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United Mine Workers v. Bagwell: New Restrictions on Severe Civil Contempt Fines

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I. INTRODUCTION

Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct.¹

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After years of silence, the Supreme Court has again addressed the court’s power to levy severe civil contempt fines.² Although the civil contempt power is “relatively unlimited,”³ the Court has not examined the issue of coercive civil contempt fines in nearly fifty years.⁴ In United Mine Workers v. Bagwell,⁵ the Supreme Court was asked to determine whether certain procedural protections should have been applied, in effect limiting the trial court’s ability to impose millions of dollars in sanctions.⁶ In a unanimous decision, the Supreme Court found that the $52 million in fines levied against the United Mine Workers of America (UMWA) for violations of a Virginia Circuit Court’s order were “serious” enough to entitle the UMWA to the safeguards of a criminal jury trial.⁷

In Bagwell II, the Supreme Court reexamined the history of coercive civil contempt sanctions and the procedural safeguards which accompany them. The Bagwell II decision was significant because it was the first time in nearly fifty years the Court considered this specific aspect of contempt law.⁸ Furthermore, the Bagwell II Court appears to have created a new category of contempt, venturing beyond the traditional distinction between civil and criminal.⁹ Under this new categorization, complex indirect contempt may require more than the standard civil procedural protections of notice and a hearing.¹⁰ Additional procedural protections may be warranted because the contemptuous

³. Id.
⁴. Id. In 1947 the Supreme Court considered three million dollars in fines that had been levied against the United Mine Workers of America (UMWA) for failure to obey a temporary restraining order. United States v. United Mine Workers of America, 330 U.S. 258, 305 (1947). The combined civil and criminal contempt fines were found to be “excessive” due to their unconditional nature. Id. The Court remedied this by conditioning nearly all of the fines on the UMWA’s ability to comply with the original restraining order and preliminary injunction. Id.
⁵. 114 S. Ct. 2552 (1994).
⁶. Id. at 2559.
⁷. Id. at 2563.
⁸. Id. at 2559. See supra note 4 and accompanying text.
⁹. Bagwell II, 114 S. Ct. at 2560.
¹⁰. Id.
conduct that leads to these contempt occurs outside of the judge’s presence.\textsuperscript{11} Thus, this new category of indirect contempt may require the “elaborate and reliable factfinding” of a jury trial.\textsuperscript{12}

The facts surrounding the contempt sanctions in \textit{Bagwell II} convinced the Court that the procedures utilized by the trial court in levying the contempt fines were inadequate.\textsuperscript{13} Generally, more extensive procedural protections are required when a fixed, noncompensatory sanction is levied for a contemptuous act which occurred outside the courtroom.\textsuperscript{14} The Court characterized the complex order of the trial court as “an entire code of conduct” and not a requirement of one discrete act.\textsuperscript{15} As a result, a wide variety of contemptuous acts taking place across the Commonwealth of Virginia led to the imposition of the fines.\textsuperscript{16} Because the conduct which lead to the violations of the trial court’s order was both complex and violent, the Court concluded that the contempt was criminal, and thus due process required that a jury trial be afforded the UMWA.\textsuperscript{17} While not clearly articulating a new standard solely based on the severity of the contempt sanction, the \textit{Bagwell II} Court weighed both the severity of the fines and the nature of the court order in holding that the contempt fines were criminal in nature.\textsuperscript{18}

This Case Comment will examine the history of the contempt power, focusing in particular on its application to labor disputes. Attention will be given to the progression of the \textit{Bagwell II} contempt sanctions through the court system as well as the particular events leading up to the contempt fines. Finally, this Comment will summarize the

\begin{itemize}
  \item \footnotesize \textsuperscript{11} \textit{Id.}
  \item \footnotesize \textsuperscript{12} \textit{Id.} (citing Green v. United States, 356 U.S. 165, 217 n.33 (1958) (Black, J., dissenting) (“[a]lleged contempt committed beyond the court’s presence where the judge has no personal knowledge of the material facts are especially suited for trial by jury”)).
  \item \footnotesize \textsuperscript{13} \textit{Id.} at 2562. \textit{See infra} notes 154-161 and accompanying text.
  \item \footnotesize \textsuperscript{14} \textit{Bagwell II}, 114 S. Ct. at 2559. \textit{See infra} notes 149-53 and accompanying text.
  \item \footnotesize \textsuperscript{15} \textit{Id.} at 2562. \textit{See infra} notes 156-58 and accompanying text.
  \item \footnotesize \textsuperscript{16} \textit{Id.} \textit{See infra} notes 74-79 and accompanying text.
  \item \footnotesize \textsuperscript{17} \textit{Id.} at 2562-63.
  \item \footnotesize \textsuperscript{18} \textit{Id.} Once a contempt sanction is designated as criminal, certain procedural requirements are necessary. \textit{See infra} note 41 and accompanying text.
\end{itemize}
Supreme Court’s opinion in Bagwell II and analyze the possible implications of the Court’s treatment of this issue.

II. OVERVIEW OF CONTEMPT

A. History of the Contempt Power

First vested in the American courts through the Judiciary Act of 1789,19 the contempt power’s roots can be traced to England.20 The power is used to coerce desired behavior from the defendant or to punish any act of disobedience or disrespect toward a judicial body.21 The contempt power has long been viewed as essential to the very operation of the court system.22 Under this philosophy the courts have developed a broad reliance on the contempt power.23 Justifying the

19. RONALD L. GOLDFARB, THE CONTEMPT POWER 20 (1963). The federal courts were given "the power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempt of authority in any case or hearing before same. . . ." Id. See 18 U.S.C. § 401 (1988):

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

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

Id.

20. GOLDFARB, supra note 19, at 9-11. The obvious purpose of this power was not only to promote efficiency and order in the courtroom, but to preserve the court's authority and dignity. Id. See also Dan B. Dobbs, Contempt of Court: A Survey, 56 CORNELL L. REV. 183, 192-93 (1971) (the "essential" need for order is often blended into a "requirement of dignity").

21. GOLDFARB, supra note 19, at 1.

22. Id. at 20. Goldfarb explains:

Gradually, any questions about the right of the judiciary to punish disobedience, obstruction, or disrespect (and they were few) were answered with the claim that this was an inherent right of English courts. Necessity then became with maturity the mother of this claimed innate, natural right of courts.

Id. at 13.

23. Robert J. Martineau, Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt, 50 U. Cin. L. Rev. 677, 679 (1981). The courts utilize contempt to control a variety of conduct, from courtroom dress to violation of an order outside of the courtroom. See also Dobbs, supra note 20, at 184-85.
use of contempt is not difficult in the first general category of contempt, direct contempt of court, or contemptuous conduct that occurs in the court's presence. In these instances of disorder or disobedience, the contempt power has been accepted as inherent and proper in maintaining the "administration of justice." However, critics note that the determination of the scope and necessity of applying the contempt power in a given instance has been left to those that the power serves, namely the courts. Abuse of this power can occur when it is used to salve the judges' own personal sensitivities and biases, and not to protect the dignity of the court.

Most instances of the second category of contempt, indirect contempt, concern either failure to perform a court-imposed duty or continuing an activity prohibited by the court. Because these contempt occur outside of the courtroom and the judge is not a witness to the disobedience, procedural safeguards in the form of factfinding processes are often necessary. For example, the allegedly contemptuous party has a right to a hearing where s/he may voice his side of the charge. However, despite these procedural protections, the judge remains the final arbiter of the dispute concerning the disobedience of his order. The courts have historically acknowledged that the exercise of the contempt power can be both arbitrary and "liable to abuse."

25. Goldfarb, supra note 19, at 68. (Although indirect contempt are interferences with the "administration of justice," such contempt occur outside the court's presence and thus require a degree of factfinding.) Id. at 68-69.
26. Richard C. Brautigam, Constitutional Challenges to the Contempt Power, 60 GEO. L.J. 1513, 1515 (1972) (citing E. Livingston, 1 The Complete Works of Edward Livingston on Criminal Jurisprudence 258-66 (1873)).
27. Id. at 1515-16. See also Ex parte Terry, 128 U.S. 289, 309 (1888) ("[t]he power which the court has of instantly punishing, without further proof or examination, contempt committed in its presence, is one that may be abused and may sometimes be exercised hastily or arbitrarily").
29. Id. at 1030-31.
31. Dudley, supra note 24, at 1026.
Whether direct or indirect, historically there have been few constraints on a court’s power to impose sanctions, whether in the form of imprisonment or fine. Needless to say, such unfettered power can lead to extreme results. Concerns of abuse focus on the court’s dual task of determining whether a forbidden act has been committed and of establishing the appropriate punishment or deterrent. In an effort to place further limits on this judicial power, the Supreme Court has gradually increased the number of procedural safeguards surrounding indirect contempt proceedings. Although it is said to “plague[] the American courts,” the long-standing criminal/civil distinction has continued to provide a foundation for the courts to facilitate this procedural development.

B. The Civil/Criminal Distinction

The distinction between civil and criminal contempt has baffled and frustrated legal scholars for decades. Courts originally devised
the distinction to permit the timely review of criminal contempt proceedings and to envelop criminal contempt within the blanket of criminal procedural protections.\textsuperscript{41} Over the years, courts have focused considerable attention on those contempt categorized as criminal, and thus the doctrine of criminal contempt has undergone procedural development and expansion.\textsuperscript{42} On the other hand, the courts have given the procedural protections associated with civil contempt less scrutiny and less development.\textsuperscript{43} Civil contempt has taken a backseat to criminal contempt because civil contempt by their nature afford the contemnor greater autonomy and control over his punishment.\textsuperscript{44} Nevertheless, this unchecked power of the courts remains an area of controversy and confusion.\textsuperscript{45} In Bagwell \textit{II}, the Supreme Court noted that in the years since its last decision dealing with coercive civil contempt, \textit{United

\begin{quote}
\textit{Contempt of Court: Eliminating the Confusion between Civil and Criminal Contempt}, 50 U. CTN. L. REV. 677 (1981); Joseph Moskovitz, \textit{Contempt of Injunction, Civil and Criminal}, 43 COLUM. L. REV. 780 (1943); GOLDFARB, supra note 19, at 58 (1963)).


42. Bagwell \textit{II}, 114 S. Ct. 2552, 2556 (citing Bloom v. Illinois, 391 U.S. 194, 201 (1968)). \textit{See also} Dudley, \textit{supra} note 24, at 1040 (stating that cases following \textit{Gompers} created numerous safeguards for the criminal contemnor). \textit{See infra} note 86 and accompanying text.

The right to a jury trial for criminal contempt has been codified in 18 U.S.C. § 3691 (1988):

Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and any act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases . . . .

\textit{Id.}

43. Dudley, \textit{supra} note 24, at 1032.

44. \textit{Id.} (quoting \textit{Gompers}, 221 U.S. at 442 (explaining that the contemnor has the power to end his punishment through compliance)).

45. Dudley, \textit{supra} note 24, at 1033. See Martineau, \textit{supra} note 23, at 684 (discussing confusion over the procedure warranted by the sanction); GOLDFARB, supra note 19, at 51-52 ("[c]ivil contempt are now treated in ways which are extraordinary and would not be tolerated were they not garbed in that title “contempt”, which we shall see is the cloak for a peculiar and sometimes severe area of the law").
States v. United Mine Workers,46 "[I]ower federal courts and state courts . . . have relied on United Mine Workers to authorize a relatively unlimited judicial power to impose noncompensatory civil contempt fines."47

In Gompers v. Buck’s Stove & Range Co.,48 the Supreme Court set out an enduring standard for distinguishing civil contempt from criminal.49 The Gompers Court first reasoned that in all instances of contempt for failure to obey a court order, some action would be taken to punish the contemnor.50 For this reason, the Court concluded that it must look to the “character and purpose”51 of the punishment, not the mere fact that the sanction acted as a punishment.52 Applying this now widely accepted analysis,53 the Court concluded that the character of the civil contempt sanction or fine is remedial and its purpose is to benefit the complainant or to coerce the defendant into doing what he refused to do.54 The character of the criminal contempt sanction, however, is purely punitive; its purpose is to punish the contemnor, and in doing so to vindicate the court’s authority.55

The Gompers Court’s analysis further considered the nature of the contemptuous act. For example, if the contemnor refused to do something that a court order had previously required, then the contempt would be civil in nature.56 In this instance, the threat of a sanction for disobedience of the order would be considered coercion or a means to encourage the behavior the court requires.57 On the other hand, once an act forbidden has been completed, it is too late to coerce, and the

47. Bagwell II, 114 S. Ct. at 2559.
48. 221 U.S. 418 (1911).
49. Dudley, supra note 24, at 1031 n.17.
50. Gompers, 221 U.S. at 441 (stating that in both criminal and civil contempt proceedings there is an accusation that the order has been disobeyed and a request that the actor be punished).
51. Id. at 441 (emphasis added).
52. Id.
53. See infra note 105 and accompanying text.
54. Gompers, 221 U.S. at 441.
55. Id.
56. Id. at 442.
57. Id.
contempt is in punishment for the disobedience. 58 Thus, the civil/criminal distinction also encompasses the difference between doing that which is forbidden and refusing to do what has been commanded. 59

Through later developments, the Supreme Court attached to criminal contempt the procedural safeguards of a statutory crime. 60 As a result, criminal contempt eventually became categorized as a crime. 61 These procedural hoops created a considerable restraint on the court's power to levy serious 62 criminal sanctions. 63 In contrast, the procedures surrounding civil contempt fines or sanctions have remained limited to the standard due process protections of notice and an opportunity to be heard. 64 Thus, the Gompers distinction evolved into a test by which a court could determine the procedural rights of the contemnor. 65

Critics have argued that the civil/criminal analysis that resulted is confusing and unworkable. 66 For example, because the procedures required in a given contempt proceeding depend upon the type of sanction, classifying the contempt is virtually impossible until the sanction

58. Id. at 442-43.
59. Id. at 443.
60. See In Re Bradley, 318 U.S. 50 (1943) (double jeopardy); Cooke v. United States, 267 U.S. 517 (1925) (rights to notice of charges, assistance of counsel, summary process, and to present a defense); Bloom v. Illinois, 391 U.S. 194, 208 (1968) (extending the right to a jury trial to criminal contempt cases because it is a fundamental right in other criminal cases).
61. See Bloom, 391 U.S. at 208 (characterizing criminal contempt as an ordinary crime).
62. See Bagwell II, 114 S. Ct. 2562 n.5 (quoting Bloom, 391 U.S. at 210 (holding that petty criminal contempt could be tried without a jury)). The Court further noted 18 U.S.C. § 1(3) (1988), which defines a petty offense as one that does not exceed a $5,000 fine or 6 months in prison. Id.
63. Dudley, supra note 24, at 1032.
64. Id.
65. Id. at 1033. Cf. Hicks v. Feiock, 485 U.S. 624, 631 (1988) ("[t]he question of how a court determines whether to classify the relief imposed in a given proceeding as civil or criminal in nature, . . . is one of long standing, and its principles have been settled at least in their broad outlines for many decades.").
66. Martineau, supra note 23, at 683. See also Dudley, supra note 24, at 1033.
has been imposed. 67 Without first determining the nature of the sanction that it is likely to impose at the conclusion of the proceeding, the court will have no guidance as to what procedures are necessary to protect the rights of contemnor in the contempt proceeding. 68

As the facts in Bagwell II illustrate, there are additional pitfalls inherent in basing the procedural rights of the contemnor on the civil/criminal distinction. For one, with the focus on the purpose and character of the sanction, courts may overlook the relative severity of the sanction. 69 Thus, reform in the area of contempt might tie procedural protections to the severity of the sanction and not to the civil/criminal distinction. 70 In Bagwell II, the Supreme Court has taken a step in this direction, placing greater emphasis on the complexity of the court’s order and the seriousness of the sanction. 71

III. STATEMENT OF THE CASE

A. The Circuit Court of Russell County

The fines that became the impetus for Bagwell II were levied against the UMWA during a violent strike against Pittston Coal Company. 72 The strike began in April 1989 in response to what the UMWA alleged to be unfair labor practices centering on health care coverage. 73 Only five months after the strike began, three thousand in-

67. Martineau, supra note 23, at 684.
68. Id.
69. Id. at 680. See also Dudley, supra note 24, at 1033.
70. Dudley, supra note 24, at 1033. Dudley suggests:
Specifically, we should abandon the civil/criminal distinction and instead allocate procedural protections in contempt in accord with a less complicated due process model that takes account of both the contempt process’ peculiar dangers and the costs of affording those protections. The touchstone of the analysis should be avoiding erroneous determinations of guilt, and the consideration triggering the provision of the more costly safeguards, such as appointed counsel and jury trial, should be the severity of the sanction, not its form.
71. Bagwell II, 114 S. Ct. at 2562.
72. Frank Swoboda, High Court’s UMWA Ruling May Curb Civil Contempt Powers, WASH. POST, July 1, 1994, at F2 ("[t]he strike became a rallying point for organized labor in general, which had been battered throughout the 1980s.").
individuals had been arrested for misconduct and violence.\textsuperscript{74} The affected coal companies, Clinchfield Coal Company and Sea "B" Mining Company, hired replacement workers to maintain operations and later sought an injunction against the UMWA for unlawful activities.\textsuperscript{75} An evidentiary hearing was conducted and the trial court enjoined the UMWA from:

obstructing certain entrances to the Company's property, from throwing rocks and other objects at vehicles and persons engaged in the Company's operations, from placing objects designed to cause damage to vehicle tires upon any surface that might be used by vehicles engaged in the Company's operations, and from intimidating and threatening physical harm to persons engaged in the Company's operations and to members of their families.\textsuperscript{76}

The trial court further dictated the size and location of the pickets.\textsuperscript{77} Notwithstanding the initial order, the UMWA continued to engage in mass picketing and sit-ins intended to block vehicle access to company sites.\textsuperscript{78} As a result, the trial court held its first show cause hearing one month after issuing the injunction order.\textsuperscript{79} Finding seventy-two violations of the injunction, the court imposed contempt fines against the UMWA of $616,000, and set a "prospective" fine schedule for future violations.\textsuperscript{80} The court threatened to fine the UMWA $100,000


\textsuperscript{75} John Hoerr, \textit{The Mine Workers Must Win This Fight To Survive}, BUS. WK., Oct. 9, 1989, at 144.

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{Bagwell II}, 114 S. Ct. at 2555.

\textsuperscript{78} \textit{Bagwell I}, 423 S.E.2d at 351-52. At one point 98 miners and one minister occupied a Pittston plant in Virginia, halting all operations there. For three days a mob of 2,000 people prevented state troopers from entering the plant and removing the invaders. Hoerr, \textit{supra} note 74, at 144.

\textsuperscript{79} \textit{Clinchfield Coal}, 402 S.E.2d at 900.

\textsuperscript{80} \textit{Id.}
for each violent violation of the order and $20,000 for each nonviolent violation. The UMWA's tactics were not impeded by the court's fine schedule. Acts of violence, such as gunfire, rock throwing, and beatings continued to occur. At successive hearings the court applied the fine schedule in imposing additional fines totaling $64 million, payable to the Commonwealth of Virginia and to the coal companies.

B. The Court of Appeals of Virginia

Shortly after the UMWA filed an appeal to the Court of Appeals of Virginia, the strike ended and the coal companies joined with the UMWA in asking the trial court to vacate all the fines. The trial court denied the request to vacate the fines. On appeal the UMWA asserted to the Court of Appeals that the contempt fines were criminal in nature and thus could not be imposed without Constitutional procedures. Finding the fines to be coercive and not compensatory in nature, the Court of Appeals of Virginia held that the fines must be vacated when the underlying litigation was resolved.

C. The Virginia Supreme Court

A special commissioner, Bagwell, was appointed to appeal to the Virginia Supreme Court to seek the vacated fines on behalf of the Commonwealth of Virginia and the counties affected by the strike. Thus, Bagwell asked the Virginia Supreme Court to determine whether the fines were in fact valid and enforceable. The UMWA argued

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81. Bagwell I, 423 S.E.2d at 352.
82. Id. at 352-53.
83. Clinchfield Coal, 402 S.E.2d at 901.
84. Bagwell II, 144 S. Ct. at 2556. After the labor dispute was settled the coal companies agreed to vacate the fines and filed a joint motion to dismiss with the UMWA. Id.
85. Clinchfield Coal, 402 S.E.2d at 902 n.1.
86. Id. at 901.
87. Id. at 904-05.
88. Bagwell I, 423 S.E.2d at 351-52 (explaining that Bagwell's petition to be made a party on behalf of the Commonwealth of Virginia while the first appeal was still pending was denied by the Court of Appeals).
89. Id. at 356.
further that the fines were invalid because the trial court's civil proceeding was improper for these criminal sanctions.\textsuperscript{90} The UMWA argued that the fines were criminal and not coercive civil fines because the court's order prohibited behavior and did not require the performance of affirmative acts.\textsuperscript{91} Rejecting this argument, the Virginia Supreme Court concluded that a threat of sanctions by a court can coerce inaction as well as action.\textsuperscript{92} The Court also relied on \textit{Gompers}, holding that criminal penalties are determinate and unconditional while civil penalties are conditional and can be avoided.\textsuperscript{93} By applying these standards and looking at the clearly articulated intent of the trial court, the Virginia Supreme Court reasoned that the fines were imposed to coerce the UMWA into obeying the injunction.\textsuperscript{94} Thus, the civil proceeding utilized by the trial court was proper and the sanctions were valid and enforceable.\textsuperscript{95}

The Virginia Supreme Court went on to reverse the decision of the Appeals Court that the fines were made moot by the settlement of the suit.\textsuperscript{96} Citing a need to preserve the court's power to enforce its orders, the Virginia Supreme Court held that a contemptuous party cannot be permitted to avoid sanction by holding off payment until the resolution of the underlying litigation.\textsuperscript{97}

\textbf{IV. THE SUPREME COURT'S OPINION}

\textbf{A. The Majority Opinion}

The Supreme Court began its analysis of the sanctions imposed against the UMWA by reviewing the historical distinction between civil

\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id. (citing New York State Nat. Organization For Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989); Aradia Women's Health Ctr. v. Operation Rescue, 929 F.2d 530, 532-33 (9th Cir. 1991); Clark v. International Union, UMWA, 752 F. Supp. 1291, 1297 (W.D. Va. 1990)).
\textsuperscript{93} Bagwell I, 423 S.E.2d at 356.
\textsuperscript{94} Id. at 357.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 358.
\textsuperscript{97} Id. at 358.
and criminal contempt sanctions.\(^9\) The Court noted that the procedural development surrounding criminal contempt has closely mirrored the expansion of Constitutional protections for other criminal penalties.\(^9\) In contrast, civil contempt usually involves an ordinary civil proceeding, with the only procedural protections consisting of notice and an opportunity to be heard.\(^10\) The Court concluded that while the actual procedures associated with civil and criminal contempt have been clearly articulated,\(^11\) these procedures are not always easily applied.\(^12\) Because the procedures used in a given contempt proceeding depend upon whether the sanction is civil or criminal, the Court noted that this blurred civil/criminal distinction often creates confusion regarding the procedures needed.\(^13\)

Recognizing that for nearly a century courts have relied upon the standards established in *Gompers*\(^14\) to classify contempt sanctions as civil or criminal,\(^15\) the *Bagwell II* Court reexamined *Gompers* to begin its analysis. The Court noted that the *Gompers* analysis begins with an examination of the purpose behind the contempt sanction.\(^16\) Usually, the purpose of the civil contempt sanction is either to coerce

\(9\) Bagwell II, 114 S. Ct. at 2556-57.
\(9\) Id. (tracing the procedural development of criminal contempt) (citing In Re Bradley, 318 U.S. 50 (1943) (double jeopardy); Cooke v. United States, 267 U.S. 517 (1925) (rights to notice of charges, assistance of counsel, summary process, and to present a defense); Gompers v. Buck Stove & Range Co., 221 U.S. 418 (1911) (privilege against self incrimination, right to proof beyond a reasonable doubt)).
\(10\) Id. at 2557.
\(11\) Id.
\(12\) Id. at 2559.
\(13\) Bagwell II, 114 S. Ct. at 2559.
\(14\) 221 U.S. 418 (1911).
\(15\) Bagwell II, 114 S. Ct. at 2557. See generally Monroe Body Co. v. Herzog, 18 F.2d 578 (6th Cir. 1927); In re Guzzardi, 74 F.2d 671 (2d Cir. 1935); Duell v. Duell, 178 F.2d 683 (D.C. Cir. 1949); Kienle v. Jewel Tea Co., 222 F.2d 98 (7th Cir. 1955); De Parcq v. United States District Court for So. Dist. of Iowa, 235 F.2d 692 (8th Cir. 1956); Flight Engineers Int'l Ass'n EAL Chapter v. Eastern Air Lines, Inc., 301 F.2d 756 (5th Cir. 1962); Latrobe Steel Co. v. United Steelworkers of America, AFL-CIO, 545 F.2d 1336 (3d Cir. 1976); Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770 (9th Cir. 1983); United States v. Ayer, 866 F.2d 571 (2d Cir. 1989); Manhattan Indus. Inc. v. Sweater Bee by Banff, Ltd., 885 F.2d 1 (2d Cir. 1989); Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990).
\(16\) Bagwell II, 114 S. Ct. at 2557 (citing Gompers, 221 U.S. at 441).
behavior or to compensate the injured party. On the other hand, the purpose of the criminal contempt sanction is to punish disobedience of a court’s order, while at the same time vindicating the court’s authority.

The Bagwell II Court noted that Gompers and subsequent cases hesitated to end the analysis with an interpretation of the sanctioning court’s purpose. This hesitation stemmed from the fact that there are almost always elements of both punishment and coercion in every contempt sanction. Sanctions almost always have the dual effect of altering the disobedient party’s behavior, and vindicating the court’s authority through punishment. As a result, any attempt to infer a court’s purpose in imposing a sanction by looking at the effect of the sanction becomes an exercise in “psychoanaly[sis].”

Faced with this ambiguity, the Bagwell II Court reasoned that it must look to the “character of the relief itself” instead of focusing on the intent behind the fine. The Court relied on prior decisions in finding that the character of a sanction centered upon the contemnor’s ability to purge the sanction. A sanction will be considered civil when it is conditioned upon the completion of some act required by the court. Generally, the conditional fine—if you do not do “x” then “y” will happen—seeks to coerce the party into complying with the court’s order. On the other hand, a fine or jail sentence that is

107. Id. (citing Gompers, 221 U.S. at 441).
108. Id. (citing Gompers, 221 U.S. at 441).
109. Id.
110. Id. at 2557 (citing Hicks, 485 U.S. at 635).
111. Id. (citing Gompers, 221 U.S. at 443).
112. Hicks, 485 U.S. at 635. Even though the purpose behind the relief is “germane” to identifying its type, basing the analysis on subjective intent would be “improper” and “mis-guided.” Id. Because there are multiple effects to both criminal and civil contempt a distinction on these lines cannot be drawn. Id. (citing Gompers, 221 U.S. at 443).
113. Bagwell II, 114 S. Ct. at 2557 (citing Hicks, 485 U.S. at 636).
114. Id. at 2558. See also Hicks, 485 U.S. at 624 (holding a determinate two year jail sentence with a purge clause is civil contempt); Shillitani v. United States, 384 U.S. 364 (1966) (holding that a conditional prison sentence is civil contempt); Penfield Co. of Ca. v. Sec. & Exch. Comm’n, 331 U.S. 865 (1947) (holding a unconditional fine is void when imposed in civil contempt proceeding).
116. Id. (quoting Penfield Co. v. SEC, 330 U.S. 585, 590 (1947)).
fixed, or imposed only after the contemptuous act has been committed, is punitive and criminal.\textsuperscript{117} Here, the contemnor does not have the ability to avoid the sanction by subsequent obedience.\textsuperscript{118} Thus, the distinction between the civil and criminal contempt sanctions focuses on the contemnor’s position, and whether he “carries the keys of his prison in his own pocket.”\textsuperscript{119}

In \textit{Bagwell II}, the UMWA argued that the fines levied by the Virginia trial court could not meet this conditional requirement and thus were not civil.\textsuperscript{120} The UMWA’s argument focused on the fact that the trial court’s order prohibited certain acts, rather than requiring certain acts be completed.\textsuperscript{121} The UMWA asserted that \textit{Gompers} defined mandatory orders as civil, and prohibitory orders as criminal.\textsuperscript{122} Thus, \textit{Gompers} suggested that a “dichotomy” existed between mandatory and prohibitory orders, the difference between refusing to do what has been mandated and doing what has been prohibited.\textsuperscript{123} The \textit{Bagwell II} Court rejected this argument as too simplistic.\textsuperscript{124} This reasoning might apply well in situations of “single, discrete” contempt;\textsuperscript{125} however, a distinction based on the wording of the order becomes impossible when conduct can occur repeatedly, or when an injunction contains both mandatory and prohibitory provisions.\textsuperscript{126} Furthermore, the Court noted that the mandatory/prohibitory distinction is based on mere semantics.\textsuperscript{127} “Under a literal application of petitioners’ theory, an injunction ordering the union: ‘Do not strike,’ would appear to be prohibitory and criminal, while an injunction ordering the union: ‘Continue working,’ would be mandatory and civil.”\textsuperscript{128}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{117} \textit{Id.} at 2558.
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Bagwell II}, 114 S. Ct. at 2558 (quoting \textit{Gompers}, 221 U.S. at 442).
\item \textsuperscript{120} \textit{Id.} at 2561.
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.} (citations omitted)
\item \textsuperscript{124} \textit{Bagwell II}, 114 S. Ct. at 2561.
\item \textsuperscript{125} \textit{Id.} These cases are simplified because they involve specifically identified acts that the court is attempting to coerce. \textit{Id.}
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Bagwell II}, 114 S. Ct. at 2561 (quoting Tr. of Oral Arg. 8-9).
\end{enumerate}
\end{footnotesize}
The Virginia trial court’s order had both mandatory and prohibitory provisions. For example, the trial court required the UMWA to place supervisors at picket sites. The threat of a sanction for not obeying this mandatory order would be civil in nature or a means to coerce the UMWA to do what it has been told to do. On the other hand, the trial court’s order also prohibited the UMWA from rock throwing. A fine imposed because the members of the UMWA were found to have thrown rocks in violation of the trial court’s order might be viewed as purely punitive and criminal. Because the order contained both mandatory and prohibitory language, the Supreme Court concluded that it must examine the order as a whole. The nature of the contempt sanctions could not be deduced through the mandatory/prohibitory dichotomy.

Gompers also supported Bagwell’s argument that the fines imposed against the UMWA were coercive and civil in nature. Bagwell characterized the fines as civil because the UMWA had notice that the fines would be imposed under the trial court’s prospective fine schedule, and thus could avoid the penalty by modifying its behavior. Such a prospective fine schedule is similar to a fine that is levied each day a contemnor fails to comply with an order. Although this argument was adopted by the Virginia Supreme Court, the Bagwell II Court concluded that the existence of a prospective fine schedule was not determinative of the nature of the sanction. The Court found that if the trial court had imposed a fixed fine upon determining that the UMWA had violated the order, the resulting sanction would have

129. Id.
130. Id.
131. Id.
132. Id.
133. Bagwell II, 114 S. Ct. at 2561.
134. Id.
135. Id.
136. See id.
137. Id. at 2562.
139. Bagwell I, 423 S.E.2d at 357.
140. Bagwell II, 114 S. Ct. at 2561.
been punitive and criminal. However, the Court concluded that the existence of a prospective fine schedule does not transform a criminal sanction into a civil one. Thus, the Court refused to equate prior notice with a conditional civil penalty. To illustrate this conclusion, the Court noted that the due process requirements of any criminal penalty include “prior notice both of the conduct to be prohibited and of the sanction to be imposed.” All criminal sanctions are arguably avoidable if one, aware of the law, obeys it.

The Court concluded that the sanctions imposed against the UMWA would not be considered civil simply because the trial court warned the Union that violations of the order would result in particular fines.

In addition to finding that the prospective fine schedule did not per se create a civil sanction, the Court went on to hold that the sanctions imposed against the UMWA were in fact criminal and not civil. The Court first reasoned that the traditional justifications for an unencumbered civil contempt power were not persuasive in this particular case. History suggests that the justification for unbridled contempt power is necessity, and there is necessity in instances of direct, disruptive contempt. Necessity is not a compelling justification in cases of indirect contempt which occur outside of the court’s presence. The UMWA’s contemptuous conduct did not involve a direct interference with the trial court’s proceedings or environment. Instead, the contempt was indirect because the prohibited conduct took

141. Id. at 2561-62 (quoting Hicks, 485 U.S. at 632-33).
143. Id.
144. Id.
145. Id.
146. Id.
147. Bagwell II, 114 S. Ct. at 2562.
148. Id.
149. Id. at 2559 (“[t]he necessity justification is at its pinnacle, of course, where contumacious conduct threatens the court’s immediate ability to conduct its proceedings.”). See supra notes 21-25 and accompanying text.
150. Bagwell II, 114 S. Ct. at 2560. These indirect contempt do not have the same need for immediate adjudication and thus can spare the time required for more elaborate procedures. Id.
151. Id. at 2562.
place at the picket site across the Commonwealth of Virginia.\textsuperscript{152} The Supreme Court concluded that speedy use of the contempt power was not necessary in cases of indirect contempt, and thus further procedural protections may be justified.\textsuperscript{153} Thus, an indirect civil contempt may justify the same procedural safeguards that are afforded a criminal contempt.\textsuperscript{154}

The Court cited the particular facts surrounding the UMWA's contemptuous actions as further support that the sanctions imposed were criminal.\textsuperscript{155} Most importantly, the Court emphasized the complexity of the trial court's order.\textsuperscript{156} The order prohibited a wide variety of conduct, all of which occurred outside of the courtroom.\textsuperscript{157} Furthermore, the violations of the order by the UMWA were numerous, lasted for several months, and occurred at locations over a large portion of Virginia.\textsuperscript{158} And finally, although not necessarily determinate, the fifty-two million dollars in fines could easily be classified as "serious" by the Bagwell II Court.\textsuperscript{159} Weighing all these factors, the Court concluded, "disinterested factfinding and evenhanded adjudication were essential, and petitioners were entitled to a criminal jury trial."\textsuperscript{160}

The Court recognized the "procedural burdens" that its holding might impose.\textsuperscript{161} Added procedural requirements for this variety of contempt would impair a court's ability to "sanction widespread, indirect contempt of complex injunctions through noncompensatory fines."\textsuperscript{162} However, this would not affect situations of direct, disruptive contempt, or civil contempt sanctions used to compensate an injured party.\textsuperscript{163} Furthermore, fines that are considered to be non-seri-
ous criminal sanctions can continue to be levied without a jury trial.164 The Court concluded that it would not sacrifice the procedural rights of the contemnor to preserve a court's unlimited right to demand respect through contempt sanctions.165

The Court made it clear that its deference to state legislative action in the area of contempt remained intact.166 If a state has structured a particular sanction as criminal or civil, the Court would uphold this interpretation to the extent that the proceeding did not violate Constitutional protections.167 Thus, the decision of a state legislature will be given greater credence than the characterization made by a lone judge.168 However, it appears that the Bagwell II Court would have overturned the fines levied in Bagwell I regardless of whether the legislature or the judiciary characterized them. The Court held that without a jury trial, the criminal fines imposed were constitutionally invalid.169

B. The Concurring Opinions

1. Justice Scalia

Justice Scalia believed that the facts in Bagwell II were not ideal for breaking new ground in the area of contempt.170 The sanctions levied against the UMWA were so extreme that the court did not need to articulate a precise test for determining when complex orders or serious sanctions are criminal.171 Thus, the facts in Bagwell II did not clarify the "variety of not easily reconcilable tests for differentiating

164. Id. at 2562 n.5 (quoting Bloom, 391 U.S. at 210 (holding that petty criminal contempt could be tried without a jury)). The Court further noted 18 U.S.C. § 1(3) (1988) which defines a petty offense as one that does not exceed a $5,000 fine or 6 months in prison or both. Id.
165. Id. at 2562-63.
166. Id. at 2563.
167. Id.
168. Bagwell II, 114 S. Ct. at 2563.
169. Id.
171. Id.
between civil and criminal contempt." Justice Scalia recommended a study of the historical underpinnings of the contempt power in order to develop a new test.

According to Justice Scalia, contempt is a variance of "our usual notions of fairness and separation of powers." Because one can be convicted of contempt without the usual criminal procedural protections, only special circumstances can justify this departure from Constitutional due process. The instances in which procedural protections are justifiably at a minimum involve orders requiring a discrete act. Here, the contemnor has the ability to quickly discern what is required and thus release himself from the court's control. In these classic instances of civil contempt, "[t]he court did not engage in any ongoing supervision of the litigant's conduct, nor did its order continue to regulate his behavior." Such examples of contempt were also the basis of the Gompers analysis for distinguishing between criminal and civil contempt. Thus, not only do these "discrete act" contempt fulfill the historical justifications for the contempt power, but they are also uniquely suited to the Gompers test.

Controversy over the criminal/civil distinction has arisen in part because of the changing role of mandatory and injunctive decrees. Many modern court orders do not have the limited breadth and reach such orders once had. The more complex orders present a wider range of issues. One of these issues is credibility "for which the factfinding protections of the criminal law (including jury trial) become much more important." Thus, complex court orders that regulate a

172. Id.
173. Id. at 2563-64.
174. Id. at 2563.
175. Bagwell II, 114 S. Ct. at 2564 (Scalia, J., concurring).
176. Id.
177. Id.
178. Id. at 2565.
179. Id. at 2564.
181. Id. at 2565.
182. Id.
183. Id.
184. Id.
wide variety of behavior over a period of time take on the appearance of the criminal law. For this reason, the unfettered use of the contempt power to enforce such decrees is no longer as easily justified.

Bagwell II involved an example of the complex court order. Among the behaviors the order sought to control were rock-throwing, puncturing of tires, threatening, following or interfering with employees and picketing locations. Scalia concluded that such behavior should not be regulated through conditional incarceration or a per diem fine imposed in a civil proceeding. An injunction with such a wide scope should not be enforced through the civil process. Such a "modern judicial order is in its relevant essentials not the same device that in former times could always be enforced by civil contempt." On the other hand, the trial court's decree also required the UMWA to provide a list of supervisors located at the picket lines. This is an example of a "discrete command, observance of which is readily ascertained." In this case it would be historically appropriate to impose a per diem fine in a civil proceeding. In conclusion, Scalia suggested that in the future the court categorize as civil those contempt which are sufficiently similar to the classic civil contempt, and thus can properly be enforced through the civil process.

2. Justice Ginsburg and Chief Justice Rehnquist

Justice Ginsburg and Chief Justice Rehnquist joined with the court in its judgment and all but part II-B of the opinion. This section of

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185. Bagwell, 114 S. Ct. at 2565 (Scalia, J., concurring).
186. Id.
187. Id.
188. Id.
189. Id.
190. Bagwell II, 114 S. Ct. at 2565 (Scalia, J., concurring).
191. Id.
192. Id.
193. Id.
194. Id.
196. Bagwell II, 114 S. Ct. at 2567 (Ginsburg, J. & Rehnquist, C.J., concurring in part
the majority opinion concerns the procedures that accompany direct and indirect contempt. The majority concludes that certain contempt occurring outside of the court may require a higher level of procedural protections. Justice Ginsburg and the Chief Justice do not explain their reasons for rejecting this section of the opinion. The Justices begin their opinion by tracing the parameters of the Gompers civil/criminal distinction. According to Gompers, the civil contempt sanction coerces because it pressures the defendant to act, and once s/he acts the pressure is removed. The defendant has the power to relieve the sanction’s pressure of his own volition. The criminal sanction on the other hand, serves only to vindicate the court’s authority. The court uses the criminal sanction to punish the contemnor’s disobedience of the court’s authority. The sanction carries with it no option for the contemnor and thus it is fixed and determinate. The Justices noted however, that sanctions can have both coercive and vindictive effects. The Justices concluded that although there has been confusion and criticism surrounding the civil/criminal distinction, the Court has continued to rely on it.

Justice Ginsburg and Chief Justice Rehnquist offered two bases for their conclusion that the Bagwell II fines were criminal and not civil in nature. First, if a conditional fine were necessarily civil then all fines would be civil. A conditional fine is a fine that will not be

and concurring in the judgment).

197. *Id.* at 2559 (discussing the justifications for the broad contempt power and the situations in which the power should be limited through the use of procedural protections).

198. *Id.* at 2560.

199. *Id.* at 2567.

200. *Id.* at 2566.


202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*


207. *Id.*

208. *Id.* at 2567.

209. *Id.*
imposed if the defendant completes an act required or refrains from prohibited conduct.210 Thus, all fines are conditioned upon the defendant's violation of the order.211 The same problem arises if all coercive fines are presumed to be civil.212 Again, the dual effect of sanctions makes it difficult to draw the civil/criminal distinction on this ground.213 Both civil and criminal sanctions coerce compliance with the court's future orders.214 Rejecting a broad interpretation of the conditional and coercive theories, the Justices concluded that the sanctions were not civil on these grounds.215

The Virginia Supreme Court's holding that the fines vindicated the authority of the courts was a second basis for the Justices' conclusion that the sanctions were criminal.216 Courts have traditionally found sanctions that serve such a purpose to be criminal.217 Furthermore, because the Virginia Commonwealth stood alone in seeking the payment of the fines, there is no longer any benefit to the original complainant.218 The argument that the fines were civil was further defeated by Virginia's failure to tie the fines to loss or damages sustained because of contemptuous acts.219 Thus, the fines were criminal because they could serve only to vindicate the court's authority.220

210. Id.
212. Id.
213. Id.
214. Id.
215. Id.
217. Id. (citing Gompers, 221 U.S. at 443).
218. Id.
219. Id.
220. Id.
V. THE IMPLICATIONS OF BAGWELL II

A. Labor Disputes

Despite all the changes that have taken place through the years in the technology, structure, and environment of coal mining, the United Mine Workers of America (UMW) still relies on bloodshed, dynamite, and intimidation to coerce acceptance of the union's demands. Not only has violence continued to be characteristic of UMW strikes and organizing efforts, its use has acquired the sanctity of tradition. Throughout the coal mining regions even today, when the UMW talks of strike, men look for ways to arm themselves.221

The law of contempt has long been intertwined with labor disputes.222 Whenever union members were found to have violated an injunction controlling the union's activity, a contempt proceeding resulted.223 Judges viewed the injunction as a swift remedy to threats of violence or property damage due to a strike.224 The situation in Bagwell II called for just this type of intervention by the courts.

The 1989 strike activities by the UMWA were undisputedly violent.225 The scope of the strike activities required the trial court to devise an elaborate and far reaching injunction in order to bring an end to the violence.226 Despite this command by the court, the UMWA "engaged in wholesale violations of the court's injunction."227

222. GOLDFARB, supra note 19, at 56. The criminal/civil contempt issue was brought to the court's attention as part of the labor movement at the turn of the century. Id. See also THIEBLOT, supra note 221, at 197 (the date of the first labor injunction was 1883 or 1884).
223. GOLDFARB, supra note 19, at 56.
224. THIEBLOT, supra note 221, at 198.
225. See International Union, UMWA v. Clinchfield Coal, 402 S.E.2d 899, 900 (Va. Ct. App. 1991) ("[n]otwithstanding the injunction, numerous acts involving violence and nonviolence, which can only be described fairly as massive, were reported"); Bagwell v. International Union, UMWA, 423 S.E.2d 349, 352 (Va. 1992) ("[a] multitude of violent acts accompanied this new strategy, including gunfire directed at coal truck drivers' vehicles."). See supra notes 73-79 and accompanying text.
226. Bagwell I, 423 S.E.2d at 351.
227. Id.
The trial court addressed this disobedience through successive contempt orders.228 With each finding that the UMWA had violated the court order, the court assessed a fine in an effort to deter the UMWA from engaging in further disobedience.229 Every month for seven months the trial court held contempt hearings and subsequently levied fines in the millions of dollars.230 As extreme as the sanctions were, they appeared to have little effect on the UMWA’s behavior.231

The Bagwell II decision was viewed as a victory for the United Mine Workers and organized labor as a whole.232 Specifically, the media quoted UMWA president Richard Trumpka as saying that the Court’s decision was a “tremendous victory for the UMWA, working Americans and their unions and the collective bargaining process.”233 Trumpka went on to say that he would continue to use whatever tactics were necessary in order to “fight for workplace rights.”234 Such a warning may not be reassuring to some in the coal industry. The UMWA’s shameless disregard for the court’s injunction begs the question of what should be done when violence erupts at the picket line. Lawyers representing Bagwell and the Commonwealth of Virginia noted that the Court’s decision in Bagwell II would leave judges little

228. Id.
229. Id. The trial court’s fine schedule made the penalty for violent violations of the injunction five times more costly than nonviolent violations. Id. at 352. The fines were clearly meant to discourage the UMWA and its members from violent behavior. Id. at 357.
230. Id. at 352 n.2 ($642,000 in fines imposed in contempt order one entered May 18, 1989; $2,465,000 in fines imposed in contempt order two entered June 7, 1989; $4,465,000 in fines imposed in contempt order three entered July 27, 1989; $16,900,000 in fines imposed in contempt order four entered September 21, 1989; $6,900,000 in fines imposed in contempt order five entered October 9, 1989; $15,800,000 in fines imposed in contempt order six entered on November 16, 1989; $7,300,000 in fines imposed in contempt order seven entered December 15, 1989; $10,300,000 in fines imposed in contempt order eight entered December 15, 1989).
231. Id. at 357. The trial court wrote, “I don’t know how much money these two defendants are willing to pay before they will obey the law.” Id.
233. Swoboda, supra note 72, at F2.
234. Id.
immediate power to maintain order in the face of continuing lawlessness and violence.\textsuperscript{235}

B. West Virginia

In West Virginia, contempt of court fines have frequently surfaced in the area of labor disputes.\textsuperscript{236} The courts in West Virginia, both state and federal, have used injunctions to control a variety of labor activity.\textsuperscript{237} When a union fails to obey a court’s order, the result is often a finding of contempt, and the imposition of sanctions by the court.\textsuperscript{238} Naturally, the contempt issue raises disputes over the nature of the sanctions and the procedural safeguards which must accompany them.\textsuperscript{239}

The Supreme Court of Appeals of West Virginia reviewed the relevant law of contempt in West Virginia in \textit{State ex rel. UMWA International Union v. Maynard}.\textsuperscript{240} According to the court, the philosophy in West Virginia had been “stringent in an attempt to fully protect the rights of alleged contemnors.”\textsuperscript{241} The West Virginia courts

\textsuperscript{235} Lewin, \textit{supra} note 232, at A18.


\textsuperscript{237} See \textit{Thornton}, 72 S.E.2d at 204 (injunction prohibiting the union leader and others from attacking, assaulting, threatening or intimidating any employee of the company); Consolidated Coal Co. v. Local 1702, UMWA, 683 F.2d at 828-29 (district court restrains union from engaging in work stoppage).

\textsuperscript{238} See Consolidated Coal Co. v. Local 1702, UMWA, 683 F.2d at 829 (fines of $3,000.00 per shift not worked against the local and $25.00 per shift against local members); \textit{Carbon Fuel}, 517 F.2d at 1350 (a fine of $10,000 imposed for a violation of a temporary restraining order).

\textsuperscript{239} See Consolidated Coal Co. v. Local 1702, UMWA, 683 F.2d at 830 (the court was asked to determine the validity of an appeal based upon whether the contempt was civil or criminal); \textit{Carbon Fuel}, 517 F.2d at 1349 (holding contempt was appealable because it was criminal in nature); \textit{Maynard}, 342 S.E.2d at 99-100.

\textsuperscript{240} 342 S.E.2d 96 (W. Va. 1985).

\textsuperscript{241} \textit{Id.} at 99.
have protected the contemnor by requiring that the alleged contemnor be given notice of the particular acts that are in violation of the court order.\textsuperscript{242} In both civil and criminal contempt proceedings, the defendant has a right to counsel, and if s/he is indigent s/he has a right to appointed counsel.\textsuperscript{243} Moreover, the West Virginia Constitution recognizes the right to a jury trial in a criminal contempt proceeding.\textsuperscript{244} The court acknowledged this right \textit{Hendershot v. Hendershot},\textsuperscript{245} where the court held that a criminal contempt sanction in the form of a fixed prison sentence activates the right to a jury trial.\textsuperscript{246}

The \textit{Maynard} court reviewed the criminal/civil distinction as discussed in \textit{State ex rel. Robinson v. Michael}.\textsuperscript{247} In \textit{Robinson}, the court held that the distinction between a civil and criminal contempt rested upon the purpose being served.\textsuperscript{248} If the purpose is to benefit a party the court may sanction a defendant in order to compel his compliance with a court order.\textsuperscript{249} A civil contempt sanction may also require the contemnor to pay a fine which is meant to compensate the party injured by the contempt.\textsuperscript{250} On the other hand, the criminal contempt sanction serves the purpose of punishment.\textsuperscript{251} The contemnor has offended the dignity, authority or order of the court, and his punishment will be either a definite term in jail or a fixed fine.\textsuperscript{252} Thus, in \textit{Maynard}, the West Virginia Supreme Court of Appeals reaffirmed its

\begin{footnotesize}
\textsuperscript{242} \textit{Id.} at 98 (citing \textit{In re Yoho}, 301 S.E.2d 581, 586 (W. Va. 1983); \textit{State ex rel. Koppers Co. v. Int'l Union of Oil, Chemical & Atomic Workers}, 298 S.E.2d 827, 829 (W. Va. 1982)).
\textsuperscript{243} \textit{Id.} at 99 (citing \textit{Eastern Associated Coal Corp. v. Doe}, 220 S.E.2d 672 (W. Va. 1975)).
\textsuperscript{244} \textit{Id.} at 100 (citing \textit{W. VA. CONST. art. III, § 14}; \textit{Hendershot v. Hendershot}, 263 S.E.2d 90 (W. Va. 1980)).
\textsuperscript{245} 263 S.E.2d 90 (W. Va. 1980).
\textsuperscript{246} \textit{Maynard}, 342 S.E.2d at 100 (citing \textit{Hendershot}, 263 S.E.2d 90).
\textsuperscript{247} 276 S.E.2d 812 (W. Va. 1981).
\textsuperscript{248} \textit{Maynard}, 342 S.E.2d at 100. The distinction between criminal and civil does not rest upon the act which constitutes the contempt because any given act could give rise to civil or criminal contempt. \textit{Id.} (citing \textit{Robinson}, 276 S.E.2d 812, Syl. Pt. 1).
\textsuperscript{249} \textit{Id.}
\textsuperscript{250} \textit{Id.}
\textsuperscript{251} \textit{Id.}
\textsuperscript{252} \textit{Id.} (citing \textit{Gompers v. Buck's Stove & Range Co.}, 221 U.S. 418 (1911)).
\end{footnotesize}
purposive analysis of the civil/criminal distinction, an approach which was rejected by the United States Supreme Court in Bagwell II.253

The facts in Maynard were remarkably similar to those in Bagwell II. In Maynard, $200,000 in fines were imposed through a prospective fine schedule for the UMWA’s violations of a circuit court’s injunction.254 Examining the trial court’s order, the West Virginia Supreme Court found:

[T]he initial injunction order covered a broad spectrum of activities and sought to limit the number of pickets and to prohibit strikers from engaging in or threatening damage to property or injury to persons employed at the work sites, denying access to the employers’ plant sites, trespassing on property owned, leased, or licensed by the employers, or parking vehicles along the highway near the entrances to the plant sites.255

The Supreme Court of Appeals of West Virginia concluded that the contempt sanctions imposed were criminal in nature.256 In reaching this conclusion, the court first noted that because the fines were payable to the state of West Virginia, they were per se criminal.257 Second, the court concluded that the fines could not be civil because they lacked a relationship with any damages to the employer.258 By imposing a set fine for every violation no matter what the character or nature of the act, the circuit court devised a rigid and arbitrary penalty.259 Like the Bagwell II Court, the West Virginia Supreme Court refused to equate a prospective fine schedule with civil contempt.260 The court noted its prior decision in Gant v. Gant,261

253. Maynard, 342 S.E.2d at 100-01. See supra note 112-13 and accompanying text.
254. Id. at 98.
255. Id. at 101-02.
256. Id. at 102.
257. Id. at 101 (citing Eastern Associated Coal Corp. v. Doe, 220 S.E.2d 672 (W. Va. 1975), which held contempt is criminal whenever a party must pay the state in order to “purge himself of contempt”).
258. Maynard, 342 S.E.2d at 101. Because the fines were not in the form of compensation, the court concluded that they were arbitrary and not for the benefit of the injured party. Id.
259. Id. at 102.
260. Id. at 101. The court looked to other states for interpretations of the use of a prospective fine schedule in contempt cases. Id. (citing In re Rubin, 474 N.Y.S.2d 94 (N.Y. App. Div. 1984); Wilson v. Fenton, 312 N.W.2d 524 (Iowa 1981); State v. Pownal Tanning
where it held that a circuit court lacked power to impose a one-per-cent-per-day penalty in a contempt proceeding.\footnote{262} Such a “prospec-tive” penalty was held to be criminal in nature because it penalized willful disobedience of the court.\footnote{263}

In \textit{Maynard}, the West Virginia Supreme Court seems to have already adopted some of the principles laid out in \textit{Bagwell II}. For one, the West Virginia court has placed the rights of the contemnor above the freedom of courts to use the contempt power.\footnote{264} Secondly, \textit{Maynard} rejected the use of a prospective fine schedule as a vehicle for civil contempt sanctions.\footnote{265} Finally, the \textit{Maynard} court noted that because “the order covered a broad spectrum of activities,” the issue of whether the sanctions were civil or criminal was “more complex.”\footnote{266} Thus, the court seems to acknowledge that special care must be given to complex court orders.

\section*{VI. Conclusion}

In \textit{Bagwell II},\footnote{267} the Supreme Court was asked to determine whether the trial court should have applied certain procedural protections, in effect limiting that court’s ability to impose millions of dollars in contempt sanctions.\footnote{268} The Court found that the $52 million in fines levied against the United Mine Workers of America (UMWA) for violations of a Virginia Circuit Court’s order were “serious” enough to entitle the UMWA to the safeguards of a criminal jury tri-}
Bagwell II may be a step toward change. The Supreme Court acknowledged that its lack of guidance has resulted in an unrestrained use of the contempt power by lower courts. However, the Court refused to abandon the criminal/civil distinction created in Gompers, as some in favor of reform have suggested. Thus, the confusion over what constitutes a criminal contempt sanction as opposed to a civil contempt sanction continues.

Bagwell II does appear to create a new category of indirect contempt. This category of contempt requires a level of procedural protection similar to those required in criminal contempt. The Court distinguishes these contempt from other civil contempt by considering the complexity of both the contemptuous conduct and the court order. As Justice Scalia noted in his concurring opinion, changes in use and form of court orders have made the traditional civil/criminal distinction an inadequate basis for attaching procedural rights.

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271. Id. at 2557. The Court provided the UMWA with greater procedural protections because it found that the contempt sanction did not fit within civil contempt as defined in Gompers. Id. at 2562. See supra note 70 and accompanying text.
272. See supra note 45 and accompanying text.
274. Id.
275. Id. at 2560.
276. See supra notes 182-86 and accompanying text.