

Protecting the Liberty of Indigent Civil Contemnors in the Absence of a Right to Appointed Counsel

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*In 2011, the United States Supreme Court held in *Turner v. Rogers* that the Due Process Clause of the Fourteenth Amendment does not require the government to provide appointed counsel in civil contempt actions — despite the possibility that a contemnor can be jailed indefinitely for continuing failure to obey a court order. This Note asserts that in civil contempt cases against indigent defendants, many of the protections that appointed counsel would have provided can and should be captured through additional cost-effective procedural changes beyond the minimal procedure the Court required in *Turner*. This Note begins, in Part II, by outlining existing procedural due process jurisprudence of civil contempt and briefly tracking the historical development of the constitutional right to appointed counsel. Part III describes possible errors a court can make that may lead to improper confinement for civil contempt and explores how the presence of a defense attorney can guard against these errors. Finally, Part IV proposes a procedural framework that attempts to encapsulate the benefits of an appointed attorney and examines both the costs and the effects of these proposals. The Note concludes with a discussion of how these changes can be implemented in order to effectively protect the due process rights of indigent accused contemnors.*

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I. INTRODUCTION

“The history of American freedom is, in no small measure, the history of procedure.”¹

For more than fifty years, scholars, activists, and practitioners have argued for a right to appointed counsel for indigent litigants in all court proceedings, not just criminal cases.² Proponents of this “Civil Gideon” movement³ — named for the landmark 1963 Supreme Court decision guaranteeing appointed counsel in all criminal prosecutions⁴ — argue that for unsophisticated litigants, the twin procedural requirements of notice and opportunity to be heard cannot be adequately met without an attorney to act as guide and advocate. A right to appointed counsel in certain types of civil cases, they maintain, would help the poorest of litigants obtain equal access to justice and assert their legal rights in situations where basic human needs such as health, safety, shelter, or child custody are at stake.⁵ Given the significant expense that

1. *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., separate opinion).

2. For an example, see the groundbreaking note by Thomas Grey, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967). Although the note was unsigned when initially published, its authorship was revealed by Judge Jacob Fuchsberg of the New York Court of Appeals in his dissent in *In re Smiley*, 36 N.Y.2d 433, 452 n.6 (1975). See also NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, <http://www.civilrighttocounsel.org> (last visited Feb. 18, 2012); *The Existing Civil Right to Counsel Infrastructure*, BRENNAN CENTER FOR JUSTICE, <http://www.brennancenter.org/analysis/existing-civil-right-counsel-infrastructure> (last visited Feb. 18, 2012) (noting that the existing civil right to counsel is “far from perfect”).

3. Although the movement to establish a guaranteed right to civil counsel has existed for decades, the term “Civil Gideon” was coined by District Judge Robert Sweet in a 1997 lecture that was published the following year. See Clare Pastore, *A Civil Right to Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065, 1074 n.39 (2009) (citing Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503 (1998)).

4. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating the Sixth Amendment's right to appointed counsel in criminal prosecutions to the states). Justice Black's original language in *Gideon* is frequently quoted in support of a right to civil counsel, despite its reference to the criminal system: “[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.” *Id.* at 344.

5. See, e.g., Symposium, *The 2006 Edward v. Sparer Symposium, Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context*, 15 TEMP. POL. & CIV. RTS. L. REV. 501 (2006) (containing twelve articles on a right to civil counsel); see also American Bar Association, House of Delegates Resolution 112A (Aug. 7, 2006), available at <http://www.americanbar.org/content/dam/aba/administrative/>

would accompany such a right, the Civil Gideon movement has been predictably unsuccessful at instituting a national, comprehensive right to counsel in civil cases.⁶ However, because modern due process jurisprudence is fundamentally a cost-benefit balancing test,⁷ a right to appointed counsel may be warranted in civil cases in which the threatened deprivation is particularly severe.

The Supreme Court recently re-examined whether the Due Process Clause of the Fourteenth Amendment requires the state to provide defense counsel in cases involving the ultimate civil deprivation: incarceration for contempt of court. The Court's unanimous rejection of this proposition in *Turner v. Rogers*⁸ was arguably the last gasp of the Civil Gideon movement as a matter of federal constitutional law.

In January 2008, Michael Turner was held in willful contempt by the Oconee County Family Court in South Carolina for failure to comply with a child support order.⁹ Turner, a sporadically employed carpenter with a broken back (and an on-and-off addiction to methamphetamine), had fallen behind in his payments several years earlier.¹⁰ He had already been held in contempt and ordered to jail five times, most recently serving a six-month term during which his child support arrears continued to accrue.¹¹ At

legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf (“RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.”).

6. Several states, however, have instituted a right to counsel in certain narrow classes of civil cases such as child custody disputes, psychiatric commitment, and involuntary medical procedures. See Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (2006) (surveying state statutes creating a right to counsel in certain types of civil cases); Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (2006) (surveying the development of the right to civil counsel in state courts).

7. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (“[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”). See *infra* Part II.B.

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

9. *Id.* at 2513.

10. *Id.*; See Brief for Petitioner at 9, *Turner*, 131 S. Ct. 2507 (No. 10-10) [hereinafter *Turner* Brief for Petitioner].

11. *Turner*, 131 S. Ct. at 2513.

the contempt hearing, Turner attempted to explain that his back injury, drug addiction, and repeated jailing for contempt made it impossible to earn enough money to both provide for his current family of five and pay his \$5,700 arrearage on the child support order.¹² As a civil proceeding, the contempt hearing carried none of the procedural protections afforded by the criminal justice system: no presumption of innocence, no reasonable doubt standard, and no right to appointed counsel.¹³ After ignoring Turner's assertions that he was unable to comply with the child support order, the court ordered Turner jailed for up to a year or until the remaining balance was paid off.¹⁴

On appeal, the Supreme Court found that Turner had not been provided several basic protections required by the Due Process Clause.¹⁵ Yet, the Court also unanimously confirmed that the clause does not require states to provide appointed counsel for indigent civil contemnors who face incarceration.¹⁶ The Court held that the societal cost of mandating appointed counsel in civil cases far outweighs the benefits to the litigant, even in cases where the litigant's physical freedom hangs in the balance.¹⁷

12. *Id.* At the time of the contempt hearing, Turner's only source of income was federal Supplemental Security Income and disability insurance benefits. *Turner Brief for Petitioner, supra* note 10, at 11 n.7.

13. "[C]ivil contempt . . . [carries] fewer procedural protections than in a criminal case." *Turner*, 131 S. Ct. at 2516. See *infra* Part II.B for an overview of the due process requirements of civil contempt.

14. *Turner*, 131 S. Ct. at 2513. Turner subsequently served the entire year in jail. *Turner Brief for Petitioner, supra* note 10, at 13–14. Two months after his release, he was again held in contempt for failure to pay off the balance and was incarcerated for another six months while the appeal of the previous contempt order was still pending. *Id.*

15. *Turner*, 131 S. Ct. at 2520.

16. *Id.* at 2512. The Supreme Court granted certiorari in response to a split among state courts, and several federal Courts of Appeals, on this question. Compare *Ridgway v. Baker*, 720 F.2d 1409, 1413–15 (5th Cir. 1983) (finding a federal constitutional right to counsel for indigent civil contemnors facing imprisonment in the child support context) with *Andrews v. Walton*, 428 So.2d 663, 666 (Fla. 1983) (holding that there are "no circumstances in which a parent is entitled to court-appointed counsel in a civil contempt proceeding for failure to pay child support"); see *Turner*, 131 S. Ct. at 2514 (surveying conflicting lower court decisions).

17. *Turner*, 131 S. Ct. at 2518–20. The holding in *Turner* was also based on the observation that in child support cases, the plaintiff is frequently a private individual who is also unrepresented by counsel, and appointing an attorney for the defendant "could make the proceeding less fair overall." *Id.* at 2519. For an interesting synthesis of the Supreme Court's recent cases involving fairness, due process, and access to justice, see Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 154–61 (2011).

Although this Note will only address civil contempt, many of its observations and proposals can be applied to civil psychiatric commitment proceedings, the other major catego-

The assistance of counsel provides many benefits to a defendant facing possible incarceration. In addition to protecting against procedural irregularities and advancing legal arguments, attorneys perform important client education and advisory functions. These functions are vital to ensuring that judicial contempt proceedings respect the defendant's rights to autonomy and fairness. Despite the Supreme Court's determination that state-sponsored counsel in civil contempt cases is too costly to be constitutionally required, the same balancing test employed by the Court in reaching that conclusion might deem equivalent procedural protections necessary if they can achieve the same goals at a dramatically lower cost to society.

This Note argues that in civil contempt cases, many of the benefits of legal counsel can and should be captured through changes to procedural rules that will provide near-equivalent protections without incurring the costs to society that so concerned the *Turner* Court. Changes to the quality and detail of court notices, reallocation of certain burdens of proof, and periodic re-examination of dispositive issues would help prevent inappropriate confinement of indigent alleged contemnors. Whether viewed as guidelines for future courts confronted with questions of due process in civil contempt proceedings or as a suggested package of legislative reforms, these changes can effectively protect the physical liberty of indigent civil defendants at minimal cost to the state. This Note will begin, in Part II, by explaining the basics of contempt law, outlining existing procedural due process jurisprudence of civil contempt, and briefly tracking the history and development of the constitutional right to appointed counsel. Part III describes the possible errors a court can make that may lead to improper confinement for civil contempt and explores the ways in which having an attorney present can guard against these specific errors. This Part also describes the problems with pro se

ry of civil cases which result in confinement. Civil commitment involves several complicating characteristics that warrant separate treatment of the subject: the potential incompetence of the defendant, the difficulty of proving mental illness and the uncertainty of treatment success, the strong public interest in confining those who may pose a danger to themselves or others, and the built-in continuing rehabilitation and reevaluation by medical experts that accompanies confinement in a psychiatric institution. For an excellent treatment of the due process concerns surrounding civil commitment of mentally disabled individuals, see Peter L. Strauss, *Due Process in Civil Commitment and Elsewhere*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 442 (Michael Kindred et al. eds., 1976).

representation in contempt proceedings and why these problems must be addressed. Part IV then proposes several procedural changes that attempt to encapsulate some of the benefits an appointed attorney would provide and examines both the costs and the effects of these proposals. The Note concludes with a discussion of how these changes can be implemented in order to effectively protect the due process rights of indigent accused contemnors.

II. CONTEMPT, DUE PROCESS, AND THE RIGHT TO COUNSEL

A. CONTEMPT AND THE CIVIL/CRIMINAL DISTINCTION

The ability to punish an individual for disobedience of a lawful court order has long been understood as a necessary and inherent power of the judiciary.¹⁸ Judges have wide latitude in imposing sanctions for contempt, either to force compliance in the face of ongoing recalcitrance or to punish violations of court orders.¹⁹ There are two types of contempt — civil and criminal — distinguished primarily by the nature and purpose of the sanction.²⁰

18. See, e.g., *Ex parte Robinson*, 86 U.S. 505, 510 (1873) (“The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts and, consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.”); *Green v. United States*, 356 U.S. 165, 169 (1958) (observing that the original contempt statute in the Judiciary Act of 1789 “expressly attribute[d] to the federal judiciary those powers to punish for contempt possessed by English courts at common law.”), *overruled by* *Bloom v. Illinois*, 391 U.S. 194 (1968). See also Joel M. Androphy & Keith A. Byers, *Federal Contempt of Court*, 61 TEX. B.J. 16, 18 (1998) (“If federal courts were unable to rely on the threat of imposing contempt sanctions, judges would be essentially powerless to ensure the orderly administration of justice within their courtrooms and in connection with the legal proceedings on their dockets. Arguably, the absence of judicial contempt powers could lead to chaos in both the courtroom and the legal system as a whole.”).

19. See, e.g., *John T. v. Del. Cnty. Intermediate Unit*, 318 F.3d 545, 554 (3d Cir. 2003) (“District courts hearing civil contempt proceedings are afforded broad discretion to fashion a sanction that will achieve full remedial relief.”) (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193–94 (1949) (contempt for violation of an injunction against violating the Fair Labor Standards Act)); see generally 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE, CIVIL* § 2960 (2d ed. 1995) (“A federal court’s discretion includes the power to frame a sanction [for contempt] to fit the violation.”).

20. *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994) (“[W]hether a contempt is civil or criminal turns on the ‘character and purpose’ of the sanction involved.”) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)).

Differentiating civil from criminal contempt is necessary to determine the level of procedural protection to which the alleged contemnor is entitled.

Criminal contempt is retrospective and punitive; it is intended to punish a wrongdoer for a past violation of a court order or injunction.²¹ Many courts refer to criminal contempt as necessary to “vindicate the authority of the court” by criminalizing disobedience of the court’s mandates.²² “Disruptive or disrespectful behavior committed in the presence of the court”²³ can be punished summarily, as elaborate procedural protections and fact-finding by a jury are unnecessary when the judge personally witnessed the contumacious conduct.²⁴ Conversely, violations of a court order that occur outside the immediate presence of the court carry all of the ordinary rights and procedural protections of the criminal justice system,²⁵ such as protection against double jeopardy, proof beyond a reasonable doubt, and a right to appointed counsel.²⁶ Sanctions for criminal contempt may include fines payable to the court or a determinate jail sentence.²⁷

21. “If the purpose of the sanction is to punish the contemnor and vindicate the authority of the court, the order is viewed as criminal.” *In re Bradley*, 588 F.3d 254, 263 (5th Cir. 2009); see also *Latrobe Steel Co. v. United Steelworkers of Am.*, 545 F.2d 1336, 1343 (3d Cir. 1976) (“Criminal contempt seeks to punish past acts of disobedience . . .”) (citing *Gompers*, 221 U.S. at 445–46).

22. *In re Contempt Finding in U.S. v. Stevens*, 663 F.3d 1270, 1274 (D.C. Cir. 2011) (quoting *Gompers*, 221 U.S. at 441); see *Bloom v. Illinois*, 391 U.S. 194, 200 (1968) (overturning criminal contempt judgment because the contemnor was not afforded full criminal process rights: “These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.”).

23. Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 349 (2000) (seminal article on modern contempt law).

24. Cf. *Bloom*, 391 U.S. at 208; see also Livingston, *supra* note 23, at 350.

25. *Bagwell*, 512 U.S. at 826 (“Criminal contempt is a crime in the ordinary sense.”); see also *Bloom*, 391 U.S. at 194.

26. See *In re Bradley*, 318 U.S. 50, 63 (1943) (double jeopardy); *Cooke v. United States*, 267 U.S. 517, 537 (1925) (right to counsel); *Gompers*, 221 U.S. at 444 (proof beyond a reasonable doubt, presumption of innocence, privilege against self-incrimination); *In re Oliver*, 333 U.S. 257 (1948) (public trial). See generally *Hicks v. Feiock*, 485 U.S. 624, 632 (1988) (“criminal penalties [for indirect contempt] may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.”).

27. Livingston, *supra* note 23, at 350; *Bagwell*, 512 U.S. at 847 (citing *Hicks*, 485 U.S. at 624 (“If the relief provided is a sentence of imprisonment, it is . . . punitive if the sentence is limited to imprisonment for a definite period. If the relief provided is a fine, it is . . . punitive when it is paid to the court . . .”) (internal citations omitted)).

In contrast, civil contempt is intended to pressure the contemnor into complying with a court order that he continues to disobey.²⁸ Civil contempt is usually imposed primarily for the benefit of a complaining party.²⁹ The standard sanction for civil contempt is imprisonment of the contemnor until he complies with the court order, but courts can also impose per diem fines.³⁰ Examples of civil contempt sanctions include jailing a reporter until she reveals a confidential source after being ordered to do so by the court,³¹ jailing a parent until she produces a child for a court-ordered neglect evaluation,³² jailing a criminal suspect until she unlocks encrypted digital files on her laptop computer to comply with a grand jury subpoena,³³ and fining a party for each day it continues to refuse to produce discovery information the court has compelled.³⁴

The defining feature of civil contempt is the contemnor's ability to purge the contempt at any time by complying with the court order³⁵ (hence the now oft-quoted adage that civil contemnors

28. Livingston, *supra* note 23, at 352.

29. *Id.* Because fines for civil contempt are paid to the complaining party (and not to the court, as is the case with criminal contempt fines), civil contempt is also used as a restitutionary tool to compensate the complaining party for any harm suffered as a result of the contumacious conduct. See *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303–04 (1947) (“Judicial sanctions in civil contempt proceedings may, in a proper case, be employed . . . to compensate the complainant for losses sustained. Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant’s actual loss . . .”) (internal citations omitted); see also Jennifer Fleischer, Note, *In Defense of Civil Contempt Sanctions*, 36 COLUM. J.L. SOC. PROBS. 35, 55–56 (2002) (noting that courts sometimes use civil contempt instead of criminal contempt in order to direct the fines to the complainant).

30. See BLACK’S LAW DICTIONARY 360 (9th ed. 2009) (“The usual sanction [for civil contempt] is to confine the contemnor until he or she complies with the court order.”); *Bagwell*, 512 U.S. at 829 (“A close analogy to coercive imprisonment is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order.”).

31. *In re Miller*, 397 F.3d 964, 966–68 (D.C. Cir. 2005) (journalist jailed for 18 months or until she revealed her sources for an article exposing an undercover CIA operative).

32. *Baltimore City Dep’t of Soc. Servs. v. Bouknight*, 493 U.S. 549, 553 (1990) (mother jailed indefinitely until she produced her allegedly abused son, after a court ordered the child into the custody of the Department of Social Services).

33. David Kravets, *Defendant Ordered to Decrypt Laptop May Have Forgotten Password*, WIRED.COM (Feb. 6, 2012, 2:55 PM), <http://www.wired.com/threatlevel/2012/02/forgotten-password/>.

34. *United States v. Bright*, 596 F.3d 683, 690 (9th Cir. 2010) (imposing a per diem fine of \$500 for each day the contemnors failed to produce credit card records subpoenaed by the Internal Revenue Service).

35. See *Bagwell*, 512 U.S. at 829 (“Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge. Thus, a ‘flat, unconditional fine’ totaling even as little as \$50 announced after a finding of contempt is criminal if the contemnor

“carry the keys of their prison in their own pockets”³⁶). A determinate fine or jail sentence with no “purge condition” attached may only be imposed on criminal contemnors.³⁷ If the accused individual is truly incapable of complying with the order, imprisoning him to coerce impossible compliance would be unproductive and abusive, and he therefore cannot be held in civil contempt.³⁸ Accordingly, if an incarcerated civil contemnor loses the ability to purge the contempt through an external change in circumstances, coercion no longer justifies further confinement, and the court must release the individual.³⁹

Although this distinction between civil and criminal contempt may seem sharp enough in theory, differentiating the two in practice can be difficult. In many situations, the same conduct may give rise to either civil or criminal contempt sanctions,⁴⁰ or even both, as “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 mandates.”⁴¹ The distinction turns on the “character and purpose” of the imposed

has no subsequent opportunity to reduce or avoid the fine through compliance.”) (internal citations omitted).

36. This saying originally appeared in *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902), but has been repeated several times by the Supreme Court. *See, e.g.*, *United States v. United Mine Workers of Am.*, 330 U.S. 258, 331 (1947); *Shillitani v. United States*, 384 U.S. 364, 368 (1966); *Hicks v. Feiock*, 485 U.S. 624, 633 (1988); *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011).

37. *See Bagwell*, 512 U.S. at 828–29 (“[A] fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a ‘completed act of disobedience,’ such that the contemnor cannot avoid or abbreviate the confinement through later compliance.”) (internal citation omitted).

38. *See, e.g.*, *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 251 (1972) (“[T]here is no justification for confining on a civil contempt theory a person who lacks the present ability to comply.”).

39. For example, if an individual is held in civil contempt and jailed for refusing to comply with a grand jury subpoena, he may only be held in contempt while that grand jury is in session (once the grand jury’s term ends, the contemnor no longer has the ability to purge the contempt by complying with the subpoena). *Shillitani*, 384 U.S. at 370; *see also* Robert H. Whorf, *The Boundaries of Contempt: Must the Court’s Power Yield to Due Process?*, 46 R.I. B.J. 9, 11 (1998) (describing the importance of both an ongoing “ability” and “opportunity” to purge civil contempt).

40. *See* Androphy & Byers, *supra* note 18, at 18; *see also* Whorf, *supra* note 39, at 12 (observing that contempt is often categorized as civil or criminal only after the fact on appeal, at which point it is too late to modify the procedural protections the contemnor received during the adjudication).

41. Edward G. Mascolo, *Procedures and Incarceration for Civil Contempt: A Clash of Wills Between Judge and Contemnor*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 171, 179 (1990) (citing *In re Irving*, 600 F.2d 1027, 1031 (2d Cir. 1979)).

sanction,⁴² and the Supreme Court has admitted that contempt is “neither wholly civil nor altogether criminal.”⁴³

For many years, courts applied this test by looking to the nature of the underlying court order that the accused contemnor allegedly violated. Past violations of prohibitive orders led to criminal contempt charges, while refusal to comply with affirmative orders constituted civil contempt.⁴⁴ In 1994, however, the Supreme Court refined this test by emphasizing the importance of a purge condition.⁴⁵ The Court also formalized several other factors to consider when determining the nature of the contempt and the level of necessary procedural protection, including the severity of the sanction and the relative complexity of the underlying court order.⁴⁶ These nuances, and the misapplication of sanctions that inevitably results, has led some scholars to call for the civil/criminal distinction to be reexamined — or even discarded entirely — in order to afford greater protections to those who face indefinite coercive sanctions.⁴⁷

B. DUE PROCESS AND CIVIL CONTEMPT

While accused civil contemnors are not afforded the full panoply of protections available to criminal defendants, the Due Process Clause does require certain minimal procedural requirements before an individual can be held in civil contempt. Procedural due process “is not a technical conception with a fixed con-

42. *In re Contempt Finding in U.S. v. Stevens*, 663 F.3d 1270, 1274 (D.C. Cir. 2011) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)).

43. *Gompers*, 221 U.S. at 441.

44. See Deborah J. Zimmerman, *Civil Contemnors, Due Process, and the Right to a Jury Trial*, 3 WYO. L. REV. 205, 210, 214–17 (2003) (discussing the development of the civil/criminal contempt distinction in the federal courts).

45. *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 838–39 (1994).

46. *Id.*

47. See, e.g., Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1033 (1993) (arguing that the level of procedural protection should depend on the severity of the threatened sanction rather than the nature of the violation); Robert J. Martineau, *Contempt of Court: Eliminating the Confusion between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677 (1981) (advocating reform of the civil/criminal contempt distinction); RONALD L. GOLDFARB, *THE CONTEMPT POWER* 58 (1963) (describing the civil/criminal distinction as an “unsatisfactory fiction”); Zimmerman, *supra* note 44, at 207 (advocating for an expanded right to trial by jury for civil contemnors); but see Fleischer, *supra* note 29, at 36 (arguing in favor of maintaining this civil/criminal distinction).

tent unrelated to time, place and circumstances.”⁴⁸ “Rather, the phrase [‘due process’] expresses the requirement of ‘fundamental fairness.’”⁴⁹ The Due Process Clause is “flexible” and “calls for such procedural protections as the particular situation demands”⁵⁰ through a balancing of the government and private interests involved. In *Mathews v. Eldridge*,⁵¹ the Supreme Court, per Justice Powell, articulated the three factors that determine the adequacy of procedural protections: the nature of the private interest at stake, the risk of erroneous deprivation and the marginal value of additional safeguards, and the government’s interest (including the fiscal and administrative burdens of additional procedure).⁵² Beyond the bedrock requirements that the individual receive notice of the impending deprivation and an opportunity to be heard in opposition,⁵³ evaluating the necessity of additional procedural protections involves weighing the core ideal of accuracy of judicial judgments (which arguably grows in importance with more serious deprivations) against the practical concerns of cost and administrability.⁵⁴

As “[a] procedure resulting in the incarceration of a person not convicted for a crime,” civil contempt “raises serious due process

48. *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196–97 (2001) (quoting Justice Stewart’s language in *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

49. *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 24 (1981) (finding no per se right to counsel in proceedings for termination of parental rights). *See infra* Part II.C.

50. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (quoting Chief Justice Burger in *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

51. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

52. *Id.* at 335; *see also* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1278 (1965) (“The required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it.”). In this highly influential article, Judge Friendly identifies eleven “Elements of a Fair Hearing” to consider when assessing adequacy of process. *Id.* at 1279–95.

53. *See, e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974) (requiring notice and an opportunity to be heard before a prisoner’s good-time credits can be revoked).

54. *Cf.* Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48–49 (1976) (criticizing the Supreme Court’s almost exclusive focus on accuracy for overlooking the importance of other process values); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-16, at 744 (2d ed. 1988) (claiming that “*the right to be heard* and *the right to hear why* are ultimately more understandable as inherent in decent treatment than as optimally designed to minimize mistakes.”).

questions.”⁵⁵ However, the due process barriers to a finding of civil contempt are surprisingly weak. Accused civil contemnors have no right to a jury trial.⁵⁶ Although a defendant charged with criminal contempt is entitled to a trial by jury if the charges will result in a sentence of imprisonment for more than six months,⁵⁷ a civil contemnor’s ability to purge the contempt at will is seen as sufficient to abrogate the need for a jury in all civil contempt proceedings.⁵⁸ In certain civil contempt situations, the due process guarantee of an opportunity to be heard can even be satisfied by submission of written briefs without an in-person hearing at all.⁵⁹

Proof beyond a reasonable doubt is not required in civil contempt cases;⁶⁰ “clear and convincing” evidence that the accused is in violation of the underlying court order is sufficient.⁶¹ While criminal defendants are guaranteed a presumption of innocence

55. William A. Austin, Note, *Due Process in Civil Contempt Proceedings: A Comparison with Juvenile and Mental Incompetency Requirements*, 44 *FORDHAM L. REV.* 1029, 1032 (1976).

56. *Shillitani v. United States*, 384 U.S. 364, 370–71 (1966) (“The conditional nature of the imprisonment — based entirely upon the contemnor’s continued defiance — justifies holding civil contempt proceedings absent the safeguards of indictment and jury, provided that the usual due process requirements are met.”) (internal citations omitted); *but see* Zimmerman, *supra* note 44 (surveying the arguments in support of and against requiring jury trials for civil contempt and concluding that the arguments in favor of jury trial protection should prevail).

57. In ordinary criminal prosecutions, a *maximum authorized* sentence greater than six months is what triggers the right to a jury trial. *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). However, because criminal contempt carries no explicitly delineated maximum sentence, it is the sentence *actually imposed* that determines whether the right to a jury trial attaches. *See Frank v. United States*, 395 U.S. 147, 149–50 (1969); *Bloom v. Illinois*, 391 U.S. 194, 210 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966).

58. *Shillitani*, 384 U.S. at 370–71.

59. *See, e.g., United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999) (“[While] a district court ordinarily should not impose contempt sanctions solely on the basis of affidavits, . . . where the affidavits offered in support of a finding of contempt are *uncontroverted*, we have held that a district court’s decision not to hold a full-blown evidentiary hearing does not violate due process.”) (internal citations omitted).

60. *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994).

61. *See, e.g., Am. Airlines, Inc. v. Allied Pilots Ass’n*, 228 F.3d 574, 581 (5th Cir. 2000); *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000); *Chi. Truck Drivers v. Bhd. Labor Leasing*, 207 F.3d 500, 505 (8th Cir. 2000); *McGregor v. Chierico*, 206 F.3d 1378, 1383 (11th Cir. 2000); *Ayres*, 166 F.3d at 994; *Reliance Ins. Co. v. Mast Constr. Co.*, 159 F.3d 1311, 1315–16 (10th Cir. 1998); *Langton v. Johnston*, 928 F.2d 1206, 1220 (1st Cir. 1991); *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590–91 (6th Cir. 1987). *Cf. Addington v. Texas*, 441 U.S. 418 (1979) (clear and convincing evidence is necessary before an individual can be committed for mental illness in a civil proceeding); *Santosky v. Kramer*, 455 U.S. 745 (1982) (clear and convincing evidence is necessary before parental rights can be severed completely in a civil case).

until the prosecution meets its heavy burden of proof, accused civil contemnors enjoy no such freedom from an affirmative burden of production. Once the movant has established a prima facie showing of noncompliance in her initial contempt motion, courts will typically issue a show-cause order shouldering the defendant with the burden to produce evidence as to why he should *not* be held in contempt.⁶² In many circumstances where the accused has a meritorious defense, the difficulty of establishing that defense may be significant, creating a risk that some defendants who should not be sanctioned may nonetheless be held in contempt.⁶³

The civil contemnor is not without defenses, however. In addition to standard equitable defenses such as duress and laches,⁶⁴ there are several important limitations on the court's contempt powers. As discussed above,⁶⁵ the defendant can show a present inability to comply with the underlying order, which is "said to be the most effectual answer to a contempt order."⁶⁶ Coercive sanctions are inappropriate even when the defendant is responsible for his own inability to comply, but the injured party may still seek civil contempt for compensatory relief,⁶⁷ and criminal contempt may still be appropriate.

Although the Supreme Court has made it quite clear that the merits of the underlying order may not be reopened for collateral

62. See *United States v. Rylander*, 460 U.S. 752, 757–58 (1983) (accused contemnor generally shoulders the burden to prove present inability to comply as a defense); *Hicks v. Feiock*, 485 U.S. 624, 637–38 (1988) (state statute creating a rebuttable presumption of ability to comply does not violate due process if applied in civil contempt proceedings); *accord* *CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992). See Mascolo, *supra* note 41, at 185–89; *but see* Comment, *The Coercive Function of Civil Contempt*, 33 U. CHI. L. REV. 120, 131–32 (1965) (endorsing this burden-shifting scheme only in certain civil contempt situations).

63. Mascolo, *supra* note 41, at 189.

64. See, e.g., *In re Grand Jury Proceedings of Special April 2002 Grand Jury*, 347 F.3d 197, 207–08 (7th Cir. 2003) (noting that while duress is not a complete defense to civil contempt for refusal to testify, it does serve as a bar to coercive imprisonment because the contemnor has no realistic option to purge the contempt through compliance); *FTC v. Trudeau*, 579 F.3d 754, 768 (7th Cir. 2009) (entertaining a laches defense to civil contempt).

65. See *supra* notes 35–39 and accompanying text.

66. *Maggio v. Zeitz*, 333 U.S. 56, 74 n.7 (1948) (citation omitted); *see also Rylander*, 460 U.S. at 757, 760–61.

67. *United States v. Basil Inv. Corp.*, 528 F. Supp. 1225, 1229 (E.D. Pa. 1981), *aff'd without opinion*, 707 F.2d 1401, 1404 (3d Cir. 1983).

attack at a contempt proceeding,⁶⁸ “it is well settled that the viability of a civil contempt order . . . hinges on the validity of the underlying injunction.”⁶⁹ The defendant may challenge the underlying order for lack of jurisdiction, unconstitutionality, or lack of specificity.⁷⁰ Disregard of an order that the issuing court did not have jurisdiction or authority to issue in the first place does not constitute contempt because such an order is “void,”⁷¹ particularly when the order infringes on the subject’s constitutional rights or compliance would “require an irretrievable surrender of constitutional guarantees.”⁷² Finally (and most commonly), if the order is not sufficiently specific to give the party adequate notice as to what is required of him, a perceived violation of the order does not constitute contempt.⁷³

Even if a contemnor is jailed indefinitely to coerce compliance, three subsequent developments may require the contemnor’s release: reversal of the underlying order, newly established inability to comply, or a clear loss of coercive effect. Unlike criminal contempt convictions, civil contempt sanctions must be vacated if

68. *Rylander*, 460 U.S. at 756–57 (noting the “long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.”); *accord* *United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999); *see infra* note 153.

69. *John T. v. Del. Cnty. Intermediate Unit*, 318 F.3d 545, 559 (3d Cir. 2003) (citing *United States v. United Mine Workers of Am.*, 330 U.S. 258, 295 (1947) (“The right to [a civil contempt order’s] remedial relief falls with an injunction which events prove was erroneously issued.”)); *Latrobe Steel Co. v. United Steelworkers of Am.*, 545 F.2d 1336, 1345–46 (3d Cir. 1976) (extending the *United Mine Workers* rule to coercive civil contempt orders).

70. *See generally* 17 AM. JUR. 2D CONTEMPT §§ 128, 130, 137 (2013).

71. *See, e.g.*, *U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) (“If a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void and an order of civil contempt based on refusal to honor it must be reversed.”); *Brougham v. Oceanic Steam Navigation Co.*, 205 F. 857, 860 (2d Cir. 1913) (“[I]f a court have jurisdiction of a cause and yet make an order in it beyond its power, . . . the order is a nullity, and affords no foundation for contempt proceedings.”).

72. *In re Novak*, 932 F.2d 1397, 1401 (11th Cir. 1991) (discussing exceptions to the collateral bar rule as applied to civil contempt); *see NAACP v. Alabama*, 357 U.S. 449, 459, 466 (1958) (overturning a judgment of civil contempt for refusing to turn over membership records that the organization was “constitutionally entitled to withhold” under the First Amendment’s guarantee of freedom of association); *Maness v. Meyers*, 419 U.S. 449, 458–61 (1975) (overturning a judgment holding an attorney in contempt for advising his client to disobey an order, because the order violated the client’s Fifth Amendment privilege against self-incrimination).

73. *See, e.g.*, *United States v. Dowell*, 257 F.3d 694, 699 (7th Cir. 2001) (“To be held in civil contempt, [the defendant] must have violated an order that sets forth in specific detail an unequivocal command from the court.”).

the underlying order is subsequently reversed on appeal or collateral attack, even though such reversal does not void the initial violation.⁷⁴ Similarly, a party who subsequently becomes unable to purge the contempt must be released from coercive confinement, despite the fact that he was found to have the ability to comply at the time he was adjudged in civil contempt.⁷⁵ Due process also demands that a civil contemnor be released from confinement if he convinces the court that the incarceration has lost its coercive value and will not succeed in pressuring him into compliance, thereby becoming punitive in nature.⁷⁶ For example, “[a] witness who [has] satisfie[d] a judge that he or she will stay in jail as long as necessary but will in no event respond to the government’s demand to testify must be released from confinement, even though the witness’s motives are clearly igno-

74. “A conviction for criminal contempt may indeed survive the reversal of the decree disobeyed; the punishment is to vindicate the court’s authority which has been equally flouted whether or not the command was right. But the same cannot be true of civil contempts, which are only remedial. It is true that the reversal of the decree does not retroactively obliterate the past existence of the violation; yet on the other hand it does more than destroy the future sanction of the decree. It adjudges that it never should have passed; that the right which it affected to create was no right at all. To let the liability stand for past contumacy would be to give the plaintiff a remedy not for a right but for a wrong, which the law should not do.” *Mann v. Calumet City*, 588 F.3d 949, 955 (7th Cir. 2009) (quoting *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, 86 F.2d 727, 727 (2d Cir. 1936) (per curiam)); see also *United States v. United Mine Workers of Am.*, 330 U.S. at 258.

75. *Shillitani v. United States*, 384 U.S. 364, 371 (1966) (“Where the grand jury has been finally discharged, a contumacious witness can no longer be confined since he then has no further opportunity to purge himself of contempt.”).

76. See, e.g., *Lambert v. Montana*, 545 F.2d 87 (9th Cir. 1976) (recognizing as actionable a contemnor’s claim that his confinement has lost its coercive effect and should be lifted); accord *In re Grand Jury Investigation*, 600 F.2d 420, 424–25 n.14 (3d Cir. 1979) (“[What] *Lambert* appears to mean by invoking the due process clause is that if and when it becomes manifest that continued imprisonment will not result in compliance, the confinement then becomes punitive in character and the contemnor must be released.”); contra *Chadwick v. Janecka*, 312 F.3d 597, 612–13 (3d Cir. 2002) (Alito, J.) (declining to follow this proposition in *Grand Jury* as dicta). Given the difficulty a contemnor would likely face in convincing a court that he is so recalcitrant as to be unfazed by confinement, this claim may be largely theoretical. See, e.g., *United States v. Lippitt*, 180 F.3d 873, 877–78 (7th Cir. 1999) (“[W]e think a district judge has virtually unreviewable discretion . . . as to the merits of this conclusion . . . All recalcitrant witnesses vehemently insist they will never talk. Trying to differentiate among them is a line of inquiry that is speculative at best and time-consuming and pointless at worst.”) (internal citations omitted); *United States v. Khanh Tung Luong*, No. 2:08-MC-00094, 2009 WL 4282101, at *3 (E.D. Cal. Nov. 19, 2009) (“This defense is narrow, because otherwise ‘the civil contempt power would be completely eviscerated were a defiant witness able to secure his release merely by boldly asserting that he will never comply with the court’s order.’”) (unpublished order) (quoting *In re Grand Jury Investigation*, 600 F.2d at 425).

ble”⁷⁷ Although this determination is left to the discretion of the trial court, appellate courts have advised against reaching such a conclusion before the contemnor has been incarcerated for a substantial period of time.⁷⁸

C. THE RIGHT TO APPOINTED COUNSEL IN CIVIL CASES

Since the right to state-sponsored legal counsel was first announced in *Gideon v. Wainwright*⁷⁹ and its predecessor cases, the Supreme Court has struggled to develop a coherent jurisprudence regarding the contexts in which the right should attach. In criminal prosecutions, at least, the right is pegged to possible incarceration: “the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense,”⁸⁰ regardless of “whether [the alleged offense is] classified as petty, misdemeanor, or felony.”⁸¹ That this judicially-created⁸² constitutional right is more widely applicable than are many of our other most important procedural protections — including the venerated and textually-guaranteed right to trial by jury, which only attaches if the defendant could be sentenced to more than six months’ imprisonment⁸³ — demonstrates the value and importance the Supreme Court attributes to appointed counsel for indigent defendants.

The Court has had several occasions to consider extending the right to counsel to cases other than formal criminal prosecu-

77. 17 AM. JUR. 2D CONTEMPT § 208 (2013) (citing *In re Papadakis*, 613 F. Supp. 109 (S.D.N.Y. 1985) and *In re Thomas*, 614 F. Supp. 983 (S.D.N.Y. 1985)).

78. *Cf. Simkin v. United States*, 715 F.2d 34, 36–37 (2d Cir. 1983) (cautioning against releasing a recalcitrant witness from coercive incarceration after less than eighteen months, given Congress’s clear intent in setting this statutory maximum).

79. 372 U.S. 335 (1963).

80. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (holding that the right to appointed counsel does not apply to non-felony prosecutions that result only in fines).

81. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

82. The right to *appointed* counsel is a judicially created extension of the Sixth Amendment, which was originally understood only to guarantee the right to be assisted by *retained* counsel. *See Turner v. Rogers*, 131 S. Ct. 2507, 2521 (2011) (Thomas, J., dissenting).

83. U.S. CONST. art. III, § 2; *see supra* note 57 and accompanying text.

tions,⁸⁴ although the Court's various decisions in this context and the state-level legislative and judicial responses to those decisions have made it difficult to identify a broad rule of applicability. The Supreme Court has held that due process does not require the provision of counsel in cases of school discipline,⁸⁵ commitment of a minor to a mental hospital by a consenting parent,⁸⁶ revocation of an inmate's good-behavior credits,⁸⁷ or imposition of solitary confinement as an internal prison disciplinary tool.⁸⁸ On the other hand, the Court did extend the right to appointed counsel to juvenile delinquency proceedings in *In re Gault*,⁸⁹ finding that the juvenile's interest in freedom from punitive confinement is sufficiently strong to require the provision of counsel despite the fact that the proceedings are styled "civil" and not "criminal."⁹⁰ In addition, in *Vitek v. Jones*,⁹¹ a plurality of the Court held that counsel must be provided to indigent prisoners faced with involuntary transfer to a state psychiatric facility. The plurality noted that an inmate "thought to be suffering from a mental disease or defect requiring involuntary treatment probably has an even greater need for legal assistance, for such a prisoner is more likely to be unable to understand or exercise his rights."⁹² In providing the crucial fifth vote, however, Justice Powell stated that, while he agreed with the plurality's holding that "qualified and independent assistance must be provided," he did not believe that due process required that the appointed advocate be a licensed attorney.⁹³

Further complicating the boundaries of the right to appointed counsel, the Court has held that there are several types of cases

84. Because the Sixth Amendment is limited on its face to "criminal prosecutions," in other contexts the right to counsel is a product of the Due Process Clauses of the Fifth and Fourteenth Amendments. See, e.g., *In re Gault*, 387 U.S. 1, 41 (1967) ("We conclude that the Due Process Clause of the Fourteenth Amendment requires that in [juvenile delinquency proceedings, if the juvenile's parents] are unable to afford counsel, [] counsel will be appointed to represent the child.").

85. *Goss v. Lopez*, 419 U.S. 565, 583 (1975).

86. *Parham v. J.R.*, 442 U.S. 584, 605–13 (1979).

87. *Wolff v. McDonnell*, 418 U.S. 539, 569–71 (1974).

88. *Id.*

89. 387 U.S. 1, 42 (1967).

90. *Id.* at 42, 49.

91. 445 U.S. 480, 496–97 (1980).

92. *Id.*

93. *Id.* at 497. See generally *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 333–34 (1985) (approving of a veterans' benefits application program that effectively disallowed retained counsel but allowed non-attorney advocates).

in which, although there is no blanket right to appointed counsel, the trial court or relevant government agency must assess whether due process requires the provision of counsel in each particular case. In *Gagnon v. Scarpelli*,⁹⁴ for example, Justice Powell applied this rule to the probation and parole systems, stating, “[we] find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.”⁹⁵

Similarly, in the landmark case of *Lassiter v. Department of Social Services of Durham County*,⁹⁶ the Court held that in a proceeding for termination of parental rights, the trial court has the discretion to determine whether appointed counsel is necessary, but there is no constitutional right to counsel in every case.⁹⁷ The Court pinpointed the dispositive inquiry:

In sum, the Court’s precedents speak with one voice about what “fundamental fairness” has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel *only when, if he loses, he may be deprived of his physical liberty*.⁹⁸

That presumption is then measured against the *Mathews* factors⁹⁹ to determine whether the provision of counsel is necessary in each case, following the approach taken in *Gagnon*.¹⁰⁰ Many courts cite *Lassiter* for the proposition that appointed counsel is never required if the litigant’s physical liberty is not at stake, ending their analysis there,¹⁰¹ leading to heavy criticism by

94. 411 U.S. 778 (1973).

95. *Id.* at 790; *see also* *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972) (“We have no thought to create an inflexible structure for parole revocation procedures.”).

96. 452 U.S. 18 (1981).

97. *Id.* at 31–32.

98. *Id.* at 26–27 (emphasis added).

99. *See supra* Part II.B.

100. *Lassiter*, 452 U.S. at 32.

101. *See, e.g.*, *Lyon v. Lyon*, 765 S.W.2d 759, 763 (Tenn. Ct. App. 1988) (no right to appointed counsel in marital dissolution case); *Hughen v. Highland Estates*, 48 P.3d 1238 (Idaho 2002) (no right to appointed counsel in unemployment benefits appeal) (both cited

scholars and judges alike.¹⁰² On the other hand, several state courts have cited *Lassiter* as requiring appointed counsel in cases of involuntary hospitalization and civil commitment.¹⁰³

Despite the language in *Lassiter* about the significance of physical liberty in addressing the necessity of appointed counsel, in *Turner v. Rogers* the Supreme Court ruled that no such automatic right exists in cases of civil contempt.¹⁰⁴ Justice Breyer, writing for a unanimous court, explained, “We believe those statements [in *Lassiter*] are best read as pointing out that the Court previously had found a right to counsel ‘only’ in cases involving incarceration, not that a right to counsel exists in *all* such cases (a position that would have been difficult to reconcile with *Gagnon*).”¹⁰⁵ Thus, the Court appears to be implicitly adopting a *Lassiter/Gagnon*-style approach and leaving the determination of the necessity of appointed counsel in civil contempt proceedings to the trial court’s discretion on a case-by-case basis.¹⁰⁶

in Pastore, *supra* note 6, at 187 n.7). Pastore provides an excellent survey of post-*Lassiter* state court decisions on the right to appointed counsel in civil cases.

102. See Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 15 TEMP. POL. & CIV. RTS. L. REV. 635, 650 (2006) (“[R]eassessment of *Lassiter*’s treatment of parents’ fundamental liberty interest in their relationships with their children is now . . . overdue.”); Sweet, *supra* note 3 (describing the problems stemming from the *Lassiter* decision); Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Revisiting Lassiter v. Department of Social Services*, 59 CATH. U. L. REV. 1057, 1060 n.18 (2010) (citing several examples of recent criticism of the *Lassiter* decision). But see Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 733, 734 (2006) (“I do not believe, however, that *Lassiter* forecloses due-process based litigation, especially when it is based on state constitutional provisions in state courts. Indeed, the Court in *Lassiter* virtually invited state courts to construct a broader right to counsel in civil cases than it had. It ended its opinion by stating that ‘wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution.’”) (quoting *Lassiter*, 452 U.S. at 33).

103. See, e.g., *Rapoport v. G.M.*, 657 N.Y.S.2d 748, 749 (N.Y. App. Div. 1997) (*Lassiter* requires appointed counsel in all involuntary hospitalizations); *Honor v. Yamuchi*, 820 S.W.2d 267 (Ark. 1991) (federal due process requires appointed counsel in civil commitment cases) (both cited in Pastore, *supra* note 6, at 190 n.26).

104. 131 S. Ct. 2507 (2011).

105. *Id.* at 2517.

106. *Id.* at 2520 (“[T]he Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings.”).

III. THE BENEFITS OF COUNSEL IN CIVIL CONTEMPT PROCEEDINGS AND THE PROBLEMS FACED BY UNREPRESENTED ACCUSED CONTEMNORS

A. THE BENEFITS OF COUNSEL

The Supreme Court's decision in *Turner v. Rogers* rejected an expansion of the right to appointed counsel to civil contempt cases. However, the Court did not leave the due process requirements for civil contempt wholly untouched.¹⁰⁷ The Court's determination that appointed counsel is not required was conditioned on the provision of "substitute procedural safeguards" that protect against improper confinement "without incurring some of the drawbacks inherent in recognizing an automatic right to counsel."¹⁰⁸ Specifically, in addition to the standard notice and opportunity to be heard, the Court required: (1) notice to the defendant that his ability to pay is a critical question; (2) the use of a financial disclosure form to elicit information about the defendant's ability to pay the child support balance; (3) an opportunity at the hearing for the defendant to respond to questions about his ability to pay; and (4) an express finding of fact regarding the defendant's ability to pay.¹⁰⁹

However laudable the Court's efforts to provide further procedural safeguards, those efforts do not remotely begin to capture the benefits appointed counsel would have provided to the defendant. If "[p]rocedural rules [are] a measure of how much the substantive entitlements are worth,"¹¹⁰ surely the right to be free from unwarranted confinement demands strong procedural protections. When determining just how strong these protections must be, the Supreme Court has identified "the risk of an erroneous deprivation . . . and the probable value, if any, of additional or

107. *Id.* at 2519.

108. *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Interestingly, these substitute procedural safeguards were raised for the first time by the United States as *amicus curiae* and were not presented in the dispute below. See Henry P. Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 693 (2012) (discussing Justice Thomas's dissent in *Turner v. Rogers* regarding the propriety of adopting views held only by an invited *amicus*).

109. *Turner*, 131 S. Ct. at 2519.

110. Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112–13.

substitute procedural safeguards” as the most important factor.¹¹¹ Any assessment of the appropriateness of additional procedural protections, therefore, must begin with a discussion of the value that appointed counsel would provide. To that end, this Part will identify some of the specific benefits that appointed counsel could provide to an indigent accused contemnor and will discuss why accused contemnors face serious due process problems in the absence of these benefits.

First, though, a caveat: it must be noted that the *Mathews* balancing approach enshrines decisional accuracy as the primary value added by additional procedure: “procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.”¹¹² If a certain procedural protection is to be required, then, it must provide a sufficient enhancement to judicial accuracy in the aggregate.¹¹³ However, aggregate accuracy alone may not be the ideal measure of necessary procedural protections. The *Mathews* equation ignores what Professor Jerry Mashaw calls “soft variables”: the inherent “process values” of satisfaction and dignity that litigants experience when afforded sufficient protective process, questions of legitimacy of government action, and the demoralization and frustration caused by repeated negative interactions with the courts.¹¹⁴ The ability to reverse and correct judicial mistakes is also a relevant factor. While occasional inaccuracies might be tolerable (and correctable) for revocation of government benefits, for example,¹¹⁵ the same does not hold true in cases of indefinite imprisonment. When such serious and irreversible deprivations are involved, those “rare exception”

111. *Mathews*, 424 U.S. at 334–35. See *supra* Part II.B.

112. *Mathews*, 424 U.S. at 344; see generally *id.* at 343–47.

113. This approach has been criticized as illogical. See Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 234 (1991) (“If due process is to mark out and defend a sphere in which the individual is reliably preserved from the demands of the collective, how can the extent of the protection the individual receives turn on some calculus explicitly designed to maximize aggregate welfare? When the claim of the individual is pitted against ‘the sheer magnitude of the collective interests at stake,’ how often will the collective good not predominate?”) (quoting Richard Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 155 (1978)).

114. Mashaw, *supra* note 54, at 48–49.

115. See, e.g., *Mathews*, 424 U.S. at 348; cf. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (finding that loss of welfare benefits was so harmful as to require a pre-termination hearing).

cases that present greater complexity may warrant a more cautious approach with a focus beyond aggregate accuracy alone. With this caveat that aggregate accuracy may not be the only relevant metric, this Part will proceed to catalog the ways in which appointed counsel would protect indigent litigants against inappropriate incarceration for civil contempt.

Services and benefits provided by defense counsel fall into two general categories. First, attorneys provide expertise in performing tasks that the litigant could complete *pro se*, such as basic legal research, motion drafting, and scheduling. Second, counsel can complete tasks that the average *pro se* litigant would not know how to accomplish (or would not even think to consider) without a legal education or baseline understanding of the law. Examples of these benefits include identifying possible defenses, watching for procedural irregularities or mistakes, policing the admissibility of evidence through objections, and handling complex legal arguments.¹¹⁶

Benefits in the first category are prime candidates to be addressed by an expansion of the services provided by *pro se* resource offices (informational assistance centers staffed by court personnel). Many courts' *pro se* offices severely limit the services staff attorneys are allowed to provide to unrepresented litigants seeking assistance.¹¹⁷ For example, staff in the Pro Se Office for one federal district court

are not permitted to give advice on legal strategy, to represent litigants in court, or to participate in any discussion with *pro se* litigants regarding the merits of a particular case. Additionally, staff may not calculate deadlines, draft papers, fill out forms, serve papers, act as interpreters, or notarize documents.¹¹⁸

116. There is a third category of benefits that appointed counsel would provide: the underlying psychological benefits to an accused contemnor of having someone "on his side" in contesting the contempt sanction. Such effects, however, cannot be captured through substitute procedural safeguards and therefore will not be addressed in this Note.

117. See 28 U.S.C. § 955 (2006) ("The clerk of each court and his deputies and assistants shall not practice law in any court of the United States.").

118. "Role of the Pro Se Office," U.S. District Court for the Southern District of New York, http://www.nysd.uscourts.gov/courtrules_prose.php?prose=office (last visited Feb. 18, 2012) (internal citation omitted).

Instead, staff attorneys are only allowed to assist pro se litigants “by explaining Court procedures and filing requirements,” as well as checking documents before submission to assure conformance.¹¹⁹ Many scholars have advocated strongly for structural reform in courts involving large numbers of pro se matters.¹²⁰

Conversely, the absence of benefits in the second category (things pro se litigants are unlikely to be aware or capable of) poses a significant problem for indigent litigants facing incarceration for civil contempt. For example, unrepresented litigants face the serious risk of failing to preserve adversely decided issues for appeal.¹²¹ Laypersons also lack the foundational knowledge of civil procedure to identify errors made by the court.¹²² As the Supreme Court has noted (albeit in the criminal context),

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel If charged with crime, [an unrepresented defendant] is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of

119. *Id.*

120. See, e.g., Benjamin H. Barton, *Against Civil Gideon (and For Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010) (arguing that a dramatic reorganization of courts with a high percentage of pro se litigants is far more efficient than an expansion of the right to appointed counsel as a solution to problems with indigent access to justice); Russell Engler, *And Justice for All — Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1990) (advocating complete reevaluation of the role of judges, clerks, and other court administrators in assisting pro se litigants). See also Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 476–77 (2002) (discussing the creation of a special magistrate position in the Eastern District of New York to deal exclusively with pro se matters); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 368–69 (2008) (advocating a change in the role of the judge when handling matters involving pro se litigants).

121. See, e.g., *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 313 (1985) (discussing the district court's finding that “absent expert legal counsel [Veterans Affairs] claimants ran a significant risk of forfeiting their rights, because . . . VA processes . . . allow claimants to waive points of disagreement on appeal, or to waive appeal altogether by failing to file the notice of disagreement.”).

122. *Id.* (“In addition, claimants simply are not equipped to engage in the factual or legal development necessary in some cases, or to spot errors made by the administrative boards.”).

counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.¹²³

This concern about inaccurate judgments in the absence of defense counsel is equally applicable to the civil contempt context.

B. POTENTIAL ERRORS IN CIVIL CONTEMPT HEARINGS

There are several serious errors a court can make in holding an individual in civil contempt, all of which are less likely if the alleged contemnor is represented by counsel. They include: (1) erroneously determining that the defendant has not complied with the court order; (2) erroneously concluding that the defendant has the ability to comply and that coercive measures are required to obtain that compliance; and (3) ordering incarceration either when other means of forcing compliance are available or for an excessive term, without a purge condition, or with a purge condition that the defendant cannot meet.¹²⁴

1. *Noncompliance*

The likelihood of an inaccurate determination that the defendant is not in compliance with the underlying court order varies by context. In cases involving child support orders, for example, compliance is often relatively easy to ascertain, and the risk of jailing a defendant who is up-to-date on his payments is therefore minimal.¹²⁵ In other situations, however, the accused contemnor may have a valid defense that the underlying court order was unclear as to what conduct was required. A *subpoena duces tecum*, for example, may not be sufficiently clear in specifying

123. *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

124. See Robert Monk, 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, 338 (1983) (arguing for the very extension of the right to appointed counsel that the Supreme Court rejected in *Turner v. Rogers*).

125. *Id.* at 338–39. Monk does give an example of such a case, however. See *Nystrom v. District Court*, 58 N.W.2d 40, 42 (Iowa 1953) (incarceration for civil contempt was improper where alleged contemnor had paid the full amount due under the child support order).

what documents are demanded.¹²⁶ In such situations, the burden rests with the defendant to show that, in the totality of the circumstances, a reasonable person in the defendant's situation would have been unable to determine what was required of him.¹²⁷ Advancing arguments of this character is precisely what litigators are trained to do, and an unrepresented litigant is likely to have serious difficulty arguing under a "totality of the circumstances" or "reasonable person" standard. This difficulty is further compounded when, as is frequently the case, the litigant is tasked with convincing the very judge who issued the order in the first place that the order is unacceptably vague.

2. Ability to Comply

The ability to comply with the order is a crucial requirement in categorizing the contempt as civil, rather than criminal.¹²⁸ As the Court noted in *Turner v. Rogers*,

[I]t is obviously important to assure accurate decisionmaking in respect to the key "ability to [comply]" question [A]n incorrect decision (wrongly classifying the contempt proceeding as civil) can increase the risk of wrongful incarceration by depriving the defendant of the procedural protections (including counsel) that the Constitution would demand in a criminal proceeding.¹²⁹

Determining whether a noncompliant party has the ability to comply — and therefore whether coercive sanctions are appropriate — can be far more prone to error than the question of non-compliance.¹³⁰ Assets may be difficult to inventory, or possession

126. See, e.g., *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291 (4th Cir. 1987) (overturning civil contempt judgment after quashing the allegedly violated subpoena for lack of specificity).

127. Cf. *United States v. Dowell*, 257 F.3d 694, 699 (7th Cir. 2001) ("To be held in civil contempt, [the defendant] must have violated an order that sets forth in *specific detail* an *unequivocal command* from the court.") (emphasis added); see also *supra* Part II.B.

128. See *supra* Part II.A.

129. *Turner v. Rogers*, 131 S. Ct. 2507, 2518 (2011).

130. Monk, *supra* note 124, at 339. Monk notes that, in cases involving nonpayment of child support, the defendant's indigence may further complicate determining ability to pay. Indigence is unlikely to have any effect on the defendant's ability to comply with other sorts of orders, however, such as those demanding testimony or document production. *Id.* at 339 n.76.

of demanded documents (for subpoenas) or knowledge (for testimony) may be uncertain. The presence of counsel for the accused contemnor would do much to reduce the risk of these types of erroneous rulings. Trial attorneys are experts at discovering crucial facts and presenting them to the court in a cogent and convincing manner. Indigent defendants are frequently “uninformed as to their rights, unaware of the limitations on the court’s powers, . . . unskilled in effective speaking, and intimidated by the trappings of authority.”¹³¹ Compared to the accused contemnor making pleas to the court on his own behalf, counsel will often carry more inherent credibility with the court when arguing that full compliance is impossible.¹³²

3. *Necessity of Incarceration*

Even if the court correctly determines that the defendant should be held in civil contempt, coercive measures short of incarceration may be equally or more effective at securing compliance. Without counsel, an unrepresented litigant may be unaware of alternative remedies or unsure of how to convince the court that confinement is inappropriate. When compliance can be secured through less drastic remedies, “coercive imprisonment cannot be justified.”¹³³ Although per diem fines are unlikely to be effective with most indigent litigants, they remain an available option. In cases of financial arrearage, assets may be seized, wages garnished, or government benefits assigned.¹³⁴ If the contempt stems from recalcitrance in the discovery process, pleadings may be stricken or contested facts deemed established against the disobedient party.¹³⁵ All of these possibilities will be familiar to an attorney and foreign to a pro se litigant. Additionally, if complete compliance is impossible, counsel is likely to be far more successful at negotiating a favorable settlement, advocating for a shorter

131. *Id.* at 342.

132. *See id.* at 342–43, 344.

133. Comment, *supra* note 62, at 128.

134. Monk, *supra* note 124, at 339; *see also* Turner Brief for Petitioner, *supra* note 10, at 10–11 (describing how the court had already garnished Turner’s wages and federal SSI benefits).

135. *See, e.g.*, FED. R. CIV. P. 37 (listing available remedies for “Failure to Make Disclosures or to Cooperate in Discovery”).

term of confinement, or securing a more favorable purge clause than the litigant himself could secure alone.

Given these values advanced by access to counsel, pro se litigants are at a disadvantage in fulfilling the two key activities — advocacy and negotiation — that most effectively help guard against unlawful confinement, “the most serious error risked in contempt proceedings.”¹³⁶ Without the benefit of counsel, an accused civil contemnor faces a serious risk of improper imprisonment. Therefore, while a constitutional right to appointed counsel does not extend to civil contempt, absent alternative procedural protections that go beyond the minimal safeguards announced in *Turner v. Rogers*, confinement of indigent litigants for civil contempt raises substantial concerns about the acceptable exercise of judicial authority.

IV. PROCEDURAL CHANGES TO APPROXIMATE THE BENEFITS OF APPOINTED COUNSEL

In the absence of a constitutional right to appointed counsel in civil contempt cases, accused contemnors face serious difficulty in adequately protecting their physical freedom against unjustified deprivation. Many have advocated for the creation of such a right through the interpretation of state constitutions or the adoption of state-level statutory schemes.¹³⁷ Bypassing the Supreme Court’s decision in *Turner v. Rogers* in this way, though, does not address the negative practical consequences of requiring appointed counsel in civil contempt proceedings identified by the *Turner* Court.¹³⁸ In contrast, the creation of additional procedural protections that approximate the benefits of counsel discussed above¹³⁹ can help to ameliorate these due process concerns without incurring the highly burdensome costs — both to the state

136. Monk, *supra* note 124, at 344.

137. See, e.g., Symposium, *An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State*, 25 *TOURO L. REV.* 1 (2009) (containing twelve articles on creating a right to civil counsel in New York); Symposium, *A Right to a Lawyer? Momentum Grows*, 40 *CLEARINGHOUSE REV.* 167–293 (2006) (containing seventeen articles on right to counsel topics).

138. 131 S. Ct. 2507, 2519–20 (2011).

139. See *supra* Part III.

fisc and to the efficiency and fairness of the proceedings¹⁴⁰ — that would accompany a constitutional right to counsel in civil cases.

Four specific procedural changes would do much to accomplish this goal: (1) inclusion of expanded substantive information on contempt law in the show-cause order or summons for the contempt hearing; (2) mandatory review of the underlying court order for vagueness and invalidity; (3) modification of the burdens of production and proof relating to ability to comply; and (4) periodic reevaluation of the contemnor's continuing ability to purge the contempt through compliance. Each of these suggestions, standing alone, would help to protect the liberty interests of accused civil contemnors; taken together, they approximate some of the primary benefits that would be afforded by mandatory provision of counsel.

A. SUBSTANTIVE INFORMATION IN COURT SUMMONS

One of the most important functions fulfilled by appointed counsel is that of client education. Indigent litigants are unlikely to be well versed in the relevant law of civil contempt. Unrepresented accused contemnors are likely to solicit advice from friends and family upon receipt of the show-cause order and may receive incorrect or merely anecdotal information. Informing the litigant of the basics of contempt law would do much to allow the litigant to properly prepare for the proceedings. Such information might include the distinction between civil and criminal contempt, what questions of law and fact will be addressed at the hearing, and what defenses can be asserted. This information regarding both the nature of the accusation and the applicable procedure should be included in an informational pamphlet that is attached to the court summons when served on the accused contemnor, allowing the litigant adequate time to prepare his defense in the face of potential incarceration.

The downsides to such a requirement are negligible. Despite the predictable concerns over how such material would be assembled and paid for, these cost concerns are trumped by the significant value to indigent unrepresented litigants that would be provided. There is also a danger that those held in contempt may

140. See *Turner*, 131 S. Ct. at 2519 (discussing the imbalance a right to counsel would create in civil contempt hearings in which the plaintiff is also not represented by counsel).

claim such information constituted “legal advice” that could serve as a basis for appeal or collateral attack. It is unlikely that any court would entertain such a specious assertion, however, and any lingering concern could be easily addressed through the inclusion of a clear disclaimer.

Far more significant, however, is the inevitable question of where to draw the line. If explanatory material is to be required for civil contempt proceedings, why would such a requirement not also apply to defendants in other types of proceedings, such as child custody hearings or tenant evictions?¹⁴¹ The answer is two-fold. First, civil contempt is unique: it is the only type of civil proceeding in which an individual may be incarcerated without appointed counsel.¹⁴² The Supreme Court has already pointed to the possibility of physical confinement as a natural dividing line for determining what process is due.¹⁴³ Second, this Note is not advocating adoption of these procedural safeguards as independently required due process protections in all types of civil cases. Rather, each suggestion is part of a larger scheme that attempts to approximate the benefits provided by appointed counsel in civil contempt cases. Questions as to whether equivalent safeguards are necessary in other types of proceedings that

141. For an interesting piece on the problems of line-drawing in the advancement of a broad civil right to counsel, see Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation By Counsel, and When Might Less Assistance Suffice?*, 9 SEATTLE J. SOC. JUST. 97 (2010).

142. Parole and probation revocation hearings, which similarly result in incarceration without a guaranteed right to appointed counsel, can be distinguished because the liberty interest held by the individual is, in the first place, only conditional in nature. See *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (“Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.”) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)). Civil commitment for psychiatric illness is a far closer case, but commitment proceedings also do not carry the same risks of indefinite improper confinement because of the built-in feedback mechanism of continuing medical reevaluation. Nonetheless, it must be conceded that there is a strong argument for similar procedural protections to be afforded to indigents facing commitment. Such arguments, however, are outside the scope of this Note. For other pieces making such arguments, see, for example, Alexander Tsesis, Note, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253 (2011) (arguing that proof beyond a reasonable doubt should be required in involuntary commitment proceedings), and Christyne E. Ferris, Note, *The Search for Due Process in Civil Commitment Hearings: How Procedural Realities Have Altered Substantive Standards*, 61 VAND. L. REV. 959 (2008) (advocating for reform of adequate representation requirements in involuntary commitment proceedings, among other changes).

143. See, e.g., *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 26–27 (1981).

similarly carry no right to appointed counsel are left for another day.

B. MANDATORY REVIEW OF THE VALIDITY AND SPECIFICITY OF
THE UNDERLYING COURT ORDER

In the absence of counsel, an accused contemnor is unlikely to be effective at convincing the court of the merits of his claims, even after being informed of the dispositive issues and available defenses.¹⁴⁴ Arguments by pro se litigants are highly prone to being dismissed as pleas for leniency or venting of frustrations, rather than as coherent legal arguments. In *Turner v. Rogers*, for example, immediately before adjudging him in civil contempt, the family court judge asked Turner if there was anything he wished to say. It is unsurprising that Turner's brief statement, which included such phrases as "I know I done wrong [sic]" and "dope had a hold to me [sic]," was ignored by the court.¹⁴⁵ As his subsequent appellate brief claims, however, he was in fact attempting to explain "that he had been unable to meet his support obligation due to a combination of prior incarceration, substance abuse problems, and physical disability."¹⁴⁶

If pro se litigants have trouble advancing arguments based on a concept as relatively straightforward as present inability to comply, those difficulties are compounded for the more complex legal arguments that the underlying order is invalid or unduly vague. Without counsel to advance such arguments, a pro se litigant effectively waives any opportunity to contest the validity of the court order he has been accused of violating. To remedy this, courts should be required to explicitly confirm the validity of any

144. See *supra* Part III.

145. *Turner* Brief for Petitioner, *supra* note 10, at 11. Turner's full statement to the court is reproduced below:

Well, when I first got out [of jail], I got back on dope. I done meth, smoked pot and everything else, and I paid a little bit here and there. And, when I finally did get to working, I broke my back, back in September. I filed for disability and SSI. And, I didn't get straightened out off the dope until I broke my back and laid up for two months. And, now I'm off the dope and everything. I just hope that you give me a chance. I don't know what else to say. I mean, I know I done wrong, and I should have been paying and helping her, and I'm sorry. I mean, dope had a hold to me.

Id.

146. *Id.*

court order under which an unrepresented litigant is to be held in civil contempt.

Admittedly, such a requirement raises concerns about efficiency and effectiveness. Reassigning the work of evaluating the order for validity and specificity from counsel to chambers incurs costs in judicial time and energy. Furthermore, in many cases it is likely that the same judge who issued the original order conducts the contempt hearing. There is little reason to believe that the judge would subsequently decide, *sua sponte*, that the order is unacceptably ambiguous or that she had exceeded the scope of her authority in issuing it in the first place.¹⁴⁷ Perhaps the most significant objection, however, is that requiring judges to consider possible defenses even when the defendant does not actually raise them constitutes an inappropriate abandonment of the role of the judge as neutral arbiter. Although some have argued that judges should adopt more paternalistic roles when dealing with *pro se* litigants¹⁴⁸ (as do some administrative commissions that hold *ex parte* proceedings¹⁴⁹), requiring a judge to review the validity of a prior court order is a far cry from instructing the court to hold one party's interests as more important than the other's.

These concerns over costs and disturbance of judicial neutrality are counterbalanced by the likelihood that in the vast majority of cases, judges will not need to invest significant effort satisfying this requirement. Judges on courts that frequently deal with civil contempt issues are likely to be highly experienced and efficient in conducting reviews of this nature. Additionally, the underlying orders in these situations are often highly standardized.¹⁵⁰ Requiring a review of validity and specificity would, therefore, be

147. While one may think an easy answer to this would be to require that a different judge evaluate the order's validity, such a requirement would likely be rejected both as highly inefficient and as an impermissible limitation on the inherent contempt powers all judges possess. *See supra* Part II.A.

148. *See supra* note 120.

149. For example, the Department of Veterans Affairs has promulgated regulations establishing that "[p]roceedings before VA are *ex parte* in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which *grants every benefit that can be supported in law* while protecting the interests of the Government." 38 C.F.R. § 3.103(a) (2011) (emphasis added).

150. In *Turner*, for example, both the underlying child support order and the contempt order at issue were standardized forms. *Turner v. Rogers*, 131 S. Ct. 2507, 2514 (2011); *see, e.g.*, Joint Appendix at 7a, 14a, 17a, *Turner*, 131 S. Ct. 2507 (No. 10-10) (standardized child support order; fill-in-the-blank show cause and contempt orders filled out by typewriter and by hand).

minimally burdensome. Conversely, when the underlying order is not standardized — for example, in cases of civil contempt before a federal district court for refusal to comply with a complex injunction — it is even more important that the court reconfirm the validity of the injunction before jailing an unrepresented party for noncompliance. The burden on the judge, then, would be more strongly justified in that situation.

C. SHIFTING THE BURDEN OF PROOF FOR ABILITY TO COMPLY

Given the difficulties that pro se litigants face in undertaking effective legal advocacy, default presumptions and shifting burdens of proof are of heightened importance when one or both parties are without counsel. Less effective advocacy directly translates into greater difficulty in satisfying any burden of proof. The Supreme Court has approved of civil contempt frameworks in which a prima facie showing of noncompliance by the plaintiff triggers a presumption of the defendant's ability to comply and shifts the burden to the defendant to prove otherwise.¹⁵¹ However, shouldering an unrepresented accused contemnor with a burden of proof regarding the central question of ability to comply increases the danger of inaccurate fact-finding and improper confinement. This danger is compounded by the relative difficulty of proving a negative. For example, proving that the defendant has enough money to pay his child support balance (such as by showing the existence of an asset) is likely to be easier than proving that he does not.

To combat this risk of inappropriate confinement, indigent accused contemnors should be relieved of bearing any substantial burden of proof that they lack the ability to comply with the court's order. Instead, the presumption of ability to comply should be overcome upon a mere prima facie claim by the accused

151. See, e.g., *CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992) (“A party seeking civil contempt bears the initial burden of proving by clear and convincing evidence that the alleged contemnor has violated an outstanding court order. Once a prima facie showing of a violation has been made, the burden of production shifts to the alleged contemnor, who may defend his failure on the grounds that he was unable to comply. The burden shifts back to the initiating party only upon a sufficient showing by the alleged contemnor. The party seeking to show contempt, then, has the burden of proving ability to comply.”) (internal citations omitted), *cert. denied*, 506 U.S. 819 (1992). See also *supra* Parts II.A and II.B.

contemnor that he does not have the ability to comply. The burden should then return to the plaintiff to prove that he does, in fact, have such ability. The central issue regarding the accused contemnor's ability to purge is unique, as an erroneous finding of present ability to comply is the only mistake that could lead to un purgeable (and therefore illegal) indefinite incarceration. Errors regarding other affirmative defenses such as laches or invalidity for lack of jurisdiction¹⁵² do not result in such a serious violation of the accused contemnor's rights. In those situations, upon being erroneously adjudged in contempt, the defendant can immediately comply with the order to avoid incarceration and then appeal the contempt judgment.¹⁵³ While judicial error will still have been committed, the defendant's physical liberty will not have been illegally restricted. It is therefore unnecessary to modify the burdens of proof with regard to affirmative defenses to civil contempt other than the inability to comply.

The traditional justification for making the accused contemnor prove an inability to comply is that he is in the best position to present evidence regarding his own ability or inability.¹⁵⁴ This is undoubtedly a strong argument, but its persuasiveness is undercut when the defendant's ability to effectively communicate such an argument to the court is hamstrung by the absence of legal representation. Additionally, plaintiffs already have significant discovery tools at their disposal to force defendants to disclose

152. See *supra* Part II.B.

153. This is a similar course of action to that which is required when a party disagrees with a court order on the merits. The traditional rule is that contempt proceedings are not an appropriate avenue for review of the merits of the underlying order; a party must comply with a validly issued court order and follow court procedure for review of that decision. See, e.g., *Vakalis v. Shawmut Corp.*, 925 F.2d 34, 36 (1st Cir. 1991) (Breyer, J.) ("If the appellants believed in good faith that the district court had erred in imposing the fine, they should have either (1) paid the fine, litigated the case and then appealed the sanction, or (2) demonstrated their inability to pay and their good faith disagreement with the court, and asked the court to stay the sanction pending an appeal. They did neither, and chose instead to flout the court's order."); *United States v. Miller*, 626 F.3d 682, 689 (2d Cir. 2010) ("Indeed, it is a well-established 'basic proposition that all orders and judgments of courts must be complied with promptly' and that while a party has a right to appeal the order, 'absent a stay, he must comply promptly with the order pending appeal.'" (quoting *Maness v. Meyers*, 419 U.S. 449, 458 (1975))).

154. See, e.g., *In re Fieock*, 215 Cal. App. 3d 141, 147-48 (Cal. Ct. App. 1989) ("The contemnor is the person in the best position to know whether inability to pay is even a consideration in the proceeding and also has the best access to evidence on the issue, particularly in cases of self-employment."), *on remand from Hicks v. Fieock*, 485 U.S. 624 (1988).

information, and the court can even sua sponte require a defendant to disclose information about his ability to comply. In *Turner v. Rogers*, the Supreme Court held that eliciting such information via a standardized disclosure form was in fact a constitutional requirement.¹⁵⁵ Given the severity of the remedy at stake, it is preferable that courts err on the side of judgments of non-contempt rather than risk incarcerating an individual with a purge condition with which he cannot possibly comply.

D. PERIODIC CONFIRMATION OF ABILITY TO PURGE

While contempt is based on a finding of ability to comply at the time of the contempt hearing, continued incarceration is conditioned on a continuing ability to purge the contempt through compliance.¹⁵⁶ If an imprisoned civil contemnor loses the ability to purge the contempt, his confinement is no longer justified by coercion, and he must be released.¹⁵⁷ The traditional example is that a recalcitrant witness may no longer be confined for civil contempt for refusing to testify before a grand jury once that grand jury has dissolved.¹⁵⁸ The loss of ability to comply is also a serious concern in several other types of civil contempt cases, especially those involving failure to pay monetary obligations. For example, a contemnor jailed for failing to pay child support may have a family requiring continued support even though he is no longer earning any income during his imprisonment. At a certain point, any savings or other assets that justified the initial contempt finding may become exhausted. Consequently, the contemnor would lose his financial ability to purge the contempt by paying his arrearage.

Defense counsel plays a significant role in coordinating this kind of post-judgment petition predicated upon changed circumstances. Without an advocate, incarcerated contemnors who lose the ability to purge due to external developments are at serious

155. “[Turner] did not receive clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial circumstances . . . Under these circumstances Turner’s incarceration violated the Due Process Clause.” *Turner*, 131 S. Ct. at 2520.

156. *See supra* Part II.B.

157. *Shillitani v. United States*, 384 U.S. 364, 371–72 (1966).

158. *Id.*

risk of remaining illegally confined. To combat this risk that coercive confinement may devolve into punitive confinement, many statutory civil contempt schemes limit the maximum period of incarceration to one year.¹⁵⁹

In order to approximate the post-judgment benefits of appointed counsel, the court should be required to periodically reconfirm the contemnor's ability to purge in order to justify continued incarceration. This is distinguishable from simply shortening the maximum confinement period for civil contempt. The contemnor should be entitled to periodic brief hearings at which he may present evidence of loss of ability to purge. The other elements of civil contempt need not be open to reexamination; the validity of the underlying order, for example, will not have changed in the interim weeks or months.

A question arises regarding which party will carry the burden of proof at these hearings: will the defendant have to prove his claimed newly-developed inability to comply, or will the plaintiff shoulder the burden of proving continued ability? In the context of the initial contempt hearing, this Note argues that the plaintiff should be required to affirmatively prove the defendant's ability to comply.¹⁶⁰ In the context of a reexamination hearing, however, a presumption that the contemnor has lost the ability to purge the contempt would make little sense. Here, such a presumption would saddle the plaintiff with the burden of proving a negative — that there has been no change in circumstances that would warrant modification of the court's original finding of ability to comply. Once the plaintiff has affirmatively proven the contemnor's ability to comply at the initial contempt hearing, it is reasonable that subsequent hearings operate on a presumption of continued ability to purge.¹⁶¹ These recurring hearings would do much to guard against the possibility of a civil contemnor being held any longer than is appropriate.

159. *See, e.g.*, S.C. CODE ANN. § 63-3-620 (West 2010) (limiting confinement for civil contempt to a maximum of one year); *cf.* 28 U.S.C. § 1826 (2006) (limiting confinement for civil contempt of a recalcitrant witness to a maximum of eighteen months).

160. *See supra* Part IV.C.

161. *Cf.* *United States v. Rylander*, 460 U.S. 752, 760 (1983) (noting that shouldering the accused contemnor with the burden of proof of inability to comply is justified by the “presumption of continuing [ability to comply] arising from the [original] order”) (citing *Maggio v. Zeitz*, 333 U.S. 56 (1948)).

Some courts have adopted this view of the necessity of periodic reexamination hearings. For example, in *Armstrong v. Gucione*,¹⁶² the Second Circuit held that after passage of a “significant period of time, a contemnor who is coercively confined and claims . . . to be incapable of complying with the court’s order, is entitled to have the court convene a new hearing at which the court will reconsider, regardless of past findings, whether the person is presently capable of complying.”¹⁶³ Concurring, then-Judge Sotomayor suggested deferring to the eighteen-month maximum duration imposed on a civil contempt sanction by the Recalcitrant Witness Statute¹⁶⁴ as “a presumptive benchmark for all civil contempt incarcerations” to delineate the point at which it becomes prudent for the court to reexamine a contemnor’s claim of inability to comply under a “more demanding” requirement of showing that incarceration continues to be coercive.¹⁶⁵

Although defendant Martin Armstrong was neither indigent nor unrepresented by counsel,¹⁶⁶ the principles adopted by the Second Circuit in that case would be effective at protecting indigent contemnors from inappropriate confinement. When the contemnor cannot afford counsel, however, eighteen months is far too long to wait before considering a claim of newly developed inability to purge through compliance. Judge Sotomayor’s rationale comparing recalcitrant witnesses to other civil contemnors in this regard is unconvincing. When a witness is incarcerated to compel testimony, there is little danger that she will subsequently develop an inability to comply. The eighteen-month maximum in the recalcitrant witness statute is more appropriately viewed as Congress’s judgment in delineating the period after which confine-

162. 470 F.3d 89 (2d Cir. 2006) (five-year incarceration for civil contempt of defendant in civil securities fraud action who had refused to comply with document production order does not violate his due process rights, but defendant is entitled to periodic renewed hearings on the issue of continued ability to purge the contempt).

163. *Id.* at 113.

164. 28 U.S.C. § 1826 (2006).

165. *Armstrong*, 470 F.3d at 113, 115 (Sotomayor, J., concurring).

166. In fact, Armstrong was far from indigent. As the New York Times reported, “A judge yesterday ordered [] renowned market forecaster [Martin Armstrong] to produce \$16 million worth of gold bars and rare antiquities in an attempt to recover the assets of investors who allegedly were bilked out of about \$1 billion Prosecutors said they believe Mr. Armstrong has 102 bars of gold, a \$750,000 bust of Julius Caesar, hundreds of rare coins, a bronze helmet and other antiques.” *Investor Ordered to Give Up Gold*, N.Y. TIMES, Jan. 8, 2000, available at <http://www.nytimes.com/2000/01/08/nyregion/investor-ordered-to-give-up-gold.html>.

ment is likely to become punitive.¹⁶⁷ In contrast, incarceration to coerce payment of financial arrearage carries a serious risk that the contemnor's assets may become depleted — particularly when the contemnor is indigent and has dependents to support during his confinement. If such a contemnor was unrepresented by counsel at the initial contempt hearing, the risk of erroneous incarceration may be more substantial, compounding the need for periodic reexamination of the contemnor's ability to purge.¹⁶⁸ Courts should be far more willing to entertain a claim of loss of ability to comply in such circumstances.

V. CONCLUSION

Civil contempt remains an area of mass justice in serious need of reform. In the absence of a right to appointed counsel, indigent accused contemnors face significant legal disadvantages. This Note has attempted to survey some of the key benefits and services provided by defense attorneys in civil contempt proceedings in order to craft approximations of those benefits through cost-effective changes to procedural rules. Clearly, this framework is far from an exact equivalent of appointed counsel, but instituting the suggested changes will help guard against improper restriction of individual physical freedom.

For advocates of greater protections for indigent accused contemnors, litigation in federal court over the requirements of the Due Process Clause is likely not the most effective way to proceed. Over the past century the Supreme Court has addressed all of the issues presented above, and modifications to federal due process jurisprudence would require overturning much of the high court's precedent in that area. In *Turner v. Rogers*, the Supreme Court addressed the question of what procedural safeguards are constitutionally required in the absence of a right to appointed counsel, and those requirements provide far less protection than would the changes suggested above. If *Turner* is any indication, the Court is unlikely to find that additional procedural protections are required to justify the lack of providing state-funded defense counsel. Thankfully, other avenues exist to advocate adoption of these procedural changes. State-level litigation

167. See *supra* notes 76–78 and accompanying text.

168. See *supra* Part III.

over the scope of state constitutional provisions has been an extremely successful vehicle for advancing the rights of indigent litigants. Many states also have statutory schemes that provide additional procedural safeguards beyond those required by the courts. However it is implemented, the framework suggested in this Note provides a cost-effective and practicable approach to protecting the liberty and dignity of indigent litigants faced with civil contempt.