battles. Parties' disappointment upon final judgment is likely to be acute. To the extent that they help to legitimize proceedings, greater procedural protections might therefore be warranted.

⁵⁹ See Morgan, *supra* note 6 (Morgan refused to bring her daughter to court, because she alleged the child's father was abusive).

While generally the deprivation associated with civil contempt incarceration is not thought to be as severe as criminal incarceration, because contemnors “carry the keys of their prison in their own pockets,”⁶⁰ in the case of child custody there is the deprivation to the child to consider as well. On the one hand, if civil confinement is the most effective way of coercing the parent into producing the child, allowing custody hearings to continue, and facilitating a resolution, then curtailed proceedings are appropriate. But civil contempt is effective because most contemnors would rather cooperate than spend more time in jail. An embattled custody litigant may be less rational in their decision-making. The normal calculus of weighing liberty against compliance is shifted, because of the extreme emotional context of the litigation. So the term of incarceration may end up being longer for these contemnors.⁶¹ As long as the parent-contemnor is incarcerated the child in question will be away from both parents and in a state of uncertain guardianship. In addition the other parent is left helpless as well. Unlike many remedial situations, the cost to both the child and the non-custodial parent grows as the contempt continues. Unlike other contempt situations, this harm may be irreparable. So in the case of parental guardianship disobedience contempt may fail both to coerce and to remedy. Because of civil contempt’s diminished value to the court in these cases the justification for curtailing procedural protections and permitting the threat of indefinite incarceration is weaker.

⁶⁰ Penfield Co., *supra* note 1.

⁶¹ *See, e.g.*, Morgan, *supra* note 6 (the contemnor stated she would wait until her daughter reached the age of maturity before disclosing her whereabouts, and eventually spent more than two years in jail before Congress intervened); Civil Contempt in the District of Columbia Courts, S. Rep., *supra* note 5.

The emotional distortion in the contemnors' decision making and the cost to the innocent parties may be mitigated by added procedural protections. While there is no right to appointed counsel generally in child custody suits, in the case of child custody contempts a court appointed attorney or arbiter would be appropriate, not as an advocate, but as an advisor. Counsel should only be guaranteed for the civil contempt hearing. Because the guarantee would be so limited because of the rarity of civil contempt incarceration for this reason and the infrequency of indigence in these circumstances, the resulting costs would not be overly burdensome. The benefit of having a dispassionate and knowledgeable person available to the offending parent to advise them of their rights and legal options outweighs the cost incurred in the provision of such counsel, especially if the court can avoid lengthy incarceration which is itself very costly.

As exemplified by the position of Dr. Morgan, civil contempt in these child custody cases has a natural expiration at the child's age of maturity, and is therefore not actually indefinite at all.⁶² The younger the child, the longer a parent would have to remain incarcerated to avoid compliance with the court.⁶³ Likewise, the younger the child, the greater the developmental harm inflicted by the deprivation of parental guardianship. Finally, the younger the child and the longer the incarceration for disobedience, the greater the deprivation to the other parent. Therefore the timing of the expiration is directly related to the harm being inflicted by the incarceration and the

⁶² See, e.g. Morgan, *supra* note 6 (Though Morgan was released upon Congressional intervention before her civil contempt would have expired, had she not been aided by Congress, she would have been released upon the eighteenth birthday of her daughter).

⁶³ Note that a civil contemnor may be tried for criminal contempt upon the expiration of the civil contempt confinement, and so incarceration may continue beyond the child's maturity.

contempt on the child and the innocent parent. Therefore, the current limit on judicial discretion in deciding the duration of incarceration is appropriate.

B. MONEY

Unlike the case of disobedient custodians, the court would derive no benefit if contemnors who fail to pay fines, hand over assets, or properly comply with court ordered payments where guaranteed counsel. If a contemnor could prove their indigence, then they could also prove an inability to comply with the court order. Having a court appointed attorney help them prove that fact does not help the court coerce or remedy as the appointment of counsel to a disobedient parent might. No third party suffers an injury as a result of the contempt. Only the interests of the litigants and authority of the court are at stake.

The contempt hearing for failure to pay monetary fines, judgments, or settlement or hand over or disclose assets to the court, does potentially involve more difficult questions of fact than in the case of child custody. As opposed to contemnors in custody suits, litigants who fail to obey the court's monetary demands are more likely to plead an inability to comply.⁶⁴ Sometimes there is a difficult factual determination to be made, increasing the risk of error and the justification for greater procedural protections. One possible added protection could be lowering the burden of proof for the contemnor claiming inability to comply. Civil contemnors must overcome the presumption of capacity. They can rebut the presumption that they are able to comply by a showing of clear and convincing evidence, which is higher than the preponderance of the evidence

⁶⁴ See Armstrong, *supra* note 6 (despite numerous judicial findings to the contrary, Armstrong argued he was unable to comply with the order, because the money in question was no longer under his control).

standard generally applied in civil cases. The contemnors in question are either in post-conviction proceedings, bankruptcy proceedings, or family law delinquencies. So the subject have either been convicted of a crime beyond a reasonable doubt after a full jury trial or have voluntarily submitted to the court's authority. Unlike criminal defendants, the court is already certain that the contemnor is in violation of an order. There is no need for a presumption of innocence; disobedience is a matter of fact. However, a preponderance of the evidence standard is appropriate. Only the ability of the court to coerce compliance is in question. If it is unclear that the contemnor can comply then he or she should not be incarcerated.

Another appropriate response to the risk of error would be the guarantee of a jury hearing on the question of ability to comply. As with criminal proceedings, there need not be a right to jury adjudication for a term of incarceration of less than six months. However, if after six months of incarceration has elapsed, the contemnor still refuses to cooperate, a jury should review the availability of funds or assets for compliance. Parents failing to pay child support, debtors failing to turn over assets to a bankruptcy court, and convicted criminals failing to pay fines are far less sympathetic than parents trying to protect their children, witnesses afraid of retribution, or journalists protecting sources. Judges are more likely to over-react to these contemnors' undermining their authority. The risk of abuse of discretion is higher. So a jury determination is more appropriate here both to determine difficult questions of fact and to avoid misuse of the contempt power. The sixth months in custody may affect the contemnors' ability to fulfill their monetary obligations, so a rehearing of capacity is appropriate. This six month incarceration for refusal to pay debts to the court would serve as the "temporal

benchmark” Judge Alito requested in *Chadwick*.⁶⁵ The administrative cost to the court of a jury determination is significant. Therefore the jury trial should only be available to a contemnor once, like habeas corpus review. Like habeas corpus, only a material change in circumstances would warrant judicial permission for a rehearing. The cost of this procedural guarantee is significantly reduced, because so few contemnors choose to stay in prison rather than comply for more than six months. At the same time, even a few outliers can create significant burdens on the court through multiple appeals⁶⁶, so the limit to the availability of multiple hearings is crucial. It may be that the hope of a jury’s sympathy will convince more contemnors to wait out the six-month period. However, given the culpability and social disapprobation that accompanies the behavior of most of these contemnors, a jury’s sympathy is far from guaranteed. After a jury finds that the contemnor is still coercible, sentencing falls to the judge, who retains the discretion to impose an indefinite term, subject to appeal.

A second protection against the risk of error is an increased ease of appeal. In the current federal approach contemnors cannot appeal their contempt until after resolution of the underlying litigation.⁶⁷ Because monetary contemnors’ ability to comply is more effected by the passage of time than other kinds of civil contempt, their ability to appeal their holdings is of greater value to them. On the other hand, it has been noted that the ability to appeal also diminishes the full power of the indefinite sentence, because the hope of release before compliance is kept alive.⁶⁸ A second, related problem with easing appeal of civil contempt is that, unlike criminal contempt, the appeals could be

⁶⁵ See *Chadwick*, *supra* note 4.

⁶⁶ See *id.*

⁶⁷ This circumstance is most relevant for bankruptcy contemnors, because child support, divorce settlement and post-conviction contemnors are all defying final adjudications.

⁶⁸ See *Chadwick*, *supra* note 4.

inexhaustible. With criminal conviction there are only guarantees of a single attempt at direct and collateral review. It would be unreasonable to impose the same absolute limit to civil contempt, because of the continuing possibility of an inability to comply. Therefore the availability of appeal must reflect a balance of the risk of error, the diminished coercive impact of indefinite incarceration, and the cost to the court in allowing constant appeal.⁶⁹ The initial summary finding by the judge of contempt should be appealable immediately; likewise with the six month jury finding. These early appeals should be subject to an abuse of discretion and “no reasonable jury” standards, respectively. Then as proposed above, after these initial appeals there may be an opportunity for future review, but only upon a showing material change in situation. The passage of time alone would be insufficient to warrant review. However, because civil contemnors’ ability to comply is likely to change over time, the presumption against the materiality of new evidence should be eased over time. A greater availability of appeal should also ameliorate concerns about the legitimacy of the summary proceeding to the contemnor and the potential of abuse by a judge frustrated by their defiance.

The availability of an indefinite term of incarceration should be maintained to preserve the coercive power of contempt for failure to make court ordered payments or property disclosures. The greater availability of a jury and an appeal adequately protect against abuse of judicial discretion in finding contempt. Similarly, the changing weight of the presumption against appeal over time protects against abuse of judicial discretion in sentencing. Because of these procedural protections, the availability of the threat of indefinite incarceration is apposite.

⁶⁹ See Armstrong, *supra* note 6.

C. CRIMINAL EVIDENCE/IDENTIFICATION

The third and final category presents the most difficult set of policy objectives to balance. Grand jury and criminal trial witnesses are necessary sources of evidence, and there is great social value in securing their testimony. Unlike other contemnors, however, these witnesses are not in court voluntarily or as the result of allegedly unlawful conduct. These witnesses are third parties to litigation. So to an even greater extent than was true of the child custody contemnors, their coercion does not effect a remedy for a wrong they have committed against an opposing party, but only ensures the authority of the court and the adjudication of the underlying matter. Currently these witnesses fall within the purview of the Recalcitrant Witness Statute, and their incarceration for civil contempt is limited to eighteen months or the duration of the underlying proceedings, whichever is shorter.⁷⁰

Like the child custody contemnors, uncooperative witnesses do not present difficult issues of fact, because their ability to testify is not at issue. So risk of error is not of great concern in the analysis. A witness could easily testify that they did not know the answers they were being asked to answer without repercussion, so long as that was true. The risk of factual error is transferred to the obstruction of justice, perjury, or criminal contempt proceedings that can follow either the close of the underlying litigation or the witness's testimony. These witnesses are caught between the threat of perjury and the consequence of answering a prosecutor's question's truthfully. Understanding the unenviable position of witnesses against the mob, Congress passed the Recalcitrant Witness Act as part of organized crime legislation. The limit on duration created by the

⁷⁰ Recalcitrant Witness Act, *supra* note 2.

act is not limited to witnesses against the mob, but extended to all witnesses who refuse to testify, including journalists refusing to divulge the identity of their sources⁷¹ and witnesses protecting defendants from prosecution.⁷²

Like the monetary contemnor, the recalcitrant witness is making a mental calculation about the cost of testifying to themselves or those they care about as compared to their freedom.⁷³ As with the child custody contemnors, this is a difficult and complicated decision with lasting costs that go beyond a monetary loss. A journalist who reveals the identity of his or her sources in a leak investigation, loses the future trust of confidential sources, thereby jeopardizing future reporting. A witness to a crime risks the retribution of the criminal against whom they are testifying, especially if the defendant is a member of a mob, gang or criminal organization. Considering the gravity of the choices before the witness and their role as a third party in the criminal litigation, the situation warrants a jury determination of the contempt. Unlike monetary contemnors, witnesses do not present ongoing questions of fact, so a single adjudication by a jury after six months of incarceration is adequate. The jury's role in evaluating the witness' violation is to weigh the costs and benefits to society as a whole at stake in the adjudication. They must consider the cost to the court's authority, the cost of not pursuing prosecution of the underlying matter, and the cost to the individual witness. If the jury determines that the individual benefit of not testifying outweighs the social cost

⁷¹ *See, e.g.*, In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1138 (2006) (upholding the incarceration of New York *Times* reporter, Judith Miller for her refusal to divulge the confidential sources).

⁷² *See* In re Grand Jury Subpoena, *Duces Tecum*, *supra* note 6.

⁷³ So after four months in prison, Judy Miller chose to cooperate with authorities and testify about the sources of her reporting; in contrast Susan McDougal spent the full eighteen months behind bars and then faced criminal contempt and obstruction of justice charges due to her non-compliance upon her release.

of disobedience then they may limit the incarceration to punishment for criminal contempt. There would not be an added administrative cost for the jury determination, because they would also be determining criminal contempt in the process of evaluating the civil contempt.

Like contemnors of child custody disputes, recalcitrant witnesses do not change in their ability to comply over time, but there is a natural expiration for their contempt. When the underlying proceeding to which the contemnor is a witness is resolved, then they can no longer be held in contempt. As noted above, this is only partially true in the case of grand juries, which can be reconvened over and over, effectively keeping a contemnor indefinitely. However, it is hard to imagine a prosecution investing the resources that a grand jury requires simply to continue to coerce a witness. Presumably a prosecutor would only decide to do so, if the underlying prosecution and the witness' testimony were of utmost importance to the state. In this respect, like custody contemnors, the term until natural expiration of a recalcitrant witness' contempt is directly proportional to the harm inflicted on the innocent party. So, as was the case with custody contemnors, recalcitrant witnesses do not require a statutorily imposed limit to duration.

D. FORESEEABLE CRITICISMS

The proposal to treat contempt according the subject and goal of the underlying court order is susceptible to a number of criticisms. First, it may be argued that a simpler solution would be to limit to a stated term, for example six months, and then let the courts fall back on criminal contempt proceedings.⁷⁴ Criminal contempt is simpler than civil

⁷⁴ See *In re Grand Jury Subpoena, Duces Tecum*, *supra* note 6.

contempt for courts and juries to understand because the elements of coercion peculiar to each subject would not be at issue. It provides finality to the litigation cutting down on the cost to the court of ongoing motion practice and appeals, while affording full criminal procedural protections. On the other hand the coercive power of the threat of indefinite duration would be lost. Perhaps even more importantly, the remedial power would be squandered as well. A contemnor would only have to wait six months to forever deprive their adversary of the remedy they deserve, after which they would benefit from the limiting power of the sentencing guidelines and procedural protections. In other words, the cost of incarceration would still be incurred without the benefit.

Second, the right to increased procedural protections or shorter incarceration depending on the subject matter of the contempt makes the determination of the category of contempt much more valuable to litigants. This creates the question of what procedural protections apply to the determination of what category of contempt the contemnor is a member. The question could be simplified by having the categorization of the contempt be determined as part of the original order as opposed to after violation. The procedures governing that order would therefore not be part of the contempt proceedings.

Finally, the new protections and incarceration limits might encourage more civil contempt. On the one hand, the availability of a jury or speedy appeal should not make much difference to the vast majority of contemnors, who comply within a matter of weeks, because they would not become eligible for such new benefits until after six months of incarceration or more. On the other hand it was the anomalous and particularly stubborn cases that reveal the shortcomings of the current system and

inspired previous reforms and this Article in the first place. In the case of parents hiding their children from the court, the addition of an advisory counsel is designed to decrease the likelihood of contempt. In the case of informational contemnors, the Recalcitrant Witness Act already limits incarceration to eighteen months or the length of the underlying proceeding. This proposal might actually *increase* the possible length of incarceration for many such contemnors, further discouraging rather than encouraging contempt. This criticism is therefore most applicable to the cases of monetary contempt. On the one hand the availability of a jury and the lowering of the burden of proof on the contemnor might encourage continued violation in hope of vindication without compliance. On the other hand, these contemnors are the least sympathetic category, so the probability of jury commiseration is low. In addition, the availability of appeal, though immediate is then subsequently limited. So to the extent a monetary contemnor entertains hopes of escaping compliance, those hopes should be short-lived.

CONCLUSION

The subject sensitive treatment of civil contempt represents the culmination of centuries' worth of development in this area of the law. This new treatment is emerging because it accomplishes the coercive and remedial goals of civil contempt while affording the greatest possible respect for the civil liberties and procedural rights of litigants and parties interest. The balance between the court's authority, the parties' fortunes, and the greater societal concerns at stake can be more accurately calibrated with this subject-sensitive approach.