



11-1975

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Joseph Bernstein

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Recommended Citation

Bernstein, Joseph (1975) "The Parameters of the Right to Counsel and Its Application in Civil Contempt Proceedings," *University of Baltimore Law Forum*: Vol. 6: No. 2, Article 15.

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The Parameters of the Right to Counsel and Its Application in Civil Contempt Proceedings

by Joseph Bernstein

I. Parameters of the Right to Counsel for the Accused in the Prosecution of Any Criminal Offense.

The modern history of the right to counsel began with *Gideon v. Wainwright*, 372 U.S. 335 (1963), which overruled *Betts v. Brady*, 316 U.S. 455 (1942), and established the constitutional right to counsel for anyone prosecuted of a felony by a state. The Sixth Amendment, which in enumerated situations has been made applicable to the states by reason of the Fourteenth Amendment, has recently been extended to include the right to counsel whenever the possibility of incarceration exists, whether the offense is classified as petty, misdemeanor or felony. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The question arises as to how far that doctrine will be allowed to expand.

The right to the assistance of counsel for one accused of any criminal offense where the possibility of incarceration exists is now guaranteed by the holding in *Argersinger v. Hamlin*, 407 U.S., at 37. The petitioner, an indigent, was charged in Florida with the offense of carrying a concealed weapon. Such offense was punishable by imprisonment up to six-months and a fine of one thousand dollars. At his trial before a judge, the petitioner was unrepresented by counsel. After being sentenced to 90 days in jail, the petitioner sought his release under habeas corpus proceedings. The Florida Supreme Court denied his appeal and held that the right to court-appointed counsel, as was provided in *Duncan v. Louisiana*, 391 U.S. 145 (1968), extended only to trials "for non-petty offenses punishable by more than six months imprisonment." 407 U.S., at 27.

The Supreme Court reversed the Florida courts. In ruling on the right to counsel, the Court stated that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial." 407 U.S., at 31. The Sixth Amendment's "requirement of counsel may well be necessary to a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more." 407 U.S., at 33. And, in discussing guilty pleas, the Court said, "[c]ounsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or in prison, and so that he is treated fairly by the prosecution." 407 U.S., at 34.

The holding in *Argersinger v. Hamlin*, *supra*, was even held applicable retroactively in *Berry v. Cincinnatti*, 414 U.S. 29 (1973). The Supreme Court held that persons convicted of misdemeanors prior to the U.S. Supreme Court decision in *Argersinger v. Hamlin*, *supra*, were entitled to the Constitutional rule enunciated there "...if they allege and prove a bona fide, existing case or controversy sufficient to invoke the jurisdiction of a federal court." 414 U.S., at 29-30.

Argersinger v. Hamlin, *supra*, has been consistently followed in all subsequent Supreme Court cases to date, except for the distinguishing remarks in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Taken at its face value, the holding in *Gagnon v. Scarpelli*, *supra*, may have been thought to place a limitation on the guarantees to assistance of counsel for one who might be thrown into jail. Specifically, "...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." 411 U.S., at 790. But, if this was designed to limit the expansion of the *Argersinger* doctrine, why was it not specifically so stated? In fact, the *Gagnon v. Scarpelli* Court only mentioned the *Argersinger v. Hamlin*, *supra*, case twice, both at 411 U.S., at 788.

The factual setting in *Gagnon v. Scarpelli*, *supra*, seems to provide the answer. The respondent, Gerald Scarpelli, pleaded guilty in July, 1965, to a charge of armed robbery in Wisconsin. He was sentenced by the trial judge to serve fifteen years in prison, but was placed on probation for seven years in lieu of imprisonment. The next month respondent was arrested by the Illinois police in the course of a burglary of a house. He admitted his guilt after being informed of his constitutional rights. The respondent's probation was revoked by the Wisconsin probation authorities without a hearing, and, thereafter, the respondent started to serve the fifteen years to which he had been sentenced by the trial judge. No hearing was afforded to the respondent during the entire probation revocation process. 411 U.S., at 778-780. The Supreme Court held this to be an error, 411 U.S., at 782, as did the Court of Appeals and the District Court, 411 U.S., at 780.

But, the appointment of counsel for an indigent probationer was decided differently by the Supreme Court than in the lower federal courts. The Supreme Court said, "...the Court of Appeals erred in accepting respondent's contention that the State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases." 411 U.S., at 787. A case-by-case approach was considered necessary to determine the necessity of counsel for indigent probationers or parolees. 411 U.S., at 790. The Supreme Court's reasoning in denying respondent the right to the assistance of counsel was based on the differences between a criminal trial and a probation or parole revocation hearing. "[W]e deal here not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime." 411 U.S., at 789. The case-by-case approach to the appointment of counsel was therefore limited to the revocation hearing and is not a limitation on the right to the assistance of counsel for an accused at his trial.

The *Gagnon v. Scarpelli* Court placed greater emphasis in two other probation

or parole revocation cases, *Mempa v. Rhay*, 389 U.S. 128 (1967) and *Morrissey v. Brewer*, 408 U.S. 471 (1972), than it did in *Argersinger v. Hamlin*, *supra*. The rights of the probationer or parolee at a revocation hearing were seen to be sufficiently different from the rights of an accused who is standing trial for the first time. Assuredly the Fourteenth Amendment's requirements of "due process of law" apply in favor of probationers and parolees at revocation hearings, as well as in cases of persons standing trial for the first time. But, different due process rights are afforded at revocation hearings and at trials. For instance, the right of counsel for a probationer at his revocation hearing is not always assured "...where the probationer was sentenced at the time of trial." *Gagnon v. Scarpelli*, 411 U.S., at 781. And,

"...no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."

Argersinger v. Hamlin, 407 U.S., at 37.

Gagnon v. Scarpelli, *supra*, and *Argersinger v. Hamlin*, *supra*, both consider the concept of loss of freedom due to incarceration. Their conclusions are at variance with respect to the right of assistance of counsel, as demonstrated *supra*, but the idea of loss of freedom is not dispensed with. As is pointed out in *Gagnon*, "[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty." 411 U.S., at 782. *Argersinger v. Hamlin*, *supra*, states emphatically that the rationale of *Powell v. Alabama*, 287 U.S. 45 (1932), and of *Gideon v. Wainwright*, 372 U.S. 335 (1963), have "relevance to any criminal trial, where an accused is deprived of his liberty." 407 U.S., at 32. Thereafter, at 37, the *Argersinger v. Hamlin*, *supra*, ruling is extended to the deprivation of liberty for any criminal offense. No mention is made of what rights may be afforded to one who is susceptible to the loss of liberty, but who just happens to be charged with a civil offense.

As the remainder of this memorandum will point out, there seems to be a total disregard as to the constitutional

right to the assistance of counsel when the accused is charged under a civil contempt statute.

II. The Loss of Liberty Potential in Civil Contempt Actions Should Allow the Alleged Contemnor to Have the Right to the Assistance of Counsel.

The law of contempt is largely judge-made law, and indeed judges and legislators have spoken of the "inherent" powers of the judiciary to punish for contempt even when legislative regulations have been contrary. See *Dobbs, Contempt of Court: A Survey*, 56 Cornell L. Rev. 183, 185 (1971); *Adkins, Code Revision in Maryland: The Courts and Judicial Proceedings Article*, 34 Md. L. Rev. 7, 13 (1974). Contempt of court has been described as an offense against the state, rather than against the judge personally, which is punishable because of the necessity of maintaining the dignity of and respect toward the court and their decrees. 17 Am. Jur. 2d, Contempt § 2. The power to punish for contempt is exercised to vindicate the court's dignity for disrespect shown to it or its orders, or to compel the performance of some order or decree whose performance is within the power of the contemnor. 17 Am. Jur. 2d, Contempt § 2. One of the penalties which may be imposed for contempt of court, whether characterized as civil or criminal, is the incarceration of the offending party.

The reasoning of *Argersinger v. Hamlin*, *supra*, in which the Court stated that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial," may have an application not only to the rights of an indigent charged with a misdemeanor (the issue in that case), but also to the rights of persons, whether indigent or not, charged with contempt of court. Since the contemnor may be deprived of his liberty in contempt proceedings, several courts have stated that he is entitled to minimal due process and equal protection rights, among which is the right to counsel. See *In re Grand Jury*, 468 F. 2d 1368 (9th Cir. 1972); *Application of Shelly*, 197 Cal.

App. 2d 199, 16 Cal. Rptr. 916 (1961); *Ex parte Davis*, 161 Tex. 561, 344 S.W. 2d 153 (1961); *Ex parte Hosken*, 480 S.W. 2d 18 (Tex. Civ. App. 1972). The Ninth Circuit Court of Appeals observed in *In re Grand Jury Proceedings*, *supra*, that the threat of imprisonment is the coercion that makes a civil contempt proceeding effective, and that the civil label did not obscure its penal nature. In that case an indigent who was charged with civil contempt for failing to answer federal grand jury questions pursuant to a court order was held to be entitled to court-appointed counsel in his contempt hearing. In *Application of Shelly*, *supra*, the court noted that a contempt proceeding arising out of a civil action was, in a broad sense, regarded as a criminal proceeding. There the applicant was allowed to waive his right to counsel even though he would have been afforded the due process right to counsel. Observing that a civil contempt hearing was quasi-criminal in nature, the court in *Ex parte Davis*, *supra*, required that adequate time be furnished to one charged with civil contempt in order that he obtain representation by counsel in the contempt proceedings. In that case the contemnor failed to make support payments required by a previous court order. And, in *Ex parte Hosken*, *supra*, the court said that contempt proceedings were often considered criminal or quasi-criminal in nature, and that a person faced with deprivation of liberty had the constitutional right to be represented by counsel.

It should be noted that while contempts are frequently classified as civil or criminal, there is a fundamental dichotomy between the two. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911). As to the standards that are used to distinguish civil from criminal contempt actions, see *Wright, et al., Civil and Criminal Contempt in the Federal Courts*, 17 F.R.D. 167 (1955); *Beale, Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161 (1908); *Moskovitz, Contempt of Injunctions, Civil and Criminal*, 43 Colum. L. Rev. 780 (1943); *Note, Civil and Criminal Contempt in the Federal Courts*. 57 Yale L. J. 83 (1947). A criminal contempt proceeding has almost all of the safeguards of a normal criminal defendant. [The crimi-

nal contemnor may be pardoned. *Ex parte Grossman*, 267 U.S. 87 (1925). The state can not appeal from an acquittal. *U.S. v. Bittner*, 11 F.2d 93 (4th Cir. 1926). The defendant may refuse to testify. *Cf. Michaelson v. U.S.*, 266 U.S. 42, 66 (1924). The defendant is presumed to be innocent. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911).] Whereas, the civil contemnor has only the rights of any civil litigant. See *Green v. U.S.*, 356 U.S. 165, 197 (1958) (Black, J., dissenting). [For instance, the civil contemnor is not entitled to a Fifth Amendment right to refuse to testify. *American Pastry Products Corp. v. United Products Corp.*, 39 F.2d 181, 183 (D. Mass. 1930). He is not favored by a presumption of innocence. *Coca-Cola Co. v. Feulner*, 7 F. Supp. 364 (S.D. Tex. 1934). Also, since confinement may continue until the civil contemnor complies or purges himself (See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911)), the open-ended sentence imposed on the civil contemnor theoretically can continue indefinitely and without the possibility of executive pardon. *In re Nevitt*, 117 Fed. 448 (8th Cir. 1902).]

The obvious question thereby presents itself: Why should the civil contemnor not be entitled to the same rights as the criminal contempt defendant? The superficial answer to this question is that civil contemnors do not need the safeguards of criminal procedure or of constitutional law because they "carry the keys of their prison in their own pocket." *In re Nevitt*, *supra*, at 461. Judge Sanborn's rationalization in that case has influenced the subsequent history of civil contempt in the United States. Comment, *The Coercive Function of Civil Contempt*, 33 U. Chi. L. Rev. 120, 125, n. 28 (1965). However, civil contemnors may not actually carry the keys in their pockets. Both compliance and inability to comply are complete defenses to coercive imprisonment proceedings. *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948); *U.S. v. Jaeger*, 117 F.2d 483 (2d Cir. 1941). The contemnor may have complied already or may be incapable of such action, yet the determination of these facts is made without certain criminal safeguards even though impris-

onment hinges of the outcome of that determination. Comment, *The Coercive Function of Civil Contempt*, *supra*, at 125.

Another possible justification for differing between the rights of civil and criminal contempt defendants rests on the function of the civil contempt. Civil contempt proceedings do not seek to punish the defendant, but they are instituted to benefit the complaining party. See *U.S. v. U.M.W.*, 330 U.S. 258 (1947); *Gompers v. Bucks Stove & Range Co.*, *supra*; *MacNeil v. U.S.*, 236 F. 2d 149 (1st Cir. 1956). And, granting additional safeguards to the civil contemnor is directly opposed to the interests of the complainant, to whom the contemnor owes a duty by reason of a prior judicial decree. Imprisoning an individual, however, without traditional criminal safeguards is against the spirit of *Argersinger v. Hamlin*, *supra*, and *Gideon v. Wainwright*, *supra*.

The resolution of the above conflict then would seem to require a balancing of interests between the two parties to the proceeding. Once a judgment on the

merits has been entered both parties have already had their day in court, and the threat of imprisonment is only used to enforce compliance with that judgment. The contemnor faces imprisonment while the complainant wants to enforce his right to the prior judgment.

The right to enforce judgments is not questioned here. However, the threat of incarceration directed towards the alleged civil contemnor is such a drastic step that modern notions of due process and equal protection clearly require that minimal criminal safeguards, such as the right to counsel, be guaranteed. See *Powell v. Alabama*, *supra*, at 68-69; *Gideon v. Wainwright*, *supra*, at 344; *Argersinger v. Hamlin*, *supra*, at 40.

The threat of incarceration in a trial setting should be enough, in itself, to activate the right to counsel requirement as was mandated in *Argersinger v. Hamlin*, *supra*. Even though a civil contempt hearing is not deemed to be classified as a criminal offense, such proceeding is held in a courtroom and is presided over by a trial judge. At the enforcement proceedings, some states, including Mary-



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land and New Jersey, even allow the State's attorney to prosecute the contempt actions as though they were criminal cases. See, e.g., Maryland Rules of Procedure, Rule P4, §d(1) and the Editor's note thereto. Thus, the power of the court and of the state's prosecutorial resources are set against the alleged contemnor in a trial setting.

"The assistance of counsel is often a requisite to the very existence of a fair trial."

Argersinger v. Hamlin, supra, at 31. The courts should not be so enamored with the forms of actions that they lose sight of their protection of one's constitutional rights.

Two recent decisions have come to opposite conclusions regarding the right to counsel in civil contempt proceedings brought to enforce previously adjudicated support orders: *Duval v. Duval*, 322 A. 2d 1 (N.H. 1974) and *Otton v. Zaborac*, 525 P. 2d 537 (Alaska 1974). The remainder of this section will discuss the implications of these two cases.

In *Otton v. Zaborac*, supra, the appellant, a divorcé, failed to make child support payments and was ordered to show cause why he should not be held in contempt. At the contempt hearing, appellant was asked whether he wanted a jury trial, but he was not advised of his right to counsel. Appellant opted to be tried by the judge, who held the appellant in contempt and jailed him. The Alaskan Supreme Court held "that an indigent in a contempt for nonsupport proceeding has a right to a court-appointed attorney." 525 P. 2d, at 538. The reasoning for that decision was based on the availability of a jury trial in civil contempt proceedings for nonsupport (*Johansen v. State*, 491 P. 2d 759 (Alaska 1971)) and on the seriousness of the potential deprivation of liberty. The right to a jury trial would have been a hollow right if the appellant could not have been heard through counsel. The court quoted from *Powell v. Alabama*, supra, stating that "[t]he right to be heard by counsel would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 287, U.S., at 68-69."

525 P. 2d, at 539. Also, the potential deprivation of liberty was a serious penal

matter even though the contempt charged was traditionally civil in nature, and that imprisonment through the courts was equal to "state action which brings into play the due process clause." 525 P. 2d, at 538, 539.

Duval v. Duval, supra, concerns the same factual setting in which a divorcé failed to make support payments and was held in contempt of court. At the contempt hearing, the defendant was without the services of counsel. The Supreme Court of New Hampshire noted that "due process does not require the right to counsel in every instance where the possibility of incarceration exists, but depends instead on circumstances which show that the defendant would be treated unfairly if the assistance of counsel were not provided." 322 A. 2d, at 4. The court based its ruling on *Gagnon v. Scarpelli*, supra, *Morrissey v. Brewer*, supra and Justice Powell's concurring opinion in *Argersinger v. Hamlin*. Without a transcript of the contempt hearing procided to them, the court remanded the case to determine "whether the issues presented below were of a complex nature or whether the defendant was without resources to obtain adequate representation without substantial hardship to himself or his family." 322 A. 2d, at 4. Also, the court stated that the *Argersinger* right to counsel decision was "inapplicable to a civil contempt action because that right is confined to criminal proceedings." 322 A. 2d, at 3. The capability of the defendant to speak for himself, the character of the proceedings and the complexity of the issues were all to be considered in any civil contempt case where the right to counsel was sought. 322 A. 2d, at 3-4.

Both of these decisions are well-written, but their conclusions vary as much as the *Argersinger* and *Gagnon* cases. It should be noted that *Otton v. Zaborac*, supra, never noted *Gagnon v. Scarpelli*, supra. Equal emphasis should show that *Duval v. Duval*, supra, lightly glossed over the concept of state action in the imprisonment of the contemnor.

In support of *Otton v. Zaborac*, supra, the case of *Gagnon v. Scarpelli*, supra, does not need citing since the probation revocation hearing involved there was so dissimilar from a trial that different

due process protections were accorded in each.

"[T]here are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences."

Gagnon v. Scarpelli, 411 U.S. at 788-789. At revocation hearings, "the state is represented not by a prosecutor but by a parole officer [who is concerned with rehabilitation]; formal procedures and rules of evidence are not employed.... The need for counsel at a revocation hearing derives not from the invariable attributes of those hearings but rather from the peculiarities of particular cases." 411 U.S., at 789. The probationer or parolee has already been convicted at a trial. Therefore, he has a more limited due process right than does a criminal defendant in a trial. As such, the civil contemnor has more dissimilarities with a probationer or parolee than with a criminal defendant. All four parties stand the possibility of incarceration, but ONLY the civil contemnor has been denied the right to counsel at his trial.

The Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall...deprive any person of...liberty...without due process of law." It is a reasonable argument that imprisonment to coerce compliance with a state court action amounts to state action. As such, a denial of due process should at least be raised when the state provides the remedy of incarcerating a civil contemnor to enforce his payment of a prior state court support decree. It may be a personal remedy to the complainant, but the state courts enforce the punishment of the civil contemnor. Perhaps that is how the *Duval v. Duval* court came to deny counsel to certain civil contemnors: The issue of state action may not have been raised.

As stated, supra, the *Duval* court's reliance on *Gagnon v. Scarpelli*, supra, may have been misdirected. The issue of providing counsel in a probation or parole revocation hearing is not equivalent to providing counsel in a civil contempt trial. The probationer and parolee have already had trials to determine their

guilt. They both have had the right to counsel at their trials. Therefore, their revocation hearings are not used to determine guilt or innocence — that has already been determined at their trials.

On the other hand, a civil contemnor needs the guidance of counsel even if he will plead guilty to the charge of failing to comply with a support order.

“Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or in prison, and so that he is treated fairly by the prosecution.” *Argersinger v. Hamlin*, 407 U.S., at 34. The civil contemnor should not be forced to stand alone against the combined powers of the complainant, the judge and the prosecutor. Since some states, including Maryland and New Jersey, provide for their State’s attorney to prosecute the civil contempt case, the unlimited state prosecutorial resources can be thrown against the civil contemnor. See Maryland Rules of Procedure, Rule P4, § 1(d) and *Editor’s note* thereto. It therefore seems reasonable to allow the civil contemnor to at least have the assistance of counsel in the preparation of his defense. Without that minimal guarantee the state is taking unnecessary advantage of the civil contemnor.

The next section will focus on the right to counsel for civil contemnors in Maryland.

III. The Civil Contempt Proceeding Under the Maryland Rules of Procedure Brought to Enforce a Previously Adjudicated Support Order Violates the Alleged Contemnor’s Right to Counsel.

Under a former provision in Maryland law, the legislature purported to limit the power of the courts to inflict summary punishment for contempt. Md. Ann. Code Art. 26, § 34 (1973). This Section 4 was of questionable validity because of judicial decisions holding that the power to punish summarily for contempt was inherent in a court of record and was not subject to legislative limitation. See *Robinson v. State*, 19 Md. App. 20, 308 A. 2d 712 (1973). It was recognized that

it would have been unconstitutional for the legislature to remove from the courts their inherent contempt powers. *Baltimore Radio Show v. State*, 193 Md. 300, 57 A. 2d 697 (1948), *cert. denied*, 388 U.S. 912 (1950). The current contempt of court provision, Md. Ann. Code Courts and Judicial Proceeding Act § 1-202 (a), merely notes that “[a] court may exercise the power to punish for contempt...in the manner described in the Maryland Rules...” The old language was removed, and the development of the law of contempt is left to the courts. The statute has been brought into conformity with the actual state of the law. Adkins, *Code Revision in Maryland: The Courts and Judicial Proceedings Article*, 34 Md. L. Rev. 7, 13 (1974).

Coercive imprisonment is a powerful judicial tool. Its use in Maryland is governed only by court decisions, and its application is guided by the Maryland Rules of Procedure, Rule P. In relation to the present inquiry in civil contempts brought to enforce a prior support order, some other applicable rules are Maryland Rules of Procedure, Rules 636, 685 and 719. Within this general framework analysis can begin.

As stated, the judiciary has a powerful tool in which it may coercively enforce court orders. The courts should determine prior to trial just what the nature of contempts proceedings are. *Hare v. Hare*, 21 Md. App. 71, 318 A. 2d 234 (1974). Contempts are classified into two categories, which are: (1) direct or constructive, and (2) civil or criminal. Md. Rules of Procedure, Rule P, §§ 2, 3, 4. The contempts are not mutually exclusive, and overlapping may result. *Roll v. State*, 15 Md. App. 31, 288 A. 2d 605, 614 (1972). The line of distinction between civil and criminal contempt is often indistinct, and often the same acts or omissions may constitute both or, at least, embrace aspects of both. *Roll v. State*, *supra*, 288 A. 2d, at 621; *State v. Roll*, 267 Md. 714, 298 A. 2d 867, at 876. In spite of the verbiage that is used to designate contempt proceedings, they are neither wholly civil nor criminal. *Grohman v. State*, 258 Md. 552, 267 A. 2d 193, 195 (1970). But, it is generally agreed that if any part of a contempt sentence is punishment, then the contempt

must be classified as a criminal one. *Roll v. State*, *supra*, 288 A. 2d, at 621; *State v. Roll*, *supra*, 298 A. 2d, at 876. If the contempt is willful, then it should be classified as a criminal one. *State v. Roll*, *supra*, 298 A. 2d, at 877. (As to definition of “willful,” see *Ewell v. State*, 207 Md. 288, 299, 114 A. 2d 66, 72 (1955).) The idea apparent from the complex of rules demonstrated above is that one needs a counselor to help him figure them out.

A jail sentence for civil contempt will be suspended if one purges himself. But, the imprisonment may be avoided altogether if the civil contemnor shows that he has neither the money nor the ability to pay. *McDaniel v. McDaniel*, 256 Md. 684, 262 A. 2d 52, 55 (1970). This interpretation of Md. Rule 636 dealing with the enforcement of orders by contempt refines and limits the court’s power to charge one with contempt. But, the problem remains as to how effectively one charged with contempt can communicate his situation with the judge. As such, the simple solution lies in affording the contemnor the right to counsel.

The typical situation involved in the violation of a support decree is the case of husband or paramour who neglects to pay child support. One case interpreting Md. Rule P1 has said that the fact that a husband is in contempt will not prevent his litigating his substantial rights in connection with which the contempt was committed. *Rethorst v. Rethorst*, 214 Md. 1, 133 A. 2d 101 (1957). The procedure to be followed by courts is generally regulated by Md. Rule P4, § b dealing with the notice to defendant. One case interpreting this rule has stated that courts must observe the rights of defendants, and such rights include those within the amorphous bundle called “due process of law.” *Roll v. State*, *supra*, 288 A. 2d, at 617. When such notice to defendant is issued, the court shall allow a reasonable time for the preparation of one’s defense and the essential facts constituting the contempt charge. *Reamer v. Reamer*, 246 Md. 532, 229 A. 2d 74, 76 (1967).

In the preparation of his defense, the alleged contemnor should have the assistance of counsel. Otherwise, it would

seem that the alleged contemnor could hardly meet his burden of proof. In violation of support orders, it is generally recognized that in the proceedings instituted to coerce payment of the ordered sums the burden is upon the alleged contemnor to prove his inability to comply with the order. 53 A. L. R. 2d 591. Since inability to pay is a complete defense, it is very important for the alleged contemnor to plan his defense adequately. The best way to plan a defense, however, is with the able assistance of an attorney, who would best know how to present the case to the judge and how to arrange an equitable solution with the State's Attorney.

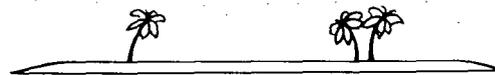
If the contemnor is indigent, then it does not seem possible for him to employ effective counsel. And, the fact that he may be indigent does not insure that he can convince the judge of his inability to pay. Coercive imprisonment is remedial, of course, only when the defendant is able to comply. *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948). And, as the Supreme Court said, "... to jail one for a contempt for omitting an act he is powerless to perform...would...make the proceeding purely punitive, to describe it charitably." 333 U.S., at 72. This is true because imprisoning a defendant incapable of performance cannot possibly cause him to take action to benefit the complainant.

The Maryland Rules of Procedure, Rule P4, § a, allows the institution of constructive contempts by "the court on its own motion, by the State's attorney or by any person having actual knowledge of the alleged contempt." After the proceeding is instituted, the defendant is issued a show cause order requiring him to show cause why he should not be held in contempt. Md. Rule P4, § b. It is clear that simply citing the defendant to show cause why he should not be held in contempt is not the equivalent of adjudicating him in contempt. *Gatuso v. Gatuso*, 16 Md. App. 632, 299 A. 2d 113, 115 (1973). The court may, also, appoint the State's Attorney or any other member of the Bar to prosecute the case. *State v. Roll, supra*, 298 A. 2d, at 878. So many of these procedures partake of the nature of a criminal proceeding that it

seems illusory to call the action a "civil" contempt. Courts should be more concerned with the constitutional rights of defendants than they are with mere forms or labels attached to proceedings.

The *Argersinger* ruling should be extended to the case of a civil contemnor

since such action has many of the attributes of a criminal action, except for the name civil. The only problem would seem to be statutory authority for the appointment of counsel in Maryland. The next issue of THE FORUM will pose such a solution.



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Parental Responsibility in Maryland for Torts of Minor Children

by Robert Lankin

At common law, the parent - child relationship alone is an insufficient basis

for holding the parent liable for the torts of his minor child. *Kerrigan v. Carroll*, 168 Md. 682, 179 A. 53 (1935). Under the common law, however, there are many examples where the parent becomes liable for the intentional torts of his minor children. Liability is often based on the parent's knowledge or imputed knowledge concerning the vicious propensities of the child to do acts which would injure persons or property. The mere knowledge however, of this disposition is not of itself sufficient to impose liability upon the parent. *Condel v. Savo*, 350 Pa. 350, 39 A.2d 51 (1944). The