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Why Turner v. Rogers Was and Wasn't Correctly Decided: How the Fourteenth Amendment Should be Read for Child Support Contemnors

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Why *Turner v. Rogers* Was and Wasn't Correctly Decided: How the Fourteenth Amendment Should be Read for Child Support Contemnors

Gina Rose Lauterio[*]

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> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."
>
> \- United States Supreme Court Justice Hugo Black[1]

I. Introduction – The Background Story

The legal saga started exactly eight years earlier, in June 2003, when a South Carolina family court judge ordered Michael Turner to pay $51.73 a week to Rebecca Rogers to help support their child.[2] During the following three years, Turner was held in contempt five different times for failure to pay the support payment;[3] "the first four times he was sentenced to ninety days' imprisonment but he ultimately paid the amount due."[4]

The fifth time he completed a six-month sentence, after which the court clerk issued a "show cause" order to him on March 27, 2006.[5] After the original hearing for this order was rescheduled because of Turner's failure to appear came the hearing specifically under review in the case at hand.[6] There, the court clerk told Turner that he was $5,728.76 behind in child support payment, and the judge then asked Turner if he had anything to say.[7] To this, Turner explained that he had missed prior payments because of drugs and an injury, but that he was now sober and sorry about

1. Peter Edelman, *When Second Best Is the Best We Can Do: Improving the Odds for Pro Se Civil Litigants*, CENTER FOR AMERICAN PROGRESS 9 (June 2011), http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/secondbest.pdf.

2. *See* Turner v. Rogers, 131 S. Ct. 2507, 2513 (2011) (revealing how the family's legal case started).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id*.

all of the failures to pay.[8] The judge responded "okay," asked if Rogers had anything to say, briefly explained federal benefits, and then stated that he found Turner in contempt, sentencing him to a year in prison or until he had a zero balance on his account.[9] He would, however, allow Turner to be available for work release if he had a job.[10] The judge thus never made an express finding of Turner's ability to pay, although according to the procedures set, this was something that he should have determined.[11] Turner appealed this decision to the Supreme Court of South Carolina, which affirmed by noting simply that Turner's situation involves civil, not criminal, contempt, and thus it does not require as many constitutional safeguards.[12] Turner once again appealed this decision, and the Supreme Court decided to take up the case.[13]

II. The Legal Ramifications of the Decision

A. Overview of the Case's Legal Significance

The case of *Turner v. Rogers*[14] was significant for both the issue at stake and its surprising holding.[15] Generally, Associate Justice Stephen G. Breyer, writing for the United States Supreme Court, decreed that indigents in contempt of child support orders, who can receive up to one year in jail

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8. *See* Turner v. Rogers, 131 S. Ct. 2507, 2513 (2011) (revealing how the family's legal case started).

9. *Id.*

10. *Id*.

11. *See id*. at 2513–14 (showing that the court did not appropriately follow due process procedure).

12. *See id.* at 2516 ("Consequently, the Court has made clear (in a case not involving the right to counsel) that, where civil contempt is at issue, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case.").

13. *See id.* at 2514 (explaining how the case was brought before the United States Supreme Court).

14. *See* Turner v. Rogers, 131 S. Ct. 2507, 2513 (2011) (holding that child support contemnors are not guaranteed a right to counsel in cases where they receive a sentence of up to a year in jail, when the opposing party is also unrepresented).

15. *See* Mark Walsh, *A Sour Note from Gideon's Trumpet*, ABA JOURNAL (Sept. 1, 2011, 3:10 AM), http://www.abajournal.com/magazine/article/a_sour_note_from_gideons _trumpet/ (explaining that the outcome in the case "prompted a robust discussion" about the critical question of the case, as well as about the basic human rights that were implicated).

for failure to comply, and who are opposed by a custodial parent without counsel, do not have a right to counsel as long as four procedural safeguards are in place.[16]

With so many qualifiers, it is easy to overlook the Supreme Court's decision as of no consequence.[17] But, the truth is that many American families are in child support arrangements where *Turner* would apply.[18] And in these circumstances, how the case is resolved is highly significant for the quality of life that the family members will afterwards lead.[19] An Urban Institute study shows that "child support reduces the number of poor children by a half million and lessens income inequality among children eligible for it," but yet, "about 70 percent of poor children eligible for child support were not getting it in 1996."[20] This point was further highlighted in the amicus curiae brief that United States Senators Jim DeMint, Lindsey Graham, Mike Johanns, and Marco Rubio filed for the respondents, where they admitted that those on Capitol Hill realize that "failure to pay child support is a major problem that inflicts tremendous social and financial costs on custodial parents and children."[21] Finally, as shown in one South Carolina case study, in child contempt cases the defendant is jailed about 95% of the time.[22] Thus, while judges may be jaded by the wealth of these cases on their dockets, how they view the parties and weigh the evidence—

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16. *See* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (restating the holding in the case).

17. *See* Walsh, *supra* note 15 (relating that the news picked up the Wal-Mart sex discrimination case, decided the same day, instead of Turner v. Rogers).

18. *See* Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 97 (2008) (explaining that there are many child support contemnors in America).

19. *See* Elaine Sorenson & Chava Zibman, *Child Support Offers Some Protection Against Poverty*, URBAN INSTITUTE (Mar.15, 2000), http://www.urban.org/publications/309440.html (showing the impact that contempt cases have on the basic human needs of the parties).

20. *Id*. (showing that the outcome of these proceedings has a large impact on the financial arrangements for a child).

21. Brief for Senator Jim Demint et al., as Amici Curiae Supporting Respondent, Turner v. Rogers, 131 S. Ct. 2507 (2011) (No. 10–10) (stating the senators conceded that politicians in Congress are aware of this important aspect of the case, citing Senators Kohl and Rockefeller as saying that child support payments are "a much-needed 'lifeline' for custodial parents").

22. Jacquelyn L. Boggess, *Child Support: Ability to Pay and Incarceration*, CENTER FOR FAMILY POLICY AND PRACTICE (Feb. 7, 2011), http://www.cffpp.org/publications/Turner%20Brief.pdf (citing a case study in the state where Turner v. Rogers originated).

what was decided in *Turner*—can be truly life changing for both parties.[23] When such disputes do arise, the proceedings may very well end with jail time for one of the parties, or result in the other sending his or her child to bed hungry for another night.[24] The case is also important for the continued functioning of the legal system; the civil rights of due process and government enforcement are undeniably implicated.[25] Thus, *Turner* does not concern trivial matters and it is worth some scrutiny.[26]

B. Note Outline

A reflection of the Court's holding and reasoning in the case raises a number of concerns, primarily because it is not clear from civil right-to-counsel case law (a so-called civil *Gideon* case law), general contempt case law, or jurisprudence that the Court should have denied a right to counsel for indigent child support contemnors.[27] Due to the wealth of support in favor of such a proposition, in fact, the Note will then examine "the elephant in the room" to understand a possible reason for why the justices decided to steer civil Gideon in another direction—that "elephant" being practicality.[28] Upon examination of the current legal justice system, particularly of Sixth Amendment criminal right to counsel, and of various states' attempts at providing civil Gideon entitlement to counsel in such family law cases, there is an unstated, but not to be overlooked,

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23. *See id.* (showing that these court opinions are a factor in whether or not a child grows up poor).

24. *See* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (showing that Turner faced up to a year in jail for failing to comply with the contempt order); Brief of Elizabeth G. Patterson et al. as Amici Curiae Supporting Petitioner at 30–1, Turner v. Rogers, 131 S. Ct. 2507 (2011) (No. 10–10) (clarifying that payment failures result in numerous and significant negative effects for the custodial family).

25. *See generally id*. (showing how the Supreme Court centers its discussion on the rights that the contemnors have under the Due Process Clause in order to ensure they have valid due process before government enforcement).

26. *See id*. at 2520; Brief of the Respondents at 2–3, Turner v. Rogers, 131 S. Ct. 2507 (2011) (No. 10–10) (summarily indicating that the stakes are high for both sides, even though it is a seemingly simple family law case).

27. *See* Brief for Legal Aid Soc'y of the District of Columbia et al. as Amicus Curiae Supporting Petitioner, Turner v. Rogers 131 S.Ct. 2507 (2011) (No. 10-10) (showing that amicus curiae believed that the Supreme Court already had on-point cases that it would use).

28. *See infra* notes 154–69 and accompanying text (considering how the Supreme Court justices handled application of the Sixth Amendment to civil Gideon).

conclusion.[29] The American legal justice system would have been crippled by a decision allowing for civil Gideon in such cases.[30] The Note will move from the Court's analysis to its mandate—the four procedural safeguards that the majority directs all state courts to implement instead of civil Gideon. The author hopes to explain why the Court should not have included mandatory safeguards and how they are unhelpful for ensuring protection of civil rights in this family law context.[31] Finally, the Note will conclude with alternative solutions to the one that the Supreme Court chose, and a preview of how *Turner v. Rogers* will be implemented in practice.[32]

III. The Fundamental Civil Rights Implicated by the Outcome

A. The Rights of the Contemnor

In child support contempt cases, both parties have pressing civil rights concerns.[33] Additionally, both sides are likely to have limited or no resources, and often times they are members of historically disadvantaged groups who may not safely assume that they receive just treatment by the government.[34] For example, a study done for the New York State Senate on local and state civil Gideon programs repeatedly noted that there are myriad reasons in favor of a civil Gideon, citing statistics showing that New Yorkers may not adequately be able to represent themselves when "two-

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29. *See* Jonathan David Kelley, *Gideon's Bullhorn: Sounding a Louder, Clearer Call for a Civil Right to Counsel* (Nov. 20, 2012), http://ssrn.com/abstract=2178813 (explaining that prior decrees for right to counsel has essentially been meaningless).

30. *See id.* (theorizing that civil application of Gideon would not be practical for the same reasons that criminal applications of Gideon lack quality and overburden the criminal justice system).

31. *See infra* notes 170–88 and accompanying text (explaining why the author and the legal aid community are skeptical that the safeguards will usher in any meaningful reform).

32. *See infra* notes 189–271 and accompanying text (predicting how the safeguards will be used by the courts, as well as alternative solutions that the author recommends instead of the current safeguards).

33. *See* Turner v. Rogers, 131 S. Ct. 2507, 2517–19 (2011) (relating that the plaintiff is seeking vindication by the courts of her legal right to payment, while the defendant is seeking adequate due process afforded to him under the Fourteenth Amendment).

34. *See* Brief in Support of Petitioner, *supra* note 24, at 11 (explaining that contemnors in such cases often are parents who are deficient in education and life skills, or who have chronic physical ailments or mental illnesses); Boggess, *supra* note 22, at 2 (explaining that contemnors are unlikely to be represented by counsel, which doubles their chances of being held in contempt).

thirds of New York adults receiving public assistance have not completed high school . . . [and] 10 percent in NYC lack a ninth-grade education."[35] Several studies show that a large majority of these parents make less than $10,000 a year and 70 percent of the child support arrears owed nationwide are expected from parents who had either no quarterly earnings or had annual earnings of less than $10,000, with only 4 percent of the debt owed by those who earn more than $40,000.[36] The Urban Institute focus study in California found that 64 percent of the obligors had court orders practically beyond their ability to pay.[37] The underpinnings of the contemnors' civil rights concern, then, is often a result of overall problems with American social justice.[38] As explained by an amicus submitted by the Legal Aid Society of the District of Columbia et al., "[a]s a practical matter, a significant number of low-income parents genuinely are unable to make the child support payments required of them, often for reasons that merit sympathy rather than scorn."[39] Upon such an examination, it is clear that although some contemnors are probably "deadbeat" and truly can pay the support, many in the circumstances described *supra* seem worthy of the government's protection, not punishment.[40]

On the contemnor's side, at stake is the individual right of liberty being taken away only by sufficient due process under the law.[41] It would seemingly be hard, however, to assure a contemnor that such a right is adequately safeguarded when currently, parents who appear in court without counsel are held in contempt more than twice as often as parents

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35. *IOLA and Civil Legal Services*. Task Force, *Expanding Gideon: The Right to Indigent Civil Representation*, N.Y. STATE SENATE (Dec. 15, 2009), http://www.nysenate.gov/report/expanding-gideon-right-indigent-civil-representation.

36. Brief in Support of Petitioner, *supra* note 27, at 9.

37. Brief in Support of Petitioner, *supra* note 27, at 10.

38. *See* Brief in Support of Petitioner, *supra* note 27, at 5–6; Boggess, *supra* note 22, at 2 (relating that there are many external factors outside of the defendant's control, which bear on whether the contemnor is able to comply with a court order).

39. Brief in Support of Petitioner, *supra* note 27, at 5.

40. *See* Brief in Support of Petitioner, *supra* note 27, at 5–10 (explaining that while these people disobeyed the law, they may have no ability to obey or they may be in circumstances that make it difficult for them to obey, so due process protection for them should not be overlooked on the assumption that they are "bad people").

41. *See* Turner v. Rogers, 131 S. Ct. 2507, 2518 (2011) ("The interest in securing that freedom, the freedom 'from bodily restraint,' lies 'at the core of the liberty protected by the Due Process Clause.' And we have made clear that its threatened loss through legal proceedings demands 'due process protection.'").

who are represented by counsel.[42] Such a fact makes it hard to believe that the cases are being decided on the merits.[43] Additionally, as the Court noted in the case, under modern day due process considerations, a contemnor is not supposed to be jailed if he truly cannot pay;[44] this is a debtors' prison situation that American law diverged from years ago.[45] Thus, meaningful due process is essential to guarantee that cases are decided on the merits and that limits are set on the government's wrath.[46]

B. The Rights of the Custodial Parent and the Child

On the other side of the courtroom, the custodial parent and the child are also concerned about due process, although with a focus on procedural due process as they are seeking vindication.[47] The plaintiff is not concerned with deprivation of liberty but she still has just as compelling an interest—she may need the legal obligation fulfilled in order to secure the fundamentals of survival.[48] The matter is complicated, however, because these important rights may be curtailed by helping out the contemnor

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42. *See* Boggess, *supra* note 22, at 2 (citing the outcome between those contemnors who try to resolve the deficiency with a lawyer and those who try to resolve the family matter without); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (admitting the "obvious truth" that "any person, haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

43. *See id.* (showing such disparity makes it hard to believe the system is fairly handling those *sans* counsel, being that it is unlikely that those with lawyers have twice as many meritorious claims as those without).

44. *See Turner*, 131 S. Ct. at 2518 (agreeing with the proposition that compares arrearages to income and shows that contemnors usually truly do not have the means to comply (citing Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 117 (2008))).

45. *See* Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 95 (2008) (questioning whether contempt proceedings are bringing back debtors' prisons).

46. *See id.* ("A variety of systemic and judicial flaws have coalesced to create a fertile environment for unjustified incarcerations. Prominent among these are serious deficiencies in current civil contempt practice. Restoration of equity and due process to this area will require an array of adjustments in federal and state law, agency practice, and judicial process.").

47. *See* Turner v. Rogers, 131 S. Ct. 2507, 2519 (2011) (explaining that the whole proceeding is just for the mother, who wants to be enforce her right to be paid).

48. *See* Sorenson, *supra* note 19 (stating that only 21 percent of the children in these arrangements live in households where the income exceeds 300 percent of the poverty threshold).

parent, and *vice versa*.[49] Providing additional procedural protection for the debtor, such as a right to a lawyer, would upset the balance between the two parties because the plaintiff usually cannot afford representation herself.[50] Additionally with only *pro se* representation in the courtroom, the court is more likely to reach a more efficient solution, which benefits the plaintiff and the child.[51] Summarily, an evaluation of the rights of one party in the legal system cannot be examined alone; the right of others are often implicated accordingly.[52]

IV. Civil Gideon Denied

Considering the competing interests at stake, it is reasonable to conclude that both parties' arguments had merits and that reasonable minds could differ on this issue.[53] It was therefore surprising that the Supreme Court was unanimous in its decision that child support contemnors, under these circumstances, do not receive a right to counsel.[54] Such an outcome seems especially surprising when one considers that the justices have strongly conflicting interpreting principles on matters such as due process.[55] Perhaps the 9-0 decision could then be justified on the reasoning that the justices did more than weigh interests, such as competing hardship and civil rights, and instead based their decision on current law and jurisprudence.[56]

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49. *See Turner*, 131 S. Ct. at 2519 ("A requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would 'alter significantly the nature of the proceeding.'").

50. *See* Brief in Support of Respondent, *supra* note 21, at 4 ("Upsetting the balance would be a particularly serious problem in the child support context, where custodial parents are often *pro se*.").

51. *See* Brief for Law Professors Benjamin Barton and Darryl Brown in Support of Respondent at 9, Turner v. Rogers, 131 S. Ct. 2507 (2011) (No. 10–10) (suggesting that empirical data shows that *pro se* representation is more likely to lead to a solution, and thus at least some type of resolution).

52. *See Turner*, 131 S. Ct. at 2519 (showing that the Supreme Court recognizes the dynamic between these two interests).

53. *See* Turner v. Rogers, 131 S. Ct. 2507, 2519 (2011) (revealing that the Supreme Court considered both the opposing interests at stake to be significant).

54. *See id.* at 2507–09 (stating the unanimous holding of the Court).

55. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 115–23 (2006) (using the case of Lawrence v. Texas, among others, to show how there are different Court interpretations as to what "due process" means).

56. *See id.* (showing how interpretations of the law differ).

Yet, an examination of these authorities below proves that the justices did not use these in reaching their decision either, and because of this, the Note proposes an answer of why the justices were nonetheless able to unite in this case.[57] The supposition is plainly that this case was decided as a common sense conclusion from a survey of the legal system instead of the result of an attempted Due Process Clause interpretation.[58] To prove such a conclusion, the Note turns to surveying the pre-*Turner* landscape.[59]

A. How Civil Gideon Case Law Pre-Turner Had Already Answered the Question

A beginning point for examining how the case should have been decided is how the courts have ruled in similar cases—the law on the books.[60] Although *Turner* is explicitly limited to child support contempt proceedings, before the case was decided the Court had already taken up the issue of whether a lawyer should be required in a civil matter such as this family law issue.[61] In particular, the two cases of *Lassiter v. Department of Social Services of Durham County*[62] and *In Re Gault*[63] addressed such concern.[64] There is also the crucial contempt case of *Gompers v. Buck's Stove & Range Company*[65] that provides some guidance

57. *See infra* notes 154–69 and accompanying text (asserting the proposition that the justices may have reached their unanimity for practical reasons).

58. *See infra* notes 154–69 and accompanying text (explaining how the realities of the legal system can be juxtaposed next to Due Process discussion).

59. *See infra* notes 60–153 and accompanying text (analyzing the pre-*Turner* case law that could have been used in deciding the case).

60. *See* Turner v. Rogers, 131 S. Ct. 2507, 2510 (2011) (showing that Justice Breyer's analysis of this due process issue also begins with a survey of case law).

61. *See generally* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (analyzing whether there is a right to counsel in another family law matter, one involving parental status termination proceedings).

62. *See id*. at 34 (concluding that the Fourteenth Amendment Due Process Clause does not mandate representation for an indigent parent in parental status termination proceeding).

63. *See In re* Gault, 387 U.S. 1, 41 (1967) (finding that the Fourteenth Amendment Due Process Clause "requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child").

64. *See id.*; *see also Lassiter*, 452 U.S. at 34 (showing that the issue in these cases was whether civil Gideon was guaranteed under the Fourteenth Amendment).

65. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 452 (1911) (dismissing

in this matter.[66] Additionally, although not controlling, the state cases of *Pasqua v. Council*[67] and *Krieger v. Commonwealth*[68] contained helpful legal analysis.[69] Altogether, the law had already begun to form how the civil Gideon issue in *Turner* would be handled, although not in the direction that *Turner* turned it.[70]

1. United States Supreme Court Case Law

a. Lassiter v. Department of Social Services of Durham County

Both sides and Justice Breyer could not avoid mention of one 1981 United States Supreme Court case: *Lassiter v. Department of Social Services of Durham County*.[71] This is because in *Lassiter*, the pertinent question was whether an indigent mother had a right to counsel in a child custody proceeding.[72] The Court, instead of answering 'yes' or 'no,' punted the question of whether the parental termination proceedings in their states needed this due process requirement to the lower courts.[73] Perhaps because of the slightly different end goal of the litigant—child custody instead of child custody payments—and because the right to counsel was

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the case in part because the lower court treated the injunctive case as if it was a criminal proceeding when really it should have proceeded in equity).

66. *See id.* at 441–44 (providing guidance on whether a contempt case is civil or criminal in nature, which is a preliminary question for the case at hand because criminal defendants with a possibility of imprisonment are guaranteed counsel under the Sixth Amendment, while civil Gideon is not provided for in the U.S. Constitution).

67. *See* Pasqua v. Council, 892 A.2d 663, 666 (N.J. 2006) (holding that the Federal and State Constitutions provide for a right to counsel in child support contempt cases).

68. *See* Krieger v. Commonwealth, 567 S.E.2d 557, 564 (Va. Ct. App. 2002) (finding that a person held in civil contempt for failure to abate a nuisance was not guaranteed a right to counsel in order to order to ensure substantial justice for due process).

69. *See id.*; *see also Pasqua*, 892 A.2d at 666 (showing that these state cases also address civil Gideon issues at stake in *Turner*).

70. *See In re* Gault, 387 U.S. 1, 35–36 (1967) (showing that the United States Supreme Court found that the Due Process Clause necessitated the availability of counsel in at least this one civil proceeding).

71. *See* Turner v. Rogers, 131 S. Ct. 2507, 2510 (2011) (indicating that Justice Breyer started discussing *Lassiter* at the beginning of his opinion).

72. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 33–34 (1981) (concluding that the Fourteenth Amendment Due Process Clause does not mandate representation for an indigent parent in parental status termination proceeding).

73. *See id*. at 31–32 (citing Gagnon v. Scarpelli as allowing lower courts to weigh the Mathews v. Eldridge factors for more individualized determinations).

never explicitly granted, the *Turner* Court did not give the case much weight.[74] But many parts of the decision, including the method of analyzing civil Gideon cases, are seemingly on point.[75]

For example, after Justice Stewart, the authoring justice, summarized previous right-to-counsel cases, he "note[d] that Gideon was sentenced to prison for five years, that Argersinger was also imprisoned if only briefly, that Gault was committed to an institution in which his freedom was curtailed, and that Scott had no right to counsel because he was not actually sentenced to confinement."[76] In essence, he explains that the cases in which the Supreme Court granted counsel involved confinement as a possible sentence.[77] The justice then reads this case law as saying that there is actually a presumption in favor of an appointed lawyer when confinement is a penalty.[78] The justice proceeded to distinguish *Lassiter* based upon the fact that the potential punishment was denial of child custody privileges, not imprisonment.[79] Reapplying this analysis to *Turner* shows that the case's circumstances, under which the defendant could potentially be jailed for a significant amount of time, align with the Court's presumption in favor of counsel.[80] Therefore, although the Court used this case to support their decision to not grant counsel, citing it as precedent of a civil case where counsel was not granted, *Lassiter* can more correctly be seen as precedent that a *Turner* scenario would be found deserving of this extra procedural protection.[81] The way in which *Lassiter* tied deprivation

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74. *See Turner*, 131 S. Ct. at 2515–17 (showing that Justice Breyer disposes of precedent in a few short paragraphs, seemingly finding limited guidance, and no on-point discussion).

75. *See infra* notes 76–85 and accompanying text (explaining that many parts of the *Lassiter* opinion seem to be applicable to *Turner*).

76. Elizabeth G. Thornburg, *The Story of* Lassiter*: The Importance of Counsel in an Adversary System*, *in* CIVIL PROCEDURE STORIES 514–15 (Kevin M. Clermont ed., 2d ed. 2004).

77. *See Lassiter*, 452 U.S. at 25–26 (observing that all previous Court holdings where the right to counsel has been granted involved a threat of imprisonment).

78. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26–27 (1981) ("[T]he Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, . . . an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.").

79. *See id*. at 31 (examining the parental interests at stake when doing a *Mathews* balancing test).

80. *See id*. at 26–27 (setting up a presumption against which "all the other elements in the due process decision must be measured").

81. *See id*. (evidencing that *Lassiter* was not limited in any way to parental

of liberty to the right to counsel merits more discussion than the *Turner* Court affords it.[82]

Another relevant part of the *Lassiter* opinion involved the Court's statement that it did not have to limit itself to constitutional interpretation when determining whether to appoint counsel in civil cases.[83] Justice Stewart explained that public policy may also be considered, and that it may require "higher standards be adopted than those minimally tolerable under the Constitution."[84] In *Lassiter*, the Court could not decide whether the addition of counsel would add to the fairness and justice of the proceedings and so left the decision to the discretion to the states.[85] In contrast, looking at both the risk of error and the more severe punishment in *Turner*, a strong argument can be made that adding the right to counsel will result in a significantly more just proceeding.[86]

To conclude, it is clear that *Lassiter* was cited by the amicus curiae of *Turner* for good reason.[87] While the Court never came down strongly in *Lassiter*, it certainly did set the stage for the provision of counsel in a situation exactly like Turner's.[88]

b. In re Gault

Another case that Justice Breyer disregarded as not being on point was *In re Gault*.[89] Yet, this case also deserved more attention than the justice

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proceedings, but instead seems applicable to civil family law cases generally).

82. *See id*. at 26 (concluding that as "the litigant's interest in personal liberty diminishes, so does his right to appointed counsel").

83. *See id*. at 37 ("Where an individual's liberty interest assumes sufficiently weighty constitutional significance, and the State by a formal and adversarial proceeding seeks to curtail that interest, the right to counsel may be necessary to ensure fundamental fairness.").

84. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 33 (1981) (providing an additional factor to the *Mathews* balancing test that courts should consider for analyzing a grant of civil Gideon).

85. *See id*. at 31–32 (discussing that many factors, like those of informality, flexibility, and economy, were best to decide on a case-by-case basis).

86. *See* Turner v. Rogers, 131 S. Ct. 2507, 2512 (2011) (noting that the interest at stake in *Turner* is a risk of incarceration, not simply a child custody proceeding).

87. *See* Thornburg, *supra* note 76, at 523–26 (explaining that several lessons can be learned from *Lassiter* in regards to the appointment of counsel).

88. *See id.* at 524 (showing how the conclusions from *Lassiter* are broad, and thus they could be applicable to civil Gideon cases generally, particularly to other family law civil Gideon cases).

89. *See Turner*, 131 S. Ct. at 2510 (listing *In re* Gault as another case that does not

afforded it.[90] In *In re Gault*, the United States Supreme Court afforded a right to counsel in juvenile delinquency proceedings.[91] Because *Turner* was not a juvenile proceding, Justice Breyer would be right if a narrow interpretation of *In re Gault* is taken.[92] However, juvenile delinquency proceedings, like child contempt cases, are noncriminal family law matters with a potential for incarceration.[93] Additionally, there is no explicit right to counsel in such matters; instead, the Court read this due process requirement from the Fourteenth Amendment.[94] Therefore, the conclusion that *In re Gault* was not reasonable precedent for *Turner v. Rogers* is a questionable one.[95]

In *Turner*, the justices never fully explained why *Lassiter* and *In re Gault* were distinguishable, nor did they explicitly overrule the cases.[96] Either of these alternatives would have left those reading the *Turner* opinion satisfied with the Court's reasoning, but because the Court did neither, it is a mystery why the Court's recent civil Gideon analysis was not given more attention.[97]

c. Gompers v. Buck's Stove & Range Company

Finally, a Supreme Court case not directly dealing with civil Gideon, but instead with the distinction between civil and criminal contempt, demands attention because Justice Breyer's reasoning in *Turner* was founded on the distinction it established.[98] In 1911, the Court in *Gompers*

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provide any definitive answer for *Turner*).

90. *See In re* Gault, 387 U.S. 1, 35–36 (1967) (granting a right to counsel in a civil case where the defendant faced possible confinement).

91. *See id*. (explaining the holding of the case).

92. *See generally* Turner v. Rogers, 131 S. Ct. 2507 (2011) (discussing civil Gideon in the child contempt setting, not in a juvenile proceeding).

93. *See In re* Gault, 387 U.S. at 76–77 (explaining the procedure of a juvenile case).

94. *See id*. at 30–31 (showing that the Court derived the requirement of a right to counsel from the Fourteenth Amendment's Due Process Clause where it was not explicitly granted).

95. *See id*. (demonstrating that the exact same analysis was used in both *In re* Gault and Turner v. Rogers).

96. *See Turner*, 131 S. Ct. at 2516 (interpreting precedent to draw a presumption in favor of counsel when there is a possibility of incarceration, but not deriving any further legal guidance from the cases).

97. *See id*. (showing that the Court never made any effort to distinguish *Lassiter* and *In re* Gault).

98. *See* Boggess, *supra* note 22, at 1 ("The court based its decision on the difference

v. Buck's Stove & Range Company declared that if a contemnor can choose to obey his sentence at any time, then the contemnor has the possibility of release within his own discretion—he has the keys to his jail cell in his pocket.[99] In such cases, the sentence is meant for coercion instead of punishment, and the contempt is a civil one.[100]

In practice, however, the civil and criminal contempt distinction is far from clear-cut.[101] For example, in the 2006 New Jersey Supreme Court case of *Pasqua v. Council*, the Court started its analysis with an internal conflict among the state's laws.[102] The Court found precedent which stated that a contempt proceeding is "essentially criminal" in nature and is ordered for the purpose of the contemnor's punishment.[103] In contrast, however, another law stated that an order to enforce a litigant's right against a defendant was "essentially civil" because the major benefit of the contempt order is for the civil litigant.[104] The type of conflict here has reasonably led to confusion, and modern day judges have been in a quandary about how to distinguish among the contempt cases in accordance with *Gompers* case law.[105] Even the American Bar Association has conceded that "the line between civil and criminal contempt proceedings has become increasingly blurred . . . and thus cannot provide a useful basis for determining the right to counsel where personal liberty is at stake."[106] And as one observer commented, "it's kind of shocking to see no right to counsel in a case

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between civil and criminal contempt . . . .").

99. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 452 (1911) (relating the holding in the case).

100. *See id*. at 441–43 (explaining the distinction between a civil and criminal contempt case).

101. *See* Brief of Nat'l Assoc. of Criminal Defense Lawyers et al. at 5, Turner v. Roger, 131 S. Ct. 2507 (2011) (No. 10-10) (explaining that the civil and criminal is not a distinction that is easily vetted out).

102. *See* Pasqua v. Council, 892 A.2d 663, 670 (N.J. 2006) (showing that in one paragraph, the court concludes that the proceeding is "essentially criminal," and then in the next paragraph says that it is "essentially civil").

103. *See id.* (citing several cases and a statute for the proposition that the case should be considered a criminal one).

104. *See id.* (citing a statute and Judicial Counsel as saying that the case is a civil one because of its intended result—vindication).

105. *See* Brief of Nat'l Assoc. of Criminal Defense Lawyers et al. at 5, Turner v. Roger, 131 S. Ct. 2507 (2011) (No. 10-10) (relating the confusion of the courts in interpreting and applying *Gompers* to modern day cases on this matter).

106. *Id*.

which someone faces more jail time than he would face for criminal contempt."[107]

Yet for legal analysis that has caused immense confusion and application among highly intellectual individuals, Justice Breyer disposed of his contempt distinction analysis fairly quickly, and he did so with questionable reasoning.[108] The justice assumed that in child contempt matters the defendants have the ability to pay, and they therefore have the ability to release themselves from jail at any time.[109] He in fact declared that he was sure that the defendants had income, such as from illegal drug dealing, but that they were simply not reporting it to the courts.[110] This is a strong assumption to make, particularly because statistics like the ones cited *supra* show that this assumption does not seem to be an accurate one.[111] In the particular case of *Turner v. Rogers*, the family court never found that Turner presently had the ability to pay.[112] It seems more likely, if following the reasoning laid out in *Gompers*, that Turner's contempt was not a civil matter.[113] Such a conclusion is important because part of the reason Justice Breyer said he could rest easy with less procedural safeguards is because the case was one of civil contempt.[114] If the justices analyzed the situation with a fresh look at *Gompers*, they may not have been so quick to decide that the proceeding was civil, that less protective due process procedures were then constitutional, and that therefore there is no afforded right to

107. Walsh, *supra* note 15.

108. *See* Turner v. Rogers, 131 S. Ct. 2507, 2516–17 (showing that the Court relates the basic holding of *Gompers*, and seemingly does not really apply the rule to the facts of the current case).

109. *See id*. at 2526.

110. *See id.* (concluding that child support contemnors actually do have the ability to pay, but that this simply will not be found by the court because they are working in illegal markets).

111. *See* Brief for the Petitioner, *supra* note 27, at 9 (relating that the financial situation of these contemnors is often abysmal).

112. *See Turner*, 131 S. Ct. at 2509 ("The judge found Turner in willful contempt and sentenced him to 12 months in prison without making any finding as to his ability to pay or indicating on the contempt order form whether he was able to make support payments.").

113. *See id.* at 2516 (showing that where Justice Breyer analyzed *Gompers*, he incorrectly relied on the contemnor having the ability to pay, and that if this assumption is corrected, then the inability to pay may take *Turner* out of the civil context).

114. *See* Turner v. Rogers, 131 S. Ct. 2507, 2516 (2011) (relating that the justice was going to follow case law supporting the notion that less procedural protection can be allowed for civil cases than must be ensured for criminal ones).

counsel.[115] Nevertheless, the Supreme Court did not engage in such reasoning and they proceeded to a *Mathews v. Eldridge*[116] analysis instead, one that can be criticized in its own regard.[117]

2. *Influential Case Law*

Beyond the Supreme Court, though, civil Gideon law was still being theorized and applied, and therefore before *Turner* reached the Court there was a wealth of judicial opinions addressing this due process concern.[118] Although not controlling on the Court, these analyses are helpful guidance on how to apply jurisprudence to the matter.[119] This is especially true because the matter is a family law concern, which is traditionally handled by the states, and it is an area where the judges have experience and expertise.[120] Two cases particularly worthy of examination are *Pasqua v. Council* and *Krieger v. Commonwealth*.[121]

a. Pasqua v. Council

In *Pasqua*, which was a child support contempt case like *Turner*, the 2006 New Jersey Supreme Court addressed the legality of civil Gideon under both the state and federal laws and Constitutions.[122] In this child

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115. *See id*. (analyzing the civil and criminal distinction with both falsely laid assumption and without much application to the particular facts of a child support contempt case).

116. *See* Mathews v. Eldridge, 424 U.S. 319, 341–48 (1976) (relating that risk of error, weight of private interest, and interests of other parties are the three factors to be examined when analyzing what due process is constitutionally granted before a private interest, like liberty, is taken away by the government).

117. *See Turner*, 131 S. Ct. at 2510 (relating that the Court spent most of its opinion on its *Mathews* analysis, instead of analyzing the foundation of its reasoning, which is determined through *Gompers* analysis).

118. *See* Thornburg, *supra* note 76, at 513–17 (listing numerous right to appointed counsel cases that the Court decided previously).

119. *See* Thornburg, *supra* note 76, at 513–17 (examining principles applicable to *Turner*, even if the case law is determined to not be on point).

120. *See* Helen Alvare, *Traditional Family Law: Connecting Marriage with Children*, THE WITHERSPOON INST. (Dec. 6, 2011), http://www.thepublicdiscourse.com/2011/12/4397/ ("It is important to understand that family law is made in large part at the state level.").

121. *See infra* notes 122–53 and accompanying text.

122. *See* Pasqua v. Council, 892 A.2d. 663, 666 (N.J. 2006) (explaining at the very beginning of the opinion that the court determined to analyze due process implications under both the Federal and the State Constitution).

support contempt case, the judges explained that the right to counsel is implicit in the New Jersey Constitution, but that furthermore, such a concept is also within the U.S. Fourteenth Amendment Due Process Clause.[123]

Judge Albin, who wrote the opinion of the Court, explained that based on the above United States Supreme Court precedent, the civil and criminal contempt distinction should not be the deciding factor for counsel assignment.[124] Instead, what is decisive is whether there is adequate due process in order for justice to result.[125] The judge then engaged in a detailed discussion about whether a child support contempt proceeding without a lawyer is a fair one—a type of analysis that was absent in *Turner*.[126] The Court explicitly rejected the assumptions of the *Turner* Supreme Court, seemingly relying more heavily on studies explaining the high risk of error and revealing that frequently judges do not make an express finding of a contemnor's ability to pay.[127] As Justice Breyer then cites the same findings in his opinion, it is surprising that the United States Supreme Court does not also find the studies to be significantly troubling.[128]

Additionally, the judges made an interesting observation not made by the Supreme Court justices.[129] While the *Turner* justices noted that such proceedings repeatedly occur for the same family—Turner had previously

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123. *See id*. at 674, 675 (concluding that a right to counsel is a necessary procedural protection for these types of contempt cases).

124. *See id*. at 671 (relating that the judge did not take a strictly *Gompers* analysis for the basis for his decision, in contrast to Justice Breyer).

125. *See id*. (examining the requirements for due process and deciding, like in *Lassiter*, that "fundamental fairness" can also be a factor, even if not a requirement from the Constitution itself).

126. *See id.* at 671 ("Although requiring counsel may complicate the procedures pertaining to enforcement of court orders, it protects important constitutional values, including the fairness of our civil justice system."); *see generally* Turner v. Rogers, 131 S. Ct. 2507 (2011).

127. *See id*. at 673 ("When an indigent litigant is forced to proceed at an ability-to-pay hearing without counsel, there is a high risk of an erroneous determination and wrongful incarceration.").

128. *See* Turner v. Rogers, 131 S. Ct. 2507, 2518 (2011).

(referencing studies and the case of McBride v. McBride, which both conclude that "failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent").

129. *See* Pasqua v. Council, 892 A.2d 663, 673 (N.J. 2006) (explaining that "[t]he task is that much more difficult when the indigent must defend himself after he has already been deprived of his freedom").

been sentenced to jail and was likely to be sentenced again—they do not take any type of conclusion from this except as assurance that the case was not moot.[130] The *Pasqua* court, though, after making the same finding, used that conclusion to argue that the task of sound *pro se* representation is "much more difficult when the indigent must defend himself after he has already been deprived of his freedom."[131] This more thorough analysis picks up on an additional reason for civil Gideon that is missing from the *Turner* opinion—that these contemnors are less and less likely to have the resources necessary to make a case, yet at the same time they are also less and less likely to have an ability to pay.[132] It is unclear how *Turner v. Rogers* was decided without weighing such a compelling factor, especially one that had already been discussed in case law by the time that the case reached the bench.[133]

The judges in the case then proceeded to do a *Mathews* balancing test, much like the one that the majority decided to do in *Turner*.[134] Because of the above reasons, however, the *Pasqua* court concluded that the available procedure was insufficient, stating that, "We cannot accept the regime suggested by defendants as an acceptable constitutional safeguard for an indigent litigant facing incarceration in a judicial proceeding. The good intentions and fair-mindedness of a Superior Court judge are not an adequate constitutional substitute for a defendant's right to counsel when jail time is at stake."[135] The Court underscored this understanding by stating that even though it trusted both the judges and the fundamentals of the justice system, this type of proceeding is more complicated than it may seem.[136] A well-executed defense in such a case requires more than just

130. *See Turner*, 131 S. Ct. at 2514–15 (relating that the case is not moot because it is "capable of repetition" yet "evading review" because of the continually renewed hearings on child contempt that one family will face).

131. *See Pasqua*, 892 A.2d at 673 (implicating that contempt cases are a particular type of civil case where due process may be more at risk because of the worsening conditions that the defendant finds himself in).

132. *See id*. (examining the reality that because these are repeat cases, the defendant will likely find himself in a worse and worse condition to represent himself *sans* counsel).

133. *See generally* Turner v. Rogers, 131 S. Ct. 2507 (2011) (showing that discussion on this concern is absent from any of the Supreme Court opinions).

134. *See Pasqua*, 892 A.2d at 672 ("The *Mathews* factors must be weighed against the presumptive right to appointed counsel that attaches when an indigent is subject to incarceration.").

135. Pasqua v. Council, 892 A.2d 663, 670 (N.J. 2006).

136. *See id*. at 673 (explaining that while tasks such as gathering evidence, presenting

document production; it still requires filing legal documents and structuring compelling legal arguments.[137] Essentially, more procedure was needed than one may believe.[138]

b. Krieger v. Commonwealth

Further guidance also came from the dissenting opinion of Judge Annuziata in the 2002 Virginia appellate case of *Krieger v. Commonwealth*.[139] Again, because this case was not controlling for the Supreme Court, the Court was free to easily overlook or ignore it.[140] Still, Judge Annuziata's opinion was a great overview of civil Gideon law and jurisprudence behind the pro-counsel argument in child support contempt cases.[141] The judge closely examined the civil right of due process before incarceration and made the compelling argument that liberty is a fundamental interest, one that affects not just the quality of one's life but also one's career and reputation.[142] Justice Breyer spent only a few short paragraphs on this interest—deprivation of liberty for up to a year of the defendant's life—and he did not discuss these interests in career and reputation.[143] Altogether, though, these interests are too significant for the amount of attention that they were given.[144]

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testimony, and articulating a defense may seem simple to a lawyer or a judge, these are "perhaps insuperable undertakings to the uninitiated layperson").

137. *See id.* (evidencing that the proceeding is not an easy one for the defendant to handle, and thus it cannot be assumed that a layperson can proceed in court alone).

138. *See id.* (suggesting that perhaps the legal professionals who are deciding these cases cannot understand how an ordinary person would handle representation incorrectly, even though they certainly may).

139. *See* Krieger v. Commonwealth, 567 S.E.2d 557, 586–87 (Va. Ct. App. 2002) (Annuziata, J., dissenting) (examining the issue of whether the government should guarantee a nuisance contemnor a lawyer).

140. *See id*. at 559 (showing that it was a Virginia Appellate Court case, which means that it is not controlling precedent for the Supreme Court).

141. *See id*. at 578–84 (examining a large amount of cases addressing civil Gideon).

142. *See id.* at 586 (pointing out a defendant in contempt's civil rights interests in cases where there is a possibility of incarceration).

143. *See* Turner v. Rogers, 131 S. Ct. 2507, 2518–19 (2011) (admitting that the risk of error in *Turner* is high, but nonetheless not spending much time examining the interplay of this *Mathews* factor with the interests of others in order to explain how the interests of others must ultimately outweigh this factor).

144. *See Krieger*, 567 S.E.2d at 577 n.3 (relating that the dissent spends too much time talking about how opinions like the majority's incorrectly apply the *Mathews* factors).

Additionally, like the *Pasqua* court, Judge Annuziata disregarded any reliance on the civil and criminal distinction and instead made clear that jail is jail.[145] He explained that many other judges have also ignored the distinction because of this hard fact, citing, for example, *Walker v. McLain*,[146] where the court decided in favor of the right to counsel because "jail is just as bleak" for the civil litigant.[147] This is simply a strong logical argument in favor of civil Gideon.[148] Also, although Justice Thomas argued against the right to counsel because of the absence of an explicit civil counterpart to the Sixth Amendment in the Constitution, a counterargument using the logic that Judge Annuziata provides is that, simply put, Americans have explicitly recognized in this constitutional provision that counsel is needed at times for adequate due process, and the quintessential punishment where right to counsel process is afforded is imprisonment.[149] And if the American people feel that counsel is needed in order to ensure a fair trial for those facing imprisonment in one courtroom, the same safeguards may be needed where the exact same punishment is set in another.[150] Justice Thomas' point seems to then be countered, but it is hard to know how Justice Thomas would respond because he did not fully engage in this analysis.[151]

Overall, then, while the Court cited very little precedent in its opinion, and concluded that none were directly on point, upon examination of the prior case law, at least some of the arguments, modes of analysis, and

145. *See* Krieger v. Commonwealth, 567 S.E.2d 557, 580 n.5 (Va. Ct. App. 2002) ("Indeed, the very nature of the proceeding and the resulting relief must be discerned especially in cases of contempt, where the line between civil and criminal penalties has become increasingly blurred in order to determine the proper applicability of federal constitutional protections.").

146. *See* Walker v. McLain, 768 F.2d 1181, 1183 (10th Cir. 1985) (denying a habeas corpus petition that incarceration without counsel violated the petitioner's due process rights because the court did not find that the petitioner could not afford a lawyer).

147. *See Krieger*, 567 S.E.2d at 562–65 (explaining that the civil and criminal distinction does not make much sense when the penalties for both are the same).

148. *See id*. (showing that perhaps the distinction set forth in *Gompers* is not applicable to the contempt cases under discussion).

149. *See* Turner v. Rogers, 131 S. Ct. 2507, 2521–23 (2011) (Thomas, J., dissenting) (surveying Justice Thomas's arguments regarding the Sixth Amendment).

150. *See id*. (comparing the civil contempt case to those criminal cases to which the Sixth Amendment applies).

151. *See id*. at 2521–27 (showing that Justice Thomas did not discuss the outstanding similarities between the child support contempt cases and the ones which he approves of counsel being afforded to).

concepts should have been addressed in *Turner*.[152] Unfortunately, very few were, with the end result that there is now less procedural protection for these defendants without much guidance as to why the state courts, who attempted better protection for them, were wrong.[153]

V. Practicality Discussion—The Glaringly Avoided Topic

Given this gaping analysis of existing law and jurisprudence, and given the current state of the legal system, it is worth mentioning the idea that *Turner v. Rogers* may simply have been a practical decision because there is just no way that America could give all of its Turners lawyers.[154] Despite the fact that the Supreme Court stated in *Lassiter* that the costs of providing counsel should not be considered a significant factor when deciding whether or not to provide counsel, it is actually an unavoidable conclusion.[155]

First, the current state of criminal Gideon seems to make this obvious.[156] Recently, Attorney General Eric Holder called attention to several prime examples of this, like a Tennessee public defender office where six attorneys are assigned to handle 10,000 misdemeanor cases per year.[157] Sadly, however, even a story like this included in the Attorney General's overview of criminal Gideon justice does not even do the situation justice.[158] Upon examination of criminal Gideon, one cannot help

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152. *See generally* Turner v. Rogers, 131 S. Ct. 2507 (2011) (showing that very few of the aforementioned civil rights concerns were brought under the purview of the Court).

153. *See id*. (showing that the Supreme Court barely addressed compelling state cases on this subject, like *Pasqua*, nor did it spend much attention on relevant Supreme Court cases).

154. Tod Aronovitz, *Gideon—Then and Now*, 77 FLA. BAR J. 6 (2003), *available at* http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/C2185D2B6A0C301785256CD9004E5ABD (citing Stephen Bright, the director of the Southern Center for Human Rights in Atlanta, Georgia, as summating that "'[n]o constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel'").

155. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981) ("But though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here . . . .").

156. *See* Kelley, *supra* note 29, at 5–7 (relating several studies that show how criminal Gideon is not functioning properly).

157. *See* Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1252–53 (2010).

158. *See id*. (revealing that the stories of the Attorney General are only a few of the many that, in their totality, prove that government-appointed counsel is not sufficient).

but admit that "[a]t the trial level, because every indigent is entitled to free counsel, few if any receive competent representation."[159] As one scholar aptly puts it, "Appointing counsel who—due to any number of factors—provide sub-par representation strips *Gideon* of its radical dexterity, and replaces Gideon's mighty trumpet with the equivalent of a child's kazoo."[160]

Secondly, even stepping back from the current Gideon system, there are overarching reasons for why civil Gideon will not come to fruition.[161] Currently, many child support contemnors proceed as defendants *sans* counsel.[162] But any economist would have to conclude that the present situation would be drastically worse if litigants like Turner were allowed government-funded counsel, for "if you price a good or service below the market rate, people will want more of it . . . and that's not necessarily good for the litigants themselves, or for society as a whole."[163] From current government attempts into this realm, it seems clear that such a system would be prohibitively expensive while providing less than an adequate quality of protection.[164]

As mentioned above, however, these glaring practical limitations should not play a part in the ruling, and on its face, they didn't; the Court never expressly addressed such limitations in *Turner*, and the former *Lassiter* holding can perhaps be seen to silently stand in instead.[165] Still, it

159. *See* Lawrence J. Siskind, *Civil Gideon: An Idea Whose Time Should Not Come*, AMERICAN THINKER (Aug. 6, 2011), http://www.americanthinker.com/2011/08/civil_gideon_an_idea_whose_time_should_not_come.html (highlighting the fact that sometimes well-intended plans do not implement well upon practice).

160. *See* Kelley, *supra* note 29, at 5 (explaining that prior decrees for right to counsel has essentially been meaningless).

161. *See* Siskind, *supra* note 159 (explaining how civil Gideon would function in accordance with micro and macroeconomic principles).

162. Joy Moses, *Grounds for Objection: Causes and Consequences of America's Pro Se Crisis and How to Solve the Problem of Unrepresented Litigants*, CENTER FOR AMERICAN PROGRESS 3–5 (June 2011), http://www.americanprogress.org/issues/2011/06/pdf/objection.pdf (explaining that *pro se* representation is normal with both low and moderate-income litigants, as well as in family law cases).

163. *See* Siskind, *supra* note 159.

164. *See id.* (explaining why free services do not function well with a market economy).

165. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981) (showing that in *Lassiter*, the Court clarified that the cost of providing counsel should not be a significant factor in whether to provide this procedural protection); *see generally* Turner v. Rogers, 131 S. Ct. 2507 (2011) (revealing that this precedent on weighing state costs is absent from the Court's discussion in *Turner*).

is impossible to discuss the options before the Court in this case without discussing that there may have really only been one option.[166] A right to civil Gideon would have crippled what many believe is already an extremely broken system.[167] If the Court mandated something that actually could never occur, there are two potential, devastating consequences: first, the courts will not be able to handle actually providing the right, and any just and swift consideration under the law would be close to impossible; and second, the American people would likely doubt the vitality of their legal justice system as a result.[168] Surely the justices must have considered such consequences, and thus the absence of any discussion of them in the *Turner* opinion, either in the majority or the dissent, is significant.[169]

VI. Mandated Procedural Safeguards

The *Turner* majority concluded that four procedural safeguards should be mandated down to the states to ensure that the Fourteenth Amendment Due Process Clause is still being upheld even without a right to counsel.[170] These four protections are:

> (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information from him; (3) an opportunity at the hearing for him to respond to statements and questions about his financial status; and (4) an express finding by the court that the defendant has the ability to pay.[171]

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166. *See* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 969 (2012) (explaining that resources are already spread too thin and that instituting civil Gideo "would undercut Gideon itself").

167. *See id.* at 990–91 (2012) (examining the budgets of government and explaining that, "[i]n the past, the Supreme Court has repeatedly acknowledged funding constraints as a reason not to expand the right to counsel").

168. *See* Joy Moses, *supra* note 162, at 5–7 (revealing that often these types of cases can proceed through the court system faster with only *pro se* representation, while also explaining that our society has a reliance on the court system to function properly, saying that "[u]naddressed legal needs threaten commonly shared notions that America is a place where anyone can get justice.").

169. *See* Benjamin H. Barton & Stephanos Bibas, *supra* note 167, at 990 (showing that the justices have talked about funding concerns in prior cases).

170. *See* Turner v. Rogers, 131 S. Ct. 2507, 2519 (2011) (explaining that the Court mandated four "substitute procedural safeguards").

171. *Id*.

The majority also left open the option of having more safeguards in place; a state after *Turner* may still institute a mandatory right to counsel program.[172] This gives leeway to states that already had civil Gideon systems in place.[173] For example, California, as one of the blindly optimistic states to take on such an obligation, has tried to implement such a program but has not to date successfully carried it out.[174] In fact, the program has already seemingly amounted to a disaster, as the state has had to slash its funding and send out layoff notices to about a third of its employees.[175]

Regardless, more safeguards may indeed be needed as the ones the Court prescribes were never vetted out, either before the case was decided or during it.[176] As Justice Thomas explained, the case was simply about whether an indigent child support contemnor should receive a right to counsel.[177] All nine justices answered 'no.'[178] The parties were not asking what procedure was then due instead, but the majority nevertheless entered into such a discussion, from which the safeguards followed.[179] Because the parties did not raise the issue of what procedure was due, however, the Court did not have many due process suggestions before it.[180] In fact, it only had one such suggestion before it—that found in the federal

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172. *See id*. at 2519–20 (claiming that the Court is receptive to other procedural safeguard alternatives in addition to the four just presented).

173. *See id.* (explaining that the Supreme Court is not limiting states to only these procedural safeguards for the due process rights of child support contemnors, although certainly not leaving the states as much leeway as the Court did in *Lassiter*).

174. *See* Siskind, *supra* note 159 (describing California's attempt at providing civil Gideon services).

175. *See* Siskind, *supra* note 159 (relating that to date, the state has been unable to keep the program fully operational).

176. *See* Turner v. Rogers, 131 S. Ct. 2507, 2524–26 (2011) (Thomas, J., dissenting) (criticizing the majority for incorrectly decreeing four safeguards when the Supreme Court had an insufficient record for that issue, and explaining that it was in answer to "a question raised exclusively in the Federal Government's *amicus* brief").

177. *See id.* at 2521 (clarifying that there was only one issue before the Court, not an additional one of what procedure a state should be required to provide to future child contemnor defendants).

178. *See* Barton & Bibas, *supra* note 167, at 970 (explaining the total unanimity of the Court's decision on this issue).

179. *See Turner*, 131 S. Ct. at 2512, 2519 (showing where Justice Breyer presented the issue before the Court, and then later where he mandated four procedural safeguards related to, but nevertheless not in line with, the issue).

180. *See id.* at 2524 (Thomas, J., dissenting) ("As here, the parties may not address the new issue in this Court, leaving its boundaries untested.").

government's amicus curae brief.[181] This switch in discussion is something Justice Thomas rightly criticized because American law is usually the result of diverse opinions and experiences coming together in the legislature, not the summation of one viewpoint of a group not even a party to the case.[182] Additionally, the safeguards are then not even assuredly effective; they were just the only suggestion on the table.[183] If the Court was going to proceed in this manner, it should have considered other options to the adopted ones, like vetted suggestions from those dealing with the child support contempt cases regularly.[184] As one observer noticed, the Court is far removed from how these cases actually function, and it thus may not be wise for them to assume they know the solution without gathering other expert legal opinions.[185] "And of course, solutions to the pro se crisis should be guided by evidence-based approaches."[186] While not necessary, evidence about the strength of particular procedural protections would have helped the Court make a more informed decision. Louis S. Rulli, a professor at University of Pennsylvania Law School, while not talking specifically about the civil contempt cases, nevertheless sums this up nicely by stating that, "an overarching lesson from legal needs studies is that empirical research plays an important role in enhancing access to justice. Our society relies heavily upon empirical data to assess the efficacy of

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181. *See* R. Reeves Anderson & Anthony J. Franze, *Commentary: The Court's increasing reliance on amicus curiae in the past term*, NAT'L L. J., (Aug. 24, 2011), *available at* http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP_NationalLawJournal_8.24.11.pdf (explaining that the Supreme Court's use of only one amicus curiae to decide the case is part of a larger legal trend where the Court is increasingly relying on amicus curiae briefs).

182. *See* Turner v. Rogers, 131 S. Ct. 2507, 2524. (Thomas, J., dissenting) ("Accordingly, it is the wise and settled general practice of this Court not to consider an issue in the first instance, much less one raised only by an *amicus*.").

183. *See id.* at 2525 (claiming that the majority said that they did know what they states were doing or what the "range of options out there" were).

184. *See* Jeffrey Selbin, Josh Rosenthal & Jeanne Charn, *Access to Evidence: How an Evidence-Based Delivery System Can Improve Legal Aid for Low- and Moderate-Income Americans*, CENTER FOR AMERICAN PROGRESS 8–11 (June 2011), *available at* http://www.americanprogress.org/issues/2011/06/pdf/evidence.pdf (recommending the use of an evidence-based system).

185. *See* Mark Walsh, *supra* note 15 (explaining that those who are family law courts on a regular basis may be able to provide useful insight that the Court is not privy to).

186. Joy Moses, *Grounds for Objection: Causes and Consequences of America's Pro Se Crisis and How to Solve the Problem of Unrepresented Litigants*, CTR. FOR AM. PROGRESS 11 (June 2011), *available at* http://www.americanprogress.org/issues/2011/06/pdf/objection.pdf.

public initiatives and to chart future directions. Law is no exception."[187] Other scholars agree.[188]

VII. Proposed Alternative Solutions

A. Establishing More New Law

If the Court could have a do-over, though, there certainly are some alternatives that it could consider.[189] First, the Court could read its precedent as guidance and allow the states to create their own solutions.[190] In *Younger v. Harris*,[191] among other cases, the Court has expressed this idea of comity and federalism, saying that there should be:

> [A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[192]

This is what states do best, acting as diverse laboratories for the crises of their citizens.[193] Understandably, such a comity may not work in all areas of

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187. Louis S. Rulli, *Money Well Spent: The Value of Civil Legal Assistance to the Poor*, 75 PHILA. LAW. 24, 25 (2012), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/TPL_mag_Fall12_probono.pdf.

188. *See* Alan Houseman, *The Justice Gap: Civil Legal Assistance Today and Tomorrow*, CTR. FOR AM. PROGRESS 12 (June 2011), *available at* http://www.americanprogress.org/issues/2011/06/pdf/justice.pdf ("We need better ways to ensure legal aid programs use tested performance measures and engage in ongoing evaluation. We must also encourage funders to conduct evaluations for quality and effectiveness.").

189. *See* Houseman, *supra* note 188, at 10–15 (showing alternative legal service delivery options that states either have already implemented or that the author believes the states should adopt).

190. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32 (1981) (leaving up to the lower courts the decision of how much procedure will be is due in the type of case before the Court).

191. *See* Younger v. Harris, 401 U.S. 37 (1971) (holding that a federal court cannot enjoin enforcement of a state statute just because that statute, on its face, abridges First Amendment rights).

192. *Id.* at 44.

193. *See* Michael S. Greve, *Laboratories of Democracy: Anatomy of a Metaphor*, 6 AM. ENTER. INST. 1 (May 2011), http://www.aei.org/files/2001/03/31/Laboratories%20of%20Democracy%20Anatomy%20of%20a%20Metaphor.pdf ("It is one of the happy

the law, but this is one where it probably would—states were already coming up with innovative solutions when they were left to their own devices before *Turner*.[194] In fact, before the decision was handed down in June 2011, a majority of states had already come up with ways to provide counsel in situations where the child support contemnor was facing jail time.[195] California, among other states, had tried a pilot program to test the feasibility of providing counsel to its Turners.[196] Twenty-four states and the District of Columbia had all established their own access-to-justice commissions, and while these were not specifically focused on child support contemnors, they nevertheless innovated solutions that would help someone like Turner get a fair determination.[197] The Supreme Court of Pennsylvania also had heartily taken on the issue, creating "IOLTA programs, filing fee surcharges, cy pres awards, and pro hac vice and attorney registration fees," while also improving the commonwealth's legal service delivery systems.[198] Many of these options seem worthy of further explanation.[199] Additionally, states may have solutions that they have not yet developed.[200] For example, New York has recently made fifty hours of pro bono service a prerequisite to sitting for its bar.[201] This state could

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incidents of the federal system,' Justice Louis D. Brandeis wrote in 1932, 'that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'").

194. *See* Debra Cassens Weiss, *Civil Gideon in Deadbeat Dad Cases Would be 'Mass*ive' *Change, Lawyer Tells Justices*, A.B.A. J. (Mar. 24, 2011, 9:12 AM), http://www.abajournal.com/news/article/civil_gideon_in_deadbeat_dad_cases_would_be_m assive_change_lawyer_tells_jus/ (noting that a majority of states had some sort of civil Gideon assistance program in place).

195. *See id.* (explaining that many states already had some sort of assistance available before the *Turner* decision).

196. *See* Siskind, *supra* note 159 (mentioning the system California has tested).

197. *See* Houseman, *supra* note 188, at 7 (relating the many civil legal aid programs in place, and how technology and partnerships can be utilized successfully to protect the civil rights of the litigants).

198. *See* Rulli, *supra* note 187, at 25 (describing Pennsylvania's Supreme Court as a leader in "expanding access to justice").

199. *See* Houseman, *supra* note 188, at 6–7 (exploring different, feasible options that can be used to protect the civil rights of the child support contemnor).

200. *See id.* at 7–9 (explaining different financial and political barriers to full program implementation).

201. *See* Mosi Secret, *Judge Details a Rule Requiring Pro Bono Work by Aspiring Lawyers*, N.Y. TIMES, Sept. 19, 2012, *available at* http://www.nytimes.com/2012 /09/20/nyregion/pro-bono-work-becomes-a-requirement-to-practice-law-in-new-york.html? _r=0 (detailing this new requirement for practicing law in New York).

recommend or direct these applicants to assist in child support contempt proceedings, thus alleviating at least part of "the justice gap."[202]

If the federal government is worried about taking a complete hands-off approach, there are still ways that it could be involved in protecting due process.[203] For example, the federal government could act as an analytical and statistical supervisor, measuring the efficacy of these programs.[204] Alternatively, one scholar has suggested that the federal government support states by forming an umbrella group for organization or by issuing a bond-type program for financial assistance.[205]

Although America's legal system is unique in some regards, the government can still survey the due process systems of other countries.[206] For example, Korea, similar to New York, has a high amount of *pro se* litigants; in Korea, more than eighty percent of the litigants are *pro se*, while ninety-nine percent of the defendants in New York City are *pro se*.[207] Yet, Korean judges take on a different role than American judges, in that they combine informal and formal proceedings through which most parties seem to reach informed and satisfactory solutions.[208] Moreover, The European Convention on Human Rights includes a provision about providing civil Gideon and, as a result, several countries have set up programs to comply.[209] While, because of the different legal and taxing

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202. *See id.* (showing one option to satisfy the 50 hour requirement is to perform pro bono work for the poor).

203. *See* Houseman, *supra* note 188, at 12 (advocating for a system where the Legal Services Corporation, the Justice Department, and state access-to-justice commissions work together).

204. *See* Selbin et al., *supra* note 184, at 6 ("Regrettably, the federal government has made little effort to capture information about legal aid funding sources, service provision, and delivery outcomes. Insufficient data makes it hard to know how and where to spend the limited money available to get the best results for low and moderate-income Americans.").

205. *See* Selbin et al., *supra* note 184, at 11 ("The president's FY 2012 budget includes $100 million in social impact bonds to spur private investment in social interventions with the potential to serve public purposes and save public resources.").

206. *See* Barton et al., *supra* note 167, at 989–90 (pointing out that the federal government can look to see how different countries' court systems work).

207. JAMES R. MAXEINER, FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE xiv (2011).

208. *See id*. (referencing several successful alternative systems that American states and cities may want to examine when determining how to best provide legal protections).

209. *See* Anna Richey Allan, *Passport for Civil Gideon: European Perspectives on the Civil Right to Counsel*, LEGAL SCHOLARSHIP FOR EQUAL JUSTICE 19–22 *available at* http://www.lsej.org/documents/472851Passport%20for%20Civil%20Gideon%20-%20Allen .pdf (last visited Sept. 26, 2013) (discussing various different ways that the right to counsel

systems, such a program might be more feasible in Europe, it is worth investigating the success of protections implemented abroad.[210] If the United States federal government adopts the suggestion to take on a more research-related role, perhaps helping to pilot programs and to measure overall effectiveness of state efforts, the federal government could also look to the civil legal aid systems in Europe and Canada for guidance.[211]

B. Achieving Reform through Current Law

Another suggestion is to accomplish civil Gideon through existing law.[212] For example, one unique suggestion by right to counsel advocates is to use the Americans with Disabilities Act and the Rehabilitation Act for this end.[213] "Using the ADA to argue for free legal representation as a courthouse accommodation for certain disabled individuals is both more restrictive and yet broader than arguing for a full civil Gideon . . . . ADA affords a broader remedy because its provisions are not 'needs based'; that is, ADA accommodations are available to rich and poor alike . . . ."[214] Additionally, many defendants in child support contempt proceedings appear to be "individual[s] with a disability" and thus qualified for ADA protection.[215]

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in civil proceedings is handled in other countries).

210. *See id.* (showing that the legal systems in other countries are organized in a different way than the American legal system).

211. *See* Houseman, *supra* note 188, at 14–15 (commenting on the ways that other countries' governments have handled civil Gideon).

212. *See* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 72–73 (2009), *available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2321&context=ulj (assessing the impact of assistance programs already working within the current law).

213. *See* Lisa Brodoff, Susan McClellan, & Elizabeth Anderson, *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE J. FOR SOC. JUST. 609, 611 (2004), *available at* http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1459&context=sjsj (examining one innovative way to use the Americans with Disabilities Act, within the bounds of the law, to further other civil rights concerns).

214. *Id*. at 611–12.

215. *See id*. at 616 ("A 'person with a disability' is defined as someone [with] . . . '(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.'").

Such a notion is compelling and will hopefully be tested.[216] At the same time, such a concept may be too idealistic because only those familiar with the law would attempt to use the ADA to provide counsel to *pro se* indigent litigants, and if indigents in need of help already have such legal advice, then they probably would not need to use the ADA.[217] The concept is a way of rerouting the current system because, as it stands, indigents are not always capable of forming sound legal arguments.[218] Increasing the legal knowledge required to figure out how to qualify for assistance could complicate representation rather than ease it.[219]

States could also work within the existing legal system—they could look into an alternative dispute resolution system; a more expanded type of small claims court, where lawyers are not allowed on either side;[220] or a more specialized court, like a tax court, where the judges are better trained to determine whether the contemnor is able to pay.[221] Instead of lawyers, it may be more beneficial to have someone similar to a bankruptcy referee, or perhaps the states can allow nonlawyers and paralegals to represent litigants in cases like *Turner v. Rogers*.[222] A Center for American Progress work group recently published other alternatives in a truly weighty list: clerks' offices can become more supportive; courts can provide multilingual *pro se* fact sheets; states can require allocution hearings; courts can simplify forms

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216. *See id*. at 629 (explaining that the ADA is fully supported by state and federal law, and that the costs of expanding such a program are minimal when compared with the loss of housing, food, and other essentials that the litigants bear in order to enforce their civil rights).

217. *See id*. at 619–20 (explaining, for a different reason, that even with some forms of simplified pro se, the litigants are still unlikely to understand underlying legal issues; seemingly, it would also be hard for the litigants to understand the rights and exceptions in each ADA title).

218. *See* Brief in Support of the Petitioner, *supra* note 27, at 15 ("Civil contempt proceedings can be extremely complex and often require skills and expertise beyond the capacity of those too poor to retain counsel.").

219. *See* Brief in Support of the Petitioner, *supra* note 27, at 15 (explaining that current litigants are already overwhelmed by the legal requirements necessary to make their cases).

220. *See* Siskind, *supra* note 159 (proffering some legal structures used in different types of claims).

221. *See* Brief in Support of the Petitioner, *supra* note 27, at 16 (explaining that other determinations that family law judges have to make, such as whether or not a party is indigent, are straightforward compared to deciding whether a party has an inability-to-pay).

222. *See* Richard Zorza, *Turner v. Rogers: The Implications for Access to Justice Strategies*, 95 JUDICATURE 255, 262 (2012), *available at* http://www.zorza.net/AJS-Turner.pdf (suggesting alternative structures other than two *pro se* parties before a judge).

and place them online; judges and clerks can enter training programs; and they can pay more attention to the all-important settlement stage in these proceedings.[223] In addition, there are legal procedures on the outskirts of American law that may be worth closer examination.[224] For example, states can examine unbundling of lawyer services for these matters.[225] Alternatively, states can "increase opportunities for nonprevailing parties to recover attorney fees, so that deserving indigent parties will have a greater chance of attracting private counsel."[226]

Solutions are certainly already out there.[227] If *Turner* had not been decided in such a broad stroke, perhaps the states would be better able to implement some of these solutions instead of being restricted by the new, unsupported, but nonetheless mandated procedures.[228] Regardless, states are not restrained from implementing alternative nonconflicting safeguards in addition to those proscribed in *Turner*, and perhaps they will.[229]

Finally, judges can also take on a more active reformative role.[230] Richard Zorza, a *pro se* expert, has suggested that judges invest in judicial education curriculum, instructional videos, and other best practices.[231] Yet,

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223. *See* Peter Edelman, *When Second Best Is the Best We Can Do: Improving the Odds for Pro Se Civil Litigants*, CTR. FOR AM. PROGRESS 8 (June 2011), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/secondbest.pdf (highlighting a myriad of possible alternatives and additions to the current child support contempt proceeding).

224. *See id*. at 5–8 (naming some alternatives that governments may not have yet tried for securing better procedural due process).

225. *See id*. at 5 ("By way of temporary appearances, unbundling can avail pro se defendants of legal defenses they didn't know they had. But unbundling is no panacea. It's risky for lawyers to take on a limited representation role on short notice.").

226. Siskind, *supra* note 159.

227. *See* Edelman, *supra* note 223, at 8–9 (referencing several viable options for altering the legal assistance available to parties in a contempt proceeding).

228. *See* Houseman, *supra* note 188, at 10–13 (explaining that there is a lack of resources and funding, which means that funds attributed to complying with *Turner* cannot then be used for instituting innovative and successfully vetted alternatives).

229. *See* Turner v. Rogers, 131 S. Ct. 2507, 2519 (2011) (explaining that the four procedural safeguards are not the only alternatives suggested by the federal government).

230. *See* Zorza, *supra* note 222, at 259–62 (indicating that the court can take a more active role in moving cases forward).

231. *See* Richard Zorza, *Courts in the 21st Century: The Access to Justice Transformation*, 49 JUDGES' J. 1, 4–7 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_judges_journal_wi10.authcheckdam.pdf (suggesting ways in which the courts can take a more active role in ensuring civil rights are protected through procedural due process).

this may inherently present a "preaching to the choir" problem, where those judges who are actively seeking the best practices probably already ensure that no one in their court is unjustly confined, while those judges who overlook procedure are unlikely to go out of their way to learn how to correctly apply more of it.[232] Still, the suggestions remain helpful in that they highlight that both counsel and judges matter.[233] Zorza's solutions are viable, well-thought out, and capable of safeguarding due process.[234]

C. True Cost-Benefit Analysis

While this may seem like the author is setting up a lengthy to-do list for the states, this Note can fortunately end on a positive note. Spending on any of these procedural safeguards will not go to waste and will not only benefit the indigents.[235] It has now repeatedly been shown that funding legal aid has a positive economic impact on the state as a whole.[236] The Pennsylvania Interest on Lawyer Trust Accounts (IOLTA) program, which is tasked with managing civil legal aid, just released a study which revealed that, for every dollar spent on legal aid, "$11 of quantifiable economic outcomes and savings were realized for all residents of the Commonwealth."[237] From the $53.6 million that was spent on the civil services programs in 2011, the State reaped $594 million in income and savings for Pennsylvanians, which in turn, supported 2,643 jobs for Pennsylvania workers.[238]

This is not an anomaly.[239] In 2009, Texas reported that for each dollar spent on providing indigent civil legal services, "the Texas economy gained

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232. *See id.* at 5–6 (illustrating that these suggestions will be helpful only to the judges who take the time to read and institute them).

233. *See id.* (indicating that justices who take a more active role in the process can lead to a better and more efficient solution).

234. *See id.* (providing a detailed, workable, and comprehensive outline of several possible ways in which courts can take a more active role).

235. *See* Rulli, *supra* note 187, at 25–28 (indicating quantitatively the positive societal impacts that result when a government spends money on civil legal assistance for its indigent citizens).

236. *See id.* (citing numerous state studies indicating that provision of legal has a positive economic effect).

237. Rulli, *supra* note 187, at 25.

238. Rulli, *supra* note 187, at 27.

239. *See* Rulli, *supra* note 187, at 27–28 (revealing that the results of the Pennsylvania IOLTA program do not stand alone).

$7.42 in total spending, $3.56 in gross output and $2.20 in personal income."[240] Massachusetts recently affirmed that after spending $9.5 million on legal aid, the state benefited to the tune of $53.2 million.[241] In 2010, the Florida Bar Foundation established that civil legal assistance created "more than 3,300 jobs, producing $250 million of output in the state economy and providing $297 million of disposable income.[242] The Florida study concluded that for every dollar spent on legal aid, the state received an economic impact of $4.78."[243] In 2011, once again the nexus was affirmed, when New York found that such spending stirred $980 million in the overall economy, which, based on the state's funding of the programs, created an almost five-to-one return for every dollar spent.[244]

A University of Pennsylvania Law School professor who helped bring these studies to light, Louis S. Rulli, established his own caveat about them—it is possible that they overstate the economic impact of legal aid spending.[245] Still, this stipulation seems to be added only to err on the side of a conservative reading of these studies because, in truth, the studies may instead be underevaluating state cost savings.[246] Regardless, there is a clear economic benefit even if the numbers are not entirely accurate, and, additionally, Rulli mentions that such spending adds unquantifiable value: improving the poor's view of the justice system and increasing the effectiveness of justice, respect, and fairness overall.[247] One can argue that preventing unjust incarceration is priceless, and that the government must try to reformat all future *Turner v. Rogers* litigations regardless of cost.[248] These studies indicate that such an argument need not be made.[249] It truly

240. Rulli, *supra* note 187, at 27.

241. Rulli, *supra* note 187, at 27.

242. Rulli, *supra* note 187, at 27.

243. Rulli, *supra* note 187, at 27.

244. Rulli, *supra* note 187, at 27.

245. *See* Rulli, *supra* note 187, at 27 (claiming that the economic impact studies are not yet perfected; these are only preliminary reports).

246. *See* Rulli, *supra* note 187, at 27 (countering that there may actually be some unrealized cost savings not yet taken into consideration).

247. *See* Rulli, *supra* note 187, at 28 ("Financial benefits are certainly gained in each of these legal aid practice areas but, more importantly, vital interests are advanced that define the type of society we value.").

248. *See* Rulli, *supra* note 187, at 28 ("In the final analysis, the relationship between ordinary citizens and their government is much more important to the long-term success of our democracy than any short-term economic gains.").

249. *See* Rulli, *supra* note 187, at 25–27 (providing consistent, independent studies

appears that reform will never be too expensive if the state can turn a profit five-fold—increasing access will just be seen as a wise investment.[250] Fortunately, then, even if *Turner* does not gets overturned in the near future, once states have a chance to examine such findings, they may feel confident to enact more significant, meaningful reform withal.[251]

VIII. Life After Turner

The Circuit Courts appear to be citing *Turner* favorably.[252] It is interesting to note, however, that at least one judge believes that the *Turner* outcome is dependent on the civil and criminal distinction.[253] This is interesting because Justice Breyer did not explicitly state this as the main basis for the majority's decision, but it appears that courts dabbling with civil Gideon may use this distinction as a takeaway from *Turner* nonetheless.[254] Such a view also lends credibility to the above argument that *Gompers* was worth a closer examination by the justices.[255] Regardless, this interpretation of *Turner* should not be used because as stated by the lower court judges above in *Pasqua* and *Krieger*, such focus misses the point that counsel in the contempt setting seems dependent on the possibility of incarceration instead.[256]

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confirming that the government, and society generally, economically benefit from providing legal services such as additional procedural protections for civil rights cases).

250. *See* Rulli, *supra* note 187, at 28 (explaining that providing citizens with legal help and protection is fundamentally important for furthering society's values, and citizens' trust in those values).

251. *See* Rulli, *supra* note 187, at 28 (explaining that in Pennsylvania, for example, the studies will convince others that "legal aid to the poor helps everyone's pocketbook and that underfunding does economic harm to all Pennsylvanians").

252. *See, e.g.*, Clauson v. City of Springfield, 848 F. Supp. 2d 63 (D. Mass. 2012); Cantey v. City of New York, 2012 U.S. Dist. LEXIS 182323 (S.D.N.Y. 2012); Eichwedel v. Curry, 700 F.3d 275 (7th Cir. 2012) (showing a preview of cases which have followed the holding).

253. *See* Hooks v. Workman, 689 F.3d 1148, 1209 (10th Cir. 2012) (citing *Turner* in a *habeas corpus* death penalty case).

254. *See* Turner v. Rogers, 131 S. Ct. 2507, 2512–20 (2011) (revealing that Justice Breyer did not spend any significant discussion on this distinction).

255. *See supra* notes 98–117 and accompanying text (arguing that *Gompers* was misread by the Supreme Court, as a case is to considered civil contempt only when the contemnor has the present possibility to comply with the court's orders).

256. *See supra* notes 124–28, 145–47 and accompanying text (utilizing past civil Gideon case law that uses *Gompers* as a backdrop, but moves past it with focusing on

In regards to the four mandated procedural safeguards, it is disconcertingly unclear how effective they will be.[257] The Brennan Center for Justice's amicus curiae brief includes a sobering revelation about how very frequently parents who truly cannot pay child support are jailed in Georgia.[258] Unjust incarceration is a serious, reoccurring event, and the solution to it should not just be decided on a whim, hope, or prayer of the Court that it will work out.[259] It is seemingly unlikely that the Court's safeguards will add any meaningful due process protection.[260] In *Turner* and other child support contempt cases, procedure was already in place.[261] It was just that some judges, like the one who Turner was before, simply decided not to abide by it.[262] The four procedures will not now provide a meaningful additional layer of protection for Turner had they been mandated by the Supreme Court before 2006.[263]

There are some who are more optimistic about the benefits of the decision, although they are still often guarded.[264] One writer, pondering in

incarceration as the determinate for whether a litigant gets additional due process procedure).

257. *See* Rebekah Diller, *Turner v. Rogers: What the Court Did and Didn't Say*, AM. CONST. SOC'Y BLOG (June 21, 2011), http://www.acslaw.org/acsblog/turner-v-rogers-what-the-court-did-and-didn't-say (concluding that it is still too uncertain to decide how *Turner v. Rogers* will be implemented as there are some practical limitations).

258. *See* Brief of Nat'l Assoc. of Criminal Defense Lawyers et al. at 16, Turner v. Roger, 131 S. Ct. 2507 (2011) (No. 10-10).

259. *See* Turner v. Rogers, 131 S. Ct. 2507, 2524 (2011) (Thomas, J., dissenting) (expressing disapproval with the Court's acceptance of one amicus brief as the solution to what due process should be constitutionally afforded to child support contemnors, saying that there are multiple reasons why the Supreme Court should not decide issues this way).

260. *See In Rejecting "Civil Gideon" in Child Support Case, Supreme Court Implicitly Raises Questions About the Value of a Lawyer*, SBM BLOG (June 20, 2011), http://sbmblog.typepad.com/sbm-blog/2011/06/us-supreme-court-rejects-civil-gideon-in-child-support-case.html (warning that there are many obstacles to the litigants still "accessing the court system").

261. *See Turner*, 131 S. Ct. at 2509, 2518 (indicating that Turner's judge was supposed to find an inability to pay on the contempt court form, although he failed to do so, and later referencing McBride v. McBride to say that such failed findings are common in the state).

262. *See id*. (relating that Turner's judge, and many other judges in the state, do not ask the questions required on the court contempt forms).

263. *See* Walsh, *supra* note 15 (citing one lawyer as saying that the safeguards are not realistic, and citing another as saying that the Court's decision here shows that they do not understand how the child contempt system truly functions).

264. *See* Walsh, *supra* note 15 (citing one lawyer as saying "This decision is progress. . . . It's not 100 percent, but it's certainly a strong step forward, and it will help the states to have this decision").

an ABA Journal article, reflected, "In the long run, the impact of the decision will be less about its language and more about its application at the state and local level. It's possible the world could be a better place in five to 10 years because of this decision."[265] A lawyer in Michigan concurred that the requirements could bring good change, but then admonished, "but this could all be a farce."[266] Rebekah Diller, Deputy Director of the Justice Program at the Brennan Center for Justice, presents a more realistic review of the Court's new mandates, commenting that they create a "thorny set of implementation questions for the lower courts," and while the procedures "may well provide sufficient safeguards in a select number of cases," they are not "self-executing" and with a system already overworked and under supervised, these may truly not help the unrepresented at all.[267]

Even though spectators seem less optimistic than the *Turner* majority was that the procedures are a panacea, hopefully the safeguards will provide some extra protection for child custody contemnors.[268] Still, it would not be a good idea to rely on such to-date unfounded hope.[269] As discussed by the majority in *Pasqua v. Council*, and by the dissent in *Krieger v. Commonwealth*, the nature of the contempt proceeding is more complicated than it may seem to be by an onlooker, and the safeguards have not altered any fundamental part of the proceeding.[270] Thus, many of the same problems may assuredly arise, and at the end of the day few feel that fundamental justice is now assured.[271]

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265. Walsh, *supra* note 15.

266. *In Rejecting "Civil Gideon" in Child Support Case, supra* note 260.

267. Diller, *supra* note 257.

268. *See* Diller, *supra* note 257 (reflecting general sentiment that the *Turner* procedural safeguards may not work the way that the Court is supposing that they will).

269. *See* Diller, *supra* note 257 (explaining that the Court's analysis and solutions may not work for more complicated factual situations that the Court did not mention).

270. *See* Krieger v. Commonwealth, 567 S.E.2d 557, 570 (Va. Ct. App. 2002) (Annuziata, J., dissenting); Pasqua v. Council, 892 A.2d. 663 (N.J. 2006) (relating the grim reality that the risk of error is so high in these types of cases that it cannot be assured that a litigant can handle his case *pro se*).

271. *See* Diller, *supra* note 257 ("With scant checks on the system, it is hard to take comfort in the procedural changes mandated by the Supreme Court. They will only work if state courts—already struggling with budget cuts and rising caseloads—find time to take extra care in their dealings with those who are unrepresented.").

IV. Conclusion

Perhaps because of the narrow holding, the case of *Turner v. Rogers* was never given significant attention outside of the legal community. Yet, as one can see from the state of *pro se* representation, criminal Gideon, and current procedural safeguards as a result of it, the case truly is newsworthy.

Although the holding is explicitly narrow, the case sets strong precedent in the opposite direction of prior civil Gideon case law. Justice Breyer's reasoning seems built on the distinction between criminal and civil contempt, despite the Supreme Court having previously said that the focus should instead be on what procedure is required for "fundamental fairness" to be ensured. This faked ignorance of prior applications of law and jurisprudence, along with the majority's silence on the practicality of civil Gideon, is relevant because although it was never admitted, the *Turner v. Rogers* decision may have been one that was based less on a due process concerns and instead was a forced finding to maintain the viability of the American legal justice system.

Despite the limited holding, the Court engaged in discussion beyond the issue raised by the parties and mandated safeguards to the states, which are too unclear to be helpful or meaningful. Instead of considering expert opinion about which due process protections would be most effective, the Court simply adopted the only suggestion available. Such a decision-making process in any context is worrisome. It is still too early to tell how the lower courts will use these mandated safeguards to change the legal protections available to litigants like Turner, but even a survey in the past year has not clarified how these procedures will add any more constitutional protection to child support contempt cases. Fortunately, there is a wealth of other options available to states, and additionally, it appears that states will financially benefit from investing in such protections. Therefore, while the Supreme Court's decision in *Turner* may not have the best answer to legal sagas that countless Americans face every day, the decision is best seen not as a roadblock or a conclusion to these stories, but rather one that can inspire fresh discussion and action for "fundamental justice" nonetheless.