CIVIL PROCEDURE

FALL 2012

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FIRST ASSIGNMENTS—AUGUST 22, 23, 27

In the first three classes we will focus on two important opinions of the United States Supreme Court. The purpose of these classes is: (1) to introduce you to the careful reading of judicial opinions by taking the opinions apart and (2) to introduce you to basic concepts and values of Due Process and our adversary system. These concepts and values shape all of the aspects of civil procedure that we will study this semester, and we will return to them frequently.

Classes 1 and 2--Readings

Lassiter v. Department of Social Services	Casebook 137-154
Note 1	Casebook 154
United States Constitution, Amendment XIV, section 1	
Note on Procedural Values	Casebook 77-80
Note on the Adversary System	Casebook 47-49

Class 1 Preparation Questions

You should read the entire Lassiter case and the first paragraph of the Fourteenth Amendment for Wednesday's class. You can wait until after Wednesday's class to read the Note on Procedural Values and the Note on the Adversary System, both of which will figure more heavily in Thursday's class.

For Wednesday, prepare yourself to answer the following questions about Lassiter. Note: these are questions that I will actually be posing in class!

1. What court rendered the Lassiter decision that we are studying?

2. When did it do so?

3. Who are the parties? Who was the plaintiff, originally, and who was the defendant?

4. In what court was the case originally brought?

5. What was the plaintiff's claim against the defendant? Who won in the trial court, and on what grounds?

6. What was the constitutional provision that Ms. Lassiter claimed that her state trial had violated? What specifically was the violation of which she complained?

7. How did Ms. Lassiter's case progress from the trial court to the Supreme Court? Why is her name first in the caption of the case in the Supreme Court?

8. How did the Supreme Court hold on the question of whether Ms. Lassiter's Due Process rights had been violated?

9. Was that holding unanimous? If not, how did the Court divide?

10. What were the Supreme Court's grounds for holding that Ms. Lassiter's Due Process rights had not been violated? (In thinking about this question, it may be helpful to you to outline the main points in Justice Stewart's opinion for the majority).

11. What are the elements of the Matthews v. Eldridge test that both the majority and dissent applied? What are the major points of disagreement between the majority and dissent with respect to the application of that test? Be prepared to answer the questions in Note 1, page 154. Please focus, in particular, on how giving Ms. Lassiter counsel might have reduced the risk of error in her case.

12. Do you think that the case was correctly decided:

--in holding that there is no Due Process right to appointed counsel that applies in all parental rights cases?

--in holding that Ms. Lassiter, in particular did not have such a right on the facts of her case?

Class 2

To the extent we have not finished the questions posed above concerning the Lassiter decision, we will do so.

In addition to rereading the Lassiter case you should now actually write down a brief statement of its holding. (try for 25-35 words). Hold on to it: after class I'll distribute some examples that you can compare your effort to.

And now you should read closely the Note on Procedural Values and the Note on the Adversary System, both assigned above. Here are some questions I will be asking based upon those two notes.

1. How would you defend, or attack, the result in Lassiter based not upon precedent, but rather upon the procedural values identified in the Note on Procedural Values?

2. In dissent, Justice Blackmun argues that the proceeding against Ms. Lassiter has an accusatory and punitive focus and that there is a gross disparity of resources between the state and Ms.

Lassiter? Why would these observations, if correct, strengthen the argument for appointing counsel?

3. Should the trial judge have helped Ms. Lassiter out by suggesting questions or objections, explaining what her defenses were and how to prove them, or otherwise ensuring that she was more effective as an advocate for herself? Does help from the judge involve special problems in an adversary system? Why?

4. To test your understanding of the scope of the Lassiter holding, read Note 2 following the case and be prepared to answer the question posed at the end of Note 2.

Class 3 Assignment and Preparation Questions

Turner v. Rogers (USSC 2011)	Opinion Attached Hereto
Note on Costs	Casebook 119-123
Note on Legal Services	Casebook 154-157

The Notes on Costs and Legal Services are background reading. Every law student should understand the effects of the high costs of legal services, and the limited provision of free legal services by state and federal governments.

The focus will be on Turner v. Rogers:

1. What court rendered the opinion we are studying and when?

2. In what court was the case originally brought? Who was the plaintiff and who was the defendant?

3. What was plaintiff's substantive claim against the defendant? Did she prevail?

4. The issue in the case arises from plaintiff's attempt to have the defendant held in contempt of court. What was the basis for the plaintiff's argument that defendant should be held in contempt? What did the trial court do in response to the plaintiff's request and why?

5. What was the basis for Mr. Turner's claim that what the trial court had done to him violated his rights under the Due Process Clause?

6. How did Mr. Turner's case progress from the trial court to the Supreme Court? Why is Mr. Turner's name first in the caption of the case?

7. What did the Supreme Court hold with respect to Mr. Turner's Due Process Claim? Was that holding unanimous? If not, how did the Court divide?

8. How do you think that Mr. Turner used *Lassiter* to argue that the Due Process Clause required the appointment of counsel in his case? Why did the Supreme Court conclude that the appointment of counsel was not required? Why did the dissenting Justices also reject that claim?

9. What was the basis for the Court's holding that the Due Process Clause had been violated even though Mr. Turner was not entitled to appointed counsel?

10. Do you think that the case is correctly decided?

11. True or false. Be prepared to offer evidence from the cases we have read to support your conclusion:

a. The case law we have read definitively establishes that there is no federal Due Process right to appointed counsel in any type of civil case.

b. There is a division in the Supreme Court between Justices who believe that there may sometimes be a constitutional right to appointed counsel in civil cases and those who believe that such a right exists only in criminal cases.

c. In general, the law of Due Process assumes that the risk of error is lower when issues are simple and higher when they are complex.

d. In general, the more important the interests at stake, the less likely that Due Process will require expensive procedures to reduce the risk of error.

e. In general, where two processes have exactly the same effect on the risk of error, the Due Process clause will not require the adoption of the more expensive one.

Turner v. Rogers

131 S.Ct. 2507 (June 20, 2011)

Justice BREYER delivered the opinion of the Court.

South Carolina's Family Court enforces its child support orders by threatening with incarceration for civil contempt those who are (1) subject to a child support order, (2) able to comply with that order, but (3) fail to do so. We must decide whether the Fourteenth Amendment's Due Process Clause requires the State to provide counsel (at a civil contempt hearing) to an *indigent* person potentially faced with such incarceration. We conclude that where as here the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide the support). But we attach an important caveat, namely, that the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order.

I

A

South Carolina family courts enforce their child support orders in part through civil contempt proceedings. Each month the family court clerk reviews outstanding child support orders, identifies those in which the supporting parent has fallen more than five days behind, and sends that parent an order to "show cause" why he should not be held in contempt. S.C. Rule Family Ct. 24 (2011). The "show cause" order and attached affidavit refer to the relevant child support order, identify the amount of the arrearage, and set a date for a court hearing. At the hearing that parent may demonstrate that he is not in contempt, say, by showing that he is not able to make the required payments. See *Moseley v. Mosier*, 279 S.C. 348, 351, 306 S.E.2d 624, 626 (1983) ("When the parent is *unable* to make the required payments, he is not in contempt"). If he fails to make the required showing, the court may hold him in civil contempt. And it may require that he be imprisoned unless and until he purges himself of contempt by making the required child support payments (but not for more than one year regardless).

B

In June 2003 a South Carolina family court entered an order, which (as amended) required petitioner, Michael Turner, to pay $51.73 per week to respondent, Rebecca Rogers, to help support their child. (Rogers' father, Larry Price, currently has custody of the child and is also a respondent before this Court.) Over the next three years, Turner repeatedly failed to pay the amount due and was held in contempt on five occasions. The first four times he was sentenced to 90 days' imprisonment, but he ultimately paid the amount due (twice without being jailed, twice after spending two or three days in custody). The fifth time he did not pay but completed a 6–month sentence.

After his release in 2006 Turner remained in arrears. On March 27, 2006, the clerk issued a new "show cause" order. And after an initial postponement due to Turner's failure to appear, Turner's civil contempt hearing took place on January 3, 2008. Turner and Rogers were present, each without representation by counsel.

The hearing was brief. The court clerk said that Turner was $5,728.76 behind in his payments. The judge asked Turner if there was "anything you want to say." Turner replied,

> "Well, when I first got out, I got back on dope. I done meth, smoked pot and everything else, and I paid a little bit here and there. And, when I finally did get to working, I broke my back, back in September. I filed for disability and SSI. And, I didn't get straightened out off the dope until I broke my back and laid up for two months. And, now I'm off the dope and everything. I just hope that you give me a chance. I don't know what else to say. I mean, I know I done wrong, and I should have been paying and helping her, and I'm sorry. I mean, dope had a hold to me." App. to Pet. for Cert. 17a.

The judge then said, "[o]kay," and asked Rogers if she had anything to say. *Ibid.* After a brief discussion of federal

benefits, the judge stated,

> "If there's nothing else, this will be the Order of the Court. I find the Defendant in willful contempt. I'm [going to] sentence him to twelve months in the Oconee County Detention Center. He may purge himself of the contempt and avoid the sentence by having a zero balance on or before his release. I've also placed a lien on any SSI or other benefits." *Id.*, at 18a.

The judge added that Turner would not receive good-time or work credits, but "[i]f you've got a job, I'll make you eligible for work release." *Ibid.* When Turner asked why he could not receive good-time or work credits, the judge said, "[b]ecause that's my ruling." *Ibid.*

The court made no express finding concerning Turner's ability to pay his arrearage (though Turner's wife had voluntarily submitted a copy of Turner's application for disability benefits, cf. *post*, at 2524, n. 3 (THOMAS, J., dissenting); App. 135a–136a). Nor did the judge ask any followup questions or otherwise address the ability-to-pay issue. After the hearing, the judge filled out a prewritten form titled "Order for Contempt of Court," which included the statement:

> "Defendant (was) (was not) gainfully employed and/or (had) (did not have) the ability to make these support payments when due." *Id.*, at 60a, 61a.

But the judge left this statement as is without indicating whether Turner was able to make support payments.

C

While serving his 12–month sentence, Turner, with the help of *pro bono* counsel, appealed. He claimed that the Federal Constitution entitled him to counsel at his contempt hearing. The South Carolina Supreme Court decided Turner's appeal after he had completed his sentence. And it rejected his "right to counsel" claim. The court pointed out that civil contempt differs significantly from criminal contempt. The former does not require all the "constitutional safeguards" applicable in criminal proceedings. And the right to government-paid counsel, the Supreme Court held, was one of the "safeguards" not required.

Turner sought certiorari. In light of differences among state courts (and some federal courts) on the applicability of a "right to counsel" in civil contempt proceedings enforcing child support orders, we granted the writ. * * *

* * * *

III

A

We must decide whether the Due Process Clause grants an indigent defendant, such as Turner, a right to state-appointed counsel at a civil contempt proceeding, which may lead to his incarceration. This Court's precedents provide no definitive answer to that question. This Court has long held that the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a *criminal* case. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). And we have held that this same rule applies to *criminal contempt* proceedings (other than summary proceedings).

But the Sixth Amendment does not govern civil cases. Civil contempt differs from criminal contempt in that it seeks only to "coerc[e] the defendant to do" what a court had previously ordered him to do. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442, 31 S.Ct. 492, 55 L.Ed. 797 (1911). A court may not impose punishment "in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Hicks v. Feiock*, 485 U.S. 624, 638, n. 9, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988). And once a civil contemnor complies with the underlying order, he is purged of the contempt and is free. *Id.*, at 633, 108 S.Ct. 1423 (he "carr[ies] the keys of [his] prison in [his] own pockets" (internal quotation marks omitted)).

Consequently, the Court has made clear (in a case not involving the right to counsel) that, where civil contempt is at issue, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case. *Id.*, at 637–641, 108 S.Ct. 1423 (State may place the burden of proving inability to pay on the defendant).

This Court has decided only a handful of cases that more directly concern a right to counsel in civil matters. And the application of those decisions to the present case is not clear. On the one hand, the Court has held that the Fourteenth Amendment requires the State to pay for representation by counsel in a *civil* "juvenile delinquency" proceeding (which could lead to incarceration). *In re Gault*, 387 U.S. 1, 35–42, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Moreover, in *Vitek v. Jones*, 445 U.S. 480, 496–497, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), a plurality of four Members of this Court would have held that the Fourteenth Amendment requires representation by counsel in a proceeding to transfer a prison inmate to a state hospital for the mentally ill. Further, in *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), a case that focused upon civil proceedings leading to loss of parental rights, the Court wrote that the

> "pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Id.*, at 25, 101 S.Ct. 2153.

And the Court then drew from these precedents "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Id.*, at 26–27, 101 S.Ct. 2153.

On the other hand, the Court has held that a criminal offender facing revocation of probation and imprisonment does *not* ordinarily have a right to counsel at a probation revocation hearing. *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); see also *Middendorf v. Henry*, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976) (no due process right to counsel in summary court-martial proceedings). And, at the same time, *Gault*, *Vitek*, and *Lassiter* are readily distinguishable. The civil juvenile delinquency proceeding at issue in *Gault* was "little different" from, and "comparable in seriousness" to, a criminal prosecution. 387 U.S., at 28, 36, 87 S.Ct. 1428. In *Vitek*, the controlling opinion found *no* right to counsel. 445 U.S., at 499–500, 100 S.Ct. 1254 (Powell, J., concurring in part) (assistance of mental health professionals sufficient). And the Court's statements in *Lassiter* constitute part of its rationale for *denying* a right to counsel in that case. We believe those statements are best read as pointing out that the Court previously had found a right to counsel "*only* " in cases involving incarceration, not that a right to counsel exists in *all* such cases (a position that would have been difficult to reconcile with *Gagnon*).

B

Civil contempt proceedings in child support cases constitute one part of a highly complex system designed to assure a noncustodial parent's regular payment of funds typically necessary for the support of his children. Often the family receives welfare support from a state-administered federal program, and the State then seeks reimbursement from the noncustodial parent. Other times the custodial parent (often the mother, but sometimes the father, a grandparent, or another person with custody) does not receive government benefits and is entitled to receive the support payments herself.

The Federal Government has created an elaborate procedural mechanism designed to help both the government and custodial parents to secure the payments to which they are entitled. These systems often rely upon wage withholding, expedited procedures for modifying and enforcing child support orders, and automated data processing. But sometimes States will use contempt orders to ensure that the custodial parent receives support payments or the government receives reimbursement. Although some experts have criticized this last-mentioned procedure, and the Federal Government believes that "the routine use of contempt for non-payment of child support is likely to be an ineffective strategy," the Government also tells us that "coercive enforcement remedies, such as contempt, have a role to play." Brief for United States as *Amicus Curiae* 21–22, and n. 8 (citing Dept. of Health and Human Services, National Child Support Enforcement, Strategic Plan: FY 2005–2009, pp. 2, 10). South Carolina, which relies heavily on contempt proceedings, agrees that they are an important tool.

We here consider an indigent's right to paid counsel at such a contempt proceeding. It is a civil proceeding. And we consequently determine the "specific dictates of due process" by examining the "distinct factors" that this Court has

previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (considering fairness of an administrative proceeding). As relevant here those factors include (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement [s]." *Ibid.* See also *Lassiter*, 452 U.S., at 27–31, 101 S.Ct. 2153 (applying the *Mathews* framework).

The "private interest that will be affected" argues strongly for the right to counsel that Turner advocates. That interest consists of an indigent defendant's loss of personal liberty through imprisonment. The interest in securing that freedom, the freedom "from bodily restraint," lies "at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). And we have made clear that its threatened loss through legal proceedings demands "due process protection." *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

Given the importance of the interest at stake, it is obviously important to assure accurate decisionmaking in respect to the key "ability to pay" question. Moreover, the fact that ability to comply marks a dividing line between civil and criminal contempt, *Hicks*, 485 U.S., at 635, n. 7, 108 S.Ct. 1423, reinforces the need for accuracy. That is because an incorrect decision (wrongly classifying the contempt proceeding as civil) can increase the risk of wrongful incarceration by depriving the defendant of the procedural protections (including counsel) that the Constitution would demand in a criminal proceeding. And since 70% of child support arrears nationwide are owed by parents with either no reported income or income of $10,000 per year or less, the issue of ability to pay may arise fairly often. See E. Sorensen, L. Sousa, & S. Schaner, Assessing Child Support Arrears in Nine Large States and the Nation 22 (2007) (prepared by The Urban Institute), online at http://aspe. hhs.gov/hsp/07/assessing-CS-debt/report.pdf (as visited June 16, 2011, and available in Clerk of Court's case file); *id.*, at 23 ("research suggests that many obligors who do not have reported quarterly wages have relatively limited resources"); Patterson, Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison, 18 Cornell J. L. & Pub. Pol'y 95, 117 (2008). See also, *e.g.*, *McBride v. McBride*, 334 N.C. 124, 131, n. 4, 431 S.E.2d 14, 19, n. 4 (1993) (surveying North Carolina contempt orders and finding that the "failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent").

On the other hand, the Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened. See *Gagnon*, 411 U.S. 778, 93 S.Ct. 1756. And in determining whether the Clause requires a right to counsel here, we must take account of opposing interests, as well as consider the probable value of "additional or substitute procedural safeguards." *Mathews, supra*, at 335, 96 S.Ct. 893.

Doing so, we find three related considerations that, when taken together, argue strongly against the Due Process Clause requiring the State to provide indigents with counsel in every proceeding of the kind before us.

First, the critical question likely at issue in these cases concerns, as we have said, the defendant's ability to pay. That question is often closely related to the question of the defendant's indigence. But when the right procedures are in place, indigence can be a question that in many—but not all—cases is sufficiently straightforward to warrant determination *prior* to providing a defendant with counsel, even in a criminal case. Federal law, for example, requires a criminal defendant to provide information showing that he is indigent, and therefore entitled to state-funded counsel, *before* he can receive that assistance. See 18 U.S.C. § 3006A(b).

Second, sometimes, as here, the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *un*represented by counsel. See Dept. of Health and Human Services, Office of Child Support Enforcement, Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State 5, 6 (2004) (51% of nationwide arrears, and 58% in South Carolina, are not owed to the government). The custodial parent, perhaps a woman with custody of one or more children, may be relatively poor, unemployed, and unable to afford counsel. Yet she may have encouraged the court to enforce its order through contempt. Cf. Tr. Contempt Proceedings (Sept. 14, 2005), App. 44a–45a (Rogers asks court, in light of pattern of nonpayment, to confine Turner). She may be able to provide the court with significant information. Cf. *id.*, at 41a–43a (Rogers describes where Turner lived and worked). And the proceeding is ultimately for her benefit.

A requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would "alter significantly the nature of the proceeding." *Gagnon, supra,* at 787, 93 S.Ct. 1756. Doing so could mean a degree of formality or delay that would unduly slow payment to those immediately in need. And, perhaps more important for present purposes, doing so could make the proceedings *less* fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive. The needs of such families play an important role in our analysis. Cf. *post,* at 2525 – 2527 (opinion of THOMAS, J.).

Third, as the Solicitor General points out, there is available a set of "substitute procedural safeguards," *Mathews,* 424 U.S., at 335, 96 S.Ct. 893, which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. They can do so, moreover, without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.,* those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. See Tr. of Oral Arg. 26–27; Brief for United States as *Amicus Curiae* 23–25. In presenting these alternatives, the Government draws upon considerable experience in helping to manage statutorily mandated federal-state efforts to enforce child support orders. See *supra,* at 2517. It does not claim that they are the only possible alternatives, and this Court's cases suggest, for example, that sometimes assistance other than purely legal assistance (here, say, that of a neutral social worker) can prove constitutionally sufficient. Cf. *Vitek,* 445 U.S., at 499–500, 100 S.Ct. 1254 (Powell, J., concurring in part) (provision of mental health professional). But the ****2520*** Government does claim that these alternatives can assure the "fundamental fairness" of the proceeding even where the State does not pay for counsel for an indigent defendant.

While recognizing the strength of Turner's arguments, we ultimately believe that the three considerations we have just discussed must carry the day. In our view, a categorical right to counsel in proceedings of the kind before us would carry with it disadvantages (in the form of unfairness and delay) that, in terms of ultimate fairness, would deprive it of significant superiority over the alternatives that we have mentioned. We consequently hold that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings).

We do not address civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody. See *supra,* at 2517. Those proceedings more closely resemble debt-collection proceedings. The government is likely to have counsel or some other competent representative. Cf. *Johnson v. Zerbst,* 304 U.S. 458, 462–463, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) ("[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel"* (emphasis added)). And this kind of proceeding is not before us. Neither do we address what due process requires in an unusually complex case where a defendant "can fairly be represented only by a trained advocate." *Gagnon,* 411 U.S., at 788, 93 S.Ct. 1756; see also Reply Brief for Petitioner 18–20 (not claiming that Turner's case is especially complex).

IV

The record indicates that Turner received neither counsel nor the benefit of alternative procedures like those we have described. He did not receive clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial circumstances. The court did not find that Turner was able to pay his arrearage, but instead left the relevant "finding" section of the contempt order blank. The court nonetheless found Turner in contempt and ordered him

incarcerated. Under these circumstances Turner's incarceration violated the Due Process Clause.

We vacate the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice THOMAS, with whom Justice SCALIA joins, and with whom THE CHIEF JUSTICE and Justice ALITO join as to Parts I–B and II, dissenting.

The only question raised in this case is whether the Due Process Clause of the Fourteenth Amendment creates a right to appointed counsel for all indigent defendants facing incarceration in civil contempt proceedings. It does not.

A

Under an original understanding of the Constitution, there is no basis for concluding that the guarantee of due process secures a right to appointed counsel in civil contempt proceedings. * * * *

B

Even under the Court's modern interpretation of the Constitution, the Due Process Clause does not provide a right to appointed counsel for all indigent defendants facing incarceration in civil contempt proceedings. Such a reading would render the Sixth Amendment right to counsel—as it is currently understood—superfluous. Moreover, it appears that even cases applying the Court's modern interpretation of due process have not understood it to categorically require appointed counsel in circumstances outside those otherwise covered by the Sixth Amendment.

1

Under the Court's current jurisprudence, the Sixth Amendment entitles indigent defendants to appointed counsel in felony cases and other criminal cases resulting in a sentence of imprisonment. Turner concedes that, even under these cases, the Sixth Amendment does not entitle him to appointed counsel. See Reply Brief for Petitioner 12 (acknowledging that "civil contempt is not a 'criminal prosecution' within the meaning of the Sixth Amendment"). He argues instead that "the right to the assistance of counsel for persons facing incarceration arises not only from the Sixth Amendment, but also from the requirement of fundamental fairness under the Due Process Clause of the Fourteenth Amendment." Brief for Petitioner 28. In his view, this Court has relied on due process to "rejec[t] formalistic distinctions between criminal and civil proceedings, instead concluding that incarceration or other confinement triggers the right to counsel." *Id.*, at 33.

But if the Due Process Clause created a right to appointed counsel in all proceedings with the potential for detention, then the Sixth Amendment right to appointed counsel would be unnecessary. Under Turner's theory, every instance in which the Sixth Amendment guarantees a right to appointed counsel is covered also by the Due Process Clause. The Sixth Amendment, however, is the only constitutional provision that even mentions the assistance of counsel; the Due Process Clause says nothing about counsel. Ordinarily, we do not read a general provision to render a specific one superfluous.

Moreover, contrary to Turner's assertions, the holdings in this Court's due process decisions regarding the right to counsel are actually quite narrow. The Court has never found in the Due Process Clause a categorical right to appointed counsel outside of criminal prosecutions or proceedings "functionally akin to a criminal trial." This is consistent with the conclusion that the Due Process Clause does not expand the right to counsel beyond the boundaries set by the Sixth Amendment.

* * * *

II

The majority agrees that the Constitution does not entitle Turner to appointed counsel. But at the invitation of the Federal Government as *amicus curiae*, the majority holds that his contempt hearing violated the Due Process Clause for an entirely different reason, which the parties have never raised: The family court's procedures "were in adequate to ensure an accurate determination of [Turner's] present ability to pay." Brief for United States as *Amicus Curiae* 19 (capitalization and boldface type deleted); see *ante*, at 2519 – 2520. I would not reach this issue.

* * * *

III

For the reasons explained in the previous two sections, I would not engage in the majority's balancing analysis. But there is yet another reason not to undertake the *Mathews v. Eldridge* balancing test here. 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). That test weighs an individual's interest against that of the Government. *Id.*, at 335, 96 S.Ct. 893 (identifying the opposing interest as "the Government's interest"); *Lassiter*, 452 U.S., at 27, 101 S.Ct. 2153 (same). It does not account for the interests of the child and custodial parent, who is usually the child's mother. But their interests are the very reason for the child support obligation and the civil contempt proceedings that enforce it.

When fathers fail in their duty to pay child support, children suffer. Nonpayment or inadequate payment can press children and mothers into poverty.

The interests of children and mothers who depend on child support are notoriously difficult to protect. Less than half of all custodial parents receive the full amount of child support ordered; 24 percent of those owed support receive nothing at all. In South Carolina alone, more than 139,000 noncustodial parents defaulted on their child support obligations during 2008, and at year end parents owed $1.17 billion in total arrears.

That some fathers subject to a child support agreement report little or no income "does not mean they do not have the ability to pay any child support." Rather, many "deadbeat dads" "opt to work in the underground economy" to "shield their earnings from child support enforcement efforts." To avoid attempts to garnish their wages or otherwise enforce the support obligation, "deadbeats" quit their jobs, jump from job to job, become self-employed, work under the table, or engage in illegal activity.

Because of the difficulties in collecting payment through traditional enforcement mechanisms, many States also use civil contempt proceedings to coerce "deadbeats" into paying what they owe. The States that use civil contempt with the threat of detention find it a "highly effective" tool for collecting child support when nothing else works. For example, Virginia, which uses civil contempt as "a last resort," reports that in 2010 "deadbeats" paid approximately $13 million "either before a court hearing to avoid a contempt

finding or after a court hearing to purge the contempt finding." Other States confirm that the mere threat of imprisonment is often quite effective because most contemners "will pay ... rather than go to jail."

This case illustrates the point. After the family court imposed Turner's weekly support obligation in June 2003, he made no payments until the court held him in contempt three months later, whereupon he paid over $1,000 to avoid confinement. Three more times, Turner refused to pay until the family court held him in contempt—then paid in short order.

Although I think that the majority's analytical framework does not account for the interests that children and mothers have in effective and flexible methods to secure payment, I do not pass on the wisdom of the majority's preferred procedures. Nor do I address the wisdom of the State's decision to use certain methods of enforcement. Whether "deadbeat dads" should be threatened with incarceration is a policy judgment for state and federal lawmakers, as is the entire question of government involvement in the area of child support. This and other repercussions of the shift away from the nuclear family are ultimately the business of the policymaking branches.

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I would affirm the judgment of the South Carolina Supreme Court because the Due Process Clause does not provide a right to appointed counsel in civil contempt hearings that may lead to incarceration. As that is the only issue properly before the Court, I respectfully dissent.