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Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age

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I. INTRODUCTION

Much attention has been paid in recent months to the plight of Matthew Cooper and Judith Miller, the journalists held in contempt of court for refusing, despite court order, to name their sources regarding the identity of a CIA operative.[1] Although Mr. Cooper's employer, Time Inc., later agreed to comply with the court order and reveal Mr. Cooper's informant, Ms. Miller, a *New York Times* reporter, steadfastly refused to "snitch."[2] Ms. Miller, therefore, was imprisoned for civil contempt.[3] After spending several months in jail Ms. Miller did name her source, thereby complying with the court order, and she was promptly set free.[4]

These journalists' refusal to testify and reveal their sources has dramatically brought to the public's attention the practice of confinement for civil contempt. Recent changes to the bankruptcy laws create a potential for

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1. *See* Adam Liptak, *Prosecutor in Leak Case Calls for Reporters' Jailing*, N.Y. TIMES, July 6, 2005, at A14.

2. Adam Liptak, *Reporter Jailed After Refusing to Name Source; Case of C.I.A. Operative; Journalist for The Times—2nd Reporter Will Speak to Grand Jury*, N.Y. TIMES, July 7, 2005, at A1.

3. *Id.*

4. Katharine Q. Seelye, *Freed Reporter Says She Upheld Principles*, N.Y. TIMES, Oct. 4, 2005, at A20.

civil contempt to affect a much larger number of people who will never, however, get the attention lavished on Mr. Cooper and Ms. Miller.

In order to minimize the abuses allegedly present in the prior bankruptcy system, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[5] was designed to make it more difficult for people to declare bankruptcy.[6] The new Bankruptcy Code likely will result in fewer people receiving bankruptcy protection. Thus, many more people may face potential imprisonment for civil contempt resulting from failure to pay a court-ordered debt. This imprisonment, even if for a short duration, can have life-long consequences, both for those who are incarcerated and for those who depend upon them. It is essential, therefore, to examine the current state of civil contempt law and propose changes for improvements to the system as it relates to those in debt.

Those in jail for civil contempt are deemed to "hold the key" to their cells—in the case of Judith Miller, all she needed to do to be set free was to provide the court-ordered information. But a question arises regarding those who have been imprisoned for failure to pay a court-determined debt—do they truly hold the key to their cells? Unlike journalists whose key (their sources) is readily obtainable and is contained in their minds (or in an easily accessible file), many of those imprisoned for contempt of court for failure to pay a court-ordered debt maintain that they do not have the funds to free themselves.

With the new bankruptcy laws severely limiting the circumstances in which a debtor can declare bankruptcy and thereby receive protection from his creditors,[7] an increasing number of debtors may be vulnerable to indefinite jail sentences. This is due in part to the currently inadequate procedural protections in place to prevent a debtor from unjust incarceration. Moreover, there is a lack of uniformity with respect to the standards for obtaining and reviewing the financial documentation that reflects a debtor's ability to pay. In addition, the contemnor is vulnerable to possible inadvertent prejudice from the presiding judge in a contempt proceeding. A judge's perception of defiance of the court's authority might induce her to

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5. Pub. L. 109-8, 119 Stat. 23 (amending scattered sections of 11 U.S.C.).

6. *See, e.g.*, Charles W. Pickering, *Pickering's Mississippi E-Memo No. 25*, Apr. 15, 2005, http://www.house.gov/pickering/old/EMemo25.htm. In the "E-memo" Mississippi Congressman Pickering stated that the Act "ensures [that] only those who truly need to declare bankruptcy do so, and makes it more difficult for those who use bankruptcy as a tool for fraud to cheat their way out of debt." *Id.*

7. *See infra* Part V.

take a contemnor's actions personally—to the detriment of the contemnor. Further, after imprisonment the "lock" may have changed so that the initial court-fashioned "key" will no longer open it. For example, one jailed contemnor has seen his liability increase from an initial amount of $2.5 million to over $4 million.[8]

The complex nature and critical consequences of the determination as to whether a debtor truly "holds the key to his cell" require more procedural protections than the civil contempt system currently affords. Indeed, serious consideration should be given to the rationale—or lack thereof—for imposing imprisonment to coerce the payment of money at all. Where a debtor has the ability to pay, award of execution, attachment, garnishment or, where applicable, a constructive trust, are available. If the debtor does not have the ability to pay, she should not be adjudicated to be in contempt in the first place, and certainly no amount of confinement will be able to coerce payment. Moreover, there is virtually no possibility that the contemnor will earn sufficient assets to pay the amount ordered if he is in prison. Consequently, there is little value in imposing indefinite imprisonment when a court attempts to enforce an order for a money payment.

In this Article, I first review the history of imprisonment for debt. I discuss how the practice first crossed the Atlantic from Europe and was eventually all but abolished in this country. Next, I evaluate both the instances in which imprisonment for debt is imposed, either by statute or by common law, and the prohibitions against the practice. The Article then examines the conventional distinctions between civil and criminal contempt. I next discuss the methods behind the determination of the inability of a debtor to comply with a court-ordered debt, and review the results of such a finding. In so doing, I analyze the burden of proof, the right to a jury trial, and the length of confinement. What follows is an evaluation of the relevant provisions of the new Bankruptcy Code, and an explanation as to why they raise additional concerns regarding civil contempt and imprisonment for debt.

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8. *See* Keith Rosenblum, *Debtor's Prison: Manuel Osete Has Been in Jail for 27 Months, with No Release in Sight. His Crime? He Didn't Commit One*, TUCSON WKLY., Mar. 24, 2005, at 9, *available at* http://www.tucsonweekly.com/gbase/Currents/Content?oid=66973 (noting that jailed lawyer H. Beatty Chadwick, imprisoned for over nine years for refusing to hand over $2.5 million to his ex-wife, has seen his liability increase to $4.2 million, and Manuel Osete, also imprisoned over a financial dispute resulting from his divorce, has seen his liability rise from $500,000 to $833,000).

With an eye toward correcting some of the flaws in the current debtor/contempt dynamic, I propose several reforms to the present system. First, I recommend that courts consider the varied consequences of imprisonment of debtors. I then examine the judiciary's multifaceted societal role and advocate that courts look beyond the strict letter of the law and analyze the broad effects upon society of judgments in debtor civil contempt cases. I propose that Sixth Amendment distinctions between civil and criminal contempt be eliminated and all defendants facing imprisonment for civil contempt be given the same due process rights as those afforded criminal defendants. To provide uniformity and fairness to the crucial determination as to whether a debtor has the ability in fact to comply with a court order, I then propose that a specialized judge or magistrate be responsible in the first instance for overseeing the compilation and review of an alleged debtor's financial documents. The specialized judge or magistrate should also be involved with post-conviction hearings and appeals, informing the presiding judge of changes in the contemnor's finances, as well as opining on whether the debtor is indeed able to pay the debt. The goal of these recommendations is to provide fair, informed, and impartial guidelines to a process that is currently ad hoc and unpredictable.

II. IMPRISONMENT FOR DEBT

A. A Brief History of Imprisonment for Debt

1. Ancient Rome

The earliest known instance of imprisonment for debt is found in the third of the Twelve Tables, the first written laws of Rome, which were drafted around 451 B.C.[9] Indeed, the only occasion for imprisonment specified in the Twelve Tables occurs in the law concerning debt,[10] which provided:

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9. *See* John Paul Adams, *The Twelve Tables* (451-450 B.C.), http://www.csun.edu/%7EHCFLL004/12tables.html (last visited June 3, 2006) (stating that the Twelve Tables were "the earliest attempt by the Romans to create a CODE OF LAW [and] the earliest (surviving) piece of literature coming from the Romans").

10. *See* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 14 (Norval Morris & David J. Rothman eds., 1998) [hereinafter OXFORD HISTORY OF THE PRISON].

> When debt has been acknowledged, or judgment about the matter had been pronounced in court, thirty days must be the legitimate time of grace. After that, then arrest of debtor may be made by laying on hands. Bring him into court. If he does not satisfy the judgment, or no one in court offers himself as surety on his behalf, the creditor may take the defaulter with him. He may bind him either in stocks or in chains; he may bind him with weight not less than fifteen pounds or with more if he shall so desire. The debtor, if he shall wish it, may live on his own. If he does not live on his own, the person [who shall hold him in bonds] shall give him one pound of grits for each day. He may give more if he shall so desire. On the third market day, creditors shall cut pieces . . . . Should they have cut more or less than their due, it shall be with impunity.[11]

In short, "[d]ebtors who could not or would not pay [a debt] were to be held in private confinement by their creditors and were to have their debts publicly announced on three successive market days, on the last of which they might be executed or sold into slavery."[12] At no point, however, did the state itself express an interest in the debt; rather, the state interceded only to ensure that the debtor remained available to the creditor, and then specified the limits of the creditor's rights against the debtor. And in no case was the debtor subject to an indefinite term of confinement—although, with execution or enslavement as the alternatives, some no doubt would have preferred prolonged imprisonment.

2. England

Incarceration for debt became well established in England when the Debtors' Act of 1350, enacted under Edward III, extended to private creditors the ability to imprison debtors for debt.[13] The intention of imprisonment was to coerce.[14] Incarceration was not seen as counterproductive, as it might appear to be to modern eyes—after all, how

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11. *See* 3 REMAINS OF OLD LATIN: LUCILIUS, THE TWELVE TABLES 424-515 (E. H. Warmington ed. & trans., 1979), *available at* http://members.aol.com/pilgrimjon/private/LEX/12tables.html.

12. OXFORD HISTORY OF THE PRISON, *supra* note 10, at 14.

13. *See id.* at 271. Prior to the Debtor's Act of 1350, imprisonment for debt had been limited to those who owed money to the Crown. *Id.*

14. *Id.*

could a person in prison work or otherwise raise funds to pay off the debt?[15] Imprisonment sometimes did coerce a debtor into making payment, if he was able to raise money from friends and relatives (this, of course, compelled the debtor to incur even more debt), but imprisonment very often failed, with people often held for years for trifling sums.[16] Further complicating matters was that a creditor was prohibited from seizing his debtor's chattels or taking other action to recover money once the debtor was incarcerated.[17] As a result, some debtors would choose to remain in prison for life to preserve their property and possessions for family and heirs.[18]

The civil process leading to imprisonment continued to be viewed as a means of securing the debtor until the debt was paid, rather than as punishment.[19] There was arrest on *mesne* process, which allowed the debtor to be arrested and imprisoned prior to trial in order to ensure his or her presence at trial.[20] The creditor had power over the person of the debtor but did not possess the right to obtain the debtor's assets to satisfy the debt.[21] Thus, the state's role was merely to maintain creditor relations by providing a place of confinement for those who had betrayed a trust.[22]

In 1813, the Insolvent Debtors Act created the Court for the Relief of Insolvent Debtors, which could order the release of debtors from prison upon application to the Justice of Peace and creation of a schedule of assets.[23] In the first six years of its operation, the court released more than 15,000 debtors owing almost £11 million, but the amount recovered and filed in court reached only £60,000.[24] In 1840, a report presented to Parliament stated that there had been no recovery in ninety-five percent of the cases.[25]

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15. *See id.*

16. *Id.*

17. *See id.*

18. *See id.*

19. *See id.* at 119.

20. *See* V. MARKHAM LESTER, VICTORIAN INSOLVENCY: BANKRUPTCY, IMPRISONMENT FOR DEBT, AND COMPANY WINDING-UP IN NINETEENTH-CENTURY ENGLAND 89 (1995).

21. *Id.*

22. Even so, certain restrictions were imposed on the ability of creditors to seize debtors. Debtors could not be arrested within the precincts of a royal palace, and could not be arrested on Sundays. *See* OXFORD HISTORY OF THE PRISON, *supra* note 10, at 279.

23. *See* The National Archives, Bankrupts and Insolvent Debtors: 1710-1869, http://www.catalogue.nationalarchives.gov.uk/RdLeaflet.asp?sLeafletID=145 (last visited Sept. 4, 2006); *see also* LESTER, *supra* note 20, at 99.

24. LESTER, *supra* note 20, at 99.

25. *Id.*

In the eighteenth and nineteenth centuries, according to another parliamentary report, the number of debtors imprisoned totaled approximately 10,000 each year.[26] Debtors incarcerated in England often brought their wives and children to the prison,[27] and babies were even born in jail.[28] These children would live out their lives in prison with their debtor parent.[29]

Commerce flourished in the English debtors' prison. In some instances debtors were required to rent space from jailers, and to buy food and drink from them.[30] Debtors were thus customers, and jailers, as all good businessmen will, cultivated their best paying clients.[31] Debtors also often sold goods and services to others confined.[32] Indeed, in the 1860s a debtor could follow his trade and retain earnings in prison.[33] The conditions of confinement thus frequently depended on the wealth of the debtor, and not on his misdeed.[34]

The 1895 Gladstone Committee on prisons, however, had reasoned that all debtors were criminal because they had caused a loss, through their recklessness or dishonesty, to their creditors. Unpaid debt was viewed as similar to stealing.[35] After the Gladstone findings, debtors' privileges were restricted and, in the official view, debtors were regarded as little better than criminals.[36]

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26. *Id.* at 97.

27. *See* CHARLES DICKENS, LITTLE DORRIT 73-75, 80-81 (Stephen Wall & Helen Small eds., Penguin Books rev. ed. 2003) (1857). Dickens describes a debtor's arrival at the Marshalsea Prison, where the debtor expected that he would be "going out again directly." *Id.* at 73. But soon the debtor sent for "a few necessary articles of furniture to be delivered by the carrier," as well as his expectant wife and two children. *Id.* at 74 (internal quotation marks omitted). He reasoned that it was "better that [they] should not be scattered, even for a few weeks." *Id.* at 74-75 (internal quotation marks omitted). Years later, the debtor's child born in the Marshalsea is an adult, her mother long dead, and her father, still in debtors' prison, is known as the "Father of the Marshalsea." *Id.* at 80-81.

28. OXFORD HISTORY OF THE PRISON, *supra* note 10, at 272.

29. *Id.*

30. *See* 1 SEÁN MCCONVILLE, A HISTORY OF ENGLISH PRISON ADMINISTRATION: 1750-1877, at 10 (1981).

31. *See id.*

32. *See id.* at 17-18.

33. *See* OXFORD HISTORY OF THE PRISON, *supra* note 10, at 146.

34. *See id.* at 275.

35. *Id.* at 277.

36. *Id.* at 146.

But there soon emerged campaigns for changes in the law, spurred by the debtors' miserable lives and misfortune.[37] Public outrage mounted as debtors were trapped for appallingly long periods of time in terrible conditions.[38] Eventually, philanthropic societies arose that would settle the debts of the poor and give them their freedom.[39] "The last jail in England exclusively for debtors—the Queen's Prison—closed in 1862 and was demolished in 1868."[40] Nevertheless, "the fiction that one was being jailed for contempt of court, and not for debt, allowed people to be imprisoned in England for private debts until the 1960s and for public debt, such as local taxes, even [today]."[41]

3. America

Early on in America's history, debtor's prisons were disfavored.[42] Indeed, the colony of Georgia was founded with the intention that it be a haven for poor debtors.[43] This was based on the notion that the New World should offer a fresh start to those afflicted with bad luck.[44]

Thus, distaste for coercive incarceration in the New World and unease with the jailing of debtors is evident from the beginnings of the Republic.[45] Some state constitutions prohibited imprisonment of debtors, but others continued the English tradition.[46] Pennsylvania, for example, as both a colony and a state, took steps to ameliorate the practice, but did not forbid it until 1842.[47] And as recently as 1969, Maine debtors were jailed for "failing

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37. *See id.* at 276.

38. *Id.*

39. *Id.* at 277.

40. *Id.* at 278.

41. *Id.* at 277.

42. *See, e.g.*, BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 2-3 (2002).

43. *See* OXFORD HISTORY OF THE PRISON, *supra* note 10, at 278.

44. *See id.*

45. *Id.*

46. *Id.*

47. *Id.* In fact, Robert Morris, the "Financier of the American Revolution," was imprisoned for debt in Philadelphia for almost three years after some investments failed. *See* Kevin Messett, Biographical Sketch of Robert Morris, http://www.pabook.libraries.psu.edu/LitMap/bios/Morris_Robert.html (last visited June 3, 2006); ColonialHall.com, Robert Morris: 1733-1806, http://www.colonialhall.com/morrisr/morrisr5.php (last visited June 3, 2006). Convinced that a strong national government would solve the new nation's economic problems, Morris crafted a plan to create a stable economic base for the Confederation,

to obey the repayment instructions of court-appointed officials."[48] While "coercive imprisonment for private debt ceased in most jurisdictions in the nineteenth century," other forms of debtor imprisonment, often masked by the fiction of contempt of court, continue today.[49]

B. Imprisonment for Debt Based on Statutory Authority

Courts frequently order imprisonment for those who are in arrears on child support or other family-related obligations, but the length of confinement is prescribed by statute, and due process protections are built into the scheme.[50] For example, the Federal Child Support Recovery Act makes it a crime, punishable by as much as two years imprisonment, willfully to fail to pay child support for a child who resides in another state or willfully to travel in interstate or foreign commerce to evade a child support obligation.[51] "Deadbeat parents" prosecuted under this statute are not

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including paper money backed by a national bank with silver and gold on deposit. *See* ColonialHall.com, Robert Morris: 1733-1806, http://www.colonialhall.com/morrisr/morrisr6.php (last visited June 6, 2006). Morris's measures led to lower inflation, and the new nation began paying its vast war debt, but Morris was considerably less successful with his personal finances. *See id.* For an interesting compilation of photographs reflecting aspects of early American debtors' prisons, see Steve Rhode, The History of Credit & Debt, http://www.myvesta.org/history/history_debtorprison.htm (last visited June 3, 2006).

48. OXFORD HISTORY OF THE PRISON, *supra* note 10, at 278.

49. *Id.* at 277.

50. *See, e.g.*, Sinaiko v. Sinaiko, 664 A.2d 1005, 1008, 1015 (Pa. Super. Ct. 1995) (affirming a fourteen-day commitment for contempt where a spouse had thwarted execution on a judgment for counsel fees by placing assets out of reach of the execution process). The *Sinaiko* court relied upon a provision in the Pennsylvania Divorce Code, *see* 23 PA. CONS. STAT. ANN. § 3502(e)(6) (West 2001), which authorizes attachment proceedings where a party to a divorce action fails to comply with an equitable distribution order. *Sinaiko*, 664 A.2d at 1012-13. Under this section, however, attachment may issue only after a hearing.

51. *See* 18 U.S.C. § 228 (2000). The Act also sets forth a presumption that, if the support obligation was in effect for the time period charged in the indictment or information, "the obligor has the ability to pay the support obligation for that time period." *Id.* § 228(b). Some courts have found that this presumption violates due process because it shifts to the defendant-obligor the burden of persuasion of the crime's willfulness element, and because the inference required of the jury is arbitrary and unreasonable. *See* United States v. Grigsby, 85 F. Supp. 2d 100, 106-07 (D.R.I. 2000); *see also* United States v. Pillor, 387 F. Supp. 2d 1053, 1057 (N.D. Cal. 2005) (stating that "the presumption in [18 U.S.C.] § 228(b) violates due process"); United States v. Morrow, 368 F. Supp. 2d 863, 865 (C.D. Ill. 2005) ("[18 U.S.C.] § 228(b) is unconstitutional . . . .").

necessarily entitled to a jury trial.[52] Many states have enacted similar statutes criminalizing failure to pay court-ordered child support and specifically providing for imprisonment in such cases.[53] Most such statutes generally permit a jury trial, however, and impose a specific length of confinement, so due process concerns are not implicated.[54]

Some statutes governing divorce proceedings authorize imprisonment if the contemnor fails to comply with an order to pay money or to deliver property.[55] These statutes enforcing family-related obligations, however, often produce exactly the opposite of the result intended. In most cases it is impossible to obtain support payments from a person who is unemployed and in jail. Indeed, as discussed in Part V, the passage of the new Bankruptcy Code makes this concern more pronounced as more debtors face potential jail terms and the concomitant inability to earn an income.

C. Imprisonment for Debt Based on Court Order

Rooted in common law, courts have authorized imprisonment when a contemnor refuses to disgorge, pursuant to court order, ill-gotten gains and other assets.[56] It is in these cases, where an indefinite term of confinement is

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52. *See, e.g.*, United States v. Narvaez, 279 F. Supp. 2d 82, 85 (D.P.R. 2003) (holding that a jury trial is unnecessary for the "petty offense" under 18 U.S.C. § 228(a)(1) of failure to pay child support, because it carries a term of imprisonment of not more than six months).

53. *See, e.g.*, Fuller v. Fuller, 295 N.Y.S.2d 14, 14 (App. Div. 1968); *see also* D.C. CODE § 11-944 (2005); OHIO REV. CODE ANN. § 2705.031 (LexisNexis 2000). For an overview of state statutes penalizing the failure to pay child support, *see* Annotation, *Power of Divorce Court, After Child Attained Majority, to Enforce by Contempt Proceedings Payment of Arrears of Child Support*, 32 A.L.R.3d 888 (1970 & Supp. 2004).

54. *See, e.g.*, D.C. CODE § 11-944.

55. *See* 23 PA. CONS. STAT. ANN. § 3502(e)(6) (West 2001); *see also* Sinaiko v. Sinaiko, 664 A.2d 1005, 1014 (Pa. Super. Ct. 1995).

56. *See, e.g.*, Commodity Futures Trading Comm'n v. Armstrong, 284 F.3d 404, 407 (2d Cir. 2002) (dismissing an appeal from a contempt order even though the contemnor had been imprisoned for over two years for failure to comply with a court order to turn over almost $15 million worth of corporate assets); Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc., 950 F.2d 1525, 1526 (11th Cir. 1992) (affirming contempt imprisonment for refusal to comply with a court order to disgorge profits from fraudulent sale of securities); Motorola Credit Corp. v. Uzan, 274 F. Supp. 2d 481, 489-90 (S.D.N.Y. 2003) (awarding damages for diversion of proceeds of fraudulently procured loans, and ordering arrest and confinement of individual defendants until such court-ordered damages were paid if the defendants were found within the jurisdiction of the court), *aff'd in part, vacated in part by, remanded in part by* 388 F.3d 39 (2d Cir. 2004).

proposed and the only way the contemnor can "purge" his contempt is by making the court-ordered payment, that it is essential that the contemnor's due process rights be protected.

For example, in *Commodity Futures Trading Commission v. Armstrong*,[57] the Second Circuit upheld continuing incarceration for an individual who failed to turn over approximately $14.9 million worth of corporate assets to the court-appointed temporary receiver for his investment firms.[58] In *Armstrong*, the contemnor had been imprisoned since January 14, 2000, under the terms of an order scheduled to expire on July 14, 2001.[59] The district court extended the confinement after a hearing in which it found that the contemnor had "produced no evidence that he had either attempted or was unable to comply with the contempt order."[60] It opined that confinement "'still serve[d] coercive purposes' in that 'it might yet yield its intended result.'"[61] The district court also concluded that the contemnor likely was "'just . . . starting to feel some effects of his continued confinement' and the 'requisite degree of coercion.'"[62]

Affirming, the Second Circuit determined that the question before it was whether the contemnor's confinement continued to have a coercive, rather than punitive, purpose.[63] Stating that the contemnor had the burden of producing evidence that he could not comply with the order, and in view of the unusually large sum of money involved, the Second Circuit held that there was no basis for rejecting the district court's finding that the contemnor's incarceration continued to serve a coercive function.[64] The Second Circuit rejected the contemnor's argument that the length of his confinement—at that point more than two years—combined with his repeated declarations that he would not comply with the contempt order, compelled the conclusion that he would never comply and that the order had thus lost its coercive effect.[65]

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57. 284 F.3d 404 (2d Cir. 2002).

58. *Id.* at 405.

59. *Id.*

60. *Id.*

61. *Id.* (quoting SEC v. Princeton Econ. Int'l Ltd., 152 F. Supp. 2d 456, 458 (S.D.N.Y. 2001)).

62. *Id.* (quoting *Princeton Econ. Int'l*, 152 F. Supp. 2d at 463).

63. *Id.*

64. *Id.* at 406.

65. *Id.*

The Eleventh Circuit came to the same determination in *Commodity Futures Trading Commission v. Wellington Precious Metals, Inc.*[66] In that case, the contemnor had been ordered to disgorge $2.8 million.[67] Upon failure to "make any payments whatsoever," the contemnor was ordered to pay five percent of that amount or face jail time.[68] Having paid nothing, he was incarcerated.[69] Several months later the contemnor filed a motion with the district court to terminate the contempt and release him from prison.[70] The district court rejected the contemnor's argument that he had earned only $1.4 million from his illegal activities, and disbelieved his accounting for the remaining $1.4 million.[71] He therefore remained incarcerated.[72]

On appeal, the Eleventh Circuit rejected the contemnor's insistence that he had earned only $1.4 million from his illegal actions,[73] and affirmed the district court's holding that he had not provided sufficient evidence of inability to pay.[74] Noting that a contemnor "'must go beyond a mere assertion of inability'"[75] and establish that he has made "'in good faith all reasonable efforts'" to meet the terms of the court order,[76] the Eleventh Circuit upheld the district court's finding that the contemnor's explanations for the missing assets were "unworthy of belief."[77]

Contempt imprisonment also has been employed against defendants accused of diverting the proceeds of fraudulently procured loans.[78] In *Motorola Credit Corp. v. Uzan*,[79] the Southern District of New York found it "clear . . . that monetary sanctions [would] not suffice to bring defendants into compliance with" the court's orders.[80] The court therefore ordered that the debtors, foreign nationals who had swindled a creditor out of tens of

66. 950 F.2d 1525 (11th Cir. 1992).
67. *Id.* at 1526.
68. *Id.*
69. *Id.*
70. *Id.*
71. *See id.* at 1527-28.
72. *See id.*
73. *See id.* at 1528-29.
74. *Id.* at 1530.
75. *Id.* at 1529 (quoting United States v. Hayes, 722 F.2d 723, 725 (11th Cir. 1984).
76. *Id.* (quoting United States v. Roberts, 858 F.2d 698, 701 (11th Cir. 1988).
77. *Id.* at 1530.
78. *See, e.g.*, Motorola Credit Corp. v. Uzan, 274 F. Supp. 2d 481, 582 (S.D.N.Y. 2003), *aff'd in part, vacated in part by, remanded in part by* 388 F.3d 39 (2d Cir. 2004).
79. 274 F. Supp. 2d 481 (S.D.N.Y. 2003).
80. *Id.* at 582.

millions of dollars, "if found within the jurisdiction of the United States, . . . be immediately arrested and held in confinement until such time as they comply with the directives" of the court.[81]

Courts have found parties to be in contempt, with the threat of imprisonment, in order to coerce the payment of a variety of fees and other expenses that previously had been court-ordered. These include contempt sanctions to enforce a HUD order for remittance into an escrow fund,[82] contempt sanctions to enforce an order to pay attorneys' fees,[83] and contempt sanctions for failure to repay into the court registry amounts previously withdrawn.[84] Failure to pay court-ordered fines[85] and failure to pay court-ordered sanctions[86] have also been actions justifying contempt.

Not infrequently, bankruptcy courts will order the bankrupt or other parties to "turn over" property, including money, for the benefit of creditors.[87] Bankruptcy courts also have noted their power to imprison on the basis of contempt when a payment order is not obeyed.[88] Where a money judgment is involved, however, bankruptcy courts have recognized that the use of the contempt power is usually not available because Federal Rule of Civil Procedure 69 requires the employment of a writ of execution, barring special circumstances.[89]

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81. *Id.*; *see also* United States *ex rel.* Thom v. Jenkins, 760 F.2d 736, 737 (7th Cir. 1985) (ordering imprisonment where a former employee failed to pay a sum he was ordered to disgorge).

82. *See, e.g.*, Pierce v. Vision Invs., Inc., 779 F.2d 302, 303-04 (5th Cir. 1986).

83. *See, e.g.*, Spain v. Bd. of Educ., 214 F.3d 925, 931 (7th Cir. 2000); Robbins v. Labor Transp. Corp., 599 F. Supp. 705, 706-07 (N.D. Ill. 1984).

84. *See, e.g.*, Piambino v. Bestline Prods., Inc., 645 F. Supp. 1210, 1216 (S.D. Fla. 1986).

85. *See, e.g.*, *In re* Spanish River Plaza Realty Co., 155 B.R. 249, 256 (Bankr. S.D. Fla. 1993).

86. *See, e.g.*, Verone v. Taconic Tel. Corp., 826 F. Supp. 632, 633 (N.D.N.Y. 1993); O'Leary v. Moyer's Landfill, Inc., 536 F. Supp. 218, 221-22 (E.D. Pa. 1982).

87. *See, e.g.*, Oriel v. Russell, 278 U.S. 358, 362, 366-67 (1929) (affirming an order under which "the bankrupt was directed to turn over to his trustees merchandise and money amounting . . . to about $10,000"); *see also* 11 U.S.C. § 541(a)(2)(B) (2000) (stating that the commencement of a bankruptcy proceeding creates an "estate" that is comprised of, with limited exceptions, "[a]ll interests of the debtor . . . that is [sic] . . . liable for an allowable claim against the debtor").

88. *See, e.g.*, *Spanish River Plaza Realty*, 155 B.R. at 254-56.

89. *See In re* Eickhoff, 259 B.R. 234, 235-36 (Bankr. S.D. Ga. 2000).

D. Prohibitions on Imprisonment for Debt

Notwithstanding the above, American law expresses a general disapproval of civil imprisonment. Indeed, a federal statute prohibits federal imprisonment for debt in any state where such imprisonment has been abolished.[90] Outright imprisonment as a penalty for violating commercial obligations, except in cases of fraud, has been abolished in every state.[91] Civil confinement of the mentally ill is limited to cases where they are a danger to themselves or others.[92] Sexual predators generally can be confined after the expiration of their criminal sentence only when they are found to be dangerous and mentally ill.[93] Deportable aliens can be confined only for a limited time without violating the Due Process Clause, unless the confinement has been ordered in a criminal proceeding or in "special and narrow nonpunitive circumstances" where a "special justification" outweighs

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90. 28 U.S.C. § 2007(a) (2000) ("A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished. All modifications, conditions, and restrictions upon such imprisonment provided by State law shall apply to any writ of execution or process issued from a court of the United States in accordance with the procedure applicable in such State.").

91. *See* Note, *Imprisonment for Debt: In the Military Tradition*, 80 YALE L.J. 1679, 1679 (1971); *see also* Becky A. Vogt, Note, State v. Allison: *Imprisonment for Debt in South Dakota*, 46 S.D. L. REV. 334, 334-35 (2001). The Pennsylvania Constitution, for example, contains a provision against imprisonment for debt. *See* PA. CONST. art. I, § 16. Pennsylvania law has long held that an order for the payment of money, without more, does not warrant attachment of the person. *See, e.g.*, Wilson v. Wilson, 21 A. 807, 807 (Pa. 1891); Brodsky v. Phila. Athletic Club, Inc., 419 A.2d 1285, 1288 (Pa. Super. Ct. 1980) (observing that, absent fraud, the abolition of imprisonment for debt prevents imprisonment to enforce a money decree).

92. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992). In *Foucha*, the Supreme Court stated that "[t]he State may . . . confine a mentally ill person if it shows 'by clear and convincing evidence that the individual is mentally ill and dangerous.'" *Id.* (quoting Jones v. United States, 463 U.S. 354, 362 (1983)). The Court then concluded that a Louisiana statute violated the Due Process Clause because it allowed an insanity acquittee to be committed to a mental institution until he was able to demonstrate that he was no longer dangerous to himself and others, even though he did not suffer from any mental illness. *Id.* at 81-83.

93. *See* Kansas v. Hendricks, 521 U.S. 346, 356-58, 371 (1997) (upholding the Kansas Sexually Violent Predator Act, KAN. STAT. ANN. §§ 59-29a01–29a15 (1994), which establishes procedures for the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," *see* § 59-29a07, are likely to engage in "predatory acts of sexual violence," *see* § 59-29a02).

the person's liberty interest.[94] Even pretrial detention under the Bail Reform Act has been upheld only because the incarcerated person is assured a prompt hearing and because the Speedy Trial Act limits the length of pretrial confinement.[95]

Thus, it is evident that a creditor's rights against a debtor do not include imprisonment, unless: (1) the imprisonment remedy is found in a statute, or (2) a court holds the debtor in contempt after it orders payment to a creditor and the debtor either resists, refuses, or is unable to comply.[96] I discuss *infra* Part IV the problems that arise with this second category of debtors.

III. THE DISTINCTIONS BETWEEN CIVIL AND CRIMINAL CONTEMPT

To improve the current state of civil contempt law as it relates to debtors it is necessary to examine the nature of the contempt power. "The power to punish for contempts is inherent in all courts."[97] This power reaches both conduct before the court and conduct beyond the court's confines, for "'[t]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the

94. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (internal quotation marks omitted). In *Zadvydas*, the Supreme Court concluded that the indefinite detention of aliens who were admitted to the United States but subsequently ordered removed would raise serious constitutional concerns regarding a federal "post-removal-period statute," and, therefore, construed the statute to contain an implicit "reasonable time" limitation, the application of which would be subject to federal court review. *Id.* at 682 (citing 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V)).

95. *See* United States v. Salerno, 481 U.S. 739, 747-48 (1987). The *Salerno* Court held that a portion of the Bail Reform Act of 1984, *see* 18 U.S.C. § 3142(e) (2000), is a constitutionally permissible limitation on liberty, in that it, in conjunction with other provisions of the Act, "carefully limits the circumstances under which detention may be sought to the most serious of crimes." *Id.* at 747 (citing 18 U.S.C. § 3142(f) (1982 & Supp. III)). "The arrestee is entitled to a prompt detention hearing, and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act." *Id.* (citing 18 U. S. C. §§ 3161-3174).

96. One author argues that criminal penalties should be imposed for non-payment of debt. *See* Richard E. James, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143, 143-45 (2002).

97. Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (alteration and internal quotation marks omitted) (quoting *Ex parte* Robinson, 86 U.S. 505, 510 (1874)).

conduct of trial.'"[98] The Supreme Court has noted that "[c]ourts independently must be vested with 'power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.'"[99]

In an early seminal case dealing with contempt imprisonment, *Gompers v. Buck's Stove & Range Co.*,[100] the Supreme Court distinguished between imprisonment for punitive purposes and imprisonment for coercive purposes,[101] a distinction that is honored to this day.[102] Courts recognize, however, that "most sanctions contain both coercive and punitive elements."[103] Courts also recognize that "what starts as coercive can over time become punitive"[104] because a contempt order may lose its coercive effect during the course of the contemnor's confinement, "leaving punishment as the sole justification for its maintenance."[105]

A distinction has also been drawn between contempt that is "direct" and contempt that is "indirect." Contempt is direct when it occurs in the immediate presence of the judge—under the court's own eye and within its own hearing.[106] For example, if a lawyer blatantly disobeys a judge's order during official court business, the judge instantly may rule that the lawyer

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98. *Id.* (alterations in original) (quoting Young v. United States ex rel. Vuiton et Fils S.A., 481 U.S. 787, 798 (1987)).

99. Int'l Union, UMWA v. Bagwell, 512 U.S. 821, 831 (1994) (quoting Anderson v. Dunn, 6 Wheat. 204, 227 (1821)).

100. 221 U.S. 418 (1911).

101. *See id.* at 442-52 (holding that a twelve-month sentence imposed on labor activist Samuel Gompers in a civil contempt proceeding had no coercive force and, therefore, was punitive and could not be imposed consistent with the Due Process Clause without affording criminal due process rights).

102. *See, e.g.*, Commodity Futures Trading Comm'n v. Armstrong, 284 F.3d 404, 406 (2d Cir. 2002) ("In distinguishing criminal and civil contempt sanctions, we inquire whether the sanction's purpose was to coerce compliance and whether the contemnor was given the opportunity to cure his contempt and thereby end the sanction." (alteration and internal quotation marks omitted)).

103. United States v. Lippitt, 180 F.3d 873, 877 (7th Cir. 1999).

104. *Lippitt*, 180 F.3d at 877 (citing *In re* Grand Jury Proceedings of Dec., 1989, 903 F.2d 1167, 1169 (7th Cir. 1990); *In re* Crededio, 759 F.2d 589, 590 (7th Cir. 1985); Simkin v. United States, 715 F.2d 34, 36 (2d Cir. 1983)).

105. *Id.*

106. *See, e.g.*, *In re* Heathcock, 696 F.2d 1362, 1365 (11th Cir. 1983) ("Direct contempt is committed in the 'actual presence of the court.'" (internal quotation marks omitted)); United States v. Peterson, 456 F.2d 1135, 1139 (10th Cir. 1972) (holding that criminal contempt is direct and punishable summarily without notice and opportunity to prepare only if committed in the actual presence of the judge and known to him).

should spend a day or so in jail and direct the bailiff to arrest and remove her from the court's presence. Thus, direct contempt for conduct in the court's presence may be punished summarily, i.e., no separate notice or hearing is required.[107] "If the judge finds a person in direct contempt of court, the judge [typically] must sign and enter a written order that recites the facts as well as the judgment and sentence."[108]

On the other hand, "contempt is indirect when it occurs out of the presence of the court, thereby requiring the court to rely on the testimony of third parties for proof of the offense."[109] Examples include preventing service of process, bribing a witness, and failing to pay court-ordered child support.[110] Indirect contempt involves a hearing, providing the contemnor a chance to prove any defenses.[111] Different substantive and procedural rules apply depending on whether the contempt is classified as civil or criminal, and direct or indirect.[112]

The primary difference between civil and criminal contempt regards the contemnor's sentence. Courts must sentence those guilty of criminal contempt to a definite jail term, a punitive sentence.[113] Imprisonment for civil contempt, on the other hand, is deemed to be coercive, and not punitive, in that its purpose is to force the contemnor to comply with a court order.[114] There is no definite jail term, as the lack of a set period of confinement indicates intent to coerce compliance.[115] However, the line between coercion

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107. *See Peterson*, 456 F.2d at 1139; *see also* Pounders v. Watson, 521 U.S. 982, 990-91 (1997) (noting that where an attorney violated a trial court's instructions not to question her client regarding punishment in the presence of the jury, the trial judge's findings concerning jury prejudice, together with the judge's assessment of the flagrance of the attorney's defiance, supported the finding of the need for summary contempt to vindicate the court's authority).

108. JUDITH OLEAN, JUDICIAL EDUC. CTR., NEW MEXICO MUNICIPAL BENCHBOOK ch. 9.2 (2004) [hereinafter MUNICIPAL BENCHBOOK], *available at* http://jec.unm.edu/resources/benchbooks/municipal/ch_09.htm.

109. U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 759 (1997) [hereinafter CRIMINAL RESOURCE MANUAL], *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00759.htm.

110. *See* MUNICIPAL BENCHBOOK, *supra* note 108, ch. 9.3.

111. *See id.*

112. *See* CRIMINAL RESOURCE MANUAL, *supra* note 109, §§ 754, 759, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00754.htm and http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00759.htm.

113. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-43 (1911).

114. *Id.* at 441-42.

115. *Id.*

and punishment is exceedingly fine, as even a civil contemnor, though his sanction is labeled "coercive," is in effect being "punished" for failing to perform a past act—i.e., obeying a court order.

Although a court determination of the nature of the contempt is required, the grounds by which to make this decision are murky and often confused. Indeed, the Supreme Court itself has noted that "'[f]ew legal concepts have bedeviled courts, judges, lawyers and legal commentators more than contempt of court.'"[116] One commentator has noted that, regarding contempt of court, "the law is a mess."[117] To illustrate, in *In re Stewart*,[118] an employer, Stewart, had demoted Stubblefield, his employee, because Stubblefield had missed work due to jury duty.[119] The judge presiding over the case in which Stubblefield was a juror initiated what he deemed to be a *civil* contempt proceeding against Stewart, deeming his treatment of Stubblefield as an affront to the court.[120] He imposed a sentence of a $100 fine and costs, and put Stewart on unsupervised probation for three months conditioned upon payment of the fine and costs and Stubblefield's reinstatement to his former position.[121] However, the Fifth Circuit reversed the ruling, deeming the proceedings and Stewart's sentence to be *criminal*, not civil.[122] The Fifth Circuit noted that "the district judge imposed a penalty that was unconditional and not subject to being lifted if Stewart purged himself."[123] Further, the court examined the district judge's statement that "I haven't had this to contend with too much, but I think I might as well just make an example out of this fellow so I won't have to bother with this matter again," and opined that it indicated a "crystal clear" intention to impose punishment upon Stewart.[124]

Furthering the confusion, the Supreme Court has noted that "[c]ourts often speak in terms of criminal contempt and punishment for remedial purposes," but did not elaborate upon what "remedial purposes" meant or

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116. Int'l Union, UMWA v. Bagwell, 512 U.S. 821, 827 n.3 (1994) (quoting Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677 (1981)).

117. Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1025 (1993).

118. 571 F.2d 958 (5th Cir. 1978).

119. *See id.* at 961-62.

120. *See id.* at 962-63.

121. *See id.* at 963.

122. *Id.* at 964, 968.

123. *Id.* at 963-64 (footnote omitted).

124. *Id.* at 964 (internal quotation marks omitted).

how it has been utilized.[125] It is apparent that the distinction between civil and criminal contempt, and the variations in between, are indeed "'conceptually unclear and exceedingly difficult to apply.'"[126]

However, determination of whether a contempt proceeding is criminal or civil is particularly important because it governs whether the Due Process Clause applies and whether a contempt hearing is required.[127] "Criminal contempt is a crime in the ordinary sense,"[128] and "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings."[129] These constitutional protections include the right (1) not to be subject to double jeopardy;[130] (2) to receive notice of the charges;[131] (3) to receive assistance of counsel;[132] (4) to receive summary process;[133] (5) to present a defense;[134] (6) not to incriminate oneself;[135] and (7) to be judged under the standard of proof

125. Shillitani v. United States, 384 U.S. 364, 369 (1966). In *Shillitani*, two men were sentenced to a term of two years imprisonment with release conditioned upon either the men answering questions that they had refused to answer in their grand jury testimony or the discharge of the grand jury, whichever came first. *Id.* at 365-68. The district court labeled their conduct criminal contempt. *Id.* at 366. However, the Supreme Court stated that "[t]he fact that both the District Court and the Court of Appeals called petitioners' conduct 'criminal contempt' does not disturb our conclusion [that the proceedings and sentencing involved civil contempt]." *Id.* at 369.

126. Int'l Union, UMWA v. Bagwell, 512 U.S. 821, 827 n.3 (1994) (quoting Dudley, *supra* note 117, at 1033).

127. In *Hicks v. Feiock*, the Supreme Court held that if the lower court determined that the contempt at issue was criminal in nature, a presumption of a father's ability to pay alimony and child support would be an unconstitutional violation of the Due Process Clause. 485 U.S. 624, 637-38 (1988). If, however, the action was civil in nature, then the presumption was not such a violation. *Id.* at 638. The Court concluded that further proceedings had to be held in order to determine whether the action was criminal or civil and whether the presumption was activated. *Id.* at 640-41.

128. Bloom v. Illinois, 391 U.S. 194, 201 (1968).

129. *Hicks*, 485 U.S. at 632.

130. CRIMINAL RESOURCE MANUAL, *supra* note 109, § 754 (citing United States v. Dixon, 509 U.S. 688, 695 (1993); In re Bradley, 318 U.S. 50 (1943)), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00754.htm.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (citing Cooke v. United States, 267 U.S. 515, 537 (1925)).

135. *Id.*

beyond a reasonable doubt.[136] If a sentence for contempt is deemed part punitive and part coercive, then the criminal aspect dominates.[137] A court's failure to make either any evaluation at all, or the correct assessment as to the nature of the contempt, is itself grounds for reversal.[138] However, due process is not required when a petitioner's contempt claim is answered only by a conclusory assertion of inability to pay without the submission of documentation supporting such a claim.[139]

An example of the effect and importance that the determination of the nature of the contempt has on the process owed a contemnor is illustrated in *International Union, UMWA v. Bagwell* (*Bagwell II*).[140] In that case, a Virginia state court found, in seven contempt hearings, that a mine workers union had committed contempt via over four-hundred violations of an injunction prohibiting strike-related activities.[141] The court had announced, upon issuance of the injunction, that it would impose fines of a certain amount in the event the violations continued.[142] "The [state] court [had] required that [the contemptuous] acts [i.e., the violations of the injunction] be prove[n] beyond a reasonable doubt, but did not afford the union a right to jury trial."[143] The trial court fined the union $52 million, payable to the state and two counties affected by the strike.[144] The trial court characterized the fines as "civil," given that they became payable only because the injunction was disobeyed.[145] The union appealed, arguing that the fines were not coercive civil fines but rather criminal fines that constitutionally could be

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136. *Id.* (citing Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 444 (1911)). Further, according to the Department of Justice, serious criminal contempts involving imprisonment of more than six months also require a jury trial. *Id.* (citing Bloom v. Illinois, 391 U.S. 194, 199 (1968)).

137. *In re* Stewart, 571 F.2d 958, 964 n.4 (5th Cir. 1978) (citing Nye v. United States, 313 U.S. 33, 42-43 (1941)).

138. *Id.* at 963-64 (holding that the sentence of both fines and confinement was neither coercive nor compensatory to the injured party, but was in fact criminal in nature and the incorrect pronouncement of the contempt as civil was grounds for reversal).

139. *See, e.g.*, Farkas v. Farkas, 618 N.Y.S.2d 787, 788 (App. Div. 1994). In *Farkas*, a husband stated that due to the declining real estate market he was unable to comply with the judgment against him, but did not provide any documentation detailing his claim. *Id.*

140. 512 U.S. 821 (1994).

141. *See id.* at 824.

142. *See id.*

143. *Id.*

144. *See id.* at 824-25.

145. *See id.* at 825.

imposed only through a jury trial.[146] The Court of Appeals of Virginia reversed the case on other grounds,[147] but the Supreme Court of Virginia subsequently reversed the Court of Appeals' decision.[148] Virginia's highest court rejected the union's contention that the fines were criminal and could not be imposed absent a trial, stating, "A prospective fine schedule was established solely for the purpose of coercing the Union to refrain from engaging in certain conduct. Consequently, the Union controlled its own fate. Thus, we hold that the fines in question are valid, coercive, civil fines."[149] The Supreme Court granted certiorari, stating simply: "We are called upon once again to consider the distinction between civil and criminal contempt."[150]

The Supreme Court ruled that the contempt was criminal,[151] but noted "the somewhat elusive distinction between civil and criminal contempt."[152] First, the Court concluded that the mere fact that the sanctions were announced in advance of any fines actually being levied did not render them coercive and civil as a matter of law.[153] Next, the Court noted that the union's sanctionable conduct occurred outside the court's presence and did not impede its ability to maintain order. These were factors weighing in favor of labeling the contempt criminal and thus invoking due process protections.[154] Additional facts leading to the Court's determination of criminal contempt were that the union's contumacy involved complex acts and the fines were "serious."[155] The Court also expressed concern about abuses that could result where "the offended judge [was] solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct,"[156] and cautioned that "the risk of erroneous deprivation from the lack of a neutral factfinder [might] be substantial."[157]

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146. Int'l Union, UMWA v. Clinchfield Coal Co., 402 S.E.2d 899, 901 (Va. Ct. App. 1991), *rev'd*, Bagwell v. Int'l Union, UMWA (*Bagwell I*), 423 S.E.2d 349 (Va. 1992), *rev'd*, *Bagwell II*, 512 U.S. 821 (1994).

147. *See id.* at 905 (vacating the contempt fines pursuant to a settlement agreement).

148. *Bagwell I*, 423 S.E.2d at 360.

149. *Id.* at 357.

150. *Bagwell II*, 512 U.S. at 823.

151. *Id.* at 837-38.

152. *Id.* at 830.

153. *Id.* at 836.

154. *Id.* at 837.

155. *Id.*

156. *Id.* at 831.

157. *Id.* at 834.

Although the Supreme Court's decision in *Bagwell II* appears to advocate review of the particulars of a court's initial order when determining whether the contempt is civil or criminal, lower courts have been reluctant to apply, let alone extend, its precepts.[158] Some courts have concluded that the labeling of the contempt in *Bagwell II* as "criminal" simply reaffirmed the traditional distinction between the two forms of contempt, making no change in the prior law denying criminal due process in cases where the purpose of the contempt sanction was to coerce performance and was conditional upon non-compliance.[159] Other courts have applied *Bagwell II* to hold that if an order alleged to have been violated is complex, extensive fact-finding is necessary and a jury trial is required.[160] Still others have utilized the Supreme Court's summation of existing law at the outset of the *Bagwell II* opinion to hold that no jury trial is required in any civil contempt proceeding.[161]

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158. Commenting on these decisions, one appellate court remarked that "it is not surprising that district courts around the country, reluctant to surrender part of their power to coerce obedience to their decrees, have resisted the logic of *Bagwell [II]*." Evans v. Williams, 206 F.3d 1292, 1297 (D.C. Cir. 2000).

159. *See, e.g., In re* Lucre Mgmt. Group, LLC, 365 F.3d 874, 876 (10th Cir. 2004) (holding that a sanction for violating a bankruptcy order could not be characterized as criminal for *Bagwell II* purposes since the bankruptcy court gave the contemnor the "key" to his prison cell); *cf.* Hanshaw Enters., Inc. v. Emerald River Dev., Inc., 244 F.3d 1128, 1137-40 (9th Cir. 2001) (stating that, under the principles articulated in *Bagwell*, "'the imposition of a sufficiently substantial punitive sanction requires that the person sanctioned receive the procedural protections appropriate to a criminal case'" (quoting Mackler Prods., Inc. v. Cohen, 146 F.3d 126, 130 (2d Cir. 1998))).

160. Jake's Ltd. v. City of Coates, 356 F.3d 896, 903-04 (8th Cir. 2004) (requiring the use of a jury trial regarding a claim of violation of an injunction against a sexually oriented business); FTC v. Kuykendall, 312 F.3d 1329, 1342 (10th Cir. 2002) ("[W]e conclude that a jury should be utilized to determine the complex facts necessary to render an appropriate award."), *vacated by, remanded by, on reh'g en banc at* 371 F.3d 745, 754 (10th Cir. 2004) (explaining that although the panel held that a contempt of a complex injunction required a jury trial, in a civil contempt case there was no such requirement); United States v. Santee Sioux Tribe of Neb., 254 F.3d 728, 736 (8th Cir. 2001) (holding a jury trial was not required because the injunction alleged to be violated was not complex); Nat'l Org. for Women v. Operation Rescue, 37 F.3d 646, 660-62 (D.C. Cir. 1994) (holding that a jury trial was required because of the complexity of the injunction).

161. ACLI Gov't Sec., Inc. v. Rhoades, 989 F. Supp. 462, 465-66 (S.D.N.Y. 1997).

IV. DETERMINATION AND RESULTS OF INABILITY TO COMPLY WITH A COURT ORDER

After a court clears the hurdle of determining whether particular conduct amounts to criminal or civil contempt, it must then determine an appropriate sanction. The ability of the contemnor to comply with a court order, whether for the payment of money or otherwise, is a required prerequisite to a finding of contempt and any sanction in connection therewith.[162] It is axiomatic that a person may not be held in contempt nor imprisoned nor sanctioned for failure to comply with a court order if it is impossible to comply.[163] But while certain affirmative acts, such as the ability to testify,[164] can easily be determined, the ability to pay a sum of money is more difficult to prove, and it is even harder to establish that one is *unable* to pay. Therefore, the possibility of an unjust confinement emerges most starkly in those cases in which the contemnor fails to produce disputed assets, and the court disbelieves her claim that she is unable to do so. The contemnor may be imprisoned indefinitely simply because she cannot prove a negative.

The contemnor's burden in such situations, and the standard of proof to which he is held, are not clear. It is important that these uncertainties be resolved if fundamental due process protections are to be provided to future contemnors. The recent implementation of the strict provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,[165] discussed in Part V, exacerbates this concern as more ordinary debtors are at risk for becoming contemnors.

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162. *See* Chadwick v. Janecka, 312 F.3d 597, 613 (3d Cir. 2002) ("[W]e cannot disturb the state courts' decision that there is no federal constitutional bar to Mr. Chadwick's indefinite confinement for civil contempt so long as he retains the ability to comply with the order requiring him to pay over the money at issue.").

163. *See id.*; *see also* Bearden v. Georgia, 461 U.S. 660, 667-68 (1983) (holding that a fine may not be converted into a jail sentence simply because of the inability to pay); George v. Beard, 824 A.2d 393, 396 (Pa. Commw. Ct. 2003) ("Before an offender can be confined solely for nonpayment of financial obligations he or she must be given an opportunity to establish inability to pay.").

164. *See supra* notes 1-4 and accompanying text; *infra* notes 189-90 and accompanying text.

165. Pub. L. 109-8, 119 Stat. 23 (amending scattered sections of 11 U.S.C.).

A. The Burden and Standard of Proof

The burden and standard of proof utilized to establish an ability to comply with an order for payment of money are unclear. Indeed, the present system invites abuse, giving leverage to some creditors that is not available in ordinary litigation. Generally, the party seeking a civil contempt finding and sanction bears the initial burden of proof, and once she makes out a prima facie case, the burden of production shifts to the alleged contemnor.[166] However, some courts have required the moving party only to prove a prima facie case of failure to comply, i.e., pay the judgment, and have placed the subsequent burden of proving an inability to comply upon the party who asserts it.[167] This is true even though an ability to comply is an essential element of contempt.[168]

It is also unclear exactly how persuasively a contemnor must prove inability to comply. Certain courts apply a "clear and convincing" standard of proof to contempt cases,[169] while others apply the criminal "beyond a reasonable doubt" standard where imprisonment may be imposed as a sanction.[170] Moreover, some circuits utilize a presumption of ability to comply in contempt cases, which a contemnor must overcome.[171] Various courts have held instead that the contemnor must show that all avenues for raising funds have been explored and exhausted,[172] or that she has been diligent and energetic in attempting to do what the court has ordered.[173]

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166. *See* Combs v. Ryan's Coal Co., 785 F.2d 970, 984 (11th Cir. 1986); *see also* Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc., 950 F.2d 1525, 1529 (11th Cir. 1992).

167. *See* Elec. Workers Pension Trust Fund of Local Union No. 58 v. Gary's Elec. Serv. Co., 340 F.3d 373, 382-83 (6th Cir. 2003); Oliner v. Kontrabecki, 305 B.R. 510, 520 (Bankr. N.D. Cal. 2004).

168. *See supra* note 162 and accompanying text. In *United States v. Rylander*, however, the Supreme Court indicated that the shifting of the burden may apply only to cases where the contemnor asserts a present inability to pay at some time after the initial determination. 460 U.S. 752, 757 (1983).

169. *See* Harris v. City of Philadelphia, 47 F.3d 1311, 1321 (3d Cir. 1995); *Wellington*, 950 F.2d at 1529.

170. *See* Barrett v. Barrett, 368 A.2d 616, 621 (Pa. 1977).

171. Maggio v. Zeitz, 333 U.S. 56, 64-65 (1948) (stating that while lower courts have carried over this presumption, it is not necessary to do so in bankruptcy actions, as the presumption is not contained in the bankruptcy statute).

172. *See* SEC v. Bilzerian, 112 F. Supp. 2d 12, 26 (D.D.C. 2000); O'Leary v. Moyer's Landfill, Inc., 536 F. Supp. 218, 219-20 (E.D. Pa. 1982).

173. Drywall Tapers, Local 1974 v. Local 530, 889 F.2d 389, 394 (2d Cir. 1989).

Others have held that the contemnor categorically must prove her inability to pay in detail[174] and that she made all reasonable efforts to comply.[175] Still others have held that if the contemnor's inability to pay is self-induced, it is not a defense to contempt,[176] while others require a showing that the contemnor has "done all within its power" to comply.[177] The Supreme Court in *Maggio v. Zeitz*,[178] in yet another permutation of the burden standard, has held that the presumption of ability to comply should be assessed in light of the present circumstances of the debtor and not based on a former determination of her ability to pay. This is especially true when some amount of time has passed between such a finding and a contempt action, unless "the time element and other factors make that a fair and reasonable inference."[179]

The burden of production is not an easy one, for a contemnor must prove "'plainly and unmistakably that compliance is impossible.'"[180] Since this determination is reviewed on the "clearly erroneous" standard in federal courts,[181] or in some state courts on the "abuse of discretion" standard,[182] the trial court determination of fact would be difficult to reverse. Thus, the individual imprisoned for failure to obey a court order requiring the payment of money is in a far worse position than one accused of a serious crime. The judge who imposes the obligation—not an impartial jury—decides whether the burden and standard of proof, frequently less arduous than the criminal standards, have been met. That judge also decides the contemnor's ability to comply, and determines the nature and extent of the sanction. The usual rules of criminal law are stood on their head. It is the contemnor who eventually

174. Pigford v. Veneman, 307 F. Supp. 2d 51, 57-58 (D.D.C. 2004); *Bilzerian*, 112 F. Supp. 2d 12; *O'Leary*, 536 F. Supp. 218.

175. *Bilzerian*, 112 F. Supp. 2d 12; *O'Leary*, 536 F. Supp. 218.

176. SEC v. Showalter, 227 F. Supp. 2d 110, 120 (D.D.C. 2002).

177. *See Pigford*, 307 F. Supp. 2d at 57-58.

178. 333 U.S. 56 (1948).

179. *Id.* at 65.

180. Huber v. Marine Midland Bank, 51 F.3d 5, 10 (2d Cir. 1995) (emphasis omitted) (quoting *In re Marc Rich & Co.*, 736 F.2d 864, 866 (2d Cir. 1984)).

181. *See* Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc., 950 F.2d 1525, 1528 (11th Cir. 1992) ("We must consider the following issue[] on appeal: . . . whether the district court was clearly erroneous in finding that [the contemnor] failed to prove that he was unable to comply with the district court's disgorgement order . . . .").

182. *See, e.g.*, State *ex rel.* Buss v. Flynn, No. E2005-00468-COA-R3-CV, 2006 WL 1328954 (Tenn. Ct. App. May 15, 2006).

must convince the judge of a negative—that he is unable to pay—or he will remain incarcerated at the judge's pleasure.[183]

The Supreme Court, in two cases involving bankrupts who were cited for contempt for failure to comply with turnover orders, has recognized that the passing of time might cause imprisonment to lose its coercive character.[184] These opinions suggest that if a reasonable interval of time in jail has failed to produce compliance, an inability to comply perhaps should be presumed and the contemnor therefore released.

B. Right to Jury Trial and Length of Confinement

As recently as 1958, the Supreme Court ruled in *Green v. United States*[185] that even in criminal contempt cases the contemnor is not entitled to the jury trial that the Sixth Amendment guarantees in other criminal proceedings.[186] A decade later, in *Bloom v. Illinois*,[187] the Court effectively reversed that ruling and held that in cases of criminal contempt the contemnor must be afforded a jury trial and other rights of the criminally accused.[188] After *Green*, but before *Bloom*, the Court decided a case

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183. One illustration of how difficult it is to overturn a determination that the contemnor has the ability to comply can be seen in the case of seventy-two-year-old Manuel Osete, who has been in prison for over forty months in Tucson, Arizona. *See* Rosenblum, *supra* note 8. Osete has been unable to prove that he is incapable of satisfying the judgment against him in his divorce from his wife of thirty-seven years. *See id.* He claims that his ex-wife and son removed documents from his property in Mexico, and without those documents he can never prove his inability to comply with the court's order to pay alimony of $10,000 per month. *See id.* Osete remains in prison and unable to get an order for the production of those documents, and his source of income, a foundry in Mexico, was forced to close in his absence. *See id.*

184. *See Maggio*, 333 U.S. at 70-71 (noting that while "Maggio makes no explanation as to the whereabouts . . . of the property which the [turnover] order, earlier affirmed, declared him to possess[,] . . . time has elapsed between issuance of [the original turnover] order and initiation of the contempt proceedings in this case"); Oriel v. Russell, 278 U.S. 358, 366 (1929) ("'I have known a brief confinement to produce the money promptly, . . . and I have also known it to fail. Where it has failed, and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely the bankrupt's inability to obey the order, he has always been released . . . .'" (quoting *In re* Epstein, 206 F. 568, 570 (E.D. Pa. 1913))).

185. 356 U.S. 165 (1958).

186. *Id.* at 183.

187. 391 U.S. 194 (1968).

188. *Id.* at 208-09.

involving civil contempt and ruled that a jury trial and other criminal procedural protections were not required.[189] That case involved contempt charges brought against two witnesses for refusal to testify before a grand jury.[190] The Court concluded that "[t]he conditional nature of the imprisonment—based entirely upon the contemnor's continued defiance—justifies holding civil contempt proceedings absent the safeguards of indictment and jury."[191]

Deprived of an impartial jury and other criminal procedural protections, a civil contemnor is subjected to a decision on the critical issue as to whether he can in fact comply with a court order made by the same judge or court that ordered him to perform the act in the first place. That judge also decides the length of the imprisonment sanction. The judge offended by the contempt, however, is least likely to be impartial, and may even feel vindictive toward the contemnor.[192] Indeed, a journalist at the *Washington Post* characterized a civil contempt case as having "'increasingly taken the character of a dispute between [the defendant] and the judge.'"[193]

The lack of due process protections afforded a contemnor before the imprisonment sanction can be imposed is significant. Professor Doug Rendleman has discussed the potential for abuse:

> Coercive confinement has an awesome potential for abuse. Power to imprison is concentrated in a single trial judge. The usual checks against abuse that precede criminal imprisonment, including a grand jury indictment, prosecutorial discretion, a jury trial for a sentence of greater than six months,

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189. Shillitani v. United States, 384 U.S. 364, 370-71 (1966).

190. *Id.* at 365.

191. *Id.* at 370-71 (citing Uphaus v. Wyman, 364 U.S. 388, 403-04 (1960) (Douglas, J., dissenting)).

192. *See* Deborah J. Zimmerman, *Civil Contemnors, Due Process, and the Right to a Jury Trial*, 3 WYO. L. REV. 205, 219 (2003); *see also* Int'l Union, UMWA v. Bagwell, 512 U.S. 821, 831 (1994) ("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. Contumacy 'often strikes at the most vulnerable and human qualities of a judge's temperament,' and its fusion of legislative, executive, and judicial powers 'summons forth . . . the prospect of the most tyrannical licentiousness.'" (alteration in original) (citations omitted)).

193. David J. Harmer, Limiting *Incarceration for Civil Contempt in Child Custody Cases*, 4 BYU J. PUB. L. 239, 263 (1990) (quoting Barton Gellman, *Lawyer Calls Jailing Vindictive, Pleads for Dr. Morgan's Release*, WASH. POST, Nov. 2, 1988, at D1).

> the presumption of innocence, proof beyond a reasonable doubt, and the opportunity for an executive pardon, are absent before coercive confinement begins.[194]

Additionally, there is no sound basis for a distinction between civil and criminal contempt with respect to the length of imprisonment. Criminal contempt has statutory guidelines for sentencing, as do other crimes, and these criminal contempt statutes should provide a useful benchmark for the length of civil contempt imprisonment. If a debtor has the ability to pay, then attachment, garnishment, and other remedies are available, which render confinement unnecessary. If a debtor does not have the ability to pay, she should not be adjudicated to be in contempt in the first place, and indefinite confinement will not serve to coerce payment. Of course, there is effectively no opportunity for a contemnor to earn sufficient assets to pay the amount ordered if she is in prison. In practice, however, decisions as to the length of contempt confinement are left to the discretion of the court that imposed the sanction, and a court's exercise of that discretion has been held "virtually unreviewable."[195]

V. HOW THE RECENT REFORMS TO THE BANKRUPTCY CODE MAY SIGNIFICANTLY INCREASE IMPRISONMENT FOR CIVIL CONTEMPT

Bankruptcy is becoming part of American life—more than one million American households annually are directly affected by bankruptcy.[196] In

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194. Doug Rendleman, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor*, 48 WASH. & LEE L. REV. 185, 190 (1991).

195. *See, e.g.*, Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc., 950 F.2d 1525, 1531 (11th Cir. 1992) (citing Simkin v. United States, 715 F.2d 34, 38 (2d Cir. 1983)). However, at least one court has rejected that contention, declaring, "[w]e cannot settle for a 'virtually unreviewable' exercise of trial court discretion when due process of law is at stake." Morgan v. Foretich, 564 A.2d 1, 7 n.5 (D.C. 1989). In *Morgan*, the court released a contemnor after a fruitless twenty-three-month confinement. *Id.* at 1-2; *see also In re* Crededio, 759 F.2d 589, 594 (7th Cir. 1985) (Posner, J., dissenting) (warning that civil contempt imprisonment "is an anomaly in our system, ... [a]s soon as it is clear that the inducement won't work, the purpose of civil contempt lapses, and the continued imprisonment of the man becomes penal, and requires a criminal proceeding").

196. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 238 (2001) ("With about one hundred million households in the United States, in the space of a decade, even allowing for some overlap, . . . about 10 percent of the country would have lived through a personal bankruptcy."); *see also*

2004, more people filed for bankruptcy than graduated from college or died from heart attacks.[197] Indeed, in 2004 approximately 1.5 million Americans filed for bankruptcy.[198] In fact, the bankruptcy filing rate has more than doubled over the past decade.[199] Bankruptcy scholars have noted that "no one is exempt from financial catastrophe. Illness or injury is part of the story for most bankruptcy petitioners and the central theme for a few."[200] "[M]iddle-class people like ourselves [are] increasingly at risk for a sudden economic collapse."[201] Over the past generation, families have become more vulnerable to financial failure, even though a higher percentage of households now have dual income-earners.[202] The ranks of the medically uninsured are rising with over twenty-three million households without health insurance today.[203] Scholars have noted that children currently are more likely to survive their parents' bankruptcy than their divorce.[204] With the increasing emphasis in our culture on materialism and the credit industry's aggressive marketing efforts,[205] there is reason to believe that an ever-increasing number of

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History of Bankruptcy in the United States, Bankruptcy Statistics, http://www.lawfirmsoftware.com/free/info/bankruptcy/statistics.htm (last visited June 3, 2006).

197. *See* Elizabeth Warren, The New Economics of the American Family, 12 AM. BANKR. INST. L. REV. 1, 11 (2004).

198. *See* Jeanne Sahadi, *House Passes Bankruptcy Bill: What You Should Know About a Bill that Will Make It Tougher for Consumers to Clear Their Debts*, CNN/MONEY.COM, Apr. 14, 2005, http://money.cnn.com/2005/04/13/pf/bankruptcy_bill/. Of those, 1.1 million people filed for Chapter 7 bankruptcy, and there were almost 450,000 Chapter 13 filings. *Id.* In Chapter 7 bankruptcy, a debtor's assets, minus those exempted by the state, are liquidated and given to creditors, and many remaining debts are cancelled, thereby creating for the debtor what is known as a "fresh start." *Id.* In Chapter 13 bankruptcy, the debtor is put on a repayment plan of up to five years, and any debts not addressed by the plan are usually discharged. *Id.*

199. Letter from Professors of Bankr. & Commercial Law to the U.S. House of Representatives Comm. on the Judiciary (Mar. 11, 2005) (on file with author) [hereinafter Letter from Professors].

200. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 175 (1989).

201. *Id.* at 325.

202. *See* Warren, *supra* note 197, at 1.

203. *Id.* at 12 & n.34.

204. *See* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE CLASS MOTHERS AND FATHERS ARE GOING BROKE 6 (2003).

205. Credit extenders may also begin to reduce their standards of credit worthiness. In this way, they will be able to attract new customers—customers most likely to have difficulty meeting their financial obligations. *See* Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249, 263-64 (1997).

Americans will over-extend themselves and be forced to seek bankruptcy protection.[206]

But to succeed in doing so may not be easy. After an eight-year battle, largely funded by the banking and credit card industries, the United States Bankruptcy Code was amended and signed into law on April 20, 2005.[207] The new law, entitled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), went into effect on October 17, 2005,[208] and was designed to minimize alleged abuses in the bankruptcy system.[209] Indeed, BAPCPA's sponsors have charged that bankruptcy has become a system "'where deadbeats can get out of paying their debt scott-free while honest Americans who play by the rules have to foot the bill.'"[210] BAPCPA will decrease the number of debtors permitted to file under Chapter 7—more debtors will be required to turn to Chapter 13.[211]

Some of the pertinent changes to the bankruptcy laws brought about by BAPCPA are:

- Under the pre-BAPCPA Bankruptcy Code it was up to a court to determine if a debtor's case qualified for bankruptcy.[212] Under BAPCPA, the debtor's income is subject to a two-part means test.[213]

- This means test is the principal means by which the drafters of BAPCPA hope to decrease the bankruptcy filing rate. The test

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206. Indeed, "[t]he number of consumer bankruptcy filings surged to a record high in 2005." *Personal Bankruptcies Hit Record High*, CNNMONEY.COM, Jan. 11, 2006, http://money.cnn.com/2006/01/11/pf/personal_bankruptcy/index.htm.

207. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (amending scattered sections of 11 U.S.C.).

208. *See* Justin Fox, *Three Cheers for Bankruptcy*, CNNMONEY.COM, Oct. 17, 2005, http://money.cnn.com/magazines/fortune/fortune_archive/2005/10/17/8358054/index.htm.

209. *See generally* ROBIN JEWELER, CONGRESSIONAL RESEARCH SERVICE, THE "BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005" IN THE 109TH CONGRESS (2005), *available at* http://www.bna.com/webwatch/bankruptcycrs4.pdf.

210. Bankruptcy This Week, Grassley Renews Effort to Reform Bankruptcy Code: Bill Includes Permanent Chapter 12 Protection for Farmers, New Consumer Protections, Child Support Provisions, Feb. 2, 2005, http://www.bankruptcyfinder.com/grassleyspressrelease.html (quoting Senator Chuck Grassley).

211. *See* Sahadi, *supra* note 198.

212. *See id.*

213. *See id.*; *see also* Michael J. Davis, *The New Bankruptcy Code: Goodbye Consumer Chapter 7 Cases*, DUPAGE COUNTY BAR ASS'N, June 2005, *available at* http://www.dcba.org/brief/junissue/2005/art20605.pdf.

denies bankruptcy protection to those who are deemed able to repay their debts.[214] The means test involves comparing a debtor's income to the median in the state in which the debtor is located.[215]

- Debtors will be required to pay for credit counseling.[216]
- The court may not grant Chapter 7 or 13 protection unless the debtor has completed an educational course in personal finance approved by the U.S. Trustee.[217]
- The debtor must provide an extensive list of supporting documents, including a certification of credit counseling, evidence of payment from employers, recent tax returns, and a photo ID.[218]

Many scholars argue that BAPCPA will impose undue hardships on those who can least afford to bear them—namely, the elderly and families with children.[219] The new Bankruptcy Code is highly procedural for consumers.[220] It is also much more costly for those already in financial distress.[221] In March 2005, several professors of bankruptcy and commercial law wrote a letter to the House Committee on the Judiciary, urging that the House of Representatives decline to support BAPCPA.[222] The professors argued that "[t]he ability to file for bankruptcy and to receive a fresh start provides crucial aid to families overwhelmed by financial problems."[223] Overall they find BAPCPA "deeply flawed" and detrimental to small business, the elderly (more than 50% of those over sixty-five are driven to bankruptcy by medical expenses they cannot pay), and families with

214. *See* Sahadi, *supra* note 198; 11 U.S.C. § 707(b)(2).

215. *See* Sahadi, *supra* note 198; 11 U.S.C. § 707(b)(2).

216. *See* Sahadi, *supra* note 198; 11 U.S.C. § 109(h). For a discussion of the credit counseling requirements, see Don Torgenrud, *Bankruptcy Reform: New Disclosure Requirements for Debtors' Counsel and New Consumer Credit Counseling Requirements*, BANKR. SEC. NEWSL. (State Bar of Mont. Bankr. Section, Helena, Mont.), July 29, 2005, at 2, *available at* http://www.montanabar.org/groups/bankruptcysection/072905News.pdf.

217. *See* Davis, *supra* note 213; 11 U.S.C. §§ 727(a)(11), 1328(g).

218. *See* Davis, *supra* note 213; 11 U.S.C. § 521.

219. Letter from Professors, *supra* note 199.

220. *See* Davis, *supra* note 213.

221. Letter from Professors, *supra* note 199.

222. *See id.*

223. *Id.*

children.[224] Many consumer advocates believe this new bill was a gift to the credit card business.[225] Companies in that industry are expected to receive more than $1 billion from repayment plans as a result of the increase in Chapter 13 filings.[226]

Apparently the public already realizes the pernicious nature of this new law. In order to beat the October deadline, bankruptcy filings in August 2005 were up 12% nationwide compared to the same month from the prior year.[227] In fact, hurricane Katrina prompted several lawmakers to suggest that storm victims along the Gulf Coast get relief from the new law's stricter provisions.[228]

The above raises concerns about the potential for an increase in the number of individuals who are at risk for being imprisoned for civil contempt for failure to pay a court-ordered debt. Those who are deemed unsuitable for bankruptcy protection likely will have creditors anxiously seeking repayment. A court, influenced by the denial of bankruptcy protection afforded to a particular debtor, may be more apt to assume that there is indeed a valid debt and the debtor has the means to pay it. The constellation of legal and financial roadblocks to debt repayment can create an untenable situation for the debtor and lead to an increasing number of contemnors. I therefore propose several changes to the current debtor/contempt scheme.

VI. RECOMMENDATIONS

A. Judicial Recognition of the Consequences of Imprisonment of Debtors

The judiciary should recognize the varied burdens imposed upon those imprisoned for failure to pay a court-ordered debt. Time spent in prison

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224. *Id.*

225. *See* Sahadi, *supra* note 198.

226. *Id.*

227. *See* Timothy Egan, *Debtors in Rush to Bankruptcy as Change Nears: October Deadline Is Set: Revised Law Means Fewer Will Be Able to Have Debts Wiped Clean*, N.Y. TIMES, Aug. 21, 2005, at A1. *But see* Bankruptcy Filings Up Despite Reforms, CNNMONEY.COM, June 12, 2006, *available at* http://www.stevequayle.com/News.alert/06_Money/060613.bankruptcy.up.html (noting that while BAPCPA caused bankruptcy filings to "plunge to a 20-year low in the first quarter of 2006, . . . a rapid rise in new cases since then raises questions about whether the law is working as expected").

228. Mary Williams Walsh & Riva D. Atlas, *Storm Victims May Face Curbs on Bankruptcy: Tighter Law Expected to Deter Court Filings*, N.Y. TIMES, Sept. 27, 2005, at A1.

creates problems for the debtor-contemnor that go beyond the deprivation of liberty. These people, who may already be in dire financial straits, might find it nearly impossible to raise themselves from debt once saddled with the stigma of prison time. Employers may be loath to hire a "convict," and a freed debtor would thereby potentially be destined to work a series of low-paying jobs. This would be associated mostly with financial survival, rather than economic recovery.

Additionally, a protracted sentence can effectively remove the debtor from the work force for so long, that, because of the speed with which technology progresses, her skill set may be rendered obsolete. When the debtor is released from prison she may no longer be capable of reentering the work force where she left it. Furthermore, a debtor's health, especially for older debtors, might also falter so significantly while in prison that future employment becomes more difficult or even an impossibility. H. Beatty Chadwick, the subject of an April 2005 ABC News Primetime television show,[229] is an example of both of these potential consequences. Once an extremely successful lawyer in the posh suburban mainline of Philadelphia, Mr. Chadwick has earned "the dubious distinction of the longest time [ever served in jail] for contempt of court."[230] Mr. Chadwick was jailed in 1995 when a judge ruled that he had hidden his wealth in overseas bank accounts rather than allow it to fall into the hands of his ex-wife during the course of a divorce settlement.[231] Recently appointed Supreme Court Justice Samuel Alito authored a Third Circuit opinion upholding Mr. Chadwick's indefinite confinement, stating that Mr. Chadwick "retains the ability to comply with the order requiring him to pay over the money at issue."[232] Mr. Chadwick, with the exception of filing nine habeas corpus petitions,[233] has been removed from the ways in which the practice of law has changed over the past decade. Were he to walk out of prison today, he would likely be unemployable as a lawyer. Furthermore, Mr. Chadwick has been treated for

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229. *See Millions in Marital Assets at Heart of Jail Term: Wealthy Lawyer Jailed for a Decade for Contempt of Court After Divorce*, ABC NEWS PRIMETIME, Apr. 28, 2005, http://abcnews.go.com/Primetime/Business/story?id=712687&page=1 [hereinafter *Wealthy Lawyer Jailed*].

230. *Id.*

231. *See id. See generally* Chadwick v. Del. County Court of Common Pleas, No. Civ. A. 95-MC-0103, 1995 WL 232500 (E.D. Pa. Apr. 19, 1995).

232. Chadwick v. Janecka, 312 F.3d 597, 613 (3d Cir. 2002).

233. *See* Chadwick v. Caulfield, 834 A.2d 562, 566 (Pa. Super. Ct. 2003) ("We note that this is Chadwick's ninth petition for a writ of *habeas corpus*.").

non-Hodgkins Lymphoma and, with his health further failing with every passing day, it is probable that he will die in prison.[234]

Today's restructuring of the American family also makes a prison sentence less survivable for the families of the contemnor. Too often the plight of the American family is overlooked in debtor cases. This is a particular concern because approximately one-third of all children are presently living in single parent homes.[235] An indefinite prison term for a single parent would not only cause a significant drain of societal resources, but more importantly, would have a devastating effect on the children involved.

B. The Judiciary's Multifaceted Societal Role

When considering whether to impose a sentence for civil contempt upon a debtor, courts should contemplate the multifaceted role of the bench. Throughout America's history, politicians and scholars alike have fiercely debated the role and purpose of the judiciary. Primarily, there are two prevailing views. On one end of the spectrum lies judicial minimalism or restraint. In simplified terms, minimalism stems from an understanding of the constitutional structure that limits the use of judicial review to prevent judicial overreaching into the political sphere.[236] It is based on the idea that the voting populous and elected representatives should be responsible for making discretionary political decisions and the judiciary should, therefore, be deferential to such decisions.[237] Scholars such as Cass Sunstein and Alexander Bickel praise "passive virtues," illustrated when courts decline to hear particular cases in order to promote democratic debate.[238] Many notable judges have expressed support of judicial restraint, including Oliver Wendell Holmes, Learned Hand, Benjamin Cardozo, Felix Frankfurter, John Marshall Harlan III, and William Rehnquist.[239]

On the other end of the spectrum lies judicial maximalism or activism. Fundamentally, maximalism expands the use of the power of judicial review,

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234. *See Wealthy Lawyer Jailed*, *supra* note 229.

235. *See* Warren, *supra* note 197, at 9.

236. *See* Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1777 (2004).

237. *See* Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L.J. 387, 394-95 (2001).

238. *See* Jeffrey Rosen, *Foreword*, 97 MICH. L. REV. 1323, 1326 (1999).

239. Nowlin, *supra* note 237, at 395, 462.

resulting in a more extensive role for the judiciary in political matters and less deference to the other political branches.[240] Under this view, the court system is responsible for protecting the Constitution and democracy itself, including human rights.[241] Justices who exemplify this role of the judiciary include Earl Warren, William Brennan, Thurgood Marshall, and Harry Blackmun.[242] Although the battle between these two opposing views continues, history has shown that the judiciary in many cases, for example *Brown v. Board of Education*[243] and *Roe v. Wade*,[244] has served the function of protecting, enhancing, and promoting societal ideals.

Courts on all levels, not exclusively the Supreme Court, should be responsible for advancing societal values. The Superior Court of Pennsylvania, in *Hyle v. Hyle*,[245] recently embraced this responsibility when faced with an ex-husband who failed to make payment in accordance with a child support order.[246] The record showed that Logan Hyle quit his job shortly after the court issued the order, and he failed to make any support payments or go back to work thereafter.[247] Mr. Hyle was charged with civil contempt seven separate times and served seven consecutive six-month prison sentences—totaling over three-and-one-half years in jail.[248] After issuing an eighth contempt order, however, the superior court determined that Mr. Hyle did not have the means to purge his contempt.[249] Accordingly, the court vacated the contempt order and remanded "for the trial court to determine what conditions [would] be sufficiently coercive yet enable [Hyle] to comply with the order."[250] Although responsible for ensuring compliance with a valid court order, by releasing Mr. Hyle the court in effect conceded

240. *Id.* at 395.

241. Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 36-37 (2002).

242. Nowlin, *supra* note 237, at 395.

243. 349 U.S. 394 (1955).

244. 410 U.S. 113 (1973).

245. 868 A.2d 601 (Pa. Super. Ct. 2005).

246. *Id.* at 603.

247. *See id.*

248. *Id.* at 603 & n.2.

249. *Id.* at 603-05. The court required Mr. Hyle to work and then pay back $2500 in order to purge the contempt. *Id.* at 605.

250. *Id.* at 606.

that society is not served by imprisonment for contempt where there is no reasonable possibility to comply.[251]

The enactment of legislation addressing coercive civil contempt in child custody cases exemplifies how courts have sometimes inadequately performed their role as advocates of societal values. To illustrate, in *Morgan v. Foretich*,[252] the contemnor, Dr. Jean Morgan, refused to allow her ex-husband the court-ordered right to visit their daughter based on her belief that he had sexually abused the child.[253] Dr. Morgan could not prove the sexual abuse of their daughter, and subsequently, hid her child from her former husband and the court.[254] She was imprisoned for civil contempt for over twenty-three months.[255] Congress took notice of Dr. Morgan's case, and in 1989, President George H.W. Bush signed the District of Columbia Civil Contempt Imprisonment Limitation Act of 1989.[256] The Act permits a person to be charged with criminal contempt after six months of incarceration for civil contempt, and limits civil incarceration without criminal charges to twelve months.[257] It was passed in order to compel the release of Dr. Morgan and to prevent similar injustices in future child custody cases.[258] Although this law only applies to persons incarcerated for civil contempt in child custody proceedings in the courts of the District of Columbia,[259] it can serve as a model for other courts to emulate. The policy behind the Act is clear: society should not tolerate unlimited coercive imprisonment of persons without due process protections, at least in custody cases. Dr. Morgan, on

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251. *Id.*; *see also* Godfrey v. Godfrey, 894 A.2d 776, 783 (Pa. Super. Ct. 2006) (holding that the court must set the conditions to purge a contempt in such a way that the contemnor has the present ability to comply with the order).

252. 564 A.2d 1 (D.C. 1989).

253. *Id.* at 1-2.

254. *Id.* at 1.

255. *See id.*

256. Pub. L. No. 101-97, 103 Stat. 633 (codified as amended at D.C. CODE ANN. §§ 11-741, 11-944 (1990 Supp.)); *see also* D.C. CODE ANN. § 11-741 (LexisNexis 2001).

257. *Id.* § 11-741(b)(1), (3)(A).

258. *See* Zimmerman, *supra* note 192, at 219-20. Indeed, the D.C. Court of Appeals ordered Dr. Morgan released two days after the Act went into effect. *Id.* The court stated "we are compelled by the record to conclude there is no realistic possibility or substantial likelihood that further incarceration will coerce Morgan into complying with the trial court's order to produce her child." *Foretich*, 564 A.2d at 11.

259. D.C. CODE ANN. § 11-741(b).

multiple occasions, stated that she would never comply with the court order at the expense of her child's safety, despite her obvious ability to comply.[260]

In child custody cases, like the journalist cases,[261] it is clear that the contemnor "holds the key" to his prison cell. As a result, these cases are substantially different than civil contempt proceedings concerning debt, where it is often uncertain whether or not a contemnor has the ability to comply with the court order. Given that in debtor cases it is often unclear whether the contemnor can comply with the court order, more, or at least comparable protections should be provided as those afforded in child custody matters. As society is not served by imprisonment for civil contempt without the ability to comply, and the determination of a debtor's ability to comply can be particularly complex, more procedural protections in these cases are essential.

C. Due Process Protections

The burden and standard of proof, and the means by which the factual questions underlying those issues are decided, are part of the broader concern regarding the process that is due in contempt proceedings.[262] However, the precise nature of the process that is due implicates the confusing and imprecise, but still robust, classification of contempt as civil or criminal.[263]

As in criminal matters, in order to reduce erroneous findings of guilt the standard for determining failure to satisfy a judgment requiring the satisfaction of a debt should be proof beyond a reasonable doubt.[264] In a 1948 opinion, Justice Black strongly asserted that the standard for civil contempt should not be clear and convincing evidence—the current standard in most courts—but instead should be proof beyond a reasonable doubt so that all contempt matters involving serious penalties be decided under a uniform standard.[265] Because the current standard of proof is unclear,[266] the

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260. *Foretich*, 564 A.2d at 2-3.

261. *See supra* notes 1-4 and accompanying text.

262. *See supra* Part IV.

263. *See* Int'l Union, UMWA v. Bagwell, 512 U.S. 821, 827 n.3 (1994) ("Numerous scholars have criticized as unworkable the traditional distinction between civil and criminal contempt."); *see also supra* Part III.

264. *But see, e.g.*, Addington v. Texas, 441 U.S. 418, 423 (1979) (noting that in a civil case involving a monetary dispute between parties, plaintiff's burden of proof should be "a mere preponderance of the evidence").

265. Maggio v. Zeitz, 333 U.S. 56, 79 (1948) (Black, J., separate opinion) ("All court proceedings, whether designated as civil or criminal contempt of court or given some other

contemnor is at an inherent disadvantage as much of the focus in examining ability or inability to comply is not on gathering the requisite documents or compiling a case, but rather determining just what needs to be proven.

The same legal protections should be afforded to all who face imprisonment for contempt. This includes the Sixth Amendment right to a trial by jury, in which those seeking a finding of contempt would bear the burden of proving willful violation of the court order beyond a reasonable doubt. It is an anomaly to afford those rights where the contempt is labeled "criminal" but not if the contempt is labeled "civil." There is no cogent basis for the distinction, as the penalty of imprisonment is in itself serious punishment. Indeed, the danger of impartiality inherent in contempt proceedings[267] necessitates the highest degree of procedural safeguards.

Affording the same Sixth Amendment rights to both criminal and civil contemnors would effectively eliminate the unworkable distinctions between civil and criminal contempt. The argument that criminal procedural protections are unnecessary in the civil context because the contemnor can end his imprisonment at will is unsupportable. For the civil contemnor, the factual issue that determines his incarceration—ability to comply with the court's order—is of the same significance as whether the criminally accused committed the crime of which he stands charged, since the resolution of both of these issues determines whether the court will order incarceration. The Supreme Court has assiduously protected the Sixth Amendment right to a jury trial for those who face imprisonment for over six months under the criminal law.[268] The imprisonment a civil contemnor faces is no different than that awaiting a criminal contemnor, and the same due process rights should be afforded to both. Indeed, one could argue that the civil contemnor is treated similarly to the worst type of criminal, as both are subjected to life imprisonment.

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name, which may result in fine, prison sentence, or both, should in my judgment require the same measure of proof, and that measure should be proof beyond a reasonable doubt.").

266. *See supra* Part IV.A.

267. *See supra* notes 192-94 and accompanying text.

268. *See, e.g.*, Lewis v. United States, 518 U.S. 322, 325 (1996) (noting that, with the exception of petty offenses, "[t]he Sixth Amendment guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed'" (quoting Duncan v. Louisiana, 391 U.S. 145, 159 (1968))); *see also* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

Due process concerns also affect the length of imprisonment imposed as a sanction for contempt. The Third Circuit has declared that "'[i]t is abhorrent to our concept of personal freedom that the process of civil contempt can be used to jail a person indefinitely, possibly for life, even though he or she refuses to comply with the court's order.'"[269] Thus, even if a contemnor is found to have the ability to pay, yet refuses to do so in order to gain a payoff, at a certain point, after "many months, or perhaps even several years," the judge should have to release the contemnor since the requisite function of confinement for contempt—coercing payment—will no longer be applicable.[270]

Additionally, it is important that courts are vigilant in ensuring that indigent debtors are aware of their right, as indigents, to court-appointed representation.[271] Paradoxically, however, there is no right to counsel to assist a defendant in proving that he is "indigent" and therefore entitled to an attorney.[272] Indeed, "criminal defendants are not entitled to assistance of counsel in their attempts to prove that they are entitled to appointed counsel under the current state of the law."[273] However, courts are constitutionally required to provide legal assistance to civil contemnors sentenced to imprisonment, as it has been determined that there is no distinction between civil contempt and criminal contempt so far as the right to counsel is concerned.[274] As the Tenth Circuit noted, "The right to counsel, as an aspect of due process, turns not on whether a proceeding may be characterized as 'criminal' or 'civil,' but on whether the proceeding may result in a deprivation of liberty."[275]

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269. *In re Grand Jury*, 600 F.2d at 424 (quoting Catena v. Seidl, 321 A.2d 225, 228 (N.J. 1974)). Courts also have acknowledged that contempt imprisonment cannot last "forever." *See, e.g.*, United States ex rel. Thom v. Jenkins, 760 F.2d 736, 740 (7th Cir. 1985).

270. *Jenkins*, 760 F.2d at 740 (noting that it may take months or years before it becomes necessary to conclude that incarceration will no longer serve coercive purposes).

271. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

272. Walker v. McLain, 768 F.2d 1181, 1184-85 (10th Cir. 1985).

273. *Id.* at 1185.

274. *Id.* at 1183.

275. *Id.* (citing Ridgway v. Baker, 720 F.2d 1409, 1413 (5th Cir. 1983)). Indeed, those who cannot financially satisfy a judgment for money, and therefore face imprisonment, are in all likelihood least able to pay a private attorney. BAPCPA likely will leave even more debtors in the position of facing imprisonment for failure to pay their debts. *See supra* Part V. With the dramatically decreased potential for bankruptcy protection, courts should focus on training court-appointed attorneys in the processes, procedures, and peculiarities of handling a civil contempt determination. The attorneys need to be well-versed in the changes to the

D. A New Procedure for the Evaluation of a Debtor's Assets

The accurate determination of the ability to comply in a civil contempt case involving debt is essential.[276] Therefore, I suggest that a specialized judge or magistrate be responsible in the first instance for overseeing the compilation and review of documentation necessary to determine the assets of a particular alleged debtor.[277] Much like the role of a probation officer, who makes sentencing recommendations to judges and often testifies in court,[278] designating a judicial officer who can focus her attention on the often intricate and intimate investigative work necessary to properly review an alleged debtor's financial situation will help standardize and streamline the process of evaluating whether one is capable of paying an alleged debt—should the judge determine at trial that such a debt indeed exists. In this way, a degree of uniformity can be attained in what currently is an ad hoc process.

Overseeing the compilation and review of documents necessary to determine the assets of a particular alleged debtor is an ideal use of a federal magistrate's authority under 28 U.S.C. § 636,[279] and would be appropriate

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Bankruptcy Code and how these changes have the potential to affect current and future clients. In the face of the credit- and bank-friendly provisions of BAPCPA, these attorneys must be prepared to defend their clients from a lengthy imprisonment in the first instance. If their clients are indeed imprisoned for civil contempt, the attorneys must continue the battle throughout their clients' potentially indefinite incarceration.

276. *See supra* notes 162-63 and accompanying text.

277. For a similar discussion of the proposed role of a magistrate in evaluating plaintiffs' requests to litigate pseudonymously, see Jayne S. Ressler, *Privacy, Plaintiffs and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L REV. 195, 237-40 (2004).

278. For a description of the multifaceted role of probation officers and other correctional treatment personnel, see U.S. Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, http://www.bls.gov/oco/ocos265.htm (last visited Mar. 26, 2006).

> Probation officers also spend much of their time working for the courts. They investigate the backgrounds of the accused, write presentence reports, and recommend sentences. They review sentencing recommendations with offenders and their families before submitting them to the court. Probation officers may be required to testify in court as to their findings and recommendations. They also attend hearings to update the court on offenders' efforts at rehabilitation and compliance with the terms their sentences.

Id.

279. According to 28 U.S.C. § 636:

> Notwithstanding any provision of law to the contrary—

for state magistrates as well. Congress created the judicial position of the magistrate with the Federal Magistrates Act of 1968.[280] The primary purpose of the federal magistrate judge is to improve the efficiency of the federal judicial system and reduce the increasing workload of the Article III district court judges.[281] In particular, magistrate judges are intended to handle the many "pretrial and preliminary matters" that arise in a case, thereby allowing the district court judges to preside over actual trial-related matters.[282] While the states do not have a uniform magistrate structure, it is not uncommon for state courts to assign certain judges to handle such pretrial or preliminary

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(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A) (2000).

280. Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 631-639). Due to the increasing importance of the magistrate, Congress changed the title of this position to magistrate judge. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5089, 5117 (1990) (codified as amended at 28 U.S.C. § 631 note).

281. S. REP. NO. 96-74, at 3 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469, 1471-72 (expressing the purpose of the Federal Magistrates Act as "facilitat[ing] a rational division of labor among judicial officers in the district court, as the magistrate would relieve the judge from personally hearing each and every pretrial motion or proceeding in the preparation of a case for trial"); S. REP. NO. 92-1065, at 3 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3350, 3351 ("[Magistrates] render valuable assistance to the judges of the district courts, thereby freeing the time of those judges for the actual trial of cases."). The Supreme Court has also affirmed the intentions of Congress in establishing the position of the federal magistrate. *See, e.g.*, Peretz v. United States, 501 U.S. 923, 934 (1991); McCarthy v. Bronson, 500 U.S. 136, 142 (1991); Mathews v. Weber, 423 U.S. 261, 268 (1976); Wingo v. Wedding, 418 U.S. 461, 463 (1974).

282. H.R. REP. NO. 94-1609, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6167 ("[T]he use of a magistrate [under the Federal Magistrates Act] will further the congressional intent that the magistrate assist the district judge in a variety of pretrial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case. . . . Without the assistance furnished by magistrates in hearing matters of this kind, . . . the [trial] judges of the district courts would have to devote a substantial portion of their available time to various procedural steps rather than to the trial itself.").

matters on a regular basis.[283] Thus, the duty of reviewing the assets of an alleged debtor can be delegated to state judicial officers who handle the preliminary matters of a case, similar to the federal magistrate judge.

The power of the magistrate judge to handle "pretrial matters" is statutorily authorized under 28 U.S.C. § 636(b)(1) and implemented by Rule 72 of the Federal Rules of Civil Procedure.[284] While no definition of the term "pretrial" exists in either the statute or Rule 72, the legislative history of 28 U.S.C. § 636 and the purpose of the magistrate judge in easing the workload of the district court judges suggest a liberal interpretation.[285] Aside from pretrial matters, the district courts may also assign "additional duties" to the magistrate judges that "are not inconsistent with the Constitution and laws of the United States."[286] As evidenced by the legislative history and the enabling statute itself, the magistrate judge has become an indispensable figure in the federal judiciary. The compilation and review of an alleged debtor's assets fits squarely within the duties of the magistrate judge.

The specialized judge or magistrate would have numerous functions. Primarily, she would make a thorough evaluation of an alleged debtor's assets. After doing so, the specialized judge or magistrate would present the debtor's asset profile to the court, which would use that information after determining whether or not the creditor's claim was valid. Over time specialized judges or magistrates would develop an expertise and efficiency in determining the assets of an alleged debtor, and they could continue their involvement with the case should problems develop throughout the course of the litigation. This would increase judicial efficiency by freeing the courts from the often time-consuming efforts necessary to uncover and compile an alleged debtor's assets. Courts would be able to focus their attention on the

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283. *See, e.g.*, CAL. CONST. art. VI, § 22 ("The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to *perform subordinate judicial duties*." (emphasis added)).

284. 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3068 (2d ed. 1997). *See generally* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

285. H.R. REP. NO. 94-1609, at 9, *reprinted in* 1976 U.S.C.C.A.N. 6162, 6169 ("Under [28 U.S.C. § 636(b)(1)(A)] a judge, in his discretion may assign *any* pretrial matter to be heard and determined by motions and matters which can arise in the preliminary processing of either a criminal or a civil case." (emphasis added)).

286. 28 U.S.C. § 636(b)(3). The main purpose of this "catchall" provision is to allow the district courts to freely experiment with "the assignment of other duties to magistrates which may not necessarily be included in the broad category of 'pretrial matters.'" H.R. REP. NO. 94-1609, at 12, *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172.

validity of the creditor's claims. Although some might argue that it would be appropriate for the court trying the merits of the action to be exposed at the outset to alleged debtors who may be acting in bad faith, having a specialized judge or magistrate handle these cases in the first instance will reduce the number and types of problems inherent in the current system.

The role of the specialized judge or magistrate should not be limited to the pretrial stage but should extend to the post-judgment stage as well. The specialized judge or magistrate should be responsible for presenting the debtor's financial information during the debtor's appeal(s) of her sentence. As noted, the "key" to a debtor's cell may change over the course of her imprisonment.[287] The magistrate can provide information to the court as to whether continued confinement would accomplish its coercive purpose. Additionally, involving a magistrate at this stage of the proceedings will diminish the concern that the judge will view the contemnor's refusal to pay as a personal affront.

One might wonder who would pay the cost for the utilization of a specialized judge or magistrate. A possible solution is the imposition of a fine upon those actually found to have adequate assets to comply with a court order. On the other hand, if the debtor is in fact found to be legitimately unable to comply, no fees would be assessed by the court. This proposal bears similarity to recoupment statutes that provide for reimbursement to the government for certain costs it incurs on behalf of those who have or who can obtain the means to repay.[288] In this manner, those legitimately in contempt further would be penalized while those honestly without means to satisfy a court order would benefit from a more uniform and streamlined process.

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287. *See* Rosenblum, *supra* note 8.

288. The most frequently applied recoupment statutes are those involving recovery of funds spent on court-appointed representation. While the statutes vary from state to state, they generally require criminal defendants to repay the costs of representation if the defendants were indigent at the time the court appointed counsel, but later became able to pay. *See, e.g.*, Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181, 218 (1998). One state requires a mother who receives prenatal and post-partum medical assistance under the Social Security Act to cooperate in efforts to recoup the costs of such medical assistance from the unwed fathers of the children. *See* Perry v. Dowling, 963 F. Supp. 231, 232 (W.D.N.Y. 1997) (seeking reimbursement for the costs of medical assistance).

VII. CONCLUSION

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 presents both a challenge and an opportunity for our legal system. Some of the most vulnerable people in our society, those in financial distress, risk being imprisoned for failure to pay a court-ordered debt. This raises important concerns about procedural fairness. In order to protect the rights of debtors, several changes to the current system are necessary. First, courts should assume a broad and more cosmopolitan view of the particular consequences of incarcerating those in debt. The judiciary should be cognizant of its multifaceted role in society, and determine whether incarceration for civil contempt, without an ability to comply, truly advances a societal interest. Additionally, debtors facing civil contempt should be afforded the same due process protections as criminal defendants. Finally, a specialized judge or magistrate should oversee the compilation and review of the documentation necessary to determine the assets of a particular alleged debtor, as well as participate in the reevaluation of the contemnor's circumstances on appeal. The goal of these recommendations is to provide informed guidelines to a capricious process in need of reform. Accordingly, societal interests may be advanced through the proper administration of justice.