# PURGING CONTEMPT: ELIMINATING THE DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPT

## I. INTRODUCTION

The specter of contempt hangs over the head of anyone who enters a courtroom. Movies and television may show an unwilling witness, an unruly defendant, or an overzealous attorney being threatened with contempt for disobeying the judge. Other movies portray the contempt power in a different light:

> JUDGE CHAMBERLAIN HALLER: If I hear anything other than "guilty" or "not guilty," you'll be in contempt. I don't even want to hear you clear your throat. I hope I've been clear. Now, how do your clients plead?
>
> VINNY GAMBINI: [slowly] I think I get the point.
>
> JUDGE CHAMBERLAIN HALLER: No, I don't think you do. You're now in contempt of court! Would you like to go for two counts of contempt?
>
> VINNY GAMBINI: Not guilty.
>
> JUDGE CHAMBERLAIN HALLER: Thank you. Bail will be set at $200,000. . . . Bailiff, please take Mr. Gambini into custody.[1]

Humor aside, this exchange effectively emphasizes the judge's broad power of contempt. By merely speaking in a manner of which the judge disapproves,[2] an attorney may find himself in contempt of court. What may not be so obvious is that one can commit contempt of court when one is far away from the courtroom;[3] merely by disobeying a court order, one may be fined or ordered to spend some quality time on a prison cot.[4]

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1. MY COUSIN VINNY 31:06–31:49 (Palo Vista Productions, Twentieth Century Fox Film Corp. 1992).

2. As the example implies, merely speaking in an improper tone to a judge may lead to being held in contempt. *E.g.*, *In re* Hillis, 858 A.2d 317, 323 (Del. 2004). The broad power of contempt has led at least one commentator to suggest that criminal contempt sanctions would be a more effective deterrent than the exclusionary rule for Fourth Amendment violations. *See* Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI.-KENT L. REV. 241 (2010).

3. This would be an indirect contempt of court. *See infra* Part III.A.

4. Courts have "nearly unfettered discretion in issuing contempt citations." Crowder v. Rearden,

Contempt is defined in general terms. For example, federal law describes contempt of court as "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice" or "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command."[5] Common contemptuous acts include violations of court orders, courtroom disruptions, and refusals to testify.[6] The potential for abuse of the contempt power is readily apparent, and the broad definition, coupled with the fact that there is often no limit on the sanctions[7] a judge can impose for contempt of court, does little to comfort attorneys or litigants.[8]

To curb this potential for abuse, the common law developed a system of classifying contempts that determines how much procedural protection a contemnor receives.[9] Contempts of court are classified according to two criteria. An act of contempt is either direct or indirect.[10] Furthermore, a contempt proceeding is either civil or criminal.[11] This creates four types of contempt: direct civil contempt, direct criminal contempt, indirect civil contempt, and indirect criminal contempt. Whether a contempt is civil or criminal has nothing to do with whether the underlying litigation is civil or criminal—a criminal defendant could be held in civil contempt, and likewise, a civil plaintiff could be held in criminal contempt.[12] More procedural rights are granted in cases of indirect contempts than in direct contempts.[13] Similarly, criminal contemnors receive more protection than civil contemnors.[14] This Note will examine the current state of the law of

296 S.W.3d 445, 450 (Ky. Ct. App. 2009). Indeed, if civil contempt sanctions are imposed, a broad range of sanctions are available such as imprisonment, fines, and even revocation of a driver's license. Parisi v. Broward Cnty., 769 So. 2d 359, 365 (Fla. 2000); *see infra* note 93.

5. 18 U.S.C. § 401 (2006).

6. William F. Chinnock & Mark P. Painter, *The Law of Contempt of Court in Ohio*, 34 U. TOL. L. REV. 309, 311–12 (2003); *see also infra* note 200.

7. Throughout this Note, the term "sanction" or "sanctions" will be used to describe whatever the judge imposes as a consequence of the contempt proceedings. I have avoided the terms "punishment" and "sentence" because those terms carry implications that the contempt is criminal in nature. *See infra* Part III.B.

8. *See* Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1026–27 (1993). The power of contempt is both "vast and unlimited," and any judge using the contempt power "suffer[s] from an obvious and ineradicable conflict of interest." *Id*. at 1027–28.

9. *See infra* Part II.

10. *E.g.*, *In re* Marriage of Betts, 558 N.E.2d 404, 415 (Ill. App. Ct. 1990); *see also infra* Part III.A.

11. *E.g.*, Crowder v. Rearden, 296 S.W.3d 445, 450 (Ky. Ct. App. 2009); Sazama v. State *ex rel*. Muilenberg, 729 N.W.2d 335, 344 (S.D. 2007); *see also infra* Part III.B.

12. *See infra* note 58 and accompanying text.

13. *See infra* Part III.C.1.

14. *See infra* Part III.C.2.

contempt, focusing on both federal and state law. In particular, it will focus on the distinction drawn between civil contempt of court and criminal contempt of court. After examining some criticisms of the distinction and its underlying rationale, ultimately the Note will argue that the distinction between civil and criminal contempt should be eliminated.

Part II of this Note will give a brief overview of the law of contempt and major developments in Supreme Court jurisprudence that affect the distinction between civil and criminal contempt. This section will also include a discussion of *International Union, United Mine Workers v. Bagwell*,[15] a recent Supreme Court case on the distinction between civil and criminal contempt. Part III will focus on the general state of the law on civil and criminal contempt, relying on both state and federal law. This Part begins with a discussion of direct and indirect contempt, then moves to the distinction between civil and criminal contempt, and culminates by explaining some of the basic differences in the procedures and rights that govern contempt proceedings based on how the contempt is classified. Part IV of the Note criticizes the distinction between civil and criminal contempt. Part V begins by discussing an early attempt to reform contempt law via statute, argues for the abolition of the distinction between civil and criminal contempt, and finally discusses the appropriate method to implement reforms.

## II. DEVELOPMENT OF THE LAW OF CONTEMPT

### *A. Early Roots*

Contempt of court has existed since the twelfth century.[16] Contempt was considered a crime[17] and was punishable by death.[18] Moreover, a judge did not need personal knowledge of the contemptuous act to hold a person in contempt.[19] Blackstone's writings served as the basis for the initial adoption of the contempt power in America.[20] However, the precise

15. 512 U.S. 821 (1994).

16. Chinnock & Painter, *supra* note 6, at 309.

17. Johansen v. State, 491 P.2d 759, 763 (Alaska 1971). Criminal contempt today is often still regarded as a crime. *See* Parisi v. Broward Cnty., 769 So. 2d 359, 364 (Fla. 2000). *See generally Ex parte* Grossman, 267 U.S. 87 (1925) (holding that a criminal contempt may be pardoned).

18. Dudley, *supra* note 8, at 1034.

19. Chinnock & Painter, *supra* note 6, at 312. According to Chinnock and Painter, the "history of contempt is inexorably intertwined with the history of the press," because many seminal contempt decisions arose out of "contempt by publication" cases. *Id*.

20. Chinnock & Painter, *supra* note 6, at 313.

origin of the distinction between civil and criminal contempt remains unclear.[21] In England, the distinction has been effectively abolished.[22]

In the United States, the contempt power of the federal courts was granted by statute to the district and circuit courts when the Judiciary Act of 1789 established the lower courts.[23] Despite the ostensible legislative grant of the contempt power, the power of contempt is inherent in the courts and would have been vested in the courts in the absence of a specific legislative grant.[24] Not surprisingly, abuses of the contempt power occurred.[25] After the impeachment proceedings of a district judge called attention to these abuses, in 1831, Congress passed an act that placed restrictions on the contempt power of federal judges.[26] The Supreme Court upheld the statute curbing the contempt power of the lower federal courts, reasoning that these courts' "powers and duties depend upon the act

21. Dudley, *supra* note 8, at 1034 n.28.

22. Chinnock & Painter, *supra* note 6, at 326.

23. Judiciary Act of 1789, ch. 20, §§ 3, 5, 17, 1 Stat. 73, 73, 75, 83; *see also Ex parte* Robinson, 86 U.S. 505, 509–10 (1874). The text of the statute provided that the federal courts "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 75. For a more complete discussion of the history of contempt, see generally Dudley, *supra* note 8, at 1034–43, and Chinnock & Painter, *supra* note 6, at 312–17.

24. *See* Anderson v. Dunn, 19 U.S. 204, 227 (1821) (noting that although Congress passed a contempt statute, "it does not follow, from this circumstance, that [the courts] would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend"); *see also Ex parte Robinson*, 86 U.S. at 510 (recognizing that contempt is an inherent power of the court and that "[t]he moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power").

25. Nye v. United States, 313 U.S. 33, 45 (1941) (citing Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 409–30 (1928) (discussing early abuses in contempt by publication cases)). The Supreme Court has noted the potential for abuse, observing that "[m]en who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir." Sacher v. United States, 343 U.S. 1, 12 (1952) (addressing the problem of a judge punishing zealous representation with the contempt power). The problem is further compounded by the fact that many contempts may consist of a verbal assault on the judge. In that case, due process offers at least limited protection to a contemnor. *See infra* note 129.

26. *Nye*, 313 U.S. at 45–47. The act provided:

> That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.

Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487, 487–88. The federal district judge in question was James H. Peck. *Nye*, 313 U.S. at 45. Judge Peck held someone in contempt for publishing a criticism of one of his opinions. *Id*. He was ultimately acquitted in the impeachment proceedings. *Id*.

calling them into existence, or subsequent acts extending or limiting their jurisdiction."[27]

### *B. Framing the Current State of Contempt Law*

The Court's landmark decision in *Gompers v. Bucks Stove & Range Co.*[28] attempted to elucidate the distinction between civil and criminal contempt.[29] Different procedures and rights apply depending on the classification of the contempt.[30] According to the Court, the "character and purpose" of the sanctions imposed often determined the class of contempt.[31] A civil contempt results in a remedial sanction that will benefit the opposing party.[32] A criminal contempt, in contrast, results in a sanction that is punitive in nature and will "vindicate the authority of the court."[33] The Court also noted that civil contempt would be appropriate when the contemnor refused to do an act required by the court and that criminal contempt would be appropriate when the contemnor performed a prohibited act.[34]

Throughout the twentieth century, the Court granted more and more protections in contempt proceedings.[35] Persons convicted of criminal contempt may be pardoned just like persons convicted of other crimes.[36] For example, if a contemnor somehow entangles the judge in the incident (for example, by repeatedly antagonizing the judge) and if the contempt is not summarily punished, due process demands that the contempt proceeding be held in front of another judge.[37] For "serious" criminal contempts, there is a jury trial right.[38]

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27. *Ex parte Robinson*, 86 U.S. at 510–11. However, the Court did not decide whether or not Congress could restrict the contempt power of the Supreme Court. *See infra* note 205.

28. 221 U.S. 418 (1911).

29. *Id*. at 441–48. The Court had previously mentioned the distinction between civil and criminal contempt when ruling on the appealability of contempt proceedings. *See* Bessette v. W.B. Conkey Co., 194 U.S. 324, 327–30, 338 (1904).

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

31. *Id.* at 441.

32. *Id*.

33. *Id*.

34. *Id*. at 443. *But see infra* note 49.

35. *See* Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 826–27 (1994) (outlining protections afforded to contemnors by citing to many twentieth-century Supreme Court cases).

36. *Ex parte* Grossman, 267 U.S. 87 (1925).

37. Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971).

38. *See* Bloom v. Illinois, 391 U.S. 194, 201–02 (1968) (holding that there is no difference between serious criminal contempts and other crimes); Duncan v. Louisiana, 391 U.S. 145, 159–60 (1968) (holding that there is a jury trial right for serious crimes); *see also Bagwell*, 512 U.S. at 826–27 (noting that there is a jury trial right for contempts that involve more than six months of

The Court has refined the distinction between criminal and civil contempt as set forth in *Gompers* in two more recent cases. In *Hicks ex rel. Feiock v. Feiock*,[39] the Court clarified that when determining whether a contemnor was held in civil or criminal contempt, the proper inquiry is into the sanction itself.[40] The Court specifically rejected an inquiry into the lower court's purpose when imposing the sanction.[41] The most recent Supreme Court case discussing the distinction between civil and criminal contempts is *International Union, United Mine Workers v. Bagwell*.[42] In *Bagwell*, the trial court initially found seventy-two violations of the injunction issued against the union.[43] The court issued a fine of $642,000 and stated that the union would incur a $20,000 fine for each future nonviolent violation of the injunction and a $100,000 fine for each violation that was violent.[44] After the dust and the underlying case settled, the trial court refused to vacate $52 million of fines that were to be paid to the state, although it did vacate the $12 million in fines that were to be paid to the opposing party.[45] The Supreme Court held that the remaining fines were criminal in nature, not civil.[46] The Court rejected the argument that just because the trial court prospectively announced the sanctions, the contempt was civil, because imposing such a sanction after the injunction was violated would have been a clear case of criminal contempt.[47] Furthermore, the Court recognized that *Gompers* had suggested that

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imprisonment). According to the Supreme Court, a major factor in determining whether a crime is "serious" is the penalty imposed for the crime; thus, a penalty in excess of six months is sufficient, but not necessary, to make a criminal contempt "serious." *Duncan*, 391 U.S. at 159.

39. 485 U.S. 624 (1988).

40. *Id.* at 635–36.

41. *Id*. The Court did note that the intent of the lower court would be "germane," but it specifically rejected any test that required examining the trial court's purpose when imposing the sanction. *Id*. Instead, "conclusions about the purposes for which [sanctions are] imposed are properly drawn from an examination of the character of the [sanctions]." *Id*. at 636. While there is room for debate whether this was truly a departure from prior Supreme Court jurisprudence, the Court's decision did at least provide a clear methodology for determining whether a contempt proceeding is civil or criminal. *See* Von Hake v. Thomas, 759 P.2d 1162, 1168 n.5 (Utah 1988).

42. 512 U.S. 821 (1994). The decision spawned a number of academic responses. *See generally* Gino F. Ercolino, Comment, United Mine Workers v. Bagwell*: Further Clarification of Civil and Criminal Contempt?*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 291 (1996) (analyzing the opinion and arguing the opinion does not clarify distinction between civil and criminal contempt); Philip A. Hostak, Note, International Union, United Mine Workers v. Bagwell*: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 CORNELL L. REV. 181 (1995) (arguing that *Bagwell* represents a new type of approach where the Court determines whether the contempt is civil or criminal by asking what kind of procedures are appropriate in the situation).

43. *Bagwell*, 512 U.S. at 823.

44. *Id*. at 824.

45. *Id*. at 824–25.

46. *Id*. at 837.

47. *Id*. at 836.

contempts could be classified on the basis of whether there was a failure to perform a mandated act or performance of a forbidden act.[48] According to the Court, the distinction between a failure to perform and a failure to forbear from acting might be useful in the "classic contempt scenario," but it nonetheless recognized that, in more complicated cases, the distinction is merely semantic.[49] The Court also emphasized that the union had no opportunity to purge the sanction once it was imposed.[50]

## III. THE CURRENT STATE OF CONTEMPT

Contempt of court is classified in two ways: the contempt may be deemed civil or criminal, and the contempt may be direct or indirect. Thus, there are four types of contempt: direct criminal contempt, direct civil contempt, indirect criminal contempt, and indirect civil contempt.[51] Because the procedural protections and rights offered to a party vary with the type of contempt, these distinctions serve an important purpose.[52]

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48. *Id*. at 835.

49. *Id*. The Court correctly observed that a mandatory act required by the court could often be worded differently to result in a prohibition, using the examples "Continue working" and "Do not strike." *Id*. Violating the "Do not strike" order is performing a prohibited action and would lead to a criminal contempt, whereas violating the "Continue working" order would lead to a civil contempt. *Id*.

50. *Id*. at 837. One commentator has argued that *Bagwell* represents a major change in contempt law because it "suggests that the Court focused on the seriousness of the penalty in determining if the contempt proceeding was criminal, instead of assessing the seriousness of the penalty after it determined the nature of the contempt proceeding." Ercolino, *supra* note 42, at 292. However, the Court has historically inspected the sanction imposed to determine whether the contempt proceeding was civil or criminal. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911) ("It is not the fact of punishment, *but rather its character and purpose* that often serve to distinguish between the two classes of cases." (emphasis added)). Considering the development of contempt law, this approach is quite logical, as it is the imposition of a criminal sanction that triggers constitutional rights. *See Bagwell*, 512 U.S. at 826–27 (noting that the imposition of a sentence of more than six months triggers the jury trial right); Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 632 (1988) ("[C]riminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt."). Essentially, the distinction between civil and criminal contempt serves only to ensure that criminal sanctions are only imposed in a proceeding that comports with most of the requirements for criminal trials. *See also* Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 239 (1971) ("[C]riminal contempt hearings must, by and large, comply with the rules for other criminal trials . . . .").

51. *See, e.g.*, *In re* Marriage of Betts, 558 N.E.2d 404, 417–25 (Ill. App. Ct. 1990) (describing the procedures and rights that apply to direct criminal contempt, direct civil contempt, indirect civil contempt, and indirect criminal contempt); *see also* Dobbs, *supra* note 50, at 186 (explaining contempt classification system). *But see Bagwell*, 512 U.S. at 827 n.2 (stating that unless a jury trial right is triggered, the civil/criminal distinction does not apply to direct contempts). Alternatively, a few states use the terminology direct and constructive contempt, rather than direct and indirect contempt. *See, e.g.*, ALA. R. CRIM. P. 33.1(b); *In re* Milkovich, 493 So. 2d 1186, 1188 (La. 1986); Fisher v. McCrary Crescent City, L.L.C., 972 A.2d 954, 971 (Md. Ct. Spec. App. 2009).

52. *See Gompers*, 221 U.S. at 444; *In re Marriage of Betts*, 558 N.E.2d at 415.

### *A. Direct and Indirect Contempt*

Determining whether a contemptuous act should be classified as direct or indirect is often relatively straightforward.[53] A direct contempt takes place in the presence of the judge, whereas an indirect contempt takes place outside the presence of the judge.[54] Conduct that disrupts the courtroom would be a direct contempt.[55] Indirect contempt almost invariably stems from a violation of a court order.[56] The distinction between indirect and direct contempt thus depends on the act of contempt.

### *B. Civil and Criminal Contempt*

Determining whether a contempt is civil or criminal is more difficult.[57] One might be tempted to think criminal contempt arises from criminal cases and civil contempt arises from civil cases. However, whether the underlying proceeding is civil or criminal is of no significance; in a civil proceeding, a contemnor may be held in either civil or criminal contempt.[58] Additionally, the same conduct may be treated as either

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53. *See* Dobbs, *supra* note 50, at 224 (noting that both the classification of direct or indirect contempts is in many cases easily made).

54. Steiner v. Gilbert, 159 P.3d 877, 880 (Idaho 2007). In a case of direct contempt, the judge would have personal knowledge of the contemptuous acts. *See, e.g.*, *In re Marriage of Betts*, 558 N.E.2d at 418–19; *Fisher*, 972 A.2d at 971. However, there are a few difficult borderline cases, such as an attorney who is late to a court proceeding, which some courts have called direct contempt and others indirect contempt. *See* Dobbs, *supra* note 50, at 224–27. These and other borderline cases might be viewed as constructive direct contempts. *In re Marriage of Betts*, 558 N.E.2d at 418–19 (recognizing a subclass of direct contempts that occur in the constructive presence of the judge—for example, knowingly filing a falsified will with the court). A reasonable treatment of these constructive direct contempts is to treat them procedurally like indirect contempts because the judge still does not have personal knowledge of the facts necessary to prove the contempt. *Id*. at 426.

55. *See* Dobbs, *supra* note 50, at 224.

56. *See* Chinnock & Painter, *supra* note 6, at 311.

57. The Supreme Court has noted that in the law of contempt, "the 'civil' and 'criminal' labels of the law have become increasingly blurred." Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 631 (1988); *see also* File v. File, 673 S.E.2d 405, 408 (N.C. Ct. App. 2009) ("[T]he demarcation between [civil and criminal contempt] may be hazy at best." (quoting O'Briant v. O'Briant, 329 S.E.2d 370, 372 (N.C. 1985))). One commentator less generously observed, "Actually, the effort by reviewing courts to label the case as a criminal or as a civil one is often an exercise in futility." Dobbs, *supra* note 50, at 245. *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994), has been interpreted as a "concession by the Court that it is almost impossible to make a rational and meaningful distinction between [civil and criminal contempt]." Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 347 (2000). Put most simply, "[t]he literature on contempt of court is unanimous on one point: the law is a mess." Dudley, *supra* note 8, at 1025. In an all too typical example, one reviewing court noted, "[T]here were times when neither the court nor counsel were certain as to the nature or purpose of the [contempt] proceedings . . . ." *In re Marriage of Betts*, 558 N.E.2d at 433.

58. *See* Stilley v. Fort Smith Sch. Dist., 238 S.W.3d 902, 911 (Ark. 2006) (stating "the focus is on the character of relief rather than the nature of the proceeding"); *In re* Nolan W., 203 P.3d 454, 466

criminal or civil contempt.[59] Thus, a contemptuous act is not itself civil or criminal. In making the determination whether a contempt is civil or criminal, courts may analyze (1) whether the opposing party benefits from the contempt action or the contempt vindicates the authority of the court,[60] (2) the trial court's purpose in imposing the sanctions,[61] (3) whether the contempt seeks to punish past conduct or coerce future conduct,[62] and (4) the nature of the sanction imposed.[63] As will be argued below, the determinative test is the nature of the sanction imposed.[64] Courts have also employed, or at least stated, other "deviant" tests.[65] Finally, some courts require that the contemnor act willfully if the contempt is criminal.[66]

Two examples will be used throughout the Note to illustrate each type of analysis. In the first, a man, after a heated argument with his ex-wife over his weekend visitation with their two children, ceases sending his monthly child support payments. The judge holds him in contempt and puts the man in jail until he makes the payments he missed.[67] In the second, a criminal defendant, when a police officer testifies against him during a trial, stands up and starts shouting, "Liar! I'm being set up!" The judge advises the defendant to stop and informs him that he risks being held in contempt if he speaks out again. The defendant remains silent through the rest of the police officer's testimony and cross-examination. The prosecution calls another police officer as a witness, and again the defendant interrupts and calls him a liar. The judge again advises him to remain silent, but the defendant erupts again when the second police

(Cal. 2009) (noting contempts can be "regarded as criminal in character even though they arise from, or are ancillary to, a civil action"); Henry v. Schmidt, 91 P.3d 651, 654 (Okla. 2004) (observing that the Oklahoma contempt statutes "do not make a distinction between penal and coercive punishment based on the style of the case or who initiates the proceedings"); Dobbs, *supra* note 50, at 237 (observing "a criminal contempt proceeding may grow out of a civil case, or a civil contempt proceeding may grow out of a criminal case").

59. *In re Marriage of Betts*, 558 N.E.2d at 417; *see also* Holifield v. Mullenax Fin. & Tax Advisory Grp., Inc., 307 S.W.3d 608, 610 (Ark. Ct. App. 2009) ("The line between civil and criminal contempt may blur at times."); Town of New Hartford v. Conn. Res. Recovery Auth., 970 A.2d 570, 576 (Conn. 2009) ("[A] court's power to hold a party in civil or criminal contempt is not limited by the nature of the offense. Rather, it is the nature of the relief itself that is instructive in determining whether a contempt is civil or criminal."); Parisi v. Broward Cnty., 769 So. 2d 359, 363–64 (Fla. 2000) (noting that the same conduct could lead to *both* civil and criminal contempt sanctions); Epperly v. Cnty. of Montgomery, 620 S.E.2d 125, 130 (Va. Ct. App. 2005) (same).

60. *See, e.g.*, *Stilley*, 238 S.W.3d at 910; *In re Marriage of Betts*, 558 N.E.2d at 416–17.

61. *See, e.g.*, Pate v. Guy, 934 So. 2d 1070, 1072 (Ala. Civ. App. 2005).

62. *In re Marriage of Betts*, 558 N.E.2d at 417.

63. *New Hartford*, 970 A.2d at 576.

64. *See infra* Part III.B.5.

65. *See* Dobbs, *supra* note 50, at 239.

66. *In re* Marriage of Cyr, 186 P.3d 88, 91–92 (Colo. App. 2008).

67. This example is based loosely on *Norman v. Cooper*, 278 S.W.3d 569 (Ark. Ct. App. 2008).

officer identifies the defendant as the perpetrator. After this final eruption, the judge holds the defendant in contempt and summarily sentences him to one week in jail.[68]

*1. Benefit Analysis*

Under the first type of analysis, a court considers whether the contempt proceeding benefits either the opposing party or the authority of the court. If the contempt primarily benefits the opposing party, it is civil.[69] On the other hand, a criminal contempt primarily benefits the court itself by "vindicat[ing] the dignity or authority of the court."[70] *Primary* benefit is of importance here, because, realistically, any sanction will both vindicate the court's authority and benefit the opposing party to some degree.[71] For example, placing a father who fails to pay child support in prison until he pays primarily benefits the mother,[72] but at the same time it also vindicates the court's authority. In contrast, holding a disruptive party in a courtroom in contempt and sentencing him to a week in jail primarily serves to vindicate the dignity of the court, although the opposing party may derive some incidental benefit from the contempt.[73] Thus, the imprisoned father

68. Courtroom outbursts can easily lead to contempt of court. *See, e.g.*, United States v. Zamorano-Torres, 31 Fed. App'x 516 (9th Cir. 2002); State v. Vasky, 495 A.2d 1347 (N.J. Super. Ct. App. Div. 1985); Commonwealth v. Snyder, 275 A.2d 312 (Pa. 1971).

69. *See, e.g.*, *In re* Marriage of Betts, 558 N.E.2d 404, 416 (Ill. App. Ct. 1990); State v. Local Union 5760, 173 N.E.2d 331, 338 (Ohio 1961) ("[V]iolations which are on their surface offenses against the party for whose benefit the order was made are civil contempts."). A similar formulation states that a civil contempt protects the rights of the opposing party. *See, e.g.*, Carter v. State *ex rel.* Bullock Cnty., 393 So. 2d 1368, 1370 (Ala. 1981); Stilley v. Fort Smith Sch. Dist., 238 S.W.3d 902, 910 (Ark. 2006); *In re* Nolan W., 203 P.3d 454, 466 (Cal. 2009); Town of New Hartford v. Conn. Res. Recovery Auth., 970 A.2d 570, 576 (Conn. 2009).

70. *In re Nolan W.*, 203 P.3d at 466 (quoting Morelli v. Superior Court, 461 P.2d 655, 658 (Cal. 1969)); *see also Stilley*, 238 S.W.3d at 910; *New Hartford*, 970 A.2d at 576; Minn. State Bar Ass'n v. Divorce Assistance Ass'n, Inc., 248 N.W.2d 733, 741 (Minn. 1976). However, this may be somewhat misleading: the true nature of the offense is impeding justice and challenging "the fundamental supremacy of the law." Chinnock & Painter, *supra* note 6, at 310.

71. As one court has noted, "[t]he confusion between civil and criminal contempt arises as a result of civil contempt often having the incidental effect of vindicating the court's authority, while, conversely, criminal contempt may permit the movant to derive the incidental benefit of preventing future noncompliance." LeMay v. Leander, 994 P.2d 546, 554 (Haw. 2000); *see also* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 443 (1911) ("[I]f the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority."); Johansen v. State, 491 P.2d 759, 764 (Alaska 1971) ("Elements of punitive as well as remedial punishment are almost invariably present in every civil contempt.").

72. This assumes that the father has the ability to pay. If the father does not have the ability to pay, obviously his imprisonment does nothing to aid the mother financially. However, inability to pay would be a complete defense to the contempt. *See infra* note 172.

73. The point may be easier to see using the example of the father who did not pay child support. If he was held in criminal contempt for his failure to pay and sentenced to a week in jail, the sanction

has been held in civil contempt,[74] and the outspoken defendant has been held in criminal contempt.[75]

### *2. Analyzing the Intentions of the Trial Court*

The second method of determining the type of contempt examines the trial court's purpose in imposing the contempt sanctions.[76] A civil contempt is designed to coerce the contemnor into compliance,[77] whereas a criminal contempt punishes the contemnor.[78] While the trial court's purpose is technically a distinct inquiry from examining who benefits from the contempt, the analysis is identical.[79] Again, the erstwhile husband has been held in civil contempt because the court is attempting to coerce him into compliance (for the benefit of the mother),[80] whereas the defendant

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does not have the same coercive effect as the civil contempt, where the father can avoid jail altogether by paying the deficient support. *See* Dobbs, *supra* note 50, at 237 (noting that it is the indeterminate nature of a sentence which gives it coercive effect). However, the opposing party (the ex-wife) still benefits from the criminal contempt; indeed, the father is likely to be deterred from skipping a payment in the future after spending a week in jail.

74. *See, e.g.*, Howell v. Howell, No. 04AP-436, 2005 WL 1331851, at *4 (Ohio Ct. App. June 7, 2005).

75. *See In re* Marriage of Slingerland, 807 N.E.2d 731, 735 (Ill. App. Ct. 2004) (observing that the petitioner's conduct and statements offended the dignity of the court); *see also* United States v. Perry, 116 F.3d 952, 954–56 (1st Cir. 1997) (upholding the trial court's imposition of a ninety-day criminal contempt sanction to vindicate the authority of the court after the contemnor urinated in the courtroom).

76. *E.g.*, *In re* E.K., 20 So. 3d 1216, 1220 (Miss. 2009); Papatheofanis v. Allen, 215 P.3d 778, 780 (N.M. Ct. App. 2009); *In re* C.W., 960 A.2d 458, 466 (Pa. Super. Ct. 2008); *In re* H.S., 629 S.E.2d 783, 787 (W. Va. 2006). The Supreme Court has rejected such an inquiry into the trial court's purpose, examining the nature of the sanctions instead. *See supra* note 41.

77. Town of New Hartford v. Conn. Res. Recovery Auth., 970 A.2d 570, 576 (Conn. 2009); *In re* Hillis, 858 A.2d 317, 322 (Del. 2004); *In re* Birchall, 913 N.E.2d 799, 810 (Mass. 2009); *see also* Robinson v. Fulliton, 140 S.W.3d 304, 309 (Tenn. Ct. App. 2003) ("The purpose of a civil contempt sanction is remedial . . . ."). However, many jurisdictions recognize compensatory civil contempt sanctions, as well as coercive sanctions. *See, e.g.*, Int'l Union, United Mine Workersv. Bagwell, 512 U.S. 821, 829 (1994) ("Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge."); Parisi v. Broward Cnty., 769 So. 2d 359, 363 (Fla. 2000); LeMay v. Leander, 994 P.2d 546, 553 (Haw. 2000) (noting that a fine paid to an opposing party was civil in nature). Thus, fixed fines that compensate the opposing party are civil in nature. *See id*. The term "remedial" provides a more accurate description of civil contempt sanctions: the court attempts to coerce compliance, but if that is not possible or irreparable harm has resulted from the contempt, substitute relief is given to the opposing party. *See* Dobbs, *supra* note 50, at 235.

78. "An essential element of a finding of criminal contempt is that such a finding is intended to punish the contemnor . . . ." Pate v. Guy, 934 So. 2d 1070, 1072 (Ala. Civ. App. 2005); *see also* Rodriguez v. Eighth Judicial Dist. Ct. *ex rel*. Cnty. of Clark, 102 P.3d 41, 45 (Nev. 2004); *In re C.W.*, 960 A.2d at 466.

79. *See* Ullmann v. State, 647 A.2d 324, 329 (Conn. 1994) (noting the determination relies on "the court's perception of the paramount interest to be vindicated").

80. *See* Dionne v. Dionne, 972 A.2d 791, 798 (Conn. App. Ct. 2009) (observing the failure to pay child support was civil contempt because the court orders were coercive).

who could not learn to hold his tongue is punished for disrupting a trial (thereby vindicating the authority of the court).[81]

*3. Chronology Analysis*

Yet another method employed by courts to determine whether a contempt is civil or criminal focuses on the chronology of the contempt. Civil contempt is prospective, while criminal contempt is retrospective.[82] Civil contempt is prospective because it focuses on getting the contemnor to comply with the court order in the future.[83] Criminal contempt is retrospective because it focuses on punishing the contemnor for past conduct.[84] However, the fact that conduct occurred in the past does not necessarily imply that the contemnor must be held in criminal contempt.[85] Using this method, one can see that the father withholding child support is held in civil contempt, because the contempt focuses on his future actions by attempting to make him comply with his obligation to pay child support.[86] In contrast, the disruptive defendant is punished for past conduct, and thus he is held in criminal contempt.[87]

*4. Analyzing the Nature of the Sanction Imposed*

Courts also analyze the nature of the sanction imposed to determine whether the contempt is criminal or civil.[88] Examining the sanctions

81. *See supra* note 75.

82. *In re* Marriage of Betts, 558 N.E.2d 404, 417 (Ill. App. Ct. 1990); *see also In re* Nolan W., 203 P.3d 454, 466 (Cal. 2009) (noting that civil contempt looks forward).

83. *See* Shillitani v. United States, 384 U.S. 364, 370 (1966); *Pate*, 934 So. 2d at 1072; *In re Marriage of Betts*, 558 N.E.2d at 417; *In re C.W.*, 960 A.2d at 466.

84. Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 828 (1994); *In re Marriage of Betts*, 558 N.E.2d at 417; Sazama v. State *ex rel*. Muilenberg, 729 N.W.2d 335, 345 (S.D. 2007); Dudley, *supra* note 8, at 1046; *see also* Ky. River Cmty. Care, Inc. v. Stallard, 294 S.W.3d 29, 32 (Ky. Ct. App. 2008) (holding a contempt was criminal because "the sanctions were imposed to punish for conduct already committed rather than to compel future action").

85. The Alabama Supreme Court rejected the argument that because the contemptuous conduct had occurred in the past, the contempt must have been criminal in nature. *See* Chestang v. Chestang, 769 So. 2d 294, 298 (Ala. 2000). Had the court accepted this argument, almost all contempt actions would be criminal. A party cannot be held in contempt without having acted contemptuously. The only way a contempt could possibly be civil under these circumstances would be if the judge announced the sanction before the conduct occurred, for example, if the judge stated that for each violation of the court order, a fine will be imposed. However, it is not clear that this scenario would necessarily be a civil contempt. *See supra* notes 47–50 and accompanying text.

86. This approach is very similar to examining the coercive effect of the sanctions. *See supra* note 80.

87. *See* Smith v. State, 855 A.2d 339, 341–44 (Md. 2004) (defendant was held in criminal contempt for cursing at the trial judge).

88. "The distinguishing factor between civil contempt and criminal contempt is the punishment

imposed is the most straightforward way of determining whether the contempt is civil or criminal.[89] In a civil contempt sanction, the contemnor must hold the "keys to his cell."[90] Thus, "no further contempt sanctions are imposed upon the contemnor's compliance with the pertinent court order."[91] The most common example is imprisonment until the contemnor complies with the court order;[92] for example, if the court announces a sanction where the contemnor is to be imprisoned until he pays overdue child support, he could avoid prison entirely by immediately paying the balance. While courts often use the "keys to his cell" language, this requirement applies equally to fines; the essential requirement for civil contempt sanctions, whether the sanction is a fine or imprisonment, is that the contemnor must be able to "purge" himself of the contempt by complying with the court order.[93] In contrast, criminal contempts impose a fixed sentence or fine that cannot be avoided by the contemnor.[94] However, a fixed fine or term of imprisonment that will be suspended upon compliance presents a more challenging case.[95] Despite the fixed nature of the fine or term of imprisonment, at least one court has held that such a suspended sanction is a civil contempt because the sanction can effectively be purged.[96] In the case of the father who has failed to pay his

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imposed." Bergquist v. Cesario, 844 A.2d 100, 106 (R.I. 2004); *see also* Stilley v. Fort Smith Sch. Dist., 238 S.W.3d 902, 911 (Ark. 2006) ("In determining whether a particular action by a judge constitutes criminal or civil contempt, the focus is on the character of relief . . . ." (quoting Ivy v. Keith, 92 S.W.3d 671, 677 (Ark. 2002))); Town of New Hartford v. Conn. Res. Recovery Auth., 970 A.2d 570, 576 (Conn. 2009) ("[T]he nature of the relief itself . . . is instructive in determining whether a *contempt* is civil or criminal." (emphasis added)); Mortgage Specialists, Inc. v. Davey, 904 A.2d 652, 672 (N.H. 2006) (noting that the "character and purpose" of the sanctions determine whether the contempt is civil or criminal); *In re* Small, 286 S.W.3d 525, 531 (Tex. App. 2009) (distinguishing civil and criminal contempt based upon their "nature and purpose").

89. *See* Von Hake v. Thomas, 759 P.2d 1162, 1168 n.5 (Utah 1988) (characterizing a focus on the sanction imposed as a clear bright-line rule).

90. *In re* Marriage of Betts, 558 N.E.2d 404, 416 (Ill. App. Ct. 1990); *see also In re* Nolan W., 203 P.3d 454, 466 (Cal. 2009); Crowder v. Rearden, 296 S.W.3d 445, 450 (Ky. Ct. App. 2009).

91. *In re Marriage of Betts*, 558 N.E.2d at 416.

92. Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 828 (1994).

93. Parisi v. Broward Cnty., 769 So. 2d 359, 365 (Fla. 2000). Generally, possible civil contempt sanctions include "incarceration, garnishment of wages, additional employment, the filing of reports, additional fines, the delivery of certain assets, [and] the revocation of a driver's license." *Id*. (quoting Gregory v. Rice, 727 So. 2d 251, 254 (Fla. 1999)).

94. *E.g.*, Stilley v. Fort Smith Sch. Dist., 238 S.W.3d 525, 911 (Ark. 2006); *In re* Marriage of Cyr, 186 P.3d 88, 91–92 (Colo. App. 2008); *In re* Small, 286 S.W.3d 525, 531 (Tex. App. 2009).

95. Professor Dudley questioned what type of contempt a court would hold a one-week sentence that was conditionally suspended upon prompt compliance with the court order. Dudley, *supra* note 8, at 1049.

96. *See In re* Marriage of Sharp, 860 N.E.2d 539, 547 (Ill. App. Ct. 2006). Similarly, a two-year contempt sentence that might end upon the termination of a grand jury proceeding or the contemnor's willingness to answer questions was held to be civil contempt because it was intended to coerce the

child support and is sentenced to jail until he pays, he has been held in civil contempt because he holds the keys to his own prison; he can get out of jail merely by complying or even avoid jail altogether if he pays immediately.[97] The disruptive defendant, sanctioned with a fixed jail term, has no chance to avoid the sanctions and therefore has been held in criminal contempt.[98]

*5. Primacy of the Nature of the Sanction Imposed*

For purposes of appellate review, the type of sanction imposed will be outcome determinative. This is because the sanction imposed will change the appellate court's perception of the trial court's purpose, the primary beneficiary of the contempt, and whether the contempt is prospective or retrospective.

To determine whether the contempt primarily benefits the opposing party or vindicates the authority of the court, one must turn to the sanction imposed. A contingent sanction, such as being jailed until compliance with a court order, serves to coerce the contemnor and benefits the opposing party.[99] A fixed sanction does not have the same coercive effect because the sanction cannot be avoided.[100]

The type of sanction imposed will also determine the court's purpose for the contempt. Although the court may state that it intends to coerce the contemnor, appellate courts do not view such a statement as dispositive.[101] The only clear-cut indicator of the intent of the court is the sanction

contemnor. Shillitani v. United States, 384 U.S. 364, 366, 369–70 (1966). The Supreme Court may come out differently today because it no longer inquires into the purpose of the trial court. *See supra* note 41. This conclusion is also reinforced by the fact that the Supreme Court has specifically rejected the argument that fixed sanctions announced before the contemptuous conduct occurred are necessarily civil, reasoning that imposing the same sanction after the conduct took place would be a clear case of criminal contempt. *Bagwell*, 512 U.S. at 836.

97. *See* Rubackin v. Rubackin, 875 N.Y.S.2d 90, 93–94 (N.Y. App. Div. 2009) (using a failure to pay child support as an example of a civil contempt because the contemnor holds the keys to his prison).

98. *See* United States v. Perry, 116 F.3d 952, 956 (1st Cir. 1997) (observing that in a criminal contempt conviction, there is no way to "purge" the sentence).

99. Some cases directly equate the coercive nature of the sanction with the sanction's contingent nature. *E.g.*, *In re* Hillis, 858 A.2d 317, 322 (Del. 2004).

100. Cases recognize the connection between an unconditional sanction and punishment for past conduct, as opposed to a conditional sanction and coercive future conduct. *E.g.*, Am. Med. Sec. Grp., Inc. v. Parker, 663 S.E.2d 697, 700 (Ga. 2008).

101. The trial court's stated purpose in imposing the sanctions is not determinative of whether the contempt is civil or criminal in nature. *E.g.*, Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 828 (1994); *In re* E.K., 20 So. 3d 1216, 1220 (Miss. 2009).

itself.[102] Moreover, as a practical matter, the inquiry into whether the court intended to coerce or punish the contemnor is effectively identical to the inquiry into whether the contempt vindicated the authority of the court or benefited the opposing party, since the benefit to the opposing party is due to the coercion of the contemnor, and vindication of the court's authority is due to the punishment of the contemnor.

Finally, whether a contempt is retrospective or prospective will also be determined by the sanction imposed. All contempt proceedings involve past conduct, or else there would be no need for the proceeding.[103] Thus, whether the contempt is prospective or retrospective depends on how the contempt is treated by the court, which is really another way of examining the trial court's purpose.

In sum, the differences between benefit, purpose, and chronology analyses are merely semantic. Furthermore, these analyses are ultimately unhelpful, because the type of sanction imposed is determinative. For example, consider the father who did not pay child support after an argument with his ex-wife.[104] If the judge places the father in jail for one week, the judge punishes the father for his past conduct, which vindicates the authority of the court, and the contempt is therefore retrospective. However, if the judge places the father in jail until he pays the owed support, the judge is acting for the benefit of the mother by attempting to coerce the father to pay, making the contempt prospective. While courts may use language implicating each different type of inquiry, it is the type of sanction imposed that drives the result.

*6. "Deviant" Tests*

While the sanction imposed effectively determines whether the contempt is civil or criminal, courts have paid lip service to other "deviant" tests,[105] even if they rarely influence the outcome of a case, except to cause more confusion.[106] One such test states that the court should consider whether a private party or a government prosecutor

102. The Supreme Court has eliminated any need to examine the court's intent. *See supra* note 41 and accompanying text.

103. *See supra* note 85 and accompanying text.

104. *See* Hughes v. Dep't of Human Res., 502 S.E.2d 233, 234 (Ga. 1998) (observing a failure to pay support may be sanctioned with either civil or criminal contempt).

105. *See* Dobbs, *supra* note 50, at 239.

106. *Id*. at 241.

litigated the contempt.[107] However, this test is largely irrelevant because often a private party may prosecute a criminal contempt.[108]

Another test states that civil contempt is appropriate when a contemnor refuses to perform an affirmative action, and criminal contempt is appropriate when a contemnor performs a prohibited action.[109] This test has been interpreted as merely stating that a coercive civil sanction is not available if there is nothing left to coerce.[110] However, the response overlooks that civil contempt sanctions may also be compensatory in nature.[111] The Supreme Court rejected the mandatory/prohibited act formulation outside of the "classic" cases of contempt.[112]

Courts have also said that criminal contempts are "offenses against the dignity or process of the court . . . , whereas violations which are on their surface offenses against the party for whose benefit the order was made are civil contempts."[113] Civil contempt thus compels "compliance with orders of the court made for the benefit of private parties."[114] This is most likely just "loose language" resulting from a confusion of inquiring whom the offense is against instead of properly inquiring into whether the sanctions vindicate the authority of the court or benefit the opposing

107. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 446 (1911); Dobbs, *supra* note 50, at 239.

108. *E.g.*, *In re* Marriage of Betts, 558 N.E.2d 404, 425 (Ill. App. Ct. 1990). Moreover, if a prosecutor is litigating the contempt, it is very likely that criminal procedures are being used. If criminal contempt procedures have been used, the court may impose either civil or criminal sanctions. *In re Marriage of Betts*, 558 N.E.2d at 431. Dobbs, however, appears to assert that a criminal sanction must be imposed if criminal procedures have been used. Dobbs, *supra* note 50, at 243–44. Perplexingly, Dobbs also states that "there is no theoretical barrier to the use of both civil and criminal contempt powers simultaneously" if criminal procedures are followed. *Id*. at 237–38.

109. *See Gompers*, 221 U.S. at 443; Dobbs, *supra* note 50, at 239–40.

110. Dobbs, *supra* note 50, at 240. Dobbs uses the example of violating an injunction against a sit-in; if the contemnor violates the injunction, there is nothing left to coerce, so punitive sanctions are all that remain. *Id*.

111. Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 829 (1994).

112. *See supra* note 49.

113. State v. Local Union 5760, 173 N.E.2d 331, 338 (Ohio 1961); *see also In re* Marriage of Slingerland, 807 N.E.2d 731, 736 (Ill. App. Ct. 2004) ("[C]riminal contempt is conduct that is *calculated* to embarrass or obstruct a court in the administration of justice or lessen the court's authority or dignity." (emphasis added)). Some courts may use this inquiry in direct criminal contempt proceedings if the contempts were not summarily punished. *In re Marriage of Betts*, 558 N.E.2d at 421 (noting, in the case of direct civil contempts, there usually is no need to inquire "whether the respondent's conduct actually did disrupt court proceedings or denigrated the dignity or authority of the court"). In the case of indirect contempts, one could easily argue that any violation of a court order offends the dignity of the court, so this standard is of limited use.

114. Stilley v. Fort Smith Sch. Dist., 238 S.W.3d 902, 910 (Ark. 2006); *see also* Alpha Med. Clinic v. Anderson, 128 P.3d 364, 380–81 (Kan. 2006); Minn. State Bar Ass'n v. Divorce Assistance Ass'n, 248 N.W.2d 733, 741 (Minn. 1976); Sazama v. State *ex rel*. Muilenberg, 729 N.W.2d 335, 344 (S.D. 2007); Von Hake v. Thomas, 759 P.2d 1162, 1168 (Utah 1988).

party.[115] Some courts have explicitly rejected the notion that the nature of the offense in any way limits the court's power to hold the contemnor in civil or criminal contempt.[116]

*7. The Mental State of the Contemnor*

Some courts require that a contemnor's actions be willful before holding him in criminal contempt.[117] Unlike all the other tests, the willful requirement fundamentally differs because it actually considers the contemnor and his actions and not just the sanctions imposed.[118] Conceptually, the willfulness requirement does not serve to distinguish a civil contempt from a criminal contempt, but rather is best understood as an element that the prosecuting party must prove in a criminal contempt case.[119] Accordingly, for the large majority of cases, the willful requirement does nothing to inform whether the contempt is criminal or civil.[120]

*C. Rights and Procedures in Contempt Proceedings*

Contempt proceedings occupy a unique procedural position because they are often classified as *sui generis*.[121] Accordingly, contempt proceedings often require special rules, separate from the regular rules for

115. *See* Dobbs, *supra* note 50, at 240.

116. *E.g.*, Town of New Hartford v. Conn. Res. Recovery Auth., 970 A.2d 570, 576 (Conn. 2009).

117. *E.g.*, *In re* Marriage of Cyr, 186 P.3d 88, 90–92 (Colo. App. 2008).

118. Normally "the classification is of the contempt proceeding or the sentence, not of the *act* of contempt . . . ." Dobbs, *supra* note 50, at 236.

119. Dobbs, *supra* note 50, at 265–66.

120. Dudley, *supra* note 8, at 1032. While most direct contempts are almost certainly willful actions, they may not all be meant to disrupt or offend the court. *See* Dobbs, *supra* note 50, at 264 (noting that a contempt may boil down to a judge's perception of a hostile tone of voice). In indirect contempts, the willful requirement is normally irrelevant because knowledge of the court order violated is required, or else the contemnor would have a complete defense. *See* Dudley, *supra* note 8, at 1032. Similarly, a violation of an injunction will almost always be willful, unless the contemnor took an action she did not realize violated the injunction. *See* Dobbs, *supra* note 50, at 263 (stating that criminal sanctions would be inappropriate if the contemnor accidentally violated an injunction, but observing that criminal sanctions still have been imposed in such situations). On the other hand, in court orders that impose a continuing duty to perform, e.g., child support orders, there could conceivably be a violation of the court order due to negligence, e.g., poor memory. Theoretically, criminal contempt sanctions would be unavailable in such a scenario. For example, if a father forgets to make a child support payment, civil contempt sanctions would be more appropriate. However, a civil contempt proceeding would be a remarkably poor mechanism to deal with a forgotten child support payment; if the payment were truly forgotten, a telephone call would most likely suffice to remedy the problem.

121. *E.g.*, *In re* Marriage of Betts, 558 N.E.2d 404, 419–20 (Ill. App. Ct. 1990); Dobbs, *supra* note 50, at 235.

civil and criminal proceedings.[122] In fact, in some states, the rules of civil or criminal procedure may not apply to contempt proceedings at all.[123] Because of this inherent ambiguity, it is easier to speak about the rights afforded to the contemnor for each type of contempt. This section will briefly outline the rights afforded based on the direct/indirect and civil/criminal distinctions.

*1. Direct and Indirect Contempt*

The distinction between direct and indirect contempt primarily serves to determine the availability of summary sanctions. Any direct contempt may be summarily punished, a process where the judge immediately finds the contemnor in contempt and announces a sanction,[124] unless the judge wishes to impose serious criminal penalties, where the contemnor would have a right to trial by jury.[125] Indirect contempts may not be summarily punished.[126] In contrast, in direct contempt, if it is unnecessary to punish the contemnor immediately to preserve courtroom order, the judge has the option of waiting until the end of the proceeding before imposing punishment.[127] Should a judge wait until the end of a proceeding to impose punishment, the contemnor must be given notice and an opportunity to be heard.[128] Additional due process protections may place some limitations on a judge; if a contempt is not summarily punished and the contempt consists of a personal attack on the judge, another judge may be required to hear the proceeding.[129]

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122. *See* Dobbs, *supra* note 50, at 235.

123. *See In re Marriage of Betts*, 558 N.E.2d at 419 (recognizing that contempt proceedings are *sui generis* and neither the civil procedure or criminal procedure code apply unless specifically made applicable). *But see* Marco Indus., Inc. v. United Steel Workers, 164 A.2d 205, 208 (Pa. 1960) (recognizing that indirect criminal contempts are clearly governed by legislation). While it may appear that this ambiguity results from legislative oversight, some states have been relatively hostile toward legislative intrusions into the court's power of contempt. *See infra* notes 205–20 and accompanying text. "Operational" statutes or rules of procedure may resolve part of the ambiguity. *See infra* Part V.A.

124. *E.g.*, Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 827 n.2 (1994).

125. *See infra* notes 130–31 and accompanying text.

126. *See Bagwell*, 512 U.S. at 827 n.2 (noting that summary adjudication is available for direct contempts). Indirect contempts do not require summary adjudication because, unlike a direct contempt, an indirect contempt does "not threaten the courts [*sic*] immediate ability to function." Ercolino, *supra* note 42, at 320–21.

127. *In re Marriage of Betts*, 558 N.E.2d at 419–20.

128. *Bagwell*, 512 U.S. at 832.

129. Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971). One court has stated that due process requires another judge to preside over the contempt proceeding if "(1) an individual reviles a judge during a judicial proceeding, (2) it is likely the remarks 'left personal stings,' and (3) sanctions for

*2. Civil and Criminal Contempt*

The right to a trial by jury is triggered only in a criminal contempt case where "serious" criminal penalties are imposed.[130] Thus, a jail sentence in excess of six months cannot be imposed unless there is a jury trial.[131] The Supreme Court has not specified a fine amount that would trigger the jury trial right,[132] but at least one state court has held that there is such a limit.[133] However, the jury trial right does not apply to civil contempt proceedings,[134] thus allowing courts to get around any limit on criminal fines by imposing civil contempt fines instead of criminal fines. Criminal contempt sanctions may not be imposed unless the contemptuous conduct is proven beyond a reasonable doubt.[135] A criminal contempt proceeding is considered to be separate from the underlying litigation that spawned the contempt.[136] Thus, imposing criminal sanctions creates a final order that may be immediately appealed.[137] "Indirect criminal contempt proceedings must generally conform to the same constitutionally mandated procedural requirements as other criminal proceedings."[138] Therefore, the presumption of innocence, right against self-incrimination, and right to

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contempt are not immediately imposed for the purpose of maintaining order in the courtroom." *In re Marriage of Betts*, 558 N.E.2d at 420 (citing *Mayberry*, 400 U.S. at 464, 466).

130. *See supra* note 38.

131. Duncan v. Louisiana, 391 U.S. 145, 159–60 (1968) (stating the Sixth Amendment applies if a serious penalty is contemplated); Bloom v. Illinois, 391 U.S. 194, 208 (1968) (stating that a jury trial cannot be denied when "serious punishment for contempt is contemplated"); Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974) (stating that any crime with a potential sentence in excess of six months is a serious crime). A logical corollary is that a judge who uses a summary criminal contempt proceeding may not impose a jail sentence in excess of six months. However, if multiple acts of contempt occur during a single proceeding, a trial judge may impose sentences throughout the trial for each act of contempt that total more than six months. *Codispoti*, 418 U.S. at 513–15.

132. *See* Dudley, *supra* note 8, at 1093–94.

133. "The traditional test for determining whether or not a charged offense is a misdemeanor is whether the penalties exceed $500 or six months' imprisonment." *In re Marriage of Betts*, 558 N.E.2d at 420.

134. Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 827 (1994).

135. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911); *In re Marriage of Betts*, 558 N.E.2d at 421.

136. Chinnock & Painter, *supra* note 6, at 311; *see also* Mortgage Specialists, Inc. v. Davey, 904 A.2d 652, 673 (N.H. 2006) ("[C]riminal contempt proceedings arising out of civil litigation . . . are not a part of the original cause." (quoting Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 804 (1987))).

137. Bessette v. W.B. Conkey Co., 194 U.S. 324, 338 (1904) (holding that the contempt sanction against a non-party to the underlying litigation was a final order and therefore appealable); *In re* Christensen Eng'g Co., 194 U.S. 458 (1904) (extending *Bessette* to the criminal contempt conviction of a party to the underlying litigation); *see also* Dudley, *supra* note 8, at 1037–38.

138. *In re Marriage of Betts*, 558 N.E.2d at 425.

counsel apply, if these rights would otherwise apply in a criminal proceeding.[139]

In a civil contempt proceeding, the contemptuous conduct need not be proven beyond a reasonable doubt, and there is no right to a jury trial.[140] Unlike criminal contempt proceedings, civil contempt is considered to merely be a part of the underlying litigation and is not a separate proceeding.[141] Therefore, imposing civil contempt sanctions does not create a final order that ends the litigation, and the sanction cannot be appealed until the completion of the underlying case.[142] Whether a civil contemnor is entitled to counsel varies by jurisdiction.[143] A civil contemnor is entitled to minimal due process.[144]

Because direct contempts may be punished summarily,[145] there are few procedural differences between direct civil and direct criminal contempt, unless the judge wishes to impose a serious penalty.[146] Some courts therefore state that the civil and criminal distinction only applies to indirect contempts.[147]

## IV. CRITICISMS OF CONTEMPT LAW

### *A. Inverted Nature of the Inquiry*

Perhaps the most obvious criticism of contempt law is the inverted nature of the analysis used in determining whether a contempt is civil or criminal. As discussed above, the type of sanction imposed effectively determines whether or not the contempt is civil or criminal.[148] While examining the sanction imposed may prove a useful tool for appellate courts to analyze contempts, the inquiry does little to aid the trial court in classifying the contempt. Due to the procedural differences between civil

139. *Id*.

140. Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 827 (1994).

141. Chinnock & Painter, *supra* note 6, at 311.

142. Doyle v. London Guarantee & Accident Co., 204 U.S. 599, 608 (1907); *see also* Dudley, *supra* note 8, at 1037–38

143. *Compare In re Marriage of Betts*, 558 N.E.2d at 424 (holding that a civil contemnor has no right to counsel), *with* Segovia v. Likens, 901 N.E.2d 310, 316 (Ohio Ct. App. 2008) (stating that a civil contemnor has a right to counsel if incarceration is contemplated).

144. Shillitani v. United States, 384 U.S. 364, 371 (1966).

145. *See supra* note 124.

146. *See* Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 827 n.2 (1994) (observing that the civil and criminal distinction "does not pertain" to direct contempts unless a serious penalty is contemplated).

147. *See id*.

148. *See supra* Part III.B.5.

and criminal contempts, a trial court must know the type of contempt before the contempt proceeding takes place, which necessarily occurs *before* the sanction is imposed.[149] Thus, a trial court must determine whether to use procedures for criminal or civil contempt without being able to analyze the sanction. One court has argued that a trial court may get around this difficulty simply by "announcing at the outset the goal of the contempt action, specifying whether the action is designed primarily to vindicate the court's authority or to coerce compliance with one of its orders for the benefit of a third party."[150] There are several reasons why the proposed solution will not work. First and foremost, a judge's stated purpose in imposing a sanction is not dispositive for purposes of establishing whether the contempt is civil or criminal.[151] Merely stating that a contempt proceeding is civil or criminal does not make it so; the fact remains that criminal sanctions cannot be imposed in a contempt proceeding unless criminal contempt procedures have been used.[152] Secondly, this argument does not respond to the underlying problem. Because the type of sanction imposed is unavailable to the trial court at the outset of the proceeding, the trial court is deprived of the clearest indicia of whether the contempt is civil or criminal. Thus, the argument fails, at a conceptual level, to respond to the difficulty a trial judge will have in determining the purpose of the proceeding.[153]

Realistically, a trial judge probably will be familiar with the allegations that form the basis for the contempt proceeding and have some idea of the sanctions that are likely to be imposed. As a practical matter, the trial judge thus will have some basis, albeit an imperfect one, from which she may determine whether to use criminal or civil contempt procedures. However, at the outset of the proceeding, the judge has not yet heard evidence about the contempt. Requiring the judge to announce the type of contempt at the outset of the proceeding effectively handcuffs the judge. If the judge announces that the contempt is civil in nature and proceeds using

149. Johansen v. State, 491 P.2d 759, 764 n.22 (Alaska 1971).

150. *Id*.

151. *See supra* note 101.

152. Dobbs, *supra* note 50, at 239. A court's stated purpose is not dispositive as to whether the contempt is civil or criminal. *See supra* note 101. Thus, even if a court stated it intended to coerce the contemnor but then imposed a three-month sentence of imprisonment without any purge conditions, the contempt should still be criminal. *See* Shillitani v. United States, 384 U.S. 364, 370 n.5 (1966) (criminal contempt is characterized by an unconditional sentence).

153. From a policy perspective, it is undoubtedly a good idea to have the court clearly state whether a contempt proceeding is civil or criminal before the proceeding begins. However, as a response to the criticism of contempt law, this argument simply fails to clarify *how* the judge can accurately make the determination without being able to scrutinize the sanction imposed.

civil contempt protections, she cannot impose criminal sanctions after the proceeding is finished.[154] Perhaps even more troubling is the fact that in announcing the type of contempt proceeding, the judge has already made some preliminary determination about what kind of sanctions she envisions imposing, which raises the serious concern that the judge may have already in effect decided on a sentence before the proceeding, offending the notion of a fair and impartial adjudicator.

### *B. The Confusing Overlap in Benefit Analysis*

Another criticism of contempt law is that the factors examined by appellate courts inject ambiguity into the distinction between criminal and civil contempt. Benefit analysis is particularly troublesome. A party will incidentally benefit from the opposing party being held in criminal contempt because a punitive sanction will have a deterrent effect on the opposing party.[155] In addition, it may provide other strategic advantages as the nonsanctioned party might feel free to litigate more aggressively and the party held in contempt may be more reserved. Conversely, a civil contempt designed to coerce compliance necessarily has some punitive aspects because some past conduct must have instigated the contempt proceedings.[156] Furthermore, "every contempt inevitably contains an element of disrespect for the authority of government."[157] Because a trial court, unlike an appellate court, cannot examine the sanctions imposed, the ambiguity inherent in these factors severely hampers a trial court's ability to determine the type of contempt before the proceedings begin.

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154. *See supra* note 152 and accompanying text. Even in the case of a failure to pay child support, for which a coercive civil sanction might seem to be well suited, a judge may desire to impose criminal sanctions. *See* Hughes v. Dep't of Human Res., 502 S.E.2d 233, 234 (Ga. 1998) (observing that a failure to pay support may be sanctioned with either civil or criminal contempt). While this would be unusual, imagine if the contemnor testified he did not pay child support because he did not think the judge had the power to make him pay his ex-wife money every month. This means the contemnor has questioned the authority of the court, an attitude that at least makes criminal contempt seem more appropriate. *See supra* Part III.B.1 Theoretically, if a judge decides criminal sanctions would be appropriate during a civil contempt proceeding, he or she could hold a separate criminal contempt proceeding later on. However, holding two separate proceedings suffers from obvious inefficiencies.

155. Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 847 (1994) (Ginsburg, J., concurring).

156. "Elements of punitive as well as remedial punishment are almost invariably present in every civil contempt." Johansen v. State, 491 P.2d 759, 764 (Alaska 1971).

157. *Id.* at 763; *see also* Town of New Hartford v. Conn. Res. Recovery Auth., 970 A.2d 570, 576 (Conn. 2009) ("[A]n alleged act of contempt may interfere with the rights of the opposing party *and* offend the dignity and authority of the court . . . .").

### *C. The Role of the Judge in Determining Whether a Contempt is Civil or Criminal*

Another criticism of the distinction between civil and criminal contempt stems from the fact that the same conduct can be punished with either civil or criminal contempt.[158] The obvious response is that criminal conduct often incurs accompanying tort liability; therefore, the fact that the same contemptuous conduct can be sanctioned in either manner should not be a surprise.[159] Nonetheless, the analogy between civil and criminal law in general has important differences from civil and criminal contempt.[160] In criminal law, a prosecutor makes the decision whether or not to bring a charge against the defendant.[161] For a civil claim, a plaintiff files a complaint.[162] However, this is not the case for contempts of court; an opposing party may make a motion for contempt,[163] but the judge may also take action *sua sponte*.[164] The judge thus can initiate the proceedings (performing the function of the plaintiff or prosecutor), determine whether the proceedings are civil or criminal, make factual findings, and impose the sanction.[165] This unification of functions is not present in civil or

158. *See In re* Marriage of Betts, 558 N.E.2d 404, 431 (Ill. App. Ct. 1990) (observing that criminal or civil sanctions may be imposed if criminal protections have been granted); *see also New Hartford*, 970 A.2d at 576 (observing that the contemptuous conduct does not affect whether the court uses civil or criminal contempt sanctions). The contempt proceeding, not the contemptuous act itself, is classified. Dobbs, *supra* note 50, at 236. This is problematic because the contemnor cannot determine whether he can expect a civil or criminal contempt. *Johansen*, 491 P.2d at 764–65 n.22.

159. Of course, one could also argue against maintaining the general distinction between civil and criminal law. In many areas of the law besides contempt, the distinction between the two has become blurry. *See* Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679 (1999); *see also* Aaron Xavier Fellmeth, *Challenges and Implications of a Systemic Social Effect Theory*, 2006 U. ILL. L. REV. 691, 702 (observing that the Supreme Court has determined that "the proper distinction between civil and criminal is largely whatever Congress says it is"); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1201 (2008) ("Congress has further blurred the line between civil immigration matters and criminal matters.").

160. Recall that contempt proceedings are *sui generis* and often require special rules and procedures. *See supra* notes 121–22 and accompanying text.

161. *See* United States v. LaBonte, 520 U.S. 751, 762 (1997) (observing that a prosecutor uses discretion "when he decides what, if any, charges to bring against a criminal suspect").

162. FED. R. CIV. P. 3.

163. *See In re Marriage of Betts*, 558 N.E.2d at 425 (detailing the proper titles for petitions to hold someone in civil or criminal contempt).

164. *See* Fisher v. McCrary Crescent City, L.L.C., 972 A.2d 954, 970–71 (Md. Ct. Spec. App. 2009) (noting a judge or party may initiate contempt proceedings).

165. The judge has "the authority not merely to find the facts but to define the offense, to initiate the enforcement proceeding, to determine both the form and the severity of the sanction, and, by the former choice, to fix what procedural protections the defendant will receive." Dudley, *supra* note 8, at 1066; *see* Parisi v. Broward Cnty., 769 So. 2d 359, 363 (Fla. 2000). "When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable

criminal proceedings and makes the fact that the same conduct can be punished by civil or criminal contempt so troubling. While tortious conduct may incur both civil and criminal liability, *someone other than the judge* decides whether to bring civil or criminal charges, both, or neither.[166]

### *D. The Lack of a Justification for Allocating Fewer Rights to Civil Contemnors*

Finally, there is no reason to treat indirect civil contempts differently than indirect criminal contempts.[167] A criminal contempt, unlike a civil contempt, must be proven beyond a reasonable doubt, may trigger a jury trial right if the penalty is "serious," and may be immediately appealed.[168] A commonly recited reason for offering fewer protections in the civil context is the fact that the contemnor holds the keys to his own prison; because the contemnor may purge or avoid the sanction via compliance, the contemnor does not need the full panoply of rights.[169] This rationale is unpersuasive because it assumes the contemnor actually can purge the sanction.[170] A civil contempt need not be proven beyond a reasonable

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of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause." Green v. United States, 356 U.S. 165, 199 (1958) (Black, J., dissenting) (footnote omitted), *overruled by* Bloom v. Illinois, 391 U.S. 194 (1968).

166. This unification of functions strikes at the heart of the law's difficulty in handling contempt. By placing so much power in a judge, the potential for abuse is readily apparent. *See* Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 840 (1994) (Scalia, J., concurring) ("That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers."). However, courts and commentators alike observe that the contempt power is necessary for the courts to be able to police their own affairs and enforce their judgments. *See, e.g.*, *Ex parte* Robinson, 86 U.S. 505, 510 (1874) ("The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice."); Dobbs, *supra* note 50, at 184 ("Every system of resolving disputes must, in some form and under some name, provide for at least these two things: its own power to preserve the orderliness of the decision-making process and its own power to enforce decisions once made."). As one commentator has explained, "[t]he history of contempt procedures reveals an ongoing and overt tension between the view of contempt as an inherent and necessary weapon of courts to enforce their orders and the fear that courts will misuse their authority to punish unpopular individuals or groups." Livingston, *supra* note 57, at 356 (footnote omitted).

167. *See Bagwell*, 512 U.S. at 843 (Scalia, J., concurring) ("The use of a civil process for contempt sanctions makes no sense except as a consequence of historical practice." (internal quotation marks omitted)).

168. *See supra* notes 130–42 and accompanying text.

169. *E.g.*, Johansen v. State, 491 P.2d 759, 765 (Alaska 1971).

170. *Id.*

doubt,[171] so a contemnor may not actually have the ability to comply with the court order, or in fact may have already complied with the order.[172]

A second reason proffered is the position of the opposing party. According to this argument, the government is the opposing party in criminal contempt, and it is therefore appropriate to grant more rights to the contemnor; however, in civil contempt, granting the contemnor more procedural rights works against the interests of the opposing party and is therefore inappropriate.[173] Again, the argument is unconvincing. Generally an opposing party can prosecute the contempt even if the contempt proceedings are criminal, meaning the government, at least in the form of a prosecuting attorney, is not necessarily involved.[174] Therefore, the assumption that granting more procedural rights does not work against the opposing party in criminal contempt is questionable at best.

Moreover, as noted in earlier criticisms, the same conduct can lead to civil or criminal contempt proceedings.[175] Since the judge can initiate contempt proceedings,[176] whether or not the contemnor is afforded these rights may be purely at the discretion of the trial judge. Finally, whether civil or criminal, the contempt sanction will vindicate the authority of the court and create incidental benefits to the opposing party.[177] Since both

171. *See supra* note 140 and accompanying text.

172. "Both compliance and inability to comply are complete defenses to coercive imprisonment proceedings. The contemnor may have already complied or be incapable of doing so, *yet the determination of these facts is made without criminal safeguards even though imprisonment hinges on the outcome of that determination*." *Johansen*, 491 P.2d at 765 (quoting Comment, *The Coercive Function of Civil Contempt*, 57 U. CHI. L. REV. 120, 125 (1965) [hereinafter *The Coercive Function of Civil Contempt*]); *see also* Dobbs, *supra* note 50, at 266 (observing a "misjudgment" in the civil contempt context "can result in a literally interminable jail sentence"). Moreover, the Supreme Court explicitly acknowledged that "[f]or a discrete category of indirect contempts, . . . civil procedural protections may be insufficient. Contempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable factfinding." *Bagwell*, 512 U.S. at 833–34. Finally, the effectiveness of coercive jail terms can be questioned. *See generally* Linda S. Beres, *Civil Contempt and the Rational Contemnor*, 69 IND. L.J. 723, 724 (1994) ("In most cases . . . a rational individual faced with a court order never will comply after serving a period of incarceration. He will either comply immediately or not at all.").

173. In criminal contempt, where the government initiates the action, the granting of procedural safeguards does not conflict with the rights of any individual. "But granting additional safeguards to the defendant in a civil contempt proceeding is directly opposed to the interests of the complainant to whom the defendant owes a duty by reason of a prior judicial decree." *Johansen*, 491 P.2d at 765 (quoting *The Coercive Function of Civil Contempt*, *supra* note 172, at 125).

174. *E.g.*, *In re* Marriage of Betts, 558 N.E.2d 404, 425 (Ill. App. Ct. 1990) ("Indirect criminal contempt charges may be prosecuted by either the State's Attorney, counsel for a litigant, or *amicus curiae* appointed by the court."); Mortgage Specialists, Inc. v. Davey, 904 A.2d 652, 673 (N.H. 2006) (observing a disinterested private attorney could prosecute a criminal contempt).

175. *See supra* note 158 and accompanying text.

176. *See supra* notes 163–64 and accompanying text.

177. *See supra* notes 155–57 and accompanying text.

types of contempt perform both functions, this is an unstable basis to deny rights to a civil contemnor.

## V. REFORM

### *A. "Operational" Reform*

An early and influential suggestion for reform sought to eliminate the confusion "built into" the distinction between civil and criminal contempt by creating an "operational" system that provides "in a statute exactly what is to be *done*" instead of "describing a theory."[178] Operational reform may clearly delineate the procedures to be used in contempt proceedings,[179] but whether it actually serves to eliminate confusion is another matter altogether. The fundamental question is *not* what procedures to use if the contempt is civil or what procedures to use if the contempt is criminal, but rather, *is the contempt civil or criminal in nature*?

Operational reforms may have, at least on the surface, eliminated the distinction between civil and criminal contempt. However, most "operational" statutes rely on a distinction between "remedial" and "punitive" sanctions.[180] The distinction between the two types of sanctions

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178. Dobbs, *supra* note 50, at 247. For a detailed discussion of such a statute, see Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677 (1981), written by a member of the Wisconsin Judicial Council Committee on Contempt. *Id*. at 677. The Wisconsin Committee came to the conclusion that the confusion in contempt "could not be solved with a definitional approach." *Id*. at 687. The Committee then sought to draft a statute that would use an "operational approach . . . providing . . . a statement of what is to be done in the imposition of sanctions for contempt rather than by a definition of the different types of contempt." *Id.* An example of a definitional statute follows:

> A contempt may be either civil or criminal. A contempt is civil if the sanction imposed seeks to force the contemnor's compliance with a court order. A contempt is criminal if the court's purpose in imposing the penalty is to punish the contemnor for a specific act and to vindicate the authority of the court. If the penalty imposed is incarceration, a fine, or both, the contempt is civil if the contemnor can end the incarceration or avoid the fine by complying with a court order and is criminal if the contemnor cannot end the incarceration or avoid the fine by complying with a court order.

MONT. CODE ANN. § 3-1-501(3) (2010). This type of statute essentially codifies the analyses explained in Part III.B, *supra.*

179. An operational statute may solve some of the problems that the *sui generis* nature of contempt creates. *See supra* notes 121–22, 160.

180. WIS. STAT. § 785.04 (2009); COLO. R. CIV. P. 107; *see also* State v. Manter, 784 A.2d 513, 514–15 (Me. 2001) (observing the state's contempt procedures, ME. R. CIV. P. 66(a)(2)(B)–(C) and ME. R. CRIM. P. 42(a)(2)(B)–(C), distinguish between punitive and remedial sanctions); Oregonians for Sound Econ. Policy, Inc. v. State Accident Ins. Fund Corp., 178 P.3d 286, 298 (Or. Ct. App. 2008) (stating that Oregon contempt statutes, OR. REV. STAT. §§ 33.015–.155 (2003), distinguish between

merely tracks the distinction between civil and criminal contempt sanctions.[181] Because the sanction effectively determines whether the contempt is civil or criminal,[182] an operational statute merely gets rid of confusing terminology.[183] Additionally, an operational statute still falls prey to many of the same criticisms as a statute that draws a distinction between civil and criminal contempt: (1) it still requires the judge to announce the sanctions before the contempt proceeding has begun; (2) it effectively allows the judge, by choosing what sanctions will be imposed, to determine what procedures will govern; (3) it offers no new tools to a trial court in determining whether the sanctions are remedial or punitive, or civil or criminal; and (4) it does not offer any stronger of a justification for using different procedures for remedial sanctions than punitive.[184]

### *B. Proposed Reform: Eliminating the Distinction Between Civil and Criminal Contempt*

Before discussing potential reforms in contempt law, a reminder of the purpose of the distinction between civil and criminal contempt will be useful. The distinction between civil and criminal contempt serves as a mechanism that limits the awesome power of contempt in an attempt to curb abuses of the power.[185] In other words, the law of contempt walks a tightrope: it must balance the need for courts to control and conduct their own affairs, while at the same time create a system for preventing

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punitive and remedial sanctions); Martineau, *supra* note 178, at 693 (observing the Wisconsin statute distinguishes between punitive and remedial sanctions).

181. Christensen v. Sullivan, 768 N.W.2d 798, 809 n.4 (Wis. 2009) (observing that contempt cases before the statute was enacted may be used to interpret the contempt statute); Martineau, *supra* note 178, at 693; *cf.* Peters-Riemers v. Riemers, 663 N.W.2d 657, 663–64 (N.D. 2003) (stating that under the contempt provisions of the North Dakota statute, "a court may impose both remedial and punitive sanctions, which incorporate the traditional characteristics of civil and criminal contempt, respectively"); *Oregonians for Sound Econ. Policy*, 178 P.3d at 298 (noting the contempt legislation "follows the common-law tradition of recognizing two classes of contempt sanctions"). In order to distinguish between remedial and punitive sanctions, Professor Martineau stated that one "easily identifiable difference between the types of sanctions is chronology. The punitive sanction is concerned with past conduct, the remedial with future conduct." Martineau, *supra* note 178, at 694; *cf. supra* Part III.B.3. Consequently, in a punitive sanction, "the primary purpose . . . is to punish rather than to induce different conduct in the future." Martineau, *supra* note 178, at 694; *cf. supra* Part III.B.2. In sum, distinguishing between remedial and punitive sanctions is not any different than the inquiries outlined *supra* in Part III.B.

182. *See supra* Part III.B.5.

183. This is not meant to deemphasize the utility of eliminating confusing verbiage and of clearly delineating the procedures to be used for both types of sanctions.

184. For criticisms of the civil and criminal contempt distinction, see *supra* Part IV.

185. Dudley, *supra* note 8, at 1031. Contempt cases "often reflect misbehavior by the judge." Dobbs, *supra* note 50, at 207.

abuses.[186] The distinction between direct and indirect contempt tracks this rationale; the need for courts to conduct their own affairs is strongest when faced with a courtroom disruption, and direct contempt recognizes the rationale by generally allowing summary adjudication for direct contempts.[187] In contrast, indirect contempts do not threaten a court's immediate ability to function,[188] and therefore more procedural protection is granted. The distinction between civil and criminal contempt, however, does not reflect this underlying rationale. The contemptuous act itself is of no consequence in determining whether the contempt is civil or criminal,[189] so the determination has nothing to do with the degree to which the conduct threatens a court's ability to function. In the case of indirect contempts specifically, the court's immediate ability to function is only very remotely impaired, if at all, while the potential for abuse remains high. The logical move is to remove the different treatment of civil and criminal contempts.

Eliminating the civil/criminal distinction removes a source of confusion among courts.[190] As previously argued, the type of sanction imposed, information obviously unavailable at the start of a contempt proceeding, effectively determines whether the contempt is civil or criminal.[191] Because the direct and indirect contempt distinction is easily made,[192] a judge can quickly and easily determine what procedures are appropriate for the situation, which avoids any requirement for the trial court to decide the type of sanctions it wants to impose *before* starting proceedings (and possibly before having heard any testimony or other evidence). This approach has the obvious benefit of eliminating appeals that claim criminal contempt sanctions were imposed after a civil contempt proceeding.

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186. "Our jurisprudence in the contempt area has attempted to balance the competing concerns of necessity and potential arbitrariness by allowing a relatively unencumbered contempt power when its exercise is most essential, and requiring progressively greater procedural protections when other considerations come into play." Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 832 (1994); *see also* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911) (describing the necessity of the contempt power).

187. Summary adjudication is only available for direct contempts of court. *See supra* Part III.C.1.

188. Ercolino, *supra* note 42, at 320–21; *see also Bagwell*, 512 U.S. at 832 (noting the "court's substantial interest" in restoring order is why summary adjudication is "tolerated" in cases of direct contempt).

189. *See supra* note 158.

190. "[T]he civil/criminal distinction, while a significant advance in curbing abuses . . . has become a major source of the confusion that is endemic to the contempt process." Dudley, *supra* note 8, at 1032–33.

191. *See supra* Part III.B.5.

192. *See supra* notes 53–56 and accompanying text.

Generally, all indirect contempts should be treated like former indirect criminal contempts. They should be proven beyond a reasonable doubt. While granting more procedural rights to cases that would have been classified as indirect civil contempts may disadvantage an opposing party desiring coercive sanctions,[193] it reduces the likelihood that coercive sanctions will be imposed when the contemnor either has already complied or cannot comply with the court order.[194] Moreover, all contempt convictions should also be immediately appealable. Currently, a coercive civil fine may place an unfair amount of pressure on a party because it cannot be appealed until the end of litigation.[195] Notably, eliminating the distinction between civil and criminal contempt does not affect the jury trial right, since only the imposition of "serious" penalties triggers the right.[196] This simple reform would cut costs[197] by eliminating a source of confusion for the courts and would bring contempt law more in line with its underlying purpose.[198]

Reform should also be more ambitious than merely eliminating the distinction between civil and criminal contempt. There is undeniably a need to leave the trial court some discretion in handling contempts before it;[199] however, the lack of guidance to the trial court is troubling. Many of

193. *See supra* note 173 and accompanying text.

194. *See supra* note 172.

195. "[A] party facing a draconian civil coercive sanction must either abandon its legal position for which sanctions were imposed or enter a potentially fatal wager that it will succeed in reversing the sanctions on appeal at the case's end, which may be years later." Dudley, *supra* note 8, at 1037.

196. *See supra* note 131. Unfortunately, this means that the judge must still consider whether "serious" penalties may be imposed before the contempt proceeding begins. Since currently the right to a trial by jury is triggered by serious penalties, this problem cannot be avoided unless the jury trial right is extended to every contempt, which is obviously impractical. However, determining whether a sentence in excess of six months could possibly be imposed is an easier inquiry than whether or not coercive or punitive sanctions are imposed.

197. Proving contempt beyond a reasonable doubt should not add significant additional administrative costs. *See* Dudley, *supra* note 8, at 1084 (observing that increased burdens of proof add only minimal costs to the litigation process).

198. Professor Dudley has proposed a "due process model," which would take "account of both the contempt process' peculiar dangers and the costs of affording those protections." Dudley, *supra* note 8, at 1033. Under the system, the severity of the sanctions determines the procedural protections available to the contemnor. *Id.* at 1081. However, such a system has a major drawback because it still requires a court to contemplate the sanctions to be imposed before beginning the contempt proceeding. *Id.* at 1095. Ultimately, because the current system of contempt turns on the type of sanctions imposed, it could be argued that such a due process model is merely a more nuanced version of the current law of contempt.

199. *See, e.g.*, Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 832 (1994) (noting the necessity of the contempt power).

the common contemptuous acts can be listed.[200] Each common contemptuous act could then have a suggested sentencing range. To maintain flexibility, the suggested sanctions should not be mandatory. Instead, they should merely be the default sanctions, much like the current operation of the Federal Sentencing Guidelines.[201] If a judge wants to impose a sanction that is greater, lesser, or of another type, the judge should be required to clearly state the reasons for deviating from the suggested sanction. Giving a trial judge suggested guidelines for common categories of contempt maintains the flexibility of the contempt power, while giving judges some background upon which to base the sanctions, rather than requiring them to make a decision in a complete vacuum. Furthermore, currently there may be no limit on the punishment a court can impose on contemnors if they are afforded a jury trial right.[202] An effective ceiling should be placed on the maximum contempt sanction available even if a jury trial right is afforded.[203]

### *C. Method of Reform*

The final question is how contempt reform should be implemented. Most commentators arguing for reform in contempt law have relied primarily on federal law and Supreme Court jurisprudence and consequently advocate legislative reform as the proper means to reform contempt law.[204] Statutory reform is a sensible mechanism, because the

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200. One list from a pair of judges is as follows:

> (1) disobedience of court orders (most indirect contempts); (2) disruptions in open court (most direct contempts); (3) obstruction of court's processes (blocking of service or execution of judgment); (4) refusal of witness to testify or produce evidence; (5) attempt to obstruct, influence, or intimidate judge, witnesses, or jurors; (6) fraud upon the court (witness or evidence tampering, perjury, forgery, alteration of records); (7) misconduct of court officers, jurors, or witnesses; (8) symbolic acts which invade the court's respect and dignity; and, (9) out-of-court statements and publications which attempt to influence judge or jurors.

Chinnock & Painter, *supra* note 6, at 311–12.

201. This is not that dissimilar to the Federal Sentencing Guidelines after *United States v. Booker*, 543 U.S. 220 (2005), made the guidelines advisory and not mandatory. However, with regard to contempt of court, the Sentencing Commission "has not provided a specific guideline for this offense." U.S. SENTENCING GUIDELINES MANUAL § 2J1.1 cmt. n.1 (2010). Ohio already has such a system in place, because despite statutory contempt provisions, OHIO REV. CODE ANN. §§ 2705.01–.10 (West 2006), Ohio courts are not bound by the penalties outlined in the statute. State v. Local Union 5760, 173 N.E.2d 331, 342 (Ohio 1961).

202. *E.g.*, *In re* Marriage of Betts, 558 N.E.2d 404, 416 (Ill. App. Ct. 1990); Dudley, *supra* note 8, at 1026–27.

203. The jury trial right does not directly prevent a judge from imposing excessive sanctions. Livingston, *supra* note 57, at 413. However, it may indirectly curb some abuses by making a judge less likely to impose a sentence greater than six months because of the demands of convening a jury.

204. *See, e.g.*, Dudley, *supra* note 8, at 1098; Ercolino, *supra* note 42, at 317–18; Livingston,

Supreme Court now allows Congress to pass laws that restrict the contempt powers of the lower federal courts.[205] A statute has the advantage of very precisely describing the procedure to be followed and serving as a "direct guide" to courts.[206] Some state courts have followed the Supreme Court's lead, also allowing state legislatures to pass legislation infringing on the contempt powers of the courts.[207] Where possible, reform should be accomplished through such legislation.

However, it is unlikely that legislative reform will be effective in all states. Not all state courts have been so accommodating toward legislative intrusions into the inherent power of contempt. By way of example, the Ohio legislature has passed a series of statutes on the contempt power of Ohio courts.[208] One statute in particular enumerates several acts, defining them as contempt of court.[209] Despite the statutes, Ohio courts held that

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*supra* note 57, at 348.

205. *See* 18 U.S.C. §§ 401–03 (2006) (current federal contempt statutes). In 1831, Congress passed a law that restricted the contempt powers of the federal courts, which the Supreme Court initially upheld. *See supra* note 27 and accompanying text. Forty years later, the Supreme Court had a different interpretation of the statute, stating that it "conferred no power not already granted and imposed no limitations not already existing. In other words, it served but to plainly mark the boundaries of the existing authority resulting from and controlled by the grants which the Constitution made and the limitations which it imposed." Toledo Newspaper Co. v. United States, 247 U.S. 402, 418 (1918). This interpretation of the law was effectively overruled. Nye v. United States, 313 U.S. 33, 49–50 (1941). However, Congress's ability to legislatively restrict the contempt power of the courts may be limited. *See* Michaelson v. United States *ex rel*. Chi., St. P., M. & O. Ry. Co., 266 U.S. 42, 66 (1924) (noting the contempt power cannot be "rendered practically inoperative" by Congress). It is worth mentioning that Congress created the federal district courts and circuit courts, not the Constitution. *Ex parte* Robinson, 86 U.S. 505, 511 (1874) (observing of the lower courts that "[t]heir powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction"). Because Congress created these courts, it makes sense that Congress can restrict their power. Although there has not been a case, and it is almost unthinkable to even consider it, it would certainly be interesting if a contempt were to occur before the Supreme Court. Would the Court view itself as bound by the federal statutes? *See id.* at 510 (stating that the 1831 contempt statute "in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt."); *see also Michaelson*, 266 U.S. at 66 (observing that "[s]o far as the inferior federal courts are concerned," Congress may restrict the power of contempt). State judiciary systems, on the other hand, might be established by the state constitution. If those courts are created by the constitution, the same rationale for allowing restrictions on the contempt power of the courts is unavailable.

206. Ercolino, *supra* note 42, at 318.

207. *See, e.g.*, Pate v. Guy, 934 So. 2d 1070, 1072 (Ala. Civ. App. 2005) (recognizing criminal contempt sanctions are limited by statute); *In re* McKinney, 447 P.2d 972, 974 (Cal. 1968) (stating that although the court has an inherent power to punish contempt, "[i]t does not, however, follow that the Legislature may not place reasonable limitations on this inherent power"). *But see, e.g.*, State v. Local Union 5760, 173 N.E.2d 331, 337 (Ohio 1961) ("Power which the Legislature does not give, it cannot take away."); State *ex rel*. McLeod v. Hite, 251 S.E.2d 746, 747 (S.C. 1979) (noting inherent powers of the court cannot be taken away).

208. OHIO REV. CODE ANN. §§ 2705.01–.10 (West 2006).

209. OHIO REV. CODE ANN. § 2705.02 (West 2006).

the contempt power is not limited to the statutorily enumerated cases of contempt.[210] Similarly, the Ohio statutes also proscribe sentences for contempt of court.[211] Ohio courts have held that despite the sentencing ranges set forth in the statutes, the statutes do not limit the sentence a court may impose for contempt.[212] Illinois provides another example. An Illinois statute that restricted the contempt power of courts by preventing a criminal defendant charged with an unlawful violation of a visitation order from being held in contempt was held unconstitutional.[213] The Supreme Court of Illinois reasoned that because the contempt power is inherent to the courts and not dependent on legislative grant, "the legislature may not restrict its use."[214]

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210. *Local Union 5760*, 173 N.E.2d at 337.

211. OHIO REV. CODE ANN. § 2705.05 (West 2006).

212. "[T]he power to punish for contempt has traditionally been regarded as inherent in the courts and not subject to legislative control." City of Cincinnati v. Cincinnati Dist. Council 51, 299 N.E.2d 686, 694 (Ohio 1973); *see also* Steiner v. Gilbert, 159 P.3d 877, 884 (Idaho 2007) (observing a court could impose civil contempt sanctions not enumerated by statute); *Local Union 5760*, 173 N.E.2d at 337, 342; Chinnock & Painter, *supra* note 6, at 330. In a similar example, the Hawai'i legislature has also enacted contempt statutes. HAW. REV. STAT. §§ 604-10.5, 710-1077 (2009). The Supreme Court of Hawai'i allows the legislature to "establish alternative procedures and penalties that do not unduly restrict or abrogate the courts' contempt powers." LeMay v. Leander, 994 P.2d 546, 553 (Haw. 2000). According to the court, the statute did not grant the power of contempt to the courts, but was "merely a legislative restatement of the courts' existing powers." *Id.* at 556; *see also* Ullmann v. State, 647 A.2d 324, 328–29 (Conn. 1994) (noting the contempt statute merely codified the court's common law contempt powers). Notwithstanding the statute, "the courts' inherent contempt powers to find violators of its orders in civil contempt were not and cannot be abrogated or unduly restricted." *LeMay*, 994 P.2d at 555. In Arkansas, contempt is defined as a class C misdemeanor, which may be punished with up to thirty days' imprisonment and a $100 fine, but because the contempt power is vested in the courts by Arkansas's constitution, courts may impose a greater sentence than thirty days. Norman v. Cooper, 278 S.W.3d 569, 574–75 (Ark. Ct. App. 2008). Hostility to legislative intrusions into the contempt is far from a recent phenomenon. In the nineteenth century, the Colorado civil code enumerated five cases of contempt, which prompted the following response from the Colorado Supreme Court:

> [A] statutory enumeration of causes as is found in our Code, when applied to the ever varying facts and circumstances out of which questions of contempt arise, can not be taken as the arbitrary measure and limit of the inherent power of a court for its own preservation, and for that proper dignity of authority which is essential to the effective administration of law.

Hughes v. People, 5 Colo. 436, 446 (1880).

213. People v. Warren, 671 N.E.2d 700, 711–12 (Ill. 1996); *see also* Walker v. Bentley, 678 So. 2d 1265, 1266–67 (Fla. 1996) (declaring a statute that prohibited a court from using indirect criminal contempt "to enforce compliance with injunctions for protection against domestic violence" unconstitutional on separation-of-powers grounds).

214. *Warren*, 671 N.E.2d at 711–12; *see also* State v. Estill, 349 P.2d 210, 212 (Wash. 1960) ("A majority of the court does not agree that the legislature has the power to supersede the inherent power of a constitutional court to punish for contempt . . . ."). *But see In re* McKinney, 447 P.2d 972, 974 (Cal. 1968) (rejecting the idea that just because the legislature did not grant contempt powers, it could not restrict contempt powers).

Courts have also struck down statutes that have been less intrusive on the contempt power of the courts. The Supreme Court of Illinois struck down, on separation-of-powers grounds, another Illinois statute that required a court to order sex offenders to cooperate with the collection of blood samples and mandated a court must hold them in contempt if they did not comply.[215] The court reasoned that these provisions removed the judiciary's "inherent discretion" in exercising contempt powers.[216] In South Carolina, a contemnor was convicted of contempt for jury tampering and sentenced to three months' imprisonment.[217] After serving one month of his sentence, he was paroled.[218] The Supreme Court of South Carolina held that anyone serving a contempt sentence could not be paroled.[219] According to the court, the "inherent authority" of the court to punish contemptuous conduct "cannot be abridged."[220]

Ideally, legislation would be used to implement contempt reform. However, some state courts have been hostile to legislative intrusions on the contempt power. Even in these hostile states, some reform may be possible via legislation if the legislation merely outlines procedures, rather than placing substantive limits on the contempt power.[221] To implement reform in this manner, the legislature could merely prescribe procedures for only direct and indirect contempt and prescribe that the same procedures be used whether the contempt is civil or criminal. Should legislation still prove ineffective, another alternative is available: promulgation of reform via state supreme court rules.[222] Should this last

215. Murneigh v. Gainer, 685 N.E.2d 1357, 1360, 1370 (Ill. 1997).

216. *Id*. at 1366–67. The court was also concerned that the statute forced courts to act as a "rubber stamp" in "issuing orders that are administrative in nature." *Id*. at 1367.

217. State *ex rel*. McLeod v. Hite, 251 S.E.2d 746, 747 (S.C. 1979).

218. *Id*.

219. *Id*. at 748.

220. *Id*. at 747. However, the court did acknowledge that the legislature could place reasonable limits on the contempt power. *Id*. at 748.

221. Even in states that have been hostile to legislative intrusion on the contempt power, the ability of the legislature to outline procedures for contempt has not received as hostile of a reception. For example, the Supreme Court of Illinois has struck down two statutes infringing on the contempt power. *See supra* notes 213–16 and accompanying text. However, while neither the Illinois civil or criminal procedure code apply to contempt proceedings directly, either code may apply if "a particular provision is made specifically applicable by its language." City of Rockford v. Suski, 718 N.E.2d 269, 276 (Ill. App. Ct. 1999); *see also* City of Cincinnati v. Cincinnati Dist. Council 51, 299 N.E.2d 686, 690 (Ohio 1973) (noting the legislature could not restrain the court's power to punish for contempt but could legislate procedure in indirect contempt proceedings); Marco Indus., Inc. v. United Steel Workers, 164 A.2d 205, 207 (Pa. 1960) (noting the procedure for indirect criminal contempt proceedings was governed by statute); *State ex rel. McLeod*, 251 S.E.2d at 748 (noting the legislature can place reasonable limitations on the contempt power, even though a contemnor serving a sentence cannot be paroled).

222. While this might appear to be a novel use of supreme court rules, the New Jersey Supreme

alternative fail, reform could be implemented through a state's constitution.[223]

## VI. CONCLUSION

The law of contempt should attempt to balance the necessity of the contempt power with the need to limit its potential for abuses. The distinction between direct and indirect contempt admirably performs this function because direct contempts more directly interfere with a court's ability to function. The distinction between civil and criminal contempt, on the other hand, serves only to provide fewer rights to civil contemnors, even though there is nothing substantively different about the conduct. Since there is a potential for abuse in both civil and criminal contempt, there is no justifiable basis for denying rights to the civil contemnor. Furthermore, the civil/criminal distinction serves only to create confusion. Therefore, the distinction between civil and criminal contempt should be eliminated, thereby greatly simplifying the law and creating a more just system. Instead, rights should be determined on the basis of the direct and indirect distinction. The easiest way to implement this systematic change is by legislation, but due to the fact that contempt is an inherent power of the court, it is highly likely that some state courts will hold legislative reform unconstitutional. In these states, legislation via a promulgated supreme court rule is a viable alternative that could accomplish the same task.

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Court promulgated several rules in 1965 to govern contempt of court. *See In re* Lynch, 848 A.2d 55, 58 (N.J. Super. Ct. App. Div. 2004).

223. Oklahoma's constitution specifically directs the legislature to pass laws regarding contempt of court. Henry v. Schmidt, 91 P.3d 651, 654 (Okla. 2004) (citing OKLA. CONST. art. 2, § 25). Naturally, such a mode of reform would be difficult to implement.

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