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### **Modern Odysseus or Classic Fraud - Fourteen Years in Prison for Civil Contempt without a Jury Trial, Judicial Power without Limitation, and an Examination of the Failure of Due Process**

Mitchell J. Frank

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MITCHELL J. FRANK\*

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[W]hat I want and all my days I pine for is to go back to my house  
and see my day of homecoming. And if some god batters me far out  
on the wine-blue water, I will endure it, keeping a stubborn spirit  
inside me, for already I have suffered much and done much hard  
work on the waves and in the fighting.<sup>1</sup>

—Odysseus

Oh for shame, how the mortals put the blame upon us gods, for they  
say evils come from us, but it is they, rather, who by their own reck-  
lessness win sorrow beyond what is given . . . .<sup>2</sup>

—Zeus

## I. INTRODUCTION

Judicial authority must include the power to punish for contempt. Otherwise, "if a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery."<sup>3</sup>

On April 5, 1995, H. Beatty Chadwick, a Pennsylvania lawyer, was arrested for civil contempt in connection with his divorce proceeding.<sup>4</sup> Fourteen years later, on July 10, 2009, and after having made numerous attempts<sup>5</sup> to secure his freedom, he was released from the Delaware County Jail in Pennsylvania.<sup>6</sup> His imprisonment was, and likely remains,

1. THE ODYSSEY OF HOMER 94 (Richmond Lattimore trans., First Perennial Classics 1999) (1965).

2. *Id.* at 28.

3. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

4. *Chadwick v. Janecka*, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at \*5 (E.D. Pa. Jan. 3, 2002), *rev'd*, 302 F.3d 107 (3d Cir. 2002).

5. See *infra* Section V.

6. Mari A. Schaefer, *Chadwick Freed After 14-Year Contempt Sentence*, PHILADELPHIA

a United States record for such a charge.<sup>7</sup>

This article will examine a difficult question—at what point, and under what circumstances, will imprisonment for civil contempt, without a jury trial, violate the Due Process Clause<sup>8</sup> of the Fourteenth Amendment to the United States Constitution simply by being too lengthy? Upon hearing that an individual had been imprisoned for so long, and only by a judge’s decision, one could, and likely would, be moved to protest or even express outrage. Sympathy for such a person would likely be inherent in such a response. However, as the facts of his case will demonstrate,<sup>9</sup> Chadwick is very far from a sympathetic figure. Perhaps that best qualifies him, along with his lengthy incarceration, as a suitable lens through which due process protections in this context, or the lack thereof, may be examined.

Section II of this article details the factual background that caused Chadwick to be imprisoned. Section III provides a summary of the differences between civil and criminal contempt, followed by a discussion of recent Supreme Court holdings as to the former. In Section IV the article discusses Pennsylvania law, the state of Chadwick’s imprisonment, as it is pertinent to civil contempt. Section V details his fourteen years of legal efforts to gain his freedom. In Section VI, the article discusses the legal “Catch-22” in which Chadwick found himself. Section VII discusses the lack of unanimity as well as silence in the Circuit Courts regarding the application of due process and the concept of “lost coercive effect” in the civil contempt arena. In Section VIII the author discusses the need for ensuring that due process is available to those in prison for civil contempt, and suggests enhanced protections to place limits on what at this time is a vehicle for the exercise of judicial power without limitation. The article concludes in Section IX.

## II. MODERN ODYSSEUS OR CLASSIC FRAUD?

Every court that considered the issue found that Chadwick did have the ability to comply with a July 22, 1994, trial court order in his divorce proceeding requiring him to return \$2,502,000 in alleged marital assets to an account under its jurisdiction.<sup>10</sup> As will be discussed in Section

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INQUIRER, July 11, 2009, at A01, *available at* Access World News, Record No. 20090711\_inq\_national\_SCHADWICK.

7. *Id.*

8. U.S. CONST. amend. XIV, § 1 (“... nor shall any State deprive any person of life, liberty, or property, without due process of law”).

9. *See infra* Section II.

10. *See Chadwick v. Janecka*, 302 F.3d 107, 118 (3d Cir. 2002); *see also infra* at Section V.

II,<sup>11</sup> sound reasons supported these findings. The question then arises—was Chadwick a modern Odysseus fighting honorably against heavy odds, or a classic fraud bent on violating the court's order no matter the cost?

The answer begins, seemingly innocently enough, with his meeting twenty-year-old Barbara Jean "Bobbie" Crowther in 1976 and marrying her one year later.<sup>12</sup> By then he had told her that his great-great-great-great-great-uncle, Charles Thompson, had signed the Declaration of Independence, but omitted the facts that Thompson had no sons of his own and the relation only came about through a marriage several centuries ago.<sup>13</sup> He spoke of family trust funds, but did not reveal that they were set up to skip a generation—his.<sup>14</sup> He cried while she sat on his lap in 1977 as he told her that he was dying of cancer and only had two years to live. While he did in fact have radiation treatment for a lymphomic tumor, two years later, in 1979, he told her he had seven years to live.<sup>15</sup>

Two personality traits material to his fourteen year course of action became evident after he and Bobbie were married—his need for control and his cheapness. As one colleague put it, "Beatty Chadwick was so tight he squeaked."<sup>16</sup> Employed as in-house counsel for I.U. International, a large utility and trucking conglomerate,<sup>17</sup> he started Bobbie on an allowance of \$37.50 every week to cover all of the household food, as well as all of her clothes and personal items.<sup>18</sup> When Chadwick told her they could not afford the cost of redecorating, Bobbie learned to reupholster their furniture. She "refinished the floors, did all the painting, built the kitchen table with the tiled top, plastered and wallpapered the bathrooms and made the window shutters with windows she bought."<sup>19</sup> Bobbie also mowed the expansive lawn of their Bryn Mawr mansion.<sup>20</sup> She made her own clothes and cut out coupons. Even before they were married, Bobbie had given up her job running a Christian education program at the age of twenty after Chadwick "had assured her

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11. See *infra* Section II, as well as further factual findings reflected in some of the Chadwick cases discussed in Section V.

12. Lisa DePaulo, *Scorched Earth*, PHILADELPHIA MAGAZINE, 1995, at 46–47.

13. *Id.* at 44.

14. *Id.* at 46.

15. *Id.* at 47.

16. *Id.* at 46.

17. *Id.* at 45.

18. *Id.* at 47.

19. *Id.* at 77.

20. Christopher McDougall, *The Prisoner Who Wouldn't Leave: Main Line Lawyer Beatty Chadwick Could Get out of Jail Tomorrow if He'd Just Open His Mouth - and His Swiss Bank Account*, PHILADELPHIA MAGAZINE, 2001, at 107–08.

that he loved her so much she would never have to work.”<sup>21</sup> And, because he “loved her so much he wanted to be with her every minute, including being driven to and picked up from work by her every day,” she gave up her car.<sup>22</sup>

When money was really tight for her she would not eat. At various times in their marriage, at 5’7” tall, she weighed slightly less than 100 pounds.<sup>23</sup> Bobbie hosted lavish parties in their home at which she would serve dinner for up to 100 people, without any help of any kind, “even a maid to help with the dishes.”<sup>24</sup> Before these parties, Chadwick would tell her how to dress, or “rather, undress for the evening” like “a tramp,” and then smirk at dinner while his male guests ogled her, she has alleged.<sup>25</sup>

By 1992, after continuing to endure what Bobbie said was abusive treatment in these and other ways, she told Chadwick that she was leaving him.<sup>26</sup> He replied, over and over, “You’re dead. You’re not going to get a cent.”<sup>27</sup> Before leaving, she searched his desk and found a trove of financial records. They helped show that Chadwick’s net worth had grown from about \$212,000 at the time they were married to roughly \$4,000,000.<sup>28</sup>

Bobbie filed for divorce in November of 1992. Three months later, at an equitable distribution conference, Chadwick told the court that he had transferred \$2,502,000 of the marital estate “to satisfy an alleged debt to Maison Blanche, Ltd., . . . a Gibraltar partnership.”<sup>29</sup> Bobbie knew nothing of this.

At a hearing on July 22, 1994, with both Chadwick and his counsel present, the trial court “determined Chadwick’s transfer of the money was an attempt to defraud Ms. Chadwick and the court.”<sup>30</sup> He ordered that Chadwick “return the \$2,502,000.00 to an account under the jurisdiction of the court, pay \$75,000.00 for Ms. Chadwick’s attorney’s fees and costs, surrender his passport and remain within the jurisdiction.”<sup>31</sup>

After Chadwick refused to comply, Mrs. Chadwick filed a petition to hold him in civil contempt that resulted in hearings on August 29,

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21. See DePaulo, *supra* note 12, at 47.

22. *Id.*

23. *Id.*

24. *Id.* at 77.

25. *Id.*

26. See generally DePaulo, *supra* note 12 and McDougall, *supra* note 20.

27. See DePaulo, *supra* note 12, at 79.

28. *Id.*

29. Chadwick v. Janecka, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at \*3 (E.D. Pa. Jan. 3, 2002), *rev’d*, 302 F.3d 107 (3d Cir. 2002).

30. *Id.*

31. *Id.*

October 18, and October 31, 1994.<sup>32</sup> Chadwick never personally appeared, although his attorney did.<sup>33</sup> "The court found Mr. Chadwick in contempt of the July 22, 1994, order and issued a bench warrant for his arrest."<sup>34</sup>

On April 5, 1995, he was still free. As a lawyer, he well knew that this warrant was valid only in Pennsylvania.<sup>35</sup> However, Chadwick had a dental appointment at 7 a.m. that day in Philadelphia, and, as Ms. Chadwick noted, "Beatty never missed his appointment to get his teeth cleaned."<sup>36</sup> He did not know, however, that his longtime dental hygienist had read about this well-publicized divorce, was sick to learn of Ms. Chadwick's situation, and had alerted her to the date and time of the appointment.

Two sheriff's deputies entered the treatment room while Chadwick was lying back in the dental chair with a bib around his neck and told him he was under arrest. His first response, in a room that contained his dental records, was to deny who he was (he claimed to be "Mr. Johnson"). When this failed, Chadwick, a "scrawny 58-year old," attacked the two "burly" deputies.<sup>37</sup> In the melee that followed, among other *sequelae*, "the walls ended up bloody and with gaping holes," and Chadwick gave one deputy a black eye and bite marks on his hand that lasted for days. By the time Chadwick was handcuffed, eight Philadelphia police officers had arrived.<sup>38</sup>

The trial court held that Chadwick had the present ability to comply with the terms of its July 22, 1994, order. It set bail at \$3,000,000.00. At any time, Chadwick could have been released either by (1) posting bail, or (2) purging his contempt by complying with the order and depositing \$2,502,000.00 in the court's account.<sup>39</sup>

Following his arrest, and after further investigation by Ms. Chadwick's attorneys, Chadwick testified again about the missing fortune. His testimony revealed the following:<sup>40</sup>

1. He had invested \$5,000 in Maison Blanche in 1990. There was a

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32. Chadwick v. Andrews, No. 97-4680, 1997 U.S. Dist. LEXIS 20506, at \*2 (E.D. Pa. Dec. 23, 1997).

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

34. *Id.*

35. Lisa DePaulo, *Rinse, Spit, Put Up Your Hands*, PHILADELPHIA MAGAZINE, June 1995, at 35.

36. *Id.*

37. *Id.* at 36.

38. *Id.*

39. Chadwick v. Janecka, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at \*5 (E.D. Pa. Jan. 3, 2002), *rev'd*, 302 F.3d 107 (3d Cir. 2002).

40. See McDougall, *supra* note 20, at 110; see also DePaulo, *supra* note 35, at 37; DePaulo, *supra* note 12, at 84.

- caveat, however, in that if Maison Blanche ever had financial difficulties Chadwick would have to provide additional funds – without apparent limitation. Chadwick was a “highly regarded corporate attorney with 20 years’ experience in international law.”<sup>41</sup> He never was able to produce a check for this \$5,000; rather, he said he had paid in cash (to the company in Gibraltar).
2. In 1993 Maison Blanche sent him a three-line message demanding about \$2,502,000 for its debts. Coincidentally, this was Chadwick’s entire fortune. “Without telling his lawyer or his accountant,” Chadwick “emptied his stock portfolio and IRA’s and wired the funds to Gibraltar.”<sup>42</sup> He did this one day before Bobbie’s first support hearing. As for why he did not contest this debt call, he said that he was an “honorable man.”<sup>43</sup>
  3. Tracking this money proved difficult. Of the \$2,502,000 sent overseas, evidence showed that in April 1993, Maison Blanche returned \$869,106 to a Chemical Bank of New York account in the name of an “H.B. Chadwick.” An additional \$995,726 had been transferred to a Swiss bank account in his name. And, \$550,000 in stock certificates that Chadwick said he had sent to an unknown barrister in England to forward to Maison Blanche was never received.
  4. As for the \$869,106, Chadwick said it must be another “H.B. Chadwick” as he had no connection to the account. He also said it was coincidence that this sum was the *exact* amount of an IRA account he had when he “lost all his money.”<sup>44</sup> That it was deposited into the Chemical Bank account 59 days after it was originally withdrawn was apparently also a coincidence, as an IRA that is not transferred into a new IRA within 60 days will incur a penalty.
  5. This \$869,106 was then divided into three separate life insurance tax-free annuities. Each had the name “H.B. Chadwick;” the social security numbers were the same as his except one digit was an 8 instead of a 3; and the number with the “8” in it had never been issued to anyone. The signatures on the policies matched Chadwick’s. His sons were the beneficiaries. Chadwick denied they were his policies.
  6. These policies were later cashed out, with the proceeds being sent to a “H.B. Chadwick” at a post office box in Shiremanstown, PA. Chadwick denied having any connection with it, despite his girlfriend having a home nearby. A PNC bank official testified that Chadwick had to come to his office two separate times to cash out one of the insurance checks, and had shown his

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41. See McDougall, *supra* note 20, at 110.

42. *Id.*

43. *Id.*

44. See DePaulo, *supra* note 12, at 84.



driver's license both times to do so. Furthermore, the official identified Chadwick in court as being the same person. Chadwick still denied any connection with these proceeds, and said he had never seen the bank official before in his life.

7. The \$869,106 was last known to be in Panama, and the \$995,726 in Gibraltar and Luxembourg. The remainder, more than \$500,000, has never been found.<sup>45</sup>

Several times during Chadwick's testimony, the trial court "exploded in disbelief, calling his story 'incredible' and 'ridiculous.'"<sup>46</sup> It asked Chadwick if he would "turn over his passport and give his wife's lawyers access to those savings accounts in Panama and Switzerland." Chadwick said he would, but only if he was released first. The trial court declined, refusing to give Chadwick "a head start in a race for the cash."<sup>47</sup> Thus his fourteen years of imprisonment began. And, so did his challenges to it.

### III. THE SUPREME COURT: CONTINUING TO DEFINE THE DIFFERENCE BETWEEN CRIMINAL AND CIVIL CONTEMPT

With the adoption of the Constitution, English common law, including the power of contempt, became the law of the United States.<sup>48</sup> Today, the power of contempt is statutory.<sup>49</sup> That such power is necessary for courts to enforce their orders is clear.<sup>50</sup> However, despite the passage of time and judicial usage,<sup>51</sup> the Supreme Court in the last half-century has still felt it necessary to both clarify and define this power and its limits. Exemplifying this is its decision in *Shillitani v. United*

45. *Id.*

46. See McDougall, *supra* note 20, at 112.

47. *Id.*

48. See *Ex Parte Grossman*, 267 U.S. 87, 108–09 (1925) (adopting English common law as an important tool of interpretation).

49. See 18 U.S.C. § 401 (2010) ("A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as – (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."); see also 18 U.S.C. § 402 (2010) (relating to criminal contempt).

50. See *Ex parte Terry*, 128 U.S. 289, 313 (1888) ("[The power of contempt] is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them.").

51. See, e.g., Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345 (2000), for an extensive history of the law of contempt, which is outside the scope of this article; see also William F. Chinnock & Mark P. Painter, *The Law of Contempt of Court in Ohio*, 34 U. TOL. L. REV. 309, 312–17 (2003).

*States*,<sup>52</sup> in which the Court undertook a detailed examination of the differences between criminal and civil contempt.

In *Shillitani*, Petitioners refused to answer questions before a grand jury after having been granted immunity. Without indictment or jury trial, they were found guilty of criminal contempt and sentenced to two years of imprisonment. The Court considered the “difficult question”<sup>53</sup> of whether indictment and jury trial were required. It noted that although both the District Court and the Second Circuit had termed petitioners’ conduct to be “criminal contempt,” this did not affect the Court’s finding that “the character and purpose of these actions clearly render them civil rather than criminal contempt proceedings.”<sup>54</sup> If it had been the latter, the contemnor would have had the right to a jury trial.<sup>55</sup> The Court in detail laid the lines of demarcation between the two:

1. “The act of disobedience consisted solely ‘in refusing to do what had been ordered,’ *i.e.*, to answer the questions, not ‘in doing what had been prohibited.’”<sup>56</sup>
2. The judgments of contempt allowed for immediate release if they answered the questions. Because the petitioners carried “‘the keys of their prison in their own pockets,’”<sup>57</sup> “the action ‘is essentially a civil remedy designed for the benefit of other parties . . . .’”<sup>58</sup>
3. “‘It is not the fact of punishment but rather its character and purpose that often serve to distinguish’ civil from criminal contempt.”<sup>59</sup>
4. “Despite the fact that [petitioners] were ordered imprisoned for a definite period, their sentences were clearly intended to operate in a prospective manner—to coerce, rather than punish. As such, they relate to civil contempt. While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor’s willingness

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52. 384 U.S. 364 (1966). The Court had previously acknowledged that contempts are “neither wholly civil nor altogether criminal.” *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911). It also acknowledged that “it may not always be easy to classify a particular act as belonging to either one of these two classes.” *Id.* (citing *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 329 (1904)).

53. *Shillitani*, 384 U.S. at 365.

54. *Id.* at 368.

55. See 18 U.S.C. § 3691 (2010). However, “petty” criminal contempt, considered to be that resulting in up to six months imprisonment, does not require a jury trial. See *Muniz v. Hoffman*, 422 U.S. 454, 475–76 (1975).

56. *Shillitani*, 384 U.S. at 368 (citing *Gompers*, 221 U.S. at 449).

57. *Shillitani*, 384 U.S. at 368 (citing *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)).

58. *Shillitani*, 384 U.S. at 368 (citing *Green v. United States*, 356 U.S. 165, 197 (1958) (Black, J., dissenting)).

59. *Shillitani*, 384 U.S. at 369 (citing *Gompers*, 221 U.S. at 441). Additionally, the Supreme Court made it clear that “a compensatory fine payable to the complainant” is also “remedial” and therefore a sign that the contempt is civil and not criminal. *Gompers*, 221 U.S. at 448.

to testify.”<sup>60</sup>

5. “The test may be stated as: what does the court primarily seek to accomplish by imposing sentence?”<sup>61</sup>

The Court’s most recent attempt to define the differences between criminal and civil contempt came in *International Union, United Mine Workers of America v. Bagwell*.<sup>62</sup> The specific issue was whether fines for contempt levied for violations of a labor injunction were “coercive civil fines” or “criminal fines that constitutionally could be imposed only through a jury trial.”<sup>63</sup>

During a protracted labor dispute with two mining companies over alleged unfair labor practices, the Mine Workers were enjoined in a complex order from, among other things, obstructing ingress and egress to company facilities and picketing with more than a specified number of people at certain sites. The trial court subsequently ruled that the union had committed seventy-two violations of the injunction, and fined it \$642,000 for its disobedience of the injunction. It also announced that future violations would result in fines of \$100,000 for each breach if violent, and \$20,000 if nonviolent. In seven subsequent contempt hearings the trial court found that the union had committed more than 400 separate and additional violations. The court gave the union a panoply of protections. Each of the contempt hearings was conducted as a separate civil proceeding, with the parties conducting discovery, introducing evidence, and calling and cross-examining witnesses. Notably for a civil proceeding, it required that “contumacious acts be proved beyond a reasonable doubt.”<sup>64</sup> The one protection that was not afforded the union, however, was that of a jury trial.<sup>65</sup>

In total, the union was fined over \$64 million. Of this amount, \$12 million was ordered to be paid to the companies, and \$52 million to the Commonwealth of Virginia along with the two counties most affected by the unlawful activity.<sup>66</sup>

The parties settled the underlying labor dispute while appeals of the contempt orders were pending, and agreed to vacate the contempt fines and dismiss the case. The trial court vacated the \$12 million payable to the companies, but not the remaining \$52 million because they “were

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60. *Shillitani*, 384 U.S. at 369–70.

61. *Id.* at 370.

62. 512 U.S. 821 (1994). “We are called upon once again to consider the distinction between civil and criminal contempt.” *Id.* at 823.

63. *Id.*

64. *Id.* at 824.

65. *Id.*

66. *Id.*

coercive, civil fines” and “payable in effect to the public.”<sup>67</sup> With the parties to the suit withdrawing due to the settlement, the court appointed a Special Commissioner to pursue the unpaid contempt fines for the Commonwealth and the counties. The Court of Appeals of Virginia ordered the fines vacated.<sup>68</sup> “[A]ssum[ing], without deciding, these fines are civil sanctions,”<sup>69</sup> it held that the trial court did not have discretion to refuse to vacate them where the parties settled the civil proceeding in which they were imposed.

The Supreme Court of Virginia reversed<sup>70</sup> on two grounds, first holding that Virginia public policy disfavored eliminating civil contempt sanctions after settlement “if the dignity of the law and public respect for the judiciary are to be maintained.”<sup>71</sup> Secondly, it rejected the union’s claim that the fines were criminal and therefore it was entitled to a jury trial. As the Supreme Court described it, “[b]ecause the trial court’s prospective fine schedule was intended to coerce compliance with the injunction and the union could avoid the fines through obedience, the court reasoned, the fines were civil and coercive and properly imposed in civil proceedings . . . .”<sup>72</sup>

The U.S. Supreme Court began its analysis with a statement of the rights owed a defendant charged with criminal contempt. These include the protections of the Constitution for a crime generally, among them notice of charges, assistance of counsel, summary process, the privilege against self-incrimination, conviction occurring only upon proof beyond a reasonable doubt, and, for “serious” criminal contempts involving imprisonment of more than six months, the right to jury trial.<sup>73</sup>

In contrast, the Court noted, sanctions for civil contempt “are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard.”<sup>74</sup> Despite the trial court having required proof beyond a reasonable doubt for what it termed civil contempt, the Supreme Court held that burden of proof was not required.<sup>75</sup> Then, as it had done before

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67. *Id.* at 825.

68. *International Union, United Mine Workers of America v. Clinchfield Coal Co.*, 402 S.E.2d 899, 905 (Va. Ct. App. 1991).

69. *Id.* at 902.

70. *Bagwell v. International Union, United Mine Workers of America*, 423 S.E.2d 349, 360 (Va. 1992).

71. *Id.* at 358.

72. *Bagwell*, 512 U.S. at 826.

73. *Id.* at 826–27.

74. *Id.* at 827.

75. *Id.* The Court did not state what the burden of proof should be in a case of civil contempt, and apparently never directly has. *See also* *United States v. Rylander*, 460 U.S. 752, 765 (1983) (Marshall, J., dissenting) (“At this stage of the proceedings, the government has not met its BURDEN of showing by CLEAR AND CONVINCING evidence that Rylander is in contempt.”) (citing

in *Shillitani*,<sup>76</sup> and still earlier in other cases,<sup>77</sup> the Court took on the task of explaining at length<sup>78</sup> the “‘conceptually unclear and exceedingly difficult to apply’”<sup>79</sup> distinction between civil and criminal contempt.<sup>80</sup> Having done so, the Court found that the \$52 million in fines were criminal in nature. First, they were “not coercive day fines, or even suspended fines, but [were] more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed.”<sup>81</sup> Additionally, the sanctionable conduct “did not occur in the court’s presence or otherwise implicate the court’s ability to maintain order and adjudicate the proceedings before it. . . .” or, involve “simple, affirmative acts.”<sup>82</sup> Finally, “[t]he union’s contumacy lasted many months and spanned a substantial portion of the State. The fines assessed were serious, totaling over \$52 million.”<sup>83</sup> For these reasons, the Court held, “disinterested factfinding and evenhanded adjudication were essential, and petitioners were entitled to a criminal jury trial” in what was a complex injunction case.<sup>84</sup>

Assuming the Court here provided new protections to contemnors by holding their contempt to be criminal and not civil in complex cases,<sup>85</sup> and requiring a jury trial for them, this was at least counterbalanced by part of its holding bearing on those facing civil contempt. In *Gompers*,<sup>86</sup> the Court had held that a defendant in civil contempt “stand[s] committed unless and until he performs the affirmative act required by the court’s order.”<sup>87</sup> It did not, however, *explicitly* say that such incarceration could be *indefinite*. In *Bagwell*, however, it did: “The

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*United States v. Rylander*, 656 F.2d 1313, 1319–20 (9th Cir. 1981))). However, in *Addington v. Texas*, 441 U.S. 418, 425 (1979), where appellant was indefinitely committed to a state mental hospital, the Court noted first that it had “repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. *See, e.g., Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *In re Gault*, 387 U.S. 1 (1967); *Specht v. Patterson*, 386 U.S. 605 (1967).” It ultimately held that a “clear and convincing” standard of proof is required by the Due Process Clause of the Fourteenth Amendment in a civil proceeding brought under state law to commit such an individual. *Id.* at 433.

76. *Shillitani v. United States*, 384 U.S. 364 (1966).

77. *See, e.g., Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911).

78. *Bagwell*, 512 U.S. at 827–30.

79. *Id.* at 827 n.3 (citing Earl C. Dudley Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1033 (1993)).

80. *See also* Livingston, *supra* note 51, at 426 (arguing that the Court expanded the scope of criminal contempt, to the detriment of the ability of civil litigants to seek relief for violations of court orders).

81. *Bagwell*, 512 U.S. at 837.

82. *Id.*

83. *Id.*

84. *Id.* at 838.

85. *See* Livingston, *supra* note 51, at 384–86.

86. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911).

87. *Id.* at 442.

paradigmatic coercive, civil contempt sanction, as set forth in *Gompers*, involves confining a contemnor *indefinitely until he complies* with an affirmative command such as an order ‘to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance.’”<sup>88</sup>

Moreover, the sheer breadth of this phrase could, in the hands of some judges, bespeak a life sentence (and, without a jury trial). As it pertained to Chadwick, it almost did.<sup>89</sup> And, this phrase was crafted by Justice Blackmun, who also acknowledged the following about contempt in *Bagwell*:

- “[T]he contempt power uniquely is “‘liable to abuse.’”<sup>90</sup>
- “[C]ivil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct.”<sup>91</sup>
- “Contumacy ‘often strikes at the most vulnerable and human qualities of a judge’s temperament’”<sup>92</sup> . . . “and its fusion of legislative, executive, and judicial powers ‘summons forth. . .the prospect of ‘the most tyrannical licentiousness.’”<sup>93</sup>

The Court in *Bagwell* did not provide any examples of what length of imprisonment for civil contempt would, or even could, violate the Due Process Clause.<sup>94</sup> Neither did it mention the Due Process Clause in connection with its allowing “indefinite” imprisonment. To the extent these may be envisioned as two aircraft, their flight plans neither allowed them to converge nor land.

In *Turner v. Rogers*,<sup>95</sup> the Court recently decided another case on civil contempt. While it did refer to *Bagwell* on a more general issue,<sup>96</sup> its facts<sup>97</sup> were not conducive to the Court re-examining its “indefinitely

88. *Bagwell*, 512 U.S. at 828 (emphasis added).

89. See *infra* at Section V.

90. *Bagwell*, 512 U.S. at 831 (citing *Bloom v. Illinois*, 391 U.S. 194, 202 (1968)).

91. *Bagwell*, 512 U.S. at 831.

92. *Id.* (citing *Bloom*, 391 U.S. at 202).

93. *Id.* (citing *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 822 (1987) (Scalia, J., concurring)).

94. U.S. CONST. amend. XIV, § 1 (“. . . nor shall any State deprive any person of life, liberty, or property, without due process of law”).

95. 131 S. Ct. 2507 (2011).

96. *Id.* at 2521 (Thomas, J., dissenting) (citing to *Bagwell* in connection with courts’ traditional assumption of “inherent contempt authority”).

97. *Id.* at 2520. After being incarcerated five times in three years for failure to make his payments, including completing a six-month sentence, Turner was held in contempt a sixth time and sentenced to one year in jail. The issue before the Court was whether the Fourteenth Amendment’s Due Process Clause required a state to provide counsel at a civil contempt hearing (for failure to pay child support) to Turner, an indigent person. The answer was a qualified “no.” The Court held that the provision of counsel is not *automatically* required by the Due Process clause, provided that sufficient alternative safeguards are provided, such as, e.g., adequate notice

until he complies" language.

For Chadwick, timing was everything. With the Supreme Court having decided *Bagwell*<sup>98</sup> in 1994, one year before he was imprisoned, in any federal court in which he might seek habeas corpus relief he faced (1) truly indefinite confinement,<sup>99</sup> (2) without the right to a jury trial,<sup>100</sup> (3) without the requirement to sustain his imprisonment of proof beyond a reasonable doubt,<sup>101</sup> or, (4) a finding of willful refusal to comply on his part,<sup>102</sup> and (5) with the burden resting on him to prove impossible his compliance with the order.<sup>103</sup> Moreover, factual findings made by the courts of Pennsylvania would be presumed correct, and he would be required to show by clear and convincing evidence that they were not.<sup>104</sup>

Pennsylvania law, because Chadwick was imprisoned by its state court order, would directly bear on any state court habeas corpus relief he would seek, and indirectly in federal court.<sup>105</sup> But, would it help or hurt?

#### IV. PENNSYLVANIA LAW OF CIVIL CONTEMPT

The Pennsylvania Supreme Court held, in *Commonwealth v. Mar-*

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of the importance of the ability to pay and a fair opportunity to present and dispute relevant information and court findings. *Id.*

98. *Bagwell*, 512 U.S. 821.

99. *Id.*

100. *Shillitani v. United States*, 384 U.S. 364 (1966).

101. *Bagwell*, 512 U.S. at 827.

102. See *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949):

The absence of willfulness does not relieve one from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. See *United States v. United Mine Workers*, 330 U.S. 258, 303-04; *Penfield Co. v. Securities & Exchange Commission*, 330 U.S. 585, 590; *Maggio v. Zeitz*, 333 U.S. 56, 68. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently. The force and vitality of judicial decrees derive from more robust sanctions.

103. See *United States v. Rylander*, 460 U.S. 752, 757 (1983):

In a civil contempt proceeding such as this, of course, a defendant may assert a *present* inability to comply with the order in question. *Maggio v. Zeitz*, *supra*, at 75-76; *Oriel v. Russell*, 278 U.S. 358, 366 (1929). While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. It is settled, however, that in raising this defense, the defendant has a burden of production. *McPhaul v. United States*, 364 U.S. 372, 379 (1960); *Maggio v. Zeitz*, *supra*, at 75-76; *Oriel v. Russell*, *supra*, at 366.

104. 28 U.S.C. § 2254(e)(1) (2010).

105. See discussion *infra* at Sections IV and V.

cone, that civil contempt “has as its dominant purpose to enforce compliance with an order of court for the benefit of the party in whose favor the order runs.”<sup>106</sup> It termed the power to punish for contempt to be a “right inherent in courts and incidental to the grant of judicial power under Article 5 of our Constitution.”<sup>107</sup> Its exercise is regulated by 42 Pa. C.S.A. § 4132 (2011), which states:

The power of the several courts of this Commonwealth to issue attachments and to impose summary punishments for contempts of court shall be restricted to the following cases:

- (1) The official misconduct of the officers of such courts respectively.
- (2) Disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court.
- (3) The misbehavior of any person in the presence of the court, thereby obstructing the administration of justice.<sup>108</sup>

Where civil contempt is concerned, the distinguishing characteristic “is the ability of the contemnor to purge himself . . . by complying with the court’s directive.”<sup>109</sup> And, “a court may not convert a coercive sentence into a punitive one by imposing conditions that a contemnor cannot perform and thereby purge himself of contempt.”<sup>110</sup> If the order is punitive, then the matter is criminal contempt which would require “the essential procedural safeguards that attend criminal proceedings generally.”<sup>111</sup>

Unlike in federal court, where the burden of showing noncompliance with an order requires clear and convincing evidence,<sup>112</sup> a complaining party in Pennsylvania need only show noncompliance by a preponderance of the evidence.<sup>113</sup> Present inability to comply is an affirmative defense borne by the alleged contemnor,<sup>114</sup> but in Pennsylvania, “the court, in imposing coercive imprisonment for civil contempt, should set conditions for purging the contempt and effecting release from imprisonment with which it is convinced *beyond a reason-*

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106. Commonwealth v. Marcone, 410 A.2d 759, 762 (Pa. 1980).

107. *Id.* at 763.

108. 42 PA. CONS. STAT. ANN. § 4232 (West 2011); *see also* 42 PA. CONS. STAT. ANN. § 4133 (West 2011) (“[T]he punishment of commitment for contempt provided in section 4132 (relating to attachment and summary punishment for contempts) shall extend only to contempts committed in open court. All other contempts shall be punished by fine only.”).

109. Wetzel v. Suchanek, 541 A.2d 761, 763 (Pa. Super. Ct. 1988) (citing Janet D. v. Carros, 362 A.2d 1060 (Super. Ct. Pa. 1976)).

110. Wetzel, 541 A.2d at 763 (citing Barrett v. Barrett, 368 A.2d 616 (Pa. 1977)).

111. Wetzel, 541 A.2d at 764 (quoting *In re Martorano*, 346 A.2d 22, 29 (Pa. 1975)).

112. *See, e.g.*, FTC v. Kuykendall, 371 F.3d 745, 754 (10th Cir. 2004); Commodity Futures Trading Comm’n v. Wellington Precious Metals, Inc., 950 F.2d 1525, 1529 (11th Cir. 1992).

113. Barrett, 368 A.2d at 621.

114. *Id.*



able doubt, from the totality of the evidence before it, the contemnor has the present ability to comply.”<sup>115</sup>

Had Chadwick been charged with civil contempt in federal court, his burden would have been higher because he would have had to prove “categorically and in detail” why he could not comply with the conditions in the order,<sup>116</sup> or, put another way, that it was impossible for him to comply.<sup>117</sup> In Pennsylvania, rather, the court could not impose conditions *to begin with* unless it had evidence showing beyond a reasonable doubt that Chadwick *could* comply with them. With this seemingly crucial factor in his favor, the road should have been made easier for him. It was counterbalanced, however, by one fact. Nothing in Pennsylvania law, whether constitutional, statutory or precedential, shed light on what would or even should constitute an endpoint for imprisonment for civil contempt.<sup>118</sup>

## V. FOURTEEN YEARS AT SEA IN THE FEDERAL AND PENNSYLVANIA COURTS

### A. 1995 to 1999: *No Nearer to the Shore*

On April 7, 1995, only two days after his arrest, Chadwick filed an emergency motion in federal court seeking his release from prison and the vacation of the bench warrant that led to his arrest.<sup>119</sup> Because he did not “adequately aver that he will have no opportunity to raise and have a timely decision by a competent state tribunal,” his motion was denied under the *Younger* abstention doctrine without prejudice to his filing a subsequent timely habeas corpus petition.<sup>120</sup> So began his nearly two dozen appearances in the trial and appellate courts of both Pennsylvania and the United States.

• *Chadwick v. Hill*<sup>121</sup> – In September 1995, Chadwick moved for

115. *Id.*

116. *NLRB v. Trans Ocean Exp. Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1973) (citing *In re Byrd Coal Co., Inc.*, 83 F.2d 256 (2nd Cir. 1936)).

117. *See United States v. Rylander*, 460 U.S. 752, 757 (1983).

118. Although the Pennsylvania Constitution does not have a “due process” clause *per se*, Art. I, §9 has been “commonly referred to as the due process clause of our constitution.” *See Commonwealth v. Snyder*, 713 A.2d 596, 600 (Pa. 1998). Both by its title, “Rights of accused in criminal prosecution,” and its terms, beginning with “In all criminal prosecutions,” it appears clearly inapplicable to civil contempt. No reported Chadwick decision has held otherwise.

119. *Chadwick v. Delaware Cnty. Court of Common Pleas*, No. 95-MC-0103, 1995 U.S. Dist. LEXIS 5130, at \*1 (E.D. Pa. April 19, 1995). Judge Shapiro later counted this as the first of Chadwick’s federal habeas petitions. *See Chadwick v. Janecka*, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at \*2 (E.D. Pa. Jan. 3, 2002).

120. *Chadwick v. Delaware Cnty. Court of Common Pleas*, No. 95-MC-0103, 1995 U.S. Dist. LEXIS 5130, at \*9 (E.D. Pa. April 19, 1995) (discussing *Younger v. Harris*, 401 U.S. 37 (1971)).

121. No. 95-0103, 1995 U.S. Dist. LEXIS 13081 (E.D. Pa. Sept. 8, 1995).

injunctive or, in the alternative, habeas corpus relief. By then, his second habeas petition in state trial court had been denied. Because there already was an appeal pending in the state Superior Court, Federal District Court Judge Norma Shapiro denied his motion for failure to exhaust state court remedies.

- *Chadwick v. Hill*<sup>122</sup> – In January 1997, again before Judge Shapiro,<sup>123</sup> Chadwick filed his third federal habeas petition. He claimed, after having been in jail for two years, that his incarceration violated the Fifth and Fourteenth Amendment guarantees of due process because the order “is no longer coercive, but has reached a punitive stage.”<sup>124</sup> By this time Chadwick had filed six state habeas petitions, three of which were still pending on appeal, including two that had been consolidated and were in the Supreme Court of Pennsylvania.<sup>125</sup> Because he had not exhausted his state court remedies, his petition was dismissed. Any issue regarding the applicability of *Bagwell* was not reached.

- *Chadwick v. Hill*<sup>126</sup> – On April 8, 1997, the Pennsylvania Supreme Court denied without comment Chadwick’s Petition for Allowance of Appeal. His petition for certiorari was then denied by the United States Supreme Court.<sup>127</sup>

- *Chadwick v. Andrews*<sup>128</sup> – In December 1997, his motion in federal court for release on bail pending determination of his July 1997 habeas petition was denied. The court held that relief on bail normally is granted only where (1) the sentence is short, such that the petitioner’s entire sentence would run before relief could be obtained; or, (2) the petitioner is gravely ill. The first did not apply because Chadwick was not serving a definite sentence. As to the second, although he had lymphoma it had been in remission for fifteen years. Therefore, his condition was not “grave.”

The court noted that following the trial court’s denial of Chadwick’s sixth state petition for habeas relief he appealed to the Superior Court, which affirmed on April 23, 1997, and “specifically invited the Pennsylvania Supreme Court to review its decision to clarify the point under state law at which a coercive penalty for civil contempt becomes a criminal sanction, but Mr. Chadwick did not seek review of that Supe-

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122. No. 96-6426, 1997 U.S. Dist. LEXIS 512 (E.D. Pa. Jan 16, 1997).

123. Unless otherwise noted herein, Judge Shapiro presided through the years over each of Chadwick’s habeas petitions filed in the United States District Court for the Eastern District of Pennsylvania.

124. *Hill*, 1995 U.S. Dist. LEXIS 512, at \*2.

125. *Id.* at \*4.

126. No. 0774, 1997 Pa. LEXIS 717 (Pa. Apr. 8, 1997).

127. *Chadwick v. Andrews*, 522 U.S. 864 (1997).

128. No. 97-4680, 1997 U.S. Dist LEXIS 20506 (E.D. Pa. Dec. 23, 1997).

rior Court decision.”<sup>129</sup> This invitation, in a memorandum opinion, was phrased as follows:

Instantly, appellant cites to the fact that he has been incarcerated since April 5, 1995. He claims the length of his incarceration, his age, poor health, inability to pursue his career and repeated hearings where he has refused compliance suggests that there is no possibility that he will comply with the order. Appellant admits that no court in this jurisdiction has adopted this test and we will not do so here. While it seems reasonable that at some point a temporal benchmark should be adopted to determine when contempt incarceration becomes impermissibly punitive we think that it is for our high court to make such a determination.<sup>130</sup>

No rationale for this decision appears in any reported case. That Chadwick, litigating in every other available forum, would choose not to attempt to have the Pennsylvania Supreme Court rule on this crucial issue, when its lower court had invited it to, and it could have set him free, makes little sense. Had he done so, he might have severely cut short his imprisonment. After all, this was still 1997—not 2009.

• *Chadwick v. Andrews*<sup>131</sup> – In April 1998, Chadwick again sought habeas relief in federal court (his fourth attempt). As he had argued in January 1997, his continued incarceration, now three years long, served only a punitive purpose. Therefore, he reasoned, since he was “no longer imprisoned for civil contempt [he] . . . must be afforded the protections and procedures available before criminal sanctions are imposed.”<sup>132</sup>

Chadwick’s earlier decision to not seek review in the Pennsylvania Supreme Court came back to haunt him, when the court dismissed his petition and held he had failed to exhaust his state remedies:

Because Mr. Chadwick failed to seek review in the Supreme Court from the denial of his sixth state habeas petition, he has not fully exhausted his available state remedies and this court cannot yet entertain his petition for federal habeas corpus. . . . When civil contempt becomes impermissibly punitive should not be considered by this court until the Supreme Court has had the opportunity, especially where the state’s intermediate appellate court specifically requested the Supreme Court to determine when confinement for civil contempt becomes punitive and requires due process protections.<sup>133</sup>

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129. *Id.* at \*4.

130. See *Chadwick v. Janecka*, No. 00-CV-1130, 2000 U.S. Dist. LEXIS 21732, at \*14–15 (E.D. Pa. Dec. 8, 2000) (quoting the Superior Court’s invitation to the Pennsylvania Supreme Court); see also discussion *infra* at Section V.

131. No. 97-4680, 1998 U.S. Dist. LEXIS 6123 (E.D. Pa. Apr. 30, 1998).

132. *Id.* at \*7.

133. *Id.* at \*15. In 2000, Chadwick sought to eliminate the procedural bar of “failure to exhaust state remedies” in an unusual way. As described by a later court, he filed his “pro se Application

• *Chadwick v. Andrews*<sup>134</sup> – The court denied his motion for reconsideration of its denial of his April 1998 petition.

B. 2000 to 2002: *Ithaca in Sight*

• *Chadwick v. Janecka*<sup>135</sup> – On Chadwick's fifth federal habeas petition, filed in March 2000, when he had been in prison for almost five years, the court by and through its magistrate's report and recommendations of December 8, 2000, finally reached the substance of his due process claims. Because the state court's factual findings were presumed to be correct,<sup>136</sup> in order to prevail Chadwick had to show "that the state court decision was contrary to clearly established case law by the United States Supreme Court, or alternatively, that the state court's decision was an unreasonable application of Supreme Court case law."<sup>137</sup>

Chadwick particularly relied on *Bagwell*, arguing that so far as due process was concerned the Supreme Court had changed the analysis from whether it was criminal or civil contempt to the seriousness of the penalty. Because his penalty had become serious, he argued, he was entitled to a jury trial with the criminal standard on the burden of proof. Finally, he repeated his ongoing argument that the length of his imprisonment had "transformed the purpose of the sanction from coercion to punishment."<sup>138</sup>

The magistrate recommended that Chadwick's habeas petition be denied. After a thorough examination of the facts in *Bagwell*, he distinguished it in the following ways:

1. The punishment in Chadwick's case was imprisonment, not based on fines as in *Bagwell*.
2. Chadwick could have purged himself of his contempt at any time by complying with the court order. "The fact that the petitioner has now served sixty-seven months in the Delaware County Prison is no fault of anyone but the petitioner himself."
3. The payment of marital funds Chadwick was ordered to make was not punitive, but compensatory.<sup>139</sup>

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for Leave to File Original Process (his seventh state habeas petition) with the Supreme Court of Pennsylvania," asserting "that he had been denied due process of law and his continued incarceration had ceased to be coercive but was punitive. This request was granted on February 8, 2000; the petition for habeas corpus was summarily denied on the same date." *Chadwick v. Janecka*, 2002 U.S. Dist. LEXIS 10, at \*9 (E.D. Pa. Jan. 3, 2002); *see also* *Chadwick v. Goldberg*, No. 223 Misc. 1999 (Pa. Feb. 8, 2000).

134. No. 97-4680, 1998 U.S. Dist. LEXIS 8446 (E.D. Pa. June 10, 1998).

135. No. 00-CV-1130, 2000 U.S. Dist. LEXIS 21732 (E.D. Pa. Dec. 8, 2000).

136. 28 U.S.C. § 2254(e) (2006).

137. *Janecka*, 2000 U.S. Dist. LEXIS 21732, at \*29 (quoting *Dickerson v. Vaughn*, 90 F.3d 87, 90 (3d Cir. 1996)).

138. *Id.* at \*33.

139. *Id.* at \*38–39.

As to Chadwick's argument that he was denied due process because of his indefinite and unlimited imprisonment for civil contempt, which by the time of his report was sixty-eight months, the magistrate stated: "If the petitioner's position were adopted by this Court, any contemnor could merely be stubborn and wait for sufficient time to pass, thus avoiding compliance with legitimate court orders with impunity. This is not an acceptable result."<sup>140</sup> In his report, however, the magistrate neither defined nor discussed what amount of time would ever be "sufficient."

• *Chadwick v. Janecka*<sup>141</sup> – In January 2002, more than a year after receiving his report, Judge Shapiro ruled on what was Chadwick's fifth federal habeas petition before her. She provided a detailed history of Chadwick's case filings, including but not limited to these five and his eight state habeas petitions.<sup>142</sup> She then rejected the magistrate's report in material part, granted Chadwick's petition for habeas corpus, and held that his continued imprisonment for civil contempt, after nearly seven years, had become impermissibly punitive.

The court acknowledged the following from the outset:

1. Chadwick still had the present ability to comply with the order, and provide the marital funds to the court for equitable distribution. "The record below clearly demonstrates that the state court findings were not erroneous. This court is convinced that Chadwick has the present ability to comply with the July 22, 1994 order."<sup>143</sup>
2. His refusals to allow the funds to be investigated without his first being released from custody gave credence to the fact that he did not want them found.
3. Upon his release, he could hide them and prevent them from being provided to the court or his wife.<sup>144</sup>

The court then framed the issue as follows:

After what is now nearly seven years' incarceration for failure to

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140. *Id.* at \*41–42.

141. No. 00-1130, 2002 U.S. Dist. LEXIS 10 (E.D. Pa. Jan. 3, 2002).

142. This opinion appears to contain the most exhaustive and detailed history of Chadwick's legal efforts up to 2002. Of particular interest to the reader may be the following: (1) the trial court's repeated findings that he had the ability to comply with the court order; (2) its offer to Chadwick, that a retired judge would be appointed as guardian to trace the assets at issue, Chadwick would provide all necessary information and materials to assist in the effort, and that once the guardian certified that Chadwick had fully cooperated and he had the information necessary to conclude his investigation, Chadwick would be freed; Chadwick would not agree to the last condition; (3) that twice in August, 1995 Chadwick declined to provide his authorization to permit third parties to investigate the status of his assets, or, to permit the IRS to release his 1993 tax return; and (4) repeated state trial and appellate rulings that his imprisonment had not lost its coercive effect.

143. *Janecka*, 2002 U.S. Dist. LEXIS 10, at \*19.

144. *Id.* at \*20.

comply, there is a serious question whether confinement is still serving a coercive purpose. After this significant period of time, there exists more than Chadwick's mere assertion that further confinement will not coerce compliance. The state courts have repeatedly determined that Chadwick's incarceration has not lost its coercive force. This court must determine whether that conclusion is contrary to Supreme Court precedent, and if not, whether it is an unreasonable application of Supreme Court precedent.<sup>145</sup>

Notwithstanding the findings of the state courts, the court here found that the coercive force had been lost. As Judge Shapiro phrased it after having ruled on Chadwick's petitions since 1995:

His obstinacy during more than six and a half years of imprisonment is persuasive that Chadwick will never voluntarily deposit the disputed funds with the court; it seems clear he is willing to remain incarcerated for life rather than allow his ex-wife access to a share of the funds.<sup>146</sup>

Accordingly, the court first held that his "continued incarceration cannot be rationalized under *Gompers* or *Bagwell* in light of Chadwick's clear and convincing proof there is no 'substantial likelihood' that his remaining in custody will result in his compliance; his confinement, no longer coercive, is an unreasonable application of Supreme Court precedent."<sup>147</sup> Second, as to due process, "after such an extensive time period, Chadwick cannot remain incarcerated without the due process attendant to imposition of criminal sanctions."<sup>148</sup> In so ruling, the court relied on *Zadvydas v. Davis*, where the Supreme Court held that an alien, pending deportation, could be held for up to six months, but not indefinitely, without due process protections of a criminal proceeding.<sup>149</sup>

In addition to what it perceived to be pertinent Supreme Court precedent, the court specifically relied on a prior holding of the Third Circuit, *In re Grand Jury Investigation (Appeal of Braun)*.<sup>150</sup> This reliance, it would turn out, was misplaced.<sup>151</sup>

The court concluded its opinion with the following:

For eighty months, Chadwick has refused to comply with a valid state court order to deposit \$ 2,500,000.00 in marital assets with the court; this renders unreasonable the belief that continued incarceration will

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145. *Id.* at \*21(internal citations omitted).

146. *Id.* at \*22.

147. *Id.* at \*23.

148. *Id.* This included, as the court noted at \*24 n.6, the right to counsel, proof of contempt beyond a reasonable doubt, and, if the sanction involved more than six months' incarceration, the right to trial by jury.

149. *Id.* at \*24 (citing *Zadvydas v. Davis*, 533 U.S. 678 (2001)).

150. *Id.* at \*15.

151. See discussion *infra* at Section V (C).

have a coercive effect. Chadwick has the present ability to comply, but the duration of his imprisonment has crossed the line from coercive to punitive, and requires his release. Chadwick should be afforded due process in any proceeding to impose additional criminal sanctions.<sup>152</sup>

H. Beatty Chadwick was a free man. Or, so it seemed. One thing missing from the court's opinion, as well as one line at its end, would prove telling. As to the former, the court, unlike its magistrate, gave exceedingly short shrift to *Bagwell*.<sup>153</sup> It narrowly relied on this Supreme Court holding for its statement of the main differences between civil and criminal contempt, which had not changed since *Gompers*.<sup>154</sup> It did not, however, discuss *Bagwell* regarding (1) its statement that civil contempt will extend "indefinitely until he complies," (2) how it may have spoken to due process ramifications for contempt that had purportedly turned from coercive to punitive, or (3) at what point that might be.<sup>155</sup> As to the latter, the court stated: "This order is stayed and Chadwick shall remain in state custody for thirty (30) days to allow appeal and application for further stay of this court's order to the appellate court."<sup>156</sup>

C. *Bagwell In The Hands Of The Third Circuit: The Winds Blow Away From Ithaca*

Mrs. Chadwick appealed the district court's order releasing Chadwick to the Third Circuit.<sup>157</sup> And, in *Chadwick v. Janecka*, in an opinion written by Judge (now Justice) Alito on *de novo* review, the court reversed.<sup>158</sup>

The heart of the opinion was whether the lower court ruling met the requirements of habeas corpus relief, particularly whether its finding that the state court's keeping him imprisoned, was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"<sup>159</sup> or (2) was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."<sup>160</sup>

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152. *Janecka*, 2002 U.S. Dist. LEXIS 10, at \*25–26.

153. See generally, *id.* at \*14–23.

154. See *id.*

155. See *id.*

156. *Id.* at \*27.

157. Chadwick was not released in the interim. As noted by the court, Mrs. Chadwick had moved for a stay pending appeal, which was granted on January 31, 2002. The United States Supreme Court then denied Chadwick's Application for Enlargement and to Vacate Stay.

158. 312 F. 3d 597, 605 (3d Cir. 2002).

159. 28 U.S.C. § 2254(d)(1) (2006).

160. 28 U.S.C. § 2254(d)(2) (2006).

In determining the first issue, the court went straight to *Bagwell*.<sup>161</sup> Chadwick argued that its phrase “indefinitely until he complies” did not mean “permanently and without other recourse,” but rather meant “with no pre-determined ending date.”<sup>162</sup> The court had “no quarrel” with this definition, but stated that this did not explain away the critical statement that a civil contemnor may be confined “indefinitely *until he complies*.”<sup>163</sup> The court contrasted the dictionary definition of “indefinitely,” meaning, “having no exact limits,” with Chadwick’s “contrary interpretation,” that “indefinitely until he complies” means “indefinitely until he complies or it becomes apparent that he is never going to comply”—an interpretation it termed “insupportable.”<sup>164</sup>

The court then turned to *Maggio v. Zeitz*, the case chiefly relied on by Chadwick, to show that his position was “clearly established” in Supreme Court law.<sup>165</sup> Maggio was the principal of a bankrupt camera shop who was imprisoned for civil contempt for not complying with a “turnover order” directing him to return property wrongfully taken from the debtor.<sup>166</sup> Chadwick relied on two sentences therein: “It is everywhere admitted that even if [the contemnor] is committed, he will be held in jail forever if he does not comply. His denial of possession is given credit after demonstration that a period in prison does not produce the goods.”<sup>167</sup>

The court took great pains over four pages to distinguish *Maggio*, and support its conclusion that “Maggio focuses on the question of *ability* to comply, not *willingness* to comply—and Mr. Chadwick’s ability to comply has not been challenged in the present proceeding and is not at issue.”<sup>168</sup>

The court then distinguished its prior holding in *In re Grand Jury Investigation (Appeal of Braun)*, relied on by the District Court, finding that it too contrasted sharply with Mr. Chadwick’s understanding of *Maggio* because it also focused on one’s ability to comply, not one’s willingness.<sup>169</sup>

As to the second possible basis for habeas relief, that the state court’s decision was “based on an unreasonable determination of the

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161. *Janecka*, 312 F.3d at 607–08 (citing *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 827 (1994)).

162. *Janecka*, 312 F.3d at 608.

163. *Id.*

164. *Id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1147 (1971)).

165. *Maggio v. Zeitz*, 333 U.S. 56 (1948).

166. *Janecka*, 312 F.3d at 609 n.9.

167. *Id.* at 611. (citing *Maggio*, 333 U.S. at 76).

168. *Id.* at 609–13.

169. *Id.* at 612 n.13 (discussing Mr. Chadwick’s reliance on *In re Grand Jury Investigation (Appeal of Braun)*, 600 F.2d 420 (3d Cir. 1979)).



facts”<sup>170</sup> there was no issue as the “District Court acknowledged that the record demonstrates that the state court findings were not erroneous, and . . . it was ‘convinced that Mr. Chadwick has the present ability to comply with the July 22, 1994 order.’”<sup>171</sup>

The court concluded with the following, a literal holding and interpretation of *Bagwell* that, even presuming one can comply, permits endless (not apparently excluding life) imprisonment for civil contempt:

The Supreme Court has never endorsed the proposition that confinement for civil contempt must cease when there is ‘no substantial likelihood of compliance.’ On the contrary, in words that might as well have been written to describe the case now before us, the *Bagwell* Court stated that ‘the paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor *indefinitely* until he complies with an affirmative command such as an order ‘to pay alimony, or to surrender property ordered to be turned over to a receiver.’<sup>172</sup>

The court felt “no need . . . to decide whether *In re Grand Jury Investigation* remains good law in light of *Bagwell*. It is enough for present purposes that the state court decisions cannot be disturbed under the restricted standard of review applicable in this habeas case.”<sup>173</sup> The court never discussed the practical ramifications of its holding or any of the risks associated with civil contempt that even Justice Blackmun took pains to note in *Bagwell*.<sup>174</sup> Chadwick would therefore remain in prison, and the Supreme Court would not intervene.<sup>175</sup>

#### D. 2003 to 2008: No Relief, And Notwithstanding The Report Of The Special Master

In September 2002, while his appeal to the Third Circuit was pending, Chadwick returned to the state courts in *Chadwick v. Caulfield* to file his ninth habeas petition.<sup>176</sup> It was denied, with both the trial and appellate courts finding first that most of his issues had been previously raised and rejected. As to Chadwick’s argument that “incarceration may become punitive where ‘the contemnor has shown there is no realistic possibility or a substantial likelihood that continued confinement will ever accomplish its coercive purpose,’”<sup>177</sup> the court reiterated its prior

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170. *Id.* at 607.

171. *Id.* at 612 (quoting *Chadwick v. Janecka*, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at \*19 (E.D. Pa. Jan 3, 2002)).

172. *Id.* at 613 (citing *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 828 (1994)).

173. *Janecka*, 312 F.3d at 613.

174. See discussion *supra* at Section III.

175. *Janecka*, 312 F.3d 597, *cert. denied*, 538 U.S. 1000 (2003).

176. 834 A.2d 562 (Pa. Super. Ct. 2003).

177. *Id.* at 569.

holding (and invitation to Chadwick) that it was for the Pennsylvania Supreme Court to define “when contempt incarceration becomes impermissibly punitive.”<sup>178</sup> It noted further that Chadwick “did not appeal to our supreme court from the denial of his sixth petition for habeas relief.”<sup>179</sup> He did, however, petition the Pennsylvania Supreme Court to take an appeal from this decision and the United States Supreme Court for certiorari. Both were denied.<sup>180</sup>

Chadwick returned in 2003 to federal court and Judge Shapiro for his sixth habeas petition there, in *Chadwick v. Caulfield*.<sup>181</sup> Unlike the temporary success he enjoyed on his fifth federal petition,<sup>182</sup> this petition was dismissed. The court found it to be a “second or successive habeas corpus application” within the meaning of the Antiterrorism and Effective Death Penalty Act,<sup>183</sup> which first required permission from the Third Circuit for the District Court to consider it.<sup>184</sup> As the Third Circuit had earlier stated in reversing the District Court, “[o]ur decision does not preclude Mr. Chadwick from filing a new federal habeas petition if he claims that he is *unable* for some reason to comply with the state court’s order.”<sup>185</sup> However, as the District Court found, “[t]he petitioner complains of procedural inadequacies in determining his past ability to pay, already rejected by this court and the Court of Appeals, but he still does not allege he is actually unable to pay.”<sup>186</sup> The result was dismissal.

In 2004, the ninth year of Chadwick’s imprisonment, and with his agreement, the trial court appointed a former Chief Judge of the Delaware County Court of Common Pleas as a Special Master with limited authority to “investigate, search and obtain any and all information regarding the monies transferred out of the United States by H. Beatty Chadwick, and which is subject to the court order of July 22, 2004.”<sup>187</sup> In his October 3, 2005, report, the Master found that Chadwick “does not possess or control the secreted assets and accordingly does not have the ability to comply with the July 22, 1994, order and should be

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178. *Id.*

179. *Id.*

180. *Chadwick v. Caulfield*, 853 A.2d 359 (Pa. 2004); *Chadwick v. Caulfield*, 834 A.2d 562 (Pa. Super. Ct. 2003), *cert. denied*, 543 U.S. 875 (2004).

181. No. 03-4793, 2003 U.S. Dist. LEXIS 23269 (E.D. Pa. Oct. 20, 2003).

182. *See supra* text accompanying notes 145–60.

183. 28 U.S.C. § 2244(b)(1) (2006).

184. 28 U.S.C. § 2244(b)(3)(A) (2006); *see also Caulfield*, 2003 U.S. Dist. LEXIS 23269 at \*9.

185. *Chadwick v. Janecka*, 312 F.3d 597, 614 (3d Cir. 2002).

186. *Caulfield*, 2003 U.S. Dist. LEXIS 23269 at \*7.

187. *See Chadwick v. Hill*, No. 06-1709, 2008 U.S. Dist. LEXIS 34431, at \*17 (E.D. Pa. Apr. 25, 2008) (discussing his tenth state habeas proceeding as well as the report and recommendations of the Special Master).

released from his present incarceration.”<sup>188</sup>

Relying on this report, Chadwick in 2005 filed his tenth state petition for habeas relief. A panel of the trial court issued what can only be described as judicially excoriating Findings of Fact, followed by its order striking the Master’s report in its entirety and denying his petition.<sup>189</sup> The court found that the Master “far exceeded the scope of his authority . . . in making any findings whatsoever regarding the propriety of defendant Chadwick’s continued incarceration,”<sup>190</sup> and listed numerous other defects in his report. As to Chadwick, who given his agreement to the appointment in his ninth year of imprisonment was expected to cooperate with the Master, the court found that he (1) refused to cooperate in general; (2) refused to sign authorizations enabling the Master to obtain relevant information; and (3) “specifically refused to sign narrowly drafted authorizations directing the release of billing information from the multiple attorneys whose services he has retained.”<sup>191</sup>

In his seventh federal habeas petition, in 2008, Chadwick again relied on the Special Master’s report.<sup>192</sup> The court recited some of the report’s findings, and many more of its defects listed by the trial court.<sup>193</sup> Because the report had been stricken in its entirety, the court found that it was “void under Pennsylvania law, of no probative value,

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188. *Id.*

189. *Id.* at \*18–22.

190. *Id.* at \*20.

191. *Id.* at \*19. The Chadwick cases cited in this article reflect a number of attorneys appearing as counsel for him throughout the years. Although he at times appeared *pro se*, as the reader will logically assume, unless they were all appearing *pro bono*, the attorneys’ fees and costs for representing him in his efforts to gain his freedom had to have been significant. The only available point of reference is the trial court’s finding that prior to commencement of trial in his divorce proceeding, Mrs. Chadwick had incurred approximately \$1,900,000.00 in fees and costs. Of this amount, her counsel estimated that sixty percent, or some \$1,140,000.00, was incurred in litigation relating to his failure to come forward with the money. *See Chadwick v. Chadwick*, 68 Pa. D. & C. 4th 369, 392 (C.P. Ct. Del. Cnty., Pa. Oct. 27, 2004). Moreover, Chadwick was involved in significant additional litigation since 1995 in which he which he appeared both *pro se* and through counsel. *See Chadwick v. Metro Corp.*, 822 A.2d 396 (Del. 2003) (rejecting Chadwick’s attempt to obtain interlocutory review of dismissal and stay orders in his suit against three parties, including Mrs. Chadwick, for defamation, invasion of privacy and conspiracy to injure his reputation); *Chadwick v. Chadwick*, No. CIV-03-30-P-C, 2003 U.S. Dist. LEXIS 9957 (D.C. Me. June 12, 2003) (dismissing Chadwick’s 42 U.S.C. §1983 claim against Mrs. Chadwick for false imprisonment, abuse of process and conversion); *Chadwick v. Metro Corp.*, 856 A.2d 1066 (Del. 2004) (affirming on full appeal dismissal of Chadwick’s claims against Mrs. Chadwick, *et al*, for defamation, invasion of privacy and conspiracy to injure his reputation); *Chadwick v. Court of Common Pleas*, No. 05-1443, 2006 U.S. Dist. LEXIS 40125 (E.D. Pa. June 15, 2006) (denying Chadwick’s 42 U.S.C. §1983 motion challenging the conditions of his imprisonment due to his non-Hodgkin’s lymphoma); *Chadwick v. Court of Common Pleas*, 244 Fed. Appx. 451 (3d Cir. 2007) (affirming denial of his 42 U.S.C. §1983 motion). No reported case mentions the source of money paid to his attorneys.

192. *Hill*, 2008 U.S. Dist. LEXIS 34431 at \*7.

193. *Id.* at \*7–8.

and cannot be credited as clearly convincing evidence or any evidence whatsoever.”<sup>194</sup> Chadwick’s reliance thereon accordingly failed, and his petition was denied; and reflecting Judge Shapiro’s understanding of what the Third Circuit had told her six years earlier about civil contempt being limitless, she concluded her opinion by stating:

Chadwick has had the opportunity to establish his inability to comply but has refused to provide the information about his bank accounts and access to those off-shore accounts that would permit an objective trier of fact to reach an informed conclusion as to his actual ability or inability to turn over the funds. It is clear from the well-reasoned state court opinions that nothing other than full compliance or complete candor establishing an inability to comply will purge the petitioner of his contempt.<sup>195</sup>

### E. *Freedom, Notwithstanding*

On Friday afternoon, July 10, 2009, Judge Joseph Cronin of the Delaware County Court of Common Pleas signed an order freeing H. Beatty Chadwick.<sup>196</sup> Within an hour, he left prison. In his ruling, Judge Cronin stated that he:

concur[s] with the prior presiding judges . . . who conclude[ ] that petitioner Chadwick has the ability to comply with the court order of July 22, 1994, but that he had willfully refused to do so. This court concludes that petitioner Chadwick continues to willfully disobey the court order. . . . [I]n order to be lawful, the petitioner’s confinement for civil contempt of court must have a coercive effect. However, if during the period of civil incarceration a court concludes that future imprisonment will not induce compliance, the imprisonment is no longer coercive, becomes punitive and the petitioner must be released.<sup>197</sup>

Albert Momjian, Mrs. Chadwick’s<sup>198</sup> longtime attorney, filed motions that Friday to delay Chadwick’s release but he was not successful.<sup>199</sup>

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194. *Id.* at \*26–27.

195. *Id.* at \*27–28.

196. Marlene DiGiacomo, *Judge Finally Sets Former Lawyer Free After 14 Years*, DELAWARE COUNTY DAILY TIMES, July 11, 2009, <http://www.delcotimes.com/articles/2009/07/11/news/doc4a57fealb39ed606977003.txt>; see also *Lawyer is Released After Serving Over 14 Years on Civil Contempt Charge*, N.Y. TIMES, July 12, 2009, <http://www.nytimes.com/2009/07/12/us/12contempt.html?>.

197. DiGiacomo, *supra* note 196.

198. For the sake of continuity, throughout this article the author has called her by her original married name. She has remarried and is legally known as Barbara Applegate. See *Chadwick v. Metro Corp., McDougall, & Barbara Chadwick a/k/a Barbara Applegate*, 822 A.2d 396 (Del. 2003).

199. DiGiacomo, *supra* note 196.

In November, 2010 a reporter for the Philadelphia Inquirer found a Match.com post by “beatty Chad.”<sup>200</sup> The profile said he was fifty-four, a lawyer who earns \$150,000 a year, “athletic and toned,” and was “seek(ing) a ‘slender’ younger gal interested in summering on a lake in Michigan with a cultured sugar daddy.”<sup>201</sup>

When asked if he was “beatty Chad,” Chadwick said yes.<sup>202</sup> He was seventy-four at the time, however, not fifty-four. And, he was not a lawyer, having had his license suspended.<sup>203</sup> As to the former, he joked, “I didn’t count the years I spent in jail.”<sup>204</sup> As to the latter he said, “I don’t know why [the dating profile he created] would say I was making a lot of money.”<sup>205</sup>

When reached for comment on her ex’s “role-playing,” Barbara “Bobbie” Applegate said, “Unbelievable! . . . He’s sick. He’s crazy. He’s always been a person who didn’t have to live by the rules.”<sup>206</sup> When reached for his comment, Albert Momjian said, “We’ve had him back in court since his release, . . . [w]e’ve asked for his tax returns. He’s *still* not cooperating. . . . I would imagine that \$2.5 million grew, wherever it was, . . . we’re going to get that money. . . . I’d do anything to get him back in jail.”<sup>207</sup>

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200. Monica Yant Kinney, *Beatty Chadwick, Trolling Match.com, Still Defying Truth*, PHILADELPHIA INQUIRER, November 10, 2010, [http://articles.philly.com/2010-11-10/news/24952796\\_1\\_sugar-daddy-heh-lawyer](http://articles.philly.com/2010-11-10/news/24952796_1_sugar-daddy-heh-lawyer).

201. *Id.*

202. *Id.*

203. *Id.*; see also Office of Disciplinary Counsel v. Chadwick, 874 A.2d 1142 (Pa. 2005) (suspending his Pennsylvania law license for five years, and requiring him to “comply with all the provisions of Rule 217, Pa.R.D.E.”); *In re Chadwick*, 6 A.3d 1284 (D.C. 2010) (suspending his license to practice law in the District of Columbia for five years with a fitness requirement); *In re Chadwick*, 285 Fed. App’x. 974, 975 (3d Cir. 2008) (affirming suspension of his right to practice law in the Eastern District of Pennsylvania for five years).

204. Kinney, *supra* note 200.

205. *Id.*

206. *Id.*

207. *Id.* As part of the court’s findings of fact in the Chadwicks’ divorce case, the court determined after hearing from a certified public accountant (who was qualified as an expert in security valuation) the current value of the missing \$2,500,000. See *Chadwick v. Chadwick*, 68 Pa. D. & C. 4th 369, 382–83 (C.P. Ct. Del. Cnty., Pa. Oct. 27, 2004). If it had been conservatively invested on January 31, 1993, in 3-month T-bills, compounded quarterly, as of April 30, 2004, it would have had a value of almost \$8,200,000 before taxes. Of this amount, 65.27 percent (with the remainder constituting the value of Chadwick’s IRA’s) was available for equitable distribution, or approximately \$5,700,000. Assuming only a 4% un compounded growth rate from then until 2011, its total value before taxes would be approximately \$10,500,000, with approximately \$6,800,000 available for equitable distribution. More detailed calculations, using available look-back data, would likely show that this figure was in reality higher. *Id.* at 382–84.

VI. CATCH-22: CAUGHT BETWEEN RESTRICTIONS ON HABEAS  
CORPUS RELIEF AND SILENCE BY THE SUPREME COURT

The Supreme Court has stated that, “[t]he moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power [to punish for contempt] . . . and to enforce obedience to their lawful orders, judgments, and processes.”<sup>208</sup> Given that civil contempt and the Due Process Clause have therefore coexisted since 1868,<sup>209</sup> one would surmise that federal courts had often seen cases involving contemnors imprisoned for civil contempt, without a jury trial, who sought their release on due process grounds. That is not the case. In 1976, the Ninth Circuit, in *Lambert v. Montana*, considered the following to be a “novel question”: “[W]hether due process considerations may affect the duration of confinement resulting from a state court’s commitment arising from a finding of civil contempt.”<sup>210</sup>

There, defendant had been incarcerated for sixteen months for refusing to testify concerning the identity of the person who had discharged a weapon in the direction of others. On this “novel question” raised by defendant, apparently for the first time in the context of federal civil contempt litigation, the court found:

Lambert’s allegation that his continuing commitment for civil contempt violates due process raises a serious constitutional challenge which requires further proceedings in the district court. Where it is alleged that the duration of an individual’s confinement no longer bears a reasonable relationship to the purpose for which he is committed a substantial federal constitutional claim relating to denial of due process is present.<sup>211</sup>

Even though Lambert had, in comparison to Chadwick’s fourteen years, “only” been incarcerated for sixteen months, the court held that:

In view of the length of time that petitioner has remained silent even though in a custodial situation, there exists a substantial likelihood that continued confinement is no longer serving its purpose. If this is true, it may be that the nature and duration of the commitment no longer bear a reasonable relationship to the purpose for which Lambert was committed and that, in fact, the commitment has lost its

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208. *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510–11 (1873).

209. *See* U.S. CONST. amend. XIV.

210. 545 F.2d 87, 88 (9th Cir. 1976).

211. *Id.* at 89. Neither Supreme Court case cited by the Ninth Circuit for this holding concerned civil contempt. *See* *Jackson v. Indiana*, 406 U.S. 715, 737–38 (1972) (finding defendant’s indefinite commitment until he was declared to be sane violated his due process rights), and *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 257 (1972) (finding defendant’s indefinite incarceration beyond his five-year criminal sentence and until he submitted to psychological examination was a violation of due process).

coercive force, and is now punishment falling under the pale of criminal contempt.<sup>212</sup>

Accordingly, the court remanded the case for the district court to determine whether the coercive force had been lost and whether continued confinement would accomplish the purpose of the original order. In Chadwick's case, however, his argument that coercive effect had been lost would be rejected for a very long time.<sup>213</sup> What was a "novel question" in the law in 1976—whether due process could pose a "serious federal constitutional challenge" to his imprisonment—took almost larger-than-life form in Chadwick's record-breaking case.<sup>214</sup>

At the outset of discussing the factors that caused this, it is important to put in context how severe his imprisonment for fourteen years without a jury trial truly was. Under Pennsylvania law, had he been convicted by a jury of any of the following offenses, and without his having any prior convictions, the punishment would have been as follows:

1. Murder in the third degree<sup>215</sup>: First-degree felony punishable by a maximum sentence of twenty years in prison,<sup>216</sup> with a recommended minimum sentence of as little as six years.<sup>217</sup>
2. Robbery with serious bodily injury<sup>218</sup>: First-degree felony with a maximum sentence of twenty years in prison,<sup>219</sup> and a recommended minimum of as little as four years to sixty-six months.<sup>220</sup>
3. Voluntary manslaughter<sup>221</sup>: First-degree felony with a maximum sentence of twenty years in prison, and a recommended minimum of as little as three years to fifty-four months (in boot camp, not in prison).<sup>222</sup>
4. Had Chadwick been convicted of passing a note to a teller at a bank and threatening the teller to turn over \$2,500,000.00 to him, it would have constituted the crime of robbery,<sup>223</sup> a second-

212. *Lambert*, 545 F.2d at 90.

213. *See, e.g., Chadwick v. Janecka*, 312 F.3d 597, 606 (3d Cir. 2002).

214. Schaefer, *supra* note 6.

215. Defined as "all . . . kinds of murder" (other than) "an intentional killing" or one committed "while defendant was engaged as a principal or an accomplice in the perpetration of a felony". 18 PA. CONS. STAT. ANN. § 2502(a)–(c) (West 2011).

216. 18 PA. CONS. STAT. ANN. § 1103(1) (West 2011).

217. *See* 204 PA. CODE § 303.16 (2011).

218. *See* 18 PA. CONS. STAT. ANN. § 3701(a)(1)(i) (West 2011).

219. § 1103(1).

220. § 303.16.

221. Defined as "a person who kills an individual without lawful justification . . . [and] at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by: (1) the individual killed; or (2) another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed. 18 PA. CONS. STAT. ANN. § 2503 (West 2011).

222. § 303.16.

223. § 3701(a)(1)(iv).

degree felony<sup>224</sup> punishable by up to ten years in prison,<sup>225</sup> and with a recommended minimum of one to two years in boot camp.<sup>226</sup>

5. Had he simply stolen \$2,500,000.00 from Mrs. Chadwick, he would have been guilty of theft of more than \$2,000, a third-degree felony<sup>227</sup> punishable by up to seven years in prison,<sup>228</sup> with a recommended minimum sentence of nine to sixteen months in boot camp.<sup>229</sup>

Had Chadwick been charged with any of these offenses and not entered into a plea bargain, no court could have imprisoned him without his having been found guilty by a jury based on evidence establishing his guilt beyond a reasonable doubt.<sup>230</sup> In fourteen years in prison for civil contempt, however, he had the benefit of neither protection. Instead, the law placed him in a Catch-22 situation facing, at the same time, too narrow a path to habeas corpus relief in conjunction with what the Third Circuit believed to be silence by the Supreme Court.<sup>231</sup>

#### A. *Habeas Corpus Relief: Too Narrow A Path*

Civil contemnors seeking federal habeas corpus relief are strictly limited as to what grounds may effect their release. They must show that either (1) the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"; or (2) its decision was "unreasonable" in light of the evidence presented to it.<sup>232</sup>

Therefore, in seeking their freedom by the first avenue, by definition civil contemnors, as well as other defendants seeking relief, cannot rely on a basis grounded in "clearly established law" by even the Circuit Courts of Appeals, and even if such law is on point and favorable. What

224. § 3701(b).

225. 18 PA. CONS. STAT. ANN. § 1103(2) (West 2011).

226. § 303.16.

227. See 18 PA. CONS. STAT. ANN. § 3903(a)(1) (West 2011).

228. § 1103(3).

229. § 303.16.

230. See, e.g., *Commonwealth v. Smith*, 17 A.3d 873, 908 (Pa. 2011).

231. The phrase "Catch-22" has entered common usage since appearing in Joseph Heller's well-known novel, *Catch-22* (1961). A "Catch-22" situation was described by Heller as follows: "There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he were sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to." *HELLER, supra*, at 46.

232. 28 U.S.C. § 2254(d)(1)–(2).



relief, then, can this avenue ever offer to defendants when the Supreme Court has been *silent* as to the basis on which they seek habeas relief?

The answer to this question, according to the Third Circuit in its 2002 decision keeping Chadwick in prison, is, in a word, none.<sup>233</sup>

The court's rationale was clear, narrow—and strict:

1. Chadwick was required to show that his argument, that because his imprisonment had lost its coercive effect it must cease, ran afoul of Supreme Court precedent.<sup>234</sup>
2. The Supreme Court had never addressed such an argument, much less accepted it.<sup>235</sup>
3. Therefore, the District Court erred in granting habeas relief on this basis.<sup>236</sup>

As to the validity of the second point, there is much doubt. While it is true that the Supreme Court had never *directly* ruled regarding the “loss of coercive effect” by the time the Third Circuit ruled against Chadwick, the Court had already held several times that the hallmark of civil contempt was its “coercive purpose” (as well as distinguishing it from criminal contempt).<sup>237</sup> This was more than “an argument”; it was settled law. Even in *Bagwell*, the Court stated that “civil contempt sanctions . . . are considered to be coercive . . . .”<sup>238</sup> The crucial question the Third Circuit would *not* ask was, if “coercive” effect is the hallmark of civil contempt as determined by clear Supreme Court precedent, and it is lost, why would civil contempt *not* terminate? Had it done so, given the logical answer, it would have affirmed the District Court's grant of habeas relief to Chadwick. Instead, the court expended considerable judicial labor distinguishing *Maggio*, the Supreme Court case heavily relied upon by Chadwick.<sup>239</sup>

Despite and perhaps because of its reliance on the literal language

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

234. The Third Circuit noted that it had held that “decisions by lower federal courts may be considered only ‘as helpful amplifications of Supreme Court precedent,’” and, “‘federal courts may not grant habeas corpus relief based on the state court’s failure to adhere to the precedent of a lower federal court on an issue that the Supreme Court has not addressed.’” *Id.* at 613.

235. *Id.*

236. *Id.*

237. *See, e.g., Shillitani v. United States*, 384 U.S. 364, 370 (1966) (“[T]heir sentences were clearly intended to operate in a prospective manner—to coerce, rather than punish. As such, they relate to civil contempt.”); *see also United States v. United Mine Workers of America*, 330 U.S. 258, 303–04 (1947) (“Judicial sanctions in civil contempt proceedings may . . . be employed for either or both of two purposes: to coerce the defendant into compliance with the court’s order, and to compensate the complainant for losses sustained.”); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1917) (“Imprisonment [for civil contempt] . . . is intended to be remedial by coercing the defendant to do what he had refused to do.”).

238. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 827 (1994).

239. *Janecka*, 312 F.3d at 609–13.

in *Bagwell*, “indefinitely until he complies,” the Court failed to note the obvious.<sup>240</sup> *Bagwell* would likely never have spoken to the issue of “lost coercive effect” of imprisonment for the simple reason that the punishment at issue was in the form of *non*-continuing fines.<sup>241</sup> Because it did not delve into *Bagwell* with nearly the effort it did with *Maggio*, it failed to measure in a reasonable way, instead of an unduly narrow one, whether habeas relief for Chadwick was appropriate. In what was a clear case of extended imprisonment, the court failed to include “lost coercive effect” or due process as factors in the question it did frame: Did the state court’s keeping him imprisoned involve “an unreasonable application of clearly established Federal law, as determined by the Supreme Court”?<sup>242</sup>

Instead, consistent with the spirit and holdings of *Gompers*,<sup>243</sup> and its successor cases on “coercive effect,”<sup>244</sup> the court should have framed the issue in a way that allowed Chadwick a fair opportunity to obtain habeas relief, such as:

Did the state court’s keeping him imprisoned unreasonably fail to recognize that coercive effect was a requirement for civil contempt, as repeatedly held by the Supreme Court, and further fail to determine that it no longer operated in his case so as to violate his due process rights?

The Third Circuit treated Chadwick harshly in yet another way. Only three years earlier, in *In re Impounded*, it had cited the Second Circuit opinion in *Simkin v. United States* with approval for the proposition that “courts have noted that a District Court’s discretion in determining what process is due to an alleged contemnor is very broad.”<sup>245</sup> In Chadwick’s case, it reviewed *de novo* Judge Shapiro’s “legal conclusions,”<sup>246</sup> and noted that the state court findings as to Chadwick’s ability to comply with the order were “not erroneous.”<sup>247</sup> However, it failed to mention *Simkin*, *In re Impounded*, or apply its own approved “very broad”<sup>248</sup> standard to Judge Shapiro’s crucial factual finding that:

Now, after nearly seven years, it is no longer reasonable to conclude Chadwick’s continued confinement might still result in compliance with the July 22, 1994 order. . . . [I]n light of Chadwick’s clear and

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240. *See id.* at 613 (quoting *Bagwell*, 512 U.S. at 828).

241. *See Bagwell*, 512 U.S. at 837.

242. *Janecka*, 312 F.3d at 606–07 (discussing 28 U.S.C. § 2254(d) (2000)).

243. *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

244. *See, e.g., Shillitani v. United States*, 384 U.S. 364, 369 n.4 (1966).

245. *In re Impounded*, 178 F.3d 150, 159 (3d Cir. 1999) (citing *Simkin v. United States*, 715 F.2d 34 (2d Cir. 1983)).

246. *Janecka*, 312 F.3d at 605 n.6.

247. *Id.* at 612.

248. *In re Impounded*, 178 F.3d at 159.

convincing proof there is no "substantial likelihood" that his remaining in custody will result in his compliance; his confinement [is therefore] no longer coercive . . . .<sup>249</sup>

Instead, it avoided confronting its own standard as well as the "factual" nature of this finding by holding that lost coercive effect as bearing on civil contempt had never been recognized by the Supreme Court.<sup>250</sup> While it can be argued that the Third Circuit made its ruling under the "narrow"<sup>251</sup> habeas standard of review, (1) it still appears to have been far too restrictive in its view of the Supreme Court's reliance on "coercive effect,"<sup>252</sup> and, (2) it failed to recognize that its District Court had such "very broad" discretion<sup>253</sup> for very good reason. In *Simkin*, the court had held:

A district judge's determination whether a civil contempt sanction has lost any realistic possibility of having a coercive effect is inevitably far more speculative than his resolution of traditional factual issues. Since a prediction is involved and since that prediction concerns such uncertain matters as the likely effect of continued confinement upon a particular individual, we think a district judge has virtually unreviewable discretion both as to the procedure he will use to reach his conclusion, and as to the merits of his conclusion.<sup>254</sup>

The Third Circuit neither discussed nor mentioned *Simkin* in keeping Chadwick in prison. There, the Second Circuit reversed the District Court's denial of a civil contemnor's release. The following was entirely consistent with what Chadwick was urging generally as to the limits of his imprisonment for contempt:

As long as the judge is satisfied that the coercive sanction might yet produce its intended result, the confinement may continue. But if the judge is persuaded, after a conscientious consideration of the circumstances pertinent to the individual contemnor, that the contempt power has ceased to have a coercive effect, the civil contempt remedy should be ended.<sup>255</sup>

Although the Third Circuit discussed certain portions of its prior holding in *In re Grand Jury Investigation* for the purpose of distinguish-

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249. *Chadwick v. Janecka*, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at \*22-23 (E.D. Pa. Jan 3, 2002).

250. *Janecka*, 312 F.3d at 613.

251. *Id.* at 605.

252. See discussion *supra* notes 231-34.

253. *In re Impounded*, 178 F.3d at 159.

254. *Simkin v. United States*, 715 F.2d 34, 38 (2d Cir. 1983).

255. *Id.* at 37. In *Simkin*, the civil contemnor was imprisoned for refusing to testify before a grand jury, pursuant to 28 U.S.C. §1826. It does not appear that he sought his release through habeas corpus. Instead, he "applied to [the court] for termination of the civil contempt sanction . . . ." *Id.* at 36.

ing it and disapproving the District Court's reliance thereon, it omitted all of the following:

In recent years a number of courts, when presented with situations involving indeterminate periods of confinement for civil contempt, have spoken of an additional constraint upon the civil contempt power. Because the contemnor's imprisonment is said to be justified as a coercive measure, these courts have declared that when the confinement has lost its coercive force it essentially becomes punitive, and the contemnor must then be released since it is well established that criminal penalties may not be imposed in civil contempt proceedings.<sup>256</sup>

The court continued in a footnote:

With respect to this new constraint on the civil contempt power, however, it is not the *purpose* of the confinement that appears to be controlling . . . so much as the notion that the point has been reached where further confinement on the basis of a summary proceeding is abhorrent because the imprisonment is manifestly devoid of coercive effect. At that point, the label, "punitive," is affixed to the imprisonment.<sup>257</sup>

Then the court quoted reasoning from the New Jersey Supreme Court:

It 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. . . . The legal justification for commitment for civil contempt is to secure compliance. Once it appears that the commitment has lost its coercive power, the legal justification for it ends and further confinement *cannot be tolerated*.<sup>258</sup>

Moreover, the Third Circuit in *Braun* actually performed the very analysis that Chadwick was asking it to make. In Section III of its opinion it undertook to resolve "[t]he often perplexing task of determining whether the confinement has essentially become punitive"<sup>259</sup> and, in Section IV it factually determined that it had not.<sup>260</sup> And, it did so despite the fact that Braun had been imprisoned for *less than three months* when he sought his release.

Although the court affirmed the District Court's decision to keep Braun imprisoned for civil contempt, its discussion highlighted the fact that due process *did* have a role to play in its decision. It referred to the Supreme Court holdings in *Jackson* and *McNeil* as "occasions [on which

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256. *In re Jury Investigation* (Appeal of Braun), 600 F.2d 420, 423-24 (3d Cir. 1979).

257. *Id.* at 424 n.12.

258. *Id.* at 424 (quoting *Cantena v. Seidl*, 321 A.2d 225, 228 (N.J. 1974)) (emphasis added).

259. *Braun*, 600 F.2d at 425.

260. *Id.* at 427-28.

the Supreme Court] discuss[ed] the due process implications of continued, non-punitive confinement in contexts closely related to civil contempt."<sup>261</sup> It held that "Braun's continued imprisonment—up to a total of eighteen months—for civil contempt is [not] so devoid of coercive purpose as to justify . . . holding that such confinement violates due process."<sup>262</sup> And, in denying his request for an evidentiary hearing, it noted that the Supreme Court had held in *Morrissey v. Brewer* that "[o]nce it is determined that due process applies, the question remains what process is due."<sup>263</sup>

The Third Circuit, in reversing its District Court and keeping Chadwick in prison, failed to apply, and barely mentioned, these highly material portions of its own prior holding in *Braun*. Neither did it discuss or mention the ramifications of its holding in terms of fundamental fairness, "abhorrent" imprisonment without end for civil contempt, or due process. Had it done so, and not been overly and unfairly narrow as to its conclusion on the Supreme Court view of "lost coercive effect," it likely would have instead affirmed the District Court and freed Chadwick.<sup>264</sup>

The second avenue through which Chadwick could have sought habeas relief, that the state courts had made an "unreasonable determination of the facts" based on the evidence before it, particularly as to his ability to comply, was also unavailable to him.<sup>265</sup> This warrants only brief mention here, because there was not just sufficient but overwhelming evidence to show that he had that ability.<sup>266</sup> Nevertheless, as discussed herein, had the Third Circuit given him the benefits of its own and prior Supreme Court holdings, as well as due process, this second avenue would have been moot.

### B. *Silence By The Supreme Court*

The Supreme Court, as noted above, has never specifically ruled on whether lost coercive effect can provide due process insulation against, or is even material to, civil contempt.<sup>267</sup> With its holding in *Bagwell* that civil contempt will continue "indefinitely until [one] complies," however, there is such a need.<sup>268</sup> Neither in *Bagwell* nor in its most recently

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261. *Id.* at 424–25 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972) and *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245 (1972)).

262. *Braun*, 600 F.2d at 428.

263. *Id.* at 428 n.27 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

264. *See supra* text accompanying notes 230–34.

265. *See* 28 U.S.C. § 2254(d)(2).

266. *See* discussion *supra* Section II.

267. *See* discussion *supra* notes 237–39.

268. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 828 (1994).

decided case involving civil contempt, *Turner*,<sup>269</sup> did it have before it facts which would have given it a fair opportunity to make such a ruling. Yet, one cannot presume that the Court would permit what the literal language in *Bagwell* allows – endless, even life, imprisonment for civil contempt, without a jury trial or proof showing guilt beyond a reasonable doubt. One has, or ought to have, a difficult time not finding such a result to be “abhorrent.”<sup>270</sup>

The power of courts to imprison for civil contempt is as old as the American judicial system.<sup>271</sup> Since the time when the question of whether due process protections were available in federal court to such contemnors was “novel,”<sup>272</sup> no statistics are needed to know that citizens have been, are now, and will in the future be imprisoned for civil contempt. There is a need for the Court to accept a case involving lost coercive effect, as soon as it has the opportunity, so that others are not trapped by the same “Catch-22” in which the Third Circuit ensnared Chadwick. On the one hand, even as one who had the ability to comply with his court order, habeas relief was available to him only if, according to the Third Circuit, the Supreme Court had determined that “lost coercive effect” and due process could terminate his lengthy imprisonment for civil contempt. On the other hand, the Supreme Court had been silent on the subject.

That putting one in a “Catch-22” is considered unfair cannot be disputed. That the Third Circuit in particular already knew that putting one in a “Catch-22” was a problem was evident from its prior holding in *Nami v. Fauver*:

In addition, prisoners are faced with a CATCH 22-style problem: in order to obtain access to legal materials, inmates must submit written requests for specific materials; however, they cannot effectively do so because they lack access to the very legal materials that would advise them which materials to request.<sup>273</sup>

#### VII. “LOST COERCIVE EFFECT,” CIVIL CONTEMPT AND THE DUE PROCESS CLAUSE IN THE CIRCUIT COURTS: A LACK OF UNANIMITY IN CASES OF EXTENDED IMPRISONMENT, OR SILENCE

Predictably, given the silence by the Supreme Court in regard to whether “lost coercive effect” and the due process clause still have roles

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269. See *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

270. *In re Jury Investigation* (Appeal of Braun), 600 F.2d 420, 424 n.12 (3d Cir. 1979).

271. See *supra* text accompanying notes 48–50.

272. See *supra* text accompanying notes 208–10.

273. *Nami v. Fauver*, 82 F.3d 63, 68 (3d Cir. 1996).

to play in extended imprisonment for civil contempt in light of its “indefinitely until he complies” standard in *Bagwell*,<sup>274</sup> there is a lack of unanimity in the Circuit Courts on this issue. Alternatively, they have not rendered decisions on this issue discussing *Bagwell*, or, on the applicability of “lost coercive effect” and due process in civil contempt cases at all.

A. *Circuits Rendering Decisions on “Lost Coercive Effect,”  
Either Pre- or Post-Bagwell*

1. THE SECOND CIRCUIT

- *Soobzokov v. CBS, Inc.*<sup>275</sup> – The continuing punishment of which defendant complained was daily fines and not imprisonment. Because the district judge found that imprisonment “would be totally ineffective in bringing about the desired result,” it should not have imposed a fine.<sup>276</sup>

- *Simkin v. United States*.<sup>277</sup> – As discussed earlier, the central issue in this pre-*Bagwell* case was whether the requisite coercive effect on the contemnor had been lost.

- *Commodity Futures Trading Commission v. Armstrong*<sup>278</sup> – The contemnor in this post-*Bagwell* decision had been in prison for two years for failing to turn over approximately \$14,900,000.00 in corporate assets to a temporary receiver. The court cited *Bagwell*, but *not* its “indefinitely until he complies” language.<sup>279</sup> Its decision centered on whether the coercive effect had been lost, with the court affirming the district court’s finding that it had not. Moreover, the court noted that, “[t]he district court fully recognizes that Armstrong’s confinement ‘cannot last forever.’”<sup>280</sup>

- *Armstrong v. Guccione*<sup>281</sup> – Armstrong returned to the Second Circuit after then having been imprisoned for seven years. The court again cited to *Bagwell* and this time not only included but began its analysis with the Supreme Court’s “indefinitely until he complies” standard.<sup>282</sup> The Second Circuit acknowledged the Third Circuit decision in

274. See *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 828 (1994).

275. 642 F.2d 28 (2d Cir. 1981).

276. *Id.* at 31.

277. 715 F.2d 34 (2d Cir. 1983).

278. 284 F.3d 404 (2d Cir. 2002).

279. *Id.* at 406. The court cited *Bagwell* indirectly, by referencing an order of the District Court that had done so.

280. *Id.* at 406–07 (citing *SEC v. Princeton Econ. Int’l Ltd.*, 152 F. Supp. 2d 456, 463 (S.D.N.Y. 2001)).

281. 470 F.3d 89 (2d Cir. 2006).

282. *Id.* at 101.

*Chadwick*, and the Supreme Court's decision in *Maggio*, holding that an inference arose in most cases that after long confinement the coercive effect had been lost.<sup>283</sup> However, as the court stated:

Armstrong's case, however, is not the ordinary case. Fifteen million dollars is a life-altering amount of money. We think that [this amount] is a significant factor to the extent that it would lead the contemnor to conclude that the risk of continued incarceration is worth the potential benefit of securing both his freedom and the concealed property.<sup>284</sup>

As did the Third Circuit in *Chadwick*, the Second Circuit found that *Maggio* did not stand for the proposition that "upon the passage of some specific period of coercive imprisonment that fails to induce compliance, an inference must be drawn of an inability to comply."<sup>285</sup> The court concluded by remanding for a new hearing on whether Armstrong had the ability to comply, which he denied, and, "on the seventh anniversary of [his] confinement, his case deserves a fresh look by a different pair of eyes."<sup>286</sup>

In *Armstrong*, the Second Circuit moved close to, but did not fully align itself with, the Third Circuit holding in *Chadwick*. On the one hand, it found seven years of imprisonment insufficient to show "lost coercive effect." On the other hand, it did not go as far as the Third Circuit and hold that "indefinitely until he complies" in *Bagwell* can never mean "indefinitely until he complies or it becomes apparent that he is never going to comply."<sup>287</sup> Its line was hard, but not as rigid as the Third Circuit's.

## 2. THE THIRD CIRCUIT

• *United States v. Harris*<sup>288</sup> – Following its decision in *Chadwick* in 2002, the court, in 2009, found itself facing many of the same issues. In *Harris*, the civil contemnor had been in prison for five years, and was making the same arguments as had *Chadwick* regarding his sentence: it had lost its coercive effect, his punishment had over time therefore turned punitive, and due process required him to be afforded a jury trial and other procedural protections consistent with criminal contempt.<sup>289</sup> One difference was that, unlike *Chadwick*, his contempt was based on his refusal to *stop* doing something, to wit: sending out bogus liens and

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283. See *id.* at 110–11.

284. *Id.* at 111.

285. *Id.*

286. *Id.* at 113.

287. See discussion *supra* at notes 172–75.

288. 582 F.3d 512 (3d Cir. 2009).

289. See *id.* at 515.



judgments against judges and prosecutors involved in his underlying criminal prosecution and conviction for conspiracy and fraud, in violation of the District Court order to the contrary.<sup>290</sup>

In the three respects that mattered, the majority opinion was a replay of the court's decision in *Chadwick*. It recited verbatim much of its prior analysis of *Bagwell* and the Supreme Court's "indefinitely until he complies" language, including Judge (now Justice) Alito's italicized emphasis of "*until he complies*," and stated that "We fully agree with [it] . . . ." <sup>291</sup> Second, it distinguished its prior decision in *In re Grand Jury Investigation (Appeal of Braun)* as involving a contemnor held in contempt and imprisoned under the Recalcitrant Witness Statute, which Harris was not (and neither was *Chadwick*).<sup>292</sup> Finally, it affirmed the District Court's order finding Harris to still be in contempt of its original order.<sup>293</sup>

The case was made easier for the Third Circuit because Harris had continued to send out the bogus documents, causing "repeated and discrete violations of the underlying order."<sup>294</sup> It was all too much for the court, such that it held, "we simply cannot countenance a situation where a contemnor's insistence on continuing his contumacious conduct inures to his benefit, and we surely do not believe that the Constitution requires such a result."<sup>295</sup>

The concurring opinion highlighted both the flaws and the unfairness in the majority opinion, against which the majority's authors attempted to provide insulation by stating, "[w]hile we can conceive of circumstances where indefinite detention pursuant to a court's civil contempt authority may be so attenuated from its original, valid purpose as to constitute a due process violation, we see no such violation here."<sup>296</sup> However, the court did not elaborate on or even describe generally what its "conception" entailed. As apparent insulation, it was hardly weatherproof.

Although concurring in the result, Judge DuBois rejected much of the majority's analysis. He termed its reliance on *Bagwell*'s "indefinitely until he complies" language to be "misplaced," because:

When read in context, the language in *Bagwell* does not mean that civil contempt can continue indefinitely without raising due process concerns. In fact, *Bagwell* neither endorses nor precludes the exis-

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290. See *id.* at 513–14.

291. *Id.* at 518.

292. *Id.* at 517 (citing 28 U.S.C. § 1826 (2006)).

293. *Id.* at 520.

294. *Id.* at 519.

295. *Id.* at 520.

296. *Id.*

tence of due process limitations on the continuation of civil contempt confinement because that issue was not before the Court. *Bagwell* dealt with the characterization of a contempt sanction as civil or criminal *at its imposition*; the issue was not the termination of an otherwise lawful coercive sanction. Moreover, *Bagwell* addressed the imposition of fines, not incarceration, and discussed coercive incarceration for comparative purposes only. The *Bagwell* Court had no occasion to consider whether there existed any limitations—due process or otherwise—on the continuation of indefinite civil contempt confinement.<sup>297</sup>

Neither in *Chadwick* nor *Harris* had the Third Circuit analyzed *Bagwell* in these terms. To the contrary, it seized in both cases on essentially three words—“until he complies”—to the exclusion of any meaningful consideration of what due process rights were owed Harris (and Chadwick). These three words are found in a holding whose facts did not concern (1) imprisonment, (2) extended or ongoing punishment, be it fines or imprisonment, or (3) the lost coercive effect of either (1) or (2) as bearing on due process. The Third Circuit was unduly narrow in its view in both cases, and unfairly reliant on *Bagwell* given the inapplicability of its facts to those before the court.

The second way in which the majority was incorrect, Judge DuBois wrote, was its attempt to distinguish *Braun*.<sup>298</sup> Despite the majority’s belief that *Braun*’s due process analysis was dicta because it arose under the Recalcitrant Witness Statute, all three of its parts were necessary to its holding.<sup>299</sup> Additionally, “[t]he due process standard articulated and applied in *Braun* has not been overruled by the Third Circuit sitting *en banc*, and there is no basis for arguing that the Supreme Court abrogated the standard in *Bagwell*.”<sup>300</sup>

In the clearest language making the point that the author could find in the case law, Judge DuBois stated the following:

In civil contempt cases not covered by the Recalcitrant Witness Statute, such as this one, due process is the only existing limitation on the continuation of “unconscionable, indeterminate periods of confinement,” and there is no reason to deny due process protection to a civil contemnor merely because he “carries the keys of his prison in his own pocket.”

. . . I firmly agree with the majority that an individual should not be allowed to “thumb its nose” at the district court’s authority. However, civil contempt confinement may not be continued indefinitely on that

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297. *Id.* at 522 (DuBois, J., concurring) (internal citations omitted).

298. *See id.* at 522 (DuBois, J., concurring).

299. *See id.* at 517–18 (“[A]ny language in *Braun* indicating our approval of the “no substantial likelihood” test . . . [is] dicta.”).

300. *Id.* at 523 (DuBois, J., concurring).

ground alone.<sup>301</sup>

This concurrence would have served far better as the majority opinion in *Chadwick* and, although the facts of the case would not have caused the result to change, in *Harris* as well. At the least, it was truer to the facts of *Bagwell*, and far more advancing of due process protections for those imprisoned for civil contempt.

### 3. THE SEVENTH CIRCUIT

• *United States v. Lippitt*<sup>302</sup> – Here, the contemnor was held in contempt for failing to sign over life insurance payments to the government to pay a fine that was imposed along with 188 months of imprisonment for conspiracy to manufacture methamphetamine.<sup>303</sup> As a result, the court added forty-seven months to his sentence. Lippitt appealed, claiming that this violated the Double Jeopardy Clause.<sup>304</sup> The court first determined that his contempt was civil, thus barring his double jeopardy claim.<sup>305</sup>

It cited *Bagwell*, including its “indefinitely until he complies” language, but held that “does not end the inquiry, for what starts as coercive can over time can become punitive.”<sup>306</sup> Then, notwithstanding this language, it proceeded to frame the issue by referring to *Lambert v. State of Montana*, a Ninth Circuit, pre-*Bagwell* case.<sup>307</sup> Ultimately, the court affirmed the District Court ruling that Lippitt’s civil contempt sentence had not lost its coercive force, and that his imprisonment thereunder would remain in effect.<sup>308</sup>

Although the court acknowledged the language in *Bagwell*, it continued to determine whether his sentence had lost its coercive effect and turned punitive, thus placing in it in direct conflict with the Third Circuit on this issue.<sup>309</sup>

### 4. THE NINTH CIRCUIT

• *Lambert v. Montana*<sup>310</sup> – In answering the “novel question” of whether due process considerations may affect the duration of imprison-

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301. *Id.* (internal citations omitted).

302. 180 F.3d 873 (7th Cir. 1999).

303. *Id.* at 874–75.

304. *Id.* at 876.

305. *Id.* at 876–77.

306. *Id.* at 877.

307. *Id.* at 877–78 (citing *Lambert v. Montana*, 545 F.2d 87 (9th Cir. 1976)).

308. *See Lippitt*, 180 F.3d at 879.

309. *See Chadwick v. Janecka*, 312 F.3d 597 (3d Cir. 2002); *see also United States v. Harris*, 582 F.3d 512 (3d Cir. 2009).

310. 545 F.2d 87 (9th Cir. 1976).

ment for civil contempt and, as discussed above, doing so emphatically in the affirmative, the Ninth Circuit stands with the Seventh Circuit in direct conflict with the Third Circuit.<sup>311</sup>

## 5. THE ELEVENTH CIRCUIT

• *Lawrence v. Goldberg*<sup>312</sup> – In bankruptcy court, Lawrence was held in civil contempt for refusing to turn over trust assets.<sup>313</sup> By the time the Eleventh Circuit decided his appeal, he had been imprisoned for more than two years. Lawrence challenged the lower court order chiefly on the basis that it was impossible for him to comply.<sup>314</sup> The Eleventh Circuit disagreed and affirmed. However, in language which aligned it with the Seventh and Ninth Circuits as discussed above, it “remind[ed] the district and bankruptcy courts” of its previous holding: “‘When civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor’s due process rights.’ . . . We are mindful that ‘although incarceration for civil contempt may continue indefinitely, it cannot last forever.’”<sup>315</sup> The court made no mention of *Bagwell*, decided eight years earlier.

### B. *The Non-Ruling Courts*

The First,<sup>316</sup> Fourth, Fifth, Sixth, Eighth, Tenth, and District of Columbia Circuit Courts have not yet ruled either on the effect of *Bagwell*’s language on lost coercive effect and due process protections in cases involving imprisonment for civil contempt, or, before *Bagwell* on such issues.

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311. *Id.* at 88.

312. 279 F.3d 1294 (11th Cir. 2002).

313. *Id.* at 1297.

314. *Id.*

315. *Id.* at 1300 (quoting *Commodity Futures Trading Comm’n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1530 (11th Cir. 1992) and *United States v. Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985)).

316. The First Circuit decided *In re Grand Jury Proceedings*, No. 94-1137, 1994 U.S. App. LEXIS 4132 (1st Cir. Mar. 8, 1994), three months before *Bagwell*. There, the contemnor had been sentenced to seventy-eight months in prison for illegal gambling, which was stayed during the duration of his civil contempt for refusing to testify before a grand jury. While the court mentioned “lost coercive effect,” the thrust of its analysis was directed to the civil contemnor’s claim that the district court had failed to make an “individualized determination that there was still a realistic possibility that continued incarceration would likely result in compliance.” *Id.* at \*4. Moreover, his only request was for remand, not for release. Thus, the focus of the court was on what the district court had reviewed particularly as to him. It held that there was no evidence “that the court here considered any factors *other than* the continued impact of incarceration on appellant.” *Id.* at \*5. The court did not mention due process. For these reasons, the author is not including the First Circuit as among those that have ruled on a Chadwick-type scenario, and with similar arguments.

### VIII. THE NEXT H. BEATTY CHADWICK: WILL THIS CONTEMNOR RECEIVE DUE PROCESS, OR, BE REFUSED?

As of today, there will be another H. Beatty Chadwick in the form of a contemnor who faces extended imprisonment for civil contempt, without a jury trial, by the hand of one or possibly several judges, but without a guarantee or even the application of due process. There likely will be several, and possibly even many. It is unlikely that, as in Chadwick, they will be attorneys and therefore able to represent themselves without having to incur substantial legal fees and costs to pursue their freedom.

Two Circuit Courts have taken positions that will allow what happened to Chadwick. Eight more are silent on the subject. As for the fifty states, a review of their civil contempt schemes shows at most four who, by definition, would not disallow it. In Wisconsin, one who disobeys a court order may be imprisoned for "only so long as the person is committing the contempt of court or 6 months, whichever is the shorter period."<sup>317</sup> In Texas, "notwithstanding any other law, a person may not be confined for [civil contempt] longer than . . . the lesser of 18 months or the period from the date of confinement to the date the person complies with the court order that was the basis of the finding of contempt . . . ."<sup>318</sup>

In providing more flexible but still meaningful due process protection for civil contemnors, Washington has explicitly stated that imprisonment for civil contempt of an order "may extend only so long as it serves a coercive purpose."<sup>319</sup> And, in identical language, so has Wyoming.<sup>320</sup>

As to the remaining forty-six states, and what limitations they prescribe for imprisonment for civil contempt, the following language variations<sup>321</sup> capture by far most of what their statutes or rules of procedure

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317. See WIS. STAT. § 785.04(1)(b) (2011); see also *Frisch v. Henrichs*, 736 N.W.2d 85, 99–100 (Wis. 2007) (citing *Larsen v. Larsen*, 478 N.W.2d 18 (Wis. 1992), and noting that this provision eliminated the requirement that civil contempt situations be purgeable)).

318. TEX. GOV'T CODE ANN. § 21.002(h)(2) (West 2011).

319. WASH. REV. CODE § 7.21.030(2)(a) (2011).

320. WYO. R. CRIM. P. 42.1(b)(1) (This language is located in this rule of criminal procedure, which states in pertinent part, "Coercive Remedies. If, after notice and hearing, the court finds that a person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in civil contempt of court and impose one or more of the following remedial sanctions: (1) Imprisonment which may extend only so long as it serves a coercive purpose.").

321. While these examples are not intended to be exhaustive of all forty-six states, they do represent most of what these states' statutes or rules provide on this issue, subject only to minor differences with those omitted.

provide: “until that person purges himself or herself,”<sup>322</sup> until performance of “the act so ordered,”<sup>323</sup> “until he has performed it,”<sup>324</sup> “until the rule, order, or judgment shall be complied with,”<sup>325</sup> and, “as long as the civil contempt continues without further hearing.”<sup>326</sup>

On the other hand, in Florida there is no statement of even a general limitation: “Every court may punish contempts against it whether such contempts be direct, indirect, or constructive, and in any such proceeding the court shall proceed to hear and determine all questions of law and fact.”<sup>327</sup>

The Due Process Clause, whether in the Fifth Amendment<sup>328</sup> applicable to the federal government, or the Fourteenth Amendment<sup>329</sup> applicable to the states, should have a certain and prominent part to play for those imprisoned for civil contempt. As has been shown in this article, however, with eight Circuit Courts and forty-six states providing no firm protection to date, it has enjoyed far too small a role.

A contemnor’s need for its protection is great. A brief recap is warranted as a reminder that even the author of the opinion in *Bagwell*, Justice Blackmun, warned of the dangers of contempt—that the power brought to bear against such a person is “uniquely . . . liable to abuse.”<sup>330</sup> The “offended judge [is] solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct,”<sup>331</sup> and, that contempt “strikes at the most vulnerable and human qualities of a judge’s temperament”<sup>332</sup> and “summons forth . . . the prospect of ‘the most tyrannical licentiousness.’”<sup>333</sup> And, as was stated concisely but eloquently in the concurring opinion in *Harris*, “In civil contempt cases not covered by the Recalcitrant Witness Statute, such as this one, due process is the *only* existing limitation on the continuation

322. ALA. R. CIV. P. 70A(e)(2).

323. COLO. R. CIV. PRO. 107(d)(2).

324. IDAHO CODE ANN. § 7-611 (2011).

325. MISS. CODE ANN. § 9-1-17 (West 2011).

326. N.C. GEN. STAT. § 5A-21(b) (2011).

327. FLA. STAT. § 38.22 (2011). And, nothing in FLA. R. CIV. P. 1.380, “Sanctions”, does more than mention “contempt” as an available remedy.

328. U.S. CONST. amend V (“nor shall any person be . . . deprived of life, liberty, or property, without due process of law”).

329. See U.S. CONST. amend. XIV, § 1.

330. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994) (quoting *Bloom v. Illinois*, 391 U.S. 194 (1968)).

331. *Bagwell*, 512 U.S. at 831.

332. *Id.* (quoting *Bloom*, 391 U.S. at 202).

333. *Bagwell*, 512 U.S. at 831 (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 822 (1987) (Scalia, J., concurring)).

of unconscionable, indeterminate periods of confinement . . . .”<sup>334</sup>

The following, the author respectfully suggests, would serve to provide the necessary additional protection:

1. The Supreme Court should, at its earliest opportunity, harmonize its prior holdings that coercive effect or purpose is the hallmark of civil contempt<sup>335</sup> with its “indefinitely until he complies” language in *Bagwell*.<sup>336</sup> It should clarify that such language was not intended to apply literally to a case of continuing imprisonment or fines, because it would be “abhorrent”<sup>337</sup> to hold that one could be imprisoned for life or fined regularly without end without benefit of trial by jury and other criminal protections. It should hold that lost coercive effect of the continuing punishment, if found by the reviewing court, is an appropriate due process basis upon which such punishment for civil contempt<sup>338</sup> should be ended; and, that “there is no reason to deny due process protection to a civil contemnor merely because he ‘carries the keys of his prison in his own pocket.’”<sup>339</sup> The alternative would be to hold that even though a civil contemnor had the ability to comply, a life sentence could be appropriate, and notwithstanding all of the dangers inherent in the exercise of the contempt power.<sup>340</sup>

2. While the Court should avoid any temporal limitations on contempt because “it would lead the contemnor to conclude that the risk of continued incarceration is worth the potential benefit of securing both his freedom and the concealed property,”<sup>341</sup> it should create a presumption as to when coercive effect of that punishment has been lost. The author suggests that an appropriate point in time for its application would be two years after imposition of punishment for violation of the underlying order. Such a presumption would be rebuttable, with the burden being on the party opposing termination of the punishment to show by the preponderance of the evidence that the coercive effect had not been lost. As this would still be part of a civil contempt proceeding, and as is currently true, neither a jury trial<sup>342</sup> nor state-appointed counsel<sup>343</sup>

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334. *United States v. Harris*, 582 F.3d 512, 523 (3d Cir. 2009) (DuBois, J., concurring) (emphasis added) (internal citations omitted).

335. See cases cited *supra* note 237.

336. *Bagwell*, 512 U.S. at 828.

337. See *In re Grand Jury Investigation* (Appeal of Braun), 600 F.2d 420, 424 (3d Cir. 1979).

338. The fact that a contemnor is released from confinement for civil contempt does not bar his then being charged with criminal contempt “even if [the civil and criminal proceedings] arise out of the same factual setting.” *United States v. Marquardo*, 149 F.3d 36, 41 (1st Cir. 1998).

339. *Harris*, 582 F.3d at 523 (DuBois, J., concurring).

340. See *Bagwell*, 512 U.S. at 831.

341. *Armstrong v. Guccione*, 470 F.3d 89, 111 (2d Cir. 2006).

342. See *Shillitani v. United States*, 384 U.S. 364, 365 (1966); discussion *supra* notes 53–55.

343. See *Cooke v. United States* 267 U.S. 517, 534 (1925). But see *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011) (where the Supreme Court held, in analyzing whether the provision of

would be provided.

Such a presumption would fairly satisfy the important interest of courts in seeing that their orders are not flouted without serious consequences. Two years in prison, away from one's family and friends combined with the numerous other detriments to be incurred, is a serious consequence. As a presumption, and not a temporal limitation, it would not automatically stand in the way of continued punishment beyond the two-year period.

Finally, it would give the opposing civil party ample time to discover either the location of what the contemnor is refusing to provide or evidence sufficient to rebut the presumption.

3. If the Supreme Court is not willing to provide the above protections, then state courts, state legislatures, and Circuit Courts should implement them. The exception, of course, would be harmonizing the Supreme Court's language in *Bagwell* with its prior holdings on coercive effect. State legislatures, in particular, should take a significant step forward by following the lead of Washington and Wyoming<sup>344</sup> and requiring a continuing coercive effect in order to continue punishment for civil contempt.

4. There is wisdom in the approach of the Second Circuit, as in *Armstrong*, in requiring a "fresh look by a different pair of eyes"<sup>345</sup> where a civil contemnor has endured continued punishment. The court did not specify its reasons, perhaps because they are obvious. If justification is needed, it is quickly found in the potential for judicial abuse in contempt cases described by Justice Blackmun, and the benefits of guarding against them.<sup>346</sup>

In *Armstrong*, the "fresh look" was ordered after seven years' imprisonment. This seems too long. A fairer limit would be four years of continued punishment, be it imprisonment or fines, at which point the contemnor's case should be assigned to a different judge. Four years is twice the amount of time recommended above for the presumption of lost coercive effect to arise. And, this time period would not cause a "revolving door" of judicial assignments for any single contemnor.

5. Where the Supreme Court has been silent as to the validity of a basis argued for statutory habeas relief,<sup>347</sup> the ability to obtain such

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counsel to a contemnor imprisoned for failure to pay child support was required by the Due Process clause, that such could be required in civil contempt proceedings depending on the nature of the case).

344. See discussion *supra* at notes 319–20.

345. See *Armstrong*, 470 F.3d at 113.

346. See *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994).

347. 28 U.S.C. § 2254(d)(1) (2006); see discussion *supra* accompanying notes 230–34.



relief, as the author has argued occurred in Chadwick's case, is unfairly lost. The statute, section 2254, provides in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.<sup>348</sup>

To avoid "opening the floodgates" to habeas petitioners, or anything approaching such an event, any expansion of this statute should be made only after careful consideration, and in the most narrow manner possible consistent with achieving the purpose of the change. However, there should be an interest in not having contemnors such as Chadwick and other habeas petitioners placed in "Catch-22" situations due simply to silence by the Supreme Court. Especially when there may be Circuit Court law available to them that would support their habeas petitions. Therefore, to allow courts to consider the grant of habeas relief when the Supreme Court has been silent, the author proposes the following:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States *or, in the absence of any decision by the Supreme Court material to the matter in question, by the Circuit Court of Appeal in whose geographical jurisdiction the State court exists.*

## IX. CONCLUSION

Regardless of whether Chadwick was a modern Odysseus or a classic fraud, the judicial system failed him in all the ways described above. The substantial likelihood that he was very far from blameless does not change the fact that he was entitled to the benefits of the due process clause. No legal authority need be cited for the proposition that even those who commit the most heinous crimes will be provided such protection.

That he should have been put in prison for failure to comply with

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348. 28 U.S.C. § 2254(d)(1)–(2) (2006).

his court order is hardly doubtful. That he should have stayed in prison for fourteen years is, to use the same and very apt descriptor provided by the Third Circuit itself, “abhorrent.” By comparison, in one way at least, Odysseus was fortunate. He was able to return to Ithaca after only ten years.