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PROCEDURAL DUE PROCESS AND THE RIGHT TO APPOINTED COUNSEL IN CIVIL CONTEMPT PROCEEDINGS

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I. INTRODUCTION

In the hierarchy of human values, none is more cherished than the right of personal liberty, a right embodied within the more general right to be let alone.[1] This right "inheres in the very nature of man,"[2] and commands such respect in our constitutional scheme that the state is prohibited from interfering with the individual's freedom of action without a legitimate objective[3] and a substantial purpose,[4] and only then if the interference is pursuant to the requirements of due process.[5] Moreover, such interference may not be arbitrary,[6] or

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1. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

2. Lewis v. City of Grand Rapids, 222 F. Supp. 349, 386 (W.D. Mich. 1963), *rev'd on other grounds*, 356 F.2d 276 (6th Cir.), *cert. denied*, 385 U.S. 838 (1966).

3. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

4. *See* Police Dep't of Chicago v. Mosely, 408 U.S. 92, 101 n.8 (1972); Dixon v. McMullen, 527 F. Supp. 711, 722-23 (N.D. Tex. 1981).

5. Baker v. McCollan, 443 U.S. 137, 145 (1979); Meachum v. Fano, 427 U.S. 215, 223 (1976). *See also* Mastin v. Fellerhoff, 526 F. Supp. 969, 972-73 (S.D. Ohio 1981); Young v. Whitworth, 522 F. Supp. 759, 762 (S.D. Ohio 1981).

6. *See* Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government. . . ."); West

purposeless,[7] but rather it must be reasonable, and in furtherance of a legitimate state interest.[8]

This right of personal liberty encompasses the essential right to physical liberty,[9] and is a protected liberty interest under due process.[10] Accordingly, before the government is permitted to infringe upon an individual's interest in his liberty, it must act within the bounds of procedures that are designed to insure that the state acts fairly and pursuant to reasonable standards.[11]

This article will analyze the right to physical liberty within the context of a proceeding for civil contempt, and, in particular, the need for appointed counsel for indigent parents threatened with incarceration as a result of child-support contempt hearings. This article first summarizes the contempt powers of courts, distinguishes between civil and criminal contempts, and discusses the criteria for, and defenses to, a finding of civil contempt. Second, it reviews the meaning of, and need for, procedural due process, and examines the factors entering into the due process equation. Third, it analyzes the right to appointed counsel for indigent defendants in civil contempt proceedings who are deprived of their physical liberty, argues that there is no meaningful distinction, for constitutional purposes, between a criminal prosecution that leads to incarceration and a prosecution for civil contempt that results in imprisonment, and concludes that such a right exists and is of constitutional dimension. Finally, it proposes a standard for the appointment of counsel in civil contempt hearings.

II. THE CONTEMPT POWER

A. *Historical Development and Modern Principles*

The power of courts to punish contempts[12] is of ancient origin,

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Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923); Dwen v. Barry, 483 F.2d 1126, 1130 (2d Cir. 1973).

7. *See* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

8. *See* Richards v. Thurston, 424 F.2d 1281, 1284 (1st Cir. 1970).

9. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

10. *See, e.g.*, Mastin v. Fellerhoff, 526 F. Supp. 969, 972 (S.D. Ohio 1981); Young v. Whitworth, 522 F. Supp. 759, 762 (S.D. Ohio 1981).

11. Major v. DeFrench, 286 S.E.2d 688, 695 (W. Va. 1982). *See also* Mathews v. Eldridge, 424 U.S. 319, 332 (1976); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161-62 (1951) (Frankfurter, J., concurring).

12. A contempt of court is generally defined as "conduct calculated to embarrass, hinder or obstruct a court in its administration of justice or to derogate from its authority or dignity, or bring the administration of law into disrepute." *In re* Estate of Melody, 42 Ill. 2d 451, 452, 248 N.E.2d 104, 105 (1969). *See* State v. Jackson, 147 Conn. 167, 168-69,

with roots stretching back to the early days of the English crown and the common law. It began as a means of assuring the efficiency and dignity of the sovereign, and evolved from the divine right of kings. As society grew and diversified, it became necessary for the monarchy to exercise its governmental powers through representatives. Thus, the contempt power was employed by the courts of early England as a means of punishing a presumed contempt or disrespect of the king's authority. In this way, the contempt power was assumed by the courts as a means of vindicating the majesty and authority of the crown, and of protecting their own existence.[13] Gradually, with the rise in power of the courts in England, and their growing independence of the crown, the authority to punish for contempt was considered inherent in the judiciary.[14] As such, it represented a step in the judicial process providing a means for administering justice and securing legal rights.[15]

Lying at the foundation of our system of government is the right of courts to conduct their business in an untrammeled manner. To implement this right, courts of necessity must possess the power to punish for contempt "when conduct tends directly to prevent the discharge of their functions."[16] This power, however, may be abused, and should not be exerted to squelch or punish courageous and forthright conduct that does not have an impact upon the orderly administration of justice. Conversely, it should be employed to check improprieties and attempts to resist or defy the procedural and substantive integrity of the judicial process.[17]

The contempt power, or the power to punish, is inherent in all courts. Its purpose is twofold: to vindicate the power and dignity of a court, and to secure to party litigants the legal rights awarded by a court.[18] By preserving order in judicial proceedings and enforcing the judgments, orders, and processes of the courts, its existence is

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158 A.2d 166, 167 (1960); Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161, 162-64 (1908). *See also* R. GOLDFARB, THE CONTEMPT POWER 1 (1963).

13. *See* State v. Roll, 267 Md. 714, 726-27, 298 A.2d 867, 875 (1973); R. GOLDFARB, *supra* note 12, at 9-14.

14. *See* State v. Roll, 267 Md. 714, 727, 298 A.2d 867, 875 (1973); R. GOLDFARB, *supra* note 12, at 12-13.

15. R. GOLDFARB, *supra* note 12, at 13.

16. Wood v. Georgia, 370 U.S. 375, 383 (1962). *See* Bridges v. California, 314 U.S. 252, 266 (1941).

17. *See* Sacher v. United States, 343 U.S. 1, 8-9, 12 (1952).

18. Bessette v. W.B. Conkey Co., 194 U.S. 324, 326, 327 (1904). *See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2960, at 581-82 (1973 & 1982 Supp.).

essential to the due administration of justice.[19] Thus, a court will properly exercise its contempt power to punish a party guilty of disrespect to the court or its order, and to compel his performance of some duty or act required of him by the court, and which he has refused to discharge.[20]

B. *Types of Contempt*

Broadly stated, a contempt is any disobedience of the orders and rules of a court that possesses the power to punish for such disobedience.[21] Although a contempt may be civil or criminal in nature,[22] conduct, in fact, may amount to both civil and criminal contempt,[23] thereby justifying both coercive and punitive sanctions. As a result, a particular act may have the characteristics of both.[24] Since this is so, some courts have characterized contempt proceedings as "*sui generis*,"[25] in that they may take on the characteristics of both civil and criminal proceedings.[26] It is more accurate, however, to retain the civil-criminal classification for contempt cases, and to interpret the *sui generis* designation as meaning only that there are instances in which special rules must apply to contempt proceedings.[27] For example, in contrast to other criminal proceedings, a prosecution for summary criminal contempt need not be initiated by an indictment or information,[28] nor is further evidence or the aid of a jury constitutionally required in such a proceeding.[29]

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19. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874). *See* Myers v. United States, 264 U.S. 95, 103 (1924); *In re* Manufacturers Trading Corp., 194 F.2d 948, 956 (6th Cir. 1952).

20. *In re* Chiles, 89 U.S. (22 Wall.) 157, 168 (1875).

21. State v. Jackson, 147 Conn. 167, 168-69, 158 A.2d 166, 167 (1960). *See* 11 C. WRIGHT & A. MILLER, *supra* note 18, at 581.

22. Tobey v. Tobey, 165 Conn. 742, 745, 345 A.2d 21, 24 (1974); Spalter v. Wayne Circuit Judge, 35 Mich. App. 156, 160, 192 N.W.2d 347, 349 (1971).

23. Gombers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911); Bessette v. W.B. Conkey Co., 194 U.S. 324, 329 (1904); 11 C. WRIGHT & A. MILLER, *supra* note 18, at 583.

24. United States v. United Mine Workers, 330 U.S. 258, 298-99 (1947).

25. Myers v. United States, 264 U.S. 95, 103 (1924); Bessette v. W.B. Conkey Co., 194 U.S. 324, 326 (1904); *In re* Manufacturers Trading Corp., 194 F.2d 948, 956 (6th Cir. 1952). *See* Blackmer v. United States, 284 U.S. 421, 440 (1932).

26. People *ex rel.* Chicago Bar Ass'n v. Barasch, 21 Ill. 2d 407, 409, 173 N.E.2d 417, 418 (1961).

27. *See* Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 235 (1971).

28. People v. Thor, 6 Ill. App. 3d 1045, 1049, 286 N.E.2d 769, 772 (Dist.-Ct. 1972); Newby v. District Court, 259 Iowa 1330, 1342, 147 N.W.2d 886, 894 (1967); Dobbs, *supra* note 27, at 221, 235. *See Ex parte* Terry, 128 U.S. 289, 307-09, 313-14 (1888).

29. Fisher v. Pace, 336 U.S. 155, 159-60 (1949); Horn v. District Court, 647 P.2d 1368, 1375 (Wyo. 1982). *See* Beale, *supra* note 12, at 172.

Although the line of demarcation between civil and criminal contempt is not always distinct, or even perceptible,[30] and sanctions for both types of contempt may be by way of either imprisonment or fine,[31] certain distinctions have emerged from an analysis of the authorities and may be summarized.

A civil contempt arises from a private wrong in which one party litigant causes harm to another litigant by failing to comply with a court order. Its purpose is to compensate the injured party, or to coerce the recalcitrant party into compliance by invoking the court's power to impose fines or incarceration. Thus, the defendant is given the choice of either performing the required act or paying the penalty.[32] He carries, in effect, "the keys of [his] prison in [his] own pockets."[33] Accordingly, a contempt will be classified as civil when the punishment is wholly remedial, serves only the purposes of the complaining party, and is not imposed as a deterrent to offenses against the public.[34]

In contrast, a criminal contempt arises from an individual's interference with the court's authority or dignity and is perceived to be a public wrong. Here, the imposition of a penalty in the form of a fine or imprisonment is punitive, rather than remedial in nature, and serves to vindicate the authority of the court.[35] Accordingly, compli-

30. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911); Board of Educ. v. Shelton Educ. Ass'n, 173 Conn. 81, 85, 376 A.2d 1080, 1082 (1977); Board of Junior College v. Cook County College Teachers Union, 126 Ill. App. 2d 418, 427, 262 N.E.2d 125, 129 (Dist. Ct. 1970), *cert. denied*, 402 U.S. 998 (1971); State v. Roll, 267 Md. 714, 728, 298 A.2d 867, 876 (1973); State v. Kilbane, 61 Ohio St. 2d 201, 204-05, 400 N.E.2d 386, 390 (1980); 11 C. WRIGHT & A. MILLER, *supra* note 18, at 583.

31. *See* McTigue v. New London Educ. Ass'n, 164 Conn. 348, 352-55, 321 A.2d 462, 464-65 (1973); Board of Junior College v. Cook County College Teachers Union, 126 Ill. App. 2d 418, 427-28, 262 N.E.2d 125, 129 (Dist. Ct. 1970), *cert. denied*, 402 U.S. 998 (1971).

32. *See* United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947); Wolfe v. Coleman, 681 F.2d 1302, 1306 (11th Cir. 1982); *In re* Irving, 600 F.2d 1027, 1031 (2d Cir.), *cert. denied sub nom.* DiLapi v. Irving, 444 U.S. 866 (1979); Duval v. Duval, 114 N.H. 422, 425, 322 A.2d 1, 3 (1974); State v. Kilbane, 61 Ohio St. 2d 201, 204-05, 206-07, 400 N.E.2d 386, 390, 391 (1980); *Ex parte* Wilson, 559 S.W.2d 698, 699 (Tex. Civ. App. 1977).

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

34. McCrone v. United States, 307 U.S. 61, 64 (1939); *See* Nye v. United States, 313 U.S. 33, 42 (1941); Horn v. District Court, 647 P.2d 1368, 1372-73 (Wyo. 1982). *See also In re* Irving, 600 F.2d 1027, 1031 (2d Cir.), *cert. denied sub nom.* DiLapi v. Irving, 444 U.S. 866 (1979).

35. Wolfe v. Coleman, 681 F.2d 1302, 1306 (11th Cir. 1982); Duval v. Duval, 114 N.H. 422, 425, 322 A.2d 1, 3 (1974); State v. Kilbane, 61 Ohio St. 2d 201, 204-05, 207, 400 N.E.2d 386, 390 (1980); *Ex parte* Wilson, 559 S.W.2d 698, 699 (Tex. Civ. App. 1977). *See* United States v. United Mine Workers, 330 U.S. 258, 302-03 (1947); *In re* Irving, 600 F.2d 1027, 1031 (2d Cir.), *cert. denied sub nom.* DiLapi v. Irving, 444 U.S. 866 (1979);

ance with the court's mandate will not lift or remove the sanction imposed.[36]

In sum, a civil contempt is primarily coercive in nature and is intended to compel compliance with the lawful orders of a court. Conversely, a criminal contempt is punitive in character and is employed to vindicate the authority and dignity of the law and the court. Thus, the primary purpose of civil contempt is to coerce, while the principal function of criminal contempt is to punish.[37] Consequently, the proper test for distinguishing a sanction for civil contempt from that for criminal contempt is to ascertain the primary objective of the court in imposing sentence.[38] In this equation, a court's characterization of a contempt proceeding as being either civil or criminal, while relevant, will not be conclusive and will be but one factor to be considered in determining the nature of such a proceeding.[39] Ultimately, a correct determination will turn on the

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Horn v. District Court, 647 P.2d 1368, 1377 (Wyo. 1982). *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 702, at 809 (1982).

36. *In re* Irving, 600 F.2d 1027, 1031 (2d Cir.), *cert. denied sub nom.* DiLapi v. Irving, 444 U.S. 866 (1979); 11 C. WRIGHT & A. MILLER, *supra* note 18, at § 2960, at 585. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442-43 (1911).

37. United States v. Professional Air Traffic Controllers Org., 678 F.2d 1, 4 (1st Cir. 1982); *In re* Dinnan, 625 F.2d 1146, 1149 (5th Cir. 1980) (per curiam); *In re* Stewart, 571 F.2d 958, 963 (5th Cir. 1978); Gorham v. City of New Haven, 82 Conn. 153, 155, 72 A. 1012, 1014 (1909); *In re* S.L.T., 180 So. 2d 374, 378-79 (Fla. Dist. Ct. App. 1965); People *ex rel.* Chicago Bar Ass'n v. Barasch, 21 Ill. 2d 407, 409, 173 N.E.2d 417, 418 (1961); Small v. Small, 413 A.2d 1318, 1322 (Me. 1980); State v. Kilbane, 61 Ohio St. 2d 201, 204-05, 400 N.E.2d 386, 390 (1980); Ventures Management Co. v. Geruso, 434 A.2d 252, 254 (R.I. 1981); Horn v. District Court, 647 P.2d 1368, 1373 (Wyo. 1982); 11 C. WRIGHT & A. MILLER, *supra* note 18, at 584; Dobbs, *supra* note 27, at 235; Comment, *The Coercive Function of Civil Contempt*, 33 U. CHI. L. REV. 120, 123-24 (1965). *See* United States v. United Mine Workers, 330 U.S. 258, 302-04 (1947); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-43 (1911); Bessette v. W.B. Conkey Co., 194 U.S. 324, 328-29 (1904); *In re* Irving, 600 F.2d 1027, 1031 (2d Cir.), *cert. denied sub nom.* DiLapi v. Irving, 444 U.S. 866 (1979); Spalter v. Wayne Circuit Judge, 35 Mich. App. 156, 160-61, 192 N.W.2d 347, 349 (1971). For excellent summaries of the distinctions between civil and criminal contempt, see De Parcq v. United States District Court, 235 F.2d 692, 699 (8th Cir. 1956); 11 C. WRIGHT & A. MILLER, *supra* note 18, at 583-84.

38. Shillitani v. United States, 384 U.S. 364, 370 (1966) ("what does the court primarily seek to accomplish by imposing sentence?"); Lamb v. Cramer, 285 U.S. 217, 220-21 (1932); Labor Relations Comm'n v. Fall River Educators' Ass'n, 1981 Mass. Adv. Sh. 297, 308, 416 N.E.2d 1340, 1347 (1981); Curlee v. Howle, 287 S.E.2d 915, 919 (S.C. 1982). *See* Dobbs, *supra* note 27, at 235. *But see* State v. Roll, 267 Md. 714, 729-30, 298 A.2d 867, 876-77 (1973) (endorsing approach which emphasizes personal, adjunctive, and less significant nature of proceedings for civil contempt, and official, independent, and more serious nature of proceedings for criminal contempt).

39. *See* Nye v. United States, 313 U.S. 33, 42-43 (1941); Wolfe v. Coleman, 681 F.2d 1302, 1306 n.8 (11th Cir. 1982); *In re* Rumaker, 646 F.2d 870, 871 (5th Cir. 1980); *In re* Dinnan, 625 F.2d 1146, 1149 (5th Cir. 1980) (per curiam).

purpose and character of the sanction imposed.[40] It becomes apparent, therefore, that the classification of a contempt is not of the act of contempt, but rather of the contempt proceeding or the sanction imposed.[41] Accordingly, a court may respond to a contumacious act by imposing both criminal and civil sanctions, one to vindicate its authority, the other to compel compliance with its orders or decrees.[42]

Of final relevance to the distinguishing characteristics of the two types of proceedings is their procedural role in the legal process. In the case of a civil contempt, it operates as a facet of a principal suit, while a criminal contempt is a separate action or proceeding brought in the name of the state or government.[43] For example, in the typical civil contempt situation, a party litigant is ordered to perform, or to refrain from doing, an act relevant to the principal suit, and if he refuses to do so at the time when performance is required or due, his refusal will constitute a contumacious act justifying imposition of coercive sanctions.[44] Such refusal is in the nature of a constructive, or indirect, contempt because it takes place outside of the immediate presence and view of the court.[45] Although criminal contempts may be constructive, they can also arise as direct contempts committed within the immediate presence and view of the court. Such direct affronts to the dignity and authority of the judicial branch of government may be dealt with summarily without doing violence to due process.[46] This power is inherent in a court and is essential to the due administration of justice. Without it, a court would be power-

40. *In re* Rumaker, 646 F.2d 870, 871 (5th Cir. 1980). *See In re* Dinnan, 625 F.2d 1146, 1149 (5th Cir. 1980) (per curiam) (purpose of contempt judgment is the "conclusive, most important" factor in distinguishing civil from criminal contempt). Although this analysis will lead to the correct result, the logic of this approach is somewhat dubious. To argue that the purpose of a sanction defines a contempt is to place the cart before the horse. In reality, the contempt will define the sanction, because a court will be *responding* to a particular contumacious act by tailoring a sanction to *fit* the act.

41. Dobbs, *supra* note 27, at 236-37.

42. *In re* Irving, 600 F.2d 1027, 1031 (2d Cir.), *cert. denied sub nom.* DiLapi v. Irving, 444 U.S. 866 (1979); Dobbs, *supra* note 27, at 236-37.

43. *See In re* Stewart, 571 F.2d 958, 963 (5th Cir. 1978).

44. *See* Board of Educ. v. Brunswick Educ. Ass'n, 61 Ohio St. 2d 290, 294-95, 401 N.E.2d 440, 443-44 (1980). *See also* L.A.M. v. State, 547 P.2d 827, 831 (Alaska 1976); State *ex rel.* L.E.A. v. Hammergren, 294 N.W.2d 705, 708 (Minn. 1980).

45. *See* McNabb v. Osmundson, 315 N.W.2d 9, 11 (Iowa 1982); Horn v. District Court, 647 P.2d 1368, 1373 (Wyo. 1982). *Cf.* Wolfe v. Coleman, 681 F.2d 1302, 1306 (11th Cir. 1982) (applying same definition to indirect criminal contempts).

46. Fisher v. Pace, 336 U.S. 155, 159-60 (1949) (no further evidence, or the aid of a jury, is required); Cooke v. United States, 267 U.S. 517, 534 (1925) (dictum) (since the court has witnessed the offense, there is no need for either evidence or the assistance of counsel); Wolfe v. Coleman, 681 F.2d 1302, 1306 (11th Cir. 1982). *See Ex parte* Terry, 128 U.S. 289, 307-309, 313-14 (1888); Beale, *supra* note 12, at 172. Where the contempt is

less to prevent persons disposed to thwarting, delaying, or obstructing it or its processes[47] and would not be able to perform its official functions properly.[48]

C. *Procedures for Civil Contempt*

Courts possess the inherent power to enforce compliance with their lawful orders by means of sanctions imposed through civil contempt.[49] In the typical civil contempt case, an individual is ordered by a court to perform an act, and if he refuses to do so at the time when performance is required or due, his refusal will constitute a contumacious act justifying the imposition of sanctions until he purges himself of the contempt.[50] Until the time for performance has arrived, however, there can be no contempt.[51]

A civil contempt for failure to comply with a court order usually consists of the following elements: (1) the existence of a valid order directing the contemner, over whom the court has jurisdiction, to do or to refrain from doing a certain act; (2) notice to the contemner of the order within reasonably sufficient time for compliance; (3) the ability of the contemner to comply with the order; and (4) noncompliance with the order by the contemner.[52] Since an adjudication or finding of civil contempt is intended to "coerce future conduct," and not to punish past misconduct, good faith is not a defense.[53] Willfulness, therefore, is not a prerequisite to an adjudication of civil contempt.[54] There must exist, however, an ability to comply with the

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constructive or indirect, however, the defendant is entitled to reasonable notice of the accusation and a separate contempt hearing. Wolfe v. Coleman, 681 F.2d at 1306.

47. Fisher v. Pace, 336 U.S. 155, 159 (1949); State v. Jackson, 147 Conn. 167, 169, 158 A.2d 166, 167-68 (1960); Goodhart v. State, 84 Conn. 60, 63, 78 A. 853, 853-54 (1911). *See* United States v. Wilson, 421 U.S. 309, 315-16 (1975); *Ex parte* Terry, 128 U.S. 289, 313 (1888); STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-4.1 (Approved Draft 1978); Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 YALE L.J. 39, 39-40 (1978).

48. *See* Myers v. United States, 264 U.S. 95, 103 (1924).

49. Shillitani v. United States, 384 U.S. 364, 370 (1966).

50. Board of Educ. v. Brunswick Educ. Ass'n, 61 Ohio St. 2d 290, 294-95, 401 N.E.2d 440, 443-44 (1980).

51. *Id.* at 295, 401 N.E.2d at 444.

52. L.A.M. v. State, 547 P.2d 827, 831 (Alaska 1976). *See* State *ex rel.* L.E.A. v. Hammergren, 294 N.W.2d 705, 708 (Minn. 1980).

53. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949) (intent of recalcitrant party is irrelevant to a finding of civil contempt); Fortin v. Commissioner of Mass. Dep't of Pub. Welfare, 692 F.2d 790, 796 (1st Cir. 1982).

54. United States v. Abodeely, 564 F. Supp. 327, 329 (N.D. Iowa 1983); Miller v. Carson, 550 F. Supp. 543, 545 (M.D. Fla. 1982); Palmigiano v. Garrahy, 448 F. Supp.

court's order,[55] the absence of which will constitute a defense.[56]

The procedures for civil contempt are substantially as follows:

(a) a motion for contempt;
(b) an order of notice to the alleged contemner to appear and to show cause why he should not be adjudged in contempt of court;
(c) a hearing on the motion; and
(d) a finding and appropriate order for contempt.[57]

1. Ability to Comply with Court Order

As noted earlier,[58] a civil contempt arises from an individual's refusal to obey a lawful order of a court, and may be punished by conditional confinement for the purpose of coercing compliance.[59] The rationale for incarceration in this instance is that the contemner carries the keys of his prison with him and his confinement will last only until he has complied with the court's order.[60] It is thus apparent that a court may not coerce that which is beyond a person's power to perform, and that, accordingly, incarceration for civil contempt is dependent upon the ability of a contemner to comply with the court's order,[61] an ability that must exist "as a matter of substance as well as form."[62] Consequently, an inability to comply is an

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659, 670 (D.R.I. 1978); Aspira of New York, Inc. v. Board of Educ., 423 F. Supp. 647, 653-54 (S.D.N.Y. 1976). *See* McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); AMF Inc. v. Jewett, 711 F.2d 1096, 1104 (1st Cir. 1983) (finding of civil contempt does not require element of scienter); NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1183-84 (D.C. Cir. 1981).

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

56. Fortin v. Commissioner of Mass. Dep't of Pub. Welfare, 692 F.2d 790, 796 (1st Cir. 1982).

57. *See, e.g.*, Gorham v. City of New Haven, 82 Conn. 153, 156, 72 A. 1012, 1014 (1909); Planning & Zoning Comm'n v. Zemel Bros., Inc., 29 Conn. Supp. 450, 453, 292 A.2d 267, 270 (Super. Ct. 1971); Nemeth v. Nemeth, 451 A.2d 1384, 1387 (Pa. Super. 1982). *See also* 2 W. NELSON, DIVORCE AND ANNULMENT §§ 16.11-16.22 (rev. 2d ed. 1961). *See generally* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911); Beale, *supra* note 12, at 172-73.

58. *See supra* text accompanying notes 32-34 & 52.

59. *See* Shillitani v. United States, 384 U.S. 364, 368 (1966).

60. *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902) (imprisoned contemnors "may [comply with the orders of the court] at any time").

61. Shillitani v. United States, 384 U.S. 364, 371 (1966); *In re* Grand Jury Investigation, 600 F.2d 420, 423 (3d Cir. 1979). *See* Maggio v. Zeitz, 333 U.S. 56, 76 (1948); United States v. Professional Air Traffic Controllers Org., 524 F. Supp. 160, 164 (D.D.C. 1981); State *ex rel.* Department of Human Servs. v. Rael, 97 N.M. 640, 643, 642 P.2d 1099, 1102 (1982); State v. Kilbane, 61 Ohio St. 2d 201, 205-06, 400 N.E.2d 386, 390 (1980); Barrett v. Barrett, 470 Pa. 253, 264, 368 A.2d 616, 621 (1977).

62. Murray v. Murray, 60 Hawaii 160, 162, 587 P.2d 1220, 1222 (1978).

affirmative[63] and complete defense to coercive imprisonment proceedings.[64]

Ability to comply does not mean the ability to fully and completely comply. Hence, to sustain the defense of inability, an alleged contemner need only to establish that he has been "reasonably diligent and energetic" in attempting to comply with the court's order[65] by taking all reasonable steps within his power to ensure compliance,[66] or that he has a reasonable or lawful excuse for not complying.[67] Ultimately, the existence of an inability to comply with the court's order is a question of fact, to be determined from all of the evidence.[68]

2. Burden of Proof

Although the burden of proving noncompliance with a valid court order will rest with the party prosecuting the contempt action by "clear and convincing" evidence,[69] the burden of persuasion concerning the defendant's ability to comply will lie with the defend-

63. Department of Revenue v. Oliver, 636 P.2d 1156, 1159 (Alaska 1981).

64. *See* United States v. Rylander, 103 S. Ct. 1548, 1552 (1983); Maggio v. Zeitz, 333 U.S. 56, 76 (1948); Fortin v. Commissioner of Mass. Dep't of Pub. Welfare, 692 F.2d 790, 796 (1st Cir. 1982).

65. Aspira of New York, Inc. v. Board of Educ., 423 F. Supp. 647, 654 (S.D.N.Y. 1976). *Accord*, Ricci v. Okin, 537 F. Supp. 817, 824 (D. Mass. 1982); Swift v. Blum, 502 F. Supp. 1140, 1143 (S.D.N.Y. 1980); United States v. Swingline, Inc., 371 F. Supp. 37, 44-45 (E.D.N.Y. 1974). This test requires that the defendant take all reasonable steps within his power to ensure compliance with the order. Sekaquaptewa v. MacDonald, 544 F.2d 396, 406 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); Ricci v. Okin, 537 F. Supp. at 824.

66. Sekaquaptewa v. MacDonald, 544 F.2d 396, 406 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); Ricci v. Okin, 537 F. Supp. 817, 824 (D. Mass. 1982).

67. Johansen v. State, 491 P.2d 759, 767 (Alaska 1971).

68. Roper v. Roper, 242 Ky. 658, 660, 47 S.W.2d 517, 519 (Ct. App. 1932).

69. AMF Inc. v. Jewett, 711 F.2d 1096, 1100 (1st Cir. 1983); NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1183 (D.C. Cir. 1981); United States v. Rylander, 656 F.2d 1313, 1318 (9th Cir. 1981), *rev'd on other grounds*, 103 S. Ct. 1548 (1983); United States v. Rizzo, 539 F.2d 458, 465 (5th Cir. 1976); Stringfellow v. Haines, 309 F.2d 910, 912 (2d Cir. 1962); Miller v. Carson, 550 F. Supp. 543, 545 (M.D. Fla. 1982) (preponderance standard of proof is not sufficient). *See* Palmigiano v. Garrahy, 448 F. Supp. 659, 670-71 (D.R.I. 1978). Although some courts have endorsed the preponderance standard of proof, *e.g.*, Johansen v. State, 491 P.2d 759, 766 (Alaska 1971); *In re* Hughes, 318 So. 2d 409, 410 (Fla. Dist. Ct. App. 1975); *see* Barrett v. Barrett, 470 Pa. 253, 263-64, 368 A.2d 616, 621 (1977), the clear and convincing standard should be applied, since an order of civil contempt may also lead to incarceration, *see* Stringfellow, 309 F.2d at 912, and would be consistent with the standard employed in civil involuntary mental commitment proceedings. Addington v. Texas, 441 U.S. 418, 433 (1979). In criminal contempt proceedings, the standard of proof is knowing, intentional, and willful noncompliance or violation beyond a reasonable doubt. NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1183-84 (D.C. Cir. 1981) (dictum).

ant.[70] This is so because failure to comply with a court or judicial decree is prima facie evidence of contempt.[71] The defendant, therefore, must refute this evidence and demonstrate, by a preponderance of the evidence, his inability to comply,[72] and that his incapacity was not the result of deliberate and calculated choice.[73] Conversely, a defense of inability to comply will not be recognized, if the defendant has willfully or voluntarily incapacitated himself from complying, or has refused reasonably to exert himself.[74]

This allocation of the respective burdens is not without danger to the defendant, especially when one considers the potentially grave consequences stemming from a finding of contempt. The problem is, of course, that it may prove to be difficult to determine whether the defendant is in fact able to comply. Thus, it may be that he is truly unable to obey the order, but that the court does not believe him,

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70. Fortin v. Commissioner of Mass. Dep't of Pub. Welfare, 692 F.2d 790, 796 (1st Cir. 1982); Palmigiano v. Garrahy, 448 F. Supp. 659, 671 (D.R.I. 1978); Johansen v. State, 491 P.2d 759, 766 (Alaska 1971); Orr v. Orr, 141 Fla. 112, 117, 192 So. 466, 468 (1939) (per curiam); *In re* S.L.T., 180 So. 2d 374, 379 (Fla. Dist. Ct. App. 1965) (since the making of a court order involves an implicit finding of ability to comply, a defendant in a civil contempt proceeding "has the burden of proving by a preponderance of the evidence such inability"); Roper v. Roper, 242 Ky. 658, 660, 47 S.W.2d 517, 519 (Ct. App. 1932); Nauman v. Nauman, 320 N.W.2d 519, 521 (S.D. 1982) (per curiam); Bailey v. Bailey, 77 S.D. 546, 549, 95 N.W.2d 533, 534 (1959); De Yonge v. De Yonge, 103 Utah 410, 412, 135 P.2d 905, 906 (1943); 2 W. NELSON, *supra* note 57, at § 16.25a, at 440-41. *See* United States v. Rylander, 103 S. Ct. 1548, 1552, 1554 (1983); United States v. Fleischman, 339 U.S. 349, 362-63 (1950); State, Dep't of Revenue v. Oliver, 636 P.2d 1156, 1159 (Alaska 1981).

71. United States v. Rylander, 656 F.2d 1313, 1318 (9th Cir. 1981), *rev'd on other grounds*, 103 S. Ct. 1548 (1983); Roper v. Roper, 242 Ky. 658, 660, 47 S.W.2d 517, 519 (Ct. App. 1932). This evidence will be sufficient to prove contempt, in the absence of evidence of inability to comply, which must be produced by the defendant. *See* Rylander, 656 F.2d at 1318, 1319.

72. Johansen v. State, 491 P.2d 759, 767 (Alaska 1971); *In re* S.L.T., 180 So. 2d 374, 379 (Fla. Dist. Ct. App., 1965).

73. Bailey v. Bailey, 77 S.D. 546, 549, 95 N.W.2d 533, 534 (1959); 2 W. NELSON, *supra* note 57, at § 16.25a, at 440. *See* Orr v. Orr, 141 Fla. 112, 117, 192 So. 466, 468 (1939) (per curiam); Nauman v. Nauman, 320 N.W.2d 519, 520 (S.D. 1982) (per curiam); Jameson v. Jameson, 306 N.W.2d 240, 241 (S.D. 1981).

74. 2 W. NELSON, *supra* note 57, at § 16.25, at 433. *See* Orr v. Orr, 141 Fla. 112, 117, 192 So. 466, 468 (1939) (per curiam); Hopp v. Hopp, 279 Minn. 170, 176, 156 N.W.2d 212, 217 (1968) (there is no defense if the party directed to comply "has not made a reasonable effort by means of his own selection to conform to an order well within his inherent, but unexercised, capacities"); Nauman v. Nauman, 320 N.W.2d 519, 520-21 (S.D. 1982) (per curiam). *But see* Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 782 n.7 (9th Cir. 1983) ("inability—whether or not self-induced—is a complete defense to a charge of coercive civil contempt"). Since a court may not civilly coerce that which cannot be performed, the *Falstaff* approach would appear to be correct. However, "self-induced ability" should not go unpunished and may be proceeded against as a constructive criminal contempt. *See id.* at 782 n.7.

thereby resulting in an indefinite confinement.[75]

III. THE DUE PROCESS EQUATION

A. *Concept and Meaning*

Justice Frankfurter has described due process as a legal concept in these terms: "Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances."[76] Not surprisingly, then, the interpretation and application of due process have become profoundly practical matters that, because of the inherent flexibility of a process of adaptation and adjustment, negate any concept of fixed procedures rigidly applicable to all situations.[77]

From this it is seen that procedural due process is not cast in a rigid mold[78] and has evolved through the centuries to embody "those . . . usages and modes of proceeding" existing in Anglo-American law[79] that have come to stand for an abiding sense of fundamental fairness in the relations between government and citizen.[80] Thus, due process of law, again in the words of Justice Frankfurter,

> is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are [principles of justice] "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"

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75. Dobbs, *supra* note 27, at 272. *See generally* Comment, *supra* note 37, at 122 (since incarceration may continue until compliance, a civil contemnor's sentence "theoretically can continue indefinitely").

76. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring).

77. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 24-25 (1981); Goss v. Lopez, 419 U.S. 565, 577-78 (1975); Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring); White v. Division of Family Services, 634 S.W.2d 258, 260 (Mo. Ct. App. 1982) (due process is "an adaptable doctrine," and "must be determined by what is just in light of the details of the particular case"). *See also* Landon v. Plasencia, 103 S. Ct. 321, 330 (1982).

78. Lassiter v. Department of Social Servs., 452 U.S. 18, 24 (1981); Rochin v. California, 342 U.S. 165, 170-72 (1952). *See* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 6 (1956).

79. Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 277 (1856).

80. *See* Landon v. Plasencia, 103 S. Ct. 321, 330 (1982); Lassiter v. Department of Social Servs., 452 U.S. 18, 24 (1981); Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978); Spencer v. Texas, 385 U.S. 554, 563-64 (1967); Lisenba v. California, 314 U.S. 219, 236 (1941).

. . . or are "implicit in the concept of ordered liberty."[81]

The meaning of "fundamental fairness," while embracing a noble ideal, "can be as opaque as its importance is lofty."[82] Applying due process "is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation" by considering relevant precedents and assessing the several (and competing) interests that are at stake.[83]

B. *Applicability*

It is a fundamental precept that due process protects the individual from arbitrary state action.[84] Accordingly, under the fourteenth amendment to the federal Constitution, a state may not deprive an individual of life, liberty, or property without due process of law.[85] In order to determine whether state action has violated this prohibition, a court must make two inquiries: first, a protected interest under due process must be identified; and, second, the degree of process due to the individual before he may be deprived of that interest must be ascertained.[86] Thus, once it is determined what process is due to the individual before he may be divested of a protected interest by state action, the procedures employed by the state will be scrutinized to see if they comport with the requirements of federal procedural due process.[87] This, in turn, requires an inquiry into the nature of the interest at stake.[88] Ultimately, however, the government will be required to act within the bounds of procedures that are designed to ensure that the state acts fairly and pursuant to reasonable standards.[89] These procedures require, as "the essentials of due

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81. Rochin v. California, 342 U.S. 165, 169 (1952) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), and Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

82. Lassiter v. Department of Social Servs., 452 U.S. 18, 24 (1981).

83. *Id.* at 24-25.

84. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 574 (1975).

85. U.S. CONST. amend. XIV, § 1.

86. Shango v. Jurich, 681 F.2d 1091, 1097 (7th Cir. 1982); Ryan v. Cleland, 531 F. Supp. 724, 730 (E.D.N.Y. 1982); Young v. Whitworth, 522 F. Supp. 759, 762 (S.D. Ohio 1981). *See* Meachum v. Fano, 427 U.S. 215, 223-24 (1976); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972); Mastin v. Fellerhoff, 526 F. Supp. 969, 972 (S.D. Ohio 1981).

87. Shango v. Jurich, 681 F.2d 1091, 1098 (7th Cir. 1982); Ryan v. Cleland, 531 F. Supp. 724, 730 (E.D.N.Y. 1982). *See* Meachum v. Fano, 427 U.S. 215, 223-24 (1976); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

88. Goss v. Lopez, 419 U.S. 565, 575-76 (1975); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

89. Major v. DeFrench, 286 S.E.2d 688, 695 (W. Va. 1982). *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161-62 (1951) (Frankfurter, J., concurring).

process," that before the state may deprive the individual of life, liberty, or property, it must accord him (1) an appropriate tribunal; (2) an inquiry into the merits of the question presented; (3) reasonable notice of the purpose of the inquiry; (4) a fair opportunity to appear in person or by counsel; (5) a meaningful opportunity to be heard; and (6) a judgment rendered in the record thus made.[90] It becomes apparent, therefore, that the procedural guarantees of due process apply whenever a state seeks to extinguish, or to significantly alter, interests encompassed by the fourteenth amendment's protection of liberty and property. Moreover, when protected interests are implicated, the individual affected thereby will be entitled to a prior hearing.[91]

In summary, whether procedural due process will be required before the government will be permitted to take action against an individual will depend on the extent of loss ultimately incurred by the individual. The inquiry must be addressed not merely to the "weight" of the particular interest at stake, but also, and in particular, to whether the nature of the interest is one entitled to liberty or property protection under due process. If it is determined that due process is applicable, the question remaining is, what process is due? Here, a court will be confronted with the flexible scope of due process and must recognize that the procedural protections required will be determined by the demands of the particular situation. This, in turn, will require a determination of the precise nature of the competing interests and a balancing of those interests so as to ensure fundamental fairness in the dealings and relations between the government and its citizens.[92] Consequently, due process, by its insistence upon the presence of certain procedural safeguards, serves to equalize the contest between government and citizen.[93]

C. *Factors to be Evaluated*

Many factors enter into the due process equation including the nature of the interest adversely affected, the procedure employed,

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90. State in Interest of L.G.W., 638 P.2d 527, 528 (Utah 1981). *See* Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932); Cooke v. United States, 267 U.S. 517, 536-37 (1925). *See also* Mathews v. Eldridge, 424 U.S. 319, 333, 348-49 (1976); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161-72 (1951) (Frankfurter, J., concurring).

91. Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972). *See* Paul v. Davis, 424 U.S. 693, 710-11 (1976); Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976).

92. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972). *See also* Landon v. Plasencia, 103 S. Ct. 321, 330, 331 (1982).

93. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 27-28 (1981).

and the balance between the conflicting interests.[94] The three major factors, or elements, that must be evaluated and balanced in deciding what due process requires, are:

(a) the private interests affected by official action;
(b) the risk of erroneous deprivation of such interests by reason of the procedures employed, and the probable value of additional or substitute procedural safeguards; and
(c) the government's interest favoring retention of existing procedures, including the function involved and the administrative and fiscal burdens that additional or substitute procedural requirements would entail.[95]

A useful rule of thumb is that the nature and type of hearing will determine the particular or applicable requirements of due process.[96] In other words, the nature of the governmental function involved and the type of private interest implicated by official action will define what procedures due process will require.[97] Moreover, the risk of error inherent in the truth-determining process as applied to the generality of cases rather than to exceptional cases will shape the nature of a due process hearing.[98] Therefore, where the risk of error is potentially substantial, it should be guarded against by procedural protections if such protections are not prohibitively costly.[99] At some point, however, the benefit of an additional safeguard to the individual affected may be outweighed by the cost involved.[100]

Since the threat of an erroneous deprivation of the private interests at stake is heightened by erroneous factual determinations and legal conclusions, it is imperative that the hearing provided comport with the need for fair dealings between the government and its citizens. But in order to ensure fairness in the relationships between

94. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

95. Landon v. Plasencia, 103 S. Ct. 321, 330 (1982); United States v. Raddatz, 447 U.S. 667, 677 (1980); Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Nordgren v. Mitchell, 524 F. Supp. 242, 243 (D. Utah 1981); Young v. Whitworth, 522 F. Supp. 759, 762 (S.D. Ohio 1981); Wake County *ex rel.* Carrington v. Townes, 293 S.E.2d 95, 98 (N.C. 1982); Major v. De French, 286 S.E.2d 688, 698 (W. Va. 1982). *Accord*, Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981).

96. *See* Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976); Goss v. Lopez, 419 U.S. 565, 578-80 (1975).

97. Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

98. Califano v. Yamasaki, 442 U.S. 682, 696 (1979).

99. *See* Goss v. Lopez, 419 U.S. 565, 580 (1975).

100. Parratt v. Taylor, 451 U.S. 527, 542-43 (1981); Ingraham v. Wright, 430 U.S. 651, 682 (1977); Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

government and citizen, it is a fundamental dictate of due process that the individual be heard in a meaningful manner.[101] It is precisely in this setting that the presence of counsel takes on added significance.

IV. THE RIGHT TO APPOINTED COUNSEL

A. *Introductory Comments*

The focus of this study will now be on the right to appointed counsel in the setting of a civil contempt proceeding for failure of an indigent parent to comply with an order for child support. The article will analyze the competing interests of the individual in the freedom, privacy, and security of his person, and those of the state in securing adequate support for children from their parents, and in preserving the authority and dignity of the courts in a manner that will not impose upon society unreasonable administrative and fiscal burdens. From this it will conclude that, while the interests of the state are weighty, those of the individual in the liberty of his person are sufficiently compelling to warrant the appointment of counsel as a matter of constitutional precept, whenever an indigent defendant, upon a finding of civil contempt, is deprived of his physical liberty.

Since the sixth amendment right to counsel is limited to criminal proceedings,[102] it is inapplicable to a civil contempt action.[103] Therefore, the right to appointed counsel in state civil contempt proceedings must be found, if it exists, in the due process clause of the fourteenth amendment,[104] as an essential safeguard of a fair trial.[105] Reference to the criminal law is not without relevance, however, for in either setting a defendant, upon a finding of guilt, will be confronted with the same danger: the loss of his freedom of movement and action.

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101. *See* Landon v. Plasencia, 103 S. Ct. 321, 331 (1982); Parratt v. Taylor, 451 U.S. 527, 540 (1981); Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Downing v. Idaho, 103 Idaho 689, 692, 652 P.2d 193, 196 (1982).

102. *See, e.g.*, Turner v. Steward, 497 F. Supp. 557, 558 (E.D. Ky. 1980).

103. Duval v. Duval, 114 N.H. 422, 425-26, 322 A.2d 1, 3 (1974). *See* Sword v. Sword, 399 Mich. 367, 380-81, 249 N.W.2d 88, 93 (1976); State *ex rel.* Department of Human Servs. v. Rael, 97 N.M. 640, 643, 642 P.2d 1099, 1102 (1982); Jolly v. Wright, 300 N.C. 83, 90, 265 S.E.2d 135, 141 (1980).

104. McNabb v. Osmundson, 315 N.W.2d 9, 11 (Iowa 1982) (sixth amendment considerations, however, may influence this determination); Duval v. Duval, 114 N.H. 422, 426, 322 A.2d 1, 3 (1974).

105. *See* Mastin v. Fellerhoff, 526 F. Supp. 969, 971 (S.D. Ohio 1981).

B. *Analysis and Discussion*

In all criminal prosecutions, an indigent accused is entitled, under the sixth[106] and fourteenth amendments to the federal Constitution, to the assistance of appointed counsel in his defense, if an authorized term of imprisonment upon conviction is actually imposed.[107] The rationale of this requirement is that freedom from arbitrary deprivation of physical liberty is a fundamental liberty interest under due process,[108] and the presence of counsel is essential to the integrity of the truth-determining process, so as to secure the very existence of a fair trial before an indigent defendant may be subjected to so severe a sanction as incarceration.[109] Similarly, due process requires the assistance of counsel in nonsummary criminal contempt proceedings[110] resulting in confinement.[111]

In view of this concern for "the core values of unqualified liberty,"[112] the Supreme Court, in *Lassiter v. Department of Social Services*,[113] observed that there exists a presumptive right to appointed counsel whenever an indigent litigant, "if he loses," may be deprived of his "physical liberty."[114] Moreover, all other elements in the due process equation must be measured against this presumption.[115]

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106. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

107. Lassiter v. Department of Social Servs., 452 U.S. 18, 25-27 (1981) (dictum); Scott v. Illinois, 440 U.S. 367, 373-74 (1979). *See* Argersinger v. Hamlin, 407 U.S. 25, 37-38, 40 (1972); *id.* at 41, 42 (Burger, C.J., concurring in result). This right to the assistance of counsel arises from the sixth amendment, and is made applicable to the states through the due process clause of the fourteenth amendment. Faretta v. California, 422 U.S. 806, 818 (1975); Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963).

108. *See* Young v. Whitworth, 522 F. Supp. 759, 762 (S.D. Ohio 1981).

109. *See* Argersinger v. Hamlin, 407 U.S. 25, 31-34 (1972); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932). *See also* Faretta v. California, 422 U.S. 806, 818 (1975).

110. Such proceedings involve contumacious behavior or conduct that is not committed in open court, and in the presence and under the observation of the judge, and which does not disturb the business of the court. *In re* Oliver, 333 U.S. 257, 275 (1948) (dictum); Cooke v. United States 267 U.S. 517, 534 (1925) (dictum).

111. *See In re* Oliver, 333 U.S. 257, 275-76 (1948); Cooke v. United States, 267 U.S. 517, 537 (1925); *In re* Stewart, 571 F.2d 958, 964 (5th Cir. 1978); *In re* DiBella, 518 F.2d 955, 959 (2d Cir. 1975) (dictum); State v. Roll, 267 Md. 714, 731 n.12, 298 A.2d 867, 877 n.12 (1973). And, it extends to proceedings for criminal nonsupport. *See* Arbo v. Hegstrom, 261 F. Supp. 397, 400-01 (D. Conn. 1966). One commentator has argued that defendants summarily convicted of a direct criminal contempt and sentenced to imprisonment must be accorded the right to counsel. Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 YALE L.J. 39, 61-62 (1978).

112. Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

113. 452 U.S. 18 (1981).

114. *Id.* at 26-27.

115. *Id.* at 27.

1. Authorities Rejecting the Appointment of Counsel

There is a split of authority concerning the constitutional right to appointed counsel in civil contempt proceedings for nonsupport, where the indigent defendant, upon a finding of contempt, is incarcerated. Those courts that have rejected a *per se* requirement of counsel have done so primarily on the rationale that because a contumacious indigent "carries the keys to his own prison," his liberty interest is not the "full-blown" liberty interest at stake in criminal cases where the defendant does not control his incarceration. Further, since civil contempt is not a form of punishment, but rather a civil remedy employed solely to enforce compliance with court orders, the threat of imprisonment is greatly diminished by the fact that he will lose his liberty only if it is demonstrated that he possesses sufficient resources to comply with the court order and has failed to make arrangements to do so.[116] They have also argued that, in the typical case, the legal and factual issues are not sufficiently complex to justify a *per se* appointment of counsel[117] but that the right will attach if the lack of the assistance of counsel deprives the indigent of a fundamentally fair hearing because of the complexity of the issues presented.[118] In addition, the argument has been made that the accuracy of decision-making in most cases would not be materially enhanced by the presence of appointed counsel.[119] Finally, the right to counsel has been rejected on the basis of the exorbitant costs such a requirement would entail.[120]

The collective position adopted by these courts is deficient for a number of reasons. As one commentator has pointed out, judges

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116. *See* State *ex rel.* Department of Human Servs. v. Rael, 97 N.M. 640, 643, 644, 642 P.2d 1099, 1102, 1103 (1982). *See also* Meyer v. Meyer, 414 A.2d 236, 239 (Me. 1980); Sword v. Sword, 399 Mich. 367, 380-83, 249 N.W.2d 88, 93-94 (1976); Duval v. Duval, 114 N.H. 422, 425-27, 322 A.2d 1, 3-4 (1974); Jolly v. Wright, 300 N.C. 83, 92-94, 265 S.E.2d 135, 142-43 (1980) (by implication); *In re* Calhoun, 47 Ohio St. 2d 15, 17-18, 350 N.E.2d 665, 666-67 (1976) (per curiam).

117. Sword v. Sword, 399 Mich. 367, 382, 249 N.W.2d 88, 93 (1976); State *ex rel.* Department of Human Servs. v. Rael, 97 N.M. 640, 644, 642 P.2d 1099, 1103 (1982); Jolly v. Wright, 300 N.C. 83, 93-94, 265 S.E.2d 135, 143 (1980).

118. For examples of courts adopting an *ad hoc* approach, but generally disfavoring appointment of counsel, see Duval v. Duval, 114 N.H. 422, 426-27, 322 A.2d 1, 4 (1974); State *ex rel.* Department of Human Servs. v. Rael, 97 N.M. 640, 644-45, 642 P.2d 1099, 1103-04 (1982).

119. State *ex rel.* Department of Human Servs. v. Rael, 97 N.M. 640, 644, 642 P.2d 1099, 1103 (1982).

120. Sword v. Sword, 399 Mich. 367, 381, 382-83, 249 N.W.2d 88, 93-94 (1976) (such a requirement would more than double the number of appointed counsel in Michigan courts).

rarely, if ever, inquire whether a parent in arrears has cash on hand equal to the portion of the arrearage required for release, nor do they release parents simply on a promise to commence payments. To this observer, the real reasons for the refusal of some courts to require the appointment of counsel for indigents in civil contempt proceedings are the costs of such a procedure and the realization that, with counsel on the scene, it would be more difficult to incarcerate individuals who are often viewed only as stereotypes in the absence of legal representation, and for whom persons of respectability, their attorneys, start proposing individual plans of payment that appear to be reasonable.[121]

Moreover, the implication of those courts adverse to the appointment of counsel that the prospect or threat of incarceration is more imaginary than real is quite unrealistic. It is true that the purpose of civil confinement is primarily coercive, whereas that of criminal imprisonment is punitive.[122] But whether the deprivation of physical liberty be viewed as coercive or punitive, the end result is the same, and the threat is realistically present in either type of proceeding. For example, in *Young v. Whitworth*,[123] an unemployed and unrepresented parent was ordered to jail for failure to obey an order to pay $75 per week, to be applied both to child support and the arrearage on back support.[124] In *McNabb v. Osmundson*,[125] the indigent parent, earning $35 to $40 weekly, was suffering from epilepsy and a drinking problem, owed debts totaling $316.40, and owned no property or a motor vehicle. Nevertheless, the court's order required that he purge himself of contempt by paying $480 and making weekly payments of $50, of which $30 was to be applied to the current installment of child support and $20 to the arrearage.[126] These cases point up the ominous fact that parents in contempt of court for noncompliance with support orders have been incarcerated without regard to an inability to comply due to no fault on their part.[127]

Although it may be correct to say that the "overriding" interest of the state in securing compliance with child-support orders is in

121. D. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT 187 (1979).

122. *See* Sword v. Sword, 399 Mich. 367, 380-81, 249 N.W.2d 88, 93 (1976); Duval v. Duval, 114 N.H. 422, 425, 322 A.2d 1, 3 (1974).

123. 522 F. Supp. 759 (S.D. Ohio 1981).

124. *Id.* at 761 & n.2.

125. 315 N.W.2d 9 (Iowa 1982).

126. *Id.* at 10.

127. *See* D. CHAMBERS, *supra* note 121, at 247-48.

protecting the financial welfare of children and not in punishing parents,[128] the fact remains that a parent found in contempt of court for nonsupport runs a very real risk of incarceration until he purges himself of contempt.[129] His exposure to the threat of imprisonment is clearly greater than it is for other defendants found to be in civil contempt of court. For example, during 1969 and the first ten and a half months of 1970, a total of 234 *divorced* men were sentenced in Genesee County, Michigan, to jail for nonpayment of child-support orders.[130] In Macomb County, Michigan, during 1970, 309 fathers were similarly incarcerated.[131] Not surprisingly, then, one commentator has noted that noncompliance with child-support orders has resulted in the confinement in Michigan of thousands of parents every year.[132]

Any attempt to deny the right to appointed counsel on the basis of the label attached to a contempt proceeding will not wash. For purposes of due process analysis, what is implicated in contempt cases is not the nature of the proceeding, but rather the liberty interest at stake.[133] It is the threat to the defendant's valued and fundamental right to unqualified physical liberty that requires the presence and assistance of counsel, which can be crucial to the outcome of a contempt hearing.[134] This threat is both real and meaningful in proceedings for either civil or criminal contempt. Moreoever, the end result of incarceration will be just as traumatic for, and will have the same impact on, a civil contemner as it will have on a criminal defendant. The realities of the situation will be equally grim and final in either case. The short of it is that the burden of imprisonment is as great in contempt cases as it is in criminal prosecutions, that it is this fact which creates the need for procedural protection, and that the label attached to the proceeding resulting in, or to the judicial order imposing, incarceration is simply irrelevant to

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128. Sword v. Sword, 399 Mich. 367, 383, 249 N.W.2d 88, 94 (1976).

129. One commentator has reported that out of a particular group of 84 fathers in Michigan made their first appearance in court on a show-cause order, sixty percent (60%) were sentenced to jail. D. CHAMBERS, *supra* note 121, at 184. While this finding may be atypical, it does point up the potential peril to which a parent charged with civil contempt is exposed.

130. *Id.* at 294 (emphasis added).

131. *Id.* at 297.

132. *Id.* at 165.

133. *See* Mastin v. Fellerhoff, 526 F. Supp. 969, 972-73 (S.D. Ohio 1981).

134. *Cf.* Argersinger v. Hamlin, 407 U.S. 25, 31-34 (1972) (counsel is required in criminal prosecutions so that contest between government and individual may be equalized); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (same); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (same).

the need for counsel.[135]

Similarly, tying the appointment of counsel to the complexity of the case misses the mark, for, again, what is at stake, and is directly threatened, is not the complexity of the issues, but rather the indigent's essential right to unqualified physical liberty.[136] It is precisely this threat that gives rise to the presumptive right to appointed counsel.[137] When the threat of incarceration ripens into reality, it is the deprivation of the individual's physical liberty which triggers the right to appointed counsel as a constitutional absolute.[138]

The most serious shortcoming in the reasoning of those courts which have refused to recognize the existence of a constitutional right to appointed counsel in civil contempt proceedings lies in their insensitivity to the individual's liberty interest in the integrity of his person and in their misconception of the importance and role of counsel in a contempt hearing. Incarceration strips the individual of his privacy, and substantially restricts his freedom of movement. It requires him to submit to authority pursuant to a regimen that, while primarily motivated by concerns for security, is calculated to seriously diminish his sense of self-worth. The overall effect is one of depression, compounded by a lack of confidence in the future. Indeed, this attitude of defeat is not without justification, for imprisonment for nonsupport can subject the individual to social opprobrium and employment discrimination.[139]

The assistance of counsel can be crucial to the outcome of a

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135. *See* United States v. Anderson, 553 F.2d 1154, 1155-56 & n.2 (8th Cir. 1977) (per curiam); *In re* DiBella, 518 F.2d 955, 958-59 (2d Cir. 1975); United States v. Sun Kung Kang, 468 F.2d 1368, 1369 (9th Cir. 1972) (per curiam); Mastin v. Fellerhoff, 526 F. Supp. 969, 973 (S.D. Ohio 1981); Padilla v. Padilla, 645 P.2d 1327, 1328 (Colo. Ct. App. 1982); McNabb v. Osmundson, 315 N.W.2d 9, 11 (Iowa 1982); Tetro v. Tetro, 86 Wash. 2d 252, 254-55, 544 P.2d 17, 19 (1975) (en banc). *See also In re* Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973); Henkel v. Bradshaw, 483 F.2d 1386, 1389, 1390 (9th Cir. 1973) (dictum); Young v. Whitworth, 522 F. Supp. 759, 762-63 (S.D. Ohio 1981).

136. *See* Mastin v. Fellerhoff, 526 F. Supp. 969, 972 (S.D. Ohio 1981).

137. Lassiter v. Department of Social Servs., 452 U.S. 18, 26-27 (1981); Young v. Whitworth, 522 F. Supp. 759, 764 (S.D. Ohio 1981).

138. Young v. Whitworth, 522 F. Supp. 759, 762-63 (S.D. Ohio 1981); Padilla v. Padilla, 645 P.2d 1327, 1328 (Colo. Ct. App. 1982); McNabb v. Osmundson, 315 N.W.2d 9, 14 (Iowa 1982). *See* Henkel v. Bradshaw, 483 F.2d 1386, 1389, 1390 (9th Cir. 1973) (dictum).

139. *See* D. CHAMBERS, *supra* note 121, at 243. *Cf.* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (pretrial confinement may imperil suspect's employment and interrupt his source of income); Argersinger v. Hamlin, 407 U.S. 25, 37 & n.6 (1972) (criminal imprisonment can result in serious repercussions affecting reputation and career); *In re* Winship, 397 U.S. 358, 363 (1970) (one convicted of crime will be "stigmatized by the conviction").

contempt hearing. Typically, the defendant will be brought into court on a "show cause" order, requiring him, in practical effect, to shoulder the burden of persuading the court why he should not be found in contempt after his noncompliance has been established. His attorney can conduct a thorough investigation of the defendant's financial condition and obtain the witnesses to support his story. In addition, counsel will be able to research the legal issues involved in the case, and to bring to his client's cause professional expertise in the procedural and substantive complexities of the law. Thus, at the hearing, counsel will be able to marshal witnesses and offer evidence supportive of the defendant's position and to present a coherent and credible defense in behalf of his client.[140] Accordingly, the presence of counsel will serve to reduce the potential for erroneous deprivation of the defendant's physical liberty, a function also served by the presence of counsel in criminal cases,[141] and to affect significantly the outcome of the proceeding.[142] Finally, in the event of a finding of contempt, counsel may be able to work out a payment plan, or a schedule of payments, that will be sufficiently satisfactory to the court to keep the defendant out of prison.[143]

2. Authorities Endorsing the Appointment of Counsel

A number of courts have endorsed a *per se* requirement of appointed counsel for indigent defendants who are incarcerated upon a finding of civil contempt. The leading authority for this position is *Young v. Whitworth*.[144] In *Young*, an indigent father filed an application for a writ of habeas corpus after he was adjudged in civil contempt of state court for failure to comply with an order for child support. He alleged that he had been denied constitutional process because he had been incarcerated without ever being advised of his right to appointed counsel and because he was not provided with such counsel. In denying a motion to dismiss the application, the

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140. *See* Young v. Whitworth, 522 F. Supp. 759, 762-63 (S.D. Ohio 1981); Comment, *The Indigent Defendant's Right to Court-Appointed Counsel in Civil Contempt Proceedings for Nonpayment of Child Support*, 50 U. CHI. L. REV. 326, 343 (1983). *See also* Argersinger v. Hamlin, 407 U.S. 25, 31-34 (1972); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

141. *See* Young v. Whitworth, 522 F. Supp. 759, 762-63 (S.D. Ohio 1981).

142. *See* D. CHAMBERS, *supra* note 121, at 185-87 (reporting that, in a random sample of parents brought into court for the first time for nonsupport, only twenty percent (20%) of those who were represented by counsel were jailed, whereas incarceration befell approximately two-thirds of those who were unrepresented).

143. *See id.* at 185-86.

144. 522 F. Supp. 759 (S.D. Ohio 1981).

federal court found that if the indigent had not been advised of his right to appointed counsel, or that such counsel had not been provided at his request, due process would be violated, and the petitioner father would be entitled to federal habeas relief.[145]

The court began its discussion by noting that due process analysis is "bilateral." First, it must be determined whether a protected liberty or property interest is at stake. If such an interest is identified, then the next step is to decide what process is required before the interest may be deprived.[146] That there was a protected interest in this case, was not seriously doubted by the court. "In this case such an interest is so clear as to require no further discussion."[147] Concerning the second issue, the court observed that a determination of whether appointed counsel was necessary would require a balancing of three factors:

(a) the private interest affected by the official action (petitioner's liberty);
(b) the risk of erroneous deprivation of such interest through the procedures employed, "and the probable value, if any, of additional or substitute procedural safeguards"; and
(c) the government's interest, including the function involved and the administrative and fiscal burdens that additional or substitute procedural requirements would entail.[148]

The court characterized "liberty" as a "lofty and majestic term." Thus, the concept of physical liberty, the rudimentary freedom to move about without restraint, is at the "heart" of our democracy.[149] It is because of this "core" value that an individual should not be deprived of physical liberty in the absence of a full panoply of procedural protections, including the right to appointed counsel, unless competing interests "absolutely" require that such procedures not be employed.[150] Here, the court felt that the potential for erroneous deprivation of petitioner's fundamental liberty interest was "very similar" to the risk of an erroneous result in criminal prosecutions.[151] Therefore, providing indigent parents with " 'the guiding hand of counsel' " would reduce the potential for error related to misunderstanding legal issues and lack of expertise in marshalling and analyz-

145. *Id.* at 761.
146. *Id.* at 762.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*

ing facts.[152] Furthermore, because of the "extreme weight" to be given to the individual's liberty interest in his freedom of movement and action, even a modest reduction in the potential for error in the deprivation of that interest would justify the imposition of appointed counsel.[153]

The court next examined the government's interest in this case, and found it to be significant. It noted that it is in the public interest for parents to be required to provide adequate support for their children, thereby relieving society of this burden. In addition, it is in the interest of both the public and the courts to have judicial mandates obeyed by those within their jurisdiction.[154] While these interests are weighty, the court did not feel that they would be obstructed by the requirement of appointed counsel. "When situations arise in which it is legitimate for a parent not to provide support, the public must be charitable and the courts flexible."[155] While not attempting to define such situations, the court did recognize that, when legal and factual issues of this nature are raised, the imposition of appointed counsel would not infringe upon the legitimate interests of government.[156]

In addressing the fiscal and administrative burdens that would be imposed on a state judicial system by the requirement of appointed counsel, the court frankly acknowledged that it would be "inane" to try to underestimate the impact such a process would have, and conceded that the fiscal and administrative burdens accompanying the imposition of counsel would be "heavy" and even "severe." The court remained convinced, however, that "the fundamental nature of physical liberty requires the imposition of this burden."[157]

The court, in *Young*, felt that this result was "very nearly mandated"[158] by *Argersinger v. Hamlin*,[159] requiring counsel under the sixth amendment in any criminal prosecution where the individual would be deprived of his physical liberty, by *In re Gault*,[160] requiring counsel in juvenile delinquency proceedings, and by *Lassiter v. De-*

152. *Id.* at 763 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).
153. 522 F. Supp. at 763.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id. Accord*, McNabb v. Osmundson, 315 N.W.2d 9, 16 (Iowa 1982).
158. 522 F. Supp. at 763.
159. 407 U.S. 25 (1972).
160. 389 U.S. 1 (1967).

partment of Social Services,[161] where the Supreme Court recognized that the deprivation of physical liberty presumptively implicates the right to appointed counsel.[162] In these cases, as well as in criminal contempt actions, the deprivation of physical liberty, and not the label attached to the proceedings, was deemed controlling. Consequently, the overwhelming weight of the liberty interest at stake mandated the appointment of counsel.[163] To the *Young* court, this interest is equally implicated in civil contempt proceedings where an individual faces imprisonment upon a finding of contumacious conduct. Thus, the court could find no justification for requiring a different rule in civil contempt cases[164] and therefore concluded that, when an indigent is faced with incarceration on civil contempt charges, due process compels the appointment of counsel.[165]

The result dictated in *Young* has been endorsed by other courts. In *Mastin v. Fellerhoff*,[166] plaintiff sought to enjoin a state domestic relations court from incarcerating him or any other indigent person found in contempt of court for failure to pay child support without first informing them of their right to have counsel appointed if they were unable to afford retained counsel and without first appointing counsel to those indigents who requested such assistance. The parties agreed that the action would be decided upon motions for summary judgment, and the issue raised was whether due process was violated by the practice of the domestic relations court of incarcerating indigent persons for civil contempt without first appointing counsel to represent them.[167] In finding that such practice constituted a denial of procedural due process, the court emphasized that the focal point of inquiry in any case in which the individual's fundamental liberty interest has been implicated is the threatened loss of physical

161. 452 U.S. 18 (1981).

162. 522 F. Supp. at 763-64.

163. *Id.*

164. *Id.* at 764-65.

165. *Id.* at 765-66. The *Young* court refused to adopt an *ad hoc* complexity-of-issues approach to the appointment of counsel, as was done by the Supreme Court in Gagnon v. Scarpelli, 411 U.S. 778, 787-90 (1973), to govern the requirement of counsel in parole revocation proceedings, by distinguishing *Gagnon* primarily on the basis of the conditional liberty of a parolee in contrast to the indigent parent's "full-fledged liberty at stake." 522 F. Supp. at 765. *Accord*, Mastin v. Fellerhoff, 526 F. Supp. 969, 973 (S.D. Ohio 1981); McNabb v. Osmundson, 315 N.W.2d 9, 14 (Iowa 1982). *But see* Sword v. Sword, 399 Mich. 367, 381, 249 N.W.2d 88, 93 (1976). *See also* Duval v. Duval, 114 N.H. 422, 426, 322 A.2d 1, 3-4 (1974).

166. 526 F. Supp. 969 (S.D. Ohio 1981).

167. *Id.* at 970.

freedom and not the nature of the proceeding.[168] Applying this yardstick to the facts developed in this case led the court to the inescapable conclusion that a state may not deprive a person of his physical liberty unless that person has been provided with appointed counsel.[169]

To the *Mastin* court, characterizing a proceeding as civil rather than criminal was "a distinction without a difference if the end result is loss of physical liberty."[170] Whenever a proceeding may result in imprisonment, reasoned the court, appointment of counsel is a due process absolute, justifying exemption from the balancing-of-interests test developed in *Mathews v. Eldridge*,[171] a test applicable only where the right at issue is not absolute.[172] It is this loss of an "absolute liberty interest" that differentiates the *per se* requirement of counsel in contempt proceedings from the case-by-case analysis applicable to situations where either no liberty or a conditional liberty interest is at stake.[173]

Even assuming, however, that the *Eldridge* balancing test was applicable, the court still found that the interests of indigents facing imprisonment in civil contempt proceedings "so far outweigh the interests of the state," and the risk of an erroneous decision is "so great, that a right to appointed counsel *clearly* exists in all cases."[174] Accordingly, the court, in *Mastin*, concluded that due process requires the appointment of counsel in civil contempt actions whenever indigent litigants "may be deprived of their physical liberty."[175] Although acknowledging some reluctance to impose "such a burden on the state system," the court believed, nevertheless, that the federal Constitution "requires no less."[176]

The federal circuits that have had an opportunity to comment on the issue of appointed counsel in civil contempt cases have recognized that, absent a knowing and intelligent waiver, the right of a

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168. *See id.* at 972-73.

169. *Id.* at 973.

170. *Id.*

171. 424 U.S. 319 (1976). *See supra* text accompanying note 95.

172. 526 F. Supp. at 973.

173. *Id.* at 972-73. For examples of the case-by-case analysis involving no loss of an absolute liberty interest, see Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) (parental termination proceedings); Mathews v. Eldridge, 424 U.S. 319 (1976) (termination of Social Security disability benefit payments); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation proceedings).

174. 526 F. Supp. at 973 (emphasis added).

175. *Id.*

176. *Id.*

defendant in a criminal prosecution not to be imprisoned for any offense without the assistance of counsel extends to contempt proceedings, either civil or criminal. The rationale of these authorities is that the burden of imprisonment is as great in contempt proceedings as it is in criminal cases, that it is this fact which creates the need for procedural protection, and that the label attached to the judicial order that imposes incarceration is simply irrelevant to the need for counsel.[177]

Various state courts have endorsed the right to appointed counsel in civil contempt proceedings, where indigent litigants are deprived of their personal freedom. The Supreme Courts of Alaska and Washington, for instance, have done so on the basis of finding no constitutional distinction between civil and criminal incarceration.[178] The Iowa Supreme Court has also found a right to appointed counsel in civil contempt proceedings that result in, or in which there exists "a significant likelihood" of, the deprivation of physical liberty.[179] Similarly, the Colorado Court of Appeals has endorsed the right to appointed counsel in any contempt proceeding that results in imprisonment.[180] In addition, the Montana Supreme Court has recognized that one charged with civil contempt of court has the right to be represented by counsel.[181] The Utah Supreme Court has acknowledged that, in nonsummary contempt proceedings, due process requires that the person charged be accorded the assistance of counsel, if so requested.[182]

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177. *See* United States v. Anderson, 553 F.2d 1154, 1155-56 & n.2 (8th Cir. 1977) (per curiam); *In re* DiBella, 518 F.2d 955, 958-59 (2d Cir. 1975); United States v. Sun Kung Kang, 468 F.2d 1368, 1369 (9th Cir. 1972) (per curiam). *See also* United States v. Bobart Travel Agency, Inc., 699 F.2d 618, 620-21 (2d Cir. 1983); *In re* Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973); Henkel v. Bradshaw, 483 F.2d 1386, 1389, 1390 (9th Cir. 1973) (dictum).

178. Otton v. Zaborac, 525 P.2d 537, 539-40 (Alaska 1974); Tetro v. Tetro, 86 Wash. 2d 252, 254-55, 544 P.2d 17, 19-20 (1975) (en banc).

179. McNabb v. Osmundson, 315 N.W.2d 9, 14 (Iowa 1982)

> [N]ebulous distinctions between civil and criminal contempts are of no consequence . . .[, for] [t]he jail doors clang with the same finality behind an indigent who is held in contempt and incarcerated for nonpayment of child support . . . as they do behind an indigent who is incarcerated for violation of a criminal statute.

Id. at 11 (citation omitted).

180. Padilla v. Padilla, 645 P.2d 1327, 1328 (Colo. Ct. App. 1982).

181. Lilienthal v. District Court, 650 P.2d 779, 782 (Mont. 1982). *Accord*, Miller v. Carson, 550 F. Supp. 543, 545 (M.D. Fla. 1982) (dictum); Hendershot v. Handlan, 248 S.E.2d 273, 282 (W. Va. 1978) (Miller, J., concurring & dissenting) (dictum).

182. Burgers v. Maiben, 652 P.2d 1320, 1322 (Utah 1982).

3. The Need for Counsel

Few rights are more cherished in Anglo-American law than the right to the assistance of counsel. This assistance is of such significance that in many cases the right to be heard would be of little avail if it did not also include the right to be heard by counsel. Few laymen, even those who are educated and intelligent, have any skill in the intricacies of legal theory and procedure. They will be incapable, as a practical matter, of avoiding pitfalls in legal practice. Left to their own resources, they may not know how to proceed properly, how to grapple with thorny legal issues, or how to apply rigorous factual and legal analysis to the pleadings. In short, they lack both the skill and knowledge adequately to prepare a defense and face the danger of losing because they do not know how to establish their innocence.[183]

The assistance of counsel is not a sterile concept. It is both vital and meaningful and serves to balance the scales in the contest between government and citizen.[184] That this is so cannot be seriously doubted.[185] Thus, for example, the presence of counsel serves to reduce the potential for erroneous deprivation of an essential liberty interest under due process[186] and to affect significantly the outcome of a legal proceeding.[187] Moreoever, an erroneous result will have an impact not only upon the liberty interest threatened but also may result in a defendant being subjected to social opprobrium and employment discrimination.[188]

It is precisely because the individual's interest in personal freedom is such a valued liberty interest under due process[189] that a deprivation of that freedom, and not simply the sixth amendment right to counsel in criminal prosecutions, will trigger the right to ap-

183. *See* Argersinger v. Hamlin, 407 U.S. 25, 31-34 (1972); Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932). *See also* Young v. Whitworth, 522 F. Supp. 759, 762-63 (S.D. Ohio 1981).

184. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 27-28 (1981).

185. *See* Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

186. *See* Mastin v. Fellerhoff, 526 F. Supp. 969, 973 (S.D. Ohio 1981); Young v. Whitworth, 522 F. Supp. 759, 762-63 (S.D. Ohio 1981).

187. *See* D. CHAMBERS, *supra* note 121, at 185-87.

188. *See id.* at 243.

189. Mastin v. Fellerhoff, 526 F. Supp. 969, 972 (S.D. Ohio 1981); Young v. Whitworth, 522 F. Supp. 759, 762 (S.D. Ohio 1981) ("such . . . [a protected liberty] interest is so clear as to require no further discussion"). *See* McNabb v. Osmundson, 315 N.W.2d 9, 11-12 (Iowa 1982); Tetro v. Tetro, 86 Wash. 2d 252, 254-55, 544 P.2d 17, 19 (1975) (en banc).

pointed counsel.[190] This approach demonstrates that what is of constitutional significance for purposes of procedural due process is not the label attached to a hearing but rather the consequences to the individual arising from an adverse ruling rendered at the hearing. Under this analysis, it becomes readily apparent that incarceration for a civil contempt is identical to a deprivation of physical liberty for either a criminal contempt or a criminal offense. In either instance, the individual's liberty interest has been equally ruptured, and it is of no import that the purpose or function of one sanction may be coercive while that of the other is remedial. In either instance, the loss of liberty is equally total and traumatic.[191]

Before an individual may be deprived of his physical liberty under due process, he must be accorded a reasonable opportunity to be heard.[192] This opportunity, however, will be of little avail, unless the individual can be heard in a meaningful manner.[193] It is precisely for this reason that the assistance of counsel is crucial to the fairness of a hearing under due process.[194]

In assessing the need for counsel in any proceeding in which an indigent litigant, if he loses, may be deprived of his physical freedom, a court should be particularly sensitive to the fundamental nature of the liberty interest at stake. The concept of physical liberty, the rudimentary freedom to move about without restraint, is at the "heart" of our democracy. It is because of this "core" value that an individual should not be deprived of his physical liberty in the ab-

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190. Lassiter v. Department of Social Servs., 452 U.S. 18, 25 (1981); Mastin v. Fellerhoff, 526 F. Supp. 969, 973 (S.D. Ohio 1981). In *Lassiter*, the Supreme Court drew support for this interpretation from the fact that counsel will be appointed in juvenile delinquency proceedings, even though designated "civil," *In re* Gault, 387 U.S. 1, 36, 41 (1967), and where proceedings are instituted for the involuntary transfer of an indigent prisoner to a state mental hospital, Vitek v. Jones, 445 U.S. 480, 496-97 (1980) (plurality opinion). 452 U.S. at 25.

191. *See* Mastin v. Fellerhoff, 526 F. Supp. 969, 973 (S.D. Ohio 1981); Otton v. Zaborac, 525 P.2d 537, 539-40 (Alaska 1974); McNabb v. Osmundson, 315 N.W.2d 9, 11 (Iowa 1982); Tetro v. Tetro, 86 Wash. 2d 252, 254-55, 544 P.2d 17, 19 (1975) (en banc).

In Mathews v. Eldridge, 424 U.S. 319 (1976), the Court observed that among the factors to be considered in assessing the constitutional validity of a decision-making process is "the *degree* of potential deprivation that may be created by a particular decision. . . ." *Id.* at 341 (emphasis added).

192. *See* Young v. Whitworth, 522 F. Supp. 759, 762 (S.D. Ohio 1981).

193. *See* Landon v. Plasencia, 103 S. Ct. 321, 331 (1982); Parratt v. Taylor, 451 U.S. 527, 540 (1981); Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Downing v. Department of Health & Welfare, 652 P.2d 193, 196 (Idaho 1982).

194. *See* Argersinger v. Hamlin, 407 U.S. 25, 31-34 (1972); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

sence of a full panoply of procedural protections, including the right to appointed counsel, unless compelling interests "absolutely" require that such procedures not be employed.[195]

Although competing governmental interests, such as fiscal and administrative burdens, the need for compliance with judicial mandates, and the public interest in securing adequate support from parents for their children, are both significant and weighty, the requirement of appointed counsel in proceedings for civil contempt will not hinder or unreasonably affect these legitimate interests.[196] But even if the requirement of counsel places a "heavy," or even "severe," burden on the fiscal and administrative resources of the state,[197] the fundamental nature of the liberty interest at stake, and the awesome consequences to the individual arising from an erroneous deprivation of that interest, so far outweigh the interests of the state as to require the imposition of this burden if the indigent litigant, upon losing the contest, is actually deprived of his physical liberty.[198] A criminal prosecution requires as much;[199] a civil prosecution for contempt can require no less.

The potential for erroneous deprivation of a liberty interest in a contempt proceeding is "very similar" to the risk of an erroneous result in a criminal prosecution.[200] There is no reason to believe that legal and constitutional issues, as well as factual analyses, are less complex in civil contempt proceedings than they are in criminal contempt actions or in juvenile delinquency cases; yet in each the assistance of counsel is required.[201] Thus, providing indigent parents with "the guiding hand of counsel"[202] will reduce the potential for error related to misunderstanding legal issues and lack of expertise in marshalling evidence and analyzing facts.[203] Furthermore, because of the "extreme weight" to be given the individual's liberty interest in his physical freedom, even a modest reduction in the potential for error in the deprivation of that interest will justify the imposition of

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195. Young v. Whitworth, 522 F. Supp. 759, 762 (S.D. Ohio 1981).

196. *Id.* at 763. *See* Comment, *supra* note 140, at 344-45.

197. Young v. Whitworth, 522 F. Supp. 759, 763 (S.D. Ohio 1981).

198. Mastin v. Fellerhoff, 526 F. Supp. 969, 973 (S.D. Ohio 1981). *See* Young v. Whitworth, 522 F. Supp. 759, 763 (S.D. Ohio 1981). *See also* Lassiter v. Department of Social Servs., 452 U.S. 18, 25-27 (1981).

199. Scott v. Illinois, 440 U.S. 367, 373-74 (1979). *See* Argersinger v. Hamlin, 407 U.S. 25, 37-38, 40 (1972); *id.* at 42 (Burger, C.J., concurring in result).

200. Young v. Whitworth, 522 F. Supp. 759, 762 (S.D. Ohio 1981).

201. *In re* Gault, 387 U.S. 1, 36, 41 (1967) (juvenile delinquency case); *In re* Di Bella, 518 F.2d 955, 959 (2d Cir. 1975) (dictum as to criminal contempt actions).

202. Powell v. Alabama, 287 U.S. 45, 69 (1932).

203. Young v. Whitworth, 522 F. Supp. 759, 763 (S.D. Ohio 1981).

appointed counsel.[204] Similarly, the presence of counsel may affect significantly an indigent's ultimate risk of incarceration.[205] It is submitted, therefore, that there exists no legitimate objection to, or substitute for, the requirement of appointed counsel.

In summary, the need for counsel in civil contempt proceedings resulting in the deprivation of physical liberty is compelling, and is supported by the fundamental nature of the liberty interest at stake, the reduced potential for error as a result of the presence of counsel, the significant impact such presence may have upon the ultimate outcome of the proceeding, and the lack of hindrance of competing governmental interests because of the requirement of appointed counsel.

In a democratic society, the freedom of the individual, while not absolute, is central to an enlightened concept of equal justice under law. Whenever that freedom must be forfeited, it should be accomplished pursuant to civilized procedures that make the commitment to the integrity of the individual a meaningful experience and not simply an empty promise.[206] Therefore, a defendant in a civil contempt proceeding should not be deprived of his physical liberty, upon a finding of guilt, without benefit of the prior assistance of counsel, either retained or appointed. If he can afford counsel of his own choice, he should be accorded a reasonable opportunity to do so. If he cannot afford retained counsel, then, subject only to a knowing and intelligent waiver,[207] counsel should be appointed for him.

C. *Standard for Appointment of Counsel*

When a court is confronted with a civil contempt proceeding against an indigent parent for noncompliance with an order for child support, it must assess, with care, the potential for incarceration in the event of a finding of guilt. A failure to do so will increase the

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204. *Id.*

205. *See* D. CHAMBERS, *supra* note 121, at 185-86.

206. *Cf.* Coppedge v. United States, 369 U.S. 438, 449 (1962) (the quality of a civilization may properly be judged by the methods employed in the enforcement of its criminal law); Watts v. Indiana, 338 U.S. 49, 54-55 (1949) (plurality opinion) (procedural safeguards employed by accusatorial system of criminal justice protect individuals from governmental oppression); McNabb v. United States, 318 U.S. 332, 343-47 (1943) (same as *Cooppedge* and *Watts*); Schaefer, *supra* note 78, at 25-26 (American standards of justice, which reflect the quality of our civilization, implement a concept of due process that seeks to protect the individual from unjust punishment).

207. *See* Faretta v. California, 422 U.S. 806, 835 (1975); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); State v. Reed, 174 Conn. 287, 293, 386 A.2d 243, 248 (1978).

risk of a court having to abort the proceeding in the event that it does decide to incarcerate an unrepresented indigent, because no individual may be imprisoned unless he is represented by counsel. Accordingly, if a court wishes to preserve the option of incarceration, then it must be prepared, first, to weigh the factors that will influence a decision of confinement and, second, to both advise the indigent of his right to appointed counsel and to provide him with such counsel, unless properly waived, if there exists a sufficient likelihood of imprisonment. This will require of the court "a predictive evaluation" of the case.[208]

The courts are not in agreement as to what standard of "predictive evaluation" a court must apply in determining whether an indigent litigant, if he loses, will be deprived of his physical liberty. In *Argersinger v. Hamlin*,[209] Chief Justice Burger, while concurring in the result, applied a "significant likelihood," or reasonable probability, standard to criminal prosecutions.[210] The Iowa Supreme Court has applied this standard to civil contempt proceedings, in reliance upon the Chief Justice's position in *Argersinger*.[211] Other courts, however, appear to have adopted a reasonable possibility standard for the appointment of counsel.[212] The better standard, and the one that more equitably balances the competing interests involved, is the reasonable probability test. By "reasonable probability" is meant that there exists a fair reason under the facts for entertaining such a belief.[213] Thus, a reasonable probability that an event will take place or happen signifies that the event is reasonably likely to occur.[214] Although this standard requires more than a mere possibility or speculation,[215] it does not require a reasonable certainty.[216]

Actual incarceration is a penalty different in kind from the mere threat of incarceration or the imposition of fines. Thus, in a criminal

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208. Argersinger v. Hamlin, 407 U.S. 25, 42 (1972) (Burger, C.J., concurring in result) (test endorsed for appointment of counsel in criminal prosecutions).

209. 407 U.S. 25 (1972).

210. *Id.* at 42 (Burger, C.J., concurring in result).

211. McNabb v. Osmundson, 315 N.W.2d 9, 14 (Iowa 1982).

212. *See* Mastin v. Fellerhoff, 526 F. Supp. 969, 973 (S.D. Ohio 1981); Tetro v. Tetro, 86 Wash. 2d 252, 254-55, 544 P.2d 17, 19-20 (1975) (en banc). *See also* Young v. Whitworth, 522 F. Supp. 759, 765-66 (S.D. Ohio 1981).

213. *See* Mims v. State, 141 Ala. 93, 95-96, 37 So. 354, 354 (1904); Williams v. Lumpkin, 169 Miss. 146, 152, 152 So. 842, 844 (1934).

214. *See* Johnson v. Connecticut Co., 85 Conn. 438, 441, 83 A. 530, 531 (1912).

215. *See* Hallum v. Village of Omro, 122 Wis. 337, 344, 99 N.W. 1051, 1054 (1904).

216. *See* Johnson v. Connecticut Co., 85 Conn. 438, 440-42, 443-44, 83 A. 530, 531-32 (1912).

prosecution, the line of demarcation for the constitutional right to appointed counsel is at the point of actual imprisonment.[217] Accordingly, and because "any deprivation of liberty is a serious matter,"[218] the burden imposed upon the states by the requirement of appointed counsel before an indigent defendant may be incarcerated must be assumed regardless of the costs imposed by such a rule.[219] To go beyond this requirement of actual incarceration in a criminal proceeding, and to insist upon the need for counsel because of exposure of an alleged civil contemner to the *threat* of imprisonment, which is the test for the reasonable possibility standard,[220] would do violence to the rationale of *Scott v. Illinois*.[221] It would also undercut the rule of *presumptive* right to appointed counsel announced in *Lassiter v. Department of Social Services*,[222] and would result in a constitutional anomaly, in that a defendant in a civil contempt proceeding would be accorded a greater right to appointed counsel than a defendant possesses in a criminal prosecution.[223]

In *Lassiter*, the Supreme Court observed that there exists a presumptive right to appointed counsel whenever an indigent litigant, "if he loses," may be deprived of his "physical liberty."[224] The Court was also careful to note, however, that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel."[225] Similarly, as the danger of actual deprivation of physical liberty diminishes, so too, does the right to appointed counsel. Therefore, exposure to the threat of incarceration does not warrant imposition of a requirement of counsel.[226]

A rule requiring the appointment of counsel upon a mere reasonable possibility of confinement has another, more practical, drawback. Such a requirement would subject the states to an op-

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217. Scott v. Illinois, 440 U.S. 367, 373-74 (1979). *See Argersinger*, 407 U.S. at 37-38, 40; *id.* at 41-42 (Burger, C.J., concurring in result).

218. *Argersinger*, 407 U.S. at 41 (Burger, C.J., concurring in the result).

219. Scott v. Illinois, 440 U.S. 367, 372-73 (1979).

220. *See* Mastin v. Fellerhoff, 526 F. Supp. 969, 973 (S.D. Ohio 1981); Tetro v. Tetro, 86 Wash. 2d 252, 254-55, 544 P.2d 17, 19-20 (1975) (en banc).

221. 440 U.S. 367, 372-73 (1979).

222. 452 U.S. 18, 26-27 (1981).

223. *See* McNabb v. Osmundson, 315 N.W.2d 9, 14 (Iowa 1982) (if right to appointed counsel in criminal cases "attaches" only when actual imprisonment is imposed, then a higher standard will not be imposed by the Supreme Court in a civil proceeding in which an indigent is not actually incarcerated).

224. 452 U.S. at 26-27.

225. *Id.* at 26.

226. *See* Henkel v. Bradshaw, 483 F.2d 1386, 1389 (9th Cir. 1973) (dictum); McNabb v. Osmundson, 315 N.W.2d 9, 14 (Iowa 1982).

pressive burden. For example, in Michigan it has been estimated that the requirement of appointed counsel for all indigents in civil contempt cases probably would result in more than doubling the number of appointed counsel in judicial proceedings.[227] This is what would occur, however, under the reasonable possibility standard, for this standard would require a court to appoint counsel in virtually all cases, on the theory that the threat of imprisonment was an implicitly realistic ingredient of any civil contempt proceeding for an unreasonable disobedience of a support order. This, in turn, would lead to prolonged hearings and substantially increase the government's financial burdens.[228]

Finally, the reasonable possibility standard would inflict a needless hardship upon the states, because in many prosecutions for civil contempt, the defendant, even if adjudged to be in contempt, will not be subjected to actual imprisonment. Incarceration for civil contempt is a proper sanction only if a court can find that the alleged contemner has unreasonably failed to comply with the order,[229] while retaining the present ability to bring himself into compliance.[230]

This is not to say that a defendant in a civil contempt proceeding is without danger of imprisonment. The threat of confinement will always be present, although it may be drastically reduced, if not actually eliminated, by having the show-cause order served upon the defendant recite that imprisonment is not presently indicated or contemplated.[231] Since, however, it is the individual's interest in his physical liberty that triggers the right to, and the need for, appointed counsel,[232] the assistance of counsel, while always beneficial, will not be constitutionally required where that liberty interest is neither materially implicated nor jeopardized. Conversely, if a court wishes to impose a sentence of confinement, the defendant will be secure in his liberty interest by the constitutional guarantee that he cannot be incarcerated *unless he is represented by counsel*.

The reasonable probability standard for the appointment of counsel will avoid an undue burden to the states without infringing

227. Sword v. Sword, 399 Mich. 367, 382-83, 249 N.W.2d 88, 94 (1976) (an estimated 25,000 support cases are added annually to files of domestic relations enforcement officers and there remain until all children affected attain age of eighteen).

228. *Id.* at 381, 382-83, 249 N.W.2d at 93, 94. *See* State *ex rel.* Department of Human Servs. v. Rael, 97 N.M. 640, 644, 642 P.2d 1099, 1103 (1982).

229. *See supra* text accompanying notes 65-74.

230. *See, e.g.*, Shillitani v. United States, 384 U.S. 364, 371 (1966).

231. *See* Henkel v. Bradshaw, 483 F.2d 1386, 1390 n.8 (9th Cir. 1973) (dictum).

232. *Lassiter*, 452 U.S. at 25.

upon the individual's fundamental interest in his personal freedom. It will function as an accurate barometer of the indigent's need for counsel, while reducing the incidence of aborted contempt proceedings arising from a belated decision to incarcerate an unrepresented indigent. At the same time, it will relieve the states of the unnecessary burden of providing counsel in those cases which do not result in imprisonment. In these particulars, the standard will equitably accommodate and balance the competing interests of the indigent and the state. Therefore, while there is no constitutional mandate for the appointment of counsel on the basis of a reasonable probability or significant likelihood of incarceration, practical necessity dictates such a requirement.

In assessing the reasonable probability of incarceration, a court must necessarily engage in "a predictive evaluation" without prejudging the controversy.[233] While not reducible to mathematical certitude, such an assessment is capable of producing a reasonably accurate result.[234] Among the pertinent factors that may be considered are the reasons for noncompliance with the order of support, the indigent litigant's ability to have complied with the order during the period or periods of nonpayment, the litigant's payment record, his attitudinal response to attempts by domestic relations officers to effect voluntary compliance with the support order, the indigent's current employment status and capability of being employed, the amount of arrearage, the present ability of the litigant to come into substantial compliance with the support order, the indigent's record of previous contempt or show-cause hearings for noncompliance, and the recommendation, if any, of the domestic relations officer assigned to the case.[235] Primary consideration, however, should be given to the litigant's *present* ability to comply with the support order, for the purpose of contempt proceedings for noncompliance with child support decrees or orders is to coerce the defendant into compliance, not to punish him for past misconduct.[236] Similarly,

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233. *Cf. Argersinger*, 407 U.S. at 42 (Burger, C.J., concurring in result) (endorsing this approach for criminal prosecutions).

234. *Cf. id.* at 40 (opinion of the Court) (prior to criminal trial, a judge "will have a [sufficient] measure of the seriousness and gravity" of the accusation to know when to appoint counsel), and *id.* at 42 (Burger, C.J., concurring in result) ("the prediction is not one beyond the capacity of an experienced judge. . . .").

235. *See* D. CHAMBERS, *supra* note 121, at 212 (report of enforcement officer to court, Genesee County, Michigan).

236. Ryfeul v. Ryfeul, 650 P.2d 369, 375 (Alaska 1982). *See* Sword v. Sword, 399 Mich. 367, 391-92, 249 N.W.2d 88, 98 (1976) (Levin, J., concurring) (consideration of past misconduct would be inconsistent with premise that civil contemner, who carries the

justification for coercive imprisonment in civil contempt proceedings depends upon the contemner's current ability to comply with the court's order. Once that ability ceases to exist, incarceration must end.[237]

A court may pursue the following, but not exclusive, lines of inquiry in assessing the present ability of an alleged contemner to comply with a support order:

(a) the accuracy of the alleged arrearage;
(b) defendant's education and skills;
(c) available employment opportunities;
(d) diligence employed by defendant in seeking work, as well as his availability for work;
(e) defendant's employment history, including reasons for termination of employment;
(f) personal history of defendant including health and physical ability to obtain gainful employment, as well as present means of support and marital status;
(g) assets, both real and personal, and liabilities of defendant, and any transfers of assets; and
(h) efforts previously made by defendant to modify support order for being excessive under the circumstances.[238]

If the inquiry reveals an arrearage and the reason or reasons for noncompliance, then the court must determine whether the defendant has sufficient present ability to comply with the order, or by the exercise of due diligence could do so,[239] and has unreasonably failed to do so.[240]

V. CONCLUSION

There is a compelling need for the presence of counsel before an

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keys of his prison, may not be incarcerated if he does not have ability to comply with order); Spalter v. Wayne Circuit Judge, 35 Mich. App. 156, 161, 192 N.W.2d 347, 349 (1971). *See also* Johansen v. State, 491 P.2d 759, 766 (Alaska 1971) (court may also consider whether defendant has asserted inability to comply with support order).

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

238. *See* Sword v. Sword, 399 Mich. 367, 378-79, 249 N.W.2d 88, 92 (1976) (finding error in trial court's attempt to limit test of ability to comply solely to physical ability). *See also* McDaniel v. McDaniel, 256 Md. 684, 693-94, 262 A.2d 52, 57-58 (1970); Hopp v. Hopp, 279 Minn. 170, 176-77, 156 N.W.2d 212, 217-18 (1968); State *ex rel.* Houtchens v. District Court, 122 Mont. 76, 82-83, 199 P.2d 272, 275 (1948); 2 W. NELSON, *supra* note 57, at § 16.25, at 435-38.

239. Aspira of New York, Inc. v. Board of Educ., 423 F. Supp. 647, 654 (S.D.N.Y. 1976); Sword v. Sword, 399 Mich. 367, 379, 249 N.W.2d 88, 92 (1976). *See* Shillitani v. United States, 384 U.S. 364, 371 (1966).

240. *See supra* text accompanying notes 65-74.

indigent litigant in civil contempt proceedings may be imprisoned.[241] To secure this protection, due process requires the appointment of counsel whenever a civil contemner is deprived of his physical liberty. Therefore, since an individual may not be incarcerated unless he is represented by counsel, a court should be prepared to appoint counsel for indigent litigants in civil contempt cases whenever there exists a reasonable probability or significant likelihood that the defendant, if he loses, will be denied his personal freedom.

241. *See* Comment, *supra* note 140, at 341-53; Mnookin, *Review: Using Jail for Child Support Enforcement*, 48 U. CHI. L. REV. 338, 366-67 n.136 (1981).