Wyoming Law Review

Volume 3 | Number 1 Article 5

January 2003

Civil Contemnors, Due Process, and the Right to a Jury Trial

Deborah J. Zimmerman

WYOMING LAW REVIEW

VOLUME 3 2003 NUMBER 1

CIVIL CONTEMNORS, DUE PROCESS, AND THE RIGHT TO A JURY TRIAL

Deborah J. Zimmerman

INTRODUCTION 205
A BRIEF HISTORY OF CONTEMPT 207
Definitions 207
Appeal of Contempt Judgments 211
Common Law History 212
Legislative History 212
A SHIFTING PARADIGM IN CONTEMPT CASE LAW 214
THE ASSAULT ON TRADITIONAL CONTEMPT 218
The Coercive Civil Contempt Saga of Dr. Elizabeth Morgan 218
Congress Weighs In: Changes to D.C. CODE ANN. § 11-741 219
Rationales for Summary Adjudication of Contempt 221
Reasons to Require Jury Trials for Civil Contemnors 223
The Importance of Bagwell: A New Test to Distinguish Civil from Criminal Contempt 228
A REASONABLE PROPOSAL 229
CONCLUSION 231

INTRODUCTION

Since the Fifth[1] and Fourteenth[2] Amendments to the United States Constitution guarantee that a person cannot be "deprived of life, liberty, or property, without due process of law," it would seem to follow that under these precepts a person cannot be incarcerated indefinitely without being granted a trial by jury. However, the case of Dr. Elizabeth Morgan proves that this is not always true. Dr. Morgan divorced her husband, Dr. Eric Foretich, in 1983, and the court awarded her temporary custody of their

1. U.S. CONST. amend. V.
2. U.S. CONST. amend. XIV, § 1.

daughter Hilary, with visitation rights to Dr. Foretich.[3] Dr. Morgan soon suspected that her ex-husband sexually abused the girl.[4] After four years of hearings and testimony by dozens of experts, a judge ordered the visits to continue, finding the evidence of sexual abuse "in equipoise."[5] In August 1987, the judge granted the child's father a two-week unsupervised visit, so Dr. Morgan had her parents smuggle Hilary out of the United States, then refused to tell the judge where she hid the girl.[6] The judge held Dr. Morgan in civil contempt of court and ordered her jailed until she told the court where Hilary was located.[7] Dr. Morgan remained jailed for more than two years, consistently refusing to disclose her daughter's whereabouts to the court.[8] At no time was she eligible to have her case heard by a jury.[9]

The question that arises from cases such as Dr. Morgan's is whether civil contemnors should be entitled to the due process protections of a jury trial. Court decisions have postulated four reasons for allowing judges to punish contempts without a jury trial. First, civil contemnors "carry the keys of their prison in their own pockets."[10] Second, courts and judges need the power to deal summarily with contempt, especially contempt committed in the presence of the court or near to it, because contempt may obstruct the administration of justice.[11] Third, because courts derive their power from the people, contempt against the court is an insult to the authority of the people, so the court may use its contempt power as a way to compel the contemnor to submit to the court's authority.[12] Fourth, requiring a court to submit the question of a party's disobedience to another court or to a jury would deprive a proceeding of its efficiency.[13]

However, there are five compelling reasons to entitle civil contemnors to the protections of the jury trial system. First, in cases of coercive civil contempt, persons who could be held indefinitely should be entitled to the due process protections of a jury trial.[14] Second, because contempt citations and their consequences are seen as punishments, this is inconsistent

---

3. JONATHAN GRONER, HILARY'S TRIAL: THE ELIZABETH MORGAN CASE: A CHILD'S ORDEAL IN AMERICA'S LEGAL SYSTEM, 66-75 (1991).

4. David J. Harmer, *Limiting Incarceration for Civil Contempt in Child Custody Cases*, 4 BYU J. PUB. L. 239, 257 (1990).

5. *Id.* at 267.

6. GRONER, *supra* note 3, at 228-32.

7. *Id.* at 220.

8. *Id.* at 268.

9. Harmer, *supra* note 4, at 263-64.

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

11. *See* Michaelson v. United States, 266 U.S. 42, 66 (1924).

12. *See* Watson v. Williams, 36 Miss. 331, 341 (Miss. 1858).

13. *See* In re Debs, 158 U.S. 564, 595 (1895).

14. *See* Harmer, *supra* note 4, at 266 (claiming coercive civil contempt gives judges too much power to imprison a person without the usual checks and balances of the justice system).

with judicial power, which should be neutral.[15] Punishment is a function of the executive branch of government.[16] Third, the United States Supreme Court has ruled that any incarceration for criminal contempt over six months' duration triggers the right to a jury trial; the same protection should apply to civil contempt.[17] Fourth, short-tempered or thin-skinned judges may abuse the contempt power because they are human and may make mistakes when they become emotionally involved in a situation, or when they perceive that their authority is being challenged.[18] Fifth, if the power of the court emanates from the people, then the people in the form of a jury should decide if the contempt citation was properly issued.[19]

This article argues that civil contemnors are entitled to the due process protections of a jury trial where incarceration lasts longer than eighteen months. Part II provides the history and background of the contempt power. Part III discusses the U.S. Supreme Court's shifting interpretation of contempt powers. Part IV shows how an assault on traditional contempt has limited the contempt power over time. Part V proposes that civil contemnors be granted a jury trial if their incarceration lasts longer than eighteen months. Part VI concludes that state and federal district courts should recognize a civil contemnor's right to a jury trial because recent United States Supreme Court decisions show the Court's preference for due process for contemnors.

A BRIEF HISTORY OF CONTEMPT

Definitions

Contempt of court is any act calculated to embarrass, hinder, or obstruct a court in administration of justice, or which is calculated to lessen the authority or dignity of the court.[20] There are four different classifications of contemptuous acts. First, contempts may be broadly classified as direct or indirect.[21] Direct contempts consist of "disruptive or disrespectful behavior committed in the presence of the court or so near to the court's presence as to disrupt the administration of justice."[22] Indirect contempts occur outside the court's presence, such as disobeying a court order to stay away from a

15. *See* Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 815 (1987) (Blackmun, J., concurring); *Id.* at 825 (Scalia, J., concurring).

16. *Id.* at 816 (Blackmun, J., concurring).

17. *See* Bloom v. Illinois, 391 U.S. 194, 211 (1968).

18. *See* Harmer, *supra* note 4, at 249-50 (citing the example of a judge who jailed and fined an assistant district attorney who merely responded "I don't believe this" when the judge ruled against her motion).

19. *See* Watson v. Williams, 36 Miss. 331, 341 (Miss. 1858).

20. *See* BLACK'S LAW DICTIONARY 319 (6th ed. 1990).

21. *See* Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 349-51 (2000).

22. *Id.* at 349.

place or person.[23] Second, contemptuous acts may be either civil or criminal.[24] Sanctions for criminal contempt punish the contemnor and vindicate the authority of the court, and are therefore punitive in nature.[25] Civil contempt sanctions are remedial in nature and benefit the complainant.[26] While these definitions seem simple enough, they do not reveal the complexity and the nuances inherent in the contempt issue. Even the United States Supreme Court has admitted that "[c]ontempts are neither wholly civil nor altogether criminal. . . . [A] particular act . . . may partake the characteristics of both."[27]

Judges may still summarily punish direct criminal contempts if the offense is petty.[28] This is allowed for two reasons. First, protections of a jury trial generally balance the interest of the accused against the resources of the state.[29] If the judge personally witnessed the contumacious conduct, little additional evidence needs to be presented.[30] Second, summary procedures are necessary for an orderly adjudication process.[31] For these two reasons, a judge may immediately punish the direct contemnor for his or her disobedience.[32] The punishment may be a determinate prison sentence or a fixed monetary fine, which is paid to the court.[33] The criminal contemnor may not avoid imprisonment or the fine by performing an affirmative act.[34]

In contrast, indirect criminal contempts occur outside the presence of the court, and are of the type of which the court has no knowledge.[35] Because the judge does not have personal knowledge of the facts of an indirect contempt, the accused is entitled to the constitutional protections afforded in any criminal trial, including the right to a jury for serious violations resulting in serious sanctions.[36] Indirect criminal contempts include acts of disobey-

---

23. *Id.* at 351.
24. *Id.* at 347.
25. *See* Joel M. Androphy & Keith A. Byers, *Federal Contempt of Court*, 61 TEX. B.J. 16, 18 (1998).
26. *Id.*
27. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911).
28. *See* Livingston, *supra* note 21, at 350.
29. *Id.*
30. *Id.*
31. *Id.* (noting that a judge should not be required to interrupt the current trial in order to hold a separate contempt proceeding).
32. *Id.* at 347.
33. *See* Androphy, *supra* note 26, at 26 (stating that "[i]mprisonment and/or fines are the traditional forms of sanctions imposed in both civil and criminal contempt proceedings").
34. *Id.* at 18 (discussing how a coercive civil contempt sanction may be avoided by obeying the court's order, but the criminal contempt sanction is intended to be punitive).
35. Philip A. Hostak, *International Union, United Mine Workers v. Bagwell: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 CORNELL L. REV. 181, 186 (1995).
36. *See* Livingston, *supra* note 21, at 353-54. Other required criminal procedure protections for criminal contemnors are the privilege against self-incrimination, the right to counsel, the presumption of innocence, and proof of guilt beyond a reasonable doubt. *Id.*

ing the court's writs and orders, such as violating an injunction issued by the court.[37] In 1968, the United States Supreme Court held that all criminal contemnors are entitled to a jury trial if the contempt is not a petty offense.[38]

On the other hand, civil contempts are imposed on the contemnor to benefit the complainant.[39] Civil contempts may be either remedial or coercive.[40] Remedial civil contempt sanctions compensate plaintiffs for damages suffered because of the contemnor's disobedience of a court order.[41] For example, if a court orders a defendant not to sell a disputed tract of land until its ownership is determined and the defendant sells it anyway, the judge may order remedial sanctions in the amount to compensate the plaintiff for the value of the property.[42]

In comparison, courts impose coercive contempt sanctions to pressure the civil contemnor into complying with a court order that she has refused to obey.[43] If a civil contemnor refuses to obey a court-ordered injunction, the court may impose per diem fines or imprisonment until she complies.[44] Civil contempt fines are paid to the complainant.[45] However, the central characteristic of a coercive civil contempt sanction is that the contemnor may end the sanction by obeying the court order.[46] This is why courts often quote the adage that civil contemnors "carry the keys of their prison in their own pockets."[47] Civil contemnors have no constitutional right to a jury trial, although they do receive the due process protections of notice and a hearing.[48]

---

37. *Id.* at 358. Congress limited the power of judges to punish those who criticized them by passing legislation allowing contempt citations only for misbehavior in the presence of the court, disobeying writs or orders, and contumacious conduct by court officers. *Id.*

38. *See* Bloom v. Illinois, 391 U.S. 194, 211 (1968) (noting that the Supreme Court has not drawn an exact line between petty and serious crimes, but if a crime is punishable by up to two years in prison, it is not a petty offense).

39. *See* Livingston, *supra* note 21, at 351-52.

40. *Id.* at 351.

41. *Id.*

42. *Id.* at 351-52.

43. *See* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 442 (1911) (stating that imprisonment for civil contempt is "intended to be remedial by coercing the defendant to do what he had refused to do.").

44. *See generally* Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 829 (1994) (discussing a court's ability to impose either coercive imprisonment or fines to force a contemnor to obey a court order).

45. *See* Livingston, *supra* note 21, at 352. Remedial civil contempt fines are another form of damages paid to the plaintiff, which he must prove in order to collect as in any other form of damages. *Id.*

46. *Id.*

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

48. *See* Jacqueline G. Miller, *Authority of the Trial Judge*, 80 GEO. L.J. 1412, 1423 (1992).

The difficulty lies in distinguishing between criminal and civil contempt. Some of the problem stems from the fact that contumacious acts from criminal cases could lead to either civil or criminal contempt and vice versa.[49] Until recently, courts used the test adopted in the *Gompers* case, which focused on character and purpose of the sanctions imposed.[50] Taken literally, the *Gompers* test determined civil or criminal contempt based on whether the court phrased the order in mandatory or prohibitory terms.[51] If the defendant refused to do an affirmative act required by a court order, it was an act of civil contempt.[52] If the defendant did something the court commanded him not to do, however, it was an act of criminal contempt.[53] The Supreme Court gave as an example the case of a striking union.[54] If the union members disobeyed an injunctive order that said, "Go back to work," it would be considered civil contempt because the court order mandated a specific act.[55] However, if the union disobeyed an injunctive order that said, "Do not strike," it would be a criminal contempt because the court intended to prohibit an act.[56]

Unfortunately, the character and purpose test is amorphous and unhelpful in many cases. This is because the court did not address more substantive concerns, such as the conduct itself, due process requirements, or the potential for arbitrary or biased rulings.[57] The confusion over contempt classification is apparent when reading cases regarding contempt. Even the United States Supreme Court has admitted that contumacious acts are "neither wholly civil nor altogether criminal,"[58] and sanctions may include elements of both civil and criminal contempt.[59] This article, however, will show that changes in court interpretation of contempt law, including an expanded test to distinguish civil from criminal contempt, provides hope of expanded due process protections for civil contemnors.[60]

---

49. *See* Androphy, *supra* note 25, at 18 (noting that in some cases, a single act of contempt could result in both civil and criminal contempt sanctions).

50. *See* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911) (stating that "[i]t is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases").

51. *See* Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 835 (1994).

52. *See Gompers*, 221 U.S. at 442.

53. *Id.*

54. *See Bagwell*, 512 U.S. at 835.

55. *Id.*

56. *Id.* But the Court stated that these distinctions were sometimes difficult to apply, especially if the court order contained both mandatory and prohibitory provisions. *Id.*

57. *See generally* Hostak, *supra* note 35, at 185-87 (describing how Bobby Seale was bound and gagged in court to prevent more contumacious outbursts).

58. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911).

59. *See* Poston v. Poston, 502 S.E.2d 86, 91 (S.C. 1998).

60. *See* Hostak, *supra* note 35, at 221-22 (stating that the Bagwell decision can "be the new paradigm by which contempt is understood, one that brings the contempt power in line with contemporary notions of procedural fairness").

Appeal of Contempt Judgments

Appealing a contempt citation may not provide an accused contemnor with sufficient procedural protections.[61] The right to appeal varies with the type of contempt judgment against a person.[62] An order judging a person in criminal contempt is a final judgment and therefore subject to immediate appeal.[63] This applies regardless of whether the contemnor is a party or non-party to the case.[64] Judgments of civil contempt against non-parties are generally final and appealable immediately.[65] Civil contemnors under the recalcitrant witness statute are entitled to an appeal within 30 days of the contempt filing.[66] Nevertheless, because courts consider other civil contempt citations interlocutory, they may not be challenged on appeal until judgment is final.[67] Although many civil contemnors eventually appeal their sentences, appellate courts "tend to treat trial court contempt convictions with great deference."[68] Some appellate courts do not even consider the question of whether the alleged conduct was truly contumacious.[69] Instead, they merely determine whether the judge abused his discretion.[70] The standard of review for civil contempt is the "clearly erroneous" standard.[71]

The result of this narrow appeal procedure is that appellate judges assume that the trial judge's actions and assessments of the contemnor's acts are fair, accurate, and unbiased.[72] Although these assumptions may be true for most cases, extra care must be taken to assure that all contemnors have access to an unbiased party to determine the appropriateness of a contempt sentence.[73] Under these circumstances, the only way to assure a civil contemnor of his Constitutional guarantees of due process and equal protection is to give him the right to have his case heard by a jury.[74]

---

61. *See* Harmer, *supra* note 4, at 253-54 (pointing out that although most judges are fair, restrained and impartial, accused contemnors require procedural due process protections against those judges who are prejudiced).
62. *See* Androphy, *supra* note 25, at 27.
63. *Id.*
64. *Id.*
65. *Id.*
66. 28 U.S.C. § 1826(b).
67. *See* Androphy, *supra* note 25, at 27.
68. *See* Harmer, *supra* note 4, at 253.
69. *Id.*
70. *Id.* (stating that most judges are allowed broad discretion in pursuing contempt citations).
71. *See* Androphy, *supra* note 25, at 27.
72. *See* Harmer, *supra* note 4, at 253 ("From what judges have attempted and have done in times past . . . we may draw some pretty shrewd conclusions as to what, if unchecked, they may attempt, and may do, in times present." (citation omitted)).
73. *See id.*
74. *Id.* at 272.

Common Law History

Judicial theories allowing courts a power similar to modern contempt have been found in the legal code of the Roman Emperor Justinian.[75] In early English law, the power of contempt emanated from the King. Because courts were considered representatives of the King, the King was presumed to be present and being personally contemned.[76] There were no constraints on punishments and contemnors not only suffered indefinite jail terms, but also sometimes forfeited property, suffered dismemberment, and were summarily executed.[77] Regarding the basis for authorizing the contempt power, legal scholars point to the assertion in Blackstone's commentaries that all contempts were tried summarily at common law.[78] However, Sir John Fox refuted the validity of this assertion based on numerous authorities dating back to the thirteenth century.[79] In fact, Fox found the sole reference to summary contempt power in an undelivered opinion by Justice Sir John Eardley-Wilmot in a case known as *The King v. Almon*.[80] Assuming this is true, modern contempt power in the United States may be traced back to the judicial philosophies of only two men: Wilmot and Blackstone.[81] Regardless of this scant authority, the summary power to punish contempt migrated to the United States with the British colonists and the common law judicial system.[82]

Legislative History

Congress has periodically passed legislation affecting courts' ability to wield the contempt power. The Judiciary Act of 1789 conferred on federal courts the power to punish contempts, thereby giving judges the right to impose sanctions for contempt of court from nearly the inception of our constitutionally-based system of government.[83] Additionally, the due process clauses of the Fifth[84] and Fourteenth[85] Amendments to the United States Constitution limit the contempt power indirectly by requiring a hearing, if not a full jury trial, in most legal proceedings.[86] In 1914, the Clayton Act[87]

---

75. *Id.* at 245-46.
76. *See* Hostak, *supra* note 35, at 186-87.
77. *Id.*
78. *Id.* at 188.
79. *Id.*
80. *Id.*
81. *Id.*
82. *See* Hostak, *supra* note 35, at 189. Hostak compares the contempt power of American courts to the image of Athena springing full-grown and armor-clad from the head of Zeus. *Id.* Similarly, courts in this country were vested with the contempt power the moment they were formed. *Id.*
83. Judiciary Act of 1789, § 17, 1 Stat. 73, 83 (1789).
84. U.S. CONST. amend. V.
85. U.S. CONST. amend. XIV, § 1.
86. *See* Hostak, *supra* note 35, at 190.
87. Clayton Act, §§ 21-22, 38 Stat. 730 (1914).

allowed federal criminal contemnors the right to a jury trial if the contumacious act was also a criminal offense under state or federal law.[88] The Norris-LaGuardia Act of 1932[89] curbed contempt powers by limiting a court's power to issue and enforce injunctions in private sector labor disputes.[90]

The current federal statute governing contempt is 18 U.S.C. § 401, which grants federal courts the power to cite a person or entity for general contempt.[91] The broad wording of the statute has led to an enormous amount of litigation.[92] The applicable section of the code states:

> A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . . (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.[93]

The statute therefore gives courts sole authority to punish any misbehavior of persons under the authority of the court without requiring due process protections of a jury trial.[94] It is important to note that this section only applies to federal courts. Each state has its own laws regarding contempt, so any federal changes to the code would not necessarily affect persons held in contempt in state courts.[95]

There is no analogous statute governing general acts of civil contempt.[96] However, 28 U.S.C. §1826, often referred to as the federal recalcitrant witness statute, limits imprisonment for coercive civil contemnors under certain circumstances.[97] This statute comes into play whenever a witness

---

88. *See* Michaelson v. United States, 266 U.S. 42, 70 (1924).
89. Norris-LaGuardia Act, § 4, 47 Stat. 70 (1932).
90. *See* Int'l Union, United Mine Workers v. United States, 330 U.S. 258, 270-73 (1947).
91. 18 U.S.C. § 401 (2002).
92. *See* Livingston, *supra* note 21, at 345-46 (noting that courts have struggled with the boundaries of the contempt power since the beginning of our country, and there is still confusion regarding its appropriate usage).
93. 18 U.S.C. § 401.
94. *See* Livingston, *supra* note 21, at 345-46
95. *See* Harmer, *supra* note 4, at 269 (explaining that the Congressional bill to free Dr. Elizabeth Morgan would not affect most other child custody contempt cases, since Congress can pass laws that apply only to federal courts, and child custody cases must be brought in state courts).
96. *See* Androphy, *supra* note 25, at 25. Before a court can impose civil contempt sanctions based on violations of a court order, the court only needs to prove: (1) the court order was valid and lawful; (2) the order was clear and unambiguous; and (3) the contemnor had the ability to comply with the order. *Id.*
97. 28 U.S.C. § 1826(a).

before a United States court or grand jury refuses to testify or provide other information without just cause.[98] The judge may then summarily order the witness confined until the witness changes his mind.[99] The statute states:

> No period of such confinement shall exceed the life of – (1) the court proceeding, or (2) the term of the grand jury including extensions, before which refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.[100]

Under this statute, incarceration for civil contempt is limited to no more than eighteen months, but only for certain contumacious acts.[101] Therefore, current statutory law does not guarantee civil contemnors the protections of due process unless the contumacious act fits within the statutory description.[102]

A SHIFTING PARADIGM IN CONTEMPT CASE LAW

Contempt convictions have resulted in a great deal of litigation because of the uncertain nature of contempt, based on the similarities between criminal and civil contempt. Moreover, because of the ambiguities in the purpose and character test, accused contemnors have heavily litigated the issue of determining the difference between civil and criminal contempt. Over the last one hundred years there has been a gradual change in contempt law, mostly accomplished by the United States Supreme Court's interpretation of the law. A review of these cases shows the interpretation of contempt law evolving to require more due process protections for both civil and criminal contemnors.

One of the first important cases regarding coercive civil contempt was *In re Nevitt* in 1902.[103] In *Nevitt*, the United States District Court for the Western District of Missouri ordered the judges of the county court of St. Clair County, Missouri, to levy a tax on the citizens of the county.[104] The levy was necessary to pay a money judgment against the county stemming from a lawsuit regarding the validity of bonds issued by the county.[105] The county judges refused to levy the tax, so the court held them in civil contempt and ordered them incarcerated until they obeyed the order.[106] The county judges appealed the contempt charge to the Eighth Circuit Court of

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. 117 F. 448 (8th Cir. 1902).
104. *See id.* at 449.
105. *Id.*
106. *Id.*

Appeals, which denied their petition.[107] In its decision, the Eighth Circuit was the first court to use the phrase that has almost become a mantra regarding coercive civil contempt. This is the belief that coercive civil contemnors "carry the keys of their prison in their own pockets."[108] The Court of Appeals refused to release the county court judges, declaring, "The law will not bargain with anybody to let its courts be defied for a specific term of imprisonment. . . . [E]ach is detained until he finds himself willing to conform."[109]

In 1911, the United States Supreme Court enunciated its first test for determining whether a contumacious act constituted a civil or criminal violation in *Gompers v. Buck's Stove and Range Company*.[110] In *Gompers*, a labor union boycotted a company because of alleged unfair labor practices.[111] The trial court issued first a temporary, and then a permanent, injunction forbidding the union from boycotting or disseminating information to the public regarding the allegations made against the company.[112] When union members violated the injunction, the company requested that the court hold the members in contempt.[113] The court did so and sentenced three of the offenders to jail terms ranging from six to twelve months.[114] The Supreme Court declared that differences between civil and criminal contempts are not determined by the punishment (in this case, a jail sentence), but rather by the "character and purpose" of that punishment.[115] The Court stated that in criminal contempt proceedings, an accused contemnor is entitled to more substantial rights and constitutional privileges than is a civil contemnor.[116] The Supreme Court then reversed and remanded the case back to the trial court because it found that the court had imposed punitive criminal contempt sentences on a civil contempt complaint.[117]

Fourteen years after *Gompers*, the Supreme Court interpreted the Constitution as requiring greater protections for contemnors whose acts occurred away from open court, or indirect contempts. In *Cooke v. United States*,[118] a trial judge convicted an attorney of contempt in a summary proceeding after the attorney wrote a letter to the judge and accused him of bias and unfairness toward the attorney's client.[119] The Supreme Court determined that because the contumacious act did not occur in open court, the

107. *Id.* at 460.
108. *Id.*
109. *Id.*
110. 221 U.S. 418 (1911).
111. *See id* at 441.
112. *Id.* at 420-21.
113. *Id.* at 422-23.
114. *Id.* at 424-25.
115. *See id. at* 441.
116. *Id* at 444-45.
117. *Id.* at 452.
118. 267 U.S. 517 (1925).
119. *See id.* at 533-34.

accused attorney was entitled to have advance notice of charges made and be given a reasonable opportunity to defend against them under due process considerations.[120] Chief Justice Taft wrote in the Court's decision that "the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt. . . . [T]he court cannot exclude evidence in mitigation."[121]

The trend toward granting more due process protections to contemnors faced a setback in 1966, when the Supreme Court approved indefinite imprisonment as an appropriate coercive measure for civil contemnors who refused to testify as witnesses in a grand jury proceeding.[122] Salvatore Shillitani was called as a witness in a grand jury proceeding, but refused to answer questions regarding drug dealing, even though he was granted immunity in exchange for his testimony.[123] The judge imprisoned him for two years or until he agreed to answer questions in the grand jury proceedings.[124] Shillitani appealed, contending his punishment was for criminal contempt and he was denied a jury trial.[125] The Court determined that the contempt was civil in nature based on the conditional and coercive nature of the imprisonment.[126] The Court justified the coercive imprisonment without a jury trial "provided that the usual due process requirements are met."[127] However, in a precursor to the Federal Recalcitrant Witness Act, the Court ruled that the definite two-year sentence was improper because a contumacious witness cannot be held after the grand jury has been discharged.[128]

Only two years later, however, the Supreme Court granted greater protections to criminal contemnors.[129] *Bloom v. Illinois* involved an attorney sentenced to two years in prison for contempt because he knowingly filed a false will with the probate court.[130] He demanded, but was refused, a jury trial.[131] For the first time, the Supreme Court determined that a criminal contempt is a crime in every essential aspect and therefore no difference exists between criminal contempt and other serious crimes.[132] The Court briefly discussed the history of criminal contempt cases and determined "This course of events demonstrates the unwisdom of vesting the judiciary with completely untrammeled power to punish contempt, and makes clear

120. *Id.* at 537.
121. *Id.* at 538.
122. Shillitani v. United States, 384 U.S. 364, 371 (1966).
123. *Id.* at 365-66.
124. *Id.* at 366-67.
125. *Id.* at 365.
126. *Id.* at 369-70.
127. *Id.* at 371.
128. *See id.*
129. *See* Bloom v. Illinois, 391 U.S. 194 (1968).
130. *Id.* at 195.
131. *Id.*
132. *Id.* at 201-02.

the need for effective safeguards against that power's abuse."[133] Therefore, the Court ruled that in order to protect against "arbitrary exercise of official power," a criminal contemnor who may be subject to a lengthy jail term must have the protections of the Constitution, including a jury trial.[134]

Most recently, the Supreme Court expanded the *Gompers* "character and purpose test" into a five-pronged analysis for determining if a contemptuous act is civil or criminal. In *International Union, United Mine Workers v. Bagwell*, striking miners violated a court injunction that set out guidelines for picketing and forbade disruptive and destructive actions by the striking workers.[135] After numerous violations of the injunction, the court announced a fine schedule for future infractions in an attempt to enforce the injunction.[136] When the strike ended, the union owed $64 million in fines for violations of the injunction – $12 million to the companies and the rest to the Commonwealth of Virginia representing law enforcement costs.[137] In the settlement agreement both parties agreed to vacate the fines, but the Virginia Supreme Court held that the fines payable to the state could not be vacated because they were for the benefit of the public, not the companies.[138]

The United States Supreme Court enunciated a new test, listing five factors to examine in order to determine if a contumacious act is civil or criminal in nature. The five factors are 1) *Gompers'* character and purpose test; 2) whether or not a purge clause exists; 3) whether the injunction violated was complex or simple; 4) whether the sanction imposed was petty or serious; and 5) the existence of state legislation regarding contempt sanctions.[139] A purge clause means the contemnor may avoid or reduce additional fines or imprisonment by subsequently obeying the court order.[140] The Supreme Court found that the *Gompers* test was not determinative, but did find that the union could not purge the contempt.[141] The court issued a complex injunction, the fines were serious and there was no state legislation.[142] Therefore, the fines were criminal in nature because the union was denied due process by the trial court's imposition of a criminal sanction.[143] Virginia therefore could not collect the fines awarded it under the injunction.[144]

---

133. *Id.* at 207.
134. *Id.* at 201-02.
135. 512 U.S. 821,835-38 (1994).
136. *See id.* at 824.
137. *Id.*
138. *Id.* at 825-26.
139. *Id.* at 835-38.
140. *Id.* at 828-29.
141. *See Bagwell*, 512 U.S. at 828-29.
142. *Id.*
143. *Id.* at 838-39.
144. *Id.* at 839.

THE ASSAULT ON TRADITIONAL CONTEMPT

In order to determine if civil contemnors should be entitled to a jury trial, the validity of the rationales for denying jury trials must be analyzed. First, this article examines the Congressional act passed in response to one woman's civil contempt incarceration. Second, this article will examine the rationales courts have given to allow summary adjudication of contempt. Third, the changing philosophy of the Supreme Court in its interpretation of the law will be discussed. Fourth, a discussion of the reasons compelling jury trials will be analyzed. Fifth, this article discusses implementation of a proposed jury trial system for civil contemnors.

The Coercive Civil Contempt Saga of Dr. Elizabeth Morgan

As stated in the introduction, Dr. Elizabeth Morgan endured twenty-five months imprisonment for coercive civil contempt and was not eligible for a jury trial.[145] Judge Herbert Dixon, Jr., confined Morgan on three separate occasions for violating Foretich's visitation rights with their daughter Hilary.[146] Morgan produced child psychologists and other experts to testify that they believed Hilary had been sexually abused by her father, but Foretich supplied experts of his own refuting the other experts' testimony.[147] In August 1987, Judge Dixon ordered a two-week unsupervised visit because he found the evidence of abuse "in equipoise."[148] Soon after, Morgan's parents fled to Great Britain and then to New Zealand with Hilary, and Morgan began serving her coercive civil contempt sentence.[149]

The only statute regarding coercive civil contempt under federal law is the Federal Recalcitrant Witness Act.[150] This provision, however, does not protect persons who defy court orders for reasons other than those expressly included within the statute. Morgan is an example of a civil contemnor who did not fall under the protection of this statute. She was not a recalcitrant witness; she was in contempt for refusing to produce her daughter for a court-ordered visitation with the child's father because she wanted to protect the girl from alleged sexual abuse.[151] In Morgan's mind, defying the

145. *See* Harmer, *supra* note 4, at 239-40.
146. *See* GRONER, *supra* note 3, at 229.
147. *Id.* at 139. Child advocates and supporters of Morgan were incensed by Judge Dixon's visitation order after his "equipoise" statement. *See* Harmer, *supra* note 4, at 267. Some asked analogous questions, such as, "If you thought you had a 50-50 chance of being raped on the way to the movies, would you go?" *Id.*
148. *See* GRONER, *supra* note 3, at 218-30.
149. *Id.* at 251-53.
150. 28 U.S.C. § 1826(a).
151. *See* Harmer, *supra* note 4, at 240.

authority of the court and remaining in prison was the only way to guarantee her daughter's safety.[152]

At least three powerful arguments may be made for entitling civil contemnors in Morgan's situation to a jury trial. First, Judge Dixon presided over the entire child custody battle and he did not believe and/or excluded evidence of sexual abuse.[153] Second, at some point the judge ordered the case to be under seal and barred all reporters from the courtroom, so only participants in the proceeding knew what occurred in the court.[154] Although this was done to protect Hilary's privacy because she was a minor,[155] it prevented neutral parties from assessing Judge Dixon's fairness in deciding the facts in the case.[156] Third, Morgan's long incarceration appeared to be due to vindictiveness on the part of Judge Dixon, who seemed incensed that Morgan would defy his orders for such a long time.[157] Indeed, one unidentified D.C. Superior Court judge admitted that the rule of thumb was that if a civil contemnor had not been coerced into compliance within six months, he would never relent.[158] Nevertheless, after Dr. Morgan had already been in jail for fifteen months Judge Dixon denied a petition to release her, stating, "[T]he coercion has only just begun . . . . It could be a year, it could be more than that" before he would believe that Morgan would not relent.[159] Although Judge Dixon only may have been doing his job as he saw fit, he arguably became personally involved in the case, requiring an independent review of his decisions regarding Morgan's contempt incarceration.[160] Although the purpose of the Court of Appeals was to review such decisions, this court could only determine whether Judge Dixon properly applied the law to the case, not reassess the findings of fact.[161]

Congress Weighs In: Changes to D.C. CODE ANN. § 11-741

In response to Morgan's plight, Congress decided to step into the controversy.[162] Bills limiting coercive civil contempt incarceration were

152. *See* GRONER, *supra* note 3, at 234.
153. *See* Harmer, *supra* note 4, at 259. On appeal, the Fourth Circuit Court of Appeals found that Judge Dixon abused his discretion by excluding evidence that Dr. Foretich's other daughter, Heather, also showed signs of sexual abuse, finding this evidence "highly relevant to disputed issues in this case." *Id.*
154. *Id.* at 260 (stating that a former attorney general of Maryland complained that because reporters were barred from the court, the public did not know the strength of Dr. Morgan's evidence).
155. *See* GRONER, *supra* note 3, at 92.
156. *Id.* at 218-19.
157. *See* Harmer, *supra* note 4, at 263 (characterizing the contempt sanctions against Morgan as a "dispute" between her and Judge Dixon).
158. *Id.* at 262.
159. *Id.* at 263-64.
160. *See* GRONER, *supra* note 3, at 161.
161. *Id.* at 146-47.
162. *See* Harmer, *supra* note 4, at 269.

introduced and passed in both the House and Senate in 1989 and President George H.W. Bush signed the District of Columbia Civil Contempt Imprisonment Act of 1989 on September 23, 1989.[163] This law only applied to persons incarcerated for civil contempt in child custody proceedings in the courts of the District of Columbia.[164] It allowed a person to be prosecuted for criminal contempt after six months' incarceration for civil contempt and limited civil incarcerations without criminal prosecutions to twelve months.[165] No person could be held pending criminal trial for more than eighteen months based on the civil contempt charge.[166] A person thus prosecuted could request a trial by jury.[167] If imprisoned for contempt, the contemnor could request and be given an expedited appeal to the D.C. Court of Appeals within sixty days of such request.[168]

Although the statute applied to any civil contemnor in a child custody case, the new law directly affected only one person: Dr. Elizabeth Morgan.[169] Two days after the President signed the Act into law, Morgan was released from jail.[170] Private detectives located Hilary in Christchurch, New Zealand, in February 1990, and both Foretich and Morgan flew there to continue the custody and visitation battle.[171] Eventually, Morgan moved to Christchurch to keep Hilary (now called Ellen) under the jurisdiction of the more child-friendly New Zealand courts.[172]

Congress cannot change the law of contempt across the nation because each state has the power to promulgate its own laws regarding contempt.[173] However, by passing this act, Congress made a very strong, clear policy statement that it disapproves of unlimited coercive imprisonment of persons without due process protection of a jury trial, at least in custody cases.[174] Given that Congress felt so strongly about due process for a civil contemnor in a child custody case, one might infer that all civil contemnors should be afforded the same protections.[175]

---

163. *Id.* at 276.
164. D.C. CODE ANN. § 11-741 (Supp. 2001).
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *See* Harmer, *supra* note 4, at 273. Many judges were critical of this bill, accusing Congress of getting involved in judicial matters, and called it "private justice" for Morgan. *Id.* at 277. However, other observers were more critical of the way judges handle coercive contempt and therefore favored the legislation. *Id.*
170. *Id.* at 277.
171. *See* GRONER, *supra* note 3, at 270-71.
172. *Id.* at 252, 275.
173. *See* Harmer, *supra* note 4, at 278-79.
174. *Id.* at 276.
175. *Id.* at 278-79.

Rationales for Summary Adjudication of Contempt

The first reason courts often give for denying civil contemnors the protection of a jury trial is that under coercive civil contempt, these contemnors "carry the keys of their prison in their own pockets."[176] This reasoning assumes that the contemnor is being purposefully stubborn to anger the court, not that there may be valid reasons for failure to comply.[177] For example, the Sixth Circuit Court of Appeals held that a person is not justified when refusing to testify under the "just cause" provisions of the Federal Recalcitrant Witness Statute merely because he fears for his own safety or the safety of others.[178] The court relied on dicta from *Piemonte v. United States*[179] that such concerns did not provide a legal basis for refusal to testify.[180] The Supreme Court stated in a footnote to *Piemonte* that the man's testimony was required for an investigation in the public interest, and his fear for himself and his family was not a valid excuse from testifying.[181] This reasoning is troublesome. Although the government's interest in investigating possible crimes and uncovering the truth in an investigation is important, it is arguably not worth the lives of innocent family members.[182] Requiring such persons to testify presents these witnesses with a true Hobson's choice – their only options being a coercive prison sentence or someone's death.[183] In cases such as this, a jury should determine if the contemnor's information is important enough to require possible long-term incarceration to force her to testify. If the jury finds imprisonment justified, the witness may still sit in jail for up to eighteen months for refusing to testify, but his due process rights will have been preserved.

A second reason used by courts to deny a civil contemnor a jury trial is that courts and judges need the power to deal summarily with contempt to avoid obstruction of justice.[184] Although certain direct contempts should be decided summarily, most of these arguably would fall under the petty criminal contempt category.[185] For example, outbursts in the courtroom and other behaviors that impair the ability of the court to perform its duties should be adjudicated immediately, but various commentators agree that these acts

176. *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902).
177. *See* Harmer, *supra* note 4, at 256 (theorizing that any person ordered to take a "morally repugnant" action would not be able to comply with an order that violated her moral beliefs).
178. In re Grand Jury Investigation, 922 F.2d 1266, 1272 (6th Cir. 1991).
179. 367 U.S. 556, 560-61 (1961).
180. *See In re Grand Jury Investigation*, 922 F.2d. at 1272 (stating that "fear for the safety of one's self or others is not a ground for refusing to testify" (citation omitted)).
181. *See Piemonte*, 367 U.S. at 560-61.
182. *Id.* at 564.
183. *See* Harmer, *supra* note 4, at 240.
184. *See* Michaelson v. United States, 266 U.S. 42, 66 (1924).
185. *See* Androphy, *supra* note 25, at 20 (explaining that summary contempt sanctions are only justified "where there is a need for immediate vindication of the court's dignity and authority").

would be considered criminal contempt offenses. [186] A long-term coercive civil contempt sentence, such as the type imposed on Morgan, does not address the problem of obstruction of justice by contemnors refusing to obey court orders.[187] Instead, many observers argue that long-term incarcerations such as hers create disrespect for the law because such imprisonments show "disregard of humane concerns."[188] One way of regaining respect for the law is to allow persons summarily jailed for civil contempt a trial by jury, perhaps under similar guidelines as those passed by Congress in the District of Columbia Civil Contempt Imprisonment Act or 1989.[189]

The third argument is that courts derive power from the people and that contempt against the court is an insult to the authority of the people.[190] Proponents of this argument reason that the court must use its power of contempt to compel the contemnor to submit to the court's authority.[191] This, however, is actually an argument for allowing jury trials to civil contemnors, because if the authority for contempt is derived from the people, then a jury trial is needed to allow the people to decide the case on its merits.

The fourth argument is that a jury trial for accused contemnors makes court proceedings inefficient.[192] The Supreme Court's reasoning for this statement is that because a court has power to order a person to do something, the court must also have the power to punish disobedience.[193] In *Debs*, the Court wrote: "This is no technical rule. In order that a court may compel obedience to its order it must have the right to inquire whether there has been any disobedience thereof."[194] Although this has been a basis for denying a jury trial to criminal contemnors since it was first written, constitutional considerations of justice under the Sixth Amendment guarantee a jury trial for all criminal prosecutions.[195] However, until *Bloom* was decided in 1968, the Supreme Court consistently ruled that it was constitutional to punish criminal contempt without a jury trial because it "was considered essential to the proper and effective functioning of the courts and to the ad-

186. *See* Livingston, *supra* note 21, at 350 (stating that "direct contempt is undoubtedly criminal in nature," but does not require a full criminal trial).

187. *Id.* at 397 (noting that most judges believe that coercive fines and jail sentences will quickly compel contemnors to obey their orders, but that a given segment of contemnors refuse to comply for a variety of reasons).

188. Harmer, *supra* note 4, at 266 (criticizing coercive civil contempt because it gives judges sole power to "deprive a citizen of liberty without the usual checks from a prosecuting attorney, a grand jury, and a jury").

189. *See id.* at 278.

190. *See* Watson v. Williams, 36 Miss. 331, 341 (Miss. 1858).

191. *Id.* at 341-42.

192. *See* In re Debs, 158 U.S. 564, 595 (1895).

193. *See id.* at 594 (explaining that "the power of a court to make an order carries with it the equal power to punish for a disobedience of that order" and it is the duty of that court to investigate and punish disobedience).

194. *Id.* at 595.

195. U.S. CONST. amend. VI.

ministration of justice."[196] The Supreme Court in *Bloom* reversed its position, and opined:

> The rule of our prior cases has strong, though sharply challenged, historical support; but neither this circumstance nor the considerations of necessity and efficiency normally offered in defense of the established rule, justify denying a jury trial in serious criminal contempt cases.[197]

Therefore, although the practice of summary judgment for criminal contemnors had strong historical support, the Court determined that the Constitution required a jury trial.[198] This ruling indicated that the Court finally agreed that for criminal contumacious acts that would result in serious penalties, a jury trial was mandated by the provisions of the Sixth Amendment.[199]

Reasons to Require Jury Trials for Civil Contemnors

Although prior court rulings have ruled that civil contemnors do not have a right to a jury trial prior to incarceration, there are compelling reasons for changing this precedent. Several of these reasons come directly from the Constitution itself, under theories of due process, separation of powers, and the right to a jury trial.

The first reason civil contemnors should be allowed protection of a jury trial is because without it, civil contemnors could be held indefinitely without being afforded due process. For example, Jacqueline Bouknight spent over seven years in jail for refusing to produce her son, Maurice Miles, for the Baltimore City Department of Social Services (BCDSS) as required.[200] A juvenile court gave BCDSS jurisdiction over Maurice because hospital personnel treating the boy for severe injuries suspected Bouknight of child abuse.[201] When cited for civil contempt for failure to produce her son for BCDSS workers as required by the juvenile court, Bouknight invoked her Fifth Amendment right against self-incrimination.[202] She argued that by producing Maurice, she would admit to control over his person and thereby subject herself to possible criminal prosecution.[203] Although she

196. Bloom v. Illinois, 391 U.S. 194, 196 (1968).
197. *See id.* at 198-99.
198. *Id.*
199. *Id.* at 210-11.
200. Paul W. Valentine, *Woman, Jailed for Contempt, Freed After 7 Years; Mother Failed to Reveal Son's Location*, WASH. POST, November 1, 1995, at D1.
201. Baltimore City Dep't of Soc. Serv. v. Bouknight, 493 U.S. 549, 552-53 (1990). The evidence showed that Maurice was hospitalized with a broken left leg when he was only three months old, and he had several other partially healed bone fractures. *Id.* Additionally, nurses observed Bouknight shaking Maurice and dropping him into his crib. *Id.*
202. *See id.* at 553.
203. *Id.* at 554.

claimed that her refusal to produce Maurice was because she did not want to have her son placed in an abusive foster home similar to the one in which she grew up, Maryland prosecutors believe that Bouknight invoked her Fifth Amendment right because her abuse resulted in Maurice's death.[204]

Juvenile court Judge David Mitchell held a series of hearings where Bouknight was repeatedly asked to produce Maurice. First she claimed that he was with an aunt in Baltimore, then with relatives in Dallas.[205] Finally, Bouknight insisted that she put Maurice in the care of a woman named "Rachael Anderson," but police investigations failed to find such a person.[206] Judge Mitchell ordered Bouknight jailed for contempt until she produced her son or revealed his location to the court.[207] Judge Mitchell rejected her claim that producing Maurice would violate her guarantee against self-incrimination, stating that the imprisonment was because she refused to obey a lawful order of the court.[208] The Maryland Court of Appeals vacated the contempt order, determining that if Bouknight produced Maurice, then she showed a measure of control over his person under circumstances which might lead to her prosecution.[209] BCDSS requested a writ of certiorari to the United States Supreme Court, which granted both the writ and a stay of the judgment of the Court of Appeals.[210]

The Supreme Court reversed the Court of Appeals, stating: "The Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purpose unrelated to the enforcement of its criminal laws."[211] That ruling meant that Bouknight had to turn Maurice over to the BCDSS or stay in jail until she complied.[212] She never obeyed.[213] In October 1995, BCDSS moved to release her and Judge Mitchell granted the motion after Bouknight spent more than seven years in jail, apparently deciding that if she had not yet relented, she never would.[214] Although her unusual use of the Fifth Amendment as a defense to a civil contempt sanction allowed her to appeal the contempt cita-

---

204. *See* Valentine, *supra* note 201.
205. Kate Shatzkin, *Obscured by Fuss of Bouknight Case; Little Boy Lost: The Legal Questions in the Case of Jacqueline Bouknight Threaten to Obscure the Small Boy Whose Whereabouts She Has Refused to Reveal for Seven Years*, BALT. SUN, Oct. 31, 1995, at 1A [hereinafter *Obscured*].
206. Kate Shatzkin, *Bouknight Calls Jailing 'Something I Had to Do'; She Says She Saved Son From Foster Care,* THE BALT. SUN, Nov. 2, 1995, at 1B.
207. *See id.*
208. *See* Baltimore City Dep't of Soc. Serv. v. Bouknight, 493 U.S. 549, 553-54 (1990).
209. *Id.* at 554.
210. *Id.*
211. *Id.* at 556.
212. *See* Valentine, *supra* note 201.
213. *Id.*
214. *Id.*

tion, she was never eligible for a jury trial.[215] Even though her circumstances were less sympathetic than those of Morgan, Bouknight's civil contempt incarceration bothered persons concerned with her due process rights.[216] Interestingly, Bouknight did not argue that the length of her incarceration entitled her to a jury trial or other due process protections.[217] This may be because she had been in prison less than two years by the time the Supreme Court decided the case.[218] However, her oversight means that the Supreme Court has not recently considered the question of due process requirements for long-term incarceration of civil contemnors.[219]

The second reason civil contemnors should be entitled to jury trials was described by Justice Scalia in his concurring opinion in *Young v. United States ex rel. Vuitton et Fils, S.A.*[220] Justice Scalia stated that courts have only the "task of neutral adjudication"[221] and should not, on their own initiative, prosecute crimes in the form of contempt citations.[222] The Founding Fathers carefully designed prosecution as a function of the Executive Branch of government.[223] Justice Scalia makes his most compelling arguments by discussing the effect *Bloom* had on the contempt powers:

> [Contempt power] must be restrained by the totality of the Constitution, lest it swallow up the carefully crafted guarantees of liberty . . . . While this principle may have varying application to the jury-trial and separation-of-powers guarantees, it is inconceivable to me that it would not prevent so flagrant a violation of the latter as permitting a judge to promulgate a rule of behavior, prosecute its violation, and adjudicate whether the violation took place.[224]

Young was another case of criminal contempt, but Justice Scalia's reasoning is valid for civil contempt cases as well. All contemnors must receive due process in prosecutions of their cases, the exception being for "orders necessary to protect the courts' ability to function."[225] Arguably, this exception refers only to direct criminal contumacious acts, committed in

---

215. *See* Harmer, *supra* note 4, at 280 (arguing that if persons such as Bouknight are suspected of crimes, then prosecute them for those crimes instead of relying on coercive civil contempt sanctions).
216. *Id.*
217. *See* Baltimore City Dep't of Soc. Serv. v. Bouknight, 493 U.S. 549, 553-54 (1990).
218. *Id.*
219. *See* Livingston, *supra* note 21, at 398-99.
220. 481 U.S. 787, 815-25 (1987) (Scalia, J., concurring).
221. *Id.* at 816 (Scalia, J., concurring).
222. *See id.* (Scalia, J., concurring).
223. *Id.* at 817-18 (Scalia, J., concurring).
224. *Id.* at 824 (Scalia, J., concurring).
225. *Id.* at 815 (Scalia, J., concurring).

the courtroom to disrupt proceedings.[226] All other contempts deserve full constitutional protections.

Third, civil contemnors should be entitled to a jury trial because the Supreme Court in *Bloom* decided that serious criminal contempts should be granted full due process protections.[227] The Court opined, "[D]ispensing with the jury in the trial of contempts subjected to severe punishment represents an unacceptable construction of the Constitution," and this rationale applies with equal force to civil as well as criminal contempts.[228] For example, Bouknight had been imprisoned nearly two years when the Supreme Court heard her case.[229] The Court focused its decision on the Fifth Amendment question and barely discussed the effect of the civil contempt sanctions, even though its decision resulted in a long-term coercive incarceration for Bouknight.[230] Had the Court considered the matter based on due process considerations, it might have decided the case in a manner similar to *Bloom*.

In *Bloom*, the Court overturned a long line of cases when Justice White, writing for the majority, stated:

> Our deliberations have convinced us, however, that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the states, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial.[231]

The Court thereby distinguished serious from petty contempts and determined that a jury trial is needed if the contempt citation would result in serious sanctions.[232] This ruling should apply equally to civil contemnors. Since the Supreme Court overruled more than 65 years' worth of *Debs'* precedent in *Bloom*, perhaps it will take only a similar case for the Court to determine that civil contemnors are also entitled to jury trial protection if the penalty is too severe.

The Supreme Court rulings in both *Bloom* and *Bagwell* show that the Court is slowly moving toward requiring full due process rights to all

---

226. *See* Livingston, *supra* note 21, at 350.
227. *See* Bloom v. Illinois, 391 U.S. 194, 198-200 (1968).
228. *Id.* at 198.
229. *See* Valentine, *supra* note 201.
230. *See* Baltimore City Dep't of Soc. Serv. v. Bouknight, 493 U.S. 549, 561-62 (1990).
231. *Bloom*, 391 U.S. at 198.
232. *See id.* (stating "serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution," and traditional criminal contempt rules are unconstitutional).

accused contemnors.[233] Civil contempt jury trials could be justified under either the Sixth or Seventh Amendment since "[c]ontempts are neither wholly civil nor altogether criminal."[234] Additionally, if the Court were to rule that federal civil contemnors are entitled to jury protections under either of these amendments, it would only take a small step to hold that states would be required to provide jury trials as well under the due process and equal protection clauses of the Fourteenth Amendment.[235]

The fourth reason civil contemnors should be entitled to a jury trial is because of the contempt power's potential for abuse.[236] Attorneys and other parties may fear that a judge could abuse her power to punish a party she dislikes, or control the proceedings in a way that prevents a party from fully presenting his case.[237] The Supreme Court recognized the potential for abuse in *Bloom*, stating:

> Over the years in the federal system there has been a recurring necessity to set aside punishments for criminal contempt as either unauthorized by statute or too harsh. This course of events demonstrates the unwisdom of vesting the judiciary with completely untrammeled power to punish contempt, and makes clear the need for effective safeguards against that power's abuse.[238]

The Court thereby recognized the potential for abuse in the contempt power and the need to regulate punishments based on criminal contempt citations.[239]

The fifth argument for jury trials is that courts derive power from the people, therefore contempt against the court is an insult to the authority of the people.[240] This argument actually provides a compelling reason to allow jury trials for civil contemnors. If courts in the United States derive their power from the people, then the people in the form of a jury should determine whether an act, or a refusal to act, is contemptuous. The judge is impartial, and does not usurp the power of the people.

---

233. *See* Hostak, *supra* note 35, at 182.
234. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911).
235. *See* Livingston, *supra* note 21, at 390-91.
236. *See* Harmer, *supra* note 4, at 249-50 (stating that some judges have even held court spectators in contempt for failure to rise when the judge entered the courtroom).
237. *See* Livingston, *supra* note 21, at 351 (noting concern by some attorneys that judges could use the contempt power to "stifle that individual's expression in the courtroom.").
238. *See* Bloom v. Illinois, 391 U.S. 194, 206-07 (1968).
239. *Id.*
240. *See* Watson v. Williams, 36 Miss. 331, 341 (Miss. 1858).

The Importance of Bagwell: A New Test to Distinguish Civil from Criminal Contempt

The Supreme Court in *Bagwell* nearly completed a paradigm shift in how the Court views summary adjudication of contempt.[241] The expanded five-pronged test effectively shifted many contumacious acts from civil to criminal classification, resulting in more due process protections for the alleged contemnor.[242] Although the new test addressed some of the due process concerns and alleviated many concerns about judicial bias and arbitrary rulings, it only addressed concerns about the actual conduct of the contemnors indirectly.[243]

The *Bagwell* test retained the *Gompers* character and purpose test, but minimized the importance of the "mandatory/prohibitory" distinction.[244] Instead, the Court chose to focus on the increased complexity of injunctive orders and the need for "elaborate and reliable factfinding (sic)"[245] to determine that one judge should not be the sole arbiter of a serious penalty against an alleged contemnor.[246] The seriousness of the sanction therefore also became a determining factor in the classification of the contumacious act.[247]

The Court also required a purge clause in order to prove the classification as civil contempt.[248] Civil sanctions must be immediately purged if the defendant and plaintiff settle the underlying dispute.[249] Because civil contempt sanctions are for the benefit of the complainant, there is no longer behavior by the defendant that need be coerced once the dispute is resolved.[250]

The general effect of the *Bagwell* decision is to classify more cases of contempt as criminal rather than civil.[251] The *Bagwell* decision is also important because it determined that violations of complex court orders would usually be treated as criminal instead of civil contempt citations.[252] However, this reasoning would generally not pertain to simpler court orders, such as the child visitation order at issue in Morgan's case.

---

241. *See* Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 838-39 (1994).
242. *See* Livingston, *supra* note 21, at 347-48.
243. *See id.* (explaining that prior court decisions have failed to adequately identify the policy rationale for different procedural requirements for civil vs. criminal contempt).
244. *See Bagwell*, 512 U.S. at 835-36.
245. *Id.* at 833-34.
246. *Id.* at 839.
247. *Id.* at 836-37.
248. *Id.* at 829.
249. *See* Livingston, *supra* note 21, at 380.
250. *Id.* at 352.
251. *Id.* at 347 (explaining that the *Bagwell* decision drew the line between civil and criminal contempts in such a way that most "substantial contempts" are now classified as criminal, mandating a jury trial).
252. *Id.* at 401.

Additionally, the Court takes the *Bagwell* reasoning a step further by applying policy considerations to its contempt reasoning.[253] In the majority opinion, Justice Blackmun wrote: "For a discrete category of indirect contempts, however, civil procedural protections may be insufficient . . . . 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."[254] Thus, the *Bagwell* case is the last in a series of contempt cases where the United States Supreme Court has shown a trend toward requiring more due process protections for accused contemnors.[255] To respond to due process concerns with other types of civil contempt, this author offers the following proposal.

A REASONABLE PROPOSAL

This article proposes that courts recognize due process protections for all civil contemnors subject to lengthy coercive jail terms. A review of Supreme Court decisions reveal that the Court is definitely moving toward requiring full due process for most contemnors, and the Court is likely to include coercive civil contempt in a future case.[256] Under the *Bagwell* reasoning, accused contemnors should be allowed a jury trial after no more than eighteen months in jail. This imprisonment period is equal to those in both the Federal Recalcitrant Witness Act and the District of Columbia Civil Contempt Imprisonment Limitation Act.[257] Both statutes impose an initial imprisonment period to allow the coercive powers of the sanction an opportunity to affect the desired response from the contemnor.[258] If after eighteen months' incarceration the civil contemnor has not relented, she may request an expedited appeals process and a jury trial, similar to the D.C. statute.[259] The D.C. statute also requires that the expedited trial occur within 90 days of the contemnor's petition for the appeal.[260] Additionally, the judge who imposed the coercive sentence upon the contemnor should not conduct this trial, to avoid any possibility of judicial prejudice or conflict of interest.[261]

The jury trial entitlement effectively changes the character of the contempt from civil to criminal.[262] The jury will decide if the alleged contemnor is truly in contempt of court under the facts and circumstances of the

253. *Id.* at 386.
254. *See* Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 833-34 (1994).
255. *See* Livingston, *supra* note 21, at 347-48.
256. *Id.* at 374.
257. 28 U.S.C. § 1826(a); D.C. CODE ANN. §11-741 (Supp. 2001).
258. 28 U.S.C. § 1826(a); D.C. CODE ANN. §11-741.
259. D.C. CODE ANN. § 11-741 (Supp. 2001).
260. *See id.*
261. *See* Livingston, *supra* note 21, at 371-72 (noting that in civil contempt complaints, Justice Brennan favored using a disinterested attorney to investigate the complaint, rather than charging the plaintiff's attorney with this task).
262. *See* Hostak, *supra* note 35, at 182.

case. In most jurisdictions, however, the jury may not determine if the underlying court order is valid based on the collateral bar rule.[263] Because coercive contempt sanctions benefit the complainant, jury instructions will need to contain a balancing test to allow jurors to weigh the competing interests. On the complainant's side, the jury will need to consider the importance of the deed required of the contemnor, the possible effect on the complainant if the deed is not accomplished, and the interest of the State in having the contemnor's deed accomplished and the authority of its courts vindicated.[264] On the contemnor's side, the jury must determine the effect of continued incarceration on the contemnor's constitutional rights and the reasons the contemnor believes she cannot comply.[265] In some cases, the contemnor may believe she has complied with the order, and the jury must determine if this is true.[266] If the jury convicts, it will be under criminal contempt, and the jury should recommend appropriate punishment for disobeying the court order.

Courts and complainants will not like these protections because they believe that it will allow contemnors to avoid doing the acts required by the court.[267] However, in cases such as Dr. Elizabeth Morgan's and Jacqueline Bouknight's, coercive civil contempt did not accomplish its intended effect, leaving complainants no better off than they were prior to the incarcerations.[268] Instead, Morgan and Bouknight were arguably worse off because they were denied constitutional due process protections.[269] After reading her story, there is little doubt that Morgan would have chosen to stay in jail until Hilary turned eighteen to protect her from the alleged sexual abuse, regardless of whether she obtained a jury trial.[270] Similarly, Maryland state officials admitted that after more than seven years, there was little hope that Bouknight would relent and produce her son for authorities.[271] At least under this proposal, complainants will have the satisfaction that the contemnor is lawfully being punished for failure to obey, rather than allowing a court to violate a person's constitutional rights under antiquated notions of judicial powers.[272]

The United States Supreme Court could create this result by deciding a coercive civil contempt case in a manner similar to *Bloom*. If a case is presented for review with truly egregious facts, there is a strong possibility that the Court would find that constitutional due process requires the protec-

263. *See* Livingston, *supra* note 21, at 411.
264. *Id.* at 418-19.
265. *Id.*
266. *Id.* at 398-99.
267. *Id.* at 409.
268. *See* Harmer, *supra* note 4, at 280-81.
269. *Id.*
270. *See* GRONER, *supra* note 3, at 235.
271. *See* Shatzkin, *Obscured*, *supra* note 206.
272. *See* Harmer, *supra* note 5, at 280-81.

tion of a jury trial before imposing long-term incarceration on a contemnor. Therefore, federal and state courts should consider the *Bagwell* reasoning when determining the outcome of current civil contempt cases in anticipation of such an outcome.

CONCLUSION

Recent United States Supreme Court decisions in *Bloom* and *Bagwell* expanded due process protections granted to criminal contemnors. The rationales given by the Court in these cases should also be conferred upon civil contemnors, entitling them to greater protections against unreasonable incarcerations, which may include the right to a jury trial. This article proposes changes through court rulings in civil contempt cases, entitling more contemnors to jury trial protections. In the United States Supreme Court, the trend is to extend to contemnors as many constitutional protections as possible. Punishment for contempt should be a matter of justice, rather than opinion. As shown by the cases of Elizabeth Morgan and Jacqueline Bouknight, coercive civil contempt in its current form can be a no-win proposition for all concerned.