DÉJÀ VU ALL OVER AGAIN: *TURNER V. ROGERS* AND THE CIVIL RIGHT TO COUNSEL

*Honorable David J. Dreyer**

ABSTRACT

Unmet needs of low-income Americans have been unaddressed for more than 100 years. Neither governments nor random pro bono effort, are adequate to provide meaningful access to advice and representation for millions of citizens otherwise left out. Since Powell v. Alabama*, due process has been the standard for the criminal right to counsel, and a movement toward civil cases has since commenced. After* Gideon v. Wainwright*, decades of litigation, and significant social and legal developments, the right to counsel in civil cases has gained limited acceptance in certain circumstances. When the Supreme Court accepted* Turner v. Rogers*, many observers and advocates logically thought a larger civil right to counsel might emerge.* Turner*'s facts (involving a litigant facing jail for civil contempt), with applicable due process precedents, seemed to portend a broader standard for appointed civil counsel. But the Supreme Court reasoned out of such a holding based on a speculative due-process perspective of "alternative procedures," not appointment of counsel.*

Like so many times before, Turner *shows the Court's resistance to a civil right to counsel due to policy preferences, despite its fundamental fairness. This contrasts with many Western jurisdictions, and it seems primarily based on unspoken economic considerations. Although some claim* Turner *is some kind of progress, it feels like déjà vu. So, the unmet need has left trial courts and state court administrators to develop resources for pro se litigants, although no one knows if such structures substantively improve access. Overall, the denial of due process due to practical realities leaves us with an unjust system and an impaired society. Any improvement may have to be derived from social change outside the courtroom.*

* Judge, Marion Superior Court in Indianapolis, Indiana; J.D., Notre Dame Law School, 1980; Master of Judicial Studies, University of Nevada, Reno, 2006; Associate Faculty, School of Public and Environmental Affairs, Indiana University-Purdue University Indianapolis; 2004 Randall T. Shepard Award for Pro Bono; 2002 Pro Bono Publico Award, Indiana State Bar Association.

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I. INTRODUCTION

No one really knows how to solve the problem of legal access for most needy Americans. Moreover, no one seems to agree on how to describe the wandering course the issue has taken for fifty years[1]—except perhaps baseball player Yogi Berra or actor Bill Murray. Yogi Berra is famous for his enigmatic and oftentimes humorous remarks. When he described back-to back home runs as "déjà vu all over again," it seemed redundant, but oddly accurate.[2] When Bill Murray starred as a self-absorbed TV newsman in the film *Groundhog Day*, his character was trapped into experiencing the same day over and over until the weird phenomenon somehow improved his life.[3] Then, the next day arrived.[4]

So it goes for observers and advocates of a civil right to counsel in these United States and this Supreme Court. On one hand, any new case or

1. *See* Gideon v. Wainwright, 372 U.S. 335, 372 (1963) (holding that the right to counsel is fundamental in all criminal cases).

2. YOGI BERRA, THE YOGI BOOK: "I REALLY DIDN'T SAY EVERYTHING I SAID!" 30 (1998) (quoting Yogi Berra) (internal quotation marks omitted).

3. GROUNDHOG DAY (Columbia Pictures 1993).

4. *Id.*

purported progress extends the status quo.[5] On the other hand, the seemingly endless repetition somehow lets good judges and lawyers accommodate access to the courts for needy people.[6] The more things change, the more they stay the same. Today, *Turner v. Rogers*, the first right to counsel case in thirty years,[7] dominates discussion about any new day for needy litigants. Again, the civil right to counsel was refused,[8] and again, the definition of due process remains enigmatic. Does it mean anything can be different?

Part II traces a general background of unmet indigent legal need, unfulfilled duties of lawyers, courts, and governments, and relevant historical court decisions. This Part suggests the progress of individual rights and the legal profession have left no lasting effect for a civil right to counsel despite idealistic judicial and professional assertions. Part III explores *Lassiter v. Department of Social Services*[9] and *Turner*. The Supreme Court's equivocal treatment of appointed civil counsel is found to be based less on legal logic than on enigmatic practical considerations. Part IV discusses some specific barriers to a civil right to counsel, including obvious, but largely unspoken financial consequences, courts' unnecessarily inflexible denial of appointed counsel in all but some narrowly prescribed civil case types, and a growing view of lawyers as dispensable. Part V asks how poor people will get help in civil court if due process does not demand it. This Part mainly reviews prominent pro se issues and the so-called "triage" idea, as related to today's access to justice. Finally, Part VI concludes that a civil right to counsel may make progress with factors beyond litigation and legal precedent, since *Turner* is not a new day.

II. "YOU'VE GOT TO BE CAREFUL IF YOU DON'T KNOW WHERE YOU'RE GOING 'CAUSE YOU MIGHT NOT GET THERE!"[10]

"[W]e are supposed to have the best legal system of any place in the world," or so said Hunter L. Roussel Jr., a Mississippi litigant, in 1996.[11]

5. *See, e.g.*, *In re* C.M., 48 A.3d 942, 949 (N.H. 2012) ("[D]ue process does not require that indigent parents have a *per se* right to appointed counsel in abuse or neglect proceedings . . . .").

6. *See, e.g.*, *id.* at 950 (leaving room for individualized determination in future cases).

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

8. *Id.* at 2520.

9. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

10. BERRA, *supra* note 2, at 102 (internal quotation marks omitted).

11. Roussel v. Robbins, 688 So. 2d 714, 719 (Miss. 1996).

Yet, this ubiquitous belief is hardly confirmed by persistent facts regarding our access to legal advice and representation.[12] First of all, most people cannot afford a lawyer when they need one.[13] Many private estimates show the average hourly fee for consumer cases is $304 an hour.[14] Some states show a general average hourly fee of around $200 an hour.[15] The anecdotal estimates for divorce fees are as much as $15,000 for a contested divorce.[16] A per capita income of little more than $41,000 a year allows little or no money for an attorney to advise or represent a typical American family.[17] Some legal studies claim to calibrate whether a lawyer is always needed for meaningful access,[18] but most observers find that "[w]e have constructed, honed and maintained an immensely complicated, arcane, formal, imposing and mystifying structure for the government-enforced resolution of civil disputes."[19]

A. *Millions of Poor People Do Not Get Access*

Citizens in poverty have had even less access or opportunity. Unmet indigent legal needs have been extrapolated or documented since the beginning of modern legal practice during the early twentieth century.[20]

12. The Article is exclusively concerned with *civil* legal assistance.

13. Debra Cassens Weiss, *Middle-Class Dilemma: Can't Afford Lawyers, Can't Qualify for Legal Aid*, A.B.A. J. (July 22, 2010), http://www.abajournal.com/news/article/middle-class_dilemma_cant_afford_lawyers_cant_qualify_for_legal_aid.

14. RONALD L. BURDGE, UNITED STATES CONSUMER LAW ATTORNEY FEE SURVEY REPORT 2010–2011, at 11 (2011), *available at* http://www.nclc.org/images/pdf/litigation/fee-survey-report-2010-2011.pdf.

15. *The Cost of Doing Business*, WIS. L.J. (Nov. 3, 2008), http://wislawjournal.com/2008/11/03/the-cost-of-doing-business/.

16. *See, e.g.*, Craig G. Kallen III, *My Divorce is Going to Cost How Much?!*, WOMANS DIVORCE (2013), http://www.womansdivorce.com/cost-of-a-divorce.html.

17. *See* Cassens Weiss, *supra* note 13 (explaining the inability of average Americans to afford legal assistance); *Washington and U.S. Per Capita Personal Income*, OFF. OF FIN. MGMT. (May 25, 2012), http://www.ofm.wa.gov/trends/economy/fig101.asp (noting the 2011 United States per capita income was $41,663).

18. *See, e.g.*, D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2149–53 (2012) (providing statistical analysis on the probability of success on appeal with or without legal assistance).

19. Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE W. RES. L. REV. 325, 327 (2010).

20. *See* EMERY A. BROWNELL, LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS' SERVICES FOR PERSONS UNABLE TO PAY FEES 77 (1951) (noting that thirty million needy persons require legal services); BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL

The need has not changed since, and the profession has never met the challenge. By the end of the century, most studies consistently found around 80% of low-income legal needs went unaddressed.[21] And, current studies show no progress. For example, the Legal Service Corporation's (LSC) most recent benchmark study still shows *less* than 20% of low-income legal needs are met.[22] Similarly, an American Bar Association (ABA) task force cites at least seven state studies finding "only a very small percentage of the legal problems experienced by low-income people (typically one in five or less) [are] addressed with the assistance of a private or legal aid lawyer."[23] The plethora of research showing unmet indigent legal needs is sobering for observers and daunting for advocates. The consistency of studies since 1919 shows a conclusion that feels painfully safe to draw: "there is an alarmingly high amount of unprovided access to the legal system for poor Americans."[24] President Carter once said, "[90%]

SURVEY 230–31 (1977) (discussing a survey in which 68% of respondents said "[m]ost lawyers charge more for their services than they are worth"); REGINALD HEBER SMITH, JUSTICE AND THE POOR 33 (1919) (noting that thirty-five million needy persons are without legal services).

21. *See, e.g.*, ROY W. REESE & CAROLYN A. ELDRED, LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994), *reprinted in* FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 7, 27 tbl.4-7 (1994) (finding, for example, that only 14% of low-income households received lawyer assistance with their housing and real property issues); THE SPANGENBERG GRP. ET AL., AN ASSESSMENT OF THE UNMET CIVIL LEGAL NEEDS OF OHIO'S POOR 3 (1991), *available at* http://www.olaf.org/public/files/other-publications/spangenburg-report.pdf (finding 83% of low-income legal needs are without access to legal assistance); UNITED WAY/CMTY. SERV. COUNCIL OF CENT. IND., LEGAL NEEDS STUDY OF THE POOR IN INDIANA 73 (1992) (finding poor Indiana residents could not get access for more than 90% of their identifiable legal needs).

22. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 16 (2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

23. HOWARD H. DANA, JR., AM. BAR ASS'N TASK FORCE ON ACCESS TO CIVIL JUSTICE, REPORT TO THE HOUSE OF DELEGATES 5 n.6 (2006), *available at* http://www.legalaidnc.org/public/participate/legal_services_community/ABA_Resolution_onehundredtwelvea[1].pdf.

24. David J. Dreyer, *Culture, Structure, and Pro Bono Practice*, 33 J. LEGAL PROF. 185, 198 (2009) (footnote omitted); *accord* ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2007, at 1 (2007), *available at* http://www.clasp.org/admin/site/publications/files/0373.pdf; DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004); Gene R. Nichol, *The Charge of Equal Justice*, JUDGES J., Summer 2008, at 38.

of our lawyers serve [10%] of our people. We are overlawyered and underrepresented."[25]

The legal profession is, of course, expected to adequately address problems of legal access through its standard rules of professional responsibility.[26] But the so-called "pro bono" ideal simply does not work. If almost 100 years of unmet need is not convincing enough, the research is undisputed.[27] There are numerous barriers to lawyers' pro bono practice and the legal profession's commitment to full access. First of all, there is a disturbing historical dichotomy between the "morally neutral" lawyer role

25. President James E. Carter, Remarks at the 100th Anniversary Luncheon of the Los Angeles County Bar Association (May 4, 1978), *in* 64 A.B.A. J. 840, 842 (1978).

26. *See* MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002). Rule 6.1 states:

> Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:
>
> (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
>
> (1) persons of limited means; or
>
> (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
>
> (b) provide any additional services through:
>
> (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
>
> (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
>
> (3) participation in activities for improving the law, the legal system or the legal profession. In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Id.

27. *See, e.g.*, *supra* notes 20–24.

for private clients and the "public-spiritedness" lawyer role required for pro bono work.[28] Consequently, pro bono cases have evolved as a form of charity.[29] The profession's public service ideal became neatly compartmentalized into legal aid offices, and any other private pro bono practice became a "sense of *noblesse oblige*" rather than a duty.[30] Despite attempts at mandatory reporting or the like, "the principle of pro bono practice remains a charitable exercise, and access for needy clients is clearly optional."[31] Secondly, the emerging economic and structural models for law firms limit private pro bono commitment.[32] As markets for private legal services are changing,[33] so too are firms' perspectives on pro bono work.[34] The time-honored pro bono ideal may be increasingly seen as a luxury among competitive interests.[35]

Furthermore, governments cannot and will not take on the financial and political burdens that indigent legal assistance has historically created.[36] The federally funded LSC has been under attack since its inception in 1974.[37] State budgets have hardly ever committed serious

28. *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 8–9 (2004).

29. *Id.* at 6.

30. *See* Susan D. Carle, *Re-Envisioning Models for Pro Bono Lawyering: Some Historical Reflections*, 9 AM. U. J. GENDER SOC. POL'Y & L. 81, 81 (2001).

31. Dreyer, *supra* note 24, at 196.

32. *See* Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83, 110 (2013).

33. *See* Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649, 1651–52 (2011) (noting the change in legal education as markets demand fewer or different lawyers); Jennifer Smith, *Rivalry Grows Among No-Frill Legal Services*, WALL ST. J. (Dec. 3, 2012), http://online.wsj.com/article/SB10001424127887323717004578155413493106962.html (reporting a high demand for cheap automated legal services that are available online).

34. *See* Steven A. Boutcher, *Rethinking Culture: Organized Pro Bono and the External Sources of Law Firm Culture*, 8 U. ST. THOMAS L.J. 108, 125 (2011).

35. *See* Leonore F. Carpenter, *"We're Not Running a Charity Here": Rethinking Public Interest Lawyers' Relationships with Bottom-Line-Driven Pro Bono Programs*, 29 BUFF. PUB. INT. L.J. 37, 63–64 (2010–2011).

36. *See* Dreyer, *supra* note 24, at 209.

37. John Kilwein, *The Decline of the Legal Services Corporation: 'It's Ideological, Stupid!'*, *in* THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES 41, 53–54 (Francis Regan et al. eds., 1999); James T. Bennett & Thomas J. DiLorenzo, *The Role of Tax-Funded Politics*, 36 PROC. ACAD. POL. SCI., no. 3, 1987 at 14, 19; *see also* Marcia Coyle, *For LSC, a 30-Year Funding Rollercoaster*, NAT'L L.J., Mar. 14, 2011, at 12, 13 ("When the LSC was created . . . it was a political

support to improve access, even when some kind of "right-to-counsel" statute exists.[38] The efforts among other financially strapped legal aid organizations are woefully inadequate, especially during times of recession.[39]

Lacking enough people, power, and purse strings, the provision of indigent legal assistance may fare better with some practical structural strategies. For example, the National Center for Access to Justice has developed an excellent listing of the economic advantages to providing civil legal aid, including reduction of evictions, foster care placements, and domestic violence.[40] The general failure of the pro bono ideal has also led to various analyses of the legal profession regarding the integral relationship between social order, system efficiency, and indigent assistance.[41] These ideas even took root at the beginning of the modern legal profession, during early twentieth century America.[42] Legal assistance, according to Theodore Roosevelt, was a "bulwark against . . . violent revolution."[43] "Injustice," said Reginald Heber Smith, "leads directly to contempt for law, disloyalty to the government, and plants the seeds of anarchy."[44]

Thus, the real struggle for indigent civil legal assistance into the twenty-first century is not finding more pro bono practitioners or begging for more LSC money. Rather, it is now divided between finding judges who will agree that due process entails a civil right to counsel and begging

football." (internal quotation marks omitted)).

38. *See* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245, 250 (2006) ("In practice, funding falls short of need almost everywhere.").

39. *See, e.g.*, Tony Pugh, *Growing Numbers of Poor People Swamp Legal Aid Offices*, MCCLATCHY (July 9, 2009), http://www.mcclatchydc.com/2009/07/09/71580/growing-numbers-of-poor-people.html.

40. LAURA K. ABEL, NAT'L CTR. FOR ACCESS TO JUSTICE, CARDOZO LAW SCH., ECONOMIC BENEFITS OF CIVIL LEGAL AID 1 (2012), *available at* http://ncforaj.files.wordpress.com/2012/09/final-economic-benefits-of-legal-aid-9-5-2012.pdf.

41. *See, e.g.*, Dreyer, *supra* note 24, at 212 ("[A]ccess is a fundamental element of efficiency."); *id.* at 216 ("[T]he traditional professional 'pro bono' ideal is outdated . . . . A new concept of 'mandatory access' should take its place . . . . 'Structural' alternatives to [e]nsure mandatory access should be explored instead of continued reliance on the 'cultural' preferences of private attorneys.").

42. *See* Cummings, *supra* note 28, at 11–12.

43. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 55 (1976) (internal quotation marks omitted).

44. SMITH, *supra* note 20, at 10.

courts, governments, nonprofits, and others to accommodate the avalanche of unrepresented litigants. According to the documented unmet legal need, some say millions are left out of the system and are now attempting to represent themselves.[45]

B. *Searching for a Civil Right to Counsel*

Civil right to counsel legal literature basically starts in 1932 with *Powell v. Alabama*[46] and may have ended with *Turner*.[47] In *Powell*, the Supreme Court aligned the criminal right to counsel to the Fourteenth Amendment's Due Process Clause and fundamental fairness.[48] Indeed, how can one now posit an argument that legal access of any kind can be denied without violating due process? The cases and some commentators answer that question with various equivalents of "it depends";[49] and with every case, every day seems like yesterday.

After *Powell*, the criminal right to counsel was expanded by *Griffin v. Illinois*,[50] and finally mandated by *Gideon* in 1963.[51] The Court used normative language each time, starting with *Powell*: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."[52] "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[53] "[A]ny person haled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[54] Civil right to counsel arguments began in

45. RHODE, *supra* note 24, at 13–14.

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

47. Turner v. Rogers, 131 S. Ct. 2507 (2011); *see also* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 970 (2012) ("*Turner* dealt the death blow to hopes for a federally imposed civil *Gideon*.").

48. *Powell*, 287 U.S. at 71.

49. *See, e.g.*, *Turner*, 131 S. Ct. at 2520 (holding that due process is satisfied if "alternative procedural safeguards" are in place); Barton & Bibas, *supra* note 47, at 986 ("[T]he question is not whether allowing some defendants to go unrepresented . . . is sometimes fundamentally unfair, but whether it is always or very often unfair.").

50. Griffin v. Illinois, 351 U.S. 12, 19 (1956) (establishing a right to a stenographer's transcript for indigent defendants).

51. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

52. *Powell*, 287 U.S. at 68–69.

53. *Griffin*, 351 U.S. at 19.

54. *Gideon*, 372 U.S. at 344.

earnest during the next decade or so, largely arguing that failure to appoint counsel for unskilled litigants violated due process.[55] Others laid social policy foundations for furnishing civil legal advice and representation to poor people in general.[56] In the meantime, the Supreme Court continued to address rights to counsel in criminal cases,[57] and the federal government began funding civil legal services for the poor.[58]

Then, civil right to counsel advocates thought a new day arrived when *Boddie v. Connecticut* held due process requires states to allow indigents to file civil divorce actions without a fee.[59] While the courts had helped indigents with lawyers in criminal cases, and required due process hearings in welfare cases, *Boddie* seemed to be the first day that provided more access to the courts.[60] Surely, it could be thought, a civil right to counsel would be a logical extension. But the next day came and it was the same—no new right to counsel. The subsequent denial of counsel for certain probation revocation hearings[61] and summary court martials[62] showed the true terrain; that is, enough process might be due process, even without an attorney. Not for almost a decade after *Boddie* did a possible new day arrive when *Vitek v. Jones* required prisoners to be appointed counsel before transfers to mental facilities.[63] The next year, *Little v. Streater* gave

55. *See, e.g.*, Francis William O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1, 9 (1967); Jeffrey M. Mandell, Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J.L. REFORM 554, 554 (1976); Note, *The Right to Counsel in Civil Litigation,* 66 COLUM. L. REV. 1322, 1330 (1966); Alan Jay Stein, Note, *The Indigent's "Right" to Counsel in Civil Cases*, 43 FORDHAM L. REV. 989, 994 (1975).

56. *See, e.g.*, Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1334–52 (1964) (arguing for a university-affiliated "neighborhood law firm" to help meet the legal needs of impoverished areas).

57. *See* Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972) (holding that *Gideon* applies to misdemeanors); *In re* Gault, 387 U.S. 1, 36–37 (1967) (establishing the right to counsel in juvenile delinquency cases).

58. Alan W. Houseman, *Legal Aid History*, *in* POVERTY LAW MANUAL FOR THE NEW LAWYER 18–25 (2002), *available at* http://web.jhu.edu/prepro/law/Pre-Law.Forms.WordDocs/Public.Interest.Law.1.pdf (noting the federal LSC began in 1965).

59. Boddie v. Connecticut, 401 U.S. 371, 374 (1971). The timing of initial *federal* funding for lawyers representing the poor and the first substantive victories for civil due process rights are striking. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 265 (1970) (holding due process requires a hearing before denying or depriving government welfare benefits).

60. *See Boddie*, 401 U.S. at 374.

61. *See* Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973).

62. *See* Middendorf v. Henry, 425 U.S. 25, 48 (1976).

63. Vitek v. Jones, 445 U.S. 480, 496–97 (1980).

paternity respondents due process rights to free blood tests, and the Court invoked *Boddie* when declaring, "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[64] New day? No way.

By this time, the due process standard had become the intricate balancing test of *Mathews v. Eldridge*, in which social security pre-termination hearings pending appeal were denied despite admitted due process implications.[65] Courts were adopting the *Mathews* Court's (in)famous holding "that due process is flexible and calls for such procedural protections as the particular situation demands."[66] The Court apparently subscribed to the concurring declarations of Justice Frankfurter in *Griffin*: "Due process is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society."[67] Advocates hoped Frankfurter's words were steps leaning towards favorable due process determinations for appointed civil counsel.[68] Instead, they were fodder for the Court's repeated resistance.[69] By the time *Boddie* and *Little* were decided more than 20 years after *Gideon*, the only possible basis for appointed civil counsel was through a case-by-case approach according to the flexible balancing test *Mathews* delineated. Under the *Mathews* test, courts consider the affected person's interest, "the risk of erroneous deprivation" by the government, and the government's "fiscal and administrative burdens" of providing counsel.[70] The promise of progress was further frustrated by *Lassiter*.[71] And so it remains to this day, just like all the days

64. Little v. Streater, 452 U.S. 1, 5–6 (1981) (citations omitted) (quoting *Boddie*, 401 U.S. at 377) (internal quotation marks omitted).

65. Mathews v. Eldridge, 424 U.S. 319, 349 (1976).

66. *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)) (internal quotation marks omitted). The *Mathews* Court also quoted *Cafeteria Workers v. McElroy*: "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Id. (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)) (internal quotation marks omitted). For a decision adopting the *Mathews* test, see *Little*, 452 U.S. at 6.

67. Griffin v. Illinois, 351 U.S. 12, 20–21 (1956) (Frankfurter, J., concurring) (internal quotation marks omitted).

68. *See, e.g.*, Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465, 476 n.53 (1970) ("Certainly there is no right to which [Justice Frankfurter's] observation applies with greater force than to the right to counsel . . . .").

69. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 382–83 (1971).

70. *See Mathews*, 424 U.S. at 335.

71. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 33 (1981).

before it. The only clear cases in which due process demands appointed indigent counsel in the United States, we are told, must involve criminal defendants—whether adult or juvenile—or prisoners being transferred to mental facilities.[72]

III. "IF THE WORLD WERE PERFECT, IT WOULDN'T BE."[73]

A. Lassiter *Promises What it Does Not Deliver*

When *Lassiter* arose, the *Mathews* balancing test could conceivably be applied to any variety of circumstances facing an indigent person.[74] But any balancing test is a judge's journey through a thicket of objective facts and subjective values. The weight ascribed to any part of any balancing test is fraught with pitfalls of bias or mistake. *Lassiter*'s issue—whether an indigent parent was entitled to appointed counsel for a parental termination proceeding[75]—and its acceptance by the Court on the heels of *Vitek*[76] was cause for hope among advocates of the civil right to counsel.[77] Yet, when *Lassiter*'s decision day dawned, the law was still the same. Surely due process was implicated, but now there is an inexplicable presumption for appointed counsel only in cases in which physical liberty is at stake,[78] and so, apparently, a presumption *against* a general civil right to counsel otherwise.[79] The *Mathews* balancing factors are then weighed against either

72. *See* Vitek v. Jones, 445 U.S. 480, 496–97 (1980); *In re* Gault, 387 U.S. 1, 36–37 (1967); Gideon v. Wainwright, 372 U.S. 335, 344 (1963). Most states have established appointed indigent civil counsel by statute in specific cases, such as family matters involving parental termination and child neglect. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-321 (2007 & Supp. 2012) (appointing counsel in child support and child custody cases); COLO. REV. STAT. § 19-3-202(1) (2012) (appointing counsel in child dependency and neglect cases); IOWA CODE § 232.89 (2011) (appointing counsel in child-in-need-of-assistance matters); 23 PA. CONS. STAT. ANN. § 2313 (West 2010 & Supp. 2012) (appointing counsel in termination of parental rights matters); *see also* Abel & Rettig, *supra* note 38, at 252–70 (providing a comprehensive listing of all specific state right-to-counsel statutes by subject matter).

73. BERRA, *supra* note 2, at 52 (internal quotation marks omitted).

74. *See Mathews*, 424 U.S. at 335 (balancing private interests at stake (the litigant's risk of erroneous deprivation) with the government's interests).

75. *Lassiter*, 452 U.S. at 24.

76. *Vitek*, 445 U.S. at 496–97.

77. *See* Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 770 (2006) (describing *Lassiter* as failing to fulfill certain aspirations).

78. *Lassiter*, 452 U.S. at 26–27.

79. *See id.* at 31.

presumption.[80] This, said the Court, was the "one voice" that precedent had established about "fundamental fairness" and a civil right to counsel.[81] Facing only the loss of children, rather than liberty, and thus employing a presumption against appointed counsel, *Lassiter* used the *Mathews* factors to find no right to appointed counsel.[82] Although the parent's interest was high and the State's interest perhaps even complementary, the Court found the risk of deprivation is not so high in *every* parental termination case as to require appointed counsel.[83] Looking at the evidence against the parent, the Court determined that "the presence of counsel for [the parent] could not have made a determinative difference."[84]

Lassiter has always had its share of detractors.[85] Many share the view that the *Mathews* weighing process by itself may have been acceptable, but is "oddly trumped by the implementation of a presumption against providing a lawyer unless liberty is at risk."[86] Even with a seemingly "slam-dunk"[87] case like *Lassiter*, the next day looked like any other day.[88]

Years passed with no change regarding the establishment of a civil right to counsel or any significant due process civil right. "For over two decades, the *Lassiter* decision appeared to paralyze serious consideration of a right to counsel in civil cases."[89] Eventually, the ongoing yearning for a new day was publicly articulated once again by Judge Robert W. Sweet during a 1998 speech to Yale Law School,[90] and "may have helped to renew

80. *Id.* at 27.

81. *Id.* at 26–27.

82. *Id.* at 31.

83. *See id.*

84. *Id.* at 32–33.

85. *See, e.g.*, Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: the Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 36 LOY. U. CHI. L.J. 363, 364 (2005) (urging reconsideration of the *Lassiter* decision); Brooke D. Coleman, Lassiter v. Department of Social Services*: Why is it Such a Lousy Case?*, 12 NEV. L.J. 591, 594–95 (2012) (criticizing the case and its misapplication of the *Mathews* balancing test due in part to sexism).

86. Nichol, Jr., *supra* note 19, at 341.

87. *Id.* at 340.

88. The Court in *Lassiter* acknowledged the irony by observing that "[t]he Court's opinion . . . in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise." *Lassiter*, 452 U.S. at 34.

89. DANA, JR., *supra* note 23, at 10.

90. Hon. Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 506 (1998).

interest in civil *Gideon* rights."[91] However, it was not until thirty years after *Lassiter* that the Supreme Court decided another case regarding the civil right to counsel in *Turner*.[92]

B. *Like* Lassiter*, Like* Turner

Turner seemed like a case that could finally bring a new morning for sleepy civil right-to-counsel advocates. First, the case involved a threatened loss of liberty because Mr. Turner faced jail for civil contempt for nonpayment of child support—so the *Lassiter* presumption for appointed counsel was arguably applicable.[93] Second, the *Mathews* balancing factors could support that presumption, or in other words, the State's interests and burdens in a private child support case should not necessarily be high enough to overcome it.[94] In fact, the intriguing wrinkle in *Turner* was that the State was not a party; two civil pro se litigants stood before a judge, and one faced incarceration without a lawyer.[95] How can this be "fundamentally fair?"[96] It was not, said the Court.[97] New day? No way. Due process was not provided, but not because Turner had no court-appointed lawyer.[98] Rather, due process was lacking, the Court said, absent "alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether [Turner] is able to comply with the support order."[99] The Court even found a potentially unique due process standard: "A requirement that the State provide counsel to the noncustodial parent to create an asymmetry of representation . . . could make the proceedings *less* fair overall . . . ."[100] In other words, too *much* process may be a violation of due process, especially if one side gets a court-appointed lawyer and the other does not.[101] The

91. Barton & Bibas, *supra* note 47, at 980.
92. Turner v. Rogers, 131 S. Ct. 2507 (2011).
93. *Id.* at 2513; *see Lassiter*, 452 U.S. at 26–27.
94. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
95. *Turner*, 131 S. Ct. at 2513.
96. *Id.* at 2512.
97. *See id.* at 2520.
98. *See id.*
99. *Id.* at 2512.
100. *Id.* at 2519.
101. *See id.* (citing Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973)). *Gagnon* itself elaborates:

> The introduction of counsel . . . will alter significantly the nature of the proceeding. If counsel is provided . . . , the State in turn will normally provide

Court indirectly theorized that the proceedings can basically backfire and upset the fundamental fairness balance for all parties, or adversely affect the State's interests when it is not even a party.[102]

Turner settled on four alternative procedures that a trial court may provide, instead of appointing counsel, to meet due process standards in pro se civil contempt child support cases: (1) provide notice that ability to pay is the critical issue of the hearing; (2) provide financial forms for respondents to complete regarding their ability to pay; (3) question respondents about their financial status; and (4) make an express finding about respondents' ability to pay.[103]

The supposedly good news from *Turner* is that the Court specifically and deliberately did not address civil contempt cases in which the petitioner is represented, when the State is a party, or unusually complex cases needing a trained advocate.[104] Arguably, a door might be open for a trial court to appoint counsel in such situations.[105] However, the bad news from *Turner* is the same—the Court likewise failed to address whether due process must require appointed counsel in those circumstances.[106]

So we may have to live another twenty or thirty years before this precedent has any chance of changing. On the other hand, one commentator optimistically wrote the day after *Turner* was decided:

> This issue will be back—even if Turner is not. Like many compromises in law and life, the one at the highest level of this case only delays to

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> its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views.

Gagnon, 411 U.S. at 787. In other words, too many lawyers can create more problems than they solve.

102. *See Turner*, 131 S. Ct. at 2519.

103. *Id.*

104. *Id*. at 2520. By citing *Gagnon* for this point, which involved a probation revocation hearing, the Court seems to imply that "unusually complex" cases of any type might deserve more due process protection for litigants, including appointed counsel. *See id.*; *Gagnon*, 411 U.S. at 788.

105. *See* Richard Zorza, Turner v. Rogers*: The Implications for Access to Justice Strategies*, 95 JUDICATURE 255, 263 (2012) ("By being explicit that certain cases within the child support contempt incarceration class might require such assistance because of such complexity, the Court in effect made it possible for litigants in a broad range of cases to request counsel.").

106. *See Turner*, 131 S. Ct. at 2520.

> some near-future Court Term the resolution of the tough questions about how far the Sixth Amendment, or the due process clause, ought to extend into these hybrid cases.[107]

Whether in the near-future or not, other observers see progress from *Turner* that improves procedures for the plethora of American pro se litigants, apart from any civil right to counsel.[108] Most notably, Richard Zorza of the Self-Represented Litigation Network finds *Turner* to be "groundbreaking,"[109] and an "endorsement of judicial engagement as helping ensure . . . fairness and accuracy, and to meet the requirements of due process."[110]

Whether deemed progressive or not, *Turner* does not represent a change in law or a civil right to counsel. So we will wake up tomorrow and the law will be basically the same as it ever was. *Turner* constitutes continued authority to ignore legal arguments for such a civil right and substitute other policy accommodations as due process.[111] Ironically, the rest of the developed world finds such accommodations to be inadequate, especially after *Airey v. Ireland*, in which the European Court of Human Rights decided there is a right to legal assistance if it is indispensable for effective access to the courts.[112] Accordingly, more than forty European countries are required to provide publicly funded legal assistance.[113] This

107. Andrew Cohen, *Turner's Trumpet: Child Support and the Right to Counsel*, THE ATLANTIC (June 21, 2011), http://www.theatlantic.com/national/archive/2011/06/turners-trumpet-child-support-and-the-right-to-counsel/240753/.

108. *See, e.g.*, Barton & Bibas, *supra* note 47, at 985.

109. Richard Zorza, Turner v. Rogers*: Improving Due Process for the Self-Represented*, *in* NAT'L CENTER FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2012: SPECIAL FOCUS ON COURTS AND COMMUNITY 56 (2012), *available at* http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Courts-and-the-Community/~/media/Microsites/Files/Future%20Trends%202012/PDFs/TRENDS%202012%20BOOK.ashx.

110. Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of* Turner v. Rogers, 50 JUDGES J., no. 4, 2011 at 16, 16; *accord* Daniel Curry, Note, *The March Toward Justice: Assessing the Impact of* Turner v. Rogers *on Civil Access-to-Justice Reforms*, 25 GEO. J. LEGAL ETHICS 487, 487 (2012).

111. *See Turner*, 131 S. Ct. at 2520.

112. Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) at 12 (1979).

113. *See id.* (recognizing the right to counsel for indigents is a human right). After *Airey*, the Council of Europe required each of its member countries to recognize the right to counsel. *International Perspective*, NAT'L COALITION FOR A CIV. RIGHT TO COUNSEL, http://www.civilrighttocounsel.org/about_the_issue/international_perspective/ (last visited Apr. 3, 2013). Currently at least forty-three Council of Europe countries provide independent and individualized rights to counsel. *See* Martha

dilemma is not new. Since *Gideon*, the U.S. legal community has wondered when, or if, it would extend to poor civil litigants.[114] As far back as 1967, a Yale law student made a prescient assertion: "[T]he Supreme Court will have trouble resisting the logic of its own recent precedent. The Court's present caution must rest less on logic than on prudence—fear of burdening governments with an intolerable expense, and hence of causing itself unwanted political troubles."[115] For advocates of a civil right to counsel, the question after *Turner* has to be: Is there any use to keep wondering?

IV. "THE FUTURE AIN'T WHAT IT USED TO BE."[116]

The continual barriers to an American civil right to counsel are large and complex. Indeed, the cases now citing *Turner* have only served to build the precedent *against* appointed counsel.[117] In *State v. Currier*, the court found that *Turner* alternative safeguards fulfilled due process, despite having the State's counsel against a pro se civil contempt respondent.[118] Those happy with *Turner* include prominent pro se advocates seeking leverage for more procedural resources[119] and strategic academic thinkers who claim "*Turner* got it right."[120]

First of all, the great, somewhat unspoken tension among governments, courts, and lawyers is simply money and determining public

F. Davis & Raven Lidman, In re Marriage of King*: Amicus Curiae Brief of International Law Scholars in Support of Appellant*, 9 SEATTLE J. FOR SOC. JUST. 185, app. A, at 199–203 (2010).

114. *See, e.g.*, Sweet, *supra* note 90, at 503–05.

115. Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 547 (1967) (footnote omitted).

116. BERRA, *supra* note 2, at 118 (internal quotation marks omitted).

117. Clauson v. City of Springfield, 848 F. Supp. 2d 63, 72 (D. Mass. 2012) (denying publicly funded counsel to a parent of a student with special education needs); Palermo v. Edmark, No. 11-cv-506-JD, 2012 WL 4052020, at *2–3 (D.N.H. Sept. 12, 2012) (declining to appoint counsel in prisoner civil rights suit for mistreatment because "there is no constitutional right to appointed counsel in civil cases" (citations omitted)); Castanias v. Lipton, No. 11-296-HJW-JGW, 2012 WL 1391921, at *5–6 (S.D. Ohio Apr. 20, 2012) ("*Turner* does not . . . categorically require counsel to be appointed for persons facing criminal contempt convictions . . . .").

118. State v. Currier, No. S-12-0114, 2013 WL 475244, at *7 (Wyo. Feb. 8, 2013).

119. *See* Zorza, *supra* note 110, at 17.

120. Barton & Bibas, *supra* note 47, at 985. Professor Bibas argued for the respondents in *Turner* before the Supreme Court. Turner v. Rogers, 131 S. Ct. 2507, 2511 (2011).

priorities, as a 1967 Yale law student cogently observed.[121] Criminal public defender budgets are stretched as it is, and "a civil *Gideon* right would likely undermine criminal indigent defense by stretching limited resources further. Even if the money did not come directly from criminal defense funding, other areas of state budgets would feel the strain."[122] Even when states actually acknowledge a civil right to counsel, like New Jersey and Pennsylvania, court-ordered requirements for appointed counsel are never adequately funded and thus hardly realized.[123] Day after day, "courts weigh issues of cost implicitly even if they do not make them explicit. . . . [E]ven if courts establish new rights, it is up to legislatures to fund them."[124]

Secondly, some complain that state judges have "abdicated [adherence to due process] by ignoring the exclusion from our civil regime that occurs for those unable to afford counsel."[125] These charges claim judges are asleep at the wheel of enforcement, aside from practical financial concerns. Even after *Lassiter*, it is argued, state courts still had an opening for "fact-based, individualized, open inquiry across the spectrum of civil actions," in order to consider appointed counsel in particularly complex cases;[126] instead, state courts just adhere to the "narrow category" of case types from federal decisions.[127] The denial of appointed counsel in civil cases is "thought to be so complete and unshakeable that jurists now see the challenge as principally a political or an ethical one."[128] So the due process flexibility to appoint counsel in various potential circumstances, as accorded and allowed by *Gagnon*, *Lassiter*, and now even *Turner*, seems to have rarely seen the light of day.

Finally, there is growing apprehension regarding the need for lawyers in every case or every circumstance. *Turner* reprised *Gagnon*'s skepticism about automatically requiring attorneys to maintain the due process

121. *See* Note, *supra* note 115, at 547.

122. Barton & Bibas, *supra* note 47, at 980.

123. *Id.* at 992; *see* Pasqua v. Council, 892 A.2d 663, 678 (N.J. 2006); Commonwealth v. $9,847.00 U.S. Currency, 704 A.2d 612, 617 (Pa. 1997) (holding civil forfeiture respondents do not have a right to appointed counsel because they do not face a loss of liberty); *see also, e.g.*, Sholes v. Sholes, 760 N.E.2d 156, 165–66 (Ind. 2001) (noting that the Indiana statutory right to civil counsel requires compensation, and trial court may decline to appoint counsel in the absence of funding).

124. Barton & Bibas, *supra* note 47, at 981 (footnote omitted).

125. Nichol, Jr., *supra* note 19, at 330.

126. *Id.* at 333.

127. *Id.*

128. *Id.* at 331.

balance—perhaps disturbing the "asymmetry of representation"—and recalled ideas that lawyers can cause more process and delay than is necessary in some matters.[129] Now, even psychological studies question attorneys' own estimates of their own importance.[130] More significantly, there are also formidable academic attempts to debunk the age-old notion that one is always better off with a lawyer.[131] In the *Turner*-type civil contempt child support scenario in which the ability to pay is critical, a lawyer is not needed, arguably because "[a]nyone can tell a judge where he works, how much he earns per week, and how much he spends on rent and medical bills."[132] Professors Barton and Bibas also laud *Turner*'s "wisdom" by "finally acknowledg[ing] that lawyers can sometimes make proceedings less fair. *Turner*'s turn away from blind faith in lawyers as indispensable for fair trials is a significant part of this landmark development."[133] Even before *Turner*, a randomized, controlled study was conducted regarding the Harvard Legal Aid Bureau.[134] It purportedly found that offers of legal assistance had no impact on the probability of success in a case and may have actually harmed clients' interest by delaying the process.[135] This growing apprehension is balanced by broader studies that suggest empirical links between getting a lawyer and getting results, especially when there is a disparity of power between parties and an appropriately skilled lawyer.[136] But the question will remain open because: "While the presence of counsel can dramatically affect case outcomes, that factor is only one

129. Turner v. Rogers, 131 S. Ct. 2507, 2519 (2011).

130. *See* Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability To Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133, 149–50 (2010); *see also* Jeffrey Selbin et al., Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative, 122 YALE L.J. ONLINE 45, 54–55 (2012), *available at* http://www.yalelawjournal.org/images/pdfs/1099.pdf ("[W]e lawyers are confident about our ability to help clients . . . but how would we know? . . . [I]t is easy to misjudge our impact." (footnotes omitted)).

131. *See* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer? An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 82 (2010) ("The widespread phenomenon of pro se divorce litigation is . . . here to stay, and that may not be a bad thing for many litigants.").

132. Barton & Bibas, *supra* note 47, at 982.

133. *Id.* at 986–87.

134. Greiner & Pattanayak, *supra* note 18, at 2140–44 (reporting the findings of the Bureau study and describing its methodology).

135. *Id.* at 2149, 2157.

136. An excellent review of relevant studies is Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 44–66 (2010).

variable. Other key variables include the substantive law, the complexity of the procedures, the individual judges, and the overall operation of the forum."[137]

As the prospect for a civil right to counsel recedes once again after *Turner*, the days remain the same, but the horizon seems different. Low-income people needing legal advice or representation may not get a lawyer in the United States, but they may get something like a lawyer. But will they get due process?

V. "IT AIN'T OVER 'TIL IT'S OVER."[138]

In the mid-1960s, Lewis Powell, then-President of the ABA, implored the profession to "face up to this problem [of legal assistance] and find more effective solutions."[139] Unless the problem was adequately addressed, he concluded that "others—far less interested in the profession of law and also less competent to devise reasonable solutions—will undertake this for us."[140] Despite all the Groundhog Days since Gideon, the market shelves are still pretty bare. Neither lawyers nor courts have met the need of indigent litigants. Countless sources continually confirm that "the imbalance between the need for legal services and their availability undermines the legitimacy of the legal system itself."[141] As the days go on, who will that someone be?

A. *Pro Se Services and Advocacy*

As time and unmet needs have dragged on, efforts to enable pro se access have been developing everywhere.[142] One obvious reason is that "the pro se problem cannot be ignored."[143] Even the lay world is now noticing that pro se litigants need help.[144] But if there is no help, the

137. *Id.* at 73–74.

138. BERRA, *supra* note 2, at 121 (internal quotation marks omitted).

139. Lewis Powell, President, Am. Bar. Ass'n, Inaugural Address at the ABA House of Delegates (Aug. 14, 1964), *reprinted in* EARL JOHNSON JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 56 (1974).

140. *Id.*

141. COMM. TO IMPROVE THE AVAILABILITY OF LEGAL SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (1990), *reprinted in* 19 HOFSTRA L. REV. 755, 775 (1991); *see also supra* notes 20–25.

142. *See* Barton & Bibas, *supra* note 47, at 987–88.

143. Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 451 (2009).

144. *See* Gillian Hadfield, *Making Legal Aid More Accessible and Affordable*,

helpless somehow have to go on. In Maricopa County, Arizona, a pro se litigant appeared in 88% of divorce cases in 1990—nearly four times the number ten years earlier.[145] During fiscal year 2010, pro se civil filings made up almost 12% of all non-prisoner filings in all U.S. federal courts.[146] Despite reports that a growing portion of court litigants may be voluntarily pro se,[147] the critical mass of unmet legal needs, in or out of court, remains at 80%.[148]

Courts are adapting and adopting. Federal district courts are showing significant structural measures to recognize, assist, and process pro se cases.[149] State courts have long strategized to modify their processes in the wake of the pro se onslaught.[150] As of the end of 2011, at least forty-five states had court-sponsored pro se resources and how-to instructions online.[151] In addition, virtually all states have relevant rules, statutes, cases, and supporting literature.[152] Similarly, traditional court support organizations have long worked to assist courts with the pro se dilemma.[153]

WASH. POST (Mar. 12, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103654.html.

145. Landsman, *supra* note 143, at 441.

146. *See* JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS ANNUAL REPORT OF THE DIRECTOR 2010, at 78–80 tbl.S–23 (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf (providing statistics by district that, when added together, reveal the figure exceeding 11.7%).

147. Landsman, *supra* note 143, at 445 & n.46 (citing Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378 (2005)).

148. *See supra* note 22 and accompanying text (detailing nationwide and state-specific statistical studies showing the inability to obtain legal assistance to average around 80% for indigent litigants).

149. *See* DONNA STIENSTRA ET AL., FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS:
A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES 2 tbl.1, 7 tbl.5, 10 (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/$file/proseusdc.pdf.

150. *See* Landsman, *supra* note 143, at 453 (theorizing that this strategy may be simply to preserve judicial legitimacy in the public's eyes).

151. *Pro Se Resources by State*, A.B.A. (2011), http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/pro_se_resources_by_state.html. Kansas and Texas showed other online assistance. *Id.* Louisiana, Mississippi, and Ohio showed no direct online assistance so far. *Id.*

152. *Id.*

153. *See* CYNTHIA GRAY, REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS 51–57 (2005) (proposing best practices for judges in cases with pro se litigants); RICHARD ZORZA, NAT'L CTR. FOR STATE COURTS, THE SELF-

The final verdict on whether pro se assistance will remain necessary and permanent may or may not be many mornings away. But if one cannot afford a lawyer in the United States today, one will have unprecedented assistance to "self-represent"—for better or worse.[154]

Since *Turner*, considerable creative analysis is yielding some positive results, and models for expanding pro se assistance are increasing in lieu of a civil right to counsel.[155]

B. *The Emerging Substitute: Triage*

Even before *Turner*, there were activists who advocated what has been formally known as differentiated case management (DCM), and lately referred to as triage.[156] DCM is a largely criminal protocol that the federal government defines as "a technique courts can use to tailor the case management process—and the allocation of judicial system resources—to the needs of individual cases."[157] Efforts regarding access to justice, like the court system's handling of poor pro se litigants, have accepted the same purpose out of necessity, but appropriately borrowed a medical emergency

HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS 21–23 (2002), *available at* http://www.zorza.net/Res_ProSe_SelfHelp CtPub.pdf (detailing a holistic approach to creating a welcoming pro se environment).

154. *See* Letter from Abraham Lincoln to Isham Reavis (Nov. 5, 1855), *in* LINCOLN ADDRESSES AND LETTERS 64, 64 (Charles W. Moores ed., 1914) (If "[one is] resolutely determined to make a lawyer of [one]self, the thing is more than half done already."). This quote is often paraphrased into the cautionary adage that someone who represents themselves has a fool for a client and thus may not realize the gravity of their undertaking. *See* Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 384 (2005) (noting the pitfalls of proceeding pro se).

155. *See, e.g.*, Zorza, *supra* note 105, at 265 (identifying gaps in *Turner*, which could create greater access to justice); Zorza, *supra* note 109, at 58–59 (listing case management techniques that can increase fairness); Zorza, *supra* note 110, at 17–18 (providing a guide for judges to use when hearing cases including pro se litigants). The Western Interstate Child Support Enforcement Council even held a *Turner* training in October 2012. *See* Rob Lafer et al., Promising Practices: How *Turner v. Rogers* is Raising Awareness for Access to Justice and Reducing the Use of Incarceration in Child Support Cases 33–62 (Oct. 3, 2012), *available at* http://www.wicsec.org/resources /1/Conference%20Materials/2012%20Jackson%20Hole/W-22%20Promising%20 Practices%20-%20How%20Turner%20v.%20Rogers%20is%20Raising%20 Awareness%20-%20Diane%20Potts,%20Richard%20Zorza,%20Rob%20Lafer.pdf.

156. *See* Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156, 165 (2011).

157. *See* NAT'L CRIMINAL JUSTICE REFERENCE SERV., DIFFERENTIATED CASE MANAGEMENT: IMPLEMENTATION MANUAL 1 (1993), *available at* http://www.ncjrs.gov/pdffiles/difm.pdf.

term.[158] Triage here is largely described as "sorting those in need so that people get the services that will be helpful. This generally includes the realization that while some cases require the full attention of a lawyer, others can be resolved by less expensive interventions such as unbundled service or referral to self-help information and tools."[159] Those who cheer *Turner* for its "turn to reality"[160] also conclude that "[i]n a world of scarce resources, legislatures, courts, and legal aid organizations need flexibility in order to triage cases."[161] But unfortunately, there is no research or critical analysis showing how legislatures, courts or legal aid organizations can actually do this—not from such cheerleaders or anyone else yet.[162]

Rather, the task is left to those who have no choice, in the face of reality, but to work to establish triage as some substitute for due process. Indeed, *Turner*'s didactic decision might come to be seen as commencing the triage standard for access to justice in America. Meanwhile, we know disturbingly little "about the processes by which the millions of people who approach courts, legal aid intake systems, and hotlines are directed into them, or the access services they do or do not receive, or indeed the consequences of those choices. All we really know is that these processes are fragmented, inconsistent, and non-transparent."[163] The available models so far are anecdotal, theoretical, and untested.[164] They include personal screening and referral methods as well as technological gateways

158. *See* MERRIAM-WEBSTER COLLEGIATE DICTIONARY 1334 (11th ed. 2011) (defining "triage" as "the sorting . . . and allocation of treatment . . . according to a system of priorities," including the "urgency of the[] need for care," and determining "priority . . . on the basis of where funds and other resources can be best used").

159. Zorza, *supra* note 156, at 164. For ideas about appellate triage, see Meehan Rasch, *A New Public-Interest Appellate Model: Public Counsel's Court-Based Self-Help Clinic and Pro Bono "Triage" for Indigent Pro Se Civil Litigants on Appeal*, 11 J. APP. PRAC. & PROCESS 461 (2010).

160. Barton & Bibas, *supra* note 47, at 982. The claimed new reality concludes that "while lawyers might be marginally helpful in routine cases, they are not essential to satisfy due process." *Id.* at 983. This Article hopes to show, on the contrary, that this is an old reality merely reinforced by *Turner* and several others.

161. *Id.* at 970.

162. For a worthy rebuttal to Professors Barton and Bibas, see John Pollock & Michael S. Greco, *It's Not Triage if the Patient Bleeds Out*, 161 U. PA. L. REV. PENNUMBRA 40 (2012), *available at* http://www.pennumbra.com/responses/11-2012/PollockGreco.pdf.

163. Richard Zorza, *The Access to Justice "Sorting Hat": Towards a System of Triage and Intake that Maximizes Access and Outcomes*, 89 DENV. U. L. REV. 859, 859 (2012).

164. *See id.* at 861.

for online assistance determination.[165] Whether important triage services should be available only to needy citizens, or to everyone, is probably a matter of policy rather than law, and so far anyone's guess. Nevertheless, triage assumptions are increasingly and necessarily embraced,[166] even in the absence of the most basic and essential data.[167]

C. *Empirical Research*

Even beyond the efforts to establish a civil right to counsel, or at least triage, there is a current of support for empirical foundations in appropriate constitutional analyses.[168] As *Turner* triage cheerleaders acknowledge, "[t]he danger is that *Turner*'s minimal suggestions will ossify" into "rather limited safeguards . . . . Nevertheless, the Supreme Court's suggestions in practice often become not only a constitutional floor, but also a ceiling. Instead of falling into this pitfall and abandoning experimentation, lower courts should use *Turner* as a spur to further innovation."[169] In other words, ongoing organized research should be launched in order to establish a new hegemony of empirical findings regarding methods and effects of triage, including consequences of representation or not.[170] Some ideas include the use of "process analysis," which compares tasks and obstacles for pro se litigants, and "outcome analysis," which compares outcomes and assistance.[171] The general data about effects of representation so far may also suggest a basis for change in the social dynamics of the courts, as well as risk-of-error evidence for new

165. *Id.* at 871, 878.

166. *See id.* at 886.

167. Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 158 (2011) ("While one can state the equation, one cannot do the math because the data are missing.").

168. *See, e.g.*, David L. Faigman, *Defining Empirical Frames of Reference in Constitutional Cases: Unraveling the As-Applied Versus Facial Distinction in Constitutional Law*, 36 HASTINGS CONST. L.Q. 631, 665 (2009) ("Historically, the Court has not demonstrated an impressive quotient of empirical sophistication. . . . It is about time that the Court improves this quotient, for substantive constitutional rights depend on it.").

169. *Id.* (footnotes omitted).

170. *See* Laura K. Abel, Turner v. Rogers *and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805, 816 (2012); *accord* Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change,* 15 TEMP. POL. & CIV. RTS. L. REV. 697, 717 (2006) ("Proponents of change . . . will benefit from the accumulation of data.").

171. Abel, *supra* note 170, at 816.

Mathews balancing tests in targeted case types.[172]

More importantly, there are efforts outside the courts and the academy to institutionalize efforts and research supporting access to justice.[173] The ABA, an ardent advocate of a civil right to counsel, has succeeded in promoting the establishment of an Access to Justice Commission in twenty-seven states and the District of Columbia.[174] Its Resource Center for Access to Justice Initiatives organizes the Commissions and other national efforts to provide technical assistance and support for state-level funding for civil legal aid.[175] The ABA has become an invaluable clearinghouse and an active working partner in building extra-judicial support for a civil right to counsel. In 2010, the U.S. Department of Justice established its Access to Justice Initiative to provide research grants and organize ongoing strategies with the ABA and others.[176] Longtime advocates are accordingly gratified by what appears to be serious new steps.[177]

D. *Future Litigation and Other*

If empirical research results in reliable evidence regarding negative, unfair, or uneven effects of triage or non-representation, then courts may face legitimate challenges to their longstanding avoidance of a civil right to counsel. But it might take more than just a lawsuit. "The cases likeliest to succeed have support from a variety of stakeholders, are combined with legislative efforts, and can demonstrate harm to individuals and shocking

172. *See* Engler, *supra* note 170, at 714.

173. *See, e.g.*, AM. BAR ASS'N, ABA PRINCIPLES OF A STATE SYSTEM FOR THE DELIVERY OF CIVIL LEGAL AID 1–3 (2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_tencivilprinciples.authcheckdam.pdf (providing ten benchmarks that indicate a state has successfully made its justice system more accessible).

174. *State Access to Justice Commissions: Lists and Links*, A.B.A. (last updated Jan. 31, 2013), http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html.

175. *About the Resource Center*, A.B.A. (last updated Apr. 19, 2013), http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html.

176. *The Access to Justice Initiative*, U.S. DEP'T OF JUST., http://www.justice.gov/atj (last visited Apr. 24, 2013).

177. *See, e.g.*, Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research* 1–2 (2012) (Stanford Pub. Law, Working Paper No. 1903769, 2011), *available at* http://ssrn.com/abstract=1903769.

results from the denial of counsel."[178] In the meantime, other alternatives may also serve to help indigent pro se litigants generally needing advice or representation, whether part of triage or not. Some examples may include increasing court filing fees in general or in case types most affecting poor parties—like family law, housing, or other human needs—to compensate appointed counsel in states with unfunded civil right to counsel laws.[179]

VI. CONCLUSION

As mornings come and go, perhaps the best perspective here is expressed by Judge Kane: "Georges Clemenceau once said that 'War is much too serious a matter to be entrusted to the military.' Much the same can be said of Justice: It is far too important to be left to the legal profession."[180]

The American legal profession faces a future in which public policy wags the constitutional dog. Now fifty years since *Gideon*, we have gone from *Gideon*'s promise—"[A]ny person haled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth"[181]—to an ad hoc triage with no consistent direction. We are delaying due process because of purported practical realities. But if practical realities were weighed when *Gideon* was decided, indigent criminal defendants would be no better off today than indigent civil litigants. Hopefully, new efforts to establish reliable, empirical evidence can show the widespread dire consequences of denied advice and representation in even the so-called simplest matters.

178. Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 40 CLEARINGHOUSE REV. 271, 280 (2006).

179. For example, Indiana formerly had increased filing fees in mortgage foreclosure cases to fund settlement prevention efforts, including lawyer mediators. IND. CODE ANN. § 33-37-5-30 (LexisNexis 2012); *see also* IND. CODE ANN. § 32-30-10.5-10 (Supp. 2012) (detailing settlement conference procedures and requirements). Revenues totaled more than $2 million per year. IND. HOUS. & CMTY. DEV. AUTH., INDIANA FORECLOSURE PREVENTION INTERVENTIONS—AN OVERVIEW 10, *available at* http://www.in.gov/sba/files/BC_Hearing_2012_263_IHCDA_Presentation.pdf. The law expired January 1, 2013. IND. CODE ANN. § 33-37-5-30(b). However, legislation has been introduced to extend the fee until 2015. H. Bill 1308, § 4, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013) (to be codified at IND. CODE § 33-37-5-32).

180. John L. Kane, U.S. Senior Dist. Judge, Access to Justice Is Restricted: A Call for Revolution, Address to the Faculty of Federal Advocates 19 (Oct. 21, 2010), *available at* http://facultyfederaladvocates.org/downloads/1010_kane_accesstojustice.pdf.

181. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

If our jurisprudence insists on linking expediency with the legal problems of poor people, then Clemenceau will be right. Nothing can replace a lawyer; triage cannot substitute for due process. Beyond litigation and legal precedent, the need for cultural and social change remains. In cases like *Gideon*, the courts led the way. Today, the leaders may be outside the courtroom where policy and political will is determined. Regardless, if a next day ever comes for indigent civil litigants and their advocates, history leaves us uncertain if it will be a better day, or just déjà vu all over again.