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

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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.

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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—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. 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. Then, the next day arrived.

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

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1. See *Gideon v. Wainwright*, 372 U.S. 335, 372 (1963) (holding that the right to counsel is fundamental in all criminal cases).
4. *Id.*
purported progress extends the status quo. On the other hand, the seemingly endless repetition somehow lets good judges and lawyers accommodate access to the courts for needy people. The more things change, the more they stay the same. Today, Turner v. Rogers, the first right to counsel case in thirty years, dominates discussion about any new day for needy litigants. Again, the civil right to counsel was refused 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 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!”

“[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.

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).
8. Id. at 2520.
10. BERRA, supra note 2, at 102 (internal quotation marks omitted).
Yet, this ubiquitous belief is hardly confirmed by persistent facts regarding our access to legal advice and representation. First of all, most people cannot afford a lawyer when they need one. Many private estimates show the average hourly fee for consumer cases is $304 an hour. Some states show a general average hourly fee of around $200 an hour. The anecdotal estimates for divorce fees are as much as $15,000 for a contested divorce. 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. Some legal studies claim to calibrate whether a lawyer is always needed for meaningful access, 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.”

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.

12. The Article is exclusively concerned with civil legal assistance.
18. See, e.g., 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. 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. 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.” 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.” President Carter once said, “[90%]
of our lawyers serve [10\%] of our people. We are overlawyered and underrepresented.”

The legal profession is, of course, expected to adequately address problems of legal access through its standard rules of professional responsibility. 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. 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

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   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. Consequently, pro bono cases have evolved as a form of charity. 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. 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.”

Secondly, the emerging economic and structural models for law firms limit private pro bono commitment. As markets for private legal services are changing, so too are firms’ perspectives on pro bono work. The time-honored pro bono ideal may be increasingly seen as a luxury among competitive interests.

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

29. Id. at 6.
31. Dreyer, supra note 24, at 196.
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).
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. The efforts among other financially strapped legal aid organizations are woefully inadequate, especially during times of recession.

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. 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. These ideas even took root at the beginning of the modern legal profession, during early twentieth century America. Legal assistance, according to Theodore Roosevelt, was a “bulwark against . . . violent revolution.” “Injustice,” said Reginald Heber Smith, “leads directly to contempt for law, disloyalty to the government, and plants the seeds of anarchy.”

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


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. Alabama46 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

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45. RHODE, supra note 24, at 13–14.
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.").
52. Powell, 287 U.S. at 68–69.
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.\textsuperscript{55} Others laid social policy foundations for furnishing civil legal advice and representation to poor people in general.\textsuperscript{56} In the meantime, the Supreme Court continued to address rights to counsel in criminal cases,\textsuperscript{57} and the federal government began funding civil legal services for the poor.\textsuperscript{58}

Then, civil right to counsel advocates thought a new day arrived when \textit{Boddie v. Connecticut} held due process requires states to allow indigents to file civil divorce actions without a fee.\textsuperscript{59} While the courts had helped indigents with lawyers in criminal cases, and required due process hearings in welfare cases, \textit{Boddie} seemed to be the first day that provided more access to the courts.\textsuperscript{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\textsuperscript{61} and summary court martials\textsuperscript{62} showed the true terrain; that is, enough process might be due process, even without an attorney. Not for almost a decade after \textit{Boddie} did a possible new day arrive when \textit{Vitek v. Jones} required prisoners to be appointed counsel before transfers to mental facilities.\textsuperscript{63} The next year, \textit{Little v. Streater} gave

\begin{itemize}
  \item \textsuperscript{56} See, e.g., Edgar S. Cahn & Jean C. Cahn, \textit{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).
  \item \textsuperscript{57} See Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972) (holding that \textit{Gideon} applies to misdemeanors); \textit{In re Gault}, 387 U.S. 1, 36–37 (1967) (establishing the right to counsel in juvenile delinquency cases).
  \item \textsuperscript{60} See \textit{Boddie}, 401 U.S. at 374.
  \item \textsuperscript{61} See Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973).
  \item \textsuperscript{63} \textit{Vitek v. Jones}, 445 U.S. 480, 496–97 (1980).
\end{itemize}
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.”

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. 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.” 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.” Advocates hoped Frankfurter’s words were steps leaning towards favorable due process determinations for appointed civil counsel. Instead, they were fodder for the Court’s repeated resistance. 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. The promise of progress was further frustrated by Lassiter. And so it remains to this day, just like all the days

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 . . . .”).
70. See Mathews, 424 U.S. at 335.
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 proceeding75—and its acceptance by the Court on the heels of Vitek76 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


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.


78. Lassiter, 452 U.S. at 26–27.

79. See id. at 31.
presumption. This, said the Court, was the “one voice” that precedent had established about “fundamental fairness” and a civil right to counsel. 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. 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. 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.”

Lassiter has always had its share of detractors. 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.” Even with a seemingly “slam-dunk” case like Lassiter, the next day looked like any other day.

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.” 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, 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.
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.
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.
93. Id. at 2513; see Lassiter, 452 U.S. at 26–27.
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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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.\footnote{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.\footnote{108} Most notably, Richard Zorza of the Self-Represented Litigation Network finds Turner to be “groundbreaking,”\footnote{109} and an “endorsement of judicial engagement as helping ensure . . . fairness and accuracy, and to meet the requirements of due process.”\footnote{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.\footnote{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.\footnote{112} Accordingly, more than forty European countries are required to provide publicly funded legal assistance.\footnote{113} This


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


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


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. 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.” 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.”

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. 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. Those happy with Turner include prominent pro se advocates seeking leverage for more procedural resources and strategic academic thinkers who claim “Turner got it right.”

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

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114. See, e.g., Sweet, supra note 90, at 503–05.
116. BERRA, supra note 2, at 118 (internal quotation marks omitted).
119. See Zorza, supra note 110, at 17.
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. Now, even psychological studies question attorneys’ own estimates of their own importance. More significantly, there are also formidable academic attempts to debunk the age-old notion that one is always better off with a lawyer. 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.” 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.” Even before Turner, a randomized, controlled study was conducted regarding the Harvard Legal Aid Bureau. 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. 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. But the question will remain open because: “While the presence of counsel can dramatically affect case outcomes, that factor is only one

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.
variable. Other key variables include the substantive law, the complexity of the procedures, the individual judges, and the overall operation of the forum.”

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.”

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.” 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.”

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.” 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. One obvious reason is that “the pro se problem cannot be ignored.” Even the lay world is now noticing that pro se litigants need help. But if there is no help, the

137. *Id.* at 73–74.
138. BERRA, *supra* note 2, at 121 (internal quotation marks omitted).
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 HOFRSTA L. REV. 755, 775 (1991); see also *supra* notes 20–25.
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.\textsuperscript{145} During fiscal year 2010, pro se civil filings made up almost 12% of all non-prisoner filings in all U.S. federal courts.\textsuperscript{146} Despite reports that a growing portion of court litigants may be voluntarily pro se,\textsuperscript{147} the critical mass of unmet legal needs, in or out of court, remains at 80%.\textsuperscript{148}

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

\begin{footnotes}
\footnotetext{145}{Landsman, \textit{supra} note 143, at 441.}
\footnotetext{147}{Landsman, \textit{supra} note 143, at 445 & n.46 (citing Drew A. Swank, \textit{The Pro Se Phenomenon}, 19 \textsc{Byu J. Pub. L.} 373, 378 (2005)).}
\footnotetext{148}{See \textit{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).}
\footnotetext{150}{See Landsman, \textit{supra} note 143, at 453 (theorizing that this strategy may be simply to preserve judicial legitimacy in the public’s eyes).}
\footnotetext{151}{\textit{Pro Se Resources by State}, A.B.A. (2011), \url{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. \textit{Id.} Louisiana, Mississippi, and Ohio showed no direct online assistance so far. \textit{Id.}}
\footnotetext{152}{\textit{Id.}}
\footnotetext{153}{See \textsc{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); \textsc{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


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).


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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

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158. See MERRIAM-WEBSTER COLLEGIATE DICTIONARY 1334 (11th ed. 2011)
(definition “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,

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. 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, even in the absence of the most basic and essential data.

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. 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.” 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. 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. 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).
171. Abel, supra note 170, at 816.
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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/l_sclaid_atj_tencivilprinciples.authcheckdam.pdf (providing ten benchmarks that indicate a state has successfully made its justice system more accessible).


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.


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.