Council to Restore the Rule of Law

CONTEMPT OF COURT - ARBITRARY EXCESS OF POWER

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by Bruce Eden

"The judicial contempt power has had a long but sordid history." Richard C. Brautigam, Constitutional Challenges to the Contempt Power, 60 Geo. L.J. 1513 (1972).

The literature on contempt of court is unanimous on one point: THE LAW IS A MESS. *Few legal concepts have bedeviled the courts, judges, lawyers and legal commentators more than contempt of court.' Robert J. Martineau, Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt, 50 U.Cin.L.Rev. 677 (1981).

Although the contempt power has been characterized as essential to the very existence of and inherent in a court, courts in noncommon-law countries manage without it. Contempt is a fictional doctrine arbitrarily established by the courts in this country to command respect. However, the contempt power has long been identified as being despotic. All one has to do is look at the family courts in New Jersey to see that the contempt power (poorly camouflaged as violation of litigant's rights) is being used in its most arbitrary and despotic form. Innocent people brought before the family courts for violations of litigant's rights are summarily and unconstitutionally denied even rudimentary due process or equal protection under the laws. Many of the so-called "hearings" are nothing more than theatrical administrative shams put on by judges acting unconstitution-ally.

One of the biggest acts of unconstitutionality is the child support enforcement proceeding. Family court judges impose huge unrealistic support obligations on non-custodial parents (97% of the time it's the father), that do not leave that parent with enough to live on. If the non-custodial parent fails to pay the ordered amounts (even though he is paying something), he is administratively summoned into court on a bogus motion to enforce litigant's rights (usually drafted by the county probation departments that collect the support). Many litigants do not fight these motions to enforce litigants rights and wind up in front of an administrative hearing officer only to be essentially "pistol-whipped" by the weight of the state and either told to "pay or stay". Most litigants usually are so indigent that they do not have the wherewithal to pay any amount of money to stay out of jail.

Moreover, the county probation departments who do the enforcement and collections of child support have become arms of the "state" judiciary as of the fall of 1995, by directive of the Legislature and the Supreme Court. Since the probation departments are now considered

state officials, any enforcement action against a litigant must now be entitled "State vs. " and the state now has the burden of proof of beyond a reasonable doubt to show that a litigant is in violation of court ordered support obligations.

Furthermore, now that New Jersey has the burden of proof on it to prove that someone is in "willful" violation of litigant's rights, all criminal due process procedures kick in for the litigant facing the state. A person is entitled to a jury trial, right to counsel, right to confrontation, right to cross-examine and present defenses, right to present evidence, witnesses and testimony, etc. New Jersey can no longer run "roughshod" over the rights of litigants appearing before its courts on child support enforcement matters. New Jersey, as have almost all other States, has become a "government by contempt" or "government by injunction".

We have seen too many abuses of judicial power in these proceedings and have come to the conclusion that judges handling these types of cases are biased and vindictive when conducting an enforcement proceeding, because it is their orders that are allegedly contemned. Judges who have issued orders and then sit on their own contempt/violation of litigant's rights hearings pertaining to their own orders, are automatically biased against the litigant and have a built in conflict of interest. All cases of this nature must be presented to another judge who had no dealings in the proceedings. Rarely does this ever happen in New Jersey. Rarely does due process or an ability to pay hearing ever happen in New Jersey. These are all Constitutional rights violations when they don't happen and judges violating rights automatically are acting in "bad faith" and lose all immunity from civil and criminal liability.

Arbitrary excesses of the contempt power have resulted in calls for procedural protection for those persons charged with contempt (violation of court orders, etc.), as well as for limitations on the types of sanctions that can be imposed upon persons found in contempt (violation of litigant's rights, etc.). Many aspects of the contempt process have been targeted for criticism to the point that contempt should be abolished as a biased procedure to be used by the courts. Even legal commentators have advocated the abolition of the contempt power. R. Goldfarb, The Contempt Power 1-2 (1963).

In virtually every state sanctions for contempt have been reversed by upper courts because improper or wrong procedures were followed in the proceedings in which the sanctions were imposed. Even though most states have enacted statutes regulating the exercise of the contempt power, these statutes have not clarified the law of contempt. Those who have studied the contempt power and its exercise by the courts are unanimous on only one point--since its inception the law of contempt of court has been in a state of confusion that neither the courts nor legislatures have been able to eliminate. R. Goldfarb, supra, note 2, at 49; Dobbs, Contempt of Court: A Survey, 57 Cornell L. Rev. 183, 282 (1971); Frankfurter & Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts-A Study in Separation of Powers, 37 Harv.L.Rev. 1010, 1049, note 4 (1924); Comment, Contempt of Court: Some Considerations for Reform, 1975 Wis.L.Rev. 1117.

For almost as long as courts have claimed and exercised this fictional power to punish for contempt there have been attempts to classify contempt of court. The principal aim of classification was to ascertain what procedures would be used for imposing sanctions by determining what type of contempt was involved in a particular case.

The most common classifications have been criminal and civil contempt and direct and indirect contempts. Yet, in New Jersey, that classification has been abolished and made more confusing than ever.

In the case of N.J. Dept. of Health v. Roselle, 34 N.J. 331 (1961), the N.J. Supreme Court unconstitutionally made contempts the same in every case that would be responded to either by punitive or coercive measures or both. Because of this action, litigants facing contempt in New Jersey are now subjected to immediate rights violations. This ruling voids the right to jury trials, even in contempt cases exceeding 6 months.

According to Walker v^ McLain, 768 F.2d 1181, 1183 (10th Cir. Okla. 1985):
"It would be absurd to distinguish criminal and civil incarceration; from the perspective of the person incarcerated, the jail is just as bleak no matter what label is used. In addition, the line between criminal and civil contempt is a fine one, and is rarely as clear as the state would have us believe. The right to counsel, as an aspect of due process, turns not one whether a proceeding may be characterized as "criminal' or "civil', but on whether the proceeding may result in a deprivation of liberty".

There are volumns of Federal and state cases addressing the due process issues of contempt and all seem to say the same thing--a person charged with contempt has a right to the essential elements of due process and egual protection of the laws.

In Ridgway v^ Baker, 720 F.2d 1409 (5th Cir. Tex. 1983), the U.S. Court of Appeals stated:
"The indigent who appears without counsel can be charged neither with knowledge that he has the burden of proving that his failure to pay [child support] was not contemptuous nor with an understanding of how to satisfy that burden".

The Supreme Court of Michigan stated:
"If the defendant does not have the present ability to pay, then he does not have the "keys to his jail1; what is nominally a civil contempt proceeding is in fact a criminal proceeding--the defendant is not being coerced, but punished." Mead v. Batchlor, 460 N.W.2d 493, 500, note 15 (Mich. 1990).

In Rutherford v. Rutherford, 296 Md. 347, 360-361, 464 A.2d 228 (1983), the Maryland Supreme Court stated:
"A defendant's actual incarceration in a jail, as a result of a proceeding at which he was unrepresented by counsel and did not knowingly and intelligently waive the right to counsel, is fundamentally unfair. As repeatedly pointed out in criminal and civil cases, it is the fact of incarceration, and not the label placed upon the proceeding, which requires the appointment of

counsel for indigents."
The use of criminal sanctions (incarceration, probation or parole) to deter future violations of court orders seems an executive function. The judicial role is the resolution of cases or controversies pursuant to Article III, Section II, of the Constitution for the United States of America. Consequently, it appears that the judiciary need only the authority to punish direct contempts or at most an additional coercive civil contempt power for out-of-court obstructions of judicial proceedings. Concern over compliance with a court order, speaks more to the correctness of a decision than to the decisionmaking process and is therefore not an integral element of the judicial function.

When a judge's order is contemned, the judge becomes the so-called "injured party". This makes the judge (who is a state official) the absolutely worst person to make the decision to prosecute, because he/she is an interested participant. In Bloom v. Illinois, 391 U.S. 194 (1968), the U.S. Supreme Court recognized the "potential for abuse" in summary contempt proceedings because "[m]en who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir".

These dangers are heightened when judges in effect make the laws (orders or judgments), prosecute their violations and sit in judgment of those prosecutions. The many classifications of contempt add to the dangers and confusion. Those classifications of contempt besides civil-criminal and direct-indirect, include positive-passive; punitive-remedial, which in many cases involves child support enforcement and may overlap each other and bases on the sanction imposed; aid to litigant-protection of authority and dignity of the court, which is also based on the purpose of the sanction; mandatory -prohibitory; state-private, which is based on the status of the party; and willful-inadvertant, which is based on the intention of the alleged contemnor.

These additional classifications are only useful as indicia of whether the contempt was civil or criminal. Even more confusing was that these classifications are not dispositive of the issue. They are of little or no assistance in guiding courts in their determination of which procedure to follow. In almost every case, the sanction is not determined until the end of the contempt proceeding where the correct procedures were not known and cannot be adjusted to fit the sanction that was imposed. In many states, higher courts have reversed contempt sanctions where the procedures are not appropriate to the sanction. One of the major reversals is incarceration for civil contempt without the prereguisite due process rights to counsel, confrontation, presentation of defenses, etc. Punitive sanctions (incarceration) can only be imposed after a contempt proceeding (or enforcement of litigant's rights proceeding) meets certain criminal due process requirements. Punitive sanctions (incarceration) repeatedly have been reversed because the judge imposed a punitive sanction at the end of a proceeding in which a civil procedure was followed.

Judges wielding this vast unlimited power of contempt suffer from an obvious and ineradicable conflict of interest. Vindicating the court's authority and enforcing litigant's rights are

so closely entwined, that the judge being victim, prosecutor and judge are dangerously commingled. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 795-801 (1987). The U.S. Supreme Court has often alluded to the grave potential for abuse to which the courts' conflicted role gives rise:

"Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court".

Bloom v^ Illinois, 391 U.S. 194, 202 (1968). Justice Hugo Black, in a famous dissent that was later vindicated by the Court's holding in Bloom, put it most forcefully:

"When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause". Green v. United States, 356 U.S. 165, 188, 199 (1958)(holding that appellate courts have a "special responsibility" to review contempt sentences in light of the potential for abuse).

The contempt law is chaotic and confusing, both substantively and procedurally. Common law development has afforded no stable and satisfactory definition of contumacious conduct and no clear-cut rules govern the adjudication of contempt proceedings.

"It would be no overstatement... to say that the offense with the most ill-defined and elastic contours in our law is now punished by the harshest procedures known to that law". Green, 356 U.S. at 200 (Black, J., dissenting). Numerous legal scholars have criticized as unworkable the traditional distinction between civil and criminal contempt. See, Dudley, Getting Beyond the Civil/ Criminal Distinction: A New Approach to Regulation of Indirect Contempts, 79 Va.L.Rev. 1025, 1033 (1993) (describing the distinction between civil and criminal contempt as "conceptually unclear and exceedingly difficult to apply"); R. Goldfarb, The Contempt Power 58 (1963) (describing "the tangle of procedure and practice" resulting from this "unsatisfactory fiction").

Civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct. Contumacy "often strikes at the most vulnerable and human qualities of a judge's temperament", and its fusion aof legislative, executive and judicial powers "summons forth... the prospect of "the most tyrannical licentiousness.'" Young, 481 U.S. at 822 (1987)(SCALIA, J., concurring in judgment).

However, summary adjudication of indirect contempts is prohibited. Cooke v. United States, 267 U.S. 517, 534, 45 S.Ct. 390, 394 (1925), and criminal contempt sanctions are entitled to full criminal due process. Yet, in New Jersey family courts, summary proceedings in civil child support enforcement proceedings are commonplace and usually the litigants are not afforded due process or equal protection under the laws--all unlawful and unconstitutional acts by the New Jersey family court judiciary.

In indirect contempt cases civil procedural protections may be insufficient.

Contempts involving out-of-court disobedience and "alleged contempts committed beyond the court's presence where the judge has no personal knowledge of the material facts are especially suited for trial by jury. A hearing must be held, witnesses must be called, and evidence taken in any event. And often...crucial facts are in close dispute". Cf. Green, 356 U.S., at 217, n.33, 78 S. C t., at 660, n.33 (Black, J., dissenting). This is typical in child support enforcement cases and contempt of domestic violence restraining order cases, but is never carried out by judges in New Jersey family court. Administrative expediency is the "order of the day" and litigants are deprived of their liberties on a routine basis.

Such contempts do not obstruct the court's ability to adjudicate the proceedings before it, and the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial. Under these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power. International Union, United Mine Workers of America v. Bagwell, -U.S. --, --,114 S.Ct. 2552, 2561, 129 L. Ed.2d 642 (1994); U.S. v. Winter, 70 F.3d 655 (1st Cir. 1995).

As stated above, New Jersey probation departments handling child support enforcement cases are state entities and have the full weight of the state behind them. This then entitles all litigants brought before the courts by the New Jersey probation department the full panoply of criminal due process, including but not limited to right to counsel, proof beyond reasonable doubt, right of confrontation, right to cross-examine, right to trial by jury, etc. Moreover, the U.S. Supreme Court has recognized that even for state proceedings, the label affixed to a contempt ultimately "will not be allowed to defeat the applicable protections of federal constitutional law". Hicks v. Feiock, 485 U.S. 624, 631, 108 S.Ct. 1423, 1429, 99 L.Ed.2d 721 (1988).

Contemporary courts have abandoned the limitations on equitable decrees that were usually a simple single act to be complied with. See G. McDowell, Equity and the Constitution 4_, <3 (1982). Courts routinely issue complex decrees which involve them in extended disputes and place them in continuing supervisory roles over parties and institutions. See, e.g., Missouri v. Jenkins, 495 U.S. 33, 56-58, 110 S.Ct. 1651, 1665-1666 (1990); Swann v. Charlotte-Mecklenburg Bd. of Ed., 401 U.S. 1, 16, 91 S.Ct. 1267, 1276 (1971).
"The modern decree differs in almost every relevant characteristic from relief in the traditional model of adjudication, not the least in that is is the centerpiece.... It provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer. Finally, it prolongs and deepens, rather than terminates, the court's involvement with the dispute." Chayes, The Role of the Judge in Public Law Litigation, 89 Harv.L.R ev. 1281, 1298 (1976).

When an order governs many aspects of a litigant's activities, rather than just a discrete act, determining compliance becomes much more difficult. Credibility issues arise, for which the factfinding protections of the criminal law (including jury trial) become much more important. And when continuing prohibitions or obligations are imposed, the order cannot be

complied with (and the contempt "purged") in a single act; it continues to govern the party's behavior, on pain of punishment--not unlike the criminal law. International Union, 114 S.Ct. at 2565.

The use of a civil process for contempt sanctions "makes no sense except as a consequence of historical practice". Weiss v. United States, 510 U.S. , ,114 S.Ct. 752, 771, 127 L.Ed.2d 1 (1994)(SCALIA, J., concurring in part and concurring in judgment).

Virtually all indirect contempts today involve disobedience of judicial orders. A "punitive" sanction for past conduct-usually a determinate fine or jail sentence--is deemed criminal. "Coercive" sanctions--usually cumulative fines or jail sentences that run until the contemnor complies with the order--and "compensatory" sanctions-monetary awards designed to compensate an injured party for contemnor's disobedience of the court's order--are deemed civil. However, ignorance of the order or inability to comply with an order is a complete defense to civil contempt sanctions. United States v. Rylander, 460 U.S. 752, 757 (1983); Maqqio v _^ Zeitz 333 U.S. 56, 75-76 (1948).

The burden of inability to comply is placed on the defendant in a civil contempt proceeding. However, since New Jersey's probation departments are "the State", the matter is one of essentially the government vs. the individual, and the burden of proof is on the state. Civil contempt standards of proof have been raised to one of "clear and convincing" evidence in a lot of areas. Muniz v. Hoffman, 422 U.S. 454 (1975); Harris v. City of Philadelphia, 47 F.3d 1311 (3rd Cir. 1995); Stotler and Co. v. Able, 870 F.2d 51 (7th Cir. 1989); Balla y_^ Idaho State Board of Corrections, 869 F.2d 461 (9th Cir. 1989); Mann v. Hendrian, 871 F.2d 51 (7th Cir. 1989). Substantial compliance with a court order is a defense to a civil action for contempt, if an alleged violating party has taken all reasonable steps to comply with court order, technical or inadvertent violations of order will not support findings of civil contempt. General Signal Corp. v. Donallco, Inc., 787 F.2d 1376 (9th Cir. 1986).

The distinction between civil and criminal contempts is exclusively focused on the contempt process' most serious problem-the unlimited nature of the contempt power and the pervasive potential for abuse and biased adjudication.

The U.S. Supreme Court initially adopted the English contempt practice, but found that this unlimited power was antithetical to the political climate in this country in the 18th and 19th Centuries. Also, there has evolved a right of review, by appeal, of contempt sanctions. Alexander v. United States, 201 U.S. 117, 121 (1906)(stating that "a right of review" arises after the imposition of sanctions).

Furthermore, no court, state or federal, may impose a contempt sanction that is "criminal" and wholly punitive, as opposed to remedial, without affording the defendant most, if not all, procedural rights secured by the Fifth and Sixth Amendments. In the Hicks v. Feiock case, a father in a state court contempt judgment for failure to pay court-ordered child support,

where he pleaded inability to pay, a question of federal law applied because of the nature of the sanction. It was found that the father had the burden of proving his case, because the statute complained of was denominated as civil.

Here in New Jersey, the civil/criminal dichotomy was eliminated in 1961. New Jersey's statutes and court rules are inconclusive on the subject, because the statutes' true purposes indicate that they are punitive. Courts in New Jersey must begin to look at each case ab initio to see whether a civil or criminal proceeding should be conducted, because sanctions for contempt are often not meted out thoughtfully and effectively, partly because of the confusion between criminal and civil. Courts have further spread confusion by indiscriminately using language connoting punishment with respect to civil contempt sanctions (i.e.--incarceration).

Courts try to use willfulness as a point of reference, yet if one is willful, only criminal contempt sanctions can be imposed, initiating criminal due process. The U.S. Supreme Court has said that criminal contempt requires proof of wilfulness, while civil contempt does not. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). Yet, New Jersey judges almost always claim that alleged contemnors wilfully violated a court order. If that's the case then criminal due process is required. If an individual is sentenced to time in jail, the sanction is criminal in nature. If the same individual is sentenced indefinitely until the order is obeyed, the sanction is coercive, because the defendant allegedly "carries the keys to get out of jail in his pocket". Yet, as stated above, if one cannot comply with an order, such as an ability to pay court-ordered child support and/or arrearages, he does not have the "keys to get out of jail".

In the Hicks v. Feiock case, as it relates to child support enforcement, the distinguishment between civil and criminal contempts was not really resolved and this case continues to cause confusion among lower courts concerning the effect of suspended sentences on the procedural rights of contemnors. In Hicks, defendant was ordered to continue to make his future child support payments regularly under coercion (civil), but was put under probation (incarceration) in a "determinate sentence with a purge clause", thus making it criminal in nature.

In two recent cases, the Third Circuit has read Hicks to mean that suspension of a determinate contempt sentence, on conditions designed to coerce the contemnor's future compliance with an ongoing order benefitting the complainant, renders the sanction civil and thus justifies dispensing with procedural safeguards. Roe v. Operation Rescue (Appeal of McMonagle), 920 F.2d 213, 216 (3d Cir. 1990); Roe v^ Operation Rescue, 919 F.2d 857, 868-69 (3d Cir. 1990). The McMonaqle decision is particularly confused.

Justice Black in Reina v. United States, 364 U.S. 507, 515 (1964) was against the view that a suspended civil contempt sentence "seems to represent a present adjudication of guilt for a crime to be committed in the future". Similarly confused is the decision in International Union vs. Bagwell, 114 S.Ct. 2552 (1994). Even as a reading of Hicks these cases are indefensible, but such confusion is inevitable in light of Hicks.

Courts have recognized that coercive sanctions may be employed only where there remains some possibility of coercing compliance with the order in question. Thus, where the contemnor lacks the present capacity to comply with the order, sanctions coercive in form are plainly punitive in fact. Similarly, where the contemnor's conduct establishes that he or she is so firmly resistant as to be beyond all possibility of successful coercion, the application of coercive sanctions must cease. Catena v. Seidl, 65 N.J. 257 (1974), 66 N.J. 32 (1974) and 68 N.J. 224, 343 A.2d 744 (N.J. 1975).

The confusion wrought by adjudicating civil and criminal sanctions in a single proceeding is exacerbated by the fact that the sanction's form, which is typically determined by the evidence adduced at the hearing, controls the very nature of that hearing. As a result, the criminal or civil nature of the proceedings--and the attendant procedural protections-are determined at the end of the hearing, rather than at the outset. Justice Rutledge, dissenting in United States v^ United Mine Workers, 330 U.S. 258 (1947), attacked the admixture of civil and criminal proceedings, stating that in any other context it "would be shocking to every American lawyer and to most citizens". Justice Rutledge dissented in that the long-existing confusion of contempts and the manner of their trial, in that whether it's civil or criminal, is determined at the end of the proceeding, rather than, as it should be, at the beginning of the proceeding. Rutledge went on to argue that in a mixed proceeding, the defendant can never tell which set of procedural rights to use. Punishment and the entire proceedings must be kept separate. The New Jersey Appellate Division has also addressed this concern in Lusardi v. Curtis Point Property Owners Assoc., 138 N.J. Super. 44, 50 (App.Div. 1975):
"In situations where circumstances will support both charge of contempt for violation of court order and court order for aid to litigant in enforcement of his private rights, there are grave doubts as to whether defendant's rights can adequately be protected at proceedings where charges of both contempt and deprivation of private rights are tried in common. In the first place, the integrity of the judicial process and the orders which emanate therefrom is so important to a government of laws that the righting of wrongs done to it should remain a unique and specially considered process. Beyond this, and as importantly, there are grave doubts whether a defendant's rights can be adequately protected in a "double-barrelled proceeding", where charges of both contempt and deprivation of private rights are tried in a common proceeding".

A. SERIOUS CONCERNS REGARDING BIASED JUDGES IN CONTEMPT PROCEEDINGS AND THE NEED FOR GREATER FUNDAMENTAL SAFEGUARDS

The most serious concerns with regard to the contempt power pertain to the essentially unlimited power granted to a judge and the grave danger of bias stemming from the court's conflicted role in vindicating its own authority. See, 28 U.S.C. 144 & 455; Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820-25 (1986); Ward y_^ Village of Monroeville, 409 U.S. 57, 59-60 (1972); Tumey v_^ Ohio, 273 U.S. 510, 522-23 (1927). A judge offended by perceived flouting of his authority or harboring a jaundiced view of a party against whom he has already ruled on the

underlying merits is no less likely to resovle factual issues in a biased manner simply because he chooses ultimately to impose a sanction designed to coerce obedience rather than expressly to punish. Moreover, the concerns arising from the unlimited nature of the sanctioning power are hardly diminished--indeed, they may be elevated--in civil contempt. By carefully crafting the sanction, a biased judge can drastically limit the procedural protections afforded the accused contemnor, foreclose any claim to a jury (thereby cloaking his factual findings with the protection of the "clearly erroneous" standard of appellate review), and possibly circumventing the contemnor's right of appeal--all without losing much, if anything, in the way of a punitive impact.

Where an alleged contemnor truthfully denies the ability to comply and the court disagrees, a "coercive" sanction is in fact purely punitive-criminal, regardless of the fact that the court says it is willing to lift the sanction whenever its order is obeyed. It is obvious that many "civil" contempt sanctions impact the contemnor more severely than many "criminal" ones. Undeserved severity often is not mitigated by judicial review, because appeals of interlocutory civil sanctions is strictly limited. While criminal contempts may be appealed prior to a final judgment, civil contempts imposed on parties to litigation may only appeal after judgment in the principal case is rendered.

Based on the aforementioned, a powerful argument is then made that the most stringent procedural safeguards should apply to those sanctions impacting most severely on the subject of legal proceedings. The sheer magnitude of civil remedies is a subject of growing concern outside the contempt context. Many current proposals for tort reform, involve imposing legislative "caps" on civil awards for both punitive damages and noneconomic loss. These "caps" should apply as well in the civil contempt context (incarceration should be only under the criminal context).

Contempt is unique in our jurisprudence in permitting one who has a major stake in the outcome to sit in judgment. But contempt law exacerbates the conflict by committing to the conflicted judge the authority not merely to find the facts but to define the offense, to initiate the enforcement proceeding, to determine both the form and the severity of the sanction, and to "fix" what procedural protections the defendant will receive. In this unique context, the U.S. Supreme Court has struggled repeatedly with the question of how to eliminate bias and potential bias (which is endemic to the contempt process as presently structured), as well as how much bias is too much when a particular judge has become so personally embroiled that the contempt proceeding should be transferred to another judge. See Taylor v. Haves, 418 U.S. 488, 501-03 (1974); Mayberry v^ Pennsylvania, 400 U.S. 455, 465-66; Offutt v. United States, 348 U.S. 11, 13-17 (1954).

Even though, it is questionable whether transferring a case to another judge (a colleague) will lower the potential for biased adjudication. The second judge will always have (a) a preexisting personal and working relationship with the first judge, (b) be forced to work closely with him in the future, and (c) share whatever sense of institutional injury and outrage that may flow from the alleged contempt. There is a potential for bias or at least the appearance of bias in

every contempt proceeding because the judge is considering conduct that allegedly constitutes an affront to the institution he represents, if not to himself personally. Cf. Ward, 409 U.S. 57.

Contempt is a process in which an individual confronts an organ of the government, here the judiciary, that has the power to deprive him of his liberty or property. Contempt proceedings are therefore at a minimum subject to the constraints of due process of law no matter whether the court involved is state or federal. The most troubling problem in the current contempt process is to find a "neutral adjudicator" to insure a fundamentally fair process. The only exception to unbiased adjudication is the doctrine of necessity, when there is no other alternative but to use the contempt power to insure obedience or compliance. There is a second rationale to allegedly justify the power of contempt. The judge's personal observation of the contumacious conduct and hence the lack of need for a fact-finding process.

However, the premise that a judge's personal observation of the contempt makes an evidentiary hearing unnecessary rests on the assumption that a judge will accurately perceive all the relevant facts. Numerous experiments have demonstrated that individuals often misperceive even simple occurrences. The shock and spontaneity of most courtroom disturbances probably increases the margin for error. Being a finder of fact and the ability to sift evidence fairly does not enhance a judge's ability as a witness.

The Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976) held that certain procedural safeguards must be maintained. Those safeguards include (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest (the erroneous deprivations are rampant in child support enforcement cases and domestic violence and their subsequent contempt cases) throught the procedures used, and the value of additional or substitute procedural safeguards; and lastly (3) the government's interest in the function involved and the fiscal-financial and administrative burdens that additional safeguards would entail.

The principal focus of due process analysis in contempt should be to avoid erroneous determinations of guilt. Contempt, like criminal process, invokes the powers of government to punish deviant behavior, but also has the high potential for abuse and bias. Contempt is the courts' principal method of vindicating their authority and enforcing their orders. Contempt is used in a stunning variety of contexts.

Courts have used due process grounds in examining legislation dealing with personal liberties and should examine their own use of the contempt power in the same light, so that the contempt power is not effectively immunized from review. The contempt power cannot be universally justified where more moderate alternatives exist.

B. CIVIL CONTEMPT IS COUNTERPRODUCTIVE IN CHILD SUPPORT AND ALIMONY CASES

Contempt, as it is used to enforce child support orders, particularly in New Jersey, has an enhanced danger of bias because imposing severe sanctions (imprisonment and revocation of driving and occupational licenses) is in tension with the ultimate goal of providing alimony and child support. The court's overriding objective in these cases is to provide the spouse and/or children with financial support. Yet, New Jersey family court judges order support in such overbearing and outrageously inflated amounts that many parent's can no longer pay them and survive and subsequently default on the payments or in some cases just pay partially, causing them to fall into arrears.

By imposing fines, jail sentences and revoking licenses, whether fixed or cumulative, will, in the vast majority of cases, impede the achievement of paying support by impairing, if not destroying, the defaulting parent's or former spouse's ability to pay. See, Ridgway v. Baker, 720 F.2d 1409, 1414-15 (5th Cir. 1983).

Even if there is no dispute about the underlying failure to comply, a disputed defense may be put forward, such as inability to pay. See U.S. v. Rylander, supra. Yet, in any case where the facts are in dispute, as they almost always invariably are in child support cases, there is a grave potential for biased adjudication. It is impossible to guarantee that a particular judge will not be unbiased or be able to identify the operative bias when it exists. In matrimonial and child support/visitation cases, the potential for clashes between judges and lawyers and litigants, and the danger of biased adjudication, is consistently heightened. Many contempt cases, in the matrimonial context, involve tense proceedings that may also involve highly publicized litigation, where the temptation to engage in posturing affects all concerned.

Some orders which require affirmative duties may be attacked collaterally, such as refusal to produce papers protected by the Fourth Amendment as not being contemptuous. Also, because of similarity with legislation, court rules may be violated without fear of sanctions, if said rules are invalid. See Johnson v. Virginia, 373 U.S. 61 (1963).

Significant burdens are imposed by requiring obedience to court orders in all cases. The individual is forced to obey now and question later. This causes severe problems when an individual has virtually no redress for infringement of rights. Requiring obedience may permanently impair the party's rights where rapid events may mean that a later reversal is of little or no value. See Walker v. Birmingham, 388 U.S. 307, 331 (1967) (Warren, C.J., dissenting); Watt, The Divine Right of Government by Judiciary, 14 U.Chi.L.Rev. 409, 433 (1947).

An individual should escape punishment for violating an erroneous order if he can demonstrate that the restriction on his rights outweighs society's interest in preserving orderly process. Although civil contempts have been praised as the least drastic power adequate to compel obedience, such a view underestimates the essentially punitive nature of civil contempt. Unless money damages would fail to provide adequate compensation for disobedience, the only

justification for attempting to coerce specific action through civil contempt is to punish the contemnor for his disobedience. A fine or imprisonment measured by the extent of the contemnor's will rather than the damage to the injured party's interests should be viewed as punitive and beyond the legitimate interest of the court. In such a case, a monetary judgment in favor of the injured party would be insufficient, and the initiation of a subsequent criminal action (imprisonment) would do little to compensate the injured party. To deny courts the power to provide effective relief in such circumstances would be unfortunate; but the power must be carefully limited, and the sanction imposed should attempt only to enforce compliance, not to inflict punishment.

Although the extent of the civil contempt sanction is measured by the resisting will of the contemnor and may fulfill purposes different from most criminal sanctions, it is nonetheless a punishment. See, Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911).

Experience in civil law countries suggests that in most cases use of the contempt power to compel obedience to court orders is unnecessary because monetary damages adeguately compensate the person injured by the violation. Most civil law courts in other countries do not have a contempt power, but some like France impose punitive fines for disobedience of a court order.

Civil contempt is allegedly for the benefit of the litigant and remedial, while criminal contempt is for the vindication of the court's authority and considered punishment. This theoretical distinction, however, should be of no significance in an analysis of the inherent power of a court to impose contempt sanctions, since civil contempt sanctions can be far more severe than those of criminal contempt. A civil contemnor allegedly "carries the keys of his prison in his own pocket", but a strong willed person could be imprisoned indefinitely through means of civil contempt.

Because of the abuse of civil contempt process by biased judges in the family courts in New Jersey, even if a person clearly shows an inability to pay child support or inability to comply with any other type of order, does not prevent that person from being imprisoned. Here is where the problem lies. An abusive court system loaded with biased judges have a huge power that they use arbitrarily and the individual litigants that appear before them to defend against onerous support orders in many cases, have no procedural safeguards. Litigants are routinely subjected to a short summary proceeding, in what is known as a 5-minute "Pay or Stay" hearing, and punished by being imprisoned without even the right to counsel for their defense.

Criminal contempt is for the benefit of the state, yet civil contempt in New Jersey is used consistently for the benefit of the state in child support enforcement proceedings because the state government (through its probation division) is bringing a contempt action (disguised as a proceeding in violation of litigant's rights) on behalf of a private litigant, in order to extract support to compensate for an alleged welfare fiscal shortfall.

Although civil contempt is measured by the resisting will of the alleged contemnor, it is nonetheless punishment. Courts have the ability to compel compliance with their interlocutory orders and final decrees. But, questions arise when it includes those orders which are oppressive or erroneous. See generally, Cox, The Void Order and the Duty to Obey, 16 U.Chi.L. Rev. 86 (1948); Note, Defiance of Unlawful Authority, 83 Harv.L.Rev. 626 (1970). Violation of an invalid statute is not deemed punishable. Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969).

Although civil contempt has been praised as the least drastic power adequate to compel obedience, such a view underestimates the essentially punitive nature of civil contempt. Unless monetary damages would fail to provide adequate compensation for disobedience, the only justification for attempting to coerce specific action through civil contempt is to punish the alleged contemnor for his alleged disobedience. The essentially inseparable nature of civil and criminal contempt has long been recognized. Gompers, supra.

Viewing the exercise of the contempt power as imposing punishment, it follows that, in the absence of a statutory offense, a court has power to punish contumacious conduct only where (1) it has power to punish common law crimes, and (2) contempt constitutes a common law crime. There is no doubt that contempt is a common law offense. J. Fox, The History of Contempt of Court (1927) (history of contempt power). Defenses to common law sanctions such as contempt are the common law remedy of Trial by Jury.

Civil contempt appears to meet the criteria of punishment which were enunciated in other contexts in the law other than contempt--presence of affirmative disability, historical view as punishment, necessity of scienter (knowledge and ability to deceive, defraud or commit crime), concurrent treatment as a crime, presence of alternative purposes and relation of criminal or fraudulent purposes and the sanctions to be imposed as a result. See, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); United States v. Lovett, 328 U.S. 303 (1946) (prohibiting and outlawing bills of attainder because the amount of punishment presupposes an offense, not necessarily criminal, but one which retribution is exacted).

Civil contempt, as a common law sanction, is the antithesis of what the Constitution and fundamental rights are about. The individual is inadequately warned of proscribed conduct. The history of common law contempt makes clear that the judiciary has been unable to define what constitutes contempt. Such indefiniteness makes it as unacceptable to hold an individual in contempt of court as to convict him for a nonstatutory offense. Legislatures may not constitutionally give courts authority which enables them to retrospectively write criminal law. Courts should not be able to delegate the power to write law to themselves.

Law founded on Anglo-American conceptions of liberty requires that crimes must be defined by the legislature. The legislature, as we have seen here in New Jersey, does not meet this requirement by issuing a blank check to courts for their retrospective finding that some act

done in the past comes within the contingencies and conflicts that inhere in ascertaining the content of the Fourteenth Amendment by "the gradual process of judicial inclusion and exclusion". Davidson v. New Orleans, 96 U.S. 97, 104 (1877). Courts cannot fit criminal punishment into the contempt process and then call it civil in order to satisfy some alleged vital fictional doctrine. The New Jersey Constitution, Article I, Paragraph 13 states:
"No person shall be imprisoned for debt in any action, or on any judgment founded upon contract, unless in cases of fraud, nor shall any person be imprisoned for a militia fine in time of peace". (underline added).

The New Jersey Supreme Court has supported this Constitutional prohibition in State v. Madewell, 63 N.J. 506, 512 (1973):
"Statutes or ordinances [rules], designed as debt collecting devices under the guise of penal laws [or contempt], contravene the constitutional prohibitions against imprisonment for debt. Thus, the legislature may not circumvent the prohibition by rendering criminal a simple breach of contract, the nonpayment of a debt, or the failure to use one's own money for a purpose other than for payment of debts....The term "debt" is not confined to its technical meaning of an obligation to pay money, but rather that it includes debt in the popular sense of a demand founded on contract express or implied, and comprises all actions ex contractus".

New Jersey child support arrearages automatically become judgments by operation of law. They become a debt as defined by New Jersey Court Rule 5:7-4 (d)(2) and the federal child support statutes 42 U.S.C. 651 et seq.:
"Any payment or installment of an order for child support or those portions of an order that are allocated for child support shall by fully enforceable and entitled to full faith and credit and shall be a judqment by operation of law on or after the date it is due".

This is further confirmed by brochures put out by the Child Support Enforcement Services of the New Jersey Probation Services, which call child support a "debt".

However, as a result of the "hot political nature" of the child support enforcement hysteria, those who fail to pay (in many cases, more child support is ordered than is necessary for children to live on and the support becomes spousal support) are summarily denied procedural safeguards and are unceremoniously imprisoned without ability to pay hearings or right to counsel.

Present statutes in New Jersey do not remedy the problems surrounding the contempt power. The New Jersey Supreme Court has been unlawfully legislating from the bench for the past twenty years on this matter and have caused confusion and convolution regarding the contempt powers. The New Jersey Statute, N.J.S.A. 2A:10-l, creates the power of contempt but does not really define what is contemptuous conduct and only couches the definition in general terms. There is no meaningful common law definition of contempt in the New Jersey statutes or court rules.

Pursuant to the United States Code, Title 28 U.S.C. §2007(a):
"A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished".

This is further supported by the case of Pierce v. Vision Investments, Inc., 765 F.2d 539 (5th Cir. Tex. 1985):
"Civil contempt judgment for failure to comply with payment terms of a consent order violated the prohibition against imprisonment for debt of this federal statute and the Texas Constitution, Article I, Paragraph 18, since the consent order was a 'money judqment' or debt under federal law, since the use of contempt sanctions constituted imprisonment for debt under federal law..." (underline added).

Specificity is required in criminal statutes and is also applicable in noncriminal statutes as well. NAACP v. Button, 371 U.S. 415, 432-33 (1963). Laws that are vague lend themselves to arbitrary enforcement and are therefore null and void. Lanzetta v^ New Jersey, 306 U.S. 451 (1939). Judicial decrees must also be very specific as well. Those that are not are void for vagueness. See, Local 1291, Int'1 Longshoremen's Assoc. v. Philadelphia Marine Trade Assoc., 389 U.S. 64, 76 (1967).

The due process clauses (of the Fifth and Fourteenth Amendments) are not limited to penal deprivations of life, liberty, or property, but apply to noncriminal matters as well. If an individual cannot determine whether certain actions are prohibited, the statute violates due process of law.

C. LACK OF SPECIFICITY IN CONTEMPT STATUTES

The contempt statutes do not pass muster. They provide vague and arbitrary meanings for courts to use in punishing by fine or imprisonment. The vague meanings are indicative of three situations which may be described in the statute as contempt: (1) misbehavior of any person in the court's presence or "so near thereto as to obstruct the administration of justice"; (2) misbehavior of any of its officers in their official transactions; (3) disobedience or resistance to a lawful court writ, order or decree. The statutes fail to provide sufficient clarification, because they do not define what the contemptuous acts are. To say that courts may punish only those contempts which are "misbehaviors" obstructing the administration of justice provides the contemnor with little more warning than he would hav in the statute's absence. Contempt statues, specifically in New Jersey, allow a judge to write contempt law from the bench on a case-by-case basis, and they should therefore be held unconstitutionally vague. Also, those statutes which fail to provide penalties for contempt should be invalid. Judicially created penalties violate separation of powers. Cf. United States v. Evans, 333 U.S. 483, 495 (1948) .

Applying the overbreadth doctrine to the contempt statues, one must first find an area of activity which is beyond the scope of legislative regulation. Such protected areas are the First and Sixth Amendments. The First Amendment protects speech from legislative abridgement. Since judges are fallible creatures, they more often than not, confuse a perfectly proper argument with a disrespectful one and punish the former as if it were the latter. This is **why** attorneys are afraid to advocate for men clients in family courts. Since divorce, custody, child support enforcement and domestic violence issues have become politically "hot", contempt citations often follow these "political" trials/hearings which makes it far more difficult for subsequent defendants to secure adequate representation. Attorneys, seeing that defending male litigants in family courts is unpopular, fail to adequately represent men in custody, support and violence hearings. Attorneys are threatened from effectively advocating for men, in subtle ways--continuous loss of cases resulting in loss of income, disbarment proceedings, alienation from other members of the profession. Biased judges who use contempt arbitrarily are the most likely threat to lawyers from taking an unpopular case.

Ways to combat this vague, arbitrary contempt power is that the language of a regulation/law be drafted in such a way as to ensure that no one will refrain from exercising constitutional rights. Second, the area of regulated conduct can be sufficiently narrow so that even though it is vague, protected conduct is clearly not regulated by it.

Vagueness of contempt statutes undermines numerous constitutional rights such as the chilling of sixth amendment zealous advocacy. The view that vagueness-overbreadth decisions creates a buffer zone around individual rights leads to the conclusion that contempt statutes should be invalidated. The need for protected advocacy derived from the First and Sixth Amendments suggests that any governmental regulation in this area must be sufficiently precise or sufficiently narrow so that the protected conduct will not be inhibited. Existing statutes and rules in New Jersey do not meet this requirement and must be held unconstitutional. Exercises of the contempt power should be declared unconstitutional as violative of either the First, Fifth, Sixth or Fourteenth Amendments to the Constitution for the United States of America and its corresponding Amendments in the Constitution for New Jersey.

However, judges will not impose limitations upon themselves regarding the contempt power; but remedial legislation is in order and would not unduly infringe upon the proper powers of the courts. Judicial contempt powers are subject to legislative regulation. Michaelson v. United States ex rel. Chicago, St.P., M.& 0. Railway, 266 U.S. 42, 65-67 (1924). Judges should not be left powerless in their courtrooms or command obedience to their decisions. An appropriate statute would recognize legitimate needs of a judge and give him power commensurate with those needs. The power should be the least amount which can meet these needs. Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); NAACP v^ Alabama ex rel. Flowers, 377 U.S. 288, 307-08 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230-31 (1821).

Contempt statutes that would be appropriate to give judges everything but

punishment power would provide judges the ability to exclude from the courtroom those who egregiously disrupt the judicial proceeding and used sparingly regarding zealous advocacy and continued disruptions be sanctioned as a waiver of the right to be present at one's trial/hearing where the individual could be constitutionally excluded. Judges would be able to award damages to parties injured by the contemnor as a result of violation of judicial decrees. Judges would also have the power to impose criminal penalties where needed--such as for conduct interfering with administration of justice, disruption and disobedience of judicial proceedings and decrees. Such criminal proceedings would be brought in a normal manner, with full procedural rights accorded to the accused.

Even though many argue that requiring a full trial for actions now punishable by contempt would unduly embarrass and burden the judiciary. This increased burden, however, may be an advantage since it will undoubtedly result in fewer criminal sanctions being imposed against the accused, especially in civil contempt cases or violations of litigants' rights cases. A review of contemporary contempt cases leaves one with the clear impression that many, if not most contempt cases, could be justified only as cases of retribution by punishment, which has generally been discredited by legal scholars. See Burger, No Man is an Island, 56 A.B.A.J. 325 (1970); 48 Tex.L.Rev. 1198, 1204-05 (1970). The high number of reversals or reductions of sentences in contempt cases confirms the view that justice would be better served if imposition of punishment were less frequent. Moreover, when considering the efficiency of the entire judicial system, requiring a trial by jury in all contempt cases may not be that great a burden. Presently, appellate courts nationwide spend a disproportionate amount of time reviewing inherently suspect contempt convictions which would be reduced had there been a full trial.

Very significant procedural safeguards should constrain the exercise of judicial contempt power to incarcerate individuals for extended periods of time or impose large monetary fines in the name of enforcing judicial orders, regardless of whether the sanctions are characterized as punitive, coercive, compensatory, or some combination of the three. Also, the contempt process should be simplified so as to make it more comprehensible for both courts and parties, who must often operate in an atmosphere of tension and time pressure.

D. PROCEDURAL SAFEGUARDS AND THE THRESHHOLD FOR INVOKING THEM

Given what is at stake in even the most trivial indirect contempt proceeding and the potential for action in haste and anger, there is no excuse for not providing the accused with written charges sufficiently specific to satisfy the demands of the Sixth Amendment. The accused has the right to be informed of the nature and the cause of the accusation.

A father who has failed to comply with a State court judgment ordering him to pay child support and who was in prison for contempt in a proceeding in which he was not represented by counsel, despite his request for same and his uncontroverted claim of indigency,

was entitled to habeas corpus relief. The indigent who appears without counsel cannot have the burden of proof imposed upon him that his failure to pay was or was not contemptuous, nor can he be forced into how he is to satisfy that burden. Ridqway v. Baker, 720 F.2d 1409 (5th Cir. Tex. 1983). Indigent defendants, who can establish their indigency, in child support enforcement hearings, have a right to appointed counsel, as an aspect of due process, if there is a threat of deprivation of liberties. Contempt convictions or violations of court orders, cannot be obtained against anyone, without the right to counsel for their defense. Walker v. McClain, 768 F.2d 1181 (10th Cir. Okla. 1985).

There is no conceivable reason not to afford the accused contemnor to be represented by counsel (either retained or appointed). With regard to counsel in criminal contempt or liberty deprivation (incarceration) proceedings, the accused contemnor has a right to counsel, and in cases involving retained counsel, the right is "unqualified". Chandler v. Fretaq, 348 U.S. 3, 9 (1954).

Whenever the facts are in dispute, fundamental fairness requires that the accused be afforded the right to confront the accusing witnesses and the right to compulsory process to summon defense witnesses. Davis v. Alaska, 415 U.S. 308, 315-16 (1974). Moreover, due process affords a broad right to present a defense to the charges asserted. Chambers v. Mississippi, 410 U.S. 284, 294 (1973). These basic protections are part of minimal due process in court proceedings leading to the imposition of penalties. In re Gault, 387 U.S. 1 (1967). They cost little or nothing to provide, with retained counsel being paid for by the accused that likely will shorten the proceedings and render them more orderly, thus actually lowering the cost. Summoning of defense witnesses is usually borne by the allegedly accused. Without these safeguards the risk of unjustified penalties is increased unacceptably.

At least three other procedural safeguards guaranteed to criminal defendants by the Constitution are central to designing a system to shield effectively against erroneous convictions--the requirement that guilt be proven beyond a reasonable doubt, In re Winship, 397 U.S. 358, 364 (1970); the right of an indigent defendant to appointed counsel, Gideon v^ Wainwriqht, 372 U.S. 335 (1963); Arqersinqer v_^ Hamlin, 407 U.S. 25 (1972)(holding that an indigent defendant may not be sentenced to a term of incarceration without being offered appointed counsel); the right to a jury trial. Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that the Sixth Amendment right to a jury trial for serious offenses is applicable to the states through the Due Process Clause of the 14th Amendment). In Blanton v. City of North Las Vegas, Nevada, 109 S.Ct. 1289 (1989), the Supreme Court ruled that nothing approximates the severity of the loss of liberty that a prison term entails. Because imprisonment is an "intrinsically different" form of punishment, it is the most powerful indication that an offense is "serious", requiring a jury trial. In civil contempt/violation of litigant's rights actions, jail is a serious punishment. It is not a coercion, but is outright punishment, and therefore entitles one to a jury trial and right to counsel, at a minimum.

E. STANDARDS OF PROOF IN ALL CONTEMPT/VIOLATION OF LITIGANT'S RIGHTS CASES, WHERE INCARCERATION IS IMPOSED, MUST BE BEYOND REASONABLE DOUBT

The standard of proof in most civil contempt cases/violation of litigant's rights cases has been raised to "clear and convincing evidence" standard of proof and in some cases "beyond a reasonable doubt". Invoking enhanced burdens on the trier of fact curtails the possibility of biased adjudication and limits erroneous findings.

In a bench trial (one without a jury), a consciously biased and manipulative judge can negate the protection afforded by the enhanced standards of proof. Enhanced burdens of proof also help to insulate the defendant from judicial bias by marginally expanding the scope of appellate review of the sufficiency of the evidence.

Elevated burdens of persuasion add little, if anything, to the cost of conducting litigation. The countervailing interests are too significant to ignore in light of the minimal costs anticipated. Also, Fed. R. Evid. 403 and the corresponding States' rules of evidence permit courts to exclude relevant evidence "if its probative value is substantially outweighed...by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Because of the high potential stakes, the constant spectre of biased adjudication, the slight impact on litigation costs, and the high premium on avoiding erroneous findings of guilt, the standard of proof in all contempts must be beyond a reasonable doubt.

F. RIGHT TO APPOINTED COUNSEL

The Supreme Court has long viewed an indigent defendant's right to an appointed lawyer as central to the fairness of a criminal trial and in particular to avoiding erroneous convictions. Gideon v. Wainwright, 372 U.S. 335, 345 (1963); Johnson y_^ Zerbst, 304 U.S. 458, 462 (1938); Powell v. Alabama, 287 U.S. 45, 66-68 (1932). In Johnson v. Zerbst the Supreme Court held that if an accused, threatened with deprivation of his liberties, is not represented by effective counsel and hasn't competently and intelligently waived his Constitutional right to counsel, the Sixth Amendment stands as a jurisdictional bar and the court no longer has jurisdiction to proceed against him.

The high Court has held that no term of punitive incarceration may be imposed without affording the accused the right to state-supplied effective counsel. The Supreme Court has also held that in civil cases where imprisonment may result, including civil commitment of the mentally ill and pretrial detention, the offer of state-supplied counsel is a prerequisite to any proceeding. In re Gault, 387 U.S. 1, 41 (1967); Allen v^ Illinois, 478 U.S. 364, 371-72 (1986);

Schall v^ Martin, 467 U.S. 253, 274-81 (1984).

However, supplying lawyers, unlike elevating the burden of proof, costs money and this alters the calculus under the Mathews analysis mentioned earlier. Given that the concern with protecting against erroneous findings of guilt is nearly as high in contempt as in the criminal process, and incarceration of potentially unlimited duration is a possibility in every contempt proceeding, it is clear that effective counsel be appointed in every case for indigent contemnors, and counsel should be a prerequisite when the sanction reaches a certain level of severity--jail.

G. RIGHT TO TRIAL BY JURY

Trial by jury provides two principal forms of protection to an accused. It insulates the accused against pro-enforcement bias that a judge might bring into a case and allows protection for individuals against the government. A right to trial by jury is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote the constitutions knew from history and experience that it was necessary to protect against unfounded criminal (and more recently unfounded civil charges such as domestic violence and violation of restraining order charges) charges brought to eliminate "political" enemies and judges who think that they are above the law. Providing a jury trial of his peers provides an accused an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. Duncan v. Louisiana, at 155-56.

Jury trials are expensive, not only because they call on more community expenses but slow down the process and make the court's machinery run much less efficient. Some believe that an alternative to expensive jury trials is to transfer a contempt case to another judge. This is also not effective, because in most cases the original judge is familiar with the facts of the case. If the case were transferred there is an issue that bias would remain. In Bloom v. Illinois, the Supreme Court recognized long-standing "apprehensions about the unbridled power to punish summarily for contempt" and concluded that the history of contempt power "demonstrates the unwisdom of vesting the judiciary with completely untrammeled power to punish contempt, and makes clear the need for effective safeguards against the contempt power's abuse". Id. at 207. The force of these observations applies to the power to impose civil , as well as criminal, contempt sanctions.

H. SELF-INCRIMINATION AND DOUBLE JEOPARDY ISSUES REGARDING CIVIL CONTEMPT

Parallel civil and criminal proceedings are common under our many dual regulatory schemes, creating major dilemmas with respect to asserting the jury trial privilege. This causes

major problems, not only with regards to self-incrimination issues but double jeopardy issues as well. If a court limits itself to imposing a civil sanction originally, nothing prevents it from later pursuing a criminal contempt charge based on information emerging from the civil action. The situation arises wherein the accused must remain silent in both the criminal and civil proceedings for contempt, unless he incriminates himself to his detriment in either case.

As long as criminal punishment (imprisonment) could result from a civil or criminal contempt proceeding, the policies against self-incrimination remain in full force. The punishment aspect is the single most powerful aspect for retaining the Fifth Amendment right against self-incrimination in either civil or criminal contempt cases.

The U.S. Supreme Court has generally held that multiple remedies for the same unlawful act do not constitute double jeopardy unless more than one remedy is purely punitive. United State v. Halper, 490 U.S. 435, 442-43 (1989). Successive punishments, for the same contumacious act do offend Double Jeopardy protections. In child support enforcement cases where the alleged contemnor does not have the money to pay, imprisoning him over and over for the same act constitutes repetitive punishment, prohibited by the Double Jeopardy clause of the Fifth Amendment. Even if the prior contempt order is no longer valid, the defendant faces the possibility of future contempt proceedings and is essentially punished where it has been previously shown that there was no ability to pay. The underlying conduct is capable of repetition, yet evades review. Roe y^_ Wade, 410 U.S. 113, 93 S.Ct. 705 (1973); Scanio v. U.S., 37 F.3d 858 (2nd Cir. 1994); Leonard v^ Nix, 55 F.3d 370 (8th Cir. 1995); Neiderheiser v_^ Borough of Berwick, 840 F.2d 213 (3rd Cir. 1988); Finberq v. Sullivan, 658 F.2d 93, 97-98 (3rd Cir. 1980).

I. USE OF GRAND JURY IN CONTEMPT PROCEEDINGS TO AVOID ERRONEOUS CONVICTIONS

The right to grand jury indictment, has been held unavailable in contempt. The classic theory underlying the grand jury--that it serves to insulate the potential defendant from excessive prosecutorial/ governmental zeal--seems on the surface perfectly suited to contempt, with its unusual blending of the roles of prosecutor and victim. But the grand jury has become largely a discovery tool of the prosecution and today seldom serves the protective function envisioned for it in the 18th Century. "It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive". United States v. Dionisio, 410 U.S. 1, 23 (1973) (Douglas, J., dissenting); see also William J. Campbell, Eliminate the Grand Jury, 64 J.Crim.L. & Criminology 174, 178 (1973) ("At its best, the grand jury today operates as a sounding board for the predetermined conclusions of the prosecuting official"). Appellate review today affords more protection than a grand jury in contempt cases, as the grand jury would most likely benefit the prosecution more than the defense.

J. ESTABLISHING THRESHOLDS AND REFORMS FOR CONTEMPT

Establishing thresholds for procedural rights in indirect contempt proceedings on the basis of the sanction's severity generates at least two procedural difficulties. First, it would require the court to determine the maximum sanction to be imposed at the outset of a contempt proceeding, because significant procedural protections would have to be afforded beyond a certain level of severity. Correlatively, if the court denied a jury and then imposed a coercive sanction, a second trial before a jury would be required after the threshold for that right had been reached.

Under the prevailing scheme, courts are similarly required to make threshold procedural choices on the basis of the anticipated sanction's form without having heard the evidence. The most significant of these procedural choices-whether to afford a jury trial - involves a predetermination of the maximum penalty to be imposed in a civil or criminal contempt.

Currently, the court must decide what form its ultimate sanction may take before determining whether its order has been violated and whether the defendant possesses the present capacity to comply. Courts are required to afford the alleged contemnor the right to a jury trial and counsel where coercive sanctions (civil) have reached the threshold for a jury trial. This occurs even without bringing about compliance, where the alleged contemnor asserts that the order has not been violated or that compliance is impossible, or it is demonstrated that coercion is ineffective making it punishment instead. The need to avoid erroneous convictions fully justifies submitting disputed factual issues to a jury.

Where an order's violation or the contemnor's ability to comply is a genuine dispute and becomes a question of fact presentable to a jury. Also, when a sanction's coercive power is no longer effective and exhausted, it becomes a fact issue triable by a jury.

Reform of the present contempt power is inherently legislative one. Numerous considerations favor legislative reform. The legislature can address the major issue concerning the sanctioning power in contempt--to impose some specified upper limit to the contempt power. The legislature should impose the Mathews due process analysis to all contempt proceedings/ violations of litigants' rights proceedings applying procedural safeguards and making them available in all contempt proceedings. It is difficult to see how adopting a Mathews-type due process framework for contempt, in New Jersey and the other states as well, accompanied by incremental additions to the procedural protections currently afforded accused civil contemnors, would work such a fundamental change in the nature of the judicial power.

"Civil" sanctions often impose much greater burdens upon the accused contemnor than "criminal" ones. The civil/criminal dichotomy does not adequately respond to longstanding

concerns about the unlimited nature of the contempt power and pervasive potential for biased adjudication. There is no reason to suppose, as the current framework does, that these concerns disappear simply because a sanction is deemed civil.

Two reforms are strongly recommended: (1) simplification of the contempt process so the sanction doesn't fit the process; (2) additional procedural safeguards against the unjustified imposition of severe coercive sanctions. Abandonment of the civil/criminal distinction is imperative, and procedural protections in contempt should provide a less complicated due process model that takes account of both the contempt process' peculiar dangers and the costs of affording those protections. The touchstone of the analysis should be avoiding erroneous determinations of guilt, and the consideration triggering the provision of the more costly safeguards, such as appointed counsel and jury trials, should be the severity of the sanction and not its form. In other words, all indirect contempts, including civil, should be tried as criminal contempts to provide all alleged contemnors with procedural safeguards guaranteed by the Constitution.